App. 1

United States Court of Appeals for the Federal Circuit

CALLAN CAMPBELL, JAMES H. CHADWICK, JUDITH STRODE CHADWICK, KEVIN C. CHADWICK, INDIVIDUALLY AND THROUGH HIS COURT-APPOINTED ADMINISTRATORS, JAMES H. CHADWICK AND JUDITH STRODE CHADWICK, KEVIN JUNSO, NIKI JUNSO, TYLER JUNSO ESTATE, THROUGH KEVIN JUNSO, ITS PERSONAL REPRESENTATIVE,
Plaintiffs-Appellants

v.

UNITED STATES,
Defendant-Appellee

2018-2014

Appeal from the United States Court of Federal Claims in No. 1:15-cv-00717-PEC, Judge Patricia E. Campbell-Smith.

Decided: August 1, 2019

STEVEN R. JAKUBOWSKI, Robbins Salomon & Patt, Ltd., Chicago, IL, argued for plaintiffs-appellants.

JOHN JACOB TODOR, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, argued for defendant-appellee. Also

represented by Joseph H. Hunt, Robert Edward Kirschman, Jr., Franklin E. White, Jr.

Before NEWMAN, LOURIE, and DYK, *Circuit Judges*.

DYK, *Circuit Judge*.

This case arises out of the 2009 bankruptcy of General Motors Corporation ("Old GM").[1] The plaintiffs compose a putative class of individuals who had asserted personal injury claims against Old GM, and whose successor liability claims were extinguished during bankruptcy. Relying on our decision in *A & D Auto Sales, Inc. v. United States*, 748 F.3d 1142 (Fed. Cir. 2014), the plaintiffs sued the United States on behalf of themselves and others similarly situated in the Court of Federal Claims ("Claims Court"), alleging that the extinguishment of their claims without just compensation violated the Takings Clause of the Fifth Amendment. The Claims Court dismissed the plaintiffs' claims, concluding that they were barred by the statute of limitations and that the plaintiffs had, in any event, failed to state a claim. Because we hold, as to the claims alleging coercion of Old GM, that the statute of limitations had run when the plaintiffs filed their complaint and, with respect to the plaintiffs' other claims, that the Claims Court also lacks jurisdiction, we affirm.

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[1] "Old GM" refers to the GM entity in existence prior to the sale of assets pursuant to 11 U.S.C. § 363.

BACKGROUND

I

In *A & D*, a group of former automobile dealerships sued the United States, raising Fifth Amendment takings claims based on the extinguishment of the plaintiffs' franchise agreements with Old GM in a bankruptcy sale pursuant to 11 U.S.C. § 363. 748 F.3d at 1147. That section gives a bankruptcy trustee the power to use, sell, or lease the property of a debtor in bankruptcy. In particular, § 363(f) (the provision at issue here) provides that "[t]he trustee may sell property . . . free and clear of any interest in such property of an entity other than the estate" under certain conditions. 11 U.S.C. § 363(f) (emphasis added).

In *A & D*, the plaintiffs alleged that the government had conditioned its continued financial assistance to Old GM on the company's submission for approval of a proposed sale order that terminated the plaintiffs' franchise agreements. 748 F.3d at 1148. The plaintiffs contended that this purported coercion effected a regulatory taking under the Fifth Amendment. *Id.* at 1149. The Claims Court denied the government's motion to dismiss for failure to state a claim but certified the case for interlocutory appeal pursuant to 28 U.S.C. § 1292(d)(2). *Id.* at 1150.

On appeal, we held that the government may, in some circumstances, be liable for a regulatory taking of property where the government pressures a third party (there, allegedly Old GM) to take an "action that affects or eliminates the property rights of the

plaintiff." *Id.* at 1153. We determined that such conduct may give rise to a taking where the government's action was "direct and intended" and where the "the third party is acting as the government's agent or the government's influence over the third party was coercive rather than merely persuasive." *Id.* at 1154. We did not decide whether the government's actions with respect to Old GM were coercive or otherwise satisfied the conditions for takings liability.[2] *Id.* at 1155–56. We explained that to state a claim, the plaintiffs needed to have pled that their "property suffered a diminution in value or a deprivation of economically beneficial use" as a result of the government's action. *Id.* at 1157. We determined that the plaintiffs' allegations were insufficient to show that their franchise agreements had value absent the government action and remanded to the Claims Court to permit the plaintiffs to amend their complaint "to include specific allegations establishing loss of value" and thereafter to determine whether a compensable taking had occurred. *Id.* at 1158–59.

II

Relying on *A & D*, on July 9, 2015, the plaintiffs here sued the government in the Claims Court alleging

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[2] Even if coercion had been established, that would merely make the third party's action the equivalent of government action. The plaintiffs would still be required to engage in the *Penn Central* analysis and to establish a diminution in the value of their property. *See Penn. Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978).

that the government had coerced Old GM to include in its proposed bankruptcy sale order provisions extinguishing the plaintiffs' property interests pursuant to § 363 of the Bankruptcy Code.

The plaintiffs are a group of individuals who alleged that they are victims of accidents involving GM vehicles (or are the family members or estates of such individuals), and had personal injury claims against Old GM. The plaintiffs alleged that under Michigan law they possessed successor liability claims at the time the § 363 sale closed. Michigan law provides that where there is a sale of assets from one entity to another such that there exists "a continuity of enterprise between a successor and its predecessor[,] . . . a successor [may be forced] to 'accept the liability with the benefits' of such continuity." *Foster v. Cone-Blanchard Mach. Co.*, 597 N.W.2d 506, 510 (Mich. 1999) (quoting *Turner v. Bituminous Cas. Co.*, 244 N.W.2d 873, 883 (Mich. 1976)).

Under Michigan law,

> a prima facie case of continuity of enterprise exists where the plaintiff establishes the following facts: (1) there is continuation of the seller corporation, so that there is a continuity of management, personnel, physical location, assets, and general business operations of the predecessor corporation; (2) the predecessor corporation ceases its ordinary business operations, liquidates, and dissolves as soon as legally and practically possible; and (3) the purchasing corporation assumes those

> liabilities and obligations of the seller ordinarily necessary for the uninterrupted continuation of normal business operations of the selling corporation.

Id. The plaintiffs' complaint here sets out facts supporting each of these factors. Though the government disputes whether the plaintiffs' successor liability claims constitute a cognizable property interest for the purposes of a Fifth Amendment taking, we assume, without deciding, that they do.

Here, Old GM filed for bankruptcy on June 1, 2009, and filed a motion seeking court approval to sell substantially all its assets to a new corporation, referred to as "New GM," pursuant to 11 U.S.C. § 363. *In re Gen. Motors Corp.*, 407 B.R. 463, 479–80, 483 (Bankr. S.D.N.Y. 2009). To facilitate the sale, the government provided financing to Old GM for the bankruptcy and the company's ongoing operations. *See id.* at 473, 479. In return, the government received $8.8 billion in debt and preferred stock of New GM and approximately 60 percent of its equity. *Id.* at 482. According to the bankruptcy court, without the government's financing, Old GM would have "face[d] immediate liquidation." *Id.* at 484. According to the plaintiffs' complaint, "on the eve of Old GM's bankruptcy filing, the [g]overnment . . . condition[ed] the closing of the [s]ale on the . . . inclusion of . . . provision[s]"

concerning successor liability.[3] J.A. 1037; *see also* Appellant Br. 8.

Because of the government's insistence, according to the complaint, the proposed sale order thus included "a number of provisions making explicit findings that New GM is not subject to [the plaintiffs'] successor liability [claims]." *Gen. Motors Corp.*, 407 B.R. at 500. Those provisions provide, in relevant part:

> Except for the Assumed Liabilities, . . . the Purchased Assets shall be transferred to the Purchaser . . . free and clear of all liens, claims, encumbrances, and other interests of any kind or nature whatsoever . . . including rights or claims based on any successor or transferee liability. . . .
>
> [A]ll persons and entities . . . holding liens, claims, encumbrances, and other interests of any kind or nature whatsoever, including rights or claims based on any successor or transferee liability, . . . are forever barred, estopped, and permanently enjoined. . . .

J.A. 449–50, ¶¶ 7, 8 (emphases added). Allegedly, the government's financing was "expressly conditioned upon approval of this motion [seeking approval of the proposed sale order] by July 10." *Gen. Motors Corp.*, 407 B.R. at 484.

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[3] This is somewhat inconsistent with other allegations of the complaint stating that extinguishment of the plaintiffs' claims was not important to the government.

The bankruptcy court approved Old GM's proposed sale order on July 5, 2009, and "permit[ted] GM's assets to pass . . . free and clear of successor liability claims." *Id.* at 505. The court determined that it would not "gamble on the notion that the U.S. Government didn't mean it when it said that it would not keep funding GM." *Id.* at 493. In approving the sale, the court explained that "GM is hopelessly insolvent" and that "if GM liquidates, there will . . . be nothing for stockholders . . . [or] unsecured creditors." *Id.* at 520.

Paragraph 70 of the sale order provided that the order "shall be effective as of 12:00 noon, EDT, on Thursday, July 9, 2009." J.A. 475. The § 363 sale closed thereafter on July 10, 2009.

III

The plaintiffs appealed the bankruptcy court's order to the United States District Court for the Southern District of New York. *See In re Motors Liquidation Co.*, 428 B.R. 43 (S.D.N.Y. 2010). Somewhat confusingly, the district court both affirmed the bankruptcy court's decision and determined that the appeal was moot. *Id.* at 64. Because the plaintiffs had failed to seek a stay of the § 363 sale pending appeal, and the § 363 sale had closed, the court concluded that the plaintiffs' appeal was statutorily moot under § 363(m) of the Bankruptcy Code. *Id.* at 56–60. The court entered an order stating that "the appeal is denied as moot, and the judgment of the Bankruptcy Court is AFFIRMED." *Id.* at 64. Though the district court

explained that it was "not unsympathetic to the plight of the [plaintiffs]," it noted that the plaintiffs' "position in the bankruptcy appears to be neither better not worse than that of any other unsecured contingent creditor." *Id.* at 63. The district court concluded that had the § 363 sale not occurred, Old GM would have proceeded to liquidation and the plaintiffs "and other unsecured creditors would have received nothing." *Id.* at 63–64.

IV

The Claims Court dismissed the plaintiffs' complaint on October 30, 2017, without deciding the question of whether the alleged class should be certified. The court held that the plaintiffs' complaint was not timely because it was not filed within the Tucker Act's six-year statute of limitations. In reaching this conclusion, the court stated that "[t]he complaint's specific references to government coercive action . . . all point to activity that predates the Sale Order issued by the bankruptcy court." J.A. 7. In other words, the court determined that the plaintiffs' takings claim had accrued, at the latest, on July 5, 2009—more than six years before the date on which the plaintiffs filed their complaint in the Claims Court.

In the alternative, the Claims Court held that dismissal was proper because the plaintiffs had failed to identify a cognizable property interest. It characterized the plaintiffs' successor liability claims as being "too contingent" to compose a property interest that

would be subject to a compensable taking under the Fifth Amendment. J.A. 18 The court explained that the plaintiffs' purported property interests were "entirely contingent upon two discretionary acts of the federal government: (1) a government financial intervention so that a New GM could be created; and[ ] (2) a government intervention so that Old GM could file for bankruptcy requesting a 363 sale." J.A. 18. The Claims Court also concluded that the plaintiffs lacked a cognizable property interest because § 363 predated the creation of the plaintiffs' purported property interests (the successor liability claims) and therefore that the possibility of extinguishment in bankruptcy "inhered" in the title to the plaintiffs' claims. J.A. 22. The court did not reach the question of whether the plaintiffs had sufficiently alleged a diminution in the value of their property as a result of the government's action.

On November 27, 2017, the plaintiffs filed in the Claims Court a combined motion for reconsideration, motion to amend the judgment, and motion for leave to file a second amended complaint. The proposed second amended complaint, in the words of the Claims Court, "reshaped[d] the description of plaintiffs' takings claims and the facts already alleged" and contained additional factual allegations. J.A. 24. The plaintiffs added facts purporting to demonstrate that government coercion continued after the bankruptcy court entered the § 363 sale order. The plaintiffs' complaint essentially added more detail about the government's claimed pressure on the bankruptcy court and the district court. The Claims Court considered the alleged

facts presented in the plaintiffs' second amended complaint but determined that the revised allegations were insufficient to change the result and denied the motion, reaffirming both of its initial grounds for dismissing the plaintiffs' complaint.

The plaintiffs appealed to this court.[4] We have jurisdiction under 28 U.S.C. § 1295(a)(3). We review the Claims Court's decision to dismiss for lack of jurisdiction de novo. *Diaz v. United States*, 853 F.3d 1355, 1357 (Fed. Cir. 2017).

DISCUSSION

I

We agree with the Claims Court that the plaintiffs' complaint was untimely insofar as the complaint alleged coercion of Old GM. The Tucker Act's statute of limitations provides that "[e]very claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues." 28 U.S.C. § 2501. The Supreme Court has held that the Claims Court's six-year statute of limitations is jurisdictional. *See John R. Sand & Gravel Co. v. United States*, 552 U.S. 130 (2008).

The plaintiffs here filed their complaint alleging Fifth Amendment takings claims in the trial court on

[4] We note that the government's brief before this court does not comply with Federal Rule of Appellate Procedure 32(a)(1)(A) because it was filed double-, rather than single-sided.

July 9, 2015. The question is when the alleged taking occurred. The plaintiffs alleged in their complaint, and reaffirmed during oral argument, that the primary conduct which caused the taking was the government's coercion of Old GM to secure approval from the bankruptcy court of a proposed sale order extinguishing the plaintiffs' successor liability claims. Specifically, the plaintiffs alleged that the government "directed" that the sale order "exclude all Personal Injury Products Liability Claims." J.A. 398, ¶ 83. In other words, that the government "condition[ed] the closing of the Sale on inclusion of a provision within the Sale Order that expressly extinguished the rights of any Personal Injury Claimant to assert successor liability claims against New GM." J.A. 403, ¶ 107. The plaintiffs contended that Old GM was "[l]eft with no option but to comply with the [g]overnment's mandate or face certain liquidation," and Old GM consequently filed for bankruptcy and submitted to the bankruptcy court a proposed sale order that "left behind the [plaintiffs'] Personal Injury Products Liability Claims." J.A. 399–400, ¶¶ 88, 98. In light of these allegations, we focus our accrual analysis on the government's alleged coercion of Old GM.

The parties present three possible dates on which the plaintiffs' takings claims may have accrued. The government argues that the claims accrued at least on July 5, 2009, when the bankruptcy court approved and entered the sale order ("Entry Date"). The plaintiffs argue to the contrary that their claims did not accrue until either July 9, 2009, the date on which the § 363

sale became effective ("Effective Date"), or July 10, 2009, the date on which the § 363 sale closed ("Closing Date"). The plaintiffs contend that the Entry Date cannot constitute the date on which their claims accrued because the value of the plaintiffs' successor liability claims had not yet been extinguished as of July 5, 2009. We conclude that under the plaintiffs' theory as to the coercion of Old GM, the alleged taking occurred on July 1, 2009—when Old GM filed the proposed sale order with the bankruptcy court.

The standards for claim accrual in physical takings and regulatory takings cases are distinct, and this distinction is important. As the Supreme Court has held, "it [is] inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a 'regulatory taking', and vice versa." *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 323 (2002) (footnote omitted).

In the case of a physical taking, claim accrual is relatively simple to pinpoint. "A physical taking generally occurs when the government directly appropriates private property or engages in the functional equivalent of a 'practical ouster of [the owner's] possession.'" *Katzin v. United States*, 908 F.3d 1350, 1361 (Fed. Cir. 2018) (alteration in original) (quoting *Washoe Cty. v. United States*, 319 F.3d 1320, 1326 (Fed. Cir. 2003)); *see United States v. Dow*, 357 U.S. 17, 24–25 (1958) (occupation of property signaled claim accrual, not the later transfer of a deed). For example, in *Casitas Municipal Water District v. United States*, 708 F.3d 1340 (Fed. Cir.

2013), this court held that the plaintiffs' physical takings claim had accrued not when the National Marine Fisheries Service issued an opinion, which, if followed, would have resulted in the diversion of some of the plaintiffs' water, but rather whenever an actual diversion of water occurred. *Id.* at 1358–59; *see also Nw. La. Fish & Game Pres. Comm'n v. United States*, 446 F.3d 1285, 1290–91 (Fed. Cir. 2006) (where the damage of a purported physical taking occurs by a continuing process of physical events, the damages must be "quantifiable and present").

In the case of a regulatory taking, however, the taking may occur before the effect of the regulatory action is felt and actual damage to the property interest is entirely determinable. As the Supreme Court recently stated in a regulatory takings case, "a property owner has a claim for a violation of the Takings Clause as soon as [the] government takes his property for public use without paying for it" without regard to post-taking remedies that may be available. *Knick v. Township of Scott*, 139 S. Ct. 2162, 2170 (2019). In other words, "because a taking without compensation violates the self-executing Fifth Amendment at the time of the taking, the property owner can bring a federal suit at that time." *Id.* at 2172. For example, in *Branch v. United States*, 69 F.3d 1571 (Fed. Cir. 1995), a bankruptcy trustee challenged the FDIC's assessment of liability and consequent seizure of a bank's assets pursuant to the Financial Institutions Reform, Recovery, and Enforcement Act. *Id.* at 1574. This court held that "[t]he seizure and closure of [a] bank, once the bank

became insolvent, did not constitute a taking." *Id.* at 1575. Rather, it was the "FDIC's assessment of liability," which directly caused the insolvency, that was the purported taking and therefore marked the date of accrual. *Id.*

In *Goodrich v. United States*, 434 F.3d 1329 (Fed. Cir. 2006), a regulatory takings case, the question was whether the issuance of a Forest Service Record of Decision ("ROD") and a final Environmental Impact Statement ("EIS") resulted in accrual of the plaintiff's takings claim. *Id.* at 1331. We held that it did. We determined that the ROD and final EIS were sufficiently final to accrue takings liability because they "are final agency statements of official position that are published [by the agency] only after years of analysis and consultation with affected parties." *Id.* at 1335. We explained that the claim accrues when the agency action is complete, "regardless of whether damages are 'complete and fully calculable.' " *Id.* at 1336 (quoting *Fallini v. United States*, 56 F.3d 1378, 1382–83 (Fed. Cir. 1995)). Here, assuming that the plaintiffs' claims had value in the first place, despite the likelihood of no recovery if Old GM had liquidated, the filing of the proposed bankruptcy sale order clearly inflicted an injury on the plaintiffs by diminishing the value of their claimed property rights.

Notably, the court in *Goodrich* made clear that where a regulatory taking is alleged, it is the final decision of the government actor alleged to have caused the taking that triggers accrual of a takings claim, not the ultimate impact of that decision. In *Goodrich*,

though "it took the Forest Service over three years to implement [the ROD] transferring Kennedy's cattle to the Whitetail Allotment"—i.e., for the government's decision to be implemented—the court nevertheless determined that the issuance of the ROD, rather than the physical appropriation by cattle of water was "a better place to deem any taking occurred." *Id.*

The plaintiffs argue that the government's pressure of Old GM was not complete (that is, not "final") at the Entry Date. According to the plaintiffs, the government could have changed its mind regarding the plaintiffs' successor liability claims at any point before the § 363 sale closed on July 10, 2009. But the plaintiffs do not cite any authority in support of their theory that a government actor's ability to change its mind prevents claim accrual. To the contrary, in *Ladd v. United States*, 630 F.3d 1015, 1023–24 (Fed. Cir. 2010); *Barclay v. United States*, 443 F.3d 1368, 1378 (Fed. Cir. 2006), *cert. denied*, 549 U.S. 1209 (2007); and *Caldwell v. United States*, 391 F.3d 1226, 1234–35 (Fed. Cir. 2004), *cert. denied*, 546 U.S. 826 (2005), in the context of an alleged physical taking effected by an action taken pursuant to the National Trail Systems Act, we held that the government's issuance of Notices of Interim Trail Use or Abandonment ("NITUs") effected a taking even though the NITUs could have been vacated by the agency or set aside by a court.

Similarly, in *Cuban Truck & Equipment Co. v. United States*, 333 F.2d 873 (Ct. Cl. 1964), our predecessor court rejected a somewhat similar theory. There the plaintiffs asserted a takings claim seeking

compensation for the value of certain vehicles. *Id.* at 875. The alleged taking was effected when the German government (at the insistence of the United States) directed a quasi-public company in possession of the vehicles to "exclude from sale or delivery [those vehicles] at its depots" ("the freeze"). *Id.* at 878 (footnote omitted). The takings claim was held to accrue on the date of the freeze. The plaintiffs argued for a later accrual date because the German government could have unilaterally decided to lift the freeze. *Id.* at 879. Our predecessor court held that this possibility did not impact the date of accrual. *Id.* Though *Ladd, Barclay, Caldwell*, and *Cuban Truck* are physical takings cases, we conclude that their reasoning is equally applicable in the regulatory takings context. The possibility that the government or a third party would change its mind does not affect the date on which the plaintiffs' takings claims accrued.

Such a takings theory, moreover, would be unworkable. Agencies generally have broad power to reconsider their decisions. *Medtronic, Inc. v. Robert Bosch Healthcare Sys., Inc.*, 839 F.3d 1382, 1385 (Fed. Cir. 2016). Thus, determining accrual based on the possibility the government actor would change its mind would make the date of accrual entirely indeterminate in many situations.

The plaintiffs also contend that the Entry Date cannot serve as the date of accrual because the order "could have been overturned in advance of the 'Effective Date' by a 'higher body' (*i.e.*, the District Court at the July 9, 2009 hearing on whether to stay the

effectiveness of the Sale Order[)]." Appellant Br. 23. We disagree. This argument ignores the fact that the government action purported to have effected a taking is the government's coercion of Old GM, not the bankruptcy court's order. Any action by the bankruptcy court or any higher judicial body merely goes to the ultimate effect of the alleged government taking. Such collateral action does not alter the finality of the government's action for the purpose of accrual of a takings claim. *See Palazzolo v. Rhode Island*, 533 U.S. 606, 618 (2001) ("The central question in resolving the ripeness issue . . . is whether petitioner obtained a final decision from the [government] determining the permitted use for the land."); *Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186 (1985) ("[A] claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue."). As the Supreme Court in *Williamson* made clear, "the finality requirement is concerned with whether the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury."[5] 473 U.S. at 193 (emphasis added).

[5] This aspect of *Williamson* remains good law under *Knick*. *See* 139 S. Ct. 2162 (2019).

II

The plaintiffs also argue that the government effected a taking by pressuring the bankruptcy court and the district court to approve the proposed sale order, citing colorful language from a book by Steve Rattner (the leader of the government team responsible for assessing the viability of Old GM's restructuring plans) that the government's threats were "the financial equivalent of holding a gun to the head' of the courts." Appellant Br. 5, 12. These actions allegedly occurred during the bankruptcy court's and district court's consideration of the proposed sale order, i.e., within the limitations period. But the coercion that could give rise to a regulatory takings claim does not include "coercion" of the court system by making an argument for a particular result. It is well established that the Claims Court "cannot entertain a taking[s] claim that requires the court to scrutinize the actions of another tribunal." *Petro-Hunt, L.L.C. v. United States*, 862 F.3d 1370, 1386 (Fed. Cir. 2017) (alteration in original) (quoting *Shinnecock Indian Nation v. United States*, 782 F.3d 1345, 1353 (Fed. Cir. 2015)); *accord Allustiarte v. United States*, 256 F.3d 1349, 1351–52 (Fed. Cir. 2001).

In *Allustiarte*, we considered a similar claim that several plaintiffs had suffered a "taking of their property at the hands of the bankruptcy trustees and courts." 256 F.3d at 1351. We held that the Claims Court lacked jurisdiction over such an action because it "would require the court to scrutinize the actions of the bankruptcy trustees and courts" and we noted that "permit[ting such] collateral attacks on bankruptcy

court judgments would 'seriously undercut[ ] the orderly process of the law.' " *Id.* at 1351–52 (second alteration in original) (quoting *Celotex Corp. v. Edwards*, 514 U.S. 300, 313 (1995)). We explained that "[t]he proper forum for [the plaintiffs'] challenges . . . lies in the Ninth Circuit [the appropriate appellate forum in *Allustiarte*], not the [Claims Court]." *Id.* at 1352.

The same reasoning applies here. The plaintiffs' allegations that the government coerced the bankruptcy court and the district court amount to no more than a mine-run challenge to the bases for those court's decisions regarding the sale order. The supposed coercion here was not extra-judicial, as was the case in *A & D.* The plaintiffs cannot maintain a collateral attack on the decisions of the bankruptcy court and district court on a takings theory. The proper forum for such a challenge is the judicial appellate process.

To the extent that the plaintiffs argue that there was a taking because § 363 did not permit the extinguishment of their successor liability claims, we disagree that this is a cognizable takings action. As we held in *Lion Raisins, Inc. v. United States*, 416 F.3d 1356 (Fed. Cir. 2005), a plaintiff's claim that "it is entitled to prevail because the agency acted in violation of a statute . . . [does] not give the plaintiff the right to litigate that issue in a takings action rather than in the congressionally mandated . . . review proceeding." *Id.* at 1369 (emphasis omitted) (quoting *Rith Energy, Inc. v. United States*, 247 F.3d 1355, 1366 (Fed. Cir. 2001)); *see*

also Petro-Hunt, 862 F.3d at 1386.[6] We see no difference, in this regard, between a takings claim based on an agency action allegedly in violation of a statute and that of a federal court. Again, the plaintiffs' remedy based on their challenge to the lawfulness of the § 363 sale was to pursue their successor liability claims through the usual appeal process, as they attempted to do. *See Motors Liquidation Co.*, 428 B.R. 43.

III

The plaintiffs briefly contend that, at worst, they should now be permitted to amend their complaint to

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[6] We note that the circuits appear to be split on the issue of whether a bankruptcy court has authority to extinguish successor liability claims pursuant to a § 363 sale. *Compare Precision Indus., Inc. v. Qualitech Steel SBQ, LLC*, 327 F.3d 537, 545–46 (7th Cir. 2003) (concluding that the "right to possess . . . property as a lessee qualifies as an interest for the purposes of section 363(f)" but limiting the definition of "interest" to include only a "right to the property itself" rather than "a right that is connected to or arising from the property"); and *In re Wolverine Radio Co.*, 930 F.2d 1132, 1147 n.23 (6th Cir. 1991) (questioning whether "general unsecured interests fall within the scope of those interests that can be discharged pursuant to section 363(f)"), *with In re Trans World Airlines, Inc.*, 322 F.3d 283, 288–93 (3d Cir. 2003) (citing 3 Collier on Bankruptcy ¶ 363.06[1]) (holding that a sale free and clear of successor liability claims based on employment discrimination was authorized under § 363); *and In re Leckie Smokeless Coal Co.*, 99 F.3d 573, 575, 581–82 (4th Cir. 1996) (affirming sale free and clear of successor liability for claims under Coal Act). *See generally* Charles Jordan Tabb, Law of Bankruptcy 450–51 (4th ed. 2016) (noting that the "prevailing trend" is that courts find that a § 363 sale can be made free and clear of successor liability claims but that there is no consensus). We need not decide this issue because its outcome does not affect our analysis.

cure any deficiency identified by this court as the plaintiffs in *A & D* were permitted to do. But the plaintiffs here already amended their complaint once as of right and then sought leave to amend their complaint again in conjunction with their motion requesting that the Claims Court reconsider its dismissal of this case. The Claims Court denied the plaintiffs' request to amend their complaint, deeming it futile in attempting to overcome the deficiencies on which the Claims Court's dismissal was based. We agree with the Claims Court and therefore likewise decline the plaintiffs' request to amend. The proposed second amended complaint simply supplies additional detail about the extent and timing of the alleged pressure on the bankruptcy court and district court. There are no new allegations in the proposed second amended complaint that would alter the date of accrual concerning the claim based on coercion of Old GM or that bolster the plaintiffs' theory concerning coercion of the courts.

CONCLUSION

We conclude that the plaintiffs' takings claims based on the alleged coercion of Old GM accrued when Old GM submitted the proposed sale order to the bankruptcy court on July 1, 2009, and that the plaintiffs' complaint in this respect was untimely because it was filed more than six years after their claims accrued. With respect to the plaintiffs' claims that the government had coerced the bankruptcy court and the district court, we conclude that the plaintiffs' claims are not within the Claims Court's jurisdiction. Under the

circumstances, we need not decide the question of whether the plaintiffs have sufficiently alleged a loss of value of their alleged property interests. Accordingly, we affirm.

AFFIRMED

In the United States Court of Federal Claims

No. 15-717C
(E-Filed: October 30, 2017)

CALLAN CAMPBELL, et al., Plaintiffs, v. THE UNITED STATES, Defendant.	Takings; Statute of Limitations, 28 U.S.C. § 2501 (2012); Claims Accrued More Than Six Years Before Suit Was Filed; No Cognizable Property Interest.

Steve Jakubowski, Chicago, IL, for plaintiffs. Robert M. Winter and Catherine A. Cooke, Chicago, IL, of counsel.

John J. Todor, Senior Trial Counsel, with whom were Chad A. Readler, Acting Assistant Attorney General, Robert E. Kirschman, Jr., Director, Franklin E. White, Jr., Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, for defendant.

OPINION

CAMPBELL-SMITH, Judge.

The court has before it defendant's motion to dismiss, ECF No. 8, which is brought pursuant to Rules 12(b)(1) and 12(b)(6) of the Rules of the United States Court of Federal Claims (RCFC). This motion has been the subject of extensive briefing by the parties: (1)

Plaintiffs' Response, ECF No. 13; (2) Defendant's Reply, ECF No. 14; (3) Defendant's First Supplemental Brief, ECF No. 19; (4) Plaintiffs' First Supplemental Brief, ECF No. 21; (5) Defendant's Response to Plaintiffs' First Supplemental Brief, ECF No. 22; (6) Plaintiffs' Response to Defendant's First Supplemental Brief, ECF No. 23; (7) Plaintiffs' Second Supplemental Brief, ECF No. 27; (8) Defendant's Response to Plaintiffs' Second Supplemental Brief, ECF No. 28; and, (9) Plaintiffs' Reply in Support of Plaintiffs' Second Supplemental Brief, ECF No. 32. The parties were also given an opportunity to present oral argument on defendant's motion, which was held on April 12, 2016 by the judge to whom this case was originally assigned. Interestingly, the parties never briefed the statute of limitations issue which commands the dismissal of plaintiffs' claims.[1]

This takings case stems from the bankruptcy of General Motors Corporation in the summer of 2009.[2] The bankruptcy court order encompassing the terms that underlie plaintiffs' claims issued on July 5, 2009.

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[1] At oral argument, plaintiffs' counsel asserted that defendant "agrees" with plaintiffs' position regarding claim accrual. Oral Argument Transcript (Tr.) at 52, 125. The court's determination of its jurisdiction over a suit does not depend on the parties' view of jurisdictional facts. See, e.g., Lambropoulos v. United States, 18 Cl. Ct. 235, 237 n.6 (1989) ("The parties cannot stipulate to jurisdiction if it does not otherwise exist." (citing Wheeler v. United States, 3 Cl. Ct. 686, 689 (1983))).

[2] This court's jurisdiction over takings claims is founded on the Tucker Act, 28 U.S.C. § 1491(a)(1) (2012). Murray v. United States, 817 F.2d 1580, 1582-83 (Fed. Cir. 1987).

Sale Order, ECF No. 4-1. This suit was filed on July 9, 2015. Because plaintiffs' claims accrued on or before July 5, 2009, they are untimely pursuant to 28 U.S.C. § 2501 (2012), the six-year statute of limitations for takings claims brought in this forum. As explained more fully below, defendant's motion to dismiss this case on jurisdictional grounds is **GRANTED**. In the alternative, the complaint would also be dismissed for failure to state a claim upon which relief may be granted.

I. Standard of Review for Motions Brought Under RCFC 12(b)(1)

When reviewing a complaint to determine its jurisdiction over a plaintiff's claims, this court must presume all undisputed factual allegations to be true and construe all reasonable inferences in favor of the plaintiff. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974), abrogated on other grounds by Harlow v. Fitzgerald, 457 U.S. 800, 814-15 (1982); Reynolds v. Army & Air Force Exch. Serv., 846 F.2d 746, 747 (Fed. Cir. 1988) (citations omitted). However, plaintiffs bear the burden of establishing subject matter jurisdiction, Alder Terrace, Inc. v. United States, 161 F.3d 1372, 1377 (Fed. Cir. 1998) (citing McNutt v. Gen. Motors Acceptance Corp. of Ind., 298 U.S. 178, 189 (1936)), and must do so by a preponderance of the evidence, Reynolds, 846 F.2d at 748 (citations omitted). If jurisdiction is found to be lacking, this court must dismiss the action. RCFC 12(h)(3).

II. Standard of Review for Motions Brought Under RCFC 12(b)(6)

It is well-settled that a complaint should be dismissed under RCFC 12(b)(6) "when the facts asserted by the claimant do not entitle him to a legal remedy." Lindsay v. United States, 295 F.3d 1252, 1257 (Fed. Cir. 2002). When considering a motion to dismiss brought under RCFC 12(b)(6), "the allegations of the complaint should be construed favorably to the pleader." Scheuer, 416 U.S. at 236. The court must not mistake legal conclusions presented in a complaint, however, for factual allegations which are entitled to favorable inferences. See, e.g., Papasan v. Allain, 478 U.S. 265, 286 (1986) ("[W]e are not bound to accept as true a legal conclusion couched as a factual allegation.") (citations omitted). The allegations of the complaint must state a plausible claim for relief to survive a motion to dismiss filed under Rule 12(b)(6). See, e.g., Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) ("To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007))).

III. Statute of Limitations, 28 U.S.C. § 2501

It is well-established that claims in this court must be brought within six years of their accrual and that this time limit is jurisdictional. See, e.g., Young v. United States, 529 F.3d 1380, 1384 (Fed. Cir. 2008) (citing 28 U.S.C. § 2501 and John R. Sand & Gravel Co. v. United States, 552 U.S. 130, 133-39 (2008)). "It is a

plaintiff's knowledge of the facts of the claim that determines the accrual date." Id. at 1385 (citations omitted); see Hopland Band of Pomo Indians v. United States, 855 F.2d 1573, 1577 (Fed. Cir. 1988) ("[A] cause of action against the government has 'first accrued' only when all the events which fix the government's alleged liability have occurred and the plaintiff was or should have been aware of their existence." (citing Kinsey v. United States, 852 F.2d 556, 557 n.* (Fed. Cir. 1988))). Binding precedent holds that equitable tolling is not available to extend the limitations period in section 2501. John R. Sand & Gravel, 552 U.S. at 133-34, 139.

IV. Factual Background

The amended complaint provides a detailed narrative of plaintiffs' claims. Distilled to their essence, the takings claims asserted here are as follows:

> The Government's demand that [plaintiffs'] rights to assert successor liability claims against [New General Motors ("New GM")] be extinguished in the [bankruptcy court's] Sale Order violated the Takings Clause of the Fifth Amendment to the United States Constitution[.]

Am. Compl. ¶ 9, ECF No. 4. As a point of logic, for the bankruptcy court to have complied with the government's demand as memorialized in the July 5, 2009 "Sale Order," the demand must have been made prior to the issuance of that order, not afterward. Thus, any

government action constituting a "demand" of the bankruptcy court could not have been presented after July 5, 2009, but, at the latest, must have been presented on or before July 5, 2009. Herein lies plaintiffs' statute of limitations problem.

In this background section, the court presents a brief review of the chronology of events asserted in the complaint, as illuminated by the briefs plaintiffs filed in this case and by plaintiffs' representations at oral argument. The court will also discuss the procedural history of the General Motors bankruptcy, but only to the extent that this procedural history provides the necessary facts for the resolution of defendant's motion. The court reserves for the "jurisdictional analysis" section of this opinion its discussion of claim accrual.

A. Plaintiffs' Claims before the Bankruptcy Court

Plaintiffs are either victims of accidents which occurred while driving General Motors vehicles, or the family members or estates of those accident victims.[3] ECF No. 4, at 8-11. Three specific accidents are referenced in the complaint, although the location of the accidents is not specified. The accident victims resided in Pennsylvania, Louisiana and Utah, respectively. Id. All

[3] The court limits its discussion of plaintiffs' claims to the named plaintiffs in this suit, but does not ignore the fact that this litigation was brought as a class action. Given the court's resolution of defendant's motion to dismiss, plaintiffs' request that their suit be certified as a class action is moot.

of the accidents occurred before the General Motors bankruptcy in 2009. Id.

These plaintiffs' legal claims against General Motors might best be described, collectively, as personal injury tort claims, at least until General Motors became the subject of bankruptcy proceedings. Id. at 3; see ECF No. 27, at 10 (describing plaintiffs' claims, pre-bankruptcy, as "underlying personal injury product liability tort claims").

The status of plaintiffs' claims in early 2009, or any details as to where such claims might have been litigated cannot be discerned from the complaint. At oral argument, plaintiffs' counsel asserted that before General Motors' petition for bankruptcy was filed, "most of [plaintiffs'] claims had already been filed . . . [i]n state court." Oral Argument Transcript (Tr.) at 84. Plaintiffs' counsel also asserted that in 2009, final judgment had not issued in favor of a claimant for the vast majority of plaintiffs' personal injury tort claims. Id. at 113.

General Motors ("Old GM") filed its bankruptcy petition on June 1, 2009. ECF No. 4, at 3. By that time, the United States Treasury had provided Old GM with several infusions of cash: (1) $13.4 billion in December 2008; (2) $6 billion on or about March 30, 2009; (3) $2 billion in April 2009; and, (4) $4 billion in May 2009. Id. at 12, 16-18. Soon after the bankruptcy petition was filed, the United States provided additional monies to Old GM, so that the federal secured investment in Old GM reached a level of $52.7 billion. Id. at 22.

Plaintiffs, competing against the United States and other Old GM creditors, were represented in Old GM bankruptcy proceedings by the same counsel that represents them here. Sale Opinion, ECF No. 4-2, at 3. Plaintiffs do not dispute that their claims, in terms of bankruptcy proceedings, were "unsecured." ECF No. 4, at 5-6; see ECF No. 23, at 4 (describing plaintiffs' personal injury tort claims as "unsecured claims against Old GM"). According to the complaint, plaintiffs' claims before the bankruptcy court are "estimated" to have had a value of $300 million. ECF No. 4, at 34-35. Plaintiffs allege that they have received, and will receive, far less than that amount from Old GM. Id. at 3 (alleging that plaintiffs have received "a fraction of their stipulated allowed amount" established during the bankruptcy proceedings). Generally, the complaint estimates that just compensation for these plaintiffs under a takings theory would total no less than $200 million, not counting interest. Id. at 49.

B. Alleged Coercion by the United States Exerted Upon Old GM and the Bankruptcy Court

Plaintiffs' takings claims rest on allegations that the United States took actions to obtain a particular restructuring of Old GM by the bankruptcy court which disfavored plaintiffs' claims. As a threshold matter, nothing in the complaint alleges a judicial taking by the bankruptcy court itself.[4] Thus, the court has

[4] The court agrees with defendant that binding precedent excludes from this court's jurisdiction claims alleging that a judicial

examined the complaint thoroughly for allegations of government action that coerced Old GM and the bankruptcy court into a restructuring of Old GM that disfavored plaintiffs. As a starting point, the court turns to plaintiffs' description of the restructuring of Old GM.

The Old GM bankruptcy effected a sale of "substantially all" of Old GM's assets to "New GM," pursuant to 11 U.S.C. § 363(b),(f) (2012). ECF No. 4, at 3. In this type of sale, a "363 sale," the acquiring entity may, if certain conditions are met, obtain particular assets from the bankruptcy petitioner and, at the same time, avoid some of the liabilities of the petitioner. Id. Pursuant to these provisions, New GM obtained most of Old GM's assets free of plaintiffs' personal injury tort claims, and also obtained these assets "free and clear," 11 U.S.C. § 363(f), of plaintiffs' "successor liability" claims which could have been brought against New GM. Id. at 4-5, 23.

Plaintiffs rely heavily on Michigan state law for their definition of successor liability claims. ECF No. 4, at 26-28; ECF No. 21, at 1-7. In essence, for plaintiffs' purposes a successor liability claim is a personal injury or product liability tort claim that is also viable against a successor corporation that has acquired the assets of the tortfeasor corporation. ECF No. 21, at 6-7.

Generally, the complaint alleges that the United States "demanded that the order approving the [363]

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taking occurred in the bankruptcy context. See ECF No. 8, at 26-27 (citing Allustiarte v. United States, 256 F.3d 1349, 1351-52 (Fed. Cir. 2001)).

Sale (the "Sale Order") include a provision that enjoined [plaintiffs] from pursuing successor liability claims against New GM, and the Bankruptcy Court included precisely such a provision in the [July 5, 2009] Sale Order." ECF No. 4, at 4. The government action that is alleged to have effected the taking is the exertion of the federal government's influence over both Old GM and the bankruptcy court in order to obtain the Sale Order extinguishing plaintiffs' successor liability causes of action. Id. at 21-26, 28-31. The complaint describes the effect of the Sale Order in this heading: "The Sale is Approved by the Bankruptcy Court and the Rights of [Plaintiffs] to Assert Successor Liability Claims Are Extinguished by the Sale Order." Id. at 30.

Referring to the federal government's exertion of influence, the complaint employs forceful language.[5] The government is alleged to have "directed" Old GM to exclude successor liability claims from the assumption of liabilities by New GM. Id. at 21. The government also "went the extra step of conditioning the closing of the [363] Sale" on extinguishing plaintiffs' successor liability claims against New GM. Id. at 26. Further, plaintiffs were "singled out" by the government's "arbitrary demand" that they bear more than their fair share of Old GM's financial problems. Id. at 41, 43. The extinguishment of their successor liability causes of action, which, according to plaintiffs, were

[5] Plaintiffs' briefs employ similar language. For example, plaintiffs state that the government's demand is effectuated by "the most coercive of means." E.g., ECF No. 13, at 7.

property under the Fifth Amendment's Takings Clause jurisprudence, was the "direct and proximate result of the Government's actions."[6] Id. at 48. Applying the analytical framework developed recently by the United States Court of Appeals for the Federal Circuit, plaintiffs' takings claims allege government "coercion" of third party actors, as opposed to a taking which is effected through direct government action. See A & D Auto Sales, Inc. v. United States, 748 F.3d 1142, 1153-56 (Fed. Cir. 2014) (discussing the "coercion" theory for a takings claim arising in the context of Old GM's bankruptcy).

The complaint's specific references to government coercive action, however, all point to activity that predates the Sale Order issued by the bankruptcy court. These government actions began in the fall of 2008, ECF No. 4, at 12, and achieved a significant milestone by May 30, 2009, id. at 21, when Old GM incorporated the successor liability extinguishment provision in the proposed Sale Agreement slated for filing in the bankruptcy court on June 1, 2009. On June 1, 2009, another milestone was met when the government's proposed conditions for the 363 Sale were incorporated in Old GM's bankruptcy filings that day. Id. at 22. A few days later, terms of the Sale Agreement (that would later be incorporated in the Sale Order) were altered to benefit

[6] The parties disagree as to whether plaintiffs' successor liability claims are property so as to support a takings claim. The court addresses this issue when it considers, in the alternative, dismissal of this suit under RCFC 12(b)(6), although defendant frames the issue as plaintiffs' "lack of standing." ECF No. 8, at 25.

the automobile dealers, not plaintiffs. Id. at 29. The finalized version of the Sale Agreement submitted to the bankruptcy court was dated June 26, 2009. ECF No. 4-1, at 53.

Lastly, just before entering the Sale Order on July 5, 2009, the bankruptcy court held a three-day evidentiary hearing, beginning on June 30, 2009 and ending on July 2, 2009. ECF No. 4-1, at 2. Plaintiffs allege that attorneys representing the United States were "on the record" before the bankruptcy court, presumably in briefs and/or at the evidentiary hearing. ECF No. 4, at 31. Attorneys for the United States are indeed listed as counsel in the Sale Opinion which also issued on July 5, 2009. ECF No. 4-2, at 2. To the extent that coercive government action could have occurred in the context of the three-day hearing, that action would have been completed on July 2, 2009. Assuming, arguendo, that the United States continued to advocate for the extinguishment of plaintiffs' successor liability claims up until the day the Sale Order issued, those advocacy activities could not have extended past July 5, 2009, when the Sale Order issued.[7]

[7] How these facts determine claim accrual in this case will be discussed in the jurisdictional analysis section of this opinion, infra.

C. Subsequent History of the Sale Order and Opinion[8]

The Sale Order filed by the bankruptcy court on July 5, 2009, established, in relevant part, the court's authorization for the 363 Sale, and granted injunctive relief extinguishing plaintiffs' successor liability claims. ECF No. 4-1, at 1-2, 22-23. The Sale Opinion, also entered on July 5, 2009, set forth the bankruptcy court's legal analysis of the 363 Sale and, in relevant part, set forth the considered basis for the extinguishment of plaintiffs' successor liability claims. ECF No. 4-2, at 58-69; see also In re Gen. Motors Corp., 407 B.R. 463, 499-506 (Bankr. S.D.N.Y. 2009) (subsequent history omitted). According to the complaint, the 363 Sale closed on July 10, 2009. ECF No. 4, at 33. Old GM's bankruptcy proceeded thereafter at a more leisurely pace, and a plan for the reorganization of Old GM went into effect on March 31, 2011. Id. The court must go beyond the complaint, however, to recount the pertinent litigation history of the Sale Order and Opinion issued on July 5, 2009. The court notes, as evidence of the scope and complexity of the General Motors bankruptcy, that some portions of this bankruptcy case continue to be litigated today. See, e.g., In re Motors

[8] The court takes judicial notice of publicly available judicial opinions in the General Motors bankruptcy litigation. See, e.g., Church of Spiritual Tech. v. United States, 26 Cl. Ct. 713, 726 & n.26 (1992) (taking judicial notice of proceedings in other courts relevant to the case at bar), aff'd, 991 F.2d 812 (Fed. Cir. 1993) (Table).

Liquidation Co., No. 09-50026 (MG), 2017 WL 4417584, at *1 (Bankr. S.D.N.Y. Oct. 4, 2017).

1. Review of the Sale Order and Opinion Sought by Plaintiffs

Plaintiffs concede that they did not seek an immediate stay of the Sale Order from the bankruptcy judge. ECF No. 13, at 27-28. Nor did they seek a stay of the Sale Order from the district court. See In re Motors Liquidation Co., 428 B.R. 43, 50-51 (S.D.N.Y. 20 10) (noting that requests for a stay had been filed by another group of plaintiffs with both the bankruptcy court and the district court, but that the "Campbell Appellants," i.e., the plaintiffs in the instant suit, did not request a stay of the Sale Order in either forum). Instead, plaintiffs asked the bankruptcy judge to certify a direct appeal to the United States Court of Appeals for the Second Circuit. Id. at 50. That request was denied on July 7, 2009. In re Gen. Motors Corp., 409 B.R. 24, 29 (Bankr. S.D.N.Y. 2009).

Plaintiffs then filed a timely appeal of the Sale Order and Opinion with the district court, which was denied as moot on April 13, 2010. In re Motors Liquidation Co., 428 B.R. at 64. According to the district court, once the unstayed Sale Order was appealed, the only possible rationale for undoing the 363 Sale would have been that New GM was not a good faith purchaser of Old GM's assets. Id. at 54. Because plaintiffs did not argue in their appeal that New GM was not a good faith purchaser, their failure to obtain a stay

of the Sale Order rendered their appeal moot. Id. For this and other reasons, plaintiffs' appeal before the district court was denied, and the Sale Order and Opinion were affirmed. Id. at 64. Although the district court expressed some sympathy for the Campbell Appellants, the court stated that the relief they requested would "unravel" the 363 Sale and result in a "liquidation in which they and other unsecured creditors would have received nothing." Id.

2. Extensive Litigation of the Terms of the Sale Order after It Was Entered on July 5, 2009

For context, the court provides a few examples of the subsequent history of the Sale Order and Opinion. An unsecured bondholder appealed the Sale Order on multiple grounds, including an allegation that the federal government had taken his property interest by exerting influence over the terms of the 363 Sale. In re Motors Liquidation Co., 430 B.R. 65, 95-96 (S.D.N.Y. 2010). This contention was rejected by the district court. Id. at 95-97. In another facet of the case, the breadth of the injunctive relief offered to New GM by the Sale Order was litigated by the United Auto Workers union. In re Motors Liquidation Co., 457 B.R. 276, 293 (Bankr. S.D.N.Y. 2011). In yet another strand of this litigation, the injunction included in the Sale Order was construed recently not to bar the claims of certain injured claimants. In re Motors Liquidation Co., 829 F.3d 135, 157-58 (2d Cir. 2016), cert. denied sub nom. Gen. Motors LLC v. Elliott, 137 S. Ct. 1813 (2017).

This is just the tip of the iceberg of the subsequent history of the Sale Order and Opinion. The court observes that the validity of the Sale Order and the interpretation of its various provisions have been vigorously and continuously litigated from July 6, 2009 onward.

V. Jurisdictional Analysis

When confronted with the statute of limitations obstacle to this suit, the court considered whether the solicitation of additional briefs on this precise issue would have been appropriate. But this is not a case in which the jurisdictional facts underlying the claims in a complaint have not been adequately explained. Plaintiffs have filed two complaints and five briefs in this case setting forth every pertinent fact required for the court's jurisdictional analysis. The General Motors bankruptcy, as noted supra, has also produced a plethora of judicial opinions, including a decision from the Federal Circuit discussing the precise type of claim presented here, a government taking by the coercion of third parties in the Old GM bankruptcy. A & D Auto, 748 F.3d at 1153-56. In these circumstances, another round of briefing focused solely on the accrual of plaintiffs' takings claims in this suit would have offered no additional helpful information to the court.

Moreover, the court cannot countenance further delay in determining its jurisdiction over this suit. Defendant's motion to dismiss this suit on jurisdictional grounds was fully briefed as of January 19, 2016. Oral argument was held by the judge previously assigned to

this case on April 12, 2016, almost three months later. Supplemental briefing ensued exploring questions of law inherent in plaintiffs' unusual takings claims. Plaintiffs and the government are entitled to a jurisdictional ruling on an amended complaint filed more than two years ago.

Further, the court observes that plaintiffs are now proceeding before a third judicial forum in their quest to obtain relief related to the extinguishment of their successor liability claims against New GM by the bankruptcy court in its Sale Order. To conserve the parties' and the federal judiciary's resources, the court is obliged to rule on its own jurisdiction in the most expeditious manner. Because the factual record is very well-developed, it is time for a jurisdictional ruling; the parties may seek appellate review of the court's claim accrual analysis if, in their view, the court has erred. Finally, the court observes that an alternative ground for dismissal has been exhaustively briefed by the parties and is ripe, if not overripe, for decision.

A. A Takings Claim Must Identify the Government Action Which Constitutes the Taking

Plaintiffs' takings claims assert coercion by the United States to induce the extinguishment of their successor liability claims in the bankruptcy court's July 5, 2009 Sale Order. Am. Compl. ¶ 9, ECF No. 4. Plaintiffs also assert that the accrual of their takings claims did not occur until the 363 Sale closed on July

10, 2009. Id. ¶ 168. Plaintiffs' allegation as to the accrual of their takings claims, a conclusion of law, is neither correct nor entitled to deference. Papasan, 478 U.S. at 286.

The Federal Circuit has held that a takings plaintiff must "pinpoint what step in the sequence of events . . . constituted conduct that the government could not engage in without paying compensation." Branch v. United States, 69 F.3d 1571, 1575 (Fed. Cir. 1995). This "step" is not necessarily the moment when the value of property is destroyed – the diminishment in value of the plaintiff's property may occur later, at another step in the sequence of events. In Branch, for example, the taking, if any, did not occur when a newly-insolvent bank was seized and closed, but beforehand, when the Federal Deposit Insurance Corporation assessed the formerly-healthy bank with more than $1 billion in liability due to the insolvency of a sister bank owned by the same holding company. Id. at 1574-75. This court is tasked with finding in the complaint the government action from which the alleged taking was the "direct result." Id. at 1575.

A similar analysis was performed in Acceptance Insurance Cos. v. United States, 583 F.3d 849, 855-57 (Fed. Cir. 2009) (Acceptance) (citing Branch, 69 F.3d at 1575, among other authorities). The plaintiff in that case attempted to point to a series of government actions, "collectively," as a taking of the plaintiff's portfolio of insurance contracts. Id. at 854. The Federal Circuit expressly rejected the plaintiff's identification of "the alleged taking as consisting of several distinct

actions viewed in concert." Id. at 855. Rather, the Federal Circuit found that the taking, if any, occurred when a government authority refused to permit a specific sale to a specific purchaser of that portfolio of insurance contracts. Id. at 855-56. Subsequent actions, such as the government's alleged control of the sale of individual insurance contracts to other purchasers, were irrelevant to the takings analysis. Id. at 854-57. The court identified the specific government action that the plaintiff alleged had directly caused the taking of its property interest, and disregarded subsequent events such as the alleged loss of the plaintiff's "entire . . . insurance business." Id. at 855.

Guided by Acceptance and Branch, this court has examined plaintiffs' amended complaint closely to identify the government action alleged to have directly caused the extinguishment of their successor liability claims against New GM. In the court's view, the government action that directly caused that extinguishment occurred no later than July 5, 2009. Much like the complaint reviewed in Acceptance, one specific government action predominates throughout plaintiffs' allegations that a taking occurred. That particular action was the coercion of Old GM and the bankruptcy court into including the extinguishment of plaintiffs' successor liability claims against New GM in the bankruptcy court's July 5, 2009 Sale Order.

B. Allegations that Coercive Government Action Directly Extinguished Plaintiffs' Successor Liability Claims in the Sale Order

The complaint distinctly identifies the government action that allegedly "took" plaintiffs' property interest. As noted supra, the "nature of this action" section of the complaint states that "[t]he Government's demand that [plaintiffs'] rights to assert successor liability claims against New GM be extinguished in the Sale Order violated the Takings Clause of the Fifth Amendment to the United States Constitution." Am. Compl. ¶ 9, ECF No. 4. The complaint goes on to state that "the Government went the extra step of conditioning the closing of the Sale on [the] inclusion of a provision within the Sale Order that expressly extinguished the rights of any Personal Injury Claimant to assert successor liability claims against New GM." Id. ¶ 107. The government action is again identified near the conclusion of the "factual allegations" section of the complaint as follows: "[T]he Government refused to yield one iota in its demand that the Sale Order contain broad language extinguishing all rights to assert successor liability claims against New GM." Id. ¶ 123.

The same government action is identified in plaintiffs' opposition to defendant's motion to dismiss. In that brief, plaintiffs state that "[t]he Government conditioned its willingness to close the Sale on the GM Bankruptcy Court's including a provision in the Sale Order extinguishing [plaintiffs'] rights to assert successor liability claims against New GM." ECF No. 13, at 10. Later in that brief, plaintiffs allege that their

"takings claim is rooted in the Government's coercive demand that the Sale Order extinguish Plaintiffs' rights to assert successor liability claims against New GM." Id. at 35. Plaintiffs conclude that "[t]he Complaint sufficiently alleges how the character of the Government's actions went too far by requiring that the Sale extinguish the Personal Injury Claimants' successor liability rights." Id. at 43.

In a supplemental brief filed later in this litigation, plaintiffs focus their takings allegations quite narrowly on the government's coercion of third parties to include particular provisions in the Sale Order, explaining:

> Plaintiffs, however, do not allege the Sale itself was a taking of their unsecured claims against Old GM. Instead, they allege a taking occurred because of the Government's coercive condition, targeted at Personal Injury Claimants, that it would close the [363] Sale only if the Sale Order included a provision that enjoined these claimants from pursuing successor liability claims against New GM.

ECF No. 23, at 4. Finally, in the most recent brief filed by plaintiffs, the government action once more identified is the coercion of third parties by the government as to the terms of the Sale Order:

> [T]he Government arbitrarily demanded that personal injury claimants' successor liability claims be eliminated through the Sale Order. . . . Clearly, then, Plaintiffs' injuries are "fairly traceable" to the Government's

> conduct, thus establishing the requisite causation for constitutional standing.

ECF No. 32, at 17-18. All of the allegations in the complaint and plaintiffs' briefs are consistent. The government action alleged to have directly caused the taking is the coercion of third parties to include an extinguishment provision in the July 5, 2009 Sale Order.

The takings claims in this case, filed on July 9, 2015, are founded on allegedly coercive acts by the government that obtained a Sale Order that disadvantaged plaintiffs. Such coercive acts could not have persisted later than July 5, 2009, the date the Sale Order issued. For this reason, plaintiffs' claims accrued on July 5, 2009 and are barred by the six-year statute of limitations established by section 2501.

C. No Direct Causation Link between Government Action and the Extinguishment of Rights to Pursue Successor Liability Claims against New GM after July 5, 2009

The court has reviewed the complaint, plaintiffs' briefs, and the opinions discussing the extinguishment of successor liability claims against New GM issued by both the bankruptcy court and the district court. Nowhere has the court found the slightest rational inference that the United States took any action targeting the property interest alleged by plaintiffs after July 5, 2009. To be sure, the sequence of government actions in the bankruptcy proceedings continued through July 10, 2009, when a government-controlled entity, New

GM, participated as a party to the closing of the 363 Sale. Am. Compl. ¶ 3, ECF No. 4. However, any government action taken from July 6 to July 10, 2009 is not the government action that directly caused the taking alleged in this case. That complained of action, discussed supra, was the government's demand that the Sale Order include terms which would extinguish successor liability claims against New GM once the 363 Sale closed. Plaintiffs, pursuant to Acceptance and Branch, cannot include every step in the sequence of government actions to "collectively" frame their takings claim. A prior specific step, taken by the government no later than July 5, 2009, marks the point in time when plaintiffs' claims accrued.

D. No Coercion by the Government after July 5, 2009

The court is mindful, too, that the elements of a taking founded upon the coercion of third parties in the Old GM bankruptcy have been set forth in a binding precedential opinion issued by the Federal Circuit. These elements are not present in any action taken by the United States after July 5, 2009. For example, a clear line was drawn between the persuasion of third parties by the federal government, which cannot create a taking, and coercive action directed to third parties, which may constitute a taking in certain circumstances. A & D Auto, 748 F.3d at 1154 (citations omitted). Here, no coercion could have occurred after July 5, 2009 because the conditioning of the 363 Sale upon the extinguishment of plaintiffs' successor liability

claims against New GM had already occurred in the Sale Order.[9] Because no coercion, and thus no taking, occurred after July 5, 2009, plaintiffs' takings claims accrued no later than July 5, 2009.

E. No Judicial Taking of Plaintiffs' Successor Liability Claims

The complaint does not contain an allegation that the bankruptcy court's actions in Old GM's bankruptcy constituted a judicial taking. To the extent that plaintiffs' complaint could be read to include such an allegation, the court finds that the injunctive relief provided New GM by the Sale Order could not have effected a judicial taking under the binding precedent of Allustiarte v. United States, 256 F.3d 1349, 1351-52 (Fed. Cir. 2001). That holding forecloses the prosecution of a takings claim in this court which would require a review of the effect of a bankruptcy court's rulings on a plaintiff's property rights. Id.; cf. A & D Auto, 748 F.3d at 1153 (commenting that bankruptcy law, in existence before contractual rights were obtained by the plaintiffs in that suit, defeated any inference that the automobile dealers possessed a compensable property interest that could be taken by the bankruptcy court). Thus, even if plaintiffs had asserted a judicial takings claim, such a claim would be beyond this court's jurisdiction. Cf. Tr. at 79 (plaintiffs' counsel) (stating that

[9] It is difficult to imagine that there was even any persuasive activity by the United States taking place once the Sale Order issued.

on these facts, it was "possible" that a judicial taking had occurred).

As part of its accrual analysis, however, the court notes that, as of July 5, 2009, the Sale Order was the most direct cause of the extinguishment of plaintiffs' successor liability claims. The terms of the Sale Order were enforced by the bankruptcy court thenceforward, and it was the bankruptcy court that ruled on various appeals seeking relief from the Sale Order. To the extent that there could have been a taking of plaintiffs' successor liability claims against New GM after July 5, 2009, the government actor capable of such action was the bankruptcy court, not the federal officials who participated in the closing of the 363 Sale. For all of the above reasons, plaintiffs' takings claims accrued on or before July 5, 2009, and are barred by this court's six-year statute of limitations.

VI. Property Interest Analysis

Although defendant's property interest arguments focus on plaintiffs' standing to bring this suit, ECF No. 8, at 22-25, and thus question this court's jurisdiction over plaintiffs' takings claims, the court believes the property interest issue is better addressed as the complaint's failure to state a claim upon which relief may be granted. Indeed, in Adams v. United States, 391 F.3d 1212 (Fed. Cir. 2004), the case upon which defendant extensively relies for its property interest arguments, the Federal Circuit affirmed the dismissal of a takings complaint for failure to state a claim upon which relief

might be granted. Id. at 1214. Because plaintiffs have included a nonfrivolous allegation that they possessed a property interest that was taken by government action, disputes over the sufficiency of that property interest go more to the plausibility of their claims, under RCFC 12(b)(6), than to jurisdictional concerns. See, e.g., Jan's Helicopter Serv., Inc. v. F.A.A., 525 F.3d 1299, 1309 (Fed. Cir. 2008) (holding that when "complaints contain nonfrivolous allegations that [the plaintiffs] fall within a protected class under the Fifth Amendment, the Court of Federal Claims has jurisdiction to consider those complaints under the Tucker Act").

A. The Property Interest Alleged by Plaintiffs in the Complaint

As the court has discussed earlier in this opinion, the complaint identifies plaintiffs' property interest that was allegedly taken by the government. Although there are various descriptive statements of the property interest of concern in the complaint, the most succinct and accurate characterization of plaintiffs' property interest can be found in this phrase: the "rights to assert successor liability claims against New GM." Am. Compl. ¶ 9, ECF No. 4. The parties hotly dispute whether plaintiffs' property interest is cognizable as property for purposes of a takings claim. The court has considered all of the parties' arguments, and concludes that the property interest identified in the complaint is not a cognizable one that supports a takings

claim in this court.[10] See, e.g., Adams, 391 F.3d at 1218 (requiring that this court first determine "whether the claimant possessed a cognizable property interest in the subject of the alleged taking for purposes of the Fifth Amendment") (citation omitted).

It is important to distinguish the personal injury tort claims against Old GM, which survived the Sale Order, and the successor liability claims against New GM, which did not. Most of plaintiffs' briefing acknowledges this distinction. See, e.g., ECF No. 13, at 9 (question presented by this case) ("Are the Personal Injury Claimants' rights to assert successor liability causes of action against New GM compensable property interests within the meaning of the Fifth Amendment?"); id. at 13 ("First, the Government fails to distinguish between Plaintiffs' underlying tort claims against Old GM and the wholly separate right to assert successor liability claims against New GM. It is the latter that were extinguished in the Sale Order, not the former."); ECF No. 23, at 4 ("[I]t is the impairment of Plaintiffs' successor liability claims against a non-debtor, New GM – not the impairment of their unsecured claims against the debtor, Old GM – that forms the gravamen of the Complaint."); id. ("Plaintiffs, however, do not allege the Sale itself was a taking of their unsecured claims against Old GM."); see also Tr. at 101 (plaintiffs'

[10] In the interests of efficiency, the court addresses only the most pertinent arguments in this regard presented by the parties during the course of this litigation.

counsel) (describing plaintiffs' property interest as the "right to bring a successor liability claim").

As briefing continued, however, plaintiffs' description of their property interest became more convoluted, as they presented the following:

> Here, the underlying "legally protected" property interests that establish Plaintiffs' constitutional standing to assert a takings claim against the Government are the personal injury products liability claims held by each Plaintiff and each member of the putative class. It is these claims for debilitating, even deadly, injuries to their bodies that were protected by the successor liability claims they had the right to assert against New GM and it is these claims that the Government caused to be extinguished in the Sale in contravention of the Takings Clause.

ECF No. 27, at 4. This is a very elaborate argument, indeed. Plaintiffs appear to allege, at least in this brief, that it was the first property right (the tort claims against Old GM), protected by a second property right (the successor liability claims against New GM), that was taken by the Sale Order.

Plaintiffs' characterization of their property interest then evolves even further in their final brief. In that brief, plaintiffs merge all of their property interests into a vague and general "right to compensation":

> Plaintiffs' legally-protected interest is their right to compensation – from any source – for

> personal injuries caused by product defects in cars manufactured by Old GM.

ECF No. 32, at 8. Unfortunately for plaintiffs, neither the facts alleged in the complaint, nor the takings jurisprudence guiding this court, support their increasingly tangled efforts to identify the property interest that was taken by the government.

The focus of the complaint is on the provisions in the Sale Order that extinguished plaintiffs' rights to bring successor liability claims against New GM. Am. Compl. ¶¶ 9, 107, 123, ECF No. 4. The alleged taking in the complaint is of a clearly defined property interest; and that right to bring successor liability claims against New GM is the only property interest in these circumstances which fits within the coercion framework established by A & D Auto. See 748 F.3d at 1152-53 (holding that the conditioning of the government's bail-out of the auto companies upon the termination of the plaintiffs' franchise agreements was possibly a taking of the auto dealers' property interests in those terminated agreements). Here, the extinguished "rights to bring successor liability claims against New GM," Am. Compl. ¶ 9, ECF No. 4, are analogous, in many respects, to the terminated franchise agreements in A & D Auto, and this is the particular property interest underlying plaintiffs' takings claims.

B. State Law Property Interest in Rights to Bring Successor Liability Claims

Plaintiffs rely on Michigan state law as a tool for understanding the dimensions of plaintiffs' property interest in their successor liability claims. Am. Compl. ¶ 157, ECF No. 4; ECF No. 21, at 1-7; Tr. at 49, 80, 128. Defendant does not agree that Michigan state law is controlling here. ECF No. 22, at 1-3. The court need not decide this issue. In the circumstances of the General Motors bankruptcy, as explained below, any state law right to bring successor liability claims was limited by federal bankruptcy law and the highly contingent nature of plaintiffs' property interest. See Bair v. United States, 515 F.3d 1323, 1327 (Fed. Cir. 2008) ("Despite the statements in a number of Supreme Court cases referring to the creation of property interests by state law, the Court has recognized that state-created property interests may be limited by federal laws, even in the area of real property."); Adams, 391 F.3d at 1219 ("'[E]xisting rules or understandings that stem from an independent source,' such as state, federal, or common law, create and define the dimensions of property interests for purposes of establishing a cognizable right and hence a potential taking." (quoting Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1030 (1992))). For the sole purpose of its property interest analysis, however, the court accepts plaintiffs' inference that Michigan state law defines

their rights to bring successor liability claims against New GM.[11]

C. Bankruptcy Law Governing Section 363 Sales Predates Plaintiffs' Personal Injury Claims and Their Rights to Bring Successor Liability Claims against New GM

As a threshold matter, the named plaintiffs in this suit base their claims on accidents which occurred, respectively, in 1994, 2004 and 2006. Am. Compl. ¶¶ 20-26, ECF No. 4. Section 363(b) of the Bankruptcy Code, which authorized the 363 Sale in this case, predates those events, and any claims which might be founded on those accidents, by a number of years. See, e.g., In re Chrysler LLC, 405 B.R. 84, 94 (Bankr. S.D.N.Y. 2009) (subsequent history omitted) (noting that asset sales have been authorized under section 363(b) since 1978). Although the enactment date of section 363(b) is not dispositive for the property interest analysis required

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[11] Plaintiffs state:

> [T]here are no individualized issues of law. Each Class member had successor liability rights against New GM that were extinguished in the 363 Sale. Regardless of which of the 50 states that Class member lived or was injured, each Class member also had the right to assert successor liability claims against New GM in Michigan, which was New GM's principal place of business and which recognizes rights to assert successor liability claims under a multitude of theories, none of which are unique to any particular member of the Class. . . .

Am. Compl. ¶ 157, ECF No. 4. The complaint does not specify where plaintiffs' personal injury tort claims against Old GM were filed.

here, see A & D Auto, 748 F.3d at 1152-53 (stating that it was the date of the challenged government action, not the date the bankruptcy law was enacted, that determined what law "inhered" in the title of the property owned by the takings plaintiffs in that suit), existing bankruptcy law at the time Old GM filed for bankruptcy, under the particular circumstances of this case, plays a greater role than it did in A & D Auto.

D. Plaintiffs' Asserted Property Interest Is Too Contingent to be Cognizable under Takings Jurisprudence Binding upon This Court

One of the key differences between A & D Auto and this case is that plaintiffs here assert a highly contingent property interest, instead of a contract-based property interest that was firmly enshrined in takings jurisprudence, as was the case in A & D Auto. 748 F.3d at 1152 (citing cases). Plaintiffs' "rights to bring successor liability claims against New GM," Am. Compl. ¶ 9, ECF No. 4, are entirely contingent upon two discretionary acts of the federal government: (1) a government financial intervention so that a New GM could be created; and, (2) a government intervention so that Old GM could file for bankruptcy requesting a 363 sale. Until these two discretionary acts occurred, the property interest asserted by plaintiffs in their complaint did not exist, because there was no New GM to sue.

Thus, applying A & D Auto, the challenged government action in this suit was contemporaneous with

plaintiffs' emergent right, created through the government bail-out of General Motors and the bankruptcy proceedings, to bring successor liability claims against New GM. In these circumstances, the powers accorded the bankruptcy court by section 363 inhered in and limited plaintiffs' property interest, because that highly contingent interest, from its inception, was targeted for – and was subject to – extinguishment by the conditions that the government imposed on the 363 Sale. A highly contingent property interest of this kind cannot support a takings claim.

E. Analogous Cases of Highly Contingent Property Interests

Plaintiffs have had the opportunity to file five briefs, and present oral argument, where they could have identified even one case where a successor liability claim was found to be a cognizable property interest in support of a takings claim. But, plaintiffs have brought no such case to the attention of the court, even in the broader context of mergers and corporate sales. As to the more specific context of bankruptcy proceedings, plaintiffs have again failed to muster a single case citation that shows that an unsecured successor liability claim was held to be cognizable property for the purpose of a takings analysis. Nor has the court found any judicial decision which concluded that the right to bring unsecured successor liability claims against the purchaser in a 363 sale – such as the one at issue in this case – is a property interest sufficient to support a takings claim.

The government observes that a district court judge reviewing the 363 Sale rejected the proposition that unsecured claims in that proceeding constituted a property interest sufficient to support a takings claim. See In re Motors Liquidation Co., 430 B.R. at 96 (citation omitted). A similar expression of this view of takings law can be found in another bankruptcy case. See In re Chrysler LLC, 405 B.R. at 111-12 (holding that "an unsecured claim [does not satisfy the] necessary prerequisite to a Fifth Amendment Takings Clause claim in the bankruptcy context") (citation omitted). These categorical holdings do not necessarily comport with A & D Auto, which found that contract-based rights, which appear to have been treated as unsecured claims in the Old GM bankruptcy, were indeed property interests protected by the Fifth Amendment. 748 F.3d at 1149, 1153. The court notes, too, that a bankruptcy court in Michigan has found that one type of unsecured claim in bankruptcy proceedings encompassed a property interest sufficient to support a takings claim. In re City of Detroit, 524 B.R. 147, 270 (Bankr. E.D. Mich. 2014). From this review of takings jurisprudence, the fact that a property interest is protected only by an unsecured claim in bankruptcy proceedings is not dispositive for the takings analysis, at least in this circuit.

Unfortunately for plaintiffs, however, binding precedent in this circuit removes highly contingent property interests, such as the one that underlies the takings claim in this suit, from the ambit of the Takings Clause. The court cites just a few examples in this

regard. The guiding principle in these cases is that federal law, including bankruptcy law, may inhere in and limit property interests that otherwise exist under state law. Bair, 515 F.3d at 1327-31. Indeed, the fact that the federal law predated the creation of the state law property interest is generally dispositive, even when the government action enforcing or triggering the federal law postdates the creation of the state law property interest.[12] See id. at 1329 ("The federal statute thus limited the petitioners' later-arising, state-created property interests, even though the state liens arose before the [federal secured] progress payments were made and the enforcement of the federal statute reduced the value of the state liens.") (footnote omitted). Following Bair, here plaintiffs' "rights to bring successor liability claims against New GM," Am. Compl. ¶ 9, ECF No. 4, were "preempted" by section 363 and were not "compensable" under takings jurisprudence in this circuit. Id. at 1331.

Adams, the case extensively relied upon by defendant, is also instructive. The Federal Circuit acknowledged that a cause of action may sometimes constitute a property interest for purposes of the

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[12] As noted above, in A & D Auto, this general principle did not apply. 748 F.3d at 1152-53 (citing Bair, 515 F.3d at 1331). But this case is distinguishable from A & D Auto because the property interest here did not exist until the government intervened in Old GM's financial troubles, directed the restructuring of Old GM's debts, created New GM, and conditioned the 363 Sale on the extinguishment of plaintiffs' right to bring successor liability claims against New GM, which coincides with the time that plaintiffs' property interest arose, allegedly, under state law.

Takings Clause. 391 F.3d at 1225-26. The cause of action must, however, "protect[] a legally-recognized property interest." Id. at 1226 (citation omitted). When the cause of action protects an interest in land, undoubtedly a property interest that supports a takings claim, the cause of action is itself a property interest for takings purposes. Id. (noting one such cause of action, which "was to recover compensation for an interest in land, a property interest cognizable under established takings jurisprudence because land is, beyond question, property under state and common law" (citing Alliance of Descendants of Tex. Land Grants v. United States, 37 F.3d 1478, 1481 (Fed. Cir. 1984))). Where, however, the cause of action is not protecting a "recognized" property right, it is not itself a compensable property interest. Id.

When the plaintiffs in Adams failed to cite "any precedent finding such a [cognizable] property interest in a claim of Government liability before an administrative agency," which was the type of cause of action at issue in that case, they failed to establish that their cause of action was a property interest sufficient to support a takings claim. Id. Here, too, plaintiffs have failed to cite any precedent for finding that successor liability claims constitute a property interest sufficient to support a takings claim.[13] See supra. Just as in

[13] Plaintiffs' reliance on Abrahim-Youri v. United States, 139 F.3d 1462 (Fed. Cir. 1997) is misplaced, for two reasons. First, the issue on appeal in Abrahim-Youri was not whether the takings plaintiffs in that case possessed a compensable property interest, but whether they had suffered an avoidable economic loss because of the alleged taking, and whether they had reasonable

Adams, 391 F.3d at 1214, 1226, plaintiffs' takings claims must be dismissed for failure to state a claim upon which relief may be granted.

Finally, the Acceptance decision clearly establishes that a highly contingent property interest is not afforded the protections of the Takings Clause. The Federal Circuit determined that the alleged taking in that case was a specific action of the United States Department of Agriculture's Risk Management Agency (RMA). The alleged taking was effected by "the RMA's rejection of the proposed sale to Rain & Hail [LLC] of [plaintiff's] portfolio of insurance policies." Acceptance, 583 F.3d at 855-56. The court then identified the property interest that was taken by the RMA's rejection of that sale. Id. at 856-57. Simply put, the property interest was "Acceptance's ability to freely sell [its] insurance portfolio to Rain & Hail." Id. at 857.

Relying on a number of cases where a right to sell property or a right to enjoy property in a particular way was limited by federal law, the Acceptance court held that the plaintiff's right to sell its portfolio to a particular buyer was not unfettered, even though a property right embodied in a contract might otherwise, under state law, be freely sold or assigned. Id. at 857-59. The court stated, for example, that "because the RMA had the authority to deny the sale of the policies at issue, Acceptance, through [its subsidiary], did not

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expectations as to the investment value of their property. Id. at 1468. Second, Abrahim-Youri contains no mention of successor liability claims.

possess the unfettered right to sell or otherwise transfer the policies, thus precluding the existence of a cognizable property interest." Id. at 858 (citations omitted). The Federal Circuit concluded that the property interest alleged to have been taken was contingent on a discretionary decision of the RMA, and therefore was not compensable under the Takings Clause:

> In other words, when the RMA decided to disapprove of the sale to Rain & Hail, there was no right to freely alienate the policies extant in Acceptance[] with which that decision interfered. Essentially, Acceptance asks us to recognize a cognizable property right in a decision by the RMA not to exercise its authority to reject the sale of insurance policies subject to the crop insurance regulatory scheme. We decline to do that.

Id. Acceptance thus stands for the proposition that when a property interest is contingent on a favorable decision of a federal agency, it is not a cognizable property interest under the Takings Clause.

Here, plaintiffs assert a property interest in their "rights to bring successor liability claims against New GM." Am. Compl. ¶ 9, ECF No. 4. At the time that the property interest arose, the government possessed the discretion to extinguish, or not extinguish, that property interest as a condition of the 363 Sale. Once the government exercised its discretion, plaintiffs' highly

contingent property interest was extinguished.[14] Following Acceptance, federal bankruptcy law, particularly the powers accorded the bankruptcy court by section 363, and the federal government's discretionary right to condition its investment in New GM on the extinguishment of plaintiffs' successor liability claims against New GM, inhered in plaintiffs' property interest such that plaintiffs' property interest was not a cognizable property interest under the Takings Clause.

VII. Conclusion

For the reasons stated in this opinion, plaintiffs' claims must be dismissed for lack of subject matter jurisdiction because they were untimely filed under 28 U.S.C. § 2501. Even if this suit had been timely filed, the complaint fails to state a claim upon which relief may be granted. Accordingly, defendant's motion to dismiss, ECF No. 8, is **GRANTED**. The clerk's office is directed to **ENTER** final judgment for defendant

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[14] As plaintiffs noted at oral argument, the bankruptcy court had no choice but to accept the government's conditions for the 363 Sale, because the alternative was economically unacceptable. Tr. at 96, 98-99, 130-31. The bankruptcy judge appears to have shared this view of the facts. See, e.g., In re Gen. Motors Corp., 409 B.R. at 32-34 (predicting dire economic consequences if the 363 Sale did not close within the timeframe specified by the government); cf. In re Motors Liquidation Co., 457 B.R. at 285 (noting that "[a]s is customary in 363 transactions, the [Sale] Order, which was 50 pages long, was drafted by the movants (and, perhaps other parties in interest) for [the bankruptcy judge's] review, approval, and ultimate entry").

DISMISSING plaintiffs' amended complaint, without prejudice.

IT IS SO ORDERED.

s/ Patricia Campbell-Smith
PATRICIA CAMPBELL-SMITH
Judge

In the United States Court of Federal Claims

No. 15-717C
(E-Filed: March 23, 2018)

CALLAN CAMPBELL, et al., Plaintiffs, v. THE UNITED STATES, Defendant.	Motion for Reconsideration, RCFC 59; Motion for Leave to File an Amended Complaint, RCFC 15(a); Reconsideration Denied; Futile Request to Amend Complaint Denied.

Steve Jakubowski, Chicago, IL, for plaintiffs. Robert M. Winter and Catherine A. Cooke, Chicago, IL, of counsel.

John J. Todor, Senior Trial Counsel, with whom were Chad A. Readler, Acting Assistant Attorney General, Robert E. Kirschman, Jr., Director, Franklin E. White, Jr., Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, for defendant.

OPINION

CAMPBELL-SMITH, Judge.

The court has before it plaintiffs' combined motion for reconsideration, motion to amend the judgment, and motion for leave to file a second amended complaint, ECF No. 35, which is brought pursuant to Rules 59 and 15(a) of the Rules of the United States Court of

Federal Claims (RCFC). The motion has been fully briefed. See Def.'s Resp., ECF No. 37; Pls.' Corrected Reply, ECF No. 39. For the reasons set forth below, plaintiffs' motion is **DENIED**.

I. Procedural Background

Plaintiffs now rely on a proposed Second Amended Class Action Complaint, ECF No. 35-1, to clarify their claims and to add additional factual allegations which, in their view, justify reconsideration of the dismissal of their claims by this court, see ECF No. 35 at 6 (stating that the proposed Second Amended Complaint "clarifie[s]" the claim accrual issue in this case), 7 (noting the "additional jurisdictional facts contained in the Second Amended Complaint"), 10 (referencing the facts that "the Second Amended Complaint now establishes"), 13 (relying on the "new jurisdictional facts ple[ ]d in the Second Amended Complaint"), 14 (stating that the Second Amended Complaint will remedy "a lack of adequate factual exposition"); see also ECF No. 39 at 5 (acknowledging plaintiffs' prior "lack of precision in alleging [their] takings claims"). The court observes that not only does the proposed Second Amended Complaint supply additional allegations of fact, it also reshapes the description of plaintiffs' takings claims and the facts already alleged. For the court's consideration of plaintiffs' motion for reconsideration, the court relies, in part, on the allegations contained in plaintiffs' proposed Second Amended Complaint, but also relies on prior representations to this court found in the First Amended Class Action

Complaint, ECF No. 4, and the briefs that plaintiffs have filed during the course of this litigation.

Familiarity with the court's opinion that is the subject of plaintiffs' motion, Campbell v. United States, 134 Fed. Cl. 764 (2017) (Campbell), is presumed. The overall issue presented in the three complaints proffered by the plaintiffs in this suit is whether the government's specific conditions placed on its financial bail-out of General Motors Corporation constituted a taking of these plaintiffs' personal injury claims. Plaintiffs' personal injury suits filed against Old GM were greatly affected by the General Motors bankruptcy in 2009. Id. at 767-68. Further, in the GM bankruptcy proceedings plaintiffs' opportunity to bring successor liability suits against New GM were extinguished. Id. at 772-73, 775.

This case was dismissed for lack of subject matter jurisdiction because the original complaint was not filed within six years of claim accrual. Id. at 773. The court found that the "coercive" government action that was alleged to have caused the taking of plaintiffs' successor liability claims could not have extended past the date when the bankruptcy court issued its Sale Order on July 5, 2009. Id. Because plaintiffs' suit was filed on July 9, 2015, more than six years later, it was untimely filed under 28 U.S.C. § 2501 (2012).

In the alternative, the court held that plaintiffs' claims would necessarily have been dismissed for failure to state a claim upon which relief may be granted. Campbell, 134 Fed. Cl. at 779. The only property right

asserted by plaintiffs to have been taken was a highly contingent right to bring successor liability claims that "was not a cognizable property interest under the Takings Clause." Id. Thus, even if plaintiffs' claims had been timely filed, the complaint would have been dismissed, in any event, for failure to state a plausible takings claim. Id. at 774, 779.

II. Standard of Review for Motions Brought under RCFC 59

Pursuant to the rules of this court, a plaintiff may be granted reconsideration of the court's disposition of a case "for any reason for which a new trial has heretofore been granted in an action at law in federal court [or] for any reason for which a rehearing has heretofore been granted in a suit in equity in federal court." RCFC 59(a)(1)(A)-(B). "The decision whether to grant reconsideration lies largely within the discretion of the [trial] court." Yuba Natural Res., Inc. v. United States, 904 F.2d 1577, 1583 (Fed. Cir. 1990) (citations omitted). The motion for reconsideration "must be based on a manifest error of law or mistake of fact and must show either: (1) that an intervening change in the controlling law has occurred; (2) that previously unavailable evidence is now available; or (3) that the motion is necessary to prevent manifest injustice." First Fed. Lincoln Bank v. United States, 60 Fed. Cl. 501, 502 (2004) (citations omitted).

III. Standard of Review for Motions Brought under RCFC 15(a)(2)

Plaintiffs' motion is also brought under RCFC 15(a)(2), which states that "[t]he court should freely give leave [to amend a pleading] when justice so requires." Id. Leave to amend a pleading should not be granted, however, when the proposed amendment would be futile. Foman v. Davis, 371 U.S. 178, 182 (1962). Amendment of a complaint to present claims outside of this court's jurisdiction would be futile. E.g., Marchena v. United States, 128 Fed. Cl. 326, 332 (2016), aff'd, 702 F. App'x 988 (Fed. Cir. 2017) (table); Ishler v. United States, 115 Fed. Cl. 530, 541 (2014); Van Vorst v. United States, 85 Fed. Cl. 227, 233 (2008); Emerald Coast Finest Produce Co. v. United States, 76 Fed. Cl. 445, 452 (2007); Saladino v. United States, 62 Fed. Cl. 782, 795 (2004).

In addition, when the proposed amended complaint fails to state a claim upon which relief may be granted, the court should deny the motion to amend as futile. E.g., Leider v. United States, 301 F.3d 1290, 1299 n.10 (Fed. Cir. 2002); Mitsui Foods, Inc. v. United States, 867 F.2d 1401, 1404 & n.4 (Fed. Cir. 1989) (citing Foman, 371 U.S. at 182); Marchena, 128 Fed. Cl. at 334. The appropriate test for futility, when there is a question as to whether the proposed amended complaint states a claim upon which relief may be granted, is the plausibility test delineated by the Supreme Court in Ashcroft v. Iqbal, 556 U.S. 662 (2009) (Iqbal) and Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007) (Twombly). E.g., A & D Auto Sales, Inc. v. United

States, 748 F.3d 1142, 1159 (Fed. Cir. 2014); Marchena, 128 Fed. Cl. at 333. Under this test, the allegations of the proposed amended complaint must state a plausible claim for relief. See, e.g., Iqbal, 556 U.S. at 678 ("To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' ") (quoting Twombly, 550 U.S. at 570).

IV. Discussion

A. Claim Accrual

Plaintiffs' briefs do not argue that the Campbell opinion contained factual errors regarding the chronology of events relevant to claim accrual. Nor do plaintiffs dispute this court's finding that the type of "taking" at issue in their claims is the alleged coercion of third parties by the federal government during the GM bankruptcy. Instead, plaintiffs contend that the court's legal analysis of the claim accrual question was flawed due to an incomplete presentation of facts in the First Amended Complaint, and because the court's analytical framework was incorrect.

The court has carefully considered the new allegations of fact in the proposed Second Amended Complaint, as well as plaintiffs' arguments based on those factual allegations and takings jurisprudence, and finds no reason to conclude that plaintiffs' takings claims accrued on July 9 or July 10, 2009, rather than on July 5, 2009. Once the bankruptcy court entered the Sale Order on July 5, 2009, any alleged government

coercion of third parties, as "coercion" is defined in this context by A & D Auto, 748 F.3d at 1153-56, ceased. The court turns to the principal arguments presented by plaintiffs on the topic of claim accrual.[1]

1. July 10, 2009 363 Sale Closing Date Proposed as the Accrual Date

As previously asserted in their First Amended Complaint, ECF No. 4 at 39, plaintiffs aver that their takings claims accrued on July 10, 2009, the closing date of the 363 Sale which conveyed many of Old GM's assets to New GM, ECF No. 35 at 9-12.[2] In support of this accrual date, plaintiffs argue, first, that precedential takings cases require that the government exert "effective control" over property before a taking can occur and the related takings claim can accrue. Plaintiffs rely on Cuban Truck & Equipment Co. v. United States, 333 F.2d 873, 878 (Ct. Cl. 1964), and Turney v. United States, 126 Ct. Cl. 202, 214 (1953), for this proposition.

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[1] The court has considered all of plaintiffs' arguments but limits its discussion here to the most substantial arguments raised in plaintiffs' briefs. Although plaintiffs rely, in part, on decisions issued by this court to establish precedent, the court's focus here is primarily on authorities which provide binding precedent. See, e.g., W. Coast Gen. Corp. v. Dalton, 39 F.3d 312, 315 (Fed. Cir. 1994) ("Court of Federal Claims decisions, while persuasive, do not set binding precedent for separate and distinct cases in that court.") (citations omitted).

[2] As explained in Campbell, in a "363 sale" under 11 U.S.C. § 363(b), (f) (2012), "the acquiring entity may, if certain conditions are met, obtain particular assets from the bankruptcy petitioner and, at the same time, avoid some of the liabilities of the petitioner." 134 Fed. Cl. at 768.

ECF No. 35 at 10-11; ECF No. 39 at 12-13. Both of these cases involved physical property (trucks or radar equipment) over which the United States military exercised some amount of physical control. The accrual of the takings claims in Cuban Truck and Turney is not at all analogous to the accrual of plaintiffs' takings claims based on the government's alleged, non-physical coercion of third parties; the holdings in those two cases in no way militate for an accrual date of July 10, 2009, for plaintiffs' takings claims in this case.

Plaintiffs next turn, ECF No. 35 at 10-12; ECF No. 39 at 12, to the Dickinson line of cases, where the accrual of a takings claim may be "postponed" if the "damages from [the] taking only gradually emerge." Nw. LA Fish & Game Pres. Comm'n v. United States, 446 F.3d 1285, 1290-91 (Fed. Cir. 2006) (citing United States v. Dickinson, 331 U.S. 745, 749 (1947)). According to the United States Court of Appeals for the Federal Circuit, this claim accrual rule applies in cases where the taking is effected by "continuous physical processes." Id. at 1291 (citing Applegate v. United States, 25 F.3d 1579, 1582 (Fed. Cir. 1994)). This accrual rule is often referred to as the stabilization doctrine. Id. at 1290-91. Because plaintiffs here allege a taking that does not involve a continuous physical process, the stabilization doctrine, and the cases cited by plaintiff that follow Dickinson, have no applicability to the accrual of their takings claims.

2. July 9, 2009 Stay Denial Date Proposed as the Accrual Date

Plaintiffs also contend that their takings claims accrued no earlier than July 9, 2009, when the emergency motion for a stay pending appeal – filed by the "Asbestos" claimants in the GM bankruptcy – was denied by the district court. ECF No. 35 at 12-14; ECF No. 35-1 at 41; see also In re Motors Liquidation Co., 428 B.R. 43, 51 (S.D.N.Y. 2010) (giving the history of the Campbell and Asbestos claimants' efforts to challenge the extinguishment of their successor liability claims against New GM before the 363 Sale closed on July 10, 2009). In broad strokes, plaintiffs argue that because the July 5, 2009 Sale Order was not effective until July 9, 2009, and because the government defended against attempts to stay the Sale Order and the 363 Sale through July 9, 2009, government coercion of third parties did not cease on July 5, 2009 – contrary to the court's holding in Campbell. ECF No. 35 at 12-14. Plaintiffs' arguments are not persuasive.

The court begins with the "effective date" argument. The court, when it issued Campbell, was not unaware of the fact that the Sale Order that issued on July 5, 2009, included a provision citing July 9, 2009, as the effective date. Indeed, the effective date of the Sale Order was highlighted by the bankruptcy court as a modification of the draft Sale Order proposed by Old GM. See ECF No. 4-1 at 48; ECF No. 4-2 at 95 n.143. As the bankruptcy court observed, the four-day period between July 5, 2009, and July 9, 2009, was specifically designed to provide a (limited) opportunity for

appellate review of the Sale Order. ECF No. 4-2 at 95 n.143. As this court noted in its prior opinion, a variety of challenges to the Sale Order were filed during this time-frame. Campbell, 134 Fed. Cl. at 770. None of these challenges prevented the Sale Order from becoming final on July 9, 2009, or prevented the 363 Sale from closing on July 10, 2009.

Even when the factual allegations presented in the proposed Second Amended Complaint are taken into account, the four-day window of time provided for appellate review in the Sale Order is not an indication that government coercion of Old GM and the bankruptcy court extended past July 5, 2009.[3] The court continues to view the entry of the Sale Order on July 5, 2009, as the actualization of the government's efforts to extinguish plaintiffs' successor liability claims as a condition of the 363 Sale, and as the accrual date for plaintiffs' takings claims. Plaintiffs' revisions to the First Amended Complaint cannot alter the true nature of plaintiffs' takings claims. See, e.g., James v. Caldera, 159 F.3d 573, 579 (Fed. Cir. 1998) (stating that the jurisdictional inquiry "does not end with the words of the complaint, however instructive they may be, for [the court] still must 'look to the true nature of the action in determining the existence or not of jurisdiction'"

[3] Plaintiffs have added the district court as another named target of the government coercion that effected the takings alleged in the proposed Second Amended Complaint. ECF No. 35-1 at 8-9, 37, 39-41. The court notes this allegation, but does not view the government's actions vis-à-vis the district court to constitute coercion. See infra.

(quoting Katz v. Cisneros, 16 F.3d 1204, 1207 (Fed. Cir. 1994))).

Pursuant to A & D Auto, the government may be liable for a taking when its coercive actions "condition" government financing on the extinguishment of legal rights, and when the company's survival depends on its acceptance of that financing with those conditions. 748 F.3d at 1154. The coercion alleged in all of plaintiffs' complaints, no matter how phrased, is bounded by this precedent. The only government actions which conform to the A & D Auto coercion scenario are those in which Old GM and the bankruptcy court were coerced into structuring the 363 Sale so that plaintiffs' successor liability claims were extinguished. Those allegedly "coercive" actions terminated, at the latest, on July 5, 2009.

Plaintiffs also rely on the litigation of claims in the GM bankruptcy between July 5, 2009, and July 9, 2009, as evidence of coercive conduct extending beyond July 5, 2009. In their proposed Second Amended Complaint plaintiffs allege a multitude of facts that show, perhaps, that the extinguishment of their successor liability claims remained a live issue in Congress and, in particular, before the district court through July 9, 2009.[4] ECF No. 35-1 at 37-41. To characterize the

[4] The court notes that plaintiffs' only challenge to the Sale Order filed during this four-day period – asserted as a request for a direct appeal to the United States Court of Appeals for the Second Circuit – was denied by the bankruptcy court on July 7, 2009. In re Motors Liquidation Co., 428 B.R. at 50-51 & n.9. The date July 7, 2009, like July 5, 2009, is outside this court's six-year

government actions that took place in these settings as continued coercion of the type described in A & D Auto is erroneous. What plaintiffs describe in these paragraphs of their proposed Second Amended Complaint is merely a four-day episode in the ongoing participation of the United States in the long-lived GM bankruptcy proceedings.

As the court noted in Campbell, that litigation has not yet concluded. 134 Fed. Cl. at 770 (citation omitted); see also In re Motors Liquidation Co., No. 09-50026 (MG), 2018 WL 491783 (Bankr. S.D.N.Y. Jan. 18, 2018). Plaintiffs cannot depend on the government's participation in the GM bankruptcy as a perpetual claim accrual-delaying mechanism. Any coercive activity by the United States that would fit within the analytical framework provided by A & D Auto terminated, at the latest, on July 5, 2009.

3. Plaintiffs' Challenge to the Court's Analytical Framework for Claim Accrual

Plaintiffs also contend that the court's analytical framework for its claim accrual ruling was flawed. In particular, plaintiffs suggest that neither Branch v. United States, 69 F.3d 1571 (Fed. Cir. 1995), nor Acceptance Insurance Cos. v. United States, 583 F.3d 849 (Fed. Cir. 2009) (Acceptance), was correctly applied in

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limitations period. Plaintiffs rely on a challenge to the Sale Order filed by the Asbestos claimants on July 8, 2009, to further delay the accrual of their own claims beyond July 7, 2009. ECF No. 35-1 at 39.

Campbell. ECF No. 35 at 12; ECF No. 39 at 11-12. Plaintiffs' argument regarding these two cases is cursory, is unsupported by citation to any cases which discuss Branch or Acceptance, and fails to persuade. The court finds nothing in plaintiffs' discussion of Branch or Acceptance that invalidates the analytical framework for claim accrual that was set forth in Campbell.

In their reply brief, plaintiffs attempt to buttress their attack on the court's reading of Branch and Acceptance by citing to a wide range of takings jurisprudence. Curiously, plaintiffs ignore three precedential cases cited by the government in its response brief. See ECF No. 37 at 11-12 (citing Goodrich v. United States, 434 F.3d 1329 (Fed. Cir. 2006); Fallini v. United States, 56 F.3d 1378 (Fed. Cir. 1995); All. of Descendants of Tex. Land Grants v. United States, 37 F.3d 1478 (Fed. Cir. 1994)). These cases were specifically offered in support of the court's claim accrual analysis, and of the court's ruling that plaintiffs' takings claims accrued on July 5, 2009. Id.

Rather than address the binding precedent of these cases and defendant's reliance on this precedent, plaintiffs largely focus in their reply brief on one of this court's decisions cited by defendant, and then draw the court's attention to a number of precedential takings cases. Whether all of plaintiffs' arguments are properly within the scope of a reply brief to which the government has not had a chance to respond is questionable. See, e.g., Arakaki v. United States, 62 Fed. Cl. 244, 246 n.9 (2004) ("The court will not consider arguments that were presented for the first time in a reply brief or

after briefing was complete." (citing Novosteel SA v. United States, 284 F.3d 1261, 1274 (Fed. Cir. 2002); Cubic Def. Sys., Inc. v. United States, 45 Fed. Cl. 450, 467 (1999))). Nonetheless, even if all of plaintiffs' claim accrual arguments in their reply brief are properly before the court, they are unpersuasive.[5]

Plaintiffs first explore the topic of claim accrual through two decisions discussing bank failures. See ECF No. 39 at 6-9 (citing Ariadne Fin. Servs. Prop. Ltd. v. United States, 133 F.3d 874 (Fed. Cir. 1998); Plaintiffs in Winstar-Related Cases, 37 Fed. Cl. 174 (1997) (subsequent history omitted)). According to plaintiffs, Ariadne stands for the proposition that a takings claim accrues when the property owner is "'sufficiently convinced'" that its property has been taken by the government. Id. at 8 (quoting Ariadne, 133 F.3d at 880). The claim accrual ruling in Campbell is in no way undermined by this proposition. By July 5, 2009, plaintiffs were "sufficiently convinced" by the issuance of the Sale Order that allegedly coercive acts of the government had resulted in a Sale Order that explicitly extinguished their successor liability claims.

Plaintiffs then attempt to find support for their attack on the court's claim accrual analysis by referencing Palazzolo v. Rhode Island, 533 U.S. 606 (2001). ECF No. 39 at 9. The court finds no parallel between the administrative exhaustion requirement stated in

[5] The court limits its consideration to binding precedent cited by plaintiffs, see supra note 1, and does not revisit arguments that the court has addressed in earlier sections of this opinion.

Palazzolo, 533 U.S. at 620-21, and the timing in this case of the alleged coercion by the federal government of Old GM and the bankruptcy court. For this reason, plaintiffs' citation to Palazzolo does not undermine the court's reliance on Branch and Acceptance for its claim accrual analysis.

Finally, plaintiffs turn to Smith v. United States, 709 F.3d 1114 (Fed. Cir. 2013). ECF No. 39 at 10-11. The statute of limitations issue in Smith was predicated on three judicial takings, i.e., the issuance of orders by three distinct courts that disbarred the appellant. 709 F.3d at 1116. Giving the Smith opinion the reading most favorable to plaintiffs here, the Federal Circuit held that a judicial taking occurs, and the plaintiff's takings claim accrues, when the final judicial order, such as a disbarment order, is issued. Id. at 1117. Unlike Smith, however, this case does not involve an allegation of a judicial taking. Thus, any "final order" rule that might be discerned in Smith does not contradict the court's claim accrual analysis in Campbell.[6]

[6] The claim accrual question in Smith did not focus on the difference between an order that was not final and a final order. Instead, the Federal Circuit weighed the appellant's arguments that: (1) accrual occurred only once the United States Supreme Court issued its judicial takings decision in Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection, 560 U.S. 702 (2010); and (2) accrual of new judicial takings claims took place when the attorney's appeals of the courts' disbarment orders were rejected. Smith, 709 F.3d at 1116-17.

4. Claim Accrual Summary

The court has reviewed all of plaintiffs' arguments challenging the court's dismissal of their takings claims on timeliness grounds. The alternative accrual dates set forth in the proposed Second Amended Complaint and plaintiffs' briefs are not well-founded. Nor have plaintiffs shown any legal error in the analytical framework employed by the court in Campbell. Because the court's claim accrual ruling in Campbell does not evince legal error, any mistake of fact, or a manifest injustice, plaintiffs' motion for the reconsideration of the court's RCFC 12(b)(1) dismissal of their claims must be denied.

B. Property Interest

Plaintiffs also contend that the court erred when it found that plaintiffs' complaint did not present a plausible takings claim. Plaintiffs' arguments in this regard are rather amorphous and difficult to categorize. Three distinct topics emerge from plaintiffs' briefs, however.

First, plaintiffs urge the court to accept, as their last word on this subject, a finalized definition of the property interest taken by the government during the GM bankruptcy proceedings. ECF No. 35 at 14. Second, plaintiffs attempt to convince the court that their property interests were not "highly contingent." Id. at 7, 14-15; ECF No. 39 at 13. Third, plaintiffs suggest that the property right which was taken by the government "'inhered' in Plaintiffs" long before the government

began its interventions in the GM bankruptcy proceedings. ECF No. 35 at 15.

The court will address each of these topics in turn. As a threshold matter, however, the court notes that plaintiffs' challenge to the court's RCFC 12(b)(6) ruling in Campbell rests largely on an attempt to reframe the legal right that was allegedly taken by the United States, and to convince the court that this legal right is more substantial than the court believed. Although this reframing of plaintiffs' claims is superficially supported by attorney argument, the undisputed facts of the GM bankruptcy ultimately determine the plausibility of plaintiffs' takings claims. See, e.g., Iqbal, 556 U.S. at 678 (stating that "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions"); Papasan v. Allain, 478 U.S. 265, 286 (1986) ("[W]e are not bound to accept as true a legal conclusion couched as a factual allegation.") (citations omitted). Here, to put it bluntly, the pen is not mightier than the well-established facts of this case. See Campbell, 134 Fed. Cl. at 770-71 (noting that the background facts of this case are well-established). The particular articulation of plaintiffs' property interest proffered by plaintiffs in their briefing is of far less importance than the facts underlying their takings claims.

1. Finalized Definition of Plaintiffs' Property Interest

The court thoroughly examined the nature of plaintiffs' property interest in Campbell, and noted that plaintiffs' description of that property interest was not always consistent. 134 Fed. Cl. at 767-69, 774-76 & n.11. The court found that the most accurate, and, indeed, the only possible property interest that could have been taken from plaintiffs by the government in the GM bankruptcy was embodied in plaintiffs' "'rights to assert successor liability claims against New GM.'" Id. at 774 (quoting ECF No. 4 at 5). The court specifically held that no other property interest would satisfy the analytical framework for a coercive taking, citing A & D Auto, 748 F.3d at 1152-53. Campbell, 134 Fed. Cl. at 775.

Plaintiffs now seek to define their property interest differently. First, they cite to "their last brief," ECF No. 32, which included the following definition of plaintiffs' property interest:

> Plaintiffs' legally-protected interest is their right to compensation – from any source – for personal injuries caused by product defects in cars manufactured by Old GM.

Campbell, 134 Fed. Cl. at 775 (quoting ECF No. 32 at 8). Second, plaintiffs elaborate on this preferred description of their property interest, as follows:

> Plaintiffs' essential view, as expressed in [their] last brief, was that a "cause of action" can be a cognizable property interest under

> the Takings Clause when it protects their right to compensation for bodily injuries caused by defective cars manufactured by Old GM.

ECF No. 35 at 14. The court is confessedly at a loss to discern the finalized definition that plaintiffs propose for the property interest taken by the United States in the GM bankruptcy. In any case, plaintiffs' legal conclusion as to the nature of their property interest does not control here.

It is abundantly clear that before the GM bankruptcy, plaintiffs possessed personal injury claims against Old GM, and potential successor liability claims against a successor company, should one be created. As of the entry of the Sale Order, the property interest that was subtracted from plaintiffs' potential and existing rights was the right to bring successor liability claims against New GM. The description of this property interest in the First Amended Complaint, ECF No. 4 at 5, is the only accurate statement of the property interest that is at issue in this suit. For this reason, the court does not defer to any legal conclusion that might be discerned in plaintiffs' motion for reconsideration regarding the finalized definition of their property interest.[7]

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[7] Plaintiffs' proposed Second Amended Complaint, like the First Amended Complaint, continues to describe plaintiffs' property interest as their right to bring successor liability claims against New GM. See ECF No. 35-1 at 2-3, 7-9, 11-16, 20, 31-33, 35-38, 41-44, 46-59.

2. Highly Contingent Property Interest

Plaintiffs next argue that the court erred in finding that their property interest was highly contingent and, thus, not cognizable under the Takings Clause. ECF No. 35 at 14-17. In support of this assertion, plaintiffs point to additional factual allegations in the proposed Second Amended Complaint. ECF No. 39 at 13 (citing to ECF No. 35-1 at 4-6, 22-23). Plaintiffs also contend that Campbell "misplaces reliance" on Acceptance and that Acceptance is distinguishable from this case. ECF No. 35 at 16-17. Plaintiffs' argument, sometimes framed as a contention that the United States lacked discretion to not rescue Old GM, ECF No. 35 at 14, 17; ECF No. 39 at 13, is not persuasive.

In their motion for reconsideration, plaintiffs failed to point to any specific facts in their proposed Second Amended Complaint which indicated that the United States lacked discretion to abstain from a rescue of Old GM. Defendant responded that the government reviewed several new allegations of fact in the proposed Second Amended Complaint and found no new evidence that the United States lacked discretion to intervene in Old GM's financial crisis. See ECF No. 37 at 15 ("Plaintiffs' proposed 'jurisdictional facts' simply restate, in conclusory fashion, their position that the Government did not have discretion in whether to provide rescue financing to GM during the financial crisis."), 17 ("Nothing in plaintiffs' proposed second amended complaint points to new evidence in support of their conclusion that the Government lacked discretion in whether to provide rescue

financing to GM; instead, they simply repeat their positions that the Government had no choice but to exercise its discretion to do so."). Defendant concluded that these conclusory statements of fact did not contradict the court's finding that the government's intervention was discretionary. Id. at 17-18.

Plaintiffs' reply brief specifically identifies the new allegations of fact in the proposed Second Amended Complaint which, in their view, establish that the government lacked discretion to abstain from an intervention in Old GM's financial crisis.[8] ECF No. 39 at 13 (citing ECF No. 35-1 ¶¶ 6-8, 10-14, 75-76). As the court reads the first three paragraphs cited by plaintiffs, federal authorities are alleged to have had strong, if not irresistible, motivation to intervene in Old GM's financial crisis. ECF No. 35-1 ¶¶ 6-8. The next five paragraphs cited by plaintiffs allege that a 363 sale, largely funded by the United States Treasury, was the only alternative to a disastrous liquidation of Old GM. Id. ¶¶ 10-14. The last two paragraphs cited by plaintiffs allege that the federal government never seriously considered that liquidation of Old GM could be permitted, because Old GM was too important to the nation's economy. Id. ¶¶ 75-76.

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[8] Because the specific paragraphs relied upon by plaintiffs were not identified until plaintiffs filed their reply brief, the government was not afforded a reasonable opportunity to respond to this particular argument. The proposed Second Amended Complaint contains 245 paragraphs, of which approximately 65 are new or substantially modified paragraphs. See ECF No. 35-2 (redline version of proposed Second Amended Complaint).

Thus, the proposed Second Amended Complaint contains additional factual allegations which must be accorded all favorable inferences due plaintiffs. See Scheuer v. Rhodes, 416 U.S. 232, 236 (1974), abrogated on other grounds by Harlow v. Fitzgerald, 457 U.S. 800 (1982). These factual allegations support the view that the United States had little choice but to rescue Old GM. Plaintiffs' legal conclusion, however, that the United States lacked discretion in its decision to fund the 363 Sale and to create New GM is not entitled to favorable inferences, however. E.g., Iqbal, 556 U.S. at 678; Papasan, 478 U.S. at 286. Until the Sale Order was entered by the bankruptcy court on July 5, 2009, the United States possessed considerable discretion over its intervention in the GM bankruptcy and the structure and conditions of the 363 Sale. This legal conclusion is supported by numerous factual allegations in plaintiffs' proposed Second Amended Complaint, as well as in the recitation of facts in the decisions of the bankruptcy court and the district court.

Even if the United States Department of the Treasury had no feasible options other than injecting massive funding into GM and structuring a bankruptcy solution that would keep GM largely intact, it is clear that Treasury exercised discretion at every step of this process. As noted in Campbell, by the time that Old GM filed for bankruptcy, the United States had overpowering leverage over Old GM due to the government's infusions of cash into the company. 134 Fed. Cl. at 768. Old GM's board, as a consequence, acceded to every demand of the United States regarding

the content of its bankruptcy filings, including the company's request for a 363 sale and the proposed terms of the Sale Order. See ECF No. 35-1 at 18-34. As the GM bankruptcy moved forward, the United States effectively controlled the timing of the 363 Sale. Id. at 37-41. The government also threatened to let Old GM fail if the government's requirements for the timely conclusion of the 363 Sale were not met. Id. at 37-40.

Given this factual background, the court does not find that the United States lacked discretion regarding the rescue of Old GM. The bankruptcy court considered and gave credence to the government's representations that it would not continue to fund Old GM unless the 363 Sale went through as specified and as scheduled. Sale Opinion, ECF No. 4-2 at 30-31. The district court commented that the extinguishment of plaintiffs' successor liability claims in the Sale Order was a key element of the 363 Sale insisted upon by Old GM and the other parties to the GM bankruptcy. In re Motors Liquidation Co., 428 B.R. at 60-62. Although the liquidation of Old GM may have been unthinkable, as plaintiffs allege, it is clear that the United States exercised considerable discretion as to how it would intervene in Old GM's financial crisis. For this reason, discretionary acts of the United States affected the "highly contingent" property interests that plaintiffs allege were taken by the government in the GM bankruptcy.

Plaintiffs raise only one other substantive challenge to the court's finding that their property interest was too contingent, because of the government's

discretionary control over that property interest, to sustain a takings claim. Plaintiffs argue that the court improperly applied Acceptance to conclude that their property interest was highly contingent. ECF No. 35 at 16-17. According to plaintiffs, "Acceptance is distinguishable . . . because it did not involve Government actions that were necessary – not discretionary – to avoid the disastrous national economic consequences that would result from the liquidation of Old GM." Id. at 17. Plaintiffs also contend that Acceptance merely "stands for the unremarkable proposition that an interest in selling certain products in interstate commerce is not a cognizable property interest for purposes of the Takings Clause." Id. (citations omitted). The court does not agree that Campbell misapplied Acceptance.

First, as noted supra, plaintiffs' suggestion that the United States had no discretion over its intervention in Old GM's financial crisis is not accurate. Second, the analogy between the property interest discussed in Acceptance, and plaintiffs' right to bring successor liability claims against New GM, is sound. These property interests resembled each other because neither property right would exist absent a discretionary act of the government. In Acceptance, the agency would need to abstain from exercising its right to reject a particular type of sale subject to regulatory approval, and here the federal government would need to abstain from conditioning the 363 Sale on the extinction of plaintiffs' successor liability claims. Campbell, 134 Fed. Cl. at 778-79. Notwithstanding any factual

distinctions that could be drawn between Acceptance and this case, highly contingent property interests, such as plaintiffs' right to bring successor liability claims against New GM, fail to support a takings claim if they are as contingent as the property interest discussed in Acceptance.[9]

3. Date That Plaintiffs' Property Interest "Inhered"

Plaintiffs also challenge the court's finding that plaintiffs' property interest arose at about the same time that it was extinguished by operation of bankruptcy law. As the court stated in Campbell:

> [A]pplying A & D Auto, the challenged government action in this suit was contemporaneous with plaintiffs' emergent right, created through the government bail-out of General Motors and the bankruptcy proceedings, to bring successor liability claims against New GM. In these circumstances, the powers accorded the bankruptcy court by section 363 inhered in and limited plaintiffs' property interest, because that highly contingent interest, from its inception, was targeted for – and was subject to – extinguishment by the conditions that the government imposed on the 363

[9] Nor do plaintiffs address the other precedential cases discussed in Campbell which show that plaintiffs' property interests are too contingent to support a takings claim. See 134 Fed. Cl. at 778-79 (citing Bair v. United States, 515 F.3d 1323 (Fed. Cir. 2008); Adams v. United States, 391 F.3d 1212 (Fed. Cir. 2004)).

> Sale. A highly contingent property interest of this kind cannot support a takings claim.

134 Fed. Cl. at 776. Plaintiffs argue, instead, that their property interest inhered at the time of their automobile accidents involving Old GM vehicles. ECF No. 35 at 15-16.

To the extent that plaintiffs' arguments in this regard are founded on their finalized (but unclear) definition of their property interest as their "right to compensation for bodily injuries," id. at 14, the court does not accept this formulation as indicative of the property interest that might have been taken by the United States during the GM bankruptcy. See supra. The only property interest at issue in this suit is plaintiffs' right to bring successor liability claims against New GM. That property interest did not exist in 1994, 2004 and 2006, when the accidents at issue in this suit occurred. See Campbell, 134 Fed. Cl. at 777-78 & n.12. Plaintiffs' attempts to repackage the property interest taken by the United States as a personal injury claim arising under Michigan state law as early as 1994 does not comport with the facts of the GM bankruptcy, as discussed supra.

Plaintiffs have not cited any authority that supports their contentions as to when their property interests inhered. Generic pronouncements as to the nature of property are not relevant to this issue. Cf. ECF No. 35 at 16 (citing Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1003 (1984); United States v. Gen. Motors Corp., 323 U.S. 373, 378 (1945)). Nor does plaintiff's reliance

on Aureus Asset Managers, Ltd. v. United States, 121 Fed. Cl. 206, 213 (2015), alter the court's analysis. ECF No. 35 at 14; ECF No. 39 at 14. Aureus does not address the date when a property interest inheres in a takings claim plaintiff. None of plaintiffs' arguments persuade the court that their property interest inhered before the United States intervened in the GM bankruptcy.

4. Property Interest Not Cognizable under the Takings Clause

For all of the above reasons, the court finds that plaintiffs' property interests were too contingent to support plausible takings claims. The court has considered all of plaintiffs' arguments to the contrary, and finds no reason to reconsider its property interest holding in Campbell or to amend its judgment.[10] Because the court's property interest ruling in Campbell does not evince legal error, any mistake of fact, or a manifest injustice, plaintiffs' motion for the reconsideration of the court's RCFC 12(b)(6) dismissal of their claims must be denied.

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[10] The court notes plaintiffs' disagreement with the distinctions the court drew in Campbell between the property interests in this case and the property interests discussed in A & D Auto. ECF No. 35 at 15-16. For the reasons stated in Campbell, plaintiffs' property interests are more contingent than the contract rights held by the plaintiffs in A & D Auto. 134 Fed. Cl. at 776-77 & n.12.

C. Proposed Second Amended Complaint

In the foregoing analysis of plaintiffs' motion for reconsideration, the court considered plaintiffs' proposed Second Amended Complaint as if it were filed and as if it superseded the First Amended Complaint. Dismissal of this case under RCFC 12(b)(1) was still warranted on timeliness grounds, and dismissal of this case, in the alternative under RCFC 12(b)(6), was still warranted because plaintiffs' takings claims were not plausible. The court thus finds that amendment of the complaint would be futile. Plaintiffs' motion to amend the complaint, ECF No. 35, must therefore be denied.

V. Conclusion

For the reasons stated in this opinion, plaintiffs' combined motion for reconsideration, motion to amend the judgment, and motion for leave to file a second amended complaint, ECF No. 35, is **DENIED**.

IT IS SO ORDERED.

s/ Patricia Campbell-Smith
PATRICIA CAMPBELL-SMITH
Judge

NOTE: This order is nonprecedential.

United States Court of Appeals for the Federal Circuit

CALLAN CAMPBELL, JAMES H. CHADWICK, JUDITH STRODE CHADWICK, KEVIN C. CHADWICK, INDIVIDUALLY AND THROUGH HIS COURT-APPOINTED ADMINISTRATORS, JAMES H. CHADWICK AND JUDITH STRODE CHADWICK, KEVIN JUNSO, NIKI JUNSO, TYLER JUNSO ESTATE, THROUGH KEVIN JUNSO, ITS PERSONAL REPRESENTATIVE,
Plaintiffs-Appellants

v.

UNITED STATES,
Defendant-Appellee

2018-2014

Appeal from the United States Court of Federal Claims in No. 1:15-cv-00717-PEC, Judge Patricia E. Campbell-Smith.

ON PETITION FOR PANEL REHEARING AND REHEARING EN BANC

(Filed Nov. 22, 2019)

Before PROST, *Chief Judge*, NEWMAN, LOURIE, DYK, MOORE, O'MALLEY, REYNA, WALLACH, TARANTO, CHEN, HUGHES, and STOLL, *Circuit Judges*.

PER CURIAM.

ORDER

Appellants Callan Campbell, James H. Chadwick, et al. filed a combined petition for panel rehearing and rehearing en banc. A response to the petition was invited by the court and filed by the United States. Appellants separately moved for leave to file a reply in support of their petition. The petition was referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc was referred to the circuit judges who are in regular active service.

Upon consideration thereof,

IT IS ORDERED THAT:

The motion for leave to file a reply is denied.

The petition for panel rehearing is denied.

The petition for en banc rehearing is denied.

The mandate of the court will issue on December 2, 2019.

Circuit Judge NEWMAN dissents from the denial of the motion for leave to file a reply.

FOR THE COURT

/s/ Peter R. Marksteiner
Peter R. Marksteiner
Clerk of Court

November 22, 2019
Date

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

CALLAN CAMPBELL WEHRY, KEVIN C. CHADWICK (individually and through his court-appointed administrators, JAMES H. CHADWICK AND JUDITH STRODE CHADWICK), JAMES H. CHADWICK, JUDITH STRODE CHADWICK, THE TYLER: JUNSO ESTATE (through KEVIN JUNSO, its personal representative), KEVIN JUNSO, AND NIKI JUNSO, all on their own behalf and on behalf of a class of all others similarly situated, Plaintiff, v. UNITED STATES, Defendant	No. 15-CV-00717 (PEC) Honorable Patricia E. Campbell-Smith

SECOND AMENDED CLASS ACTION COMPLAINT

(Filed Nov. 27, 2017)

Callan Campbell Wehry ("**Campbell**" or "**Wehry**"), Kevin C. Chadwick (individually and through his court-appointed administrators, James H. Chadwick

and Judith Strode Chadwick) ("**Kevin Chadwick**"), James H. Chadwick, individually ("**James Chadwick**"), Judith Strode Chadwick, individually ("**Judith Chadwick**," and together with Kevin Chadwick and James Chadwick, the "**Chadwicks**"), the Tyler Junso Estate (through Kevin Junso, its personal representative) ("**Tyler Junso Estate**"), Kevin Junso, individually ("**Kevin Junso**"), and Niki Junso ("**Niki Junso**," and together with the Tyler Junso Estate and Kevin Junso, the "**Junsos**") (collectively, the "**Plaintiffs**"), on their own behalf and on behalf of a class of all other persons similarly situated, by and through their attorney of record, Steve Jakubowski of Robbins, Salomon & Patt, Ltd., and with knowledge as to their own acts and events taking place in their presence and upon information and belief as to all other matters, for their Second Amended Class Action Complaint against the United States (including the Department of the Treasury and its agents acting at its direction) (the "**Government**") under the Takings Clause of [2] the Fifth Amendment to the United States Constitution (the "**Takings Clause**"), allege as follows:

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X. RELIEF REQUESTED 59

I.

NATURE OF THIS ACTION

1. Plaintiffs and the members of the class are natural persons, court-appointed administrators, decedents' estates and their representatives, and others (collectively, the "**Personal Injury Claimants**") that hold allowed prepetition claims (the "**Personal Injury Claims**") in the bankruptcy case of *In re Motors Liquidation Company, et al., f/k/a General Motors Corp.*, Case No. 09-50026 (MG) (Bankr. S.D.N.Y) (the "**GM Bankruptcy**") based on deaths or personal injuries caused by defective motor vehicles (or component parts thereof) manufactured, sold, or delivered by General Motors Corporation and affiliates ("**Old GM**") before June 1, 2009, the date Old GM filed its bankruptcy petition for relief.

2. The claims of all Personal Injury Claimants in the Class are fixed, liquidated, and not disputed by any party in the GM Bankruptcy. All Class members have received distributions on account of these allowed claims that are but a fraction of their stipulated allowed amount.

3. On July 10, 2009 (the "**Closing Date**"), the Government closed on and thereby consummated its purchase of substantially all of Old GM's operating assets through the wholly-owned, government-sponsored enterprise that it formed on the eve of Old GM's bankruptcy filing ("**New GM**").

[4] 4. The acquisition was authorized by order of the Bankruptcy Court overseeing the GM Bankruptcy (the "**GM Bankruptcy Court**") pursuant to Sections 363(b) and (f) of the United States Bankruptcy Code (11 U.S.C. §§ 363(b), (f)), which together authorize a bankrupt debtor to sell its property outside of a chapter 11 plan of reorganization "free and clear of any interest in such property." This bankruptcy sale of Old GM's assets was commonly referred to as the "363 Sale" (the "**363 Sale**" or "**Sale**").

5. The order of the GM Bankruptcy Court approving the 363 Sale, a copy of which is attached as **Exhibit 1** hereto ("the "**Sale Order**"), was entered on July 5, 2009 (the "**Order Entry Date**"). Paragraph 70 of the Sale Order, however, provided that "this Order . . . shall be effective as of 12:00 noon, EDT, on July 9, 2009" (the "**Order Effective Date**"). On July 5, 2009, the Bankruptcy Court also entered a Memorandum Opinion to accompany the Sale Order, a copy of which is attached hereto as **Exhibit 2** (the "**Sale Opinion**").

6. The Government's decision to move forward with the 363 Sale transaction can be traced to the days and weeks following the inauguration of President Obama when a team drawn in large measure from the private equity world (the "**Auto Team**") was formed and charged with responsibility for evaluating the restructuring plans of GM, negotiating the terms of any further financial assistance, and making day-to-day decisions on behalf of the Obama administration.

7. By late March 2009, according to the leader of the Auto Team, the Obama administration had conclusively determined that a forced or orderly liquidation of Old GM was "unthinkable." It was an option, the leader of the Auto Team stated, that the Government "never seriously considered" since Old GM, as America's second largest industrial company, "was deeply woven into the very fabric of America, with its generations of workers, its networks of suppliers and dealers, its historical resonance, and its symbolism."

[5] 8. To the new administration, this Auto Team leader stated, Old GM "embodied the intimate connection between the free capital markets and the social and political contract on which they depend and so it could not be allowed simply to disappear," particularly—the Auto Team felt—since "[Old] GM's problems were, to a considerable degree, of its own making—and fixable."

9. Old GM, however, did not want to file bankruptcy and worked hard to effectuate an out-of-court restructuring that would obviate the need for a bankruptcy filing. The Government, as Old GM's sole funding source, however, said it would not fund Old GM's operations past June 1, 2009 except in a bankruptcy proceeding in which the contemplated 363 Sale to the Government was approved by the GM Bankruptcy Court no later than July 10, 2009. This demand forced Old GM to file its chapter 11 petition for relief on June 1, 2009.

10. The Government's financial intervention in Old GM's restructuring, beginning in December 2008 and continuing through the closing of the 363 Sale, however, was not a discretionary act. Indeed, the Government considered an orderly liquidation of Old GM to be "unthinkable."

11. Yet, as the Bankruptcy Court found, liquidation was the only alternative to a bailout by the Government through a 363 Sale. In that regard, the Bankruptcy Court specifically found that "[t]here [we]re no merger partners, acquirers, or investors willing and able to acquire GM's business [and] [o]ther than the [Government], there are no lenders willing and able to finance GM's continued operations." (Ex. 2, Sale Opinion, at p. 23).

[6] 12. Further, the Bankruptcy Court found:

- "The 363 Transaction is the only available means to preserve the continuation of GM's business.
- There is no viable alternative to the 363 Transaction.
- The only alternative to the 363 Transaction is liquidation."

(Ex. 2, Sale Opinion, at p. 25).

13. In sum, the Government was the only entity financially capable of bailing out Old GM and preventing its liquidation. The Government was determined to avoid a liquidation of Old GM because it believed that Old GM played a central role in the national economy

based on its being the nation's largest auto manufacturer, its employment of approximately 235,000 employees worldwide, its purchases of approximately $50 billion in supplier goods, and its role as one of the country's largest healthcare providers. Notably, the Auto Team leader stated, the Government did not adopt such a position with respect to the Chrysler bailout and was prepared for Chrysler's possible liquidation if a 363 sale could not be arranged.

14. Given the dire national consequences of a liquidation of Old GM, the Government's decision to bail out Old GM was not a discretionary act undertaken in a proprietary capacity, but one necessitated by sovereign concerns regarding the disastrous and irreparable consequences for the national economy and the entire U.S. auto supplier industry that the Government believed would result from Old GM's liquidation. Indeed, based on the evidence presented at the Sale Hearing by Old GM and the Government, the Bankruptcy Court found:

> The only alternative to an immediate sale is liquidation—which would be a disastrous result for GM's creditors, its employees, the suppliers who depend on GM for their own existence, and the communities in which GM operates.

[7] 15. Further, because consents from various stakeholders holding massive claims against Old GM would be necessary for an effective out-of-court restructuring, yet could not be obtained, the 363 Sale

option became the only course of action available to save Old GM.

16. Significantly, Old GM's senior management wanted the Personal Injury Claims assumed in full as part of any restructuring, including in a 363 Sale to the Government. The Auto Team, however, being dominated by scions of the corporate mergers and acquisitions world, viewed bankruptcy as a golden opportunity for the Government to do exactly what these private equity gurus would be permitted to do in a normal arms-length 363 sale among private parties; that is, rinse away the successor liability claims of tort claimants.

17. The Government, however, was acting in a sovereign capacity, not a proprietary one, and thus its actions are not necessarily absolved from a claim under the Takings Clause simply because those actions would—but for the Takings Clause—be permitted in bankruptcy without the payment of just compensation.

18. Hence, Plaintiffs are not saying that the Government was not permitted to purchase Old GM's assets in a 363 Sale free and clear of successor liability claims. Rather, Plaintiffs are saying that, as here, where there was no essential nexus—as is required when the Government so drastically extinguishes valuable property rights—between the demand that Personal Injury Claimants' successor liability claims against New GM be extinguished and enjoined in an unstayed Sale Order, combined with a threat to terminate all funding of Old GM, and the Government's

acknowledged financial indifference to assumption of these claims.

19. On May 27 and 28, 2009, Old GM's board of directors ("**Old GM's Board**") met to consider whether to authorize the bankruptcy filing and Old GM's entry into a "Master Purchase and Sale Agreement" with New GM that would set the precise terms of the 363 Sale [8] (the "**Sale Agreement**"). In that meeting, the Government represented to Old GM's Board that if, for whatever reason, it were to agree before the close of the Sale to assume Old GM's liabilities to Personal Injury Claimants, then the Government would neither attempt to renegotiate a reduction of the purchase price nor walk from the deal.

20. Despite the Government's financial indifference to assumption of Old GM's liabilities to Personal Injury Claimants, in both the 363 Sale proceedings before the GM Bankruptcy Court and the subsequent stay hearings before the GM Bankruptcy Court and before United States District Court for the Southern District of New York (the "**District Court**") between the Order Entry Date and the Order Effective Date, the Government threatened that (a) it would not continue to provide Old GM with debtor in possession financing ("**DIP Financing**"), critical for Old GM to survive even a day in bankruptcy, if the Sale Order was not effective and not subject to a stay pending appeal as of July 10, 2009, the targeted Closing Date, and (b) it would not close the acquisition unless the Sale Order included provisions that enjoined the Personal Injury Claimants from pursuing successor liability claims

against New GM and held the assets transferred to New GM in the 363 Sale would be "free and clear" of the "interests in property" that these claims constituted.

21. The GM Bankruptcy Court stated that the "only truly debatable issues in this case" are "how any approval order should address successor liability." (*See* Sale Opinion, Ex. 1, at p. 3). But in the face of the Government's coercive threat to cut off DIP Financing and force Old GM into immediate liquidation unless the Government got what it wanted (*i.e.*, a Sale Order that enjoined Personal Injury Claimants' successor liability claims and was not stayed pending appeal), neither the Bankruptcy Court nor the District Court was willing—in the words of the [9] Bankruptcy Court—"to gamble on the notion that the Government didn't mean it when it said that it would not keep funding GM." (*See* Sale Opinion, Ex. 2, at p. 3).

22. After the Order Entry Date of July 5, 2009 and continuing through oral argument at a hearing before the District Court in the morning of July 9, 2009 on the motion of certain asbestos claimants for a stay of the Sale Order pending appeal, the Government continued to threaten that (a) it would not continue to provide Old GM with DIP Financing if the Sale Order were not effective and not subject to any stay pending appeal as of the Closing Date, and (b) it would not close the acquisition unless the Sale Order included provisions that enjoined the Personal Injury Claimants from pursuing successor liability claims against New GM.

23. These threats were, in the words of the head of the Auto Team, "the financial equivalent of holding a gun to the head" of the Bankruptcy Court and District Court in order to compel a result regarding the treatment of successor liability claims in a 363 Sale that at the time was uncertain and involved novel issues of bankruptcy law. With neither the Bankruptcy Court nor the District Court willing to stay the Order Effective Date, the Government, in reliance on the effectiveness of the Sale Order, closed the Sale on July 10, 2009.

24. The Government's coercive threats regarding its willingness to let Old GM liquidate rather than provide even a dollar of incremental funding for the benefit of Personal Injury Claimants, coupled with its independent decision—notwithstanding significant political pressure from consumer advocacy groups—to close in reliance on the provisions of the Sale Order that, by their terms, extinguished and enjoined Personal Injury Claimants' successor liability claims, together violated the Takings Clause because there was no essential nexus—as is required when the Government so drastically extinguishes valuable property rights—between [10] those coercive threats and the Government's acknowledged financial indifference to assumption of the Personal Injury Claims left behind.

25. Any assertion by the Government that "commercial necessity" drove it to leave Personal Injury Claims behind with Old GM is false based on how those claims were to be treated in the solicitation commenced by Old GM on April 27, 2009, with the full

support of the Government, for the voluntary exchange by holders of $27 billion in Old GM's publicly-traded debt securities (the "**Bondholder Debt**") into Old GM common stock (the "**Exchange Offers**"). If consummated, the holders of that debt (the "**Bondholders**") would have received a 10% ownership stake in Old GM; Personal Injury Claims, however, would have been paid in full in the ordinary course.

26. Old GM, however, failed to obtain the requisite acceptances for the Exchange Offers, which expired by their terms on May 26, 2009, just six days before Old GM filed for bankruptcy.

27. In directing that Personal Injury Claimants receive markedly worse treatment in the Sale than the full payment proposed for them in the Exchange Offers, while concurrently agreeing that holders of at least $90 billion of other unsecured debt at Old GM (including the Bondholders) would receive the same or far better treatment in the Sale than proposed for them in the Exchange Offers, the Government singled out the Personal Injury Claimants to bear the brunt of its pre-filing goal of squeezing out those creditors (like the maimed, the disabled, the widows, the orphans, and other Personal Injury Claimants) that the Government considered marginal because they were not expected to have any ongoing business relationships with New GM.

[11] 28. The Government's callous disregard of the health and welfare of these marginalized claimants, advanced under the false guise of "commercial

necessity," also violated a principal purpose of the Takings Clause, which is to bar the Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole. These claimants were victims of Old GM's defective products, not the cause of Old GM's problems.

29. And although on the eve of Old GM's bankruptcy filing, the Government did condition the closing of the Sale on the GM Bankruptcy Court's inclusion of a provision in the Sale Order that enjoined the successor liability claims of Personal Injury Claimants, it did so only because Section 363(f) of the Bankruptcy Code permitted that outcome, not because elimination of such claims was necessary or otherwise designed to protect the Government's assurance in the financial viability of New GM and the repayment of the loans and other assistance.

30. This is not a case where the central fact question before the Court is what remedy (or lack thereof) the Personal Injury Claimants would have had if the Government had not closed on the Sale (*i.e.*, "but for" the Government action). Here, the Government specifically represented to Old GM's Board of Directors at a meeting held three days before the filing that if the Government decided to waive the requirement in the Sale Agreement that successor liability claims be extinguished in the Sale, the Government would still close without any reduction to the purchase price.

31. As such, the appropriate "but for" analysis in this case is that, even though the Government was actually financially indifferent to assumption of Personal Injury Claims by New GM, but for (a) the Government's arbitrary demand that Personal Injury Claimants' rights to [12] assert successor liability claims be eliminated through the Sale Order and (b) the Government's threat to terminate all funding of Old GM if its demands were not met, the Personal Injury Claimants' valuable rights to pursue successor liability claims against New GM would have been preserved.

32. The economic impact of the Government's actions on the Personal Injury Claimants has been severe. Instead of receiving full compensation to cover their medical costs (which alone could be astronomical), their pain and suffering, and their losses—in many cases—of limbs, mobility, capacity, livelihood, consortium, or even life itself, the Government deprived them any recompense at the time of the taking and forced them to wait years before distributions on their allowed claims in the GM Bankruptcy might finally trickle down to them.

33. To remedy this wrong, the Government should be ordered to pay all the allowed claims of Personal Injury Claimants in the GM Bankruptcy, less whatever fraction of that amount was actually recovered by them in the case, plus pre- and post judgment interest and reasonable attorneys' fees and costs.

II.

JURISDICTION

34. The Tucker Act, 28 U.S.C. § 1491(a)(1), provides exclusive jurisdiction in the United States Court of Federal Claims for any claim against the Federal Government to recover damages founded on the Constitution. Accordingly, this Court has jurisdiction pursuant to 28 U.S.C. § 1491(a).

35. This action was commenced on July 9, 2015, exactly six years following the Order Effective Date and the date of the Government's last threat before the District Court that it would terminate funding of Old GM the next day if the District Court were to stay the [13] effectiveness of the Sale Order pending an appeal of the successor liability issues. This action, therefore, is timely brought under 28 U.S.C. § 2501.

III.

CONSTITUTIONAL PROVISION

36. Plaintiffs' claims are governed by the Takings Clause of the Fifth Amendment to the United States Constitution, which provides in pertinent part: "[N]or shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

IV.

THE PARTIES

37. Plaintiff Callan Campbell Wehry is a United States citizen and a resident of the Commonwealth of Pennsylvania. She is one of thousands of Personal Injury Claimants holding allowed claims in the GM Bankruptcy. On August 17, 2004, one week before she was to start college, Callan was a front-seat passenger in a 1996 GMC Jimmy when the driver of the vehicle lost control while attempting to make a left turn. The vehicle entered a driver-side leading roll and rolled 1.5 times before landing on its roof. The defectively designed roof of the car collapsed over Callan's seat. Callan sustained a cervical spinal cord injury at C6-7, which rendered her a quadriplegic. Callan was 18 years old at the time of her accident. She has been confined to a wheelchair since her injury. Her medical advisors have advised that she will need a wheelchair for the rest of her life. Callan holds an allowed claim in the GM Bankruptcy in the amount of $4,900,000.00. Her rights to assert successor liability claims against New GM, like those of all the other Personal Injury Claimants holding allowed claims in the GM Bankruptcy, were extinguished in the 363 Sale at the express direction of the Government. Callan was married on October 10, 2015, and changed her name Callan Campbell Wehry.

[14] 38. Plaintiff Kevin Chadwick, individually and through his court-appointed administrator, James Chadwick, is United States citizen and a resident of

the state of Louisiana. He is one of thousands of Personal Injury Claimants holding an allowed claim in the GM Bankruptcy. On July 4, 1994, Kevin was driving his 1988 Chevrolet Beretta when a pickup truck ran a stop sign and the vehicles crashed. Kevin was paralyzed from the neck down. The injury was caused by a defective seat belt and a defectively designed hood latch and hood hinge system that allowed the hood to invade the passenger compartment and strike Kevin in the head, causing injury to his brain. Kevin was 21 years old at the time of his accident. He holds an allowed claim in the GM Bankruptcy in the amount of $2,200,000.00. His rights to assert successor liability claims against New GM, like those of all the other Personal Injury Claimants holding allowed claims in the GM Bankruptcy, were extinguished in the 363 Sale at the express direction of the Government.

39. Plaintiff James H. Chadwick, the father of Kevin Chadwick and the court-appointed administrator of Kevin Chadwick's Special Needs Trust, is a United States citizen and a resident of the state of Louisiana. He is one of thousands of Personal Injury Claimants holding an allowed claim in the GM Bankruptcy. He holds an allowed claim in the GM Bankruptcy, in his individual capacity, in the amount of $150,000.00. His rights to assert successor liability claims against New GM, like those of all the other Personal Injury Claimants holding allowed claims in the GM Bankruptcy, were extinguished in the 363 Sale at the express direction of the Government.

40. Plaintiff Judith Strode Chadwick, the mother of Kevin Chadwick, is a United States citizen and a resident of the state of Louisiana. She is one of thousands of Personal Injury Claimants holding an allowed claim in the GM Bankruptcy. She holds an allowed claim in the [15] GM Bankruptcy in the amount of $150,000.00. Her rights to assert successor liability claims against New GM, like those of all the other Personal Injury Claimants holding allowed claims in the GM Bankruptcy, were extinguished in the 363 Sale at the express direction of the Government.

41. Plaintiff the Tyler Junso Estate, through its personal representative, Kevin Junso, holds an allowed claim in the GM Bankruptcy in the amount of $1,487,500.00. It is one of thousands of Personal Injury Claimants holding allowed claims in the GM Bankruptcy. On April 25, 2006, Tyler and his father, Kevin Junso, were involved a single car rollover accident while driving a 2003 GMC Envoy. During the rollover, the windshield and side windows were knocked out, reducing the strength of the roof structure. The GMC Envoy sustained catastrophic damage to the roof structure, which buckled inwardly toward Tyler and Kevin. Despite wearing their seatbelts, both occupants were partially ejected from the vehicle during the roll over. Seventeen year old Tyler, the driver, sustained massive skull and neck injuries and died at the scene of the accident. Tyler's head was partially outside the vehicle during the roll over sequence, due to the broken window and lateral displacement of the roof structure, and made contact with both the ground and the roof

during the crash. Tyler was 17 years old at the time of his death. The paramedics found Kevin, still buckled in on the passenger side, with his left leg out the windshield and his right leg out the passenger side window. Kevin sustained severe injuries to both of his knees and lower legs, eventually leading to the amputation of his right leg below the knee and multiple surgeries to address the severe ligament damage sustained in his knees. The Tyler Junso Estate holds an allowed claim in the GM Bankruptcy in the amount of $1,487,500.00. Its rights to assert successor liability claims against New GM, like those of all the [16] other Personal Injury Claimants holding allowed claims in the GM Bankruptcy, were extinguished in the 363 Sale at the express direction of the Government.

42. Plaintiff Kevin Junso is a United States citizen and a resident of the state of Utah. He is one of thousands of Personal Injury Claimants holding an allowed claim in the GM Bankruptcy. Kevin Junso, in his individual capacity, holds an allowed claim in the GM Bankruptcy in the amount of $175,000.00. His rights to assert successor liability claims against New GM, like those of all the other Personal Injury Claimants holding allowed claims in the GM Bankruptcy, were extinguished in the 363 Sale at the express direction of the Government.

43. Plaintiff Niki Junso is a United States citizen and a resident of the state of Utah. She is one of thousands of Personal Injury Claimants holding an allowed claim in the GM Bankruptcy. Niki holds an allowed claim in the GM Bankruptcy in the amount of

$87,500.00 for damages associated with loss of her son Tyler and lifetime injuries to her husband Kevin. Her rights to assert successor liability claims against New GM, like those of all the other Personal Injury Claimants holding allowed claims in the GM Bankruptcy, were extinguished in the 363 Sale at the express direction of the Government.

44. Defendant United States includes, without limitation, the Department of the Treasury ("**Treasury**") and its agents acting at its direction, such as the members of the Auto Team.

45. This action is brought by the Plaintiffs against the United States on behalf of themselves and on behalf of a class of all others similarly situated.

[17] **V.**

FACTUAL ALLEGATIONS

A. Background to the Government's Intervention in the Old GM's Restructuring.

46. Old GM was founded in September 1908. It was the global automobile sales leader for 77 consecutive years from 1931 through 2007.

47. On Old GM's one-hundredth anniversary in September 2008, however, Old GM faced significant financial difficulties stemming from its inability to obtain debt or equity financing from private sources or public markets to fund its mounting operational losses.

48. In testimony before the Senate Banking Committee on November 18, 2008, Rick Wagoner, Old GM's Chief Executive Officer ("**Wagoner**"), said that if the domestic auto industry were allowed to fail, the societal costs would be catastrophic. He predicted that three million jobs would be lost within the first year, U.S. personal income would be reduced by $150 billion, tax revenues of more than $156 billion over three years would be lost, and consumer and business confidence would suffer a significant blow.

49. In response to this financial crisis facing Old GM, the Government, as the only source of funding to support Old GM's prodigious cash needs, obtained the necessary Congressional authorization under the Troubled Asset Relief Program ("**TARP**") to begin providing funding to Old GM.

50. TARP was established by Congress, effective as of October 3, 2008, in the Emergency Economic Stabilization Act of 2008, Pub. L. 110-343, 122 Stat. 3765 ("**EESA**"). EESA authorized the Secretary of the Treasury to purchase troubled assets from "financial firms," but this definition did not mention manufacturing companies.

[18] 51. On December 18, 2008, Treasury made the decision to make TARP money available to the U.S. auto industry and created TARP's Automotive Industry Financing Program ("**AIFP**").

52. The Government made its first $13.4 billion advance in December 2008. Like all other advances that followed, this advance was secured by a first

priority security interest in substantially all the assets of Old GM.

53. Treasury's loan agreement with Old GM in connection with that advance (the "**TARP Loan Agreement**") required Old GM to submit by February 17, 2009, for approval by the "President's Designee," a restructuring plan showing how Old GM would achieve "long-term viability" using TARP funds.

54. In order for Old GM to access further TARP funding after March 31, 2009, the TARP Loan Agreement required that the viability plan be acceptable to Treasury and contain the following three conditions:

a. Old GM was required to establish a comprehensive agreement for labor and retiree cost reductions with the International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America ("**UAW**"), which represented nearly all of Old GM's union employees as well as an estimated 500,000 retirees;

b. As part of any new labor agreement, the UAW would have to agree that at least 50% of the approximately $18 billion obligation owed by Old GM to the UAW retiree health care trust, called the "Voluntary Employee Beneficiary Association Plan" (the "**VEBA Trust**") would be funded solely through the issuance of Old GM common stock; and

c. Old GM would have to commence the Exchange Offers for the purpose of obtaining the agreement of at least 90% of the Bondholders to exchange their Bondholder Debt for Old GM common stock.

[19] 55. None of the conditions to continued funding under the TARP Loan Agreement, however, included a requirement that Old GM devise a plan that would impair the ability of Personal Injury Claimants to fully recover on their products liability claims.

B. The Auto Team Is Formed and Its Influence Over Old GM Is Extended.

56. On February 15, 2009, the President convened the Presidential Task Force on the Auto Industry (the "**Auto Task Force**") to deal with the bailouts of GM and Chrysler. Treasury Secretary Timothy Geithner and National Economic Council Director Lawrence Summers were named co-chairs of the Auto Task Force, which had 21 members, including several Cabinet-level officials from across the Executive Branch.

57. While the Auto Task Force was formed to address the restructuring of GM and Chrysler, a group known as the Auto Team (the "**Auto Team**") was formed and charged with responsibility to evaluate the restructuring plans of GM and Chrysler, negotiate the terms of any further financial assistance, and make day-to-day decisions on behalf of the Auto Task Force.

58. Leading the Auto Team was Steven Rattner ("**Rattner**"), co-founder of the Quadrangle Group, a private equity firm. Rattner's deputy on the Auto Team was Ron Bloom ("**Bloom**"), an investment banker with significant union-related experience who had worked for Lazard Frères & Co.

59. The other two key members of the Auto Team who worked on Old GM's restructuring with Rattner and Bloom were Matthew Feldman ("**Feldman**"), who was head of the corporate restructuring practice at the law firm of Wilkie, Farr & Gallagher, and Harry Wilson ("**Wilson**"), who was a member of Silver Point Capital, a hedge fund management firm.

[20] 60. These four leaders of the Auto Team played a major role in directing Old GM's restructuring through the close of the 363 Sale, with Wilson leading the team having responsibility for direct oversight of Old GM's financial and operational restructuring.

61. In addition to Feldman, the Government retained several preeminent law firms as outside counsel to advise the Government on out-of-court restructuring alternatives and the novel option, which had never been tried before in connection with a Government-sponsored corporate bailout, of a sale directly to the Government under Section 363 of the Bankruptcy Code. None of the Government's outside or in-house counsel, however, provided material advice as to whether the actions of the Government in directing the extinguishment of Personal Injury Claimants' rights to assert successor liability claims against New GM

might violate the just compensation requirements of the Takings Clause.

62. It was the absence of such advice that led Wilson, in justifying the Government's decision to leave Personal Injury Claims behind with Old GM despite there being "some obvious human sensitivities," to testify that "our test had to be what a commercial buyer would do; we had a fiduciary duty to use taxpayer dollars in the most appropriate way, and that's the judgment that we had to ultimately make."

63. On February 17, 2009, Old GM submitted its restructuring plan to the Auto Team, as required by the TARP Loan Agreement. The Auto Team promptly sent a memo to the heads of the Auto Task Force with "first-blush impressions" of Old GM's restructuring plan. The memo listed four central risks to Old GM's plan, none of which mentioned any adverse impact to Old GM from having to pay Personal Injury Claimants in full.

[21] 64. On or around March 19, 2009, according to Rattner, the Auto Team determined that the driving factor in establishing a target filing date for the GM Bankruptcy was an upcoming payment due June 1, 2009 to the Bondholders.

65. The Auto Team members reasoned that if Old GM made that payment, it would be paying 100 cents on the dollar to bondholders who, as unsecured creditors, were only entitled to a fraction of that amount given Old GM's value relative to its capital structure.

66. What followed was the Auto Team's direct involvement in the decisions affecting Old GM, using its financial leverage as Old GM's only conceivable lender, to significantly influence the decisions of Old GM through the closing of the 363 Sale.

67. In March 2009, the Auto Team believed that Old GM, under the leadership of then Chief Executive Officer Wagoner was unwilling to move toward bankruptcy.

68. Wagoner had been adamantly opposed to putting Old GM into bankruptcy and had done little, if any, planning for the possibility because he did not believe that Old GM could survive a bankruptcy.

69. On March 27, 2009, Rattner called Wagoner and its then-President and Chief Operating Officer, Fritz Henderson ("**Henderson**"), to separate meetings. At the meeting with Wagoner, Rattner asked for his resignation, which Wagoner tendered. Separately, Rattner asked Henderson to serve as Old GM's CEO, which Henderson accepted.

70. The Auto Team's decision to replace Wagoner with its hand-picked selection, Henderson, sent a clear message to Old GM's Board of Directors and senior executive team of Old GM that the Government would have significant influence over Old GM's operating and restructuring decisions.

[22] 71. Three days after this management shake-up, on March 30, 2009, the Obama Administration publicly rejected the restructuring plan Old GM had submitted on February 17, 2009 as not viable.

72. Concurrently, the Administration issued a "viability determination fact sheet," which signaled its willingness to work with Old GM to effect an out-of-court restructuring by stating:

> In order to execute a new, more aggressive restructuring plan within 60 days, we will work with [Old] GM to use all available tools to implement this plan. The best path to achieve this may well be an expedited, court-supervised process to extinguish unsustainable liabilities, should an out-of-court restructuring not be possible.

73. With the issuance of the viability determination fact sheet, Treasury also advanced an additional $6 billion in TARP funds to Old GM, enough to enable it to survive over the next 60 days.

74. Nothing in the Administration's viability determination fact sheet mentioned the need to eliminate or reduce the costs associated with Personal Injury Claims. Quite the opposite. A section entitled "Support for Consumers and the Auto Industry" reassured consumers that the restructuring would not adversely affect them. It stated:

> During this process, the Administration wants to ensure that consumers have confidence in the cars they buy. . . . Consumers

> who are considering new car purchases should have the confidence that even in this difficult period, their warranties will be honored.

75. By late March 2009, the administration conclusively determined that a forced or orderly liquidation of Old GM was "unthinkable." According to the Auto Team's leader, a forced or orderly liquidation an option that the Government "never seriously considered" since Old GM, as America's second largest industrial company, "was deeply woven into the very fabric of [23] America, with its generations of workers, its networks of suppliers and dealers, its historical resonance, and its symbolism."

76. To the new administration, according to the Auto Team's leader, Old GM "embodied the intimate connection between the free capital markets and the social and political contract on which they depend and so it could not be allowed simply to disappear," particularly since the Auto Team felt that" [Old] GM's problems were, to a considerable degree, of its own making—and fixable."

C. With the Government's Support, Old GM Commences the Exchange Offers in Hopes of Effectuating an Out-of-Court Restructuring of Old GM.

77. Even after Wagoner's removal, Old GM's executives strongly preferred an out-of-court restructuring to a bankruptcy proceeding.

78. One of Henderson's first acts as new CEO was to advise Old GM executives that his preferred approach was to restructure Old GM through an out-of-court restructuring centered around the Exchange Offers, which Old GM considered as "Plan A" and a bankruptcy filing as "Plan B."

79. On April 27, 2009, with the Government's express approval, Old GM commenced the Exchange Offers for its $27 billion in unsecured publicly-traded Bondholder Debt. If consummated, the Bondholders would have received a 10% ownership stake in Old GM's common stock.

80. In a press release accompanying the Exchange Offers, approved by the Government, Old GM stated that "[t]he exchange offers are a vital component of GM's overall restructuring plan to achieve and sustain long-term viability and the successful consummation of the exchange offers will allow GM to restructure out of bankruptcy court."

[24] 81. The Government supported Old GM's efforts in obtaining the requisite consents in the Exchange Offers by agreeing to advance an additional $4 billion in first priority secured debt to Old GM in May 2009.

82. Had all the Government's conditions to the Exchange Offers been satisfied, the Government agreed that it would consent to the Exchange Offers and convert its entire debt into a majority equity stake in Old GM's common stock, thereby eliminating the need for a bankruptcy filing.

83. Consummation of the Exchange Offers also would have meant that all Personal Injury Claims would have been paid in full in the ordinary course.

D. Personal Injury Claims Are Classified by the Government and Old GM as "Politically Sensitive" Liabilities.

84. On May 1, 2009, Old GM and the Government engaged in a planning meeting to carve up the myriad of tasks necessary to plan for a possible bankruptcy filing and 363 Sale in the event the Exchange Offers failed.

85. Among the action items requested by the Government was development of a list of so-called "politically sensitive" liabilities.

86. These liabilities carried sensitivities for Old GM and the Government primarily because the manner in which they were handled in any restructuring had a reputational impact on both Old GM and the Government.

87. Old GM's CFO Young stated that this exercise was about identifying liabilities that might present a public relations challenge if New GM did not assume them.

88. Old GM's management considered payment of Personal Injury Claims in the ordinary course to be an important component of the customer relationship program for the GM brand and therefore put these claims on the list of "politically sensitive" liabilities.

[25] 89. Shortly thereafter, Old GM sent the Government a memo that identified approximately $6 billion in such "politically sensitive" liabilities.

90. Included on the list was the $916 million in Personal Injury Claims that, as of December 31, 2008, comprised Old GM's products liability loss reserve (the "**Products Liability Loss Reserve**").

91. Old GM set the Products Liability Loss Reserve based on a rigorous annual review of Old GM's historical loss records conducted by Aon Global Risk Consulting ("**Aon**") to determine the projected losses associated with Personal Injury Claims.

92. This $916 million Products Liability Loss Reserve figure was then reported on Old GM's publicly-filed audited financial statements for the year ending December 31, 2008.

93. Aon determined that the $916 million Products Liability Loss Reserve could be segregated into $388.8 million for expected losses associated with existing reported claims and another $376.4 million for expected losses associated with unreported claims that would eventually be reported. The remaining $150.8 million was allocated to defense costs for both categories of claims.

94. Because Old GM's insurance coverage for these claims was triggered only when the loss per occurrence exceeded $35 million, Old GM was essentially self-insured for all of these Personal Injury Claims.

95. Old GM management recommended assumption of these "politically sensitive" Personal Injury Claims because it was concerned that rejecting such claims would adversely impact the company's reputation.

96. Old GM projected that the cash flow impact of assuming all Personal Injury Claims represented by the $916 million Products Liability Loss Reserve would only be [26] approximately $100 million per year for the first five years following consummation of the 363 Sale.

E. The Exchange Offers Expire, the Sale Agreement Is Finalized Six Days Later, and the GM Bankruptcy Is Commenced.

97. The Exchange Offers failed to garner the requisite acceptances from 90% of the Bondholders and expired on May 26, 2009.

98. As a condition to additional funding, the Government mandated that Old GM file its bankruptcy petition for relief on June 1, 2009, the day that a $1 billion interest payment would have been required to be paid on the Bondholder Debt.

99. By filing bankruptcy, Old GM would be precluded as a matter of law from making this interest payment while the Bondholders would be precluded by the bankruptcy "automatic stay" from taking any action against Old GM on account of the defaulted interest payment.

100. Old GM's Board of Directors met on May 29 and 30, 2009 to approve the bankruptcy filing and the Sale Agreement, which would set the precise terms of the 363 Sale.

101. Before that Board meeting, the Government directed that the section of the Sale Agreement governing the assumption of liabilities by New GM exclude all Personal Injury Claims, whether presently existing or arising in the future, along with most of the other "politically sensitive" liabilities.

102. "Personal Injury Claims, however, the Government specifically represented to the Board at the meeting that if the Government decided before the close of the Sale to assume these liabilities, it would still close the Sale without any change in the consideration paid to Old GM.

[27] 103. At the conclusion of the board meeting, Old GM's Board of Directors voted to authorize the filing of the GM Bankruptcy and the concurrent filing of the Sale Agreement for approval by the Bankruptcy Court.

104. The Government conditioned additional funding for Old GM on a "quick-rinse bankruptcy" (as Rattner called it) that would enable the Government to consummate the outright purchase by New GM of substantially all the operating assets of Old GM within 40 days after the bankruptcy filing.

105. Rattner described the Government's coercive threat that the Sale be consummated within 40

days as "the financial equivalent putting a gun to the heads of the bankruptcy judge, GM's stakeholders, and of course Team Auto itself." By this he meant that everyone involved was left with no choice but to submit to the Government's "quick-rinse" demands or be saddled with blame for precipitating Old GM's liquidation and the consequent demise of the entire domestic auto industry.

106. Left with no option but to comply with the Government's mandate or face certain liquidation, Old GM filed its bankruptcy petition for relief in the bankruptcy court for the Southern District of New York (the "**Bankruptcy Court**") on June 1, 2009.

107. Contemporaneous with its bankruptcy filing, Old GM filed two important motions. One motion (the "**Sale Motion**") sought authority from the Bankruptcy Court to sell, pursuant to the Sale Agreement, substantially all Old GM's operating assets to New GM pursuant to the strict terms of the Sale Agreement.

108. The Government insisted that Sale Motion seek Bankruptcy Court authorization of the Sale under Sections 363(b) and (f) of the United States Bankruptcy Code (11 U.S.C. §§ [28] 363(b), (f)), which together authorize a bankrupt debtor to sell its property outside of a chapter 11 plan of reorganization "free and clear of any interest in such property."

109. The second motion sought approval of a postpetition credit facility that gave the Government the right to advance up to an additional $33.3 billion to Old GM on a first priority secured basis, subject to

the limiting condition that the entire facility would terminate if the Bankruptcy Court did not approve the Sale Motion by July 10, 2009, the fortieth day after the bankruptcy filing (the "**DIP Financing Motion**").

110. The DIP Financing Motion was approved by the Bankruptcy Court and the Government made advances in the intervening days that, by the time of the Sale, resulted in the Government having a total of $52.7 billion in first priority secured loans outstanding to Old GM.

111. The $33.3 billion advanced by the Government after Old GM's bankruptcy filing, however, was not needed by Old GM to fund its operations during the 40 day "quick-rinse" cycle mandated by the Government.

112. Rather, its purpose was to give the Government sufficient first priority secured debt to enable it to tender a $48.7 billion credit bid in exchange for substantially all the assets of Old GM.

113. The financial expert for Old GM testified at the Bankruptcy Court's hearing on the Sale Motion that, even under the most optimistic of valuation assumptions, the Government's $48.7 billion credit bid would exceed the value of all assets purchased by the Government in the Sale by $700 million.

114. In crafting the Sale Agreement, the Government unilaterally determined which liabilities of Old GM would be assumed by New GM (and paid in full) and which liabilities [29] would be left behind with Old

GM (and receive whatever distributions, if any, would be paid to general unsecured creditors in the GM Bankruptcy).

115. In cherry-picking which liabilities to assume as successor or leave behind with Old GM, the Government went well beyond the agreements reached with Old GM in the Exchange Offers regarding the acceptable aggregate amount of liabilities for assumption by the restructured enterprise.

116. Not only did the Government leave behind the Bondholder Debt (as contemplated by the Exchange Offers), it also left behind the Personal Injury Claims that the Government agreed only five days earlier would be paid in full in the event the Exchange Offers were successfully consummated.

117. In choosing which additional liabilities to exclude from the Sale Agreement in addition to the Personal Injury Claims, however, the Government did not similarly exclude the vast majority of other unsecured claims, aggregating approximately $41.7 billion (excluding Bondholder Debt), that also were scheduled to be paid in full if the Exchange Offers were successfully consummated.

118. Instead, the Government provided in the Sale Agreement that, notwithstanding the dramatically worse treatment afforded Personal Injury Claimants in the Sale compared with the treatment contemplated for them in the Exchange Offers, New GM would assume these other $41.7 billion in liabilities and pay them in full following the closing of the

Sale. The $41.7 billion in liabilities to be assumed by New GM in the Sale were represented by:

a. $15.5 billion in dealer obligations, warranty obligations, customer deposits, deferred revenues, and marketing liabilities;

b. $8.4 billion in post-employment benefits to union and non-union retirees;

[30] c. $5.4 billion in estimated future pension cash contributions (at present value);

d. $5.4 billion in trade payables;

e. $3.8 billion in payroll, post-employment benefits and training, and pension obligations owing to Delphi Automotive, a former division of Old GM that had been spun-off in 1999; and

f. $3.1 billion in various other operating liabilities, including rent, taxes, and capital leases.

119. In the Sale, the Government also showed special favor to $18 billion in prepetition unsecured claims owed by Old GM to the VEBA Trust, a retiree benefits trust maintained by Old GM's most powerful labor union, the UAW. Specifically, the Government agreed that, at the closing of the 363 Sale, New GM would issue to the VEBA Trust $6.5 billion in New GM preferred stock along with 17.5% of New GM common stock. The equity interests granted the VEBA Trust by New GM were valued as of the closing of the Sale at

between $13.15 billion and $14.9 billion, representing a projected 73%-82% recovery to the VEBA Trust on account of its $18 billion in unsecured claims against Old GM.

120. As such, after the Exchange Offers failed and the Sale Agreement was filed with the Bankruptcy Court six days later, the Government did not change the proposed payment in full for treatment of approximately $60 billion in prepetition unsecured liabilities described above.

121. Nor did the Government propose a worse treatment for Bondholders in the Sale Agreement despite the fact that the Bondholders' rejection of the Exchange Offers directly precipitated Old GM's bankruptcy filing. In fact, Old GM was projecting that recoveries to Bondholders would nearly double compared with what had been offered them in the Exchange Offers.

[31] 122. In stark contrast to the same or improved treatment given the nearly $90 billion of combined general unsecured and Bondholder Debt described above compared with the treatment proposed for these claims in the Exchange Offers, the Government inexplicably slashed the projected recoveries to Personal Injury Claimants by 80%-90% from the full payout proposed for them in the Exchange Offers.

123. The Government's rationalization for this disparate treatment of liabilities having the same priority was that it only would assume those liabilities that it determined were "commercially necessary" for

New GM to succeed, with one Government official testifying in support that "our animating principle from the very beginning . . . was what's the commercial basis, the commercial need for that liability to be brought to New [GM]; why would a buyer buy that liability if he or she didn't have to."

124. But this attempt to rationalize the grossly disproportionate treatment of Personal Injury Claims fails because only five days before the Sale Agreement was executed by Government and Old GM, the Government had been willing to consummate an out-of-court restructuring pursuant to the Exchange Offers that guaranteed full payment to Personal Injury Claimants in the ordinary course.

125. More than not agreeing to assume the Personal Injury Claims in the Sale Agreement, however, the Government went the extra step of (i) conditioning the closing of the Sale on inclusion of a provision within the Sale Order that expressly extinguished the rights of any Personal Injury Claimant to assert successor liability claims against New GM and (ii) threatening to terminate all funding to Old GM unless the Sale Order were entered by July 10, 2009 and not subject to any stay pending appeal.

[32] 126. This additional condition deprived the Personal Injury Claimants of their manifest right under the laws of the State of Michigan (where New GM could be sued by any one of these claimants) to assert successor liability claims against New GM based on the seamless transition of operations from Old GM to

New GM after the 363 Sale, as illustrated by the following:

a. Four of Old GM's eight brands were assumed by New GM (the remainder were discontinued);

b. Old GM's management and employees continued in their same roles with New GM;

c. New GM marketed its operating business under the identical "GM" brand name and trademarks;

d. Most of Old GM's tangible and intangible assets were purchased and used by New GM (including Old GM's goodwill);

e. New GM continued to sell cars through dealers who were dealers of Old GM;

f. New GM continued to purchase the same materials from the same suppliers under the same contractual terms available to Old GM;

g. Service relationships with dealers continued under New GM;

h. New GM's marketing campaign was designed so that the customer viewed the transfer as a uninterrupted transition of the best parts of Old GM to the New GM from a warranty, services, parts, and experiential perspective;

i. Press releases announced that, after the 363 Sale, GM "would execute the key

elements of its April 27 viability plan, along with additional initiatives, to achieve winning financial results by putting customers first, concentrating on adding to the Company's line of award-winning cars and trucks through four core brands";

j. The Government effected a "loan to own" strategy that enabled it, as Old GM's only viable lender, to obtain majority control over Old GM prepetition on a fully dilute basis and to direct a "quick-rinse" bankruptcy sale of Old GM to the Government; and

k. In furtherance of its "loan to own" strategy, the Government maintained tight control over New GM's board and senior management after the close of the Sale, including the right to appoint 10 of the 13 members of New [33] GM's board of directors (with no more than 5 directors being legacy directors of Old GM) and to implement any corporate action by majority written consent.

127. In *Foster v. Cone-Blanchard Mach Co.*, 597 N.W.2d 509 (Mich. 1999), the Michigan Supreme Court held that the "continuity of enterprise" doctrine is a well-established doctrine for asserting successor liability claims and "provide[s] a remedy to an injured plaintiff in those cases in which the [seller] corporation 'legally and/or practically becomes defunct' . . . and the injured plaintiff 'has no place to turn for relief except

to the second corporation.' " *Id*. at 511 (citing *Turner v. Bituminous Cas. Co.*, 244 N.W. 2d 873, 879 (Mich. 1976)).

128. Based on *Foster*, it is evident that in the absence of the Sale Order's injunctions against initiation of successor liability claims against New GM, all Personal Injury Claimants could have successfully brought such claims against New GM under the "continuity of enterprise" doctrine, as established by the following indisputable facts:

a. There was a continuation of the enterprise from Old GM to New GM based on the continuity of management, personnel, physical location, assets and general business operations;

b. Old GM ceased operating and liquidated following the Sale;

c. New GM assumed those liabilities and obligations that it believed were commercially necessary for the uninterrupted continuation of normal business operations of Old GM; and

d. New GM held itself out to the world as the effective continuation of Old GM.

129. *Foster* further held that the "continuity of enterprise" doctrine would not be negated where, as here, there was no continuity of ownership between the predecessor and successor corporation.

130. As such, it was only the unique ability under federal bankruptcy law to execute sales "free and clear" of successor liability claims that enabled the GM Bankruptcy Court to [34] hold, purely as a matter of bankruptcy law, that—facts aside—New GM would not be deemed the legal successor to Old GM.

F. The Government Changes the Treatment of Certain Personal Injury Claims After the Filing Date.

131. Old GM filed its bankruptcy petition a day after an identically-patterned 363 sale in the bankruptcy case of Chrysler, LLC was approved by the bankruptcy court overseeing that case.

132. In the GM Bankruptcy, however, the Government faced stiffer political winds than it had faced in Chrysler's regarding the treatment of Personal Injury.

133. This opposition organized with greater force in the GM Bankruptcy primarily because the bankruptcy court in the Chrysler case, the filing of which preceded the GM Bankruptcy by exactly one month, held that all successor liability claims of products liability claims (including those of future accident victims) could be extinguished in a sale under Bankruptcy Code section 363 if those accidents occurred in cars manufactured prepetition.

134. Following the GM Bankruptcy filing, Old GM's senior management continued to advocate for

New GM's assumption of existing Personal Injury Claims arising from accidents that occurred prepetition, but the Government refused to authorize their assumption by New GM.

135. Within a few days after the commencement of the GM Bankruptcy, however, the Government agreed to change the Sale Agreement so that New GM would indemnify the entire GM dealer network for any Personal Injury Claims asserted against a member of that network.

136. The Government and Old GM projected that this indemnity obligation to dealers would result in the effective assumption by New GM of approximately $434 million (or 46%) of the Personal Injury Claims represented by the $934 million Products Liability Loss Reserve as of March 31, 2009.

[35] 137. Consequently, the projected cash flow impact of assuming the remaining prepetition Personal Injury Claims (which Old GM projected at $500 million, or approximately 54% of the $934 million Products Liability Loss Reserve recorded by Old GM on its publicly filed financial statements as of March 31, 2009) was reduced from the original estimate of $100 million per year for the first five years following consummation of the 363 Sale to approximately $54 million per year.

138. Of this remaining $500 million reserve, approximately $81 million represented projected defense costs and $419 million represented the projected

actual liability to the remaining personal injury claimants whose liabilities were not assumed by New GM.

139. Despite this additional significant change to the allowance of Personal Injury Claims as a result of the dealer indemnity agreements, and consistent with its promises to the GM Board in advance of the bankruptcy filing, the Government neither attempted to renegotiate a downward adjustment to the purchase price nor threatened to walk from the deal.

G. The Sale Is Approved by the Bankruptcy Court, But the Sale Order, by Its Terms, Does Not Become Effective Until Noon on July 9, 2009, the Order Effective Date.

140. On July 5, 2009, following three full days of hearing, the Bankruptcy Court entered the Sale Order approving the Sale Agreement. The Sale Order, however, did not become effective, by its terms, until 12:00 p.m., EDT, on July 9, 2009.

141. Throughout the hearings on the Sale, and thereafter in emails among counsel regarding the form of Sale Order that would be submitted for approval by the Bankruptcy Court, the Government refused to yield one iota in its demand that the Sale Order contain broad language extinguishing all rights to assert successor liability claims against New GM, including on account of Personal Injury Claims not explicitly assumed in the Sale Agreement.

142. To that end, the Government insisted that the Sale Order provide that:

> [36] a. The closing of the Sale would "vest New GM with all right, title, and interest of the Debtors [*i.e.*, Old GM] . . . free and clear of liens, claims, encumbrances, and other interests . . . , including rights or claims . . . based on any successor or transferee liability";
>
> b. "New GM shall not be deemed . . . to: (i) be a legal successor . . . to the Debtors . . . , (ii) have, de facto or otherwise, merged with or into the Debtors; or (iii) be a mere continuation or substantial continuation of the Debtors or the enterprise of the Debtors"; and
>
> c. "all persons and entities are forever prohibited and enjoined from commencing or continuing in any manner any action or other proceeding . . . against New GM . . . with respect to any . . . successor or transferee liability of New GM for any of the Debtors."

See Sale Order, Ex. 1, at p. 13, ¶ AA; p. 24, ¶ 10; p. 40, ¶ 46; p. 41, ¶ 47.

143. In pressing its case before the Bankruptcy Court for an injunction barring the assertion of successor liability claims against New GM, the Government agreed that such rights are "interests in property" that could be extinguished in a "free and clear" sale under section 363(f) of the Bankruptcy Code. Further, its

attorneys expressly concurred on the record with the assessment that rights to assert successor liability claims are "interests in property."

144. The Bankruptcy Court agreed, stating in the Sale Opinion it would follow the holding of the Second Circuit in *In re Chrysler, LLC*, 405 B.R. 84 (Bankr. S.D.N.Y. 2009), *aff'd*, 576 F.3d 108 (2d Cir. 2009), that the Personal Injury Claimants' rights to assert successor liability claims against the buyer of Chrysler's assets constitute "interests in property" because these claims "arise from the property being sold." *In re Chrysler, LLC*, 576 F.3d 108, 126 (2d Cir. 2009). *See* Sale Opinion, Ex. 2, at p. 60, n.109 (citing 3 *Collier on Bankruptcy* at ¶ 363.06[1] ("the trend seems to be in favor of a broader definition [of "interests in property"] that encompasses other obligations that may flow from ownership of the property")).

145. The GM Bankruptcy Court stated that the "only truly debatable issues in this case" are "how any approval order should address successor liability." (*See* Sale Opinion, Ex. 1, [37] at p. 3). But in the face of the Government's coercive threat to cut off DIP Financing and force Old GM into immediate liquidation unless the Government got what it wanted (*i.e.*, a Sale Order that enjoins Personal Injury Claimants' successor liability claims and that is not stayed by a reviewing court pending appeal), neither the Bankruptcy Court nor the District Court was willing—in the words of the Bankruptcy Court—"to gamble on the notion that the Government didn't mean it when it said that it would

not keep funding GM." (*See* Sale Opinion, Ex. 2, at p. 3).

146. These threats were, in the words of the head of the Auto Team, "the financial equivalent of holding a gun to the head" of the Bankruptcy Court and District Court in order to compel a result regarding the treatment of successor liability claims in a 363 Sale that at the time was uncertain and involved novel issues of bankruptcy law.

H. Between the Order Entry Date and Order Effective Date, the Government Objects to All Efforts to Stay the Effectiveness of the Sale Order While Continuing to Threaten Immediate Liquidation If the Sale Order Either Is Stayed Past July 10, 2009 or Fails to Extinguish and Enjoin All Personal Injury Claimants' Successor Liability Claims.

147. Despite the Government's financial indifference to assumption of Old GM's liabilities to Personal Injury Claimants, in both the 363 Sale proceedings before the GM Bankruptcy Court and the subsequent stay hearings before the GM Bankruptcy Court and District Court between the Order Entry Date and the Order Effective Date, the Government threatened that (a) it would not continue to provide Old GM with DIP Financing, critical for Old GM to survive even a day in bankruptcy, if the Sale Order was not effective and not subject to a stay pending appeal as of July 10, 2009, the targeted Closing Date, and (b) it would not close the acquisition unless the Sale Order included

provisions that enjoined the Personal Injury Claimants from pursuing successor liability claims against New GM and held the assets transferred to New [38] GM in the 363 Sale would be "free and clear" of the "interests in property" that these claims were.

148. Between the Order Entry Date and the Closing Date, the heads of the Center for Auto Safety (Clarence Ditlow) and the Center for Justice & Democracy (Joanne Doroshow), together with other consumer advocacy groups, lobbied heavily on Capitol Hill and in the media in hopes of getting the administration to waive the condition that the Personal Injury Claimants' successor liability claims be extinguished in the Sale. Though, in the words of Ms. Doroshow on July 8, 2009, "[t]here is a lot happening on the Hill that is extremely positive" and "[k]eeping urgent pressure on the Hill is critical," political pressure ultimately failed to alter the Government's decision to close on the Sale without changing the treatment afforded Personal Injury Claimants on account of their successor liability claims against New GM.

149. In the Government's opposition filed on July 7, 2009 to motions filed after the Order Entry Date seeking a direct and expedited appeal of the Sale Order to the Second Circuit or, alternatively, for a stay pending appeal, the Government argued that "any stay pending appeal must be conditioned upon a substantial supersedeas bond to protect New GM and the debtors' stakeholders from the potentially disastrous consequences if the sale does not close promptly." That bond, the Government argued, "is plainly in the

billions, if not tens of billions, of dollars" and potentially could reach "the $90 or so billion in damages to these estates in a liquidation scenario as opposed to under the 363 [Sale] Transaction," though the minimum should be "at least $7.4 billion."

150. In denying these motions in a "Bench Decision and Order" dated July 7, 2009 (the "**Bench Decision**"), the Bankruptcy Court reiterated its concern that "[t]he continued availability of the financing provided by Treasury is expressly conditioned upon approval of this motion by [39] July 10. . . . Without such financing, GM faces immediate liquidation. . . . If I or any other court were to grant the requested stay, GM would soon have to liquidate."

151. The Ad Hoc Committee of Asbestos Personal Injury Claimants, who—along with the Plaintiffs—moved for a direct and expedited appeal of the Sale Order before the Bankruptcy Court, filed late in the day on July 8, 2009 a motion with the District Court for a stay pending appeal. With the Sale Order set to go effective by its terms at noon on July 9, 2009, the District Court required briefs in opposition be filed no later than 4:00 a.m. on July 9, 2009 and set oral argument for 8:30 a.m. that same day.

152. In the Government's opposition to the motion for a stay pending appeal filed in the District Court on July 9, 2009, the Government stated that "[a] key aspect of the undisputed evidence [before the Bankruptcy Court at the Sale hearing] was Treasury's unwillingness to continue to fund GM's operations

absent the prompt closing of the sale, throwing good money after bad."

153. To dispel any doubt of the Government's position that it would cease funding Old GM and let it liquidate rather than spend even a dollar of incremental funding for the benefit of Personal Injury Claimants, the Government's opposition quoted the following testimony of the Auto Team's Harry Wilson during the Sale hearing:

> Q: Okay. You testified, on a few occasions, that Treasury had no intention to fund General Motors after July 10th if the sale order is not entered, is that right?
>
> A: Yes.
>
> Q: Why not?
>
> A: Well, it goes to the core principle or concern about any Chapter 11 proceeding, which is that this business cannot withstand the uncertainty of an open-ended process or a process of uncertain duration. . . . General Motors' market share today is dramatically [40] lower than it was a year ago before the financial distress entered in. Market share this time last year was about twenty-two percent. It's a little bit over eighteen percent now. That's a massive erosion. And that was based on the fears of distress and despite the intervention of the U.S. Treasury. I imagine if there was concern about how that would play out over time, it would

only be dramatically larger, in our estimation. So that's why we cannot take an open-ended commitment. We have a fiduciary duty to the U.S. taxpayers. We've made a judgment that the funding associated with this process was appropriate but that any incremental funding we are not willing to provide.

* * *

A: Yes.

Q: And that you and your designates and your counsel were negotiating a final version of the sale order, is that correct?

A: Yes.

Q: And is it your expectation that that final sale order, when it is submitted to Judge Gerber, will reflect the Treasury's final position on all of the objections that have been filed?

A: That's correct.

Q: And if that final order, as it reflects Treasury's resolution of all of the objections that have been filed, is not entered on or before July 10th, does Treasury have an intention to fund?

A. No.

154. At oral argument later that morning before the District Court, the Government's lawyers addressed the District Court and reiterated the Government's position, as stated in its opposition brief, that

"*no* amount would adequately hedge against the 'potentially grievous systemic damage to the automobile industry' that would result from GM's liquidation. As a result, even a stay conditioned on a multibillion dollar bond 'would be unconscionable.' " (emphasis in original, quoting from Bench Decision). In sum, the Government argued, financial destruction would follow in the wake of any tinkering with the Sale Order.

[41] 155. The Court issued a preliminary oral decision following argument heard on July 9, 2009, and later that morning issued its written opinion denying the motion for stay pending appeal. In its opinion, the District Court noted at the outset that "the entry of even a brief stay would constitute an event of default and provide the [Government] the right to refuse financing. . . . There is thus a substantial risk that the government would exercise such a right and that GM would be forced into liquidation with disastrous consequences for GM, its creditors [including the appellants challenging the successor liability provisions of the Sale Order], and our country."

156. In sum, between the Order Entry Date of July 5, 2009 and continuing through oral argument at a stay hearing before the District Court on the morning of July 9, 2009, just hours before the Sale Order was, by its terms, to become effective, the Government continued to threaten that (a) it would not continue to provide Old GM with DIP Financing if the Sale Order were not effective and not subject to any stay pending appeal as of the Closing Date, and (b) it would not close the acquisition unless the Sale Order included

provisions that enjoined the Personal Injury Claimants from pursuing successor liability claims against New GM.

I. The Sale Closes and All Personal Injury Claimants' Rights to Assert Successor Liability Claims Are Extinguished and Enjoined.

157. New GM consummated the 363 Sale on the Closing Date, July 10, 2009.

158. With neither the Bankruptcy Court nor the District Court willing to stay the Order Effective Date, the Government, in reliance on the effectiveness of the Sale Order, closed the Sale on July 10, 2009.

159. New GM paid approximately $91.1 to $93.5 billion for substantially all the assets of Old GM in the 363 Sale, broken down as follows:

a. a $48.7 billion credit bid of senior secured debt owed the U.S. Treasury; plus

[42] b. $48.4 billion of assumed liabilities that would be paid in full, including the $41.7 billion in liabilities described above and $6.7 billion additionally owed to the Government; plus

c. $7.4 to $9.8 billion in value being given to Old GM in the form of New GM equity (stock and warrants); less

d. $13.4 billion of excess cash on hand at Old GM from TARP loan advances that would

be transferred to New GM at the closing of the 363 Sale.

160. Based on the various agreements described above and reflected in the Sale Agreement and the record of the proceedings before the Bankruptcy Court, the post-closing ownership of New GM was as follows:

- 60.83% by the Government on account of its credit bid;
- 11.67% by the Canadian Government (in exchange for $9.5 billion in debt to the Canadian Government assumed by New GM and immediately converted to common stock);
- 17.5% by the VEBA Trust; and
- 10% by the Old GM bankruptcy estate (having an estimated value at the Sale closing of $3.8-$4.8 billion).

161. The Old GM bankruptcy estate also received two tranches of warrants that gave it the right to purchase up to 15% of New GM common stock, which Old GM's financial expert testified had an estimated value at the closing of the 363 Sale of $3.6-$5.0 billion.

162. The equity consideration distributed to Old GM, however, was not delivered at or around the time of the closing of the 363 Sale to Personal Injury Claimants or holders of any other general unsecured claims.

163. Stripped of all rights to assert successor liability claims against New GM, the Personal Injury

Claims were relegated to the bottom of Old GM's barrel and limited to a *pro rata* share of whatever recoveries, if any, Old GM would pay to its general unsecured creditors.

[43] 164. Although Old GM was projecting that total allowed general unsecured claims for distribution purposes in the GM Bankruptcy, including Bondholder Debt, would be between $31 billion and $35 billion, recoveries to general unsecured creditors at the time of the Sale were neither determinable nor guaranteed. No bar date for the filing of proofs of claim had been set as of the Sale closing, and when it finally was set about four months later, over 70,000 proofs of claim were filed having an aggregate face value of approximately $270 billion.

165. The aggregate face amount of filed priority claims alone may have exceeded the value of the entire $7.4 to $9.8 billion valuation placed on New GM common stock transferred to Old GM in the Sale, which represented the only projected source of distributions to Old GM's creditors based on their relative priorities.

166. As such, on July 10, 2009, at the precise moment that the Government closed on the Sale, the Personal Injury Claimants' rights to assert successor liability claims were effectively extinguished and these claimants had nothing more than a contingent interest in an indeterminate portion, if any, of the consideration paid over by New GM in the Sale to Old GM's bankruptcy estate.

167. Old GM's Plan of Reorganization (the "**Plan**") was not confirmed by the Bankruptcy Court until March 29, 2011, and did not become effective until March 31, 2011, nearly two years after the closing of the Sale.

168. The effective date of the Plan was the earliest possible time that any Personal Injury Claimant would have been eligible to receive on account of their "Allowed" claims any of the consideration paid to Old GM's bankruptcy estate in the Sale.

[44] 169. No additional consideration was given to the Personal Injury Claimants on account of the extinguishment in the 363 Sale of their rights to assert successor liability claims against New GM.

VI.

CLASS ALLEGATIONS

170. This action is brought and may be properly maintained as a class action pursuant to the Rules 23(a) and Rules 23(b)(2)-(3) of the Rules of the Court of Federal Claims ("**RCFC**"). This action satisfies the numerosity, commonality, typicality, adequacy, predominance, and superiority prerequisites of Rule 23. The named class representatives seek to maintain this case as a class action on behalf of a class (the "**Class**") defined as follows:

> The Class is defined as any person or entity that is a holder of a claim that is "Allowed" (as such term is defined in the "Debtors' Second

Amended Joint Chapter 11 Plan" (the "Plan") confirmed by order of the United States Bankruptcy Court for the Southern District of New York in the chapter 11 bankruptcy case captioned *In re Motors Liquidation Company, et al., f/k/a General Motors Corp.*, *et al.*, Case No. 09-50026 (reg) (the "GM Bankruptcy"), entered on March 29, 2011) in the GM Bankruptcy for death or personal injuries arising before June 1, 2009 and caused by motor vehicles designed for operation on public roadways, or by the component parts of such motor vehicles, and in each case, manufactured, sold, or delivered by General Motors Corporation, Saturn, LLC, Saturn Distribution Corporation, or Chevrolet-Saturn of Harlem, Inc. (collectively, "Sellers").

For avoidance of doubt, the Class does not include the following claims (whether or not such claims represent an "Allowed Claim" in the GM Bankruptcy): (i) "Asbestos Claims" (as defined in the Plan); (ii) claims asserted by the "Ignition Switch Plaintiffs," "Pre-Closing Accident Plaintiffs," "Non-Ignition Switch Plaintiffs," "Economic Loss Plaintiffs," "Pre-Closing Accident Victim Plaintiffs," or "Groman Plaintiffs" (as such terms are used or defined in that certain judgment of the Bankruptcy Court dated June 1, 2015 (Dkt. No. 13178) (the "Sale Enforcement Order")), whether asserted on one's own behalf or on behalf of a class of all others similarly situated; (iii) claims asserted in any of the "Ignition Switch Actions" (as such term is used or defined in the Sale Enforcement Order), whether

> asserted on one's own behalf or on behalf of a class of all others similarly situated; or (iv) Allowed Claims in the GM Bankruptcy that [45] are exclusively for economic loss to the value of one's vehicle or other personal property and do not include a claim for any personal injuries.

171. The named Plaintiffs are all holders of Allowed Claims in the GM Bankruptcy for death or personal injuries arising before June 1, 2009 that were caused by motor vehicles designed for operation on public roadways, or by the component parts of such motor vehicles, and in each case, manufactured, sold or delivered by one of the Sellers (the "**Personal Injury Claims**").

172. Plaintiffs reserve the right to modify the Class as may be appropriate based upon the evidence revealed during the course of discovery.

173. The Class is comprised of several thousand holders of Allowed Personal Injury Claims in the GM Bankruptcy, making joinder impractical. The aggregate amount of Allowed Personal Injury Claims in the GM Bankruptcy is presently estimated at approximately $300 million.

174. There is a well-defined community of interest among Class members and disposition of the Allowed Personal Injury Claims of the Class members in a single class action will provide substantial benefits to all parties and to the Court.

175. The Class meets the prerequisites of RCFC 23(a). The Class is so numerous that the individual joinder of all members is impracticable.

176. While the exact number and identities of the Class members are unknown at this time to the Plaintiffs, the number and identities of the Class members are known to Wilmington Trust Company ("**WTC**"), the administrator of the "Motors Liquidation Company GUC Trust" (the "**GUC Trust**") which was established under the Plan to, among other things, determine the allowed amount of general unsecured claims in the GM Bankruptcy, including the Allowed Personal Injury Claims.

[46] 177. The GUC Trust, through its administrator WTC, has been making distributions to holders of Allowed Personal Injury Claims and has been responsible for resolving all outstanding disputed Personal Injury Claims.

178. WTC is believed to have separately categorized all Allowed Personal Injury Claims, thereby allowing identification of all such claims.

179. As required by RCFC 23(a)(2), common questions of law and fact exist as to all Class members and predominate over any questions affecting only individual members. Plaintiffs, like all Class members, had their rights to assert successor liability claims against New GM extinguished in the Sale Order, effective upon the closing of the 363 Sale.

180. All actions by the Government in causing the rights of Personal Injury Claimants to assert successor liability claims against New GM to be extinguished upon the closing of the 363 Sale also affected the Class members equally and coterminously.

181. As such, the principal question of law and fact in this case, common to all Class members, is whether the actions of the Government in causing the rights of Personal Injury Claimants to assert successor liability claims against New GM to be extinguished in the 363 Sale constituted a taking of property from Class members without just compensation, in violation of the Takings Clause.

182. As required by RCFC 23(a)(3), Plaintiffs' claims are typical of the claims of the Class members, as Plaintiffs each hold Allowed Personal Injury Claims in the GM Bankruptcy and each of their respective rights to assert successor liability claims against New GM were extinguished in the 363 Sale at the direction of the Government.

183. Such action by the Government constituted a direct taking of such claims from the named Plaintiffs and other Class members without just compensation.

[47] 184. As a result of the Government's actions to extinguish the Personal Injury Claimants' rights to assert successor liability claims against New GM, instead of being paid in full on their allowed Personal Injury Claims, the recoveries of the Personal Injury Claimants were limited to whatever fractional

recoveries would be paid to general unsecured creditors in the GM Bankruptcy. At the time of the Sale, the distributions to these claimants were neither made nor capable of certain determination.

185. As required by RCFC 23(a)(4), Plaintiffs will fairly and adequately protect the interests of the Class members and have no interest antagonistic to those of the Class members. Plaintiffs have retained counsel experienced in the litigation of class actions, with particular experience in the relevant facts and law applicable to this case because of counsel's extensive representation of Plaintiffs in the hearings on the 363 Sale.

186. This action is maintainable as a class action pursuant RCFC 23(b)(1) because, as noted above, the Government acted or refused to act on grounds generally applicable to the Class, thus making the subject of this action a course of conduct involving documents, regulations, policies, and actions applicable to the Class members as a whole.

187. As required by RCFC 23(b)(2), the questions of law or fact common to Class members predominate over any questions affecting only individual members. The common predominating question in this case, applicable to all Class members, is whether the Government's decision to extinguish the Class members' rights to assert successor liability claims against New GM constituted a taking without just compensation.

188. Further, the question of what damages any individual member of the Class suffered is common to

the Class for it is based on the difference between the allowed amount of [48] each member's prepetition Personal Injury Claim in the GM Bankruptcy and the actual recoveries on that claim in the GM Bankruptcy.

189. Consequently, there are no individualized issues of law. Each Class member had successor liability rights against New GM that were extinguished in the 363 Sale. Regardless of which of the 50 states that Class member lived or was injured, each Class member also had the right to assert successor liability claims against New GM in Michigan, which was New GM's principal place of business and which recognizes rights to assert successor liability claims under a multitude of theories, none of which are unique to any particular member of the Class, including the "continuity of enterprise" doctrine for imposition of successor liability claims under Michigan law.

190. The expense and burden of individual litigation also would make it difficult, if not impossible, for individual Class members to obtain redress for the rights taken from them by the Government. The unnecessary cost to the court system of adjudicating such individualized litigation also would be substantial, if not prohibitive.

191. Maintaining this action as a class action presents fewer management difficulties, conserves the resources of the parties and the court system, and protects the rights of each Class member.

192. Notice of the pendency of this action, and any resolution thereof, can be readily provided to Class

members simply through the well-established notice and distribution mechanisms established in the GM Bankruptcy by WTC and the GUC Trust for handling notices and distributions to holders of allowed Personal Injury Claims in the case.

[49] **VII.**

FIRST CLAIM FOR RELIEF

***PER SE* TAKING OF RIGHTS TO ASSERT SUCCESSOR LIABILITY CLAIMS IN VIOLATION OF THE TAKINGS CLAUSE**

193. Plaintiffs reallege and incorporate by reference herein paragraphs 1 through 192.

194. The Takings Clause requires that the United States pay just compensation for all property taken for public use.

195. Each of the respective rights of Class members to assert successor liability claims against New GM constitute interests in property that were extinguished in the 363 Sale at the direction of the Government.

196. The Government's actions in directing the extinguishment in the 363 Sale of the rights of the Plaintiffs and other Class members to assert successor liability claims against New GM constituted a *per se* taking for which just compensation was not paid.

197. The rights of the Plaintiffs and other Class members to assert successor liability claims against New GM are rights that exist under state law.

198. The Bankruptcy Court found that the rights of the Personal Injury Claimants to assert successor liability claims against New GM are "interests in property" and the Government concurred in that assessment.

199. The Government itself benefited when it directed that the rights of the Plaintiffs and other Class members to assert successor liability claims against New GM be extinguished because New GM was wholly-owned by the Government at the time of the 363 Sale. Even after the consummation of the deals between New GM and other stakeholders contemplated by the 363 Sale, the Government retained a 60.8% equity ownership stake in New GM.

[50] 200. The Government's taking of the named Plaintiffs' and other Class members' rights to assert successor liability claims occurred no sooner than the July 9, 2009 Order Effective Date since it was only on that date that the Government had the authority to close the Sale and thereby, pursuant to the terms of the Sale Order, deny the Personal Injury Claimants the right to pursue successor liability claims against New GM.

201. The Government's coercive threats regarding its willingness to let Old GM liquidate rather than provide even a dollar of incremental funding for the benefit of Personal Injury Claimants, coupled with its

independent decision—notwithstanding significant political pressure from consumer advocacy groups—to close in reliance on the provisions of the Sale Order that, by their terms, extinguished and enjoined Personal Injury Claimants' successor liability claims, together violated the Takings Clause because there was no essential nexus—as is required when the Government so drastically extinguishes valuable property rights—between those coercive threats and the Government's acknowledged financial indifference to assumption of the Personal Injury Claims left behind.

202. The Government's callous disregard of the health and welfare of these marginalized claimants, advanced under the false guise of "commercial necessity" and "fiduciary duty to taxpayers" also violated a principal purpose of the Takings Clause, which is to bar the Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole. These claimants were victims of Old GM's defective products, not the cause of Old GM's problems.

203. None of the consideration paid to Old GM in the 363 Sale was either distributed or guaranteed to be distributed to the Personal Injury Claimants at the time of the Government's taking of their rights. The Personal Injury Claimants had nothing more at the time of the Sale [51] than a contingent interest in an indeterminate portion, if any, of the consideration paid over by New GM in the Sale to Old GM's bankruptcy estate.

204. Each of the Plaintiffs and each member of the Class suffered injury as a proximate result of the Government's actions.

205. As a direct and proximate result of the acts of the Government, Plaintiffs and the Class members have been damaged in the amount of at least $200 million, plus interest thereon at a rate to be established by this Court.

206. Plaintiffs, for themselves and on behalf of the Class, have incurred and will incur attorneys' fees, costs, and expenses of litigation in an amount as yet unascertained, and these too are compensable at such amount to be established by this Court.

207. These damages represent the just compensation due the Plaintiffs and other Class members under the Fifth Amendment as a result of the Government's actions in directing the extinguishment of their rights to assert successor liability claims against New GM following the 363 Sale.

VIII.

SECOND CLAIM FOR RELIEF
(Pleaded in the Alternative)

CATEGORICAL REGULATORY TAKING OF THE RIGHT TO ASSERT SUCCESSOR LIABILITY CLAIMS

208. Plaintiffs reallege and incorporate by reference herein paragraphs 1 through 192.

209. The purpose of the Takings Clause is to prevent the Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.

[52] 210. A violation of the Takings Clause may occur when a governmental regulation denies a property owner all economically beneficial use of the property.

211. The Bankruptcy Court found that the rights of the Personal Injury Claimants to assert successor liability claims against New GM are "interests in property" and the Government concurred in that assessment.

212. Despite having designated the underlying claims of Personal Injury Claimants against Old GM as "politically sensitive" liabilities that, if required to be assumed by the Government, would neither have given the Government the right to walk away from the deal nor reduce the consideration paid to Old GM under the Sale Agreement, the Government directed that the rights of these claimants to assert successor

liability claims against New GM be extinguished in the Sale Order.

213. In so doing, the Government was not simply adjusting the benefits and burdens of economic life in a manner that secures an average reciprocity of advantage to the Personal Injury Claimants. Rather, the Government singled out this group of claimants to unjustly bear the burden of a broader problem not of their making that, in all fairness and justice, should be borne by the public as a whole. These claimants were victims of Old GM's defective products, not the cause of Old GM's problems.

214. The Government's taking of the Plaintiffs' and the other Class members' rights to assert successor liability claims occurred on the July 10, 2009 closing date of the 363 Sale.

215. None of the consideration paid to Old GM in the 363 Sale was distributed, or guaranteed to be distributed, to the Personal Injury Claimants at the time of the Government's taking of their rights. The Personal Injury Claimants had nothing more at the time of the Sale [53] than a contingent interest in an indeterminate portion, if any, of the consideration paid over by New GM in the Sale to Old GM's bankruptcy estate.

216. The Government's actions in directing that the Sale Order extinguish the Plaintiffs' and other Class members' rights to assert successor liability claims against New GM was a categorical regulatory taking within the meaning of the Takings Clause.

217. Each of the Plaintiffs and each Class member suffered injury as a proximate result of the Government's actions.

218. This is not a case where the central fact question before the Court is what remedy (or lack thereof) the Personal Injury Claimants would have had if the Government had not closed on the Sale (*i.e.*, "but for the government action"). Here, the Government specifically represented to Old GM's Board of Directors at a meeting held three days before the filing that if the Government decided to assume the "politically sensitive" liabilities owing to Personal Injury Claimants as part of the Sale, the Government would still close the deal without any downward adjustment to the purchase price.

219. Consequently, the appropriate "but for" analysis in this case is that, even though the Government was actually financially indifferent to assumption of Personal Injury Claims by New GM, but for (a) the Government's arbitrary demand that Personal Injury Claimants' rights to assert successor liability claims be eliminated through the Sale Order and (b) the Government's threat to terminate all funding of Old GM if its demands were not met, the Personal Injury Claimants' valuable rights to pursue successor liability claims against New GM would have been preserved.

[54] 220. As a direct and proximate result of the acts of the Government, Plaintiffs and the Class members have been damaged in the amount of at least $200

million, plus pre- and post-judgment interest thereon at a rate to be established by this Court.

221. Plaintiffs, for themselves and on behalf of the Class, have incurred and will incur attorneys' fees, costs, and expenses of litigation in an amount as yet unascertained, and these too are compensable at such amount to be established by this Court.

222. These damages represent the just compensation due the Plaintiffs and other Class members under the Fifth Amendment for the Government's categorical taking of their rights to assert successor liability claims against New GM.

IX.

THIRD CLAIM FOR RELIEF
(Pleaded in the Alternative)

NON-CATEGORICAL REGULATORY TAKING OF THE RIGHT TO ASSERT SUCCESSOR LIABILITY CLAIMS

223. Plaintiffs reallege and incorporate by reference herein paragraphs 1 through 192.

224. A non-categorical regulatory taking may arise from the adverse impact a regulation has on an owner's use of property, without entirely destroying the property's value.

225. Determining whether a non-categorical regulatory taking occurred requires an analysis in this case of (i) the economic impact of the regulation on the

Personal Injury Claimants, (ii) the extent to which the regulation interferes with the objectively-determined investment-backed expectations of the Personal Injury Claimants, and (iii) the character of the government action and whether the regulation has "gone too far" by disproportionately burdening a small class of persons for the public's benefit.

[55] 226. Each of the respective rights of the Plaintiffs and other Class members to assert successor liability claims against New GM constituted interests in property that were extinguished in the 363 Sale at the direction of the Government in such manner as to disproportionately burden the Plaintiffs and other Class members for the public's benefit.

227. The Bankruptcy Court found that the rights of the Personal Injury Claimants to assert successor liability claims against New GM are "interests in property" and the Government concurred in that assessment.

228. The economic impact of the Government's actions on the Personal Injury Claimants has been severe. Instead of receiving full compensation for their liquidated and undisputed claims to cover their medical costs, their pain and suffering, and their losses—in many cases—of limbs, mobility, capacity, livelihood, consortium, or even life itself, the Government deprived these claimants of all recompense at the time of the taking, forcing them to wait years until marginal recoveries on their allowed claims in the GM Bankruptcy finally began to trickle down to them.

229. The Personal Injury Claimants also had reasonable, investment-backed expectations that GM would stand behind its cars, as Old GM consistently promised in its marketing campaigns.

230. None of these claimants could have expected such unfair treatment when they bought their defective vehicle given the assurances made to consumers about the reliability of Old GM.

231. No one from Old GM ever advised its customers that Old GM's products liability insurance coverage was only triggered when the liability per occurrence exceeded $35 million (meaning that Old GM was effectively completely self-insured).

[56] 232. Nor could these claimants have expected that the Government, through a team of appointees with little or no auto industry experience, would eliminate their rights to assert successor liability claims, thereby annulling Old GM's promises of reliability as well as the recommendation of Old GM's CEO that these claims be assumed by New GM.

233. Despite having designated the underlying claims of Personal Injury Claimants as "politically sensitive" liabilities that, if required to be assumed by New GM, would neither have given the Government the right to walk away from the deal nor have changed the consideration payable to Old GM under the Sale Agreement, the Government demanded that the Personal Injury Claimants' rights to assert successor liability claims against New GM be extinguished in the

Sale Order and threatened to terminate all funding of Old GM if that did not happen.

234. In treating Personal Injury Claimants markedly worse in the Sale than was proposed for them in the Exchange Offers, while at the same time giving holders of at least $90 billion of other unsecured debt at Old GM (including the Bondholders) the same or far better treatment than they would have received in the Exchange Offers, the Government singled out the Personal Injury Claimants to bear the brunt of its campaign on the eve of the bankruptcy filing to squeeze from the deal liabilities owed to creditors (like the maimed, the disabled, the widows, the orphans, and other Personal Injury Claimants) that the Government considered marginal players because they were not expected to have any ongoing business relationship with New GM.

235. The Government's callous disregard of the health and welfare of these marginalized claimants, advanced under the guise of "commercial necessity," also violated a principal purpose of the Takings Clause, which is to bar the Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the [57] public as a whole. These claimants were victims of Old GM's defective products, not the cause of Old GM's problems.

236. The Government's actions in demanding extinguishing the Personal Injury Claimants' rights to assert successor liability claims against New GM and threatening to terminate its funding of Old GM if its

demands were not met went too far because the total Allowed Claims of Personal Injury Claimants were projected at the time of the Sale at no more than approximately $420 million, or about one-half percent of the purchase price paid by the Government in the Sale.

237. Because approximately $434 million of the $934 million representing Old GM's Products Liability Loss Reserve as of March 31, 2009 was being treated as assumed by New GM as a result of indemnity agreements reached with dealers after the filing of the GM Bankruptcy, the projected cash flow impact of the Personal Injury Claims left behind in the 363 Sale would not have exceeded approximately $55 million per year over the five year period following the consummation of the 363 Sale.

238. Meanwhile, New GM agreed in the Sale to assume over $48.4 billion in liabilities in full or in substantial part in the Sale, including $5.4 billion in trade supplier debt (which was assumed in full) and $18 billion of debt to the VEBA Trust (which received common and preferred stock of New GM at the close of the Sale, enabling a projected recovery of between 73% and 82%).

239. Assumption by New GM of the Personal Injury Claims, therefore, represented a mere fraction of the consideration payable by the Government in the Sale. Given the indifference of the Government to assumption of these liabilities (because it still would have closed the 363 [58] Sale without a downward

adjustment to the purchase price), the Government's action went too far.

240. Justice and fairness require that economic injuries caused by public action be compensated by the Government, rather than remain disproportionately concentrated on the relatively small pool of Personal Injury Claimants whose rights to assert successor liability claims against New GM were extinguished in the Sale.

241. This is not a case where the central fact question before the Court is what remedy (or lack thereof) the Personal Injury Claimants would have had if the Government had not closed on the Sale (*i.e.*, "but for the government action"). Here, the Government specifically represented to Old GM's Board of Directors at a meeting held three days before the filing that if the Government decided to assume the "politically sensitive" liabilities owing to Personal Injury Claimants as part of the Sale, the Government would still close the deal without any downward adjustment to the purchase price.

242. Consequently, the appropriate "but for" analysis in this case is that, even though the Government was actually financially indifferent to assumption of Personal Injury Claims by New GM, but for (a) the Government's arbitrary demand that Personal Injury Claimants' rights to assert successor liability claims be eliminated through the Sale Order and (b) the Government's threat to terminate all funding of Old GM if its demands were not met, the Personal

Injury Claimants' valuable rights to pursue successor liability claims against New GM would have been preserved.

243. As a direct and proximate result of the Government's actions, Plaintiffs and the Class have been damaged in the amount of at least $200 million, plus pre- and post judgment interest thereon at a rate to be established by this Court.

[59] 244. Plaintiffs, for themselves and on behalf of the Class, have incurred and will incur attorneys' fees, expert witness fees, costs, and expenses of litigation in an amount as yet unascertained, and these too are compensable at such amount to be established by this Court.

245. These damages represent the just compensation due the Plaintiffs and other Class members under the Fifth Amendment for the Government's noncategorical taking of these claimants' rights to assert successor liability claims against New GM.

X.

RELIEF REQUESTED

WHEREFORE, Plaintiffs, on behalf of themselves and the members of Class, demand judgment against the United States as follows:

A. That the Court certify this case as a class action under RCFC 23(b) and find that the Plaintiffs have met the requirements of class representatives

and may maintain this action as representatives of the Class;

B. That the Court certify the Class comprised of any person or entity identified in Paragraph 139 of this Complaint;

C. That the Court award a money judgment to Plaintiffs and other Class members in an amount to be determined at trial, estimated at no less than $200,000,000 in the aggregate, for damages sustained as a result of the permanent taking of their rights to assert successor liability claims against New GM, together with plus pre- and post judgment interest thereon at a rate to be established by this Court, and any and all further costs, disbursements, and reasonable attorneys' fees; and

D. That the Court grant such other and further relief as the Court deems to be just and proper.

[60] Dated: Washington, D.C.

_____, ___, 2017 By: s/ Steve Jakubowski

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re	:	Chapter 11 Case No.
GENERAL MOTORS CORP., *et al.*,	:	09-50026 (REG)
	:	(Jointly Administered)
Debtors.	:	

ORDER (I) AUTHORIZING SALE OF ASSETS PURSUANT TO AMENDED AND RESTATED MASTER SALE AND PURCHASE AGREEMENT WITH NGMCO, INC., A U.S. TREASURY-SPONSORED PURCHASER; (II) AUTHORIZING ASSUMPTION AND ASSIGNMENT OF CERTAIN EXECUTORY CONTRACTS AND UNEXPIRED LEASES IN CONNECTION WITH THE SALE; AND (III) GRANTING RELATED RELIEF

Upon the motion, dated June 1, 2009 (the "**Motion**"), of General Motors Corporation ("**GM**") and its affiliated debtors, as debtors in possession (collectively, the "**Debtors**"), pursuant to sections 105, 363, and 365 of title 11, United States Code (the "**Bankruptcy Code**") and Rules 2002, 6004, and 6006 of the Federal Rules of Bankruptcy Procedure (the "**Bankruptcy Rules**") for, among other things, entry of an order authorizing and approving (A) that certain Amended and Restated Master Sale and Purchase Agreement, dated as of June 26, 2009, by and among GM and its Debtor subsidiaries (collectively, the "**Sellers**") and NGMCO, Inc., as successor in interest to Vehicle Acquisition

Holdings LLC (the "**Purchaser**"), a purchaser sponsored by the United States Department of the Treasury (the "**U.S. Treasury**"), together with all related documents and agreements as well as all exhibits, schedules, and addenda thereto (as amended, the "**MPA**"), a copy of which is annexed hereto as Exhibit "A" (excluding the exhibits and schedules thereto); (B) the sale of the Purchased Assets[1] to the Purchaser free and clear of liens, claims, encumbrances, and interests (other than Permitted Encumbrances), including rights or claims based on any successor or transferee liability; (C) the assumption and assignment of the Assumable Executory Contracts; (D) the establishment of certain Cure Amounts; and (E) the UAW Retiree Settlement Agreement (as defined below); and the Court having jurisdiction to consider the Motion and the relief requested therein in accordance with 28 U.S.C. §§ 157 and 1334 and the Standing Order M-61 Referring to Bankruptcy Judges for the Southern District of New York of Any and All Proceedings Under Title 11, dated July 10, 1984 (Ward, Acting C.J.); and consideration of the Motion and the relief requested therein being a core proceeding pursuant to 28 U.S.C. § 157(b); and venue being proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409; and due and proper notice of the Motion having been provided in accordance with this Court's Order, dated June 2, 2009 (the "**Sale Procedures Order**"), and it appearing that

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[1] Capitalized terms used herein and not otherwise defined shall have the meanings ascribed to such terms in the Motion or the MPA.

no other or further notice need be provided; and a hearing having been held on June 30 through July 2, 2009, to consider the relief requested in the Motion (the "**Sale Hearing**"); and upon the record of the Sale Hearing, including all affidavits and declarations submitted in connection therewith, and all of the proceedings had before the Court; and the Court having reviewed the Motion and all objections thereto (the "**Objections**") and found and determined that the relief sought in the Motion is necessary to avoid immediate and irreparable harm to the Debtors and their estates, as contemplated by Bankruptcy Rule 6003 and is in the best interests of the Debtors, their estates and creditors, and other parties in interest and that the legal and factual bases set forth in the Motion establish just cause for the relief granted herein; and after due deliberation and sufficient cause appearing therefor, it is

FOUND AND DETERMINED THAT

* * *

Transfer of Purchased Assets Free and Clear

7. Except for the Assumed Liabilities, pursuant to sections 105(a) and 363(f) of the Bankruptcy Code, the Purchased Assets shall be transferred to the Purchaser in accordance with the MPA, and, upon the Closing, shall be free and clear of all liens, claims, encumbrances, and other interests of any kind or nature whatsoever (other than Permitted Encumbrances), including rights or claims based on any successor or

transferee liability, and all such liens, claims, encumbrances, and other interests, including rights or claims based on any successor or transferee liability, shall attach to the net proceeds of the 363 Transaction in the order of their priority, with the same validity, force, and effect that they now have as against the Purchased Assets, subject to any claims and defenses a Seller or any other party in interest may possess with respect thereto.

8. Except as expressly permitted or otherwise specifically provided by the MPA or this Order, all persons and entities, including, but not limited to, all debt security holders, equity security holders, governmental, tax, and regulatory authorities, lenders, trade creditors, dealers, employees, litigation claimants, and other creditors, holding liens, claims, encumbrances, and other interests of any kind or nature whatsoever, including rights or claims based on any successor or transferee liability, against or in a Seller or the Purchased Assets (whether legal or equitable, secured or unsecured, matured or unmatured, contingent or noncontingent, senior or subordinated), arising under or out of, in connection with, or in any way relating to, the Sellers, the Purchased Assets, the operation of the Purchased Assets prior to the Closing, or the 363 Transaction, are forever barred, estopped, and permanently enjoined (with respect to future claims or demands based on exposure to asbestos, to the fullest extent constitutionally permissible) from asserting against the Purchaser, its successors or assigns, its property, or the Purchased Assets, such persons' or entities' liens,

claims, encumbrances, and other interests, including rights or claims based on any successor or transferee liability.

9. This Order (a) shall be effective as a determination that, as of the Closing, (i) no claims other than Assumed Liabilities, will be assertable against the Purchaser, its affiliates, their present or contemplated members or shareholders, successors, or assigns, or any of their respective assets (including the Purchased Assets); (ii) the Purchased Assets shall have been transferred to the Purchaser free and clear of all claims (other than Permitted Encumbrances); and (iii) the conveyances described herein have been effected; and (b) is and shall be binding upon and govern the acts of all entities, including, without limitation, all filing agents, filing officers, title agents, title companies, recorders of mortgages, recorders of deeds, registrars of deeds, registrars of patents, trademarks, or other intellectual property, administrative agencies, governmental departments, secretaries of state, federal and local officials, and all other persons and entities who may be required by operation of law, the duties of their office, or contract, to accept, file, register, or otherwise record or release any documents or instruments, or who may be required to report or insure any title or state of title in or to any lease; and each of the foregoing persons and entities is directed to accept for filing any and all of the documents

* * *

47. Effective upon the Closing and except as may be otherwise provided by stipulation filed with or announced to the Court with respect to a specific matter or an order of the Court, all persons and entities are forever prohibited and enjoined from commencing or continuing in any manner any action or other proceeding, whether in law or equity, in any judicial, administrative, arbitral, or other proceeding against the Purchaser, its present or contemplated members or shareholders, its successors and assigns, or the Purchased Assets, with respect to any (i) claim against the Debtors other than Assumed Liabilities, or (ii) successor or transferee liability of the Purchaser for any of the Debtors, including, without limitation, the following actions: (a) commencing or continuing any action or other proceeding pending or threatened against the Debtors as against the Purchaser, or its successors, assigns, affiliates, or their respective assets, including the Purchased Assets; (b) enforcing, attaching, collecting, or recovering in any manner any judgment, award, decree, or order against the Debtors as against the Purchaser, its successors, assigns, affiliates, or their respective assets, including the Purchased Assets; (c) creating, perfecting, or enforcing any lien, claim, interest, or encumbrance against the Debtors as against the Purchaser or its successors, assigns, affiliates, or their respective assets, including the Purchased Assets; (d) asserting any setoff, right of subrogation, or recoupment of any kind for any obligation of any of the Debtors as against any obligation due the Purchaser or its successors, assigns, affiliates, or their respective assets, including the Purchased Assets; (e) commencing

or continuing any action, in any manner or place, that does not comply, or is inconsistent with, the provisions of this Order or other orders of this Court, or the agreements or actions contemplated or taken in respect thereof; or (f) revoking, terminating, or failing or refusing to renew any license, permit, or authorization to operate any of the Purchased Assets or conduct any of the businesses operated with such assets. Notwithstanding the foregoing, a relevant taxing authority's ability to exercise its rights of setoff and recoupment are preserved.

* * *

Exhibit A

AMENDED AND RESTATED MASTER SALE AND PURCHASE AGREEMENT

EXECUTION COPY

AMENDED AND RESTATED

MASTER SALE AND PURCHASE AGREEMENT

BY AND AMONG

GENERAL MOTORS CORPORATION,

SATURN LLC,

SATURN DISTRIBUTION CORPORATION

AND

CHEVROLET-SATURN OF HARLEM, INC.,

as Sellers

AND

NGMCO, INC.,

as Purchaser

DATED AS OF

JUNE 26, 2009

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Exhibit Y	Form of Certificate of Designation of Purchaser for Preferred Stock
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* * *

Section 2.3 Assumed and Retained Liabilities.

(a) The "Assumed Liabilities" shall consist only of the following Liabilities of Sellers:

(i) $7,072,488,605 of Indebtedness incurred under the DIP Facility, to be restructured pursuant to the terms of **Section 6.9** (the "Purchaser Assumed Debt");

(ii) all Liabilities under each Purchased Contract;

(iii) all Intercompany Obligations owed or due, directly or indirectly, by Sellers to (A) any Purchased Subsidiary or (B) any joint venture or other entity in which a Seller or a Purchased Subsidiary has any Equity Interest (other than an Excluded Entity);

(iv) all Cure Amounts under each Assumable Executory Contract that becomes a Purchased Contract;

(v) all Liabilities of Sellers (A) arising in the Ordinary Course of Business during the Bankruptcy Case through and including the Closing Date, to the extent such Liabilities are administrative expenses of Sellers' estates pursuant to Section 503(b) of the Bankruptcy Code and (B) arising prior to the commencement of the Bankruptcy Cases to the extent approved by the Bankruptcy Court for payment by Sellers pursuant to a Final Order (and for the avoidance of doubt, Sellers' Liabilities in clauses (A) and (B) above include Sellers' Liabilities for personal property Taxes, real estate and/or other ad valorem Taxes, use Taxes, sales Taxes, franchise Taxes, income Taxes, gross receipt Taxes, excise Taxes, Michigan Business Taxes and Michigan Single Business Taxes), in each case, other than (1) Liabilities of the type described in **Section 2.3(b)(iv), Section 2.3(b)(vi)** and **Section 2.3(b)(ix),** (2) Liabilities arising under any dealer sales and service Contract and any Contract related thereto, to the extent such Contract has been designated as a Rejectable Executory

Contract, and (3) Liabilities otherwise assumed in this **Section 2.3(a)**;

(vi) all Transfer Taxes payable in connection with the sale, transfer, assignment, conveyance and delivery of the Purchased Assets pursuant to the terms of this Agreement;

(vii) (A) all Liabilities arising under express written warranties of Sellers that are specifically identified as warranties and delivered in connection with the sale of new, certified used or pre-owned vehicles or new or remanufactured motor vehicle parts and equipment (including service parts, accessories, engines and transmissions) manufactured or sold by Sellers or Purchaser prior to or after the Closing and (B) all obligations under Lemon Laws;

(viii) all Liabilities arising under any Environmental Law (A) relating to conditions present on the Transferred Real Property, other than those Liabilities described in **Section 2.3(b)(iv)**, (B) resulting from Purchaser's ownership or operation of the Transferred Real Property after the Closing or (C) relating to Purchaser's failure to comply with Environmental Laws after the Closing;

(ix) all Liabilities to third parties for death, personal injury, or other injury to Persons or damage to property caused by motor vehicles designed for operation on public roadways or by the component parts of such motor vehicles and, in each case, manufactured, sold or delivered by Sellers (collectively, "Product Liabilities"), which arise directly out of accidents, incidents or other distinct and discreet occurrences that happen on or after the

Closing Date and arise from such motor vehicles' operation or performance (for avoidance of doubt, Purchaser shall not assume, or become liable to pay, perform or discharge, any Liability arising or contended to arise by reason of exposure to materials utilized in the assembly or fabrication of motor vehicles manufactured by Sellers and delivered prior to the Closing Date, including asbestos, silicates or fluids, regardless of when such alleged exposure occurs);

(x) all Liabilities of Sellers arising out of, relating to, in respect of, or in connection with workers' compensation claims against any Seller, except for Retained Workers' Compensation Claims;

(xi) all Liabilities arising out of, relating to, in respect of, or in connection with the use, ownership or sale of the Purchased Assets after the Closing;

(xii) all Liabilities (A) specifically assumed by Purchaser pursuant to **Section 6.17** and (B) arising out of, relating to or in connection with the salaries and/or wages and vacation of all Transferred Employees that are accrued and unpaid (or with respect to vacation, unused) as of the Closing Date;

(xiii) (A) all Employment-Related Obligations and (B) Liabilities under any Assumed Plan, in each case, relating to any Employee that is or was covered by the UAW Collective Bargaining Agreement, except for Retained Workers Compensation Claims;

(xiv) all Liabilities of Sellers underlying any construction liens that constitute Permitted Encumbrances with respect to Transferred Real Property; and

(xv) those other Liabilities identified on Section 2.3(a)(xv) of the Sellers' Disclosure Schedule.

(b) Each Seller acknowledges and agrees that pursuant to the terms and provisions of this Agreement, Purchaser shall not assume, or become liable to pay, perform or discharge, any Liability of any Seller, whether occurring or accruing before, at or after the Closing, other than the Assumed Liabilities. In furtherance and not in limitation of the foregoing, and in all cases with the exception of the Assumed Liabilities, neither Purchaser nor any of its Affiliates shall assume, or be deemed to have assumed, any Indebtedness, Claim or other Liability of any Seller or any predecessor, Subsidiary or Affiliate of any Seller whatsoever, whether occurring or accruing before, at or after the Closing, including the following (collectively, the "Retained Liabilities"):

(i) all Liabilities arising out of, relating to, in respect of or in connection with any Indebtedness of Sellers (other than Intercompany Obligations and the Purchaser Assumed Debt), including those items identified on Section 2.3(b)(i) of the Sellers' Disclosure Schedule;

(ii) all Intercompany Obligations owed or due, directly or indirectly, by Sellers to (A) another Seller, (B) any Excluded Subsidiary or (C) any joint venture or other entity in which a Seller or

an Excluded Subsidiary has an Equity Interest (other than a Transferred Entity);

(iii) all Liabilities arising out of, relating to, in respect of or in connection with the Excluded Assets, other than Liabilities otherwise retained in this **Section 2.3(b)**;

(iv) all Liabilities (A) associated with non-compliance with Environmental Laws (including for fines, penalties, damages and remedies); (B) arising out of, relating to, in respect of or in connection with the transportation, off-site storage or off-site disposal of any Hazardous Materials generated or located at any Transferred Real Property; (C) arising out of, relating to, in respect of or in connection with third-party Claims related to Hazardous Materials that were or are located at or that migrated or may migrate from any Transferred Real Property, except as otherwise required under applicable Environmental Laws; (D) arising under Environmental Laws related to the Excluded Real Property; or (E) for environmental Liabilities with respect to real property formerly owned, operated or leased by Sellers (as of the Closing), which, in the case of clauses (A), (B) and (C), arose prior to or at the Closing, and which, in the case of clause (D) and (E), arise prior to, at or after the Closing;

(v) except for Taxes assumed in **Section 2.3(a)(v)** and **Section 2.3(a)(vi)**, all Liabilities with respect to any (A) Taxes arising in connection with Sellers' business, the Purchased Assets or the Assumed Liabilities and that are attributable to a Pre-Closing Tax Period (including any Taxes

incurred in connection with the sale of the Purchased Assets, other than all Transfer Taxes), (B) other Taxes of any Seller and (C) Taxes of any Seller Group, including any Liability of any Seller or any Seller Group member for Taxes arising as a result of being or ceasing to be a member of any Seller Group (it being understood, for the avoidance of doubt, that no provision of this Agreement shall cause Sellers to be liable for Taxes of any Purchased Subsidiary for which Sellers would not be liable absent this Agreement);

(vi) all Liabilities for (A) costs and expenses relating to the preparation, negotiation and entry into this Agreement and the Ancillary Agreements (and the consummation of the transactions contemplated by this Agreement and the Ancillary Agreements, which, for the avoidance of doubt, shall not include any Transfer Taxes), including Advisory Fees, (B) administrative fees, professional fees and all other expenses under the Bankruptcy Code and (C) all other fees and expenses associated with the administration of the Bankruptcy Cases;

(vii) all Employment-Related Obligations not otherwise assumed in **Section 2.3(a)** and **Section 6.17**, including those arising out of, relating to, in respect of or in connection with the employment, potential employment or termination of employment of any individual (other than any Employee that is or was covered by the UAW Collective Bargaining Agreement) (A) prior to or at the Closing (including any severance policy, plan or program that exists or arises, or may be deemed to exist or arise, as a result of, or in connection with, the

transactions contemplated by this Agreement) or (B) who is not a Transferred Employee arising after the Closing and with respect to both clauses (A) and (B) above, including any Liability arising out of, relating to, in respect of or in connection with any Collective Bargaining Agreement (other than the UAW Collective Bargaining Agreement);

(viii) all Liabilities arising out of, relating to, in respect of or in connection with Claims for infringement or misappropriation of third party intellectual property rights;

(ix) all Product Liabilities arising in whole or in part from any accidents, incidents or other occurrences that happen prior to the Closing Date;

(x) all Liabilities to third parties for death, personal injury, other injury to Persons or damage to property, in each case, arising out of asbestos exposure;

(xi) all Liabilities to third parties for Claims based upon Contract, tort or any other basis;

(xii) all workers' compensation Claims with respect to Employees residing in or employed in, as the case may be as defined by applicable Law, the states set forth on **Exhibit G** (collectively, "Retained Workers' Compensation Claims");

(xiii) all Liabilities arising out of, relating to, in respect of or in connection with any Retained Plan;

(xiv) all Liabilities arising out of, relating to, in respect of or in connection with any Assumed Plan or Purchased Subsidiaries Employee Benefit

Plan, but only to the extent such Liabilities result from the failure of such Assumed Plan or Purchased Subsidiaries Employee Benefit Plan to comply in all respects with TARP or such Liability related to any changes to or from the administration of such Assumed Plan or Purchased Subsidiaries Employee Benefit Plan prior to the Closing Date;

(xv) the Settlement Agreement, except as provided with respect to Liabilities under Section 5A of the UAW Retiree Settlement Agreement; and

(xvi) all Liabilities arising out of, related to or in connection with any (A) implied warranty or other implied obligation arising under statutory or common law without the necessity of an express warranty or (B) allegation, statement or writing by or attributable to Sellers.

* * *

Section 9.6 Amendment. This Agreement may not be amended, modified or supplemented except upon the execution and delivery of a written agreement executed by a duly authorized representative or officer of each of the Parties.

* * *