APPENDIX TABLE OF CONTENTS

OPINIONS AND ORDERS

REHEARING ORDER

OTHER DOCUMENT

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT (DECEMBER 29, 2020)

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

TAYLOR & SONS, INC., CEDRIC THEEL, INC., WHITEY'S, INC., RFJS COMPANY, LLC, JIM MARSH AMERICAN CORPORATION, LIVONIA CHRYSLER JEEP, INC., BARRY DODGE INC.,

Plaintiffs-Appellants,

ALLEY'S OF KINGSPORT, INC., ET AL.,

Plaintiffs,

v.

UNITED STATES,

Defendant-Appellee.

MIKE FINNIN MOTORS, INC.,
GUETTERMAN MOTORS, INC.,

Plaintiffs-Appellants,

ALLEY'S OF KINGSPORT, INC., ET AL.,

Plaintiffs,

v.

UNITED STATES,

Defendant-Appellee.

No. 2020-1185, 2020-1205

On Appeal from the United States Court of Federal Claims in Nos. 1:10-cv-00647-NBF, 1:11-cv-00100-NBF, 1:12-cv-00900-NBF, Senior Judge Nancy B. Firestone.

Before: DYK, TARANTO, and STOLL, Circuit Judges.

TARANTO, Circuit Judge.

Before mid-2009, the plaintiffs in these cases were automobile dealers operating as franchisees of Chrysler LLC. In that year, Chrysler filed a petition for reorganization in bankruptcy, and it rejected the franchise agreements in the bankruptcy proceeding under 11 U.S.C. § 365. Plaintiffs sued the United States in the Court of Federal Claims, alleging that the government played a role in Chrysler's rejection of the franchise agreements that constituted a taking of their property, requiring just compensation under the Takings Clause of the Fifth Amendment to the United States Constitution. In 2014, agreeing with the Claims Court, we allowed the case to proceed beyond the pleading stage. *A & D Auto Sales, Inc. v. United States*, 748 F.3d 1142 (Fed. Cir. 2014). On remand, the Claims Court, after a full trial, rejected the claims on two grounds—first, that the government's actions did not amount to coercion of Chrysler's decision to reject the franchise agreements and, second, that plaintiffs did not prove that the franchise agreements would have had value but for those actions. *Colonial Chevrolet Co, Inc. v. United States*, 145 Fed. Cl. 243 (2019) (Trial Opinion).

On plaintiffs' appeal, we now affirm on the latter ground and do not address the former.

I

A

Taylor & Sons, Inc. (Taylor) and Mike Finnin Motors, Inc. (Finnin) are two of the nine plaintiffs-appellants, all of whom, like many other dealers, had their franchise agreements with Chrysler rejected in the 2009 Chrysler bankruptcy proceeding. Taylor and six other plaintiffs-appellants have been called the "Alley's dealers," and Finnin and one other plaintiff-appellant have been called the "Colonial dealers," reflecting the names of the first-named plaintiffs in the actions filed and consolidated in the Claims Court.

In late 2008, Chrysler, which had been experiencing significant difficulties that were exacerbated by a general market crisis, sought financial assistance from the federal government. The Department of the Treasury entered into a Loan and Security Agreement (Agreement) with Chrysler. The Agreement provided for an immediate bridge loan (totaling $4 billion) to Chrysler and also provided for further, more wide-ranging negotiations—in which the Treasury Department's new Auto Team Task Force (Auto Team) was to play a central role—aimed at enabling the Chrysler business to continue operating over the long term. J.A. 10460 (§ 7.20(b)). The Auto Team and Chrysler ultimately agreed on a plan under which Chrysler would file for reorganization, the government would supply substantial funding during the bankruptcy process, and a newly formed entity (to be owned in part by Italian vehicle manufacturer Fiat) would take over the business. One issue discussed during the negotiations was reducing the number of Chrysler's dealer-franchisees, which Chrysler had been doing for many years through its "Project Genesis," though more gradually and with a greater role for franchisees' choice than was now discussed. J.A. 10365–66, 10378–82.

Chrysler filed for bankruptcy on April 30, 2009. *In re Chrysler LLC*, 405 B.R. 84, 87–88 (Bankr. S.D.N.Y. 2009). Two weeks later, on May 14, 2009, Chrysler, as debtor-in-possession, invoked its right under 11 U.S.C. § 365 to "assume or reject any executory contract" by filing a motion to approve rejection 789 franchise agreements, including those of the Alley's and Colonial dealers. *Id.* at 88. The bankruptcy court approved the rejection on June 9, 2009, effective immediately, with the result that the now-former franchisees could no longer exercise franchise-agreement rights, such as holding themselves out as authorized Chrysler dealers and providing warranty-covered service for which Chrysler would pay. Order Rejecting Executory Contracts, *In re Chrysler LLC*, No. 09-50002, ECF No. 3802 (Bankr. S.D.N.Y. 2009).

B

Following rejection of their franchise agreements, plaintiffs filed the present actions, alleging that the federal government had committed a taking by its actions that assertedly coerced Chrysler's rejection of the franchise agreements in bankruptcy. When the government moved to dismiss the claims for failure to state a claim, the Claims Court denied the motion, *Colonial Chevrolet Co., Inc. v. United States*, 103 Fed. Cl. 570 (2012); *Alley's of Kingsport, Inc. v. United*

States, 103 Fed. Cl. 449 (2012), but granted the government's motion for interlocutory appeal, *Colonial Chevrolet Co., Inc. v. United States*, 106 Fed. Cl. 619 (2012); *Alley's of Kingsport, Inc. v. United States*, 106 Fed. Cl. 762 (2012).

On the interlocutory appeal, we affirmed the denial of dismissal and remanded the case. *A & D Auto Sales*, 748 F.3d at 1147, 1159. We concluded that plaintiffs had alleged sufficient facts for the takings claim to pass muster at the motion-to-dismiss stage, save for their failure to allege a loss of economic value because the complaints "d[id] not sufficiently allege that the economic value of the plaintiffs' franchises was reduced or eliminated as a result of the government's actions." *Id.* at 1147. And we remanded with instructions to grant plaintiffs leave to amend their complaints to allege economic loss of "but-for economic use or value" in the absence of government financing. *Id.* at 1157–58.

On remand, the complaints were amended, then the case proceeded through discovery and a trial, after which the Claims Court entered findings of fact and conclusions of law that rejected the dealers' takings claims on two grounds, each sufficient for judgment against the dealers. The court ruled first that the challenged government actions that led to Chrysler's franchise terminations—focused on conditions the government placed on its provision of funding—did not constitute a taking because those actions did not rise to the level of "coercion" as the trial court understood our holding in *A&D Auto Sales. Trial Opinion*, 145 Fed. Cl. at 249, 316–22. The Claims Court also ruled that, in any event, the taking claim failed on a separate ground: the dealers failed to prove that their franchise agreements would have had positive value in a "but for world" without the government's challenged actions. *Id.* at 249, 322–24.

The Claims Court entered final judgment against the dealers on October 2, 2019. The dealers timely appealed. We have jurisdiction under 28 U.S.C. § 1295(a)(3).

II

Whether government action constitutes a compensable taking is a question of law based on factual underpinnings. *See Wyatt v. United States*, 271 F.3d 1090, 1096 (Fed. Cir. 2001). We review the Claims Court's legal conclusions de novo and its factual findings for clear error. *Reoforce, Inc. v. United States*, 853 F.3d 1249, 1265 (Fed. Cir. 2017). Findings of fact are "clearly erroneous" when "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Gadsden Indus. Park, LLC v. United States*, 956 F.3d 1362, 1368 (Fed. Cir. 2020) (internal quotation marks and citations omitted). "'The fact-finder has broad discretion in determining credibility'" of witnesses. *J.C. Equip. Corp. v. England*, 360 F.3d 1311, 1315 (Fed. Cir. 2004) (quoting *Bradley v. Sec'y of Health & Human Servs.*, 991 F.2d 1570, 1575 (Fed. Cir. 1993)).

On appeal, plaintiffs challenge both of the Claims Court's rulings. We conclude that the Claims Court committed no reversible error in determining that the dealers failed to prove a positive value that their franchise agreements would have had but for the challenged government actions. That conclusion suffices for affirmance. We do not reach the Claims Court's no-coercion ruling.

The Fifth Amendment states: "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V. There is no compensable taking when the alleged economic impact of the government action has not resulted in a diminution in value. *See A&D Auto Sales*, 748 F.3d at 1157 (collecting cases); *see also Love Terminal Partners, L.P. v. United States*, 889 F.3d 1331, 1342 (Fed. Cir. 2018); *Cienega Gardens v. United States*, 331 F.3d 1319, 1340 (Fed. Cir. 2003).[1] "It is the property owner who bears the burden of proving an actual loss has occurred"; the property owner must "show actual damages 'with reasonable certain[t]y,' which 'requires more than a guess, but less than absolute exactness.'" *Gadsden*, 956 F.3d at 1371 (quoting *Otay Mesa Prop., L.P. v. United States*, 779 F.3d 1315, 1323 (Fed. Cir. 2015)) (cleaned up).

The trial court did not clearly err in finding that the dealers failed to meet their burden. The dealers have conceded that Chrysler would have petitioned for bankruptcy, and proceeded to liquidate, in a hypothetical, but-for world without government financial assistance. *Trial Opinion*, 145 Fed. Cl. at 247; Alley's Op. Br. 44; Colonial Op. Br. 36. The dealers' but-for-

---

[1] In their opening brief, the Colonial dealers argue that the government actions at issue were "a per se direct taking, akin to a physical taking," Colonial Op. Br. 38–39, but they present no argument that this characterization, even if correct, modifies their burden to prove the loss in value of the franchise agreements but for the challenged government actions. We therefore apply the loss-in-value requirement here without regard to other issues about the proper characterization of the claim for takings analysis.

world valuations of the franchise agreements—presented by experts Diane Anderson Murphy and Edward Stockton—rested on premises about how Chrysler or a bankruptcy trustee would have treated the franchise agreements in such a liquidation. The Claims Court rejected those crucial premises about the butforworld franchise treatment as unsupported and unpersuasive. Trial Opinion, 145 Fed. Cl. at 319, 322–24. We see no basis for reversing that determination, which leaves plaintiffs with no reliable proof of the but-for-world value they must establish.

The Claims Court found that "a trustee in bankruptcy would have rejected all franchise agreements to protect the assets of the bankruptcy estate." *Trial Opinion*, 145 Fed. Cl. at 323. The evidence supports that finding. Donald MacKenzie, one of the government's expert witnesses, testified that "Chrysler could not have paid its dealers for any warranty service performed after the [bankruptcy] petition date, nor could the company have provided assurance of future performance under the dealer franchise agreements," due to the company's high debt. Testimony of Donald MacKenzie, Tr. 4076:10–14 (May 3, 2019), No. 1:10-cv-00647, ECF No. 480; *id.* at 4045:15–19; *see Trial Opinion*, 145 Fed. Cl. at 319, 323. There was evidence that Chrysler, in an unassisted liquidation, would have ceased production and other activities. *Trial Opinion*, 145 Fed. Cl. at 294. With context-describing support from former Bankruptcy Judge Gerber, Mr. MacKenzie also testified that Chrysler's obligation under the franchise agreements to purchase back unsold vehicles and parts in the event of termination (triggered by a discontinuance of production, J.A. 10113) was a liability that, consistent with fiduciary and trustee duties, would have been avoided in a liquidation by a rejection of the franchise agreements. *See Trial Opinion*, 145 Fed. Cl. at 307–09, 319, 323–324. The Claims Court reasonably found that, in a liquidation (in a but-for world), the franchise agreements of plaintiffs would have been rejected.

That finding amply supports the Claims Court's refusal to credit the valuation opinions of the plaintiffs' experts. The valuation opinion of Ms. Murphy, for the Alley's dealers, rested on the contrary assumption—that the franchise agreements would <u>not</u> have been rejected in a liquidation, so that the dealerships would have continued to operate as Chrysler dealerships and sell Chrysler vehicles. *See, e.g., id.* at 254–255, 284; Testimony of Diane Anderson Murphy, Tr. 1749: 4–7 (Apr. 15, 2019), No. 1:10-cv-00647, ECF No. 462 ("Q. Your valuation certainly assumes that the dealers will last more than five years, correct? A. The dealership would last more than five years, yes."); id. at 1750:1–6 ("You write . . . 'even in the absence of Government funding and Chrysler having entered bankruptcy, the franchise agreements of the Chrysler franchisees would remain in full force and effect.' Correct? A. Yes."). The same is true of the valuation testimony of the Colonial dealers' valuation expert Mr. Stockton. *See Trial Opinion*, 145 Fed. Cl. at 323.

There also were other unpersuasive assumptions built into the opinions of the dealers' valuation experts. For example, the Claims Court found a number of additional assumptions by Ms. Murphy unsupported by the evidentiary record, *Trial Opinion*, 145 Fed. Cl. at 323 n.46—a finding not challenged on appeal. The Claims Court, relying on testimony of Mr. MacKenzie and others, rejected, as well, the assumption embedded in Mr. Stockton's valuation that the federal government would have chosen to continue to cover Chrysler warranties after Chrysler began to liquidate. Id. at 303 n.41, 319, 323. Further, based on the fact that the property at issue here consists of contract rights, *see Taylor v. United States*, 959 F.3d 1081, 1087 (Fed. Cir. 2020) (noting Takings Clause precedents involving contract rights)—specifically, the plaintiffs' rights under their franchise agreements—the Claims Court noted that Ms. Murphy testified that her calculations included tangible property beyond the rights in the franchise agreements, *see* J.A. 21797 (Tr. 1542:2–22), yet her opinion "did not separately analyze how these tangible assets contributed to the plaintiff's income stream profits, separate from the franchise agreement allegedly taken," *Trial Opinion*, 145 Fed. Cl. at 322. The same was true of Mr. Stockton's valuation, which he testified included, beyond the terms of the franchise agreements, "other elements of value associated with franchise operations." *Trial Opinion*, 145 Fed. Cl. at 286; see also J.A. 22611 (Tr. 2356:15–16). "[W]hat was important was for the focus to be on awarding just compensation for exactly what had been taken in the case." *Otay Mesa Prop., L.P.*, 779 F.3d at 1320. The Claims Court reasonably found the testimony of the dealers' experts not adequately so focused.

We conclude that the record supports the Claims Court's rejection of crucial assumptions of the plaintiffs' experts and finding that the plaintiffs did not provide a reliable proof that, in the but-for world, the franchise agreements would have had a positive value. The Claims Court's finding is not clearly erroneous. And contrary to the Colonial dealers' contention, Colonial

Op. Br. 51–52, the finding of no proof of but-for-world value of the specific property at issue does not rest on any exclusion by the Claims Court of a legally legitimate method of proving value. The variations in methodology discussed by the Colonial dealers are immaterial given the Claims Court's well-supported rejection of the plaintiffs' experts' assumption about the treatment of the franchise agreements in the liquidation that would concededly have occurred in the but-for world.

We have considered the dealers' remaining arguments and find them unpersuasive.

III

For the foregoing reasons, we affirm the trial court's judgment.

AFFIRMED

TRIAL OPINION OF THE UNITED STATES COURT OF FEDERAL CLAIMS (OCTOBER 12, 2019)

IN THE UNITED STATES
COURT OF FEDERAL CLAIMS

COLONIAL CHEVROLET CO., INC., ET AL.,

Plaintiffs,

v.

THE UNITED STATES,

Defendant.

ALLEY'S OF KINGSPORT, INC., ET AL.,

Plaintiffs,

v.

THE UNITED STATES,

Defendant.

UNION DODGE, INC., ET AL.,

Plaintiffs,

v.

THE UNITED STATES,

Defendant.

Nos. 10-647C, 11-100C, and 12-900C

Fifth Amendment Taking; Government Action Through Coercion; Economic Value in a "But For World"

Before: Nancy B. FIRESTONE, Senior Judge.

FIRESTONE, Senior Judge.

This action was brought by car dealers that had their franchise agreements with Chrysler LLC ("Old Chrysler" or "Chrysler") rejected when Old Chrysler went into bankruptcy during the Great Recession in April 2009.[1] These car dealer plaintiffs claim that the United States Government ("government") is liable for taking their franchise agreements without just compensation in contravention of the Fifth Amendment. They claim the government is liable because the government through its actions coerced Chrysler into filing for bankruptcy under a government negotiated prepackaged bankruptcy plan, which called for a reduction in Chrysler's franchise network. The reduction was accomplished through the rejection in the bankruptcy of 789 franchise agreements, including plaintiffs' agreements.[2] Plaintiffs claim that had the

---

[1] The court's use of the terms "Old Chrysler" or "Chrysler" in this opinion refer to Chrysler before it filed for bankruptcy in 2009. The term "New Chrysler" will be used to refer to the Chrysler that emerged after the 2009 bankruptcy. The court follows the same approach for Old General Motors, "Old GM" or "GM," to refer to the company before it filed for bankruptcy in 2009.

[2] Under the Bankruptcy Code, 11 U.S.C. § 365, a debtor or bankruptcy trustee "may assume or reject any executory contract . . .

government not gotten involved in the Chrysler bankruptcy their franchise agreements would not have been rejected by Chrysler in bankruptcy but would have been assumed by the owner of New Chrysler.

The taking claims addressed in this decision trace back to three separate lawsuits, Case Nos. 10-647, 11-100 and 12-900, filed by three groups of plaintiffs that owned franchise agreements with either Old Chrysler or Old General Motors and that had their franchise agreements rejected in the Chrysler and GM bankruptcies. The first of these three lawsuits, *Colonial Chevrolet Co.*, was filed on September 27, 2010 and the government moved to dismiss the lawsuit on January 21, 2011. On February 27, 2012 the government's motion to dismiss was denied and the case was certified for interlocutory appeal. *Colonial Chevrolet Co., Inc. v. United States*, 103 Fed. Cl. 570 (2012); *Colonial Chevrolet Co., Inc. v. United States*, 106 Fed. Cl. 619, 622 (2012). During the Federal Circuit's interlocutory review, two later filed cases, *Alley's of Kingsport, Inc. and Union Dodge, Inc.* (Case Nos. 11-100 and 12-900) were stayed pending the Federal Circuit's decision in *Colonial Chevrolet Co.*

On April 7, 2014, the Federal Circuit issued its decision affirming the denial of the government's motion to dismiss. *A&D Auto Sales, Inc. v. United States*, 748 F.3d 1142 (Fed. Cir. 2014). The Circuit held that the plaintiffs had alleged sufficient facts to support potential Fifth Amendment taking claims based on a theory of coercion. The Circuit also held,

---

of the debtor." The franchise agreements at issue in this case are executory contracts that were rejected in bankruptcy by the debtor, Chrysler.

however, that the plaintiffs had failed to allege sufficient facts to show that their franchise agreements would have had economic value in a "but for world" where the government had not provided financial assistance to Chrysler or GM.[3]

Regarding a taking by coercion, the Federal Circuit indicated that if the plaintiffs could establish that Chrysler's decision to enter bankruptcy under terms negotiated by the government was not voluntary, a potential taking may be found. *Id.* at 1154. The Circuit identified several cases where a party's actions affecting the property of third parties was found to be attributable to government pressure and thus a possible taking under a theory of government coercion. *Id.* at 1154-55. Based on the plaintiffs' allegations of Chrysler and GM seeking government assistance during the Great Recession in late 2008 and early 2009, the Circuit listed several "circumstances" it deemed potentially relevant to the issue of coercion including but not limited to (1) whether the government insisted on the franchise terminations or targeted franchisees for termination, (2) whether the franchise terminations would have occurred in any event, (3) whether government financing was essential to Chrysler, and (4) whether the government had a role in creating the economic circumstances alleged to have given rise to coercion. *Id.* at 1155. But the Circuit also noted that if the government was acting

---

[3] The concept of the "but for world" is derived from the Federal Circuit's discussion of economic value in *A&D Auto Sales*. 748 F.3d at 1158-59. As the Circuit explained, in a regulatory taking case, plaintiffs have the burden of showing what value their property would have had in the absence of government action. *Id.*

only as a lender to Chrysler and GM and negotiated bankruptcy terms necessary to protect the government's financial interests, the government might not be liable for a taking. *Id.* at 1156-57.

Regarding plaintiffs' failure to allege that their franchise agreements had economic value, the Circuit explained that to prove a taking the plaintiffs would need to establish that their franchise agreements would have had value in a hypothetical "but for world" where the government had not provided financial assistance to Chrysler or GM. *Id.* at 1157-59. If plaintiffs' franchise agreements would not have had value in a "but for world" without government assistance, the Circuit explained, the government did not "take" anything of value and cannot be liable for a "taking." *Id.* The Circuit remanded the case to this court to allow plaintiffs the opportunity to amend their complaints to include allegations of value in a "but for world" without government assistance. *Id.* at 1158-59.

On September 15, 2014, the plaintiffs in all three above-captioned cases filed amended complaints in which they posited that their franchise agreements would have had value under several "but for world" scenarios in which the government did not provide financial assistance to Chrysler or GM. *Colonial Chevrolet Co., Inc. v. United States*, 123 Fed. Cl. 134, 140-46 (2015). The government moved to dismiss the amended complaints claiming that plaintiffs' "but for" assumptions were either implausible or barred by *A&D Auto Sales*. *Id.* On September 9, 2015, this court granted in part and denied in part the government's motion, holding that certain of plaintiffs' "but for world" scenarios were consistent with the Federal

Circuit's decision in *A&D Auto Sales. Id.* The court also severed the GM plaintiffs from the Chrysler plaintiffs and put the GM plaintiffs' claims on a separate discovery timetable.

Following this court's decision granting in part and denying in part the government's motion to dismiss, the court, on December 4, 2015, consolidated the three above-captioned lawsuits for the purposes of case management, discovery, and for trial on the merits of the Chrysler plaintiffs' taking claims. On April 6, 2016, this court denied the Chrysler plaintiffs' motion for class certification. Thereafter, the parties chose 10 representative Chrysler plaintiffs for purposes of discovery and trial. One of the Chrysler representative plaintiffs withdrew from the litigation prior to the commencement of trial leaving nine representative plaintiffs.

The nine representative plaintiffs were divided into two groups: the *Alley's* group with seven plaintiffs including Taylor & Sons, Inc., Cedric Theel, Inc., Whitey's Inc., RFJS Company, Jim Marsh American Corp., Livonia Chrysler Jeep, Inc., Barry Dodge, Inc., and the *Colonial* group with two plaintiffs including Guetterman Motors, Inc. and Mike Finnin Motors, Inc. The two groups of plaintiffs are represented by different attorneys and sometimes relied on different evidence to prove their taking claims.

Trial to determine principally whether there was government action through coercion and whether plaintiffs' franchise agreements would have had economic value in a "but for world" without government assistance was held in Washington, D.C. between April 8, 2019 and May 8, 2019. Post-trial arguments were held on June 19, 2019 and June 20, 2019. During trial the court heard testimony from 36 witnesses and received 542 exhibits into evidence.

Importantly, at trial the representative plaintiffs did not focus their coercion evidence on Chrysler being forced to accept the government's negotiated bankruptcy terms (including a reduction in Chrysler franchises) because Chrysler needed the government's financial assistance, as the Federal Circuit had assumed in *A&D Auto Sales*. 748 F.3d at 1155. Instead, plaintiffs presented opinion testimony to the effect that Chrysler did not need the government's financial assistance. Plaintiffs' experts conceded that Chrysler would have had to file for bankruptcy in 2009. However, they opined that Chrysler would have had more options in bankruptcy than the one option negotiated by the government. According to plaintiffs' experts, Chrysler was coerced because Chrysler was left with no alternative but to accept the government's assistance after the government took over negotiations with Chrysler's creditors and others in early 2009.

Plaintiffs' evidence to prove coercion by government action was somewhat conflicting at trial. On the one hand, the plaintiffs introduced evidence to show that Chrysler did not wish to enter bankruptcy but instead wanted the government to loan Chrysler billions of dollars outside of bankruptcy. The plaintiffs relied on this evidence to show (among other things) that the government, not Chrysler, wanted to use bankruptcy to reduce Chrysler's franchise network by rejecting plaintiffs' franchise agreements, rather than pursuing voluntary franchise terminations consistent with state law.

On the other hand, the plaintiffs conceded that Chrysler could not have avoided bankruptcy in 2009 and built both their coercion and economic value theories around this concession. The plaintiffs offered expert opinions to support a coercion theory based on the assumption that there were many companies interested in purchasing Chrysler in late 2008 and early 2009, during the Great Recession. According to plaintiffs' experts, these potential purchasers would have kept Chrysler open during a Chrysler bankruptcy and would not have had any reason to reject any franchise agreements. Plaintiffs introduced evidence to show that the government took over negotiations with Chrysler's creditors, worker unions, and suppliers to accomplish the government's public policy goals of saving jobs and pensions. The plaintiffs asserted that their evidence demonstrated that the decision to reduce the Chrysler franchise network involuntarily in bankruptcy was in furtherance of these policy goals and was never part of Chrysler's own franchise reduction plans.

Plaintiffs also claimed that their franchise agreements would have had economic value in a "but for world" where Chrysler did not accept government assistance but was able to enter bankruptcy outside the terms negotiated by the government. Specifically, plaintiffs presented expert valuation testimony to show that their franchise agreements would have had value in a "but for world" without government assistance because their franchise agreements would never have been rejected in a bankruptcy.

The *Alley's* plaintiffs presented expert opinion testimony to show that if Chrysler had entered bankruptcy without government assistance the outcome for Chrysler would have been very similar to the bankruptcy with government assistance, but with all franchisees remaining Chrysler franchisees. According to the evidence presented by the *Alley's* plaintiffs, franchises had value in a "but for world" because franchisees would have had retained all their income streams, including new car sales, used car sales, warranty and other services. They also presented expert valuation testimony to the effect that that their income from these sources would have continued for years because any new Chrysler owner would have assumed their franchise agreements in bankruptcy.

The *Colonial* plaintiffs also presented expert opinion evidence to show that their franchise agreements would have had value in a "but for world." The *Colonial* expert also opined that franchisees would have been able to generate profits from various income streams during a Chrysler bankruptcy without government assistance. The *Colonial* plaintiffs, however, did not claim that their franchise agreements had a "fair market value," as the *Alley's* plaintiffs' claimed. Rather, the *Colonial* plaintiffs' expert set forth various "but for world" values based on the anticipated profits those plaintiffs would have received from being able to sell their remaining Chrysler inventory and used cars, and from performing warranty and other service work.

The government presented fact and expert evidence to refute the *Alley's* and *Colonial* plaintiffs' claims of government liability based on coercion and on economic value. The government presented evidence to show that the government did not force Chrysler into bankruptcy or into rejecting any of the plaintiffs' franchise agreements. The government presented undisputed evidence to show that Chrysler had been working to reduce its franchise network for years and that Chrysler, not the government, identified the number and names of the franchise agreements to be rejected in bankruptcy.

The government also presented evidence from government and Chrysler witnesses to show that Chrysler's decision to enter bankruptcy under government negotiated bankruptcy terms was based on Chrysler's best business judgment after consideration of its options. The government presented undisputed testimony from Chrysler and government witnesses to confirm that the government did not directly threaten or force Chrysler to accept the government's bankruptcy plan. The undisputed evidence established that the government was willing to allow Chrysler to pursue bankruptcy with limited government assistance if it wished to proceed in bankruptcy on its own. In fact, the government offered Chrysler $750 million to help finance a wind-down if Chrysler wished to pursue other bankruptcy options. The undisputed evidence also made clear that if all of Chrysler's creditors had agreed to the government's terms, the government would have given Chrysler financial assistance outside of bankruptcy.

The government also presented undisputed testimony from Chrysler witnesses to show that Chrysler's financial problems pre-dated the Great Recession. The undisputed evidence established that Chrysler had started to look for a partner or alliance in 2007 because Chrysler knew it was not viable without an alliance with a company having a small car fleet. The testimony established that no car manufacturer was interested in joining forces with Chrysler in 2007 other than Fiat, and that Fiat made clear that it was not willing to offer Chrysler the financial assistance Chrysler needed.

The government further presented expert opinion evidence to show that the assumptions the *Alley's* and *Colonial* plaintiffs' experts relied on to establish that Chrysler could have remained open during a bankruptcy without government assistance and would not have rejected any franchise agreements were not supported by facts. The government presented expert evidence to establish that there were no potential purchasers of Chrysler in 2009. The government also presented expert evidence to confirm that, without government funding, Chrysler would not have been able to remain operational during a bankruptcy. According to the government's expert witnesses, Chrysler would have faced immediate liquidation under Chapter 7 of the Bankruptcy Code if it had not received government assistance and would have had to immediately close its factories and reject all of its franchise agreements. Based on this evidence the government asserted that Chrysler's decision to accept the government's bankruptcy plan was made voluntarily and was not coerced.

Regarding economic value, the government's experts opined that, in the "but for world" without government assistance, all of Chrysler's factories and parts depots would have closed. The experts opined that in the "but for world" there would have been no new cars to sell, paid warranty work or Chrysler parts. According to the government's experts, in the "but for world" without government assistance, Chrysler would have been forced into liquidation and the bankruptcy trustee would have rejected all Chrysler franchises. As such, the government's experts concluded, none of Chrysler's franchise agreements would have had economic value.

As discussed in the opinion that follows, the court finds, after considering all of the fact and expert evidence, that the plaintiffs failed to establish by a preponderance of the evidence that the United States by its actions coerced Chrysler into filing for bankruptcy under the government's negotiated bankruptcy terms or into rejecting any of the plaintiffs' Chrysler franchise agreements in the Chrysler bankruptcy.[4] The evidence established that the government did not force Chrysler to accept its bankruptcy terms. The evidence established that the government was willing to give $750 million to Chrysler if Chrysler wished to proceed to bankruptcy alone.

The government's evidence also established that the government through its actions did not interfere with potential acquirers from coming forward to purchase Chrysler in bankruptcy. The evidence established that none of the potential acquirers the plaintiffs' identified were interested or capable of purchasing Chrysler in April 2009. The evidence established that Chrysler accepted the government's prepackaged bankruptcy plan based on Chrysler's best business judgment after consideration of its options. The evidence further established that had the government not provided financial assistance to Chrysler, Chrysler would have been forced into liquida-

---

[4] The plaintiffs conceded that Chrysler was not acting as the government's agent in this case. Tr.4821:25-4822:5. Thus their entire case hinged on their proving the government by its actions coerced Chrysler into entering bankruptcy under pre-packaged terms negotiated by the government.

tion under Chapter 7 of the Bankruptcy Code and that, in that circumstance, all of plaintiffs' franchise agreements would have been rejected by the bankruptcy trustee. The evidence thus established that Chrysler's decision to accept the government's prepackaged bankruptcy terms was a voluntary decision and not coerced.

Because the evidence established that Chrysler would have faced immediate liquidation in a Chapter 7 bankruptcy without government assistance, the court also finds that plaintiffs failed to prove their franchise agreements would have had value in a "but for world" without government assistance. The evidence established that in a Chapter 7 bankruptcy all of Chrysler's franchise agreements would have been rejected by the bankruptcy trustee to preserve the assets of the bankruptcy estate and that plaintiffs' franchise agreements would have had no economic value in that circumstance. Thus, plaintiffs failed to prove that any property of value was "taken" from them.[5]

In reaching these conclusions, as discussed in the opinion, the court is mindful of the testimony it heard from the owners of each representative franchise and appreciates the sense of betrayal they felt when they learned that Chrysler had decided to reject their franchise agreements in the April 2009 Chrysler bankruptcy. The court sympathizes with many of

---

[5] Because the court reaches these conclusions, the court does not discuss in this opinion other issues presented at trial as to whether the taking alleged by the plaintiffs was a per se taking or should be evaluated under the *Penn Central* factors. *See A&D Auto Sales*, 748 F.3d at 1151, 1159.

these owners who testified as to how the loss of their franchise agreements devastated not only their businesses but their lives. Nonetheless, the court was tasked with deciding whether the plaintiffs proved that the United States coerced Chrysler into rejecting their franchise agreements and whether their franchise agreements would have had any value during the Great Recession in a "but for world" without the government's financial assistance. For the reasons discussed below, the court was compelled to find that the plaintiffs did not meet their burden and it is for those reasons that plaintiffs' taking claims have been rejected.

The court's opinion begins with a lengthy summary of the evidence presented followed by detailed findings of fact and conclusions of law as follows: (I) Summary of the Individual Plaintiffs' Testimony and Claims, (II) Summary of the Plaintiffs' Evidence, (III) Summary of the Government's Evidence, and, finally, (IV) Findings of Fact and Conclusions of Law.

I. Summary of Individual Plaintiffs' Testimony and Claims

Based on the evidence summarized below, the court has made the following findings regarding the terms of the plaintiffs' franchise agreements, the profitability of their franchises before their Chrysler franchise agreements were rejected in the Chrysler bankruptcy, Chrysler's justification for rejecting their franchise agreements in bankruptcy, and their participation or decision not to participate in an arbitration program established by Congress after the Chrysler bankruptcy to allow Chrysler franchisees to seek reinstatement as New Chrysler franchisees. The court also summarizes the amount each plaintiff claims as just compensation based on their experts' valuations.

A. Taylor & Sons Inc.

Gregory Taylor testified on behalf of the Taylor & Sons, Inc. ("Taylor") dealership, which for the years at issue was located at 300 Cedar Street in Sandpoint, Idaho. Taylor was incorporated under Idaho state law. The dealership included Chrysler, Dodge, and Jeep franchises at the time of the alleged taking. Taylor also had a GM franchise allowing it to sell Chevrolet vehicles at the time of the alleged taking of its Chrysler franchises. Taylor operated its Chrysler/Dodge/Jeep and Chevrolet dealership under the same roof from 1988 until 2009. Taylor continues to sell Chevrolet vehicles under its franchise agreement with New GM.

Taylor was formed in August 1988 and when it purchased a majority interest in an existing Chevrolet, Oldsmobile, Chrysler, Dodge, and Plymouth dealership. In September 1988, Taylor was awarded a new Chrysler franchise agreement, a new Plymouth franchise agreement,[6] and a new Dodge franchise agreement. PX162 (Chrysler, Plymouth, and Dodge Agree-

---

[6] Chrysler stopped producing Plymouth cars in 2001 and terminated all Plymouth franchises, including the Taylor franchise, on September 30, 2001. Taylor, along with all other Plymouth franchise holders, received a letter from Chrysler on September 19, 2000, a year before the termination, informing them that the Plymouth line would end with the 2001 model year. In these letters, Chrysler agreed, consistent with the terms of the Plymouth franchise agreements, to buy back all new vehicles, parts, accessories, and signs from terminated Plymouth franchise holders.

ments). In June 1998, Taylor was awarded a Jeep franchise which was subject to the same terms as the Chrysler, Plymouth, and Dodge franchise agreements. DX39 (Jeep Agreement).

The Chrysler, Dodge, and Jeep franchise agreements Taylor entered into with Chrysler were virtually identical. Entitled "Sales and Service Agreements," the franchise agreements provided Taylor with the "right to order and purchase from [Chrysler] and to sell at retail . . . those specific models of [Chrysler] vehicles . . . listed on the Motor Vehicle Addendum[.]" PX162 (Chrysler and Dodge Agreements), DX39 (Jeep Agreement). The Motor Vehicle Addendum ("MVA") to Taylor's Chrysler franchise agreement allowed it to sell "[a]ll passenger cars of the Chrysler line-make." PX162. The MVA to the Dodge franchise agreement allowed it to sell "[a]ll passenger cars of the Dodge line-make" and "[a]ll trucks of the Dodge line-make." PX162. The MVA for the Jeep dealership allowed Taylor to sell "all trucks in the Jeep Line-make." DX39.

In addition to allowing Taylor to sell the abovementioned Chrysler vehicles, the agreement also contained a "Sales Locality" provision which identified the "territory of DEALER's responsibility for the sale of [Chrysler, Dodge or Jeep] vehicles, vehicle parts and accessories." PX162; DX39. Taylor's sales locality ranged from twenty-five to seventy-five miles from its dealership depending on the direction and county boundaries. In the same Sales and Service Agreement, Taylor agreed to build a facility in a specific area meeting the requirements set forth by Chrysler for "new and used vehicle display areas, salesrooms, service areas, parts and accessories areas, building exterior and grounds [that would be] satisfactory to

[Chrysler] as to appearance and layout, and [that would] be maintained and used as set forth in the Dealership Facilities and Location Addendum." DX1424.

Taylor's franchise agreements with Chrysler also required that it agree to "service [Chrysler] vehicles actively and effectively and provide and maintain, for servicing [Chrysler] vehicles, adequate facilities equipped with the basic tools common to the trade and with special tools and equipment peculiar to [Chrysler] products and necessary for servicing and repairing specified [Chrysler] vehicles proper, efficiently, and competitively." *Id.* As part of its service obligation to Chrysler, Taylor was further required to "cause its service personnel to receive such training from time to time required by [Chrysler] to maintain their technical expertise to render competent customer service, including the use of improved methods of repair, or the repair of new parts or systems, developed by [Chrysler]." *Id.* Furthermore, the franchise agreements required Taylor to "at all times keep on hand . . . the number and assortment of [ ] parts that in [Chrysler's] judgment is necessary to meet the service requirements and to meet all of [the] obligations" under the franchise agreement. Taylor's franchise agreements also required franchisees to "submit to [Chrysler], in such manner, in such form, and at such times as [Chrysler] may reasonably request, complete and accurate reports of sales and stocks of new and used vehicles on hand and other reports, including monthly financial statements and operating reports." *Id.* These reports were admitted into evidence as exhibits PX181, PX187, PX188, PX189, PX182, PX184 for the years between 2004 and 2009 and included information on each of the following income streams: (1) new car sales, (2) used car sales, (3) warranty service work, (4) customer pay service work, (5) miscellaneous (body shop, finance and insurance, etc.).

Finally, each of Taylor's franchise agreements identified standardized additional terms regarding Chrysler and Taylor's rights in the event of termination. Paragraph 28 describes the various ways in which Chrysler and a dealer can terminate the franchise:

> (a) DEALER may terminate this Agreement on not less than thirty (30) days written notice. (b) [Chrysler] may terminate this Agreement on not less than (60) days written notice for the following reasons: . . . failure of DEALER to meet its minimum service satisfaction requirements . . . failure of DEALER to perform fully any of DEALER's undertakings or obligations as set forth in this Agreement . . . the conviction of DEALER . . . of any crime . . . impairment of the reputation or financial standing of DEALER . . . (c) Notwithstanding the provision above this Agreement will terminate automatically without notice from either party on: . . . (v) the discontinuance by [Chrysler] of the production or distribution of all [Chrysler] vehicles listed on the Motor Vehicle Addendum[.]

DX1424.

Under the agreements, if Chrysler terminates a franchise pursuant to Paragraph 28, Chrysler agreed

> to buy and DEALER agrees to sell, free and clear of any liens and encumbrances, within

> ninety (90) days after the effective date of any termination under Paragraph 28: (a) All new, unused and unsold specified [Chrysler] vehicles . . . (b) All new, unused and undamaged [Chrysler] parts that are priced and identified as eligible for return . . . (c) All new, unused and undamaged [Chrysler] accessories or accessories packages for the yearly model current at the effective date of termination . . . (d) All signs of a type required by [Chrysler] belonging to DEALER, showing the name 'Chrysler Corporation' or one of the designated trade names applicable only to [Chrysler] products or [Chrysler's] affiliated companies . . . (e) Special tools (in complete sets), of a type recommended by [Chrysler], adapted only to the servicing of [CHRYSLER] vehicles and purchased by DEALER during the thirty-six (36) months immediately preceding the effective date of termination at a price and under terms and conditions to be agreed upon by [Chrysler] and DEALER.

Id.

Mr. Taylor and each of the other plaintiffs who testified explained that they understood that, regardless of the above-cited termination provisions in the franchise agreements, each of their franchise agreements were also subject to state laws precluding the termination of dealerships under state law unless certain criteria were met.[7]

---

[7] Idaho state law provides that "a manufacturer shall not cancel, terminate or fail to renew any franchise agreement with a dealer unless the manufacturer has satisfied the notice re-

On May 13, 2009, after Chrysler had filed for bankruptcy on April 30, 2009, Taylor received a letter from Chrysler stating that all three of its Chrysler franchise agreements would be rejected in bankruptcy. The letter stated in full:

> As you know, we are in the process of seeking approval of the sale of our primary operating assets to a new company. The unprecedented decline in the industry has had a significant impact upon sales and requires the new company to reduce production levels to better match ongoing demand. With the downsizing

---

quirement of subsection (2) of this section and has good cause for cancellation, termination or nonrenewal." Idaho Code Ann. § 49-1614(1) (West 2009). Specifically, Idaho law provides that "[n]otwithstanding the terms, provisions or conditions of any franchise agreement or of any waiver, good cause shall exist for the purposes of termination, cancellation or nonrenewal when there is a failure by the dealer to comply with a provision of the franchise agreement, where the provision is both reasonable and of material significance to the franchise agreement relationship, and provided that the dealer has been notified in writing of the failure within one hundred eighty (180) days prior to termination, cancellation or nonrenewal. A protest may be filed in accordance with the provision of section 49-1617, Idaho Code." Idaho Code Ann. § 49-1614(4). However, the Idaho Code provides that a franchise agreement cannot be terminated because its owner has a franchise agreement with another automobile manufacturer. Idaho Code Ann. § 49-1614(5). Furthermore, Idaho law provides that "[t]he manufacturer shall have the burden of proof under this section concerning the issue of good cause, which shall include, but not be limited to, termination, nonrenewal or cancellation of any franchise agreement by the manufacturer for insolvency, license revocation, conviction of a felony, fraud by a dealer or failure by a dealer to comply with a provision of the franchise agreement, where the provision is both reasonable and of material significance to the franchise agreement relationship." Idaho Code Ann. § 49-1614(6).

of operations following the sale and reduction of plants and production, similar reductions must be made in the size of the dealer body.

With regret, this letter is to inform you that on May 14th, 2009, we are filing a motion in bankruptcy court rejecting the Sales and Service Agreement(s) between Chrysler Motors LLC and the dealership listed above. Upon approval from the court, your agreement will be rejected on or about June 9, 2009.

We intend to maintain "business as usual" with you until the rejection takes place. We intend to honor warranty and incentive payments, during the period that you remain an active dealer subject to available financing. It is necessary to work together to make this transition as seamless as possible to your customers. After rejection, we want to work with you to assist in the redistribution of new vehicles and parts to ease the burden on you. Attached to this letter, please find further details regarding the transition period. Your business center will be in touch to offer assistance.

These are extraordinary times, and they call for extraordinary efforts. It is with a sense of profound sadness that we must take this step and reject some of our dealer Sales and Service Agreement(s), but it's a necessary step in the process of pursuing and completing the sale of our assets to the new company. We wish there was a better way, but there isn't.

> We are grateful for the support you and your company have provided Chrysler over the years and we wish you the best under these circumstances.

PX178.

The justification for rejecting Taylor's Chrysler franchises in bankruptcy were explained by Peter Grady, Chrysler's Director of Dealer Operations at the time of the Chrysler bankruptcy. In his testimony, Mr. Grady explained that Chrysler examined several criteria in selecting which franchisees to reject in bankruptcy. These criteria, he further explained, grew out of an earlier voluntary effort by Chrysler to rationalize or reduce its dealership network under a program called "Project Genesis." Project Genesis, which is discussed in greater detail later in the opinion, identified several criteria which Chrysler employed in an effort to get all of its dealers to sell all Chrysler brands under one roof and to ensure that each such dealer would have sufficient market share to maximize profitability. The Project Genesis criteria were modified in the month leading up to the Chrysler bankruptcy when the option of rejecting franchise agreements in bankruptcy without regard to state law became more likely.

As discussed in more detail *infra* by the plaintiffs' bankruptcy expert Judge Fitzgerald and the government's bankruptcy expert Judge Gerber, under the Bankruptcy Code, executory contracts can be rejected in bankruptcy without regard to state law in order to preserve estate assets. Judge Fitzgerald and Judge Gerber also explained that rejecting a franchise agreement in bankruptcy is legally distinct from terminating a franchise agreement. Rejection excuses the party filing for bankruptcy from having to continue performance under the contract. To the extent the contracting party has a breach of contract claim arising from the rejection of the agreement, the contracting party, here the franchisee, has an unsecured claim in the bankruptcy.

According to Mr. Grady, Chrysler consulted with Fiat, the New Chrysler owner, to determine which franchisees out of the total number of 3100 should have their franchise agreements rejected in bankruptcy. Eventually Chrysler selected 789 franchisees for rejection. In determining which 789 franchisees to reject in bankruptcy, Mr. Grady testified that Chrysler examined the following: (1) whether the franchise was meeting its Minimum Sale Responsibility ("MSR")[8], (2) the franchise's Scorecard for Sales,[9] Share, Shipments, Warranty, etc., (3) whether the

---

[8] Each franchise agreement required franchisees to meet MSR. Steven Landry, Chrysler's Executive Vice President of sales and marketing, explained that the MSR was calculated by taking the number of new Chrysler vehicles registered in a state and comparing that number to the number of total new vehicles registered in that state to determine the market share for Chrysler vehicles in that location. Tr.3471:14-3472:19. An MSR was then set based on the number of new vehicles the franchisee would need to sell for Chrysler to maintain its market share. *Id.* Put another way, the MSR was used to determine if a dealership held the same market share in its sales locality as Chrysler held either on the state or national level. *Id.*

[9] Mr. Grady explained that each dealer received a scorecard which was "made up of a total of 1000 points, and the detail within the scorecard mainly focused on sales versus targets, market share within the dealer's geographic area, shipments versus targets, and then customer profile targets," customer satisfaction, and warranty work. Tr.3599:7-3600:2.

franchise facility had adequate capacity and met Chrysler's standards, (4) the franchise location, (5) the franchise's financial strength, (6) the franchise's management, (7) whether the franchise had a "dual" or competitor's dealership under the same roof, and (8) whether it was a single point franchise, meaning it did not have all three Chrysler brands under one roof. Tr.3598:8-3602:21.

Mr. Grady explained that Taylor's three franchises were rejected by Chrysler in bankruptcy because together they had only met 36% of its MSR, sold less than 100 new Chrysler vehicles the previous year, and were co-located under one roof with a Chevrolet franchise. Tr.3809:23-3810:23; DX1315.

After Taylor received the May 13, 2009 letter informing it that all of its Chrysler franchise agreements would be rejected, Taylor sold its remaining new Chrysler brand vehicles either "a few thousand dollars over net . . . [but] for far less than [Taylor] paid Chrysler to purchase them[,]" "for net cost, meaning that [Taylor] made no profit on them despite housing and advertising the vehicles for months[,]" or by "trad[ing] [the] remaining Chrysler new inventory, Chrysler for GM, with another dealer who had been notified that his GM franchise would be terminated." Tr.294:13-25. Regarding the Chrysler parts Taylor had in stock, Taylor explained that the dealership "traded some parts to the same terminated General Motors dealer, to the extent [it] could, and used some of the parts on Chrysler vehicles that [it] continued to service. [Taylor] eventually threw the remaining parts in the dumpster." Tr.295:4-8. Finally, Taylor disposed of Chrysler specialized tools and equipment in an auction "but could only earn pennies on the dollar." Tr.295:11-13.

In December 2009, eight months after Chrysler had filed for bankruptcy, Congress enacted Section 747 of the Consolidated Appropriations Act of 2010, Pub. L. 111-117 ("Section 747") to allow dealerships to seek a franchise with New Chrysler under an arbitration program. If a dealer won in arbitration it would receive a customary and usual letter of intent to enter into a franchise agreement with New Chrysler. Taylor elected not to participate in the arbitration program "because there was nothing left and [Taylor] would have had to buy something [it] previously owned, and it would have cost a lot of money." Tr.326:14-17.

Taylor's 2010 financial statement for its Chevrolet franchise showed that Taylor received a net income of $94,122 from that dealership. DX614. As noted, Taylor continues to operate as a Chevrolet dealer to the present day. Tr.299:10-13.

Taylor claims that the rejection of its three Chrysler franchise agreements in the Chrysler bankruptcy amounts to a taking because the government coerced Chrysler into bankruptcy with a plan that included the rejection of its franchise agreements. Taylor claims it is entitled to just compensation. Plaintiffs' valuation expert Diane Anderson Murphy,[10] based on instructions she received from the *Alley's* plain-

---

[10] As will be described in further detail *infra*, Ms. Murphy is a Director with the Valuation Services Group of Moss Adams LLP. She is the coauthor of several versions of the National Automobile Dealers Association's dealership valuation guide and she has managed or staffed well over 1,500 dealership appraisal projects.

tiffs' counsel, provided valuation opinions for two dates: December 2008 and April 2009. During closing argument, counsel for the *Alley's* plaintiffs stated that April 30, 2009 was the date of any "taking" by the government and that the compensation the *Alley's* plaintiffs are seeking is based on the value of their franchise, as determined by Ms. Murphy, on that date. *See* Tr.5097:23-5098:14, Tr.5109:22-5110:5. In addition to Ms. Murphy's valuation opinions, plaintiffs relied on the opinion testimony of the plaintiffs' three other experts: David Berliner,[11] Judge Judith Fitzgerald,[12] and Maryann Keller.[13]

---

[11] As will be described in further detail *infra*, Mr. Berliner is the partner in charge of BDO's Business Restructuring Services Group with advisory and consulting experience in the areas of business restructuring, reorganizations, Section 363 sales, and debtor-in-possession financing. He has worked on bankruptcy cases involving the liquidation of large corporations such as Sports Authority Holdings, Malibu Lighting Corporation, Furniture Brands International, American Home Mortgage, and Pillowtex Corporation.

[12] As will be described in further detail *infra*, Judge Fitzgerald is a former United States Bankruptcy Judge who sat in the Western District of Pennsylvania for over twenty-five years, the District of Delaware for twenty years, the Eastern District of Pennsylvania for eight years and in the District of the United States Virgin Islands for nine years. During her tenure as a Bankruptcy Judge she presided over hundreds of Chapter 11 bankruptcies, including cases that involved the assumption or rejection of executory contracts such as franchise agreements and licenses.

[13] As will be described in further detail *infra*, Ms. Keller is the Principle at Maryann Keller & Associates who provides automotive-related advisory services to companies, investors, and professional firms. She has advised clients on issues across

As discussed in greater detail *infra*, Ms. Murphy opined that the economic loss Taylor sustained from the rejection of its franchise agreements on either date of taking she examined is equal to Taylor's entire Chrysler dealership as an ongoing business. According to Ms. Murphy, although the franchise agreement is an intangible asset, its value is equal to all the net income generated by the dealership as well as the physical assets associated with those income streams. Thus, in valuing the franchise agreements on the dates selected, she considered the income streams from not only new car sales and warranty work, which are expressly derived from Chrysler's obligations under the franchise agreements, but also the net income from used car sales and non-warranty service work.

In valuing Taylor's franchise, Ms. Murphy also made several assumptions regarding the fate of Chrysler in a "but for world" without government financial assistance. Ms. Murphy assumed that all of Chrysler's assets would have been sold in bankruptcy to a third party. She also assumed that the new Chrysler would either (1) continue indefinitely to produce all of Chrysler's product lines or (2) continue indefinitely with production of only the Chrysler trucks. She assumed production under either scenario would not have been interrupted during the bankruptcy and that the franchisees would have continued to receive new cars and/or trucks to sell without significant interruption. Ms. Murphy further assumed that Taylor (and all the other *Alley's* plaintiff franchiseeships she valued) would have had their franchise agreements assumed

---

the automotive supply chain, from component companies to retail sales.

by any new Chrysler owner and thus would have been able to continue as Chrysler franchisees without interruption. Ms. Murphy further testified that the terms of the franchise agreements assumed by Chrysler's new owner would not be altered by the new owner. Finally, she assumed that the economy on both dates was recovering and would grow at a healthy rate.[14]

Ms. Murphy based her valuations for Taylor on financial statements Taylor submitted to Chrysler for 2004, 2005, 2006, 2007, 2008, and from January to May 2009. PX181, PX187, PX188, PX189, PX182, PX184. These financial statements reported income on Taylor's three major income streams: new car sales, used car sales, and fixed services (warranty service, customer pay service, and parts). In addition, for plaintiffs, like Taylor, with franchise agreements with another automobile manufacturer, Ms. Murphy applied a "used to new formula" to determine the proportion of new car sales, used car sales, service, and parts that should be attributed to only to the Chrysler franchise. Based on this "used to new formula," Ms. Murphy calculated that Taylor's Chrysler franchises gave Taylor a net income of $117,514 in 2004, $75,901 in 2005, $89,634 in 2006, $103,287 in 2007, $83,555 in 2008, and $24,200 from January to May 2009. *See* PX244.1B.

Using the above-cited income amounts and the assumptions she made about Chrysler and the econo-

---

[14] Much of Ms. Murphy's testimony was devoted to explaining the local economy of each of the *Alley's* plaintiffs' market and how those economic conditions were improving during the early portion of 2009.

my, Ms. Murphy opined that the value of Taylor's franchise agreements, in a "but for world" without government assistance, would have been worth: (1) $686,000 where Chrysler enters bankruptcy but continues to produce cars and trucks or (2) $558,000 for where Chrysler enters bankruptcy but continues to produce only trucks. Tr.1406:6-7.

B. Cedric Theel Inc.

Cedric Theel testified on behalf of the Cedric Theel Inc. ("Theel") dealership which for the years at issue was located at 3955 Trenton Drive Bismarck, North Dakota. Theel was incorporated under the laws of North Dakota. The dealership included a Dodge franchise at the time of the alleged taking. Theel also had a Toyota franchise at the time of the alleged taking.

Theel was incorporated in 1983 and in 1985 Theel purchased a Dodge dealership in Bismarck, North Dakota. Tr.408:4-24. The Dodge franchise agreement that was eventually rejected in bankruptcy was awarded to Theel on February 1, 2000. In 1990 Theel obtained the right to sell Mitsubishi. Tr.409:14-15. In 1992 Mr. Theel and his wife purchased the Toyota and Hyundai dealership that was next door to the Theel Dodge dealership and placed ownership of that dealership under a new company, Cedric Theel Ltd. In 1995, the Dodge and Toyota dealerships were consolidated under one roof and under the ownership of Theel. Tr.408:4-409:21.

The Dodge franchise agreement that Theel entered into in February 2000 is identical in form and substance to the Dodge franchise agreement described and quoted in the preceding section describing the Taylor franchise agreements and is not repeated here. *See* PX191 (Dodge Agreement). Mr. Theel explained that he understood regardless of the above-quoted termination provisions in his franchise agreement that his Dodge franchise agreement was also subject to state law protection.[15] Tr.417:7-13.

On May 13, 2009, Theel received a letter from Chrysler stating that its Dodge franchise agreement would be rejected in bankruptcy. The letter is identical to that received by Taylor and the other representative plaintiffs in this case. DX449. Mr. Grady, Director of Dealer Operations, explained that Theel's Dodge franchise agreement was rejected by Chrysler in bankruptcy because Theel's MSR was only 70%, it was a single Dodge franchise dealer, and it had a dual dealership with Toyota. Tr.3801:4-3803:14; DX1315.

After Theel received the May 13, 2009 letter informing it that its Dodge franchise agreement would be rejected, Theel had "about 60 new Dodge vehicles on hand at the time." Tr.421:15. Theel sold "most of the new Dodge cars to customers at fire sale prices . . . [and] [s]ome [other dealers] bought the remainder of [its] new Dodge inventory" all at a loss. Tr.421:22-24. Theel also had "approximately $200,000

---

[15] North Dakota law provides that a manufacturer may not "[a]ttempt or threaten to terminate, cancel, or fail to renew or substantially change the competitive circumstances of the dealership contracts for any reason other than failure of the automobile or truck retailer to comply with the terms of the contract between the parties, if the attempt or threat is based on the results of a circumstance beyond the retailer's control, including a natural disaster in the dealership market area or a labor dispute." N.D. Cent. Code Ann. § 51-07-02.3(5) (West 2009).

in Dodge parts" which it sold "to a warehouse for 25 to 75 percent less than what [it] paid for them." Tr.422:2-6. Additionally, Theel "tried to convert [the] servicing area for Toyota servicing, but a lot of the equipment was not suited for Toyotas, including all of the diesel engine service equipment, which was for Dodge vehicles only." Tr.422:20-23. Theel also sold a $30,000 sign that it had purchased shortly before its Dodge franchise was rejected to another Chrysler dealer for only $16,000. Tr.423:10-13. Mr. Theel testified that he elected not to participate in the Section 747 arbitration process because he never got an answer as to why his Dodge franchise was terminated. Tr.452:4-8. Theel's 2010 financial statement for its Toyota franchise showed that Theel earned a net income of $606,447 from that dealership. DX621. Theel's 2011 financial statement shows that its Toyota dealership earned a net income of $674,499. DX653. Theel continues to operate as a Toyota dealer to the present day.

Theel claims that the rejection of its Dodge franchise agreement in the Chrysler bankruptcy amounts to a taking and, for the same reasons as relied on by Taylor, seeks just compensation. As with Taylor, Theel relies on Ms. Murphy to establish the value of the franchise agreement at the time of the alleged taking. After reviewing Theel's 2004, 2005, 2006, 2007, 2008 and January to May 2009 financial statements, DX77, DX107, DX139, DX197, DX312, Ms. Murphy calculated that Theel's Dodge franchise agreement generated a net income of $130,323 in 2004, $175,006 in 2005, $97,377 in 2006, $142,333 in 2007, and $69,279 in 2008. *See* PX244.1E.

Using these values and her assumptions, Ms. Murphy calculated the amount of just compensation Theel is seeking for the claimed taking of its Dodge franchise agreement. Under Ms. Murphy's income valuation approach, the amount of just compensation Theel is seeking for the claimed taking of the franchise agreement on April 30, 2009 is either (1) $709,000 where Chrysler enters bankruptcy but continues to produce cars and trucks or (2) $621,000 for where Chrysler enters bankruptcy but continues to produce only trucks. Tr.1406:12-13.

C. Mansfield Motor Group/Whitey's Auto Group

Dirk Schluter testified on behalf of Mansfield Motor Group, d/b/a Whitey's Auto Group ("Whitey's") which for the years at issue was located at 1493 Park Avenue West, Mansfield, Ohio. Whitey's was incorporated under the laws of Ohio. The dealership included a Chrysler franchise at the time of the alleged taking. Tr.817:12-13. Whitey's also had a Lincoln-Mercury franchise under the same roof as the Chrysler franchise at the time of the alleged taking. Whitey's was incorporated in 1947 and received its first Chrysler franchise agreement in the mid-1960s. Tr.818:14-17, 819:16-18.

In August 2001, Whitey's was awarded a new Chrysler agreement when Mr. Schluter and his brother became the new owners of Whitey's. Tr.820:5-15. The 2001 franchise agreement is the agreement that was rejected in the Chrysler bankruptcy. The Chrysler franchise agreement that Whitey's entered into in August 2001 is identical in form and substance to the Chrysler franchise agreement described in the preceding section regarding Taylor & Sons. PX224.

Mr. Schluter explained that he understood that regardless of the above-cited termination provisions that his franchise agreement was also subject to state laws precluding the termination of franchise agreements under state law.[16] Tr.824:15-21.

On May 13, 2009 Whitey's received a letter from Chrysler stating that its Chrysler franchise agreement would be rejected in bankruptcy. The letter is identical to the ones received by other representative plaintiffs in this case. PX239. Mr. Grady, Director of Dealer

---

[16] Ohio law provides that "no franchisor shall terminate or fail to continue or renew a franchise except for good cause." Ohio Rev. Code Ann. § 4517.54(A) (West 2009). Ohio law also provides that "[i]n determining whether good cause has been established by the franchisor for terminating or failing to continue to renew a franchise, the motor vehicle dealers board shall take into consideration the existing circumstances, including, but not limited to: (1) The amount of retail sales transacted by the franchisee during a five-year period immediately preceding such notice as compared to the business available to the franchisee; (2) the investment necessarily made and obligations incurred by the franchisee to perform its part of the franchise; (3) the permanency of the franchisee's investment; . . . (7) the extent and materiality of the franchisee's failure to comply with the terms of the franchise and the reasonableness and fairness of the franchise terms. . . . " Ohio Rev. Code Ann. § 4517.55(A) (West 2009). Ohio law also specified that "[n]otwithstanding the terms, conditions, or provisions of any franchise or waiver, the following do not constitute good cause for terminating or failing to continue or renew a franchise: (1) Refusal by the franchisee to purchase or accept delivery of any new motor vehicle, parts, accessories, or any other commodity or service not ordered by the franchisee; (2) The fact that the franchisee or the owner of any interest therein, owns, has an investment in, participates in the management of, or holds a license for the sale of the same or any other line-make of new motor vehicle; . . . (5) Failure of the franchisee to achieve any unreasonable or discriminatory performance criteria." Ohio Rev. Code Ann. § 4517.55(B) (West 2009).

Operations, explained that Whitey's Chrysler franchise was rejected by Chrysler in bankruptcy because it only met 45% of its MSR, was a dual dealership with a Lincoln franchise, and was only a single Chrysler franchise dealer. Tr.3806:21-3803:13; DX1315.

After Whitey's received the May 13, 2009, it was able to "place[ ] [its] [new] inventory with another dealer, [although it] lost money on the vehicles." Tr. 831:15-17. Whitey's also lost money on its "inventory of used Chrysler vehicles because [it] could no longer sell them with a certified status of used cars and with the manufacturer warranty," and sold them often at a loss. Tr.831:18-22. Whitey's lost money on the inventory of Chrysler-specific parts although it was able to use some of the parts in customer-pay service. Tr.832:14-18. Whitey's also "threw out the remaining Chrysler signage, as well as the Chrysler brochures and other advertising material." Tr.832:20-23. Whitey's filed a request for arbitration and received $10,000 in settlement from New Chrysler. Tr.833:15-21.

In August of 2008 Whitey's acquired franchise agreements to sell Volvo and Mercedes-Benz vehicles. Whitey's financial statement for its Lincoln, Volvo, and Mercedes-Benz franchises showed that Whitey's earned a net income of $157,562 in 2010, the first full year without the Chrysler franchise. Tr.891:17-19; DX1493.

Whitey's claims that the rejection of its Chrysler franchise agreement in the Chrysler bankruptcy amounts to a taking for the same reasons as relied on for plaintiffs Taylor and Theel. Whitey's relies on Ms. Murphy for the valuation of the franchise agreement. Ms. Murphy, after reviewing Whitey's 2005, 2006, 2007, 2008, and January to May 2009 financial statements, PX223, PX233, calculated that Whitey's Dodge franchise agreement resulted in a net income of $195,853 in 2004, $127,940 in 2005, $159,309 in 2006, $120,535 in 2007, $61,415 in 2008 and $30,292 between January and May 2009. PX244.1D.

Using these values and her assumptions, Ms. Murphy calculated the amount of just compensation Whitey's is seeking for the claimed taking of the franchise agreement. Under Ms. Murphy's income valuation approach, the amount of just compensation Whitey's is seeking for the April 30, 2009 taking date is either (1) $524,000 where Chrysler enters bankruptcy but continues to produce cars and trucks, or (2) $292,000 for where Chrysler enters bankruptcy but continues to produce trucks. Tr.1406:10-11.

D. RFJS Company, LLC

Robert L. Frederick II and John Scotford Jr. testified on behalf of RFJS Company, LLC ("RFJS"), which for the years at issue was located at 7871 Market Street Boardman, Ohio. RFJS was incorporated under Ohio state law. Tr.967:13. The dealership at the time of the rejection of the franchise agreements included Chrysler, Dodge, and Jeep franchises. Tr.972:14-15. RFJS did not have any franchise agreements with other auto manufacturers at that time. RFJS was formed in 2006. Mr. Fredrick contributed the Dodge franchise agreement that he owned to RFJS and Mr. Scotford contributed the cash that was used to purchase a Chrysler/Jeep dealership. Tr.966:34-967:8. The Dodge franchise agreement that Mr. Fredrick contributed was awarded to RFJS in October 2006. DX130. This Dodge franchise agreement was identical in form and substance to the franchise agreements described above.

RFJS's Chrysler and Jeep franchise agreements, however, were different from those described above. RFJS's "Sales and Service Agreement[s]" contained different terms. DX131; DX132. Instead of having an indefinite franchise agreement that could only be terminated upon specified events, RFJS's Chrysler and Jeep franchise agreements provided that they only continued "in effect until the expiration of 24 months after the execution date at which time this Term Agreement will terminate automatically without notice to or by either party." *Id.* The agreements went on to state that "[i]f this Term Agreement is not terminated as provided herein or in Paragraph 28 of said Terms and Provisions, and thus continue in effect for the period set forth in the immediately forgoing Paragraph, [Chrysler], at the expiration of such period, will enter into the Standard Chrysler Corporation Sales and Service Agreement current at the date of said expiration, for such specified [Chrysler] vehicles with DEALER, provided that DEALER has fulfilled each and every condition set forth in [the Agreement]." *Id.* RFJS received its Term Sales and Service Agreements for its Chrysler and Jeep franchises on October 27, 2006. *Id.* As part of the term franchise agreements RFJS had to build a satisfactory dealership facility at 7870 Market Street, Boardman, Ohio within twelve months of the execution of the Chrysler and Jeep franchise agreements. *Id.*

As of October 2007, RFJS had not met its obligation to build a facility at 7871 Market Street to Chrysler's standards. On May 20, 2008, RFJS got a one-year extension of its Chrysler and Jeep franchise agreements in order to complete the construction of a facility at 7871 Market Street. DX253.

Mr. Fredrick and Mr. Scotford testified that they understood that, despite the above-cited termination provisions, their Chrysler, Dodge, and Jeep franchise agreements were subject to state laws and could not be terminated or not renewed unless certain criteria were met.[17]

---

[17] Ohio law provides that "no franchisor shall terminate or fail to continue or renew a franchise except for good cause." Ohio Rev. Code Ann. § 4517.54(A) (West 2009). Ohio law also provides that "[i]n determining whether good cause has been established by the franchisor for terminating or failing to continue to renew a franchise, the motor vehicle dealers board shall take into consideration the existing circumstances, including, but not limited to: (1) The amount of retail sales transacted by the franchisee during a five-year period immediately preceding such notice as compared to the business available to the franchisee; (2) the investment necessarily made and obligations incurred by the franchisee to perform this part of the franchise; (3) the permanency of the franchisee's investment; . . . (7) the extent and materiality of the franchisee's failure to comply with the terms of the franchise and the reasonableness and fairness of the franchise terms. . . . " Ohio Rev. Code Ann. § 4517.55(A) (West 2009). Ohio law also specified that "[n]otwithstanding the terms, conditions, or provisions of any franchise or waiver, the following do not constitute good cause for terminating or failing to continue or renew a franchise: (1) Refusal by the franchisee to purchase or accept delivery of any new motor vehicle, parts, accessories, or any other commodity or service not ordered by the franchisee; (2) The fact that the franchisee or the owner of any interest therein, owns, has an investment in, participates in the management of, or holds a license for the sale of the same or any other line-make of new motor vehicle; . . . (5) Failure of the franchisee to achieve any unreasonable or discriminatory performance criteria." Ohio Rev. Code Ann. § 4517.55(B) (West 2009).

On May 13, 2009, RFJS received a letter from Chrysler stating that its Chrysler, Dodge, and Jeep franchise agreements would be rejected in bankruptcy. The letter is identical to that received by the other representative plaintiffs in this case. Tr.970:17-19. Mr. Grady, Director of Dealer Operations, explained that RFJS's Chrysler, Dodge, and Jeep franchise agreements were rejected by Chrysler in bankruptcy because RFJS dealership was an excess point, i.e. a location that Chrysler determined was no longer valuable and because the dealership was operating at a loss and had been placed on a finance hold by Chrysler Financial.[18] DX1315.

After RFJS received the May 13, 2009 letter informing it that its Chrysler, Dodge, and Jeep franchise agreements would be rejected, "all of [its] new cars either ended up being retailed or wholesaled to

---

18 Leland Wilson, the Chief Financial Officer of Chrysler Financial between 2007 and 2010, explained the significance of a dealer being placed on a financial hold and not being able to obtain floor plan financing to finance their purchase of new and used cars. He explained that floor plan financing involved dealers "order[ing] cars through Chrysler, Chrysler would ship those cars to the dealers. Each of those dealers that [Chrysler Financial] financed would have a dealer . . . credit line" that would be used to finance the purchase. Tr.3855:9-11. He went on to explain that "the first lien collateral [for the loan] was the vehicle" and that when the car was sold the proceeds were used to pay off the loan the dealer incurred to purchase the car and allowed the dealer to continue purchasing new vehicles. Tr.3855:17-23. RFJS was one of the Chrysler franchisees that relied on Chrysler Financial for floor plan financing. "Financial hold" meant that Chrysler Financial was no longer willing to extend floor plan financing to RFJS and thus it could not obtain new inventory through its Chrysler Financial credit line. Tr. 3806:3-8.

other dealers [it] had good relationships with," but "that really didn't help[.]" Tr.972: 7-10. RFJS "made the best deal [it could for] parts. [Its] tools and equipment were sold at an auction," but it got "virtually nothing." Tr.972:20-25. Ultimately, RFJS "shut down the dealership" and "did not consider staying open as a service and used car dealership because [its] business ran on the new car franchise." Tr.973:1-11. After its Chrysler, Dodge, and Jeep franchise agreements were rejected, RFJS pursued arbitration under Section 747 and settled with New Chrysler for $200,000. Tr.1029:13-25. Because RFJS did not continue as either a new car dealership or used car and service dealership there are no financial statements for RFJS past June 2009.

RFJS claims that the rejection of its Chrysler, Dodge, and Jeep franchise agreements in the Chrysler bankruptcy amounts to a taking of its franchises for the same reasons relied on by Taylor, Theel, and Whitey's. RFJS relies on Ms. Murphy's valuation as the basis for the just compensation it is seeking. Ms. Murphy, after reviewing RFJS's 2006, 2007, 2008, and January to May 2009 financial statements, PX153, calculated that RFJS's Chrysler, Dodge, and Jeep franchise agreements resulted in a net income of $104,940 in 2006, $331,375 in 2007, lost $45,125 in 2008, and earned $24,065 from January to May 2009. PX244.1F.

Using these values and her assumptions, Ms. Murphy calculated the amount of just compensation RFJS is seeking for the claimed taking of the franchise agreements. Under Ms. Murphy's income valuation approach, the amount of just compensation RFJS seeks for the claimed taking for the April 30, 2009 date is (1) $1,766,000 where Chrysler enters bankruptcy but continues to produce cars and trucks, or (2) $1,329,000 for where Chrysler enters bankruptcy but continues to produce only trucks. Tr.1406:14-15.

E. Jim Marsh American Corporation

Jim Marsh testified on behalf of Jim Marsh American Corporation ("Marsh") which for the years at issue was located 8555 West Centennial Parkway, Las Vegas, Nevada. Tr.367:7. Marsh is incorporated under the laws of Nevada. The dealership included a Chrysler and Jeep franchise at the time of the alleged taking. In early 2009, Marsh purchased a Kia, Suzuki, and Mitsubishi dealership. Tr.379:9-12. The Suzuki dealership closed in 2014 when Suzuki filed for bankruptcy and Marsh sold the Mitsubishi dealership in 2017. Tr.378:23-25. Marsh still operates a Kia dealership. The Chrysler and Jeep franchise agreements that were rejected by Chrysler in the Chrysler bankruptcy were awarded to Marsh on December 21, 2000. Tr.367:21-25. Prior to receiving these franchise agreements, Marsh had other Chrysler and Jeep franchise agreements dating back to 1995 and 1971. Tr.366:17-367:20. Marsh's 2000 Chrysler and Jeep franchise agreements were identical in form and substance to those of the other representative plaintiffs in this case. DX44.

Mr. Marsh explained that he knew that state laws protected his franchise agreements from unjust termination and testified that throughout his several decades of experience as a new vehicle franchise owner he had never heard of an involuntary termination of a franchise agreement other than when an owner was convicted of a felony or some form of fraud.[19] Tr.369:21-370:2.

On May 13, 2009, Marsh received a letter from Chrysler stating that its Chrysler and Jeep franchise agreements would be rejected in bankruptcy. The letter is identical to that received by the other representative plaintiffs in this case. PX147. Mr. Grady, Director of Dealer Operations, explained that Marsh's Chrysler and Jeep franchise agreements were rejected by Chrysler in bankruptcy because Marsh had only met 38% of its MSR, it lacked a Dodge franchise agreement, and because Chrysler wanted a third-party candidate to run a Chrysler, Dodge, and Jeep dealership in a different part of Las Vegas. DX1315.

---

[19] Nevada state laws provide that "[n]otwithstanding the terms of the franchise, a manufacturer or distributor shall not terminate or refuse to continue any franchise unless it has received the written consent of the dealer or: (a) It has given written notice of its intention to the dealer and the Director; and (b) Either the following conditions occurs: (1) The dealer does not file a protect with the Director within the time allowed by this section; or (2) After the dealer has filed a protest and the Director has conducted a hearing on the matter, the Director issues an order authorizing the manufacturer or distributor to terminate the franchise or permit it to lapse." Nev. Rev. Stat. Ann. § 482.36352(1) (West 2009). Furthermore, Nevada state law states that "[i]n determining whether good cause has been established for permitting a manufacturer or distributor to terminate, refuse to continue, modify or replace a franchise, the Director shall consider without limitation: (1) The amount of business transacted by the dealer, as compared to the business available to the dealer . . . (2) The investment necessarily made and obligations incurred by the dealer to perform its part of the franchise . . . (6) The extent of the dealer's failure, if any, to comply with the terms of the franchise." Nev. Rev. Stat. Ann. § 482.36355 (West 2009).

After Marsh received the May 13, 2009 letter informing it that its Chrysler and Jeep franchise agreements would be rejected, it had to "liquidate [its] inventory of new cars, leaving [it] with an inventory of Chrysler-specific tools that [it[could no longer use for warranty service and which [it] could no long use to access the manufacturer's computer to perform new car service." Tr.373:8-12. Also, Marsh "obtained most of [its] used car inventory from trade-ins associated with the purchase of new cars [and] [l]osing new car sales meant [it] had fewer used cars to sell." Tr.373:13-16. Marsh also "lost the after-sale income and the after-market warranties and service contracts that [it] could no longer sell in connection with the sale of Chrysler-Jeep projects." Tr.373:16-19. Marsh participated in the Section 747 arbitration process and won a letter of intent from New Chrysler. In January 2017, Marsh opened a new Chrysler-Jeep dealership but was required to spend significant amounts of money to open this new dealership. Tr.374:11-18.

Marsh claims that the rejection of its Chrysler and Jeep franchise agreements in the Chrysler bankruptcy amounts to a taking for the same reasons relied on by plaintiffs Taylor, Theel, Whitey, and RFJS. Marsh relies on Ms. Murphy's valuations of his franchise agreements to support a claim for just compensation. Ms. Murphy, relying on the same income streams and same calculation methods as described above, and after reviewing Marsh's 2004, 2005 2006, 2007, 2008, and January to May 2009 financial statements, PX145, calculated that Marsh's Chrysler and Jeep franchise agreements resulted in a net income of $860,020 in 2004, $1,032,818 in 2005,

$1,396,370 in 2006, $932,272 in 2007, $816,019 in 2008, and earned $746,431 from January to May 2009. PX244.1G.

Using these values and her assumptions, Ms. Murphy calculated the amount of just compensation Marsh is seeking for the claimed taking of the franchise agreement. Under Ms. Murphy's income valuation approach, the amount of just compensation Marsh seeks for the claimed taking of the franchise agreement for the April 30, 2009 date is (1) $8,972,000 where Chrysler enters bankruptcy but continues to produce cars and trucks or (2) $7,037,000 for where Chrysler enters bankruptcy but continues to produce only trucks. Tr.1406:14-15.

F. Livonia Chrysler-Jeep

Collen and David MacDonald testified on behalf of Livonia Chrysler-Jeep ("Livonia") which for the years at issue was located at 30777 Plymouth Road, Livonia, Michigan. Livonia is incorporated under the laws of Michigan. The dealership included a Chrysler and Jeep franchise at the time of the alleged taking. Tr.1290:5-9.

The Chrysler and Jeep franchise agreements that were rejected in the Chrysler bankruptcy were awarded to Livonia on April 24, 1998. These Chrysler and Jeep franchise agreements were identical in form and substance to the franchise agreements that the other representative plaintiffs had with Chrysler. PX136. Both Mr. and Mrs. MacDonald explained that they understood that, regardless of the termination terms in those agreements, the agreements could only be terminated consistent with the franchise laws in Michigan.[20] Tr.1293:5-14.

On May 13, 2009, Livonia received a letter from Chrysler stating that its Chrysler and Jeep franchise agreements would be rejected in bankruptcy. The letter is identical to that received by the other representative plaintiffs in this case. PX139. Mr. Grady, Director of Dealer Operations, testified that Livonia's Chrysler and Jeep franchise agreements were rejected by Chrysler in bankruptcy because Chrysler did not like the location of the dealership and thought that it would be more profitable to move the Chrysler and Jeep franchises to a Dodge dealership a few miles away. DX1315.

After it received the May 13, 2009 letter informing it that its Chrysler and Jeep franchise agreements would be rejected, Livonia had to "sell [its] parts inventory and new car inventory at a substantial loss." Tr.1295:21-23. Additionally, Livonia was unable to get out of contracts, such as an advertising contract, and "had to continue to pay them, though [it] no longer needed their services." Tr.1295:23-1296:1. Livonia participated in the Section 747 arbitration process and was ultimately awarded a letter of intent from New Chrysler and has since signed new Chrysler

---

[20] Michigan law provides that an automobile manufacturer can only terminate or not renew a franchise agreement if they have acted in good faith and have good cause. Mich. Comp. Laws Ann. § 445.1567. Michigan law provided that the following alone did not constitute good cause for termination: a change in ownership of the dealership, refusal of the dealership to purchase or accept delivery of any automobile parts; or if the owner of the dealership has a franchise with another auto manufacturer. Mich. Comp. Laws Ann. § 445.1568.

and Jeep franchise agreements with New Chrysler. Tr.1362:5-25.

Livonia claims that the rejection of its Chrysler and Jeep franchise agreements in the Chrysler bankruptcy amounts to a taking for the same reasons relied on by the other *Alley's* plaintiffs. Livonia relies on Ms. Murphy's valuation to support the amount of just compensation seeks. Ms. Murphy, relying on the same income streams and same calculation methods as described above, and after reviewing Livonia's 2006, 2007, 2008, and January to May 2009 financial statements, calculated that Livonia's Chrysler and Jeep franchise agreements resulted in a net income of $659,903 in 2006, $595,052 in 2007, $718,631 in 2008, and $130,224 from January to May 2009. PX244.1A.

Using these values and her assumptions, Ms. Murphy calculated the amount of just compensation Livonia is seeking for the claimed taking of the franchise agreement. Under Ms. Murphy's income valuation approach, the amount of just compensation Livonia is seeking for the claimed taking of the franchise agreement on the April 30, 2009 taking date is (1) $4,464,000 where Chrysler enters bankruptcy but continues to produce cars and trucks or (2) $3,705,000 for where Chrysler enters bankruptcy but continues to produce only trucks. Tr.1406:4-5.

G. Barry Dodge Inc.

Andrew Riexinger testified on behalf of Barry Dodge Inc. ("Barry"), which for the years at issue was located at 4579 South Main Street, Brockport, New York. Barry was incorporated under the laws of New

York. Barry's dealership included Chrysler, Dodge, and Jeep franchises at the time of the alleged taking.

The Chrysler and Dodge franchise agreements that were rejected in the Chrysler bankruptcy were awarded to Barry on August 9, 1993. The Jeep franchise agreement that was rejected in the Chrysler bankruptcy was awarded to Barry on December 19, 1997. Barry's Chrysler, Dodge, and Jeep franchise agreements are identical in form and substance to the other franchise agreements owned by the other representative plaintiffs. PX2. Mr. Riexinger also testified that he understood that, regardless of the termination provisions in these franchise agreements, state law precluded the termination of dealerships for unjust reasons.[21] Tr.1218:23-1219:1.

On May 13, 2009, Barry received a letter from Chrysler stating that its Chrysler, Dodge, and Jeep franchise agreements would be rejected in bankruptcy. The letter is identical to that received by the other representative plaintiffs in this case. PX4. Mr. Grady, Director of Dealer Operations, explained that Barry's Chrysler, Dodge, and Jeep franchise agreements were rejected by Chrysler in bankruptcy because it only

---

[21] New York state law provides that a franchisor cannot terminate or refuse to renew a franchise "except for due cause, regardless of the terms of the franchise." N.Y. Vehicle and Traffic Law § 463.2(d)(1). New York state law specifies that "[i]f the termination is based upon performance of the dealer in sales and services there shall be no due cause if the dealer substantially complies with the reasonable performance provisions of the franchise during such cure period and no due cause if the failure to demonstrate such substantial compliance was due to factors which were beyond the control of such dealer." N.Y. Vehicle and Traffic Law § 463.2(e)(3).

met 42% of its MSR and because it was considered an excess point because Chrysler wanted to reduce the number of dealers in the Brockport area. DX1315.

After Barry received the May 13, 2009 letter informing it that its franchise agreements would be rejected it had to "salvage what money [it] could from [its] existing inventory." Tr.1220:14-16. Barry "sold [its] inventory of vehicles to other [dealers] and parts to one of [its] former competitors . . . for 50 grand." Tr.1220:16-18. Barry also "sold some of [its] specialized tools to former competitors, which [it] could no longer use since [it] no longer provided warranty services for new vehicles." Tr.1220:18-21. Barry continued to operate under the name "Barry's Auto Center" as a used car dealership that also sells campers and cargo trailers. Tr.1221:7, Tr.1221:16-17. Barry's 2010 financial statement for its used car dealership showed that it earned a net income of $239,417. DX618. Barry chose not to file for arbitration under Section 747. Tr.1269:13-16.

Barry claims that the rejection of its Chrysler, Dodge, and Jeep franchise agreements amounts to a taking for the same reasons as relied on by the other *Alley's* plaintiffs. Barry relies on Ms. Murphy's valuations to support the amount of just compensation it seeks. Ms. Murphy, relying on the same income streams and same calculation methods as described above, and after reviewing Barry's 2004, 2005, 2006, 2007, 2008, and January to May 2009 financial statements, calculated that Barry's Chrysler, Dodge, and Jeep franchise agreements resulted in a net income of $172,181 in 2004, $68,367 in 2005, $55,878 in 2006, $186,534 in 2007, $163,704 in 2008, and earned $124, 052 from January to May 2009. PX244.1C.

Using these values and her assumptions, Ms. Murphy calculated the amount of just compensation Barry is seeking for the claimed taking of the franchise agreement. Under Ms. Murphy's income valuation approach, the amount of just compensation Barry is seeking for the April 30, 2009 taking date is (1) $1,124,000 where Chrysler enters bankruptcy but continues to produce cars and trucks, or (2) $859,000 for where Chrysler enters bankruptcy but continues to produce trucks. Tr.1406:8-9.

H. Guetterman Motors

Jack Guetterman testified on behalf of Guetterman Motors ("Guetterman"), one of the two representative *Colonial* plaintiffs, which for the years at issue was located at 2210 Sycamore Street, Cairo, Illinois. Guetterman was incorporated under the laws of Illinois. Guetterman's dealership included Chrysler, Dodge and Jeep franchises as well as a Ford franchise at the time of the alleged taking.

The Chrysler, Dodge and Jeep franchise agreements that were rejected in the Chrysler bankruptcy were awarded to Guetterman on February 11, 1993. Guetterman's Chrysler, Dodge, and Jeep franchise agreements are identical in form and substance to the other franchise agreements owned by other representative plaintiffs. DX16 (Chrysler Agreement), DX21 (Dodge Agreement), DX22 (Jeep Agreement). Mr. Guetterman also testified that he understood that, regardless of the termination provisions in these franchise agreements, state law precluded the termination of dealerships for unjust reasons.[22] Tr. 2179:6-10.

On May 13, 2009, Guetterman received a letter from Chrysler stating that its Chrysler, Dodge, and Jeep franchise agreements would be rejected in bankruptcy. The letter is identical to that received by the other representative plaintiffs in this case. Mr. Grady, Director of Dealer Operations, explained that the Guetterman Chrysler, Dodge and Jeep franchise agreements were rejected by Chrysler in bankruptcy because the dealership only met 53% of its MSR, was considered an excess point in the Cairo area, was placed on a financial hold by Chrysler Financial, and had a competitive dual Ford dealership attached to the Chrysler showroom. DX1315.

---

22 Illinois state law provides that an automobile manufacturer cannot terminate or fail to renew a franchise agreement without good cause and without giving sufficient notice as outline in Illinois state law. 815 Ill. Comp. Stat. Ann. § 710/4(d)(6). The Illinois Board of Motor Vehicles determines if there is sufficient good cause not to renew or cancel a franchise and Illinois law provides that it shall consider, but is not limited to, the following factors: "(1) The amount of retail sales transacted by the franchise during a 5-year period immediately before the date of the notice of proposed actions as compared to the business available to the franchisee. (2) The investment necessarily made and obligations incurred by the franchisee to perform its part of the franchise. (3) The permanency of the franchisee's investment. . . . (5) Whether the franchisee has adequate moto vehicle sales and service facilities, equipment, vehicle parts, and service personnel to reasonably provide for the need of the customers of the same line make of motor vehicles handled by the franchisee. . . . (7) The extent and materiality of the franchisee's failure to comply with the terms of the franchise and the reasonableness and fairness of those terms. . . . " 815 Ill. Comp. Stat. Ann. § 710/12(d).

After Guetterman received the May 13, 2009 letter, Mr. Guetterman testified that Chrysler only bought "back $18,754 of parts for 68 cents on the dollar" and that the dealership was unable to sell its remaining Chrysler parts. Tr.2180:2-10. Mr. Guetterman explained that the "cost of the remaining parts is over $100,000." Tr.2180:6-7. Mr. Guetterman also testified that he "attempted to negotiate with the New Chrysler through [the] St. Louis dealer placement manager . . . but [it] was turned down." Tr.2176:15-19. Mr. Guetterman further testified that he "paid the initial fee and got a date to proceed" under the Section 747 arbitration process, but that before the arbitration date, New Chrysler offered Guetterman a letter of intent for a new franchise agreement. Tr.2176:21 25. Mr. Guetterman explained that he did not accept the letter of intent because it imposed new requirements which have required between $1 million and $2 million in new investments. Tr.2177:12-15.

Guetterman's 2010 financial statement for its Ford franchise, which it expanded into space previously dedicated for Chrysler vehicles, showed that Guetterman received a net income of $120,920 from that dealership. DX613. Guetterman's 2011 financial statement for its Ford franchise showed that Guetterman received a net income of $82,813 from that dealership. DX648. Guetterman continues to operate as a Ford dealer to the present day.

Guetterman claims that the rejection of its three Chrysler franchise agreements in the Chrysler bankruptcy amounts to a taking based on the same theory of coercion relied on by the *Alley's* plaintiffs and discussed *infra*. Guetterman is seeking just compensation in various amounts based on two different "but for" Chrysler Chapter 11 liquidation scenarios. Unlike, the *Alley's* plaintiffs, discussed above, Guetterman relies on the testimony of Ted Stockton[23] as its valuation expert. As will be explained in greater detail later in the opinion, Mr. Stockton's valuation approach is very different from the one employed by Ms. Murphy. For example, while Ms. Murphy assumes that at least some Chrysler cars or trucks will continue to be produced in her "but for world," Mr. Stockton assumes that Chrysler would have been liquidated in a Chapter 11 bankruptcy and that Chrysler vehicles would no longer have been produced. He assumes that there would be no new vehicles manufactured once Chrysler entered into bankruptcy. He assumed, however, that Chrysler parts would continue to be produced by entities that would have licensed Chrysler's name and would have offered those parts to the dealers for a price.

Ms. Murphy and Mr. Stockton also used different methods to calculate just compensation. Ms. Murphy calculated the amount of just compensation based on the income valuation approach assuming each of the *Alley's* plaintiffs would have continued as franchisees with a new Chrysler car manufacturer. Mr. Stockton calculated just compensation based largely on a "lost profits" method.

---

[23] As will be described in further detail *infra*, Mr. Stockton is the Vice President of Economics Services at the Fontana Group Inc. During his employment at Fontana he has worked 30,000 hours, focused on issues related to the automotive retail industry, and has conducted studies of hundreds of franchise operations that sell a wide array of branded vehicles.

Specifically, Mr. Stockton posited two "but for worlds" where Chrysler liquidates in bankruptcy at some point in April 2009. The two "but for worlds" are as follows (1) a Chapter 11 bankruptcy where there is an orderly wind-down of Chrysler's operations and Guetterman continues to operate under its existing franchise agreements either for (i) three years or (ii) seventeen months, depending on how long the wind-down takes to complete, and (2) immediate liquidation of Chrysler in which Guetterman's Chrysler dealership continues to operate indefinitely as a "branded" Chrysler dealer, under a licensing agreement with third party. Mr. Stockton testified that these "but for worlds" were provided to him by counsel. Tr.2544:17-21.

Under the orderly wind-down scenarios that either last for three years or seventeen months, Mr. Stockton made the following assumptions. He assumed that the franchise agreements were not terminated in bankruptcy and are kept in effect for the period of the wind-down. He further assumed that the United States would have guaranteed the warranty obligations for the incumbent Chrysler customers. As part of this scenario, Mr. Stockton assumed that Chrysler would attempt to sell off-lease vehicle returns to the Chrysler franchisees which would provide the plaintiffs with additional used cars to sell during the wind-down period.

Under the second scenario, immediate liquidation, Mr. Stockton testified that he assumed that the United States would have again guaranteed the warranty obligations for the incumbent Chrysler customers. He further assumed that a consortium of Chrysler dealerships would have acquired the rights to certain propriety parts and intellectual property, i.e. the Chrysler brand, in the Chrysler bankruptcy and that the plaintiffs would have been able to operate as Chrysler branded dealerships for the purposes of serving and selling used Chrysler vehicles, although not with any franchise agreement.[24] Under this second scenario, there is no "Chrysler" and thus no continuing franchise agreement between Chrysler and the plaintiffs. Further, under this second scenario, the plaintiffs would continue as "branded" dealers for between seven to ten years.

To set a value for what was "taken" by the government in Mr. Stockton's "but for world," Mr. Stockton calculated how much net profit Guetterman lost under these two liquidation scenarios by using Guetterman's 2006, 2007 and 2008 financial statements. DX138, DX196, DX311. Under Mr. Stockton's approach, the amount of just compensation Guetterman is seeking varies depending on the scenario, as follows: (1) $122,761 for the immediate liquidation scenario; (2) $112,942 for a Chapter 11 three-year orderly wind-down scenario; and (3) $61,047 for a Chapter 11 17-month orderly wind-down scenario. Tr.2456:11-19.

I. Mike Finnin Motors

Mike Finnin testified on behalf of Mike Finnin Motors ("Finnin"), the second Colonial plaintiff, which

---

[24] Mr. Stockton also testified on cross examination that if a consortium of dealers did not purchase the proprietary parts and intellectual property from Chrysler during the Chrysler bankruptcy, some unidentified third party would have and then would have licensed these parts and the brand to the Chrysler plaintiffs, who would thus have been able to continue as Chrysler-branded dealers. Tr.2446:5-10.

for the years at issue was located at 4355 Dodge Street, Dubuque, Iowa. Finnin was incorporated under the laws of Iowa. Finnin's dealership included Chrysler and Jeep franchises as well as a Kia franchise acquired in 2007.

The Chrysler and Jeep franchise agreements that were rejected in the Chrysler bankruptcy were awarded to Finnin on November 21, 1994. Finnin's Chrysler and Jeep franchise agreements are identical in form and substance to the other franchise agreements owned by the other representative plaintiffs. DX29 (Jeep Agreement), DX32 (Chrysler Agreement). Mr. Finnin also testified that he understood that, regardless of the termination provisions in these franchise agreements, state law precluded the termination of dealerships for unjust reasons.[25]

On May 13, 2009, Finnin received a letter from Chrysler stating that its Chrysler and Jeep franchise

---

[25] Iowa state law provides that a "franchiser shall not terminate or refuse to continue any franchise unless the franchiser has first established, in a hearing held under the provisions of this chapter, that both of the following apply: a. The franchiser has good cause for termination or noncontinuance. b. Upon termination or noncontinuance, another franchise in the same line-make will become effective in the same community, without diminution of the motor vehicle service formerly provided, or that the community cannot be reasonably expected to support such a dealership." Iowa Code Ann. § 322A.2(1) (West 2009). Iowa state law further provides that "[u]pon hearing, the franchiser shall have the burden of proof to establish that under the provisions of this chapter the franchiser should be granted permission to terminate or not continue the franchise, or to enter into a franchise establishing an additional motor vehicle dealership, or to alter a franchisee's community." Iowa Code Ann. § 322A.9 (West 2009).

agreements would be rejected in bankruptcy. The letter is identical to that received by the other representative plaintiffs in this case. DX446. Mr. Grady, Director of Dealer Operations, explained that Finnin's Chrysler and Jeep franchise agreements were rejected by Chrysler in bankruptcy because the dealership only met 66% of its MSR and because Chrysler believed that a nearby Dodge dealer was a better dealer and wanted that dealer to have the Finnin Chrysler and Jeep franchises. DX1315.

After Finnin received the May 13, 2009 letter, Finnin lost use of half of a "10,000 new square foot showroom at [its] main facility" that was dedicated to its Chrysler and Jeep franchises. Tr.2244:19-21. Finnin also lost the income it could have derived from "selling the Jeep-Chrysler products, not selling those trade [ins], not performing warranty work on the Chrysler-Jeep vehicles, not selling parts to our individual clients and our wholesale accounts, and . . . the blue-sky value for the franchise." Tr.2249:1-8. Finnin "sought to get [its] Chrysler franchise back through 747 arbitration [and] spent over $180,000 trying to get it back, but it was denied by the arbitrator." TR2249:9-12. Finnin's 2010 financial statement from the Kia franchise that had been co-located with its Chrysler franchises showed that Finnin received an annual net profit of $291,742 from that dealership. DX620. Finnin's 2011 financial statement from its Kia franchise showed that it received an annual net profit of $473,108 from that dealership. DX650.

Finnin claims that the rejection of its Chrysler and Jeep franchise agreements in the Chrysler bankruptcy amounts to a taking of its two franchises based on a theory of coercion that is the same as that relied on by the *Alley's* plaintiffs. Finnin is seeking just compensation in various amounts depending on two different "but for" liquidation scenarios posited by its valuation expert Mr. Stockton. As explained above regarding Guetterman, Mr. Stockton posits two "but for worlds" where Chrysler liquidates in bankruptcy to establish the value of Finnin's franchise agreements. Mr. Stockton calculated the profit Finnin allegedly lost based on these two liquidation scenarios by using Finnin's 2006, 2007 and 2008 financial statements. DX137, DX195, and DX310. Under Mr. Stockton's valuation approach, the amount of just compensation Finnin is seeking is as follows: (1) $1,591,912 for the immediate liquidation scenario; (2) $1,391,138 for the three-year orderly wind-down scenario; (3) $775,040 for the 17-month orderly wind-down scenario. Tr.2453:15-19.

II. Summary of Plaintiffs' Fact and Expert Evidence

A. Plaintiffs' Fact Witnesses

i. Steven Rattner

Steven Rattner testified for both the plaintiffs and the United States at trial. He explained that he was appointed by Timothy Geithner, President Obama's Secretary of Treasury, at the end of February 2009 to head a newly formed Auto Team Task Force ("Auto Team") at the United States Department of Treasury.[26]

---

[26] Mr. Rattner came to the Auto Team with a journalism and finance background. Mr. Rattner was a reporter for the New York Times for over eight years and had been an investment banker for both Lehman Brothers and Lazard Freres before cofounding a private equity firm, the Quadrangle Group. Tr.1606:15-1607:4. After leaving the Auto Team, Mr. Rattner

According to Mr. Rattner, his role was to assemble and oversee "a team of people who were going to address the growing crisis in the automobile industry [in 2008-09] and . . . come up with some policies to ameliorate the situation." Tr.1607:7-10. He remained in this position from February 2009 until July 2009. Tr.1607:12-15.

Mr. Rattner testified that he understood that his job on the Auto Team "was a restructuring exercise in that the Government had put some bridge loans into [Chrysler] at the end of 2008 . . . [and] it would be the [Obama] Administration that would have to figure out what, if anything, the Government should do, could do by the way of permanent financing to make [Chrysler] viable." Tr.1623:8-18. Mr. Rattner explained that in carrying out the goals of the Auto Team there was a principle called "shared sacrifice" which meant they "felt that all the stakeholders in [Chrysler] . . . were going to have to make sacrifices and share in them." Tr.1626:11-16. These sacrifices, Mr. Rattner testified, would come from "the lenders, the shareholders, the employees, the workers, the suppliers, and the dealers." Tr.1627:7-9. Mr. Rattner explained that, for the lenders, this meant that they would not be able to recover the entirety of the outstanding debt that Chrysler owed to them. Tr.1628:3-12. Mr. Rattner testified that, for the employees, shared sacrifice was that their contracts would be renegotiated and that Chrysler's obligations to them would be restructured or reduced. Tr.1628:15-

---

returned to his earlier work in finance and today he is chairman and chief executive officer of Willett Advisors, which manages the personal and philanthropic assets of former New York City Mayor Michael Bloomberg. Tr.1607:16-23.

17. At that time, the shared sacrifice of the auto dealers was not discussed.

Mr. Rattner explained that prior to Obama taking office, Chrysler had received a bridge loan from the Trouble Asset Relief Fund ("TARP") from the Bush Administration in the amount of $4 billion on December 31, 2008, and that under the terms of the bridge loan Chrysler was required to submit a "Viability Plan" to the U.S. Department of Treasury by February 17, 2009. DX996. Mr. Rattner explained that Chrysler was required to produce "a plan showing how, in their judgment, with whatever tools and adjustments or financial support or whatever it was that they thought they needed, a plan that would allow them to become profitable again and remain viable or profitable . . . for the indefinite future." Tr.1630:5-12.

Chrysler's Viability Plan was prepared by Chrysler, with the help of Robert Manzo, a restructuring specialist from the Capstone consulting firm who was retained by Chrysler starting in 2008. Tr.3928:18-24; DX1056. In its plan, Chrysler offered the following three options: (1) a stand-alone plan, in which Chrysler would continue with the same management but with an additional $5 billion from Treasury and $6 billion from the Department of Energy for a total of $11 billion in additional government funding, (2) an alliance with Fiat plan, under which the two companies would work together to rebuild Chrysler with lighter and more fuel efficient vehicles and also would receive $11 billion in additional government funding, and (3) an orderly wind-down of Chrysler in bankruptcy plan, which would require $24 billion in debtor-in-possession or "DIP" financing for a two-year wind-down of operations to allow for the continued production of cars and trucks. Tr.1720:9-25; DX1056. Upon receiving Chrysler's Viability Plan, members of the Auto Team and their experts, including Mr. Mosquet,[27] were asked to review Chrysler's plan. Mr. Ronald Bloom,[28] Mr. Rattner's deputy who later testified for the government, was primarily responsible for reviewing Chrysler's Viability Plan along with other members of the Auto Team including Brian Osias and Clay Calhoon.[29] After reviewing Chrysler's Viability Plan, the Auto Team determined that Chrysler could not survive under the terms proposed. On March 30, 2009 President Obama announced that Chrysler's Viability Plan was rejected, and that Chrysler would be given until the end of April to revise its Viability Plan. DX1133.

Mr. Rattner testified that the Auto Team gave serious consideration to allowing Chrysler to liquidate in bankruptcy without government involvement but

---

[27] As discussed *infra*, Mr. Mosquet is a senior partner and managing director in the Detroit office of Boston Consulting Group. Since 2005, Mr. Mosquet has worked mainly in the automotive industry. Tr.1858:7-1859:14.

[28] As discussed *infra*, Mr. Bloom was the deputy to Mr. Rattner and later became the head of the Auto Team. Tr.2685:7-15. Mr. Bloom, prior to joining the Auto Team, had worked for the United Steelworkers Union from 1996 to 2008, where he negotiated their collective bargaining contracts and managed their relationship with Wall Street firms interested in investing in steel companies that are unionized. Tr.2682:25-2683:7.

[29] Brian Oasis testified, as discussed in greater detail *infra*, that he was an analyst who worked alongside with Mr. Calhoon and by March 2009 was focused exclusively on Chrysler. Tr.3138:21-3139:2.

came to understand that Chrysler needed to survive in some form so that its suppliers would also survive. Specifically, Mr. Rattner testified that if Chrysler was no longer making cars and trucks and instead was liquidated "many of those suppliers would have also been forced into some form of liquidation, and the problem was not just those jobs that were lost, but suppliers in this industry typically do not supply just one manufacturer. They supply multiple, maybe all of them. And so you have Ford, you would have GM, you would have Toyota, and all the people who operate in the south, potentially not being able to get parts they needed to make their cars, and it was not inconceivable-and I don't think we were being doomsday folks to say this-that we thought the whole industry could shut down, at least for a bit, in a Chrysler liquidation." Tr.1725:9-22. Mr. Rattner also explained that the Obama Administration was concerned about unemployment, particularly in the auto industry, and therefore concluded that keeping Chrysler alive was important for this reason as well. Tr.1725:8-22.

After Chrysler's initial Viability Plan was rejected by the Auto Team, but before another plan was submitted, Mr. Rattner explained that the Auto Team largely took control of Chrysler's viability planning and began meeting with Chrysler's stakeholders, including its creditors, represented by JP Morgan (the administrative agent for the nearly $7 billion in debt owned by Chrysler's first lien lenders), Fiat (Chrysler's prospective purchaser), the United Auto Workers ("UAW"), and suppliers. The evidence established that many of these meetings took place without

Chrysler management present.[30] As Mr. Rattner testified, "between March 30th and the end of April, [the Auto Team], Chrysler, ultimately the banks, the UAW, various interested parties, attempted and ultimately succeeded in negotiating a set of go-forward arrangements that each party could live with and that [the Auto Team] determined would allow Chrysler to achieve viability." Tr.1636:10-15.

Mr. Rattner testified that in his role as leader of the Auto Team he negotiated with Chrysler's first lien lenders, represented by JP Morgan. Tr.1650:4-1651:16. Mr. Rattner testified in detail how the Auto Team set the terms and pace of the negotiations with JP Morgan, where he understood that his "first offer was not going to be [his] last offer, so [he] deliberately started low[.]" Tr.1652:15-18. He explained that he "spent a good bit of time-many hours in a short period of time negotiating with [JP Morgan] and [JP Morgan] negotiating with [the] other [lenders]" to try and modify the terms of the $7 billion in loans so that Chrysler would not have to file for bankruptcy, but that those negotiations failed. Tr.1653:21-1654:11. Eventually, the first lien lenders received $2 billion in an agreement approved by the Bankruptcy Court. Tr.1653:8-11.[31]

---

30 The evidence established that Chrysler, without the Auto Team's support, continued to work on an alternative Viability Plan that required government assistance, but which Chrysler hoped would meet the government's requirements without Chrysler having to enter bankruptcy. As described in more detail in the discussion of Mr. Nardelli and Mr. Bloom's testimony, this effort by Chrysler failed.

31 As discussed *infra*, JP Morgan's advisor John Haeckel testified that after reviewing Chrysler's Viability Plan, he came to

Mr. Rattner testified that his deputy, Mr. Bloom, was charged with negotiating an arrangement with UAW. Tr.1637:4-15. Mr. Rattner testified that the Auto Team "[sat] down with UAW and attempted to negotiate some restructuring of the [employee's] contract and of Chrysler's obligation to [its employees]." Tr.1628:15-17. These negotiations eventually led to UAW pension funds receiving shares in New Chrysler. Specifically, under the prepackaged bankruptcy plan, negotiated by the government's Auto Team, in exchange for forgiving $8 billion in fixed obligations owed by Chrysler to the UAW's Voluntary Employees' Beneficiary Association Plan or "VEBA," UAW agreed to accept a $4.6 billion unsecured note and stock in New Chrysler. Tr.2720:7-13.

Mr. Rattner explained that the Auto Team also took charge of the negotiations with Fiat regarding a potential merger with Chrysler. Mr. Rattner described it as "a kind of three-way negotiation in which Chrysler, Fiat, and the U.S. Government all participated." Tr.1636:16-24. The evidence established that under the final negotiated prepackaged bankruptcy plan, Fiat would take over management of New Chrysler and receive stock in new Chrysler. Fiat would not, however, have to pay Chrysler for its interest in New Chrysler. Mr. Rattner stated that consistent with its financing role, the government had to approve the deal with Fiat. Tr.1636:25-1637:3. Mr. Rattner acknowledged that the government's

---

believe that the first lien lenders would never get more than $2 billion from Chrysler if Chrysler entered bankruptcy without government assistance. He thus advised JP Morgan to accept the government's proposal to relinquish the debt held by first lien lenders for the government's $2 billion. Tr.2865:25-2866:3.

power in this circumstance is known as the "Golden Rule," meaning "he who has the gold makes the rules." Tr.1683:9-12.

Mr. Rattner explained that reducing the number of Chrysler franchises was in Chrysler's proposed Viability Plan before the government got involved and thus was always a part of Chrysler's viability planning. Tr.1665:13-20. Known in the auto industry as "dealership rationalization," the government understood from Chrysler's submissions that Chrysler planned to reduce the total number of franchisees and wanted to combine all brands under one roof to make Chrysler viable. *Id.* For this reason, "dealer rationalization," which was initiated by Chrysler well before the financial crisis, was always going to be part of a final Chrysler Viability Plan. Tr.1665:13-20, Tr.1641:12-21, Tr.16380:14-17. Mr. Rattner, explained however, that the Auto Team "never got into the question of which dealers, how, or anything of that sort" but rather was looking at it from a macro level of how many. Tr.1664:20-1665:12. He also agreed that one of the positives of moving forward with a Chrysler bankruptcy was that it would allow Chrysler to reduce its dealership network without having to comply with state franchise laws, which, as identified in the footnotes for each representative plaintiff, provide significant protections to car franchisees and limit the circumstances under which dealerships can be terminated. Put another way, bankruptcy would allow Chrysler to reject franchise agreements without having to first comply with state laws. Tr.1642:13-25.

Mr. Rattner further explained that the government had hoped that Chrysler would not have to file for bankruptcy and testified that up to the last minute the government was willing to provide funding under the terms the government negotiated with Chrysler's lenders and others. Tr.1653:24-25, Tr.1654:9-11. However, he also testified that everyone understood from the beginning of the Auto Team's review of Chrysler's Viability Plan that bankruptcy was an option. Tr.1640:6-22, Tr.1642:4-11. When JP Morgan was not able to get an agreement from all of Chrysler's lenders, the government concluded that if Chrysler, in some form, was going to continue to manufacture cars and trucks, Chrysler would have to file for bankruptcy under the terms the Auto Team negotiated. Tr.1661:12-18.

Per the court's pre-trial order, the government also elicited testimony and evidence from Mr. Rattner during the plaintiffs' case-in-chief. In his testimony for the government, Mr. Rattner explained that Chrysler understood that "it could not be viable unless it had significant sacrifice" from all interested parties including dealers, shareholders, suppliers, the UAW, and credit groups. Tr.1719:12-16. He explained that he understood at the time that JP Morgan and the other first lien lenders would not provide Chrysler with any financing in order to allow Chrysler to continue to operate as an ongoing concern while in bankruptcy. Without this debtor-in-possession or "DIP" financing, Chrysler could not continue to manufacture new cars and trucks. Thus, if Chrysler was to continue to make cars and trucks during bankruptcy, Mr. Rattner explained that Chrysler needed the federal government's assistance. Tr.1722: 13-1723:5. Mr. Rattner also made clear in his testimony that the Auto Team never targeted specific dealers for rejection. Tr.1737:1-6.

ii. Xavier Mosquet

The plaintiffs also presented the testimony of Xavier Mosquet to support their coercion claim. Mr. Mosquet is a senior partner and managing directing for Boston Consulting Group ("BCG") in its Detroit office, and was an advisor to the Auto Team. Tr.1858:7-20. Mr. Mosquet explained that BCG is a "managing consulting firm present in several countries around the world" that gives advice to corporations about operation issues. Tr.1858:21-1859:14. He explained that he is an expert in the automotive industry and further explained that BCG was retained by the Auto Team in 2009, with Mr. Mosquet as the team leader, to analyze the Viability Plans submitted by GM and Chrysler in February 2009. Tr.1859:24-1860:12.

Regarding the Chrysler Viability Plan, Mr. Mosquet explained that Chrysler's plan was not viable. The plaintiffs, however, focused Mr. Mosquet's testimony on his understanding of Chrysler's "Project Genesis" plan, which, as described above in connection with the testimony of the individual plaintiffs, was a voluntary Chrysler program designed to reduce or "rationalize" Chrysler's dealership network without forced dealership closures. Tr.1873:3-6, Tr.1874:3-8, Tr.1885:19-23. Mr. Mosquet testified that neither he nor anyone else at BCG criticized Project Genesis. Tr.1909:17-1910:8. He also testified that, in comparison to GM, which had not begun to rationalize its dealership network, BCG had concluded that Chrysler had already done significant dealership closures and was thus ahead of GM. PX704; Tr.1892:13-20. Mr. Mosquet testified that BCG concluded that Chrysler had "already gone through a significant number of low performing consolidations." Tr.1936:15-20; PX704. Mr. Mosquet further testified that BCG concluded that any further reduction in the dealership network could result in eliminating additional good dealers with "limited upside potential." Tr.1894:11-17; PX704.

Mr. Mosquet explained that in evaluating Chrysler's Viability Plan, BCG had not done any analysis concerning whether further reducing the number of Chrysler dealers would positively impact Chrysler's sales or increase its profitability. He also testified that no one at BCG had analyzed the health of the overall dealership network. Tr.1900:11-1901:5, Tr.1901:15-18. He testified that he understood that Fiat's plan for the Chrysler dealerships was the same as Project Genesis. Tr.1882:1-4. Mr. Mosquet concluded by stating that only Chrysler was in the position to determine the appropriate size of its dealership network. Tr.1962:12-23, Tr.1963:4-6.

iii. Alfredo Altavilla

In accordance with the court's pre-trial order, the court allowed the parties to introduce the video deposition of Alfredo Altavilla, Fiat's Head of Business Development and CEO of Fiat Powertrain Technology, in lieu of his attendance at trial. In his deposition, Mr. Altavilla testified regarding the negotiations between the government and Fiat and regarding Fiat's interest in the size and composition of Chrysler's dealership network.

Mr. Altavilla explained that there had been an initial term sheet negotiated between Fiat and Chrysler regarding an "alliance" before the Auto Team got involved. He testified that the second term sheet between Fiat and Chrysler was significantly renegotiated by the Auto Team. Depo. 60:8-25. Specifically, Mr. Altavilla explained that during his first meeting with Mr. Bloom from the Auto Team, Mr. Altavilla learned that the government would be Fiat's "main counterpart for executing the alliance[.]" Depo. 67:20-68:5. He went on to explain that the second term sheet had no provisions that were promoted or suggested by Chrysler and that in negotiating the second term sheet it was understood that the Auto Team expected additional concessions from both sides. Depo. 177:15-178:3. Mr. Altavilla explained, however, that neither in the first or second term sheet executed between Chrysler and Fiat was there any mention of reducing the dealership network by a specific number of dealers. Depo. 154:4-22, Depo. 152:23-153:4. Mr. Altavilla testified that part of the reason that Fiat was interested in Chrysler was because Chrysler had an extensive dealership network. Depo. 140:20-25. He testified that Fiat eventually came to understand from Chrysler why a reduction in the size of the dealership network made sense and deferred to Chrysler's judgment when Chrysler proposed accelerating Project Genesis with the more ambitious "Project Tiger." Ultimately, Project Tiger became the basis for Chrysler deciding which franchise agreements to reject in the bankruptcy.[32] Depo. 146:4-147:11.

---

[32] As will be discussed in greater detail *infra*, Project Tiger was a plan proposed by Chrysler in April 2009 just before it entered bankruptcy. DX1167.

B. The Plaintiffs' Experts

i. Dr. Donald Marron

The plaintiffs presented the testimony of Dr. Donald Marron, Ph.D., an economist and Institute Fellow and Director of Economic Policy Initiatives at the Urban Institute in Washington D.C. and president of Marron Economics, LLC, an economic consulting firm. Tr.2047:1-6. Dr. Marron was called to explain why, in his view, the terms the Auto Team negotiated in its prepackaged bankruptcy plan did more than protect the government's financial interests. Dr. Marron opined that the government's negotiated terms were designed to achieve valid public policy goals including saving jobs and pensions.

Dr. Marron holds an A.B. in mathematics from Harvard University and a Ph.D. in economics from the Massachusetts Institute of Technology and is an expert in the fields of public finance and industrial organization. Tr.2047:7-11. From 2002 through early 2009, Dr. Marron served in senior economic policy positions in the United States Congress and the White House. Tr.2047:19-21. His positions included being the Executive Director of the Joint Economic Committee, Acting Director of the Congressional Budget Office ("CBO"), and Senate-confirmed member of the Council of Economic Advisors. Tr.2047:21-25. In his role at CBO he "directed a staff of about 230 employees that were charged with working on a broad range of economic and budget issues." Tr.2047:25-2048:2. From August 2007 until January 2009 he served at the White House Council of Economic Advisors as a consultant, then senior economic advisor, and then as member where he was "actively engaged in responding to the financial crisis, including the creation and use of the Troubled Asset Relief Program." Tr.2048:5-11. He has published numerous articles and papers on the economics of public policy and has provided testimony to committees of the U.S. Congress on more than twenty occasions. Tr.2048:19-24.

Dr. Marron offered several opinions relevant to the government's motivation in providing Chrysler with financial support during the economic crisis and opined that the government, in providing funding and in requiring certain actions in exchange for government financing, was acting in its governmental capacity and not simply as a private lender. Dr. Marron's opinions are summarized as follows.

First, Dr. Marron opined that "[t]he United States experienced a remarkably severe financial crisis and economic downturn starting in 2007. The main causes include[d] excesses in mortgage lending and fragility of a highly leveraged financial system reliant on ample liquidity." He further testified that "[g]overnment policy errors contributed to the financial crisis and the severity of the economic downturn." Tr.2055:23-2056:4.

Second, Dr. Marron opined that "[t]he government had unique power to combat the financial crises and was correct to use it. Many companies directly benefited from that support, but the purpose was not to help individual companies. Instead, the goal was to support essential parts of the economy, and, in so doing, stem job losses and avoid an even more severe economic downturn. The Chrysler . . . bailout[], for example, [was] intended to support the domestic auto industry as a whole, including suppliers and other auto manufacturers[.]" Tr.2058:25-2059:10. Dr. Marron explained that having learned its lesson from inaction during the Great Depression, the government acted in order "to support the economy as a whole and [to] avoid a downturn as severe or worse than in the Great Depression." Tr.2061:17-19.

Third, Dr. Marron testified that it was his opinion that "[t]he government did not act in a commercial manner in rescuing Chrysler. The government did not have a commercial motive. It sought to protect the broader economy, not earn a commercial return. The government did not seek commercial returns. Instead, it gave Chrysler substantial subsidies." Tr.2062:24-2063:4. Dr. Marron explained that during the financial crisis the "government did not have a commercial motivation in enacting TARP" but rather aimed to support the American economy and prevent job loss. Tr.2063:10-14. Dr. Marron noted that the government's concern of "shared sacrifice" is not something a private lender would have considered but is a public policy consideration made by the government when acting in its governmental capacity. Tr.2065:5-9. Additionally, Dr. Marron opined that the "government knowingly subsidized Chrysler, offering financial terms much more generous than private investors would accept" and that this was further evidence that the government was not acting as a private lender. Tr.2065:9-11. Dr. Marron acknowledged that "[s]ome of the government's actions did parallel those a commercial lender or financier might take" but that ultimately "[t]he Chrysler bailout as a whole was decidedly non-commercial." Tr.2065:10-13, Tr.2065:24-25.

Fourth, Dr. Marron testified that it was his opinion that the government was not acting as a private lender because the loans to Chrysler were highly subsidized. Tr.2066:1-6. Specifically, Dr. Marron explained that "the government did not invest in the companies on commercial terms" but rather "expected to lose money." Tr.2066:6-8. In support of his opinion, Dr. Marron relied on contemporaneous reports by the Office of Financial Stability ("OFS"), the CBO, and the Office of Management and Budget ("OMB"). He noted that OFS in 2009 published three estimates of the Automotive Industry Financing Program,[33] with subsidy rates ranging from 43% to 60%, meaning that the government understood that it would not likely receive repayment. PX257. For example, Dr. Marron explained that in its first estimate OFS calculated that the government had made $75.9 billion in loans and equity investments to auto companies but that the securities it received were worth only $30.5 billion. Tr.2068:8-15. Dr. Marron noted that this meant the $45.4 billion difference was a subsidy to the auto companies, which was about 60% of the overall investment. *Id.* Dr. Marron explained that for the other two estimates calculated by OFS, the subsidization rate was consistent with the first estimate. Dr. Marron went on to explain that the CBO and OMB reported similar numbers and subsidization rates. Based on these rates, Dr. Marron concluded that the government acted in its governmental capacity and not as a private lender when it bailed out Chrysler. Tr.2076:9-15.

---

[33] This program provided capital to both Chrysler and GM as well as their captive finance companies, Chrysler Financial and General Motors Acceptance Corporation, and auto part suppliers. Tr.2117:18-25.

Dr. Marron acknowledged on cross examination that all the reports that he relied on included figures that encompassed all or nearly all of the government's loans to the auto industry and not just to Chrysler. Tr.2126:8-2129:20. Additionally, on cross examination, Dr. Marron acknowledged that New Chrysler repaid all its federal loans to the United States. He explained, however, "when the loans were first made, the analysts would have assumed there was some probability of default and that would have been built into their estimated subsidy rate . . . [a]nd by the end, where it turned out after the fact that this loan didn't default, that adjustment goes away." Tr.2138:12-24.

ii. David Berliner

David Berliner, who received a B.A. degree in economics from Lafayette College and an M.B.A. from the University of Michigan, also testified for the plaintiffs. He is a licensed Certified Public Accountant as well as a Certified Insolvency and Restructuring Advisor and a Certified Turnaround Professional. Tr.100:3-7. Mr. Berliner is currently a partner at BDO, an international accounting, tax and consulting firm, where he oversees business restructuring and turnaround services. Tr.99:21-100:8. He has been involved in several bankruptcy cases involving the liquidation of "large corporations including Sports Authority Holdings, Malibu Lighting, Furniture Brands International, American Home Mortgage, and Pillowtex Corporation." Tr.101:7-11. He also "served as the financial advisor to the official committee of unsecured creditors in the bankruptcy of Daewoo Motor America, Inc." Tr.101:18-20.

Mr. Berliner offered his opinion that "the Chrysler dealers whose franchises were terminated and made worthless in June 2009 would have fared better and their franchises would have retained significant value if the U.S. Government had not acted as it did in 2009." Tr.102:3-7. Specifically, Mr. Berliner testified that "absent the financial assistance from the Government, Chrysler would have filed for an ordinary liquidation in bankruptcy and would not have terminated existing dealer franchises as it did in 2009" and "under this but for scenario . . . the rejected dealers would have generated revenues and earnings for a period of at least 20 months or longer during a Chrysler 2009 liquidation, and therefore, the rejected dealership franchises would have had substantial value." Tr.102:8-19. Mr. Berliner posits that had the government not gotten involved in providing financial assistance to Chrysler, Chrysler would have begun a Chapter 11 liquidation bankruptcy with debtor-in-possession or DIP financing so that Chrysler could continue manufacturing at least some of Chrysler's vehicle lines with valid warranties. He further opined that Chrysler would not have rejected any franchise agreements if Chrysler had entered Chapter 11 without government assistance. Tr.131:5-18.

Mr. Berliner explained that, in his view, had the government not provided assistance to Chrysler, Chrysler would have sold its assets in a Section 363 bankruptcy sale. Although described in more detail by former Bankruptcy Judge Judith Fitzgerald, plaintiffs' bankruptcy expert, Mr. Berliner explained that "Section 363 sales are any sale of a debtor's assets conducted under the authority of the Bankruptcy Court . . . and may include individual assets belonging to the debtor, a combination of assets, or substantially, all of the debtor's assets." Tr.131:20-25. Mr. Berliner explained that in his opinion Chrysler "would have begun a Section 363 asset sale process to attempt to sell its valuable vehicle lines, such as Jeep, Dodge Ram Truck, and Town & Country/Dodge Minivan[.]" Tr.132:7-11. Mr. Berliner testified that "more than one potential bidder would have submitted a qualifying bid . . . and Chrysler would have held an auction in order to select the highest and best bid." Tr.135:20-24. Mr. Berliner explained that he based his conclusion on the assumption that "[b]idding would have been competitive, in part due to the interest in obtaining the valuable Chrysler brands and also in part, out of concern that a competitor might win one of these or more of these iconic brands at too low a price," and because through bankruptcy the assets would be taken free and clear of all liens and claims. Tr.135:24-136:6.

Mr. Berliner further explained why he believed that Chrysler would have likely received DIP financing. Tr.137:5-6. Mr. Berliner stated that "[i]f the debtor does not have sufficient cash to conduct the asset sales and to cover the costs of the liquidation process, the debtor will seek Bankruptcy Court permission to obtain debtor-in-possession or DIP financing to provide the necessary funds." Tr.137:20-24. Mr. Berliner reasoned that a debtor would seek DIP financing because "[i]f the debtor has only limited funds to conduct a sale process, then the liquidation sales must be done in an accelerated time frame which generally results in lower prices than an orderly sale process." Tr.137:8-12. Mr. Berliner opined that Chrysler would have sought and would have obtained some

DIP financing from "its secured lenders, Cerberus [the then-owner of Chrysler], a stalking horse bidder for the Chrysler brands, or a state government [where] a plant producing Chrysler's valuable brands was located." Tr.138:10-14. Mr. Berliner testified that these entities would have been incentivized to provide DIP financing in order "to ensure the liquidation process and sale of assets was done over a reasonable time frame and in an orderly manner" to maximize the value of the assets. Tr.138:19-24. Mr. Berliner went on to state that "even if no DIP financing was provided to Chrysler . . . one or two brands would have still been sold, maybe at a lower sales price" and the "Chrysler dealers would still have been able to continue providing service and parts and selling used vehicles to their customers and still may have received some new vehicles to sell in the future from the acquirer of the brands." Tr.129:11-23.

Mr. Berliner next opined that warranty work would continue at all the plaintiffs' franchises because, in his view, the government would have put into place some type of warranty program to guarantee the outstanding warranties of Chrysler car owners. Mr. Berliner explained that he believed that "[i]f nothing else, the government would likely have insisted that there was a warranty program to ensure public safety, consumer protection, and prevent the collapse of the U.S. automotive industry. Tr.140:7-11. Specifically, Mr. Berliner testified that "given the large number of Chrysler vehicles on the roads in early 2009 . . . a recall warranty program would have been put in place in a Chrysler 2009 liquidation." Tr.141:2-6.

Regarding the plaintiffs' franchises, Mr. Berliner opined that "no Chrysler dealers would have been immediately terminated in a Chrysler 2009 liquidation." Tr.141:7-9. Mr. Berliner testified that "there was no short-term benefit to Chrysler rejecting dealership agreements" and that Chrysler would not have rejected any agreements in bankruptcy. Tr.144:15-17, Tr.144:23-145:2.

Mr. Berliner testified that he supported his opinions based on evidence he examined from three other automobile bankruptcies in the United States: Daewoo Motors America, Saab America, and American Suzuki Motor Company. Mr. Berliner explained that Daewoo Motors America ("DMA") was the U.S. import and distribution arm of Daewoo Motor Company, which in 2002 had a network of 525 dealerships. Tr.145:14-19. He explained that DMA was forced to file for Chapter 11 bankruptcy in the United States in 2002 after its parent company was placed into reorganization status in South Korea. Tr.145:20-24. Mr. Berliner testified that "[a]s part of the DMA bankruptcy, the company entered into long-term agreements with the buyer of Daewoo to provide service, warranty repairs and Daewoo parts to the U.S. market through the DMA dealership network" and that "approximately 450 of the DMA dealers entered into agreements with the buyer and remained in business for many months, providing service and warranty repair work and selling used cars." Tr.145:24-146:8.

Next, Mr. Berliner testified regarding the fate of Saab America after Saab Automobiles went into bankruptcy. He testified that, following that bankruptcy, the 188 dealers in the dealership network stayed open for a period of time to service cars and sell used vehicles. Tr.146:13-22. Finally, Mr. Berliner testified about the American Suzuki Motor Corporation

("Suzuki") bankruptcy in 2012. Mr. Berliner explained that at the time Suzuki filed for bankruptcy, it had "220 automobile dealerships, 900 motorcycle/ATV dealerships, and over 780 outboard marine dealerships." Tr.146:24-147:2. Mr. Berliner explained that Suzuki undertook an orderly liquidation process where it entered into a Service and Parts Agreement with its dealers where Suzuki would honor all warranties and allow the dealers to continue to provide warranty service and sell the remaining new automobiles. Tr.147:8-22.

Mr. Berliner testified these historic examples of prior auto bankruptcies together with his expert opinions supported his conclusion that "Chrysler dealers would have continued in business, earning profits by performing a range of services for a period of time" if Chrysler had filed for Chapter 11 bankruptcy without government assistance. Tr.149:10-13. He testified that "[s]ome of the valuable Chrysler brands, such as Jeep, Dodge RAM trucks, and minivans, would be sold to an acquirer in a 363 sale" and that the "acquirer would seek to restart production as soon as possible, likely sometime in late 2009 or 2010." Tr.149:13-17. Mr. Berliner concluded that if the 363 purchaser did not have an existing dealership network, the Chrysler dealers could potentially continue in business indefinitely and have their franchise agreements assumed by the new manufacturer. Tr.149:18-23. Mr. Berliner acknowledged that even if the Section 363 acquirer in bankruptcy had a dealership network, "there would be some transition period of one to two years after the Section 363 sale where it would be necessary for the acquirer to utilize the existing Chrysler dealers to sell new vehicles and provide service and warranty repairs until the acquirer's dealer network was ready." Tr.149:24-150:5. Mr. Berliner explained that during this transition period, the Chrysler dealers would be able to continue to provide service and warranty work and sell some new Chrysler vehicles as well as used vehicles, and, at the end of the transition period, would either remain dealers or would wind-down their operations. Tr.150:6-13. Mr. Berliner reiterated that dealers would have had a "minimum of 20 months and potentially longer" from the date of the filing of a Chrysler bankruptcy in a "but for world" without government funding, and that the plaintiffs would have been able to derive profits from their operations for this period. Tr.151:1-7.

On cross examination, Mr. Berliner admitted that it is not uncommon for a debtor in bankruptcy to reject executory contracts, like franchise agreements, as Chrysler did in its bankruptcy, based on its business judgment. Tr.194:5-15, Tr.195:5-6. Mr. Berliner also admitted on cross examination that he had no opinion as to who would have acquired Chrysler's assets in a 363 sale. Tr.197:10-14. He explained that he "believed" that there would be an acquirer, that the sale would occur within four to six months, and that, as a result, the plaintiffs would have had sixteen to twenty months to perform service and warranty work. Tr.201:8-17, Tr.153:12-20. Mr. Berliner further admitted on cross examination that some of the Chrysler franchisees would likely have had their agreements rejected in the bankruptcy and that only some would have been given new franchise agreements with the Section 363 purchaser. Tr.203:19-204:25. In this connection, Mr. Berliner explained that he assumed that Chrysler franchisees would have access to financing to purchase new cars from Chrysler (known as floor plan financing) and that there would be DIP financing in place to allow Chrysler to orderly wind-down in a bankruptcy. Tr.230:1-6, Tr.233:16-24.

Finally, regarding the other auto bankruptcies he relied on, Mr. Berliner admitted on cross examination that there were some important distinctions between those bankruptcies and what would have happened to Chrysler had the government not intervened. First, he acknowledged that franchise agreements were rejected in the Saab bankruptcy. Tr.262:22-263:10, Tr.153:12-20. Next, he acknowledged that the Suzuki bankruptcy involved an auto distributor going bankrupt, and not the manufacturer. Finally, in the case of Suzuki, he acknowledged that the manufacturer continued to provide financial assistance that would not have been available to Chrysler in a "but for world" bankruptcy. Tr.263:23-265:10.

iii. Maryann Keller

The plaintiffs presented the testimony of Ms. Maryann Keller, an automotive industry expert with decades of experience conducting automotive industry financial research and analysis. She is currently the principle of Maryann Keller & Associates, a position she has held since January 2001. Tr.1070:17-22. She holds a bachelor's degree in chemistry from Rutgers University and a master's degree from Bernard Baruch School at the City University of New York. Tr.1073:14-17. She has "advised clients on issues across the automotive supply chain, from component companies to retail sales area." Tr.1071:11-14. Ms. Keller has been "qualified as an automotive expert in three proceedings, the first in the International Court of Arbitration in Hong Kong; a second in the State of Virginia; and, finally, in the Bankruptcy Court in New York City." Tr.1071:18-22. She has lectured about the automotive industry at Columbia University, Harvard, NYU, MIT, and the Economic Club of Detroit. Tr.1072:19-21. Ms. Keller has also authored two books on the automotive industry and written columns on the automotive industry for the Christian Science Monitor, Motor Trend Magazine, and Automotive Industries. Tr.1072:23-1073:1.

Ms. Keller testified that she was asked to opine on what would have happened if "the federal government had not provided financial assistance to Chrysler LLC in 2009 [and] the company would have restructured in a bankruptcy proceeding." Tr.1073:18-22. She testified that in her opinion Chrysler's assets that would have attracted multiple buyers and that Chrysler would have continued to manufacture vehicles during the bankruptcy. She also opined that plaintiffs would have been able to continue to sell Chrysler vehicles and would not have rejected any franchise agreements in a bankruptcy without government involvement. Tr.1074:11-1075:1.

Ms. Keller testified that the most prized assets of Chrysler would have been the Jeep brand, the Dodge RAM truck brand, and the Chrysler family of minivans. Tr.1076:2-14. Ms. Keller testified that there would likely have been at least 12 companies interested in purchasing Chrysler's assets and continuing to manufacture Chrysler vehicles. She explained that without having to abide by UAW contracts and pay union wages she believed Chryslers' assets would become more valuable and would have attracted more interest from potential purchasers. Tr.1086:12-21. She identified the following entities as potential purchasers of Chrysler's assets: The Blackstone Group; The Fiat Group, Ford Motor Company, Geely, General Motors, Magna International, Inc., Mahindra & Mahindra Limited, PSA Peugeot Citroen, Renault, Tata Motors, Tracinda Corp., and Volkswagen Group. Ms. Murphy testified as to why each of these entities was in a position financially to purchase Chrysler's vehicle lines in a Section 363 sale and why it would have made financial sense for them to do so. Tr.1086: 22-1102:23.

First, Ms. Keller testified that in her opinion the Blackstone Group would "have targeted Chrysler's physical assets in addition to its brands and intellectual property." Tr.1087:7-9. Ms. Keller explained that she believed the Blackstone Group would be a potential Section 363 purchaser in part because it was a large private equity firm with "$31.8 billion in assets under management with $821.3 million in revenues" during 2007 and that it had attempted to acquire "Chrysler in the spring of 2007 from Daimler" but had lost to Cerberus. Tr.1087:1-6.

Second, Ms. Keller testified that Fiat also would have been a potential Section 363 purchaser because "the combination of these two companies was ideal . . . Fiat's expertise was small fuel-efficient cars while Chrysler's expertise was trucks and sport utility vehicles" and because "Fiat had the ability to make Jeep a major international brand and to add Italian designed cars to the North American portfolio." Tr. 1089:8-19. She explained that Fiat, which paid nothing for Chrysler under the government's prepackaged bankruptcy plan, was in a financial position to purchase Chrysler's assets because in 2007 it had earned €2.1 billion on €59 billion in revenue. Tr.1088:2-7.

Third, Ms. Keller opined that Ford would have been a potential bidder because its financial conditions were "impressive" in 2007, with $13 billion in cash on hand and access to more than $10 billion in credit in 2008. Tr.1090:1-3. Ms. Murphy testified that she believed "Ford had the wherewithal to have been a bidder for select Chrysler assets that complemented its . . . portfolio including the Jeep brand." Tr.1090:3-6.

Fourth, Ms. Keller opined that Geely, a Chinese automotive manufacturing company headquartered in Hangzhou, Zejiang would have been a potential Section 363 purchaser. Ms. Keller explained that "[b]y the end of 2007, Geely recorded, in Hong Kong dollars, 11.3 billion in revenues and recorded . . . record breaking profits of Hong Kong dollars [of] 320 million before taxes." Tr.1090:7-10. She explained that she believes that at the time of a Chrysler bankruptcy, Geely was "well capitalized for both domestic and international growth." Tr.1090:15-16. Ms. Keller further testified that Geely's subsequent "acquisition of Lotus and its subsequent acquisition of Volvo demonstrated its ability and willingness to acquire international automotive assets that would add to its brand portfolio and its technical expertise." Tr.1090:17-21. Ms. Keller also noted that Geely "actually attempted to purchase some or all of Fiat Chrysler in 2018" to further support her opinion that Geely would have been an interested bidder in Chrysler's assets if there had been an open Section 363 sale. Tr.1091:11-14.

Fifth, Ms. Keller opined that General Motors could have been a potential buyer of "select Chrysler brands that complemented its own product portfolio, especially Jeep after it discontinued the Hummer brand," after GM emerged from bankruptcy at some point in 2008. Tr.1092:8-13.

Sixth, Ms. Keller testified that Magna International, a Canadian global automotive part supplier, could have been a prospective bidder on Chrysler's assets in the event of an open Section 363 auction. Ms. Keller explained that Magna in 2007 "had over 25 billion in revenue and over 68 million in net income." Tr.1092:16-17. Ms. Keller testified that "Magna was financially tied to Chrysler as a major supplier of components for all Chrysler vehicles" and thus would have had an interest in bidding for Chrysler's assets. Tr.1092:19-21. She went on to explain that in 2007, when Chrysler was for sale, Magna had made a bid of $4.7 billion and that Magna would likely attempt to purchase Chrysler's assets again in a Section 363 sale. Tr.1092:22-1093:1.

Seventh, Ms. Keller testified that Mahindra & Mahindra Limited ("Mahindra"), an automotive and farm equipment manufacturer based in Mumbai, India, would have been another potential purchaser of Chrysler's assets in a Chrysler bankruptcy. Ms. Keller explained that by "the end of fiscal year 2008, ending March 31, 2008, Mahindra had produced more than 2 million vehicles . . . [and had a] gross income . . . [of] $3.05 billion." Tr.1093:18-25. Ms. Keller testified that she believed that Mahindra would have been interested in purchasing Chrysler's assets because "it would have benefited from entering the global light vehicle segment on a major scale" and "would have targeted Chrysler's Jeep and Dodge truck brands." Tr.1094:1-9. Ms. Keller also noted that her opinion was supported by the fact that Mahindra representatives met with Chrysler in early 2008 to discuss the possible acquisition of certain Chrysler assets. Tr. 1094:5-7.

Eighth, Ms. Keller testified that PSA Peugeot Citroen ("PSA"), a French automobile company, would be another likely bidder on Chrysler's assets in a bankruptcy. She explained that in 2007, PSA had earned a profit of €1.8 billion and had sold over 3.4 million vehicles. Tr.1094:15-18. She opined that "PSA had been seeking to return to the United States . . . [and] the French Government had guaranteed financial assistance to PSA during the financial crisis." Tr.1094:15-24. Ms. Keller stated that PSA's interest in Chrysler's assets would have stemmed from the fact that "the Chrysler product portfolio would fill gaps, especially for light trucks in [PSA's] portfolio . . . and the Chrysler acquisition would have provided a [United States] dealer body . . . that would have granted [PSA] franchises to those dealers without the burden of having dealers make additional facilities investments." Tr.1094:24-1095:8.

Ninth, Ms. Keller testified that Renault, the second largest auto manufacturing company in France, would have also been an interested bidder. Ms. Keller explained that in 2007 Renault generated €40.6 billion in revenue and earned 2.7 billion in profit, and that it would have likely been interested in returning to the United States market through an acquisition of Chrysler assets. Tr.1095:18-25.

Tenth, Ms. Keller testified that Tata Motors ("Tata"), an automobile manufacturer based in Mumbai, India, would have also been a potential bidder on Chrysler's assets in order to expand its international market share. Ms. Keller explained that "Tata wanted to become an international automaker" which is evidenced by its 2008 acquisition of Jaguar Land Rover from Ford and the fact that in early 2008 Tata was in talks with Chrysler about selling the Jeep brand in India. Tr.1096:17-1097:18.

Eleventh, Ms. Keller opined that Tracinda Corp, a privately-owned investment company based in Beverly Hills, California, would have been another potential purchaser. Ms. Keller explained that "on April 5th, 2007, Tracinda made a $4.5 billion cash offer to DaimlerChrysler for its U.S.-based unit" and that it would have likely made similar efforts to purchase Chrysler's assets in bankruptcy in 2009. Tr.1098:3-6. Ms. Keller also explained that Tracinda would have been a likely 363 purchaser because it had made other forays into the automotive industry by purchasing large amounts of shares in GM and Ford. Tr.1098:9-19.

Finally, Ms. Keller opined that the Volkswagen Group ("VW") would have been a potential purchaser of Chrysler's assets in a Section 363 sale. She explained that in 2007 VW had earned €6.5 billion in pre-tax profit and "was a financially strong company and had previously acquired auto companies and successfully integrated them into its business." Tr.1098:24-1099:3. Ms. Keller testified that although VW had success in many global markets, "its presence in the North American market lagged because the company did not have what are called crossover sport utility vehicles [and] pickup trucks," which a purchase of Chrysler's assets in a 363 sale would have provided. Tr.1099:3-7.

Ms. Keller went on to explain, after listing the 12 different potential Section 363 purchasers, that her conclusion that some company would have purchased Chrysler's assets and made use of its vehicle lines is supported by historical examples in the automotive industry. She explained that "[t]he modern auto industry is notable for the willingness of buyers to purchase the assets of financially distressed, even bankrupt automakers." Tr.1100:5-7. She further testified that Chrysler brands like Jeep would have attracted a number of buyers both for the name recognition and the distribution network. For example, Ms. Keller noted that the Jeep brand was purchased by Chrysler in 1987 when it bought American Motors. Tr.1101:25:1102:18. She explained that Chrysler made this purchase even though American Motors was in financial distress and that Chrysler decided to preserve the dealership network in order to preserve an expertise in Jeep service and a distribution network. Tr.1102:24-1103:11.

Ms. Keller also pointed to the sales of MG Rover, Lotus, Saturn, Hummer, and Saab, including some while the brand was in bankruptcy. She explained that each of these brands attracted potential buyers despite less than ideal financial conditions, which, in her opinion, demonstrated that automakers have an appetite for purchasing brands with name recognition in order to revitalize them. Tr.1104:15-1105:16 (MG Rover), Tr.1105:17-1106:10 (Lotus), Tr.1106:11-1109:8 (Saturn), Tr.1109:9-1110:7 (Hummer), Tr.1110:8-1111:19 (Saab). She went on to explain that economic indicators predicted a rebound in auto sales which would have made Chrysler's assets even more valuable. Specifically, Ms. Keller relied on the fact that S&P

500 was up 25% between March and May 2009, the Consumer Confidence as measured by the University of Michigan was up 20% in the same time period, and gas prices were on the decline. Tr.1112:7-1113:9. She also noted that used vehicle values are a "effective predictor of future auto demand" and that used vehicle prices were steadily increasing though the first half of 2009. Tr.1114:25-1115:3.

Ms. Keller testified that all these factors indicated that there would have been a strong market for Chrysler's assets with many potential bidders, which would have resulted in higher value for Chrysler and in turn its creditors had the government not intervened. She opined that it was because the government intervened that other willing purchasers did not come forward. Tr.1121:3-25. Ms. Keller further explained that "Chrysler would have been a highly desirable partner for a number of the world's automakers because of its brand recognition, its desirable truck portfolio, and other vehicle offerings. And the company coming out of bankruptcy would have been freed of those debt obligations and labor costs that were really [Chrysler's] major liabilities." Tr.1121:11-17.

On cross examination, Ms. Keller admitted that she was not offering an opinion as to which of the companies discussed would have purchased Chrysler's assets in a Section 363 sale or how much those companies would have had to pay for Chrysler's assets. Tr.1123:11-23, Tr.1124:2-14. She also admitted that in preparing her testimony she did not conduct an analysis of how profitable any of Chrysler's products lines were at the time. Tr.1151:23-1152:9. Additionally, throughout her cross examination she admitted that for the 12 companies she proffered as potential Section

363 buyers, she did not consider such factors as whether those companies had ever expressed an interest in buying Chrysler, or had the financial ability to pay for Chrysler's assets in an amount sufficient to meet its debt, at the time of the Chrysler bankruptcy in April 2009. Tr.1155:21-24, Tr.1159:22-25, Tr.1160:15-16.

Ms. Keller was confronted on cross examination with an article from May 31, 2009 in the New York Times in which she was quoted as saying that she believed that Chrysler as well as GM had too many dealer showrooms to be profitable and that there was an advantage in reducing these dealers in bankruptcy.[34] Tr.1148:1-1149:11. Government counsel also asked Ms. Keller about an April 30, 2009 article she authored, published in the Detroit News, where she espoused the belief that Chrysler was a failing auto manufacturer that had been written off by its owner Cerberus, that no entity would step in to provide Chrysler with sufficient money to keep Chrysler going, and that the best result that could be hoped for the Chrysler-Fiat alliance was that not too much money was lost.[35] Tr.1180:19-22, Tr.1182:25-1184:15; DX1602.

---

[34] In her May 31, 2009 New York Times article Ms. Keller is quoted as saying that "GM and Chrysler bore costs associated with their huge dealer networks, which they can now streamline [and] [o]nly through bankruptcy could this be accomplished without huge expenses and litigation with individual dealers." Tr.1148:3-8.

[35] In the Detroit News article Ms. Keller wrote "Daimler and Cerberus have written off their investment in [Chrysler]." She explained that Cerberus "seemed to know [it was] acquiring a hollow auto business since [it] immediately spoke about forming partnerships and affiliations to compensate for the lack of

iv. Judge Judith Fitzgerald

The plaintiffs also offered the opinion testimony of the Judith Fitzgerald, a retired federal bankruptcy judge. Judge Fitzgerald was "sworn into the Western District of Pennsylvania [as a bankruptcy judge] on October 30, 1987, [and] sat for nearly twenty-six years before [her] retirement in May 2013." Tr.521:7-11. She was also "designated to sit in the District of Delaware for twenty years, the Eastern District of Pennsylvania for eight, and the District of the United States Virgin Islands for nine." Tr.521:12-16. Prior to serving as a bankruptcy judge, she served for "12 years as an Assistant United States Attorney in the Western District of Pennsylvania." Tr.521:17-19. She has taught numerous law classes on commercial transactions, bankruptcy, and contracts. Tr.521:25 522:2. She is currently "a shareholder, member of the board, and vice president of the law firm of Tucker Arensberg, PC, which is based primarily in Pittsburgh, Pennsylvania." Tr.520:21-24. Judge Fitzgerald testified that she was retained by the plaintiffs "to look at but for scenarios that would address what Chrysler may have been able to do . . . in the absence of government action, and to compare that with the real world franchise terminations that occurred in the actual Chrysler bankruptcy case." Tr.522:11-17. Judge Fitzgerald explained that she arrived at three opinions: (1) Chrysler could not have survived outside of bankruptcy without government assistance, (2) plaintiffs' dealerships would have retained value as part of Chrysler's

---

homegrown models." She explained that she believed that Chrysler would need more than $6 billion to continue and that she could not "imagine any lender stepping up with new loans." DX1602.

sale of assets, restructuring, or merger with another entity in a bankruptcy proceeding, and (3) plaintiffs' franchises would have had value during an orderly wind-down of Chrysler regardless of whether there was a sale of Chrysler assets. Tr.562:20-563:22.

Judge Fitzgerald began her opinion testimony by describing the bankruptcy process and how the Chapter 11 bankruptcy was applied to Chrysler. Tr.574:10. She explained that United States bankruptcy law serves several basic purposes including (1) a means by which a debtor can process creditor claims as a collective rather than on an individual basis, (2) providing a fresh start for a debtor, (3) preserving going concern values, (4) strengthening a company's balance sheets, and (5) offering a liquidation alternative to entities that would not be able to reorganize without the bankruptcy process. Tr.574:11-24. Judge Fitzgerald explained that when a debtor files for bankruptcy it must provide the court with schedules and statements of its financial affairs which includes a list of known claims against the debtor. Tr.575:10-24. Judge Fitzgerald testified that a corporation would choose a Chapter 11 bankruptcy because it "is designed to keep the company's management operation[al] . . . during its bankruptcy" while it attempts to negotiate how the claims of its creditors are handled and how to reorganize. Tr.577:7-18.

Judge Fitzgerald explained that when a company files a voluntary petition for bankruptcy it creates an estate that "is comprised of all the property and property interests of the debtor . . . in order to maximize[e] its value to pay creditors." Tr.578:20-579:4. In a Chapter 11 bankruptcy, "the debtor remains in possession and has the status of a trustee for most purposes." Tr.579:7-9. She went on to explain that "creditors" are prioritized with secured creditors having the highest priority followed by unsecured creditors. Tr.579:25-580:15.

Next, Judge Fitzgerald explained the role of the Section 363 asset sale. She explained that Section 363 sales are used to dispose of a debtor's assets while it determines its longer-term needs. Tr.587:3-7. Judge Fitzgerald testified that "[d]ebtors frequently prosecute motions to sell assets during their bankruptcies . . . [because they] are typically brought as 'free and clear' proceedings, so that the purchaser can acquire the assets without the debtor's liabilities, including contingent and unliquidated claims." Tr. 588:24-589:5. She further explained that "[g]enerally, a debtor will retain professional advisors with skill in selling the particular assets available to provide an estimate of their value and/or to market them through a private sale or at auction." Tr.589:17-20. "When a debtor proposes to sell valuable assets, it is customary to file a motion to establish bid procedures that set out . . . the time frame and terms on which due diligence can be conducted, identifies the assets to be sold, how to qualify a purchaser, and any required deposit." Tr.589:24-590:4.

Judge Fitzgerald also testified about the executory contracts, i.e., the franchise agreements held by the plaintiffs with Chrysler. Tr.591:4-10. Judge Fitzgerald explained that a debtor can either assume the executory contract, assign it to a third party, or reject the executory contract pursuant to Section 365 of the Bankruptcy Code. Tr.591:11-16. "Rejection of an executory contract such as a franchise agreement is merely a breach that indicates that the debtor will no longer perform." Tr.592:5-7. Judge Fitzgerald testified that bankruptcy judges "are aware that rejection is not the same as termination and the consequences of rejection are governed by applicable nonbankruptcy law." Tr.592:7-10. She explained that rejection of an executory contract only frees the debtor from an obligation to perform and that the other party to the executory contract can recover damages by filing an unsecured debt claim in the bankruptcy. Tr.592:5-593:11. Judge Fitzgerald explained that, based on her experience with the rejection of executory contracts in bankruptcy proceedings, the rejection order in the Chrysler bankruptcy was not typical because it contained provisions enjoining the plaintiffs from holding themselves out as authorized dealers or performing services or maintenance on Chrysler vehicles, which effectively terminated the franchise agreements rather than just announcing, through rejection, Chrysler's intent not to perform its obligations under the franchise agreement. Tr.595:4-10.

Next, Judge Fitzgerald explained that collective bargaining agreements and pension obligations, although executory contracts, are treated differently from other executory contracts in bankruptcy. Tr.597:17-23. Judge Fitzgerald opined that the government "had a strong motivation in driving the sale to Fiat that included Fiat's assumption of much of Chrysler's debt" because "[h]ad Chrysler gone out of business and terminated the pension plans, the Government would have had a substantial outlay of funds from the Pension Benefit Guaranty Corporation, called the PBGC, to the retirees." Tr.598:24-599:5. Judge Fitzgerald opined that without government involvement, the new Chrysler entity would have entered negotiations about having to assume the employer's obligations. Tr.600:17-25.

Judge Fitzgerald testified about the use of cash collateral in a Chapter 11 bankruptcy. She explained that cash collateral is defined by Section 363(a) of the Bankruptcy Code as cash, deposit accounts, and other cash equivalents. Tr.601:10-18. Judge Fitzgerald went on to explain that a debtor in bankruptcy can only use cash collateral with the creditor's consent or a court order. Tr.601:18-20. Judge Fitzgerald testified that, in her experience, "the debtor and lender will negotiate the terms of a cash collateral order and stipulate to the terms of the use of cash collateral and the form of adequate protection" for the creditor. Tr.602:5-8.

The final element of a Chapter 11 bankruptcy about which Judge Fitzgerald testified concerned DIP financing. She explained that during a bankruptcy a debtor can obtain and incur normal unsecured debt that it would normally incur during the course of operating its business. Tr.602:22-25. However, Judge Fitzgerald explained that in order to incur secured or DIP debt, the debtor needs the bankruptcy court's approval. Tr.603:6 7. She explained that DIP financing has "superpriority" status and gets paid ahead of all other claims, including the secured debt that was previously incurred. Tr.603:24-604:2. She explained that secure creditors have a right to and often object to the proposed DIP financing. Tr.603:20-23. Judge Fitzgerald explained that few creditors will provide DIP financing as a secondary lien and that a secured lender often will provide the DIP financing to avoid further deterioration of its collateral and to maximize the recovery it can receive from the bankruptcy. Tr.606:16-22.

It is against this backdrop that she offered the following three opinions about the differences between the government's negotiated bankruptcy plan and what she opined would have occurred if Chrysler had filed for a Chapter 11 bankruptcy without the government's terms. First, Judge Fitzgerald opined that during an orderly wind-down in a Chapter 11 bankruptcy, "Chrysler would carry out its obligation to maximize value," which would involve hiring experts, analyzing the value of its assets, marketing and selling those assets, assuming or rejecting supplier contracts in accordance with the sale of viable lines, rejecting unnecessary executory contracts, and distributing the proceeds of sales to creditors. Tr.630:8-23. Judge Fitzgerald explained that, in her opinion, based on the Viability Plan that Chrysler submitted to the government, Chrysler would have had over $1 billion in cash at the time of the bankruptcy filing and that she believed the bankruptcy court would have authorized the use of the cash collateral to maximize Chrysler's value for Chrysler's creditors. Tr.632:10-15.

Judge Fitzgerald opined that the Chrysler wind-down would have played out in the same manner as the bankruptcies of Hostess and American Suzuki Motors Corporation ("AMSC"). Tr.649:12-652:12. Judge Fitzgerald testified that both the Hostess and AMSC bankruptcies are indicative of how the Chrysler bankruptcy would have proceeded because they involved an orderly wind-down and asset sale of a large corporation which retained its stores and dealers during the bankruptcy. *Id.* Judge Fitzgerald explained that as part of the wind-down in bankruptcy, plaintiffs' franchises would have been retained because the dealers would have preserved the economic value of Chrysler's assets. In support of this contention, Judge Fitzgerald also relied on the bankruptcies of Daewoo Motor America and Saab Cars North America, where the respective companies' dealers remained functioning through the course of the bankruptcy to maximize value for creditors. Tr.657:2-658:1. She explained that "[d]ealerships were not liabilities of Chrysler, and as a liquidating entity, Chrysler would not have received any direct benefit in the form of cash or liquid assets from an expedited termination of dealerships." Tr.661:12-16. Thus, Judge Fitzgerald concluded that in an "orderly wind-down, Chrysler likely would have made every effort to support the franchises, to keep them in operation while going out of business sales are undertaken and the bankruptcy was administered. Chrysler dealerships would have remained in business, servicing and maintaining vehicles and providing parts for as long as there were Chrysler cars, minivans and trucks on the highway." Tr.662:1-8.

Second, Judge Fitzgerald opined that if Chrysler were sold in a Section 363 bankruptcy sale, the plaintiffs' franchise agreements would have been assumed and would have continued to have value. Tr.681:24-682:7. She explained that she believed that to "minimize their losses and maximize their recoveries, the first lien lenders likely would have worked with Chrysler through a Chapter 11 to effectuate a sale of Chrysler's core business as a going concern" which would have included providing "defensive" DIP financing. Tr.682:22-683:1. Judge Fitzgerald explained that at the time of a Chrysler bankruptcy, lenders were beginning to provide DIP financing at record levels. Tr.694:3-7. She further explained that in "the context of a 363 sale for the core business to a strategic buyer, it is improbable that the buyer would have agreed to have been bound by the existing terms of the UAW collective bargaining agreement[.]" Tr.699:1-5. Judge Fitzgerald further stated that "as part of a sale of assets to a strategic buyer, the buyer . . . would have analyzed each one of the executory contracts . . . to determine whether the contracts should be assumed and assigned to the buyer or rejected by the estate." Tr.703:24-704:4. Judge Fitzgerald concluded that in her 363 sale scenario, Chrysler would not have benefited from the rejection of its franchise agreements, and Chrysler's dealers would have been able to continue their business operations and preserve their value during the bankruptcy and potentially for as long as there were new cars and used cars that needed service and maintenance. Tr.705:18-23.

Finally, Judge Fitzgerald opined that, regardless of whether Chrysler pursued an orderly wind-down or was sold in a 363 sale, she believed that the dealerships would not have had their franchise agreements rejected and thus could have continued in operation servicing cars and selling used cards during the course of any bankruptcy for at least several months. Tr.710:7-20.

On cross examination, Judge Fitzgerald clarified several of the assumptions underlying her opinions. First, she admitted that she assumed that the government would provide a warranty program to cover Chrysler's outstanding warranties. Tr.742:5-16. Second, she assumed that in absence of government financial assistance, dealers would have helped fund

Chrysler's bankruptcy or would have purchased Chrysler's assets. Tr.743:22-744:7.

On cross examination, Judge Fitzgerald conceded that Chrysler would have required between $12 to $20 billion dollars in DIP financing in order to stay operational. She further conceded that her reliance on the Hostess bankruptcy, which only required $75 million in DIP financing, and the Daewoo bankruptcy, which required only $1.65 million in DIP financing, were not analogous to Chrysler's situation. Tr.785:17-786:2, Tr.799:20-800:17. Similarly, she conceded that the because American Suzuki received DIP financing from its parent company, it was also very different from the circumstances Chrysler faced. Tr.789:20-794:4.

v. Diane Anderson Murphy

The *Alley's* plaintiffs, as noted above, presented Diane Anderson Murphy as their valuation expert. Ms. Murphy was tasked with valuing each of the *Alley's* plaintiffs' franchise agreements for purposes of determining lost economic value in a "but for world" without government financial assistance to Chrysler. Ms. Murphy is the director of the valuation services group of Moss Adams LLP. Tr.1398:19-22. She began working at Moss Adams in 1994 and currently leads Moss Adams' "business appraisal practice within the firm's automotive and dealer service practice, which focuses on automobile, heavy equipment, commercial truck, RV, motorcycle, and power sports dealers." Tr.1398:23-1399:3. She is an accredited senior appraiser in business valuation with the American Society of Appraisers and has been active in business appraising for over thirty years. Tr.1399:4-

8. As a member of Moss Adams' automotive and dealer services practice, she has provided valuation and value-related consulting services to well over 1,500 dealership appraisal projects that range from single-point dealerships to groups of dealerships. Tr.1399:13-19. She has "served as coauthor for several versions of the National Automobile Dealers Associations' dealership valuation guide." Tr.1400:9-14. She is also an associate member of the of the National Association of Dealer Counsel, a member of the American Society of Appraisers, and a member of the Washington State Auto Dealers Association. Tr.1400:24-1401:3. She explained that she was "engaged to provide a valuation opinion as of two dates, December 31, 2008 and April 30, 2009 . . . under two scenarios, continued production of Chrysler cars and trucks and continued production of only Chrysler trucks[.]" Tr.1401:9-15.

Ms. Murphy explained that she was tasked with determining the economic value of the *Alley's* plaintiffs' franchise agreements in a "but for world" without government financial assistance. She testified that she employed the "standard fair market value, which is the price, expressed in terms of cash equivalents, at which property, here the Chrysler franchise, would change hands between a hypothetical willing and able buyer and a hypothetical willing and able seller." Tr.1403:1-6. Specifically, she explained that she used the income approach to determine the value of the plaintiffs' franchises at these two times. Tr.1404:16-19. Ms. Murphy testified that she considered numerous factors including those related to the national economic outlook, the local economic outlook, and the historical sales and profitability of the franchises in formulating her values for each franchise. Ms. Murphy explained that her assumptions were that the government would provide no financial assistance, that Chrysler entered bankruptcy on the date of the valuation, and that the franchise agreements were in full force and effect on the valuation date.[36] Tr.1407:4-23.

Ms. Murphy then testified about her valuation methodology. First, she explained that in valuing the franchise agreements held by the plaintiffs she "considered only the Chrysler franchise-related assets" owned by the plaintiffs, which included all intangible assets/income streams including used car sale and customer pay work. Tr.1410:18-1411:16. She explained that in her many years of experience in valuing dealerships she "cannot recall a single instance where a purchaser of a franchised dealership sought to pay only for the revenue streams associated with the new car department, OEM [original equipment manufacturer—here, Chrysler] parts and sales and warranty repairs and not for the additional departments of the dealership franchise, including used car sales, customer pay and other parts and service." Tr. 1411:17-1412:2. Ms. Murphy opined that the franchise agreement, although only enumerating specific rights of the franchisee, is always valued as both the rights guaranteed, such as new car sales, but also other income streams that are clearly derived from those rights. Tr.1412:3-12. She explained that this is further supported by the terms of the franchise agreement, which require that the franchisees have facilities to handle new and used vehicle sales as well

---

[36] As discussed *Supra*, the Alley's plaintiffs are no longer relying on the December 31, 2008 date and thus Ms. Murphy's calculations for that date are not evaluated in this opinion.

as have sufficient parts stocked for both warranty and customer pay work. Tr.1415:7-15; DX1224. Additionally, Ms. Murphy explained that Chrysler also "required its franchised dealers to report all departmental operations in monthly financial reports submitted to [Chrysler]." Tr.1416:5-7.

Next, Ms. Murphy explained how she was able to separate the used cars for "dual" dealer plaintiffs, i.e. dealers with franchise agreements with two different manufacturers or OEMs, when the financial statements provided by the plaintiffs only identified total used car sales and did not break them down by the OEM. Tr.1417:4-14. She explained that "[u]nder the used-to-new formula, one assumes that the sale of used cars follows the same rate of sales as branded cars, both Chrysler and non-Chrysler." Tr.1417:14-17. She explained that she also used the used-to-new formula to estimate the proportion of service and parts income streams, which on the income statements are also not separated by manufacturer. Tr.1417:23-1418:2.

Ms. Murphy explained that she considered three different valuation approaches before deciding on the income approach: the income approach, market approach, and asset-based approach. Tr.1418:13-1419:1. Under the income approach, "estimated future returns are discounted to present value at an appropriate rate of return for the investment." Tr.1418:15-17. Under the market approach, "market transactions involving companies that are similar to the subject business" are used to set the price of a franchise. Tr.1418:18-22. Finally, the asset-based approach values the assets minus the liabilities of the business. Tr.1418-23-1419:1. Ms. Murphy explained that she chose to value the plaintiffs' franchises using the income approach "because it represents the amount a prudent investor would pay for the franchisee's expected future cash flows based on market rates of return and the franchise's specific risks." Tr.1419:2-6.

Ms. Murphy explained that in applying the income approach, "expected future returns from an investment in the form of cash flows are discounted to present value at an appropriate rate of return for the investment." Tr.1425:22-25. She explained that "[t]he selected discount rate . . . should reflect the degree of uncertainty or risk associated with returns and returns available from alternative investments," and that the higher the uncertainty, the higher expected rate of return, which results in a lower value for investment. Tr.1425:25-1426:5. She explained that in her income approach she used a discounted cash flow analysis, where "future cash flows are discounted to present value using an appropriate discount rate or rate of return." Tr.1427:23-1428:4. Cash flows are forecasted for a discrete period; Ms. Murphy explained that she used a period of five years and then projected growth at a constant rate in perpetuity. *Id.* Ms. Murphy further explained that she "applied a discounted cash flow analysis whereby cash flow is defined as earnings before interest and taxes, commonly referred to as EBIT, minus income taxes on EBIT, plus noncash expenses, plus or minus adjusted working capital changes, minus capital expenditures, equals free cash flow, which we call debt free, and all of this cash flow is before any non-flooring interest expense [i.e. the cost of borrowing to buy cars from the manufacturer]." Tr.1428:11-18.

She explained that "the first step in valuing a company is typically an examination of the dealership's historical cash flow and an investigation into the history, location, and general background of the dealership to provide a context for the business and its financial results." Tr.1433:11-15. Ms. Murphy explained that she used a historical trend over approximately five years preceding the valuation dates. Tr.1433:22-23. Ms. Murphy then made adjustments to the earnings that she believed would be representative of normalized results in income flow by identifying atypical expenses or sales and removing them from the trend. Tr.1433:24-1434:3. She also took into consideration the industry's financial health, local area economic expectations, and other factors that may affect potential cash flow. Tr.1434:16-22. Based on this valuation method, Ms. Murphy calculated what she believed each of the *Alley's* plaintiffs' franchise agreements were worth on the two valuation dates she was given by counsel.

Set forth below are the franchise valuations and amount of just compensation she calculated for each of the *Alley's* plaintiffs based on the assumptions she was given for the April 30, 2009 taking date:

Plaintiff	Cars & Trucks Continue Production	Trucks Continue Production
Livonia Chrysler Jeep, Inc.	$4,464,000	$3,705,000
Taylor-Parker Motor Co.	$686,000	$558,000
Barry Dodge, Inc.	$1,124,000	$859,000
Whitey's Inc.	$524,000	$292,000
Cedric Theel, Inc.	$709,000	$621,000
RFJS Company, LLC	$1,766,000	$1,329,000
Jim Marsh American Corp.	$8,302,000	$6,512,000

Tr.1406:2-20.

On cross examination, Ms. Murphy clarified that her valuations of the franchise agreements included not only discounted cash flow but also tangible assets such as equipment, parts, land, and cash that would be included in a sale. Tr.1542:2-22. Additionally, she clarified that all her valuations assumed that the dealerships were ongoing businesses. Tr.1548:9-11. She admitted on cross examination that it would have been difficult for vehicle customers and for auto dealers to finance their inventory through borrowings on the valuation dates she was given, but that she did not consider how those issues would have impacted the value of the franchise agreements. Tr.1563:12-19. She further admitted that she assumed that there would be no disruption in the plaintiffs' ability to sell new cars at any time and that if there were a disruption it would change her income assumptions and thus would change her valuation. Tr.1747:9-14.

vi. Dr. John Nevin

Dr. John R. Nevin, Ph.D., an Emeritus Professor at the University of Wisconsin, Madison, School of Business, testified on behalf of the Colonial plaintiffs. Tr.1965:16-19. He holds a B.S. in Marketing from Southern Illinois University (1965) and a Master of Science degree in Marketing (1968) and Doctor of Philosophy in Marketing (1972) from the University of Illinois. Tr.1965:19-23. He has over "40 years of experience in analyzing, research[ing], and teaching in the field of channel distribution and distribution supply chain management." Tr.1968:3-5. In 1970, Dr. Nevin was appointed to an assistant professorship at the School of Business at the University of Wisconsin, Madison, became an associate professor in 1977, a full professor in 1983, and an emeritus professor in 2012. Tr.1966:4-8. He was the executive director of the Granger Center for Supply Chain Management from 1992 to 2016 as well as the Executive Director for the Center for Brand and Product Management from 2003 to 2007 and 2010 to 2013. Tr.1966:13-18. Dr. Nevin has served as a member of the Editorial Board for the Journal of Marketing, the Journal of Retailing, the International Marketing Review, Advances in Distribution Channel Research, and the Journal of Marketing Channels. Tr.1967:8-12.

Dr. Nevin explained that he was retained by the Colonial plaintiffs to explain the nature of franchise agreements, the underlying rational for the franchise business model, the history of auto dealership franchising and its regulatory environment, and how market value of an auto dealership is determined. Tr.1967:15-1968:1. He was not asked and did not present a valuation of the franchise agreements for the two *Colonial* plaintiffs.

Dr. Nevin explained that "[i]n the most general sense, a franchise is a legal agreement between two independent parties whereby one of those parties, the franchisor, grants a license to the other party, the franchisee, to sell the trademarked product or service, and, in return, receives a payment or royalty and conformance to quality standards." Tr.1968:17-22. Dr. Nevin testified that "the strategic essence of the franchise business model can be accurately explained by identifying three critical components of the franchise system: the brand, the operating system, and the ongoing support provided by the franchisor to the franchisee." Tr.1970:12-16. He went on to explain that "the brand creates the demand, allowing the franchisee to initially obtain customers," "the operating system essentially delivers the promise, thereby allowing the franchisee to maintain customer relationships and to build loyalty," and finally, "the ongoing support and training provides the impetus for growth, offering the franchisee the tools and tips to expand its customer base and build its market share." Tr.1970:17-1971:2.

Dr. Nevin explained that there were "two different types of franchises, a product distribution or traditional franchise and a business format franchise." Tr.1971:3-8. Dr. Nevin explained that the plaintiffs' franchise agreements with Chrysler were product distribution or traditional franchises where "the franchisor provides relatively little in the way of management and marketing assistance to the franchisees." Tr.1971:9-11. He explained that auto companies choose to distribute their product through franchisees because it allows for expansion with limited capital and human resources, reduction in distribution costs, and access to individuals who are highly motivated and know the local market. Tr.1972:15-20.

Dr. Nevin then went on to explain the history of auto dealer franchise agreements in the United States. Specifically, he noted that there were, beginning in the 1950s, federal and state laws "passed to address the perceived inequality in the power relationship between the auto manufacturer and auto dealers and the concern over the large capital investments in acquiring or building dealerships and sustaining their operations." Tr.1976:14-18. Dr. Nevin explained that state laws protect franchisees from being terminated, protect a franchisee's business territory, and provide several other protections. Tr.1977:8-1980:1. He explained that "a franchised automobile dealer's exclusive territory is a valuable property right." Tr. 1980:4-5.

Dr. Nevin testified how automobile franchises are typically valued, including the concept of "blue sky" value in a dealership. He explained that dealerships are valued by adding the market value of the franchisee's tangible assets—real estate, inventory, furniture, fixtures, equipment, etc.—to the franchise's intangible value, which in the auto dealership industry is known as "blue sky," or good will. Tr.1982:3-8; PX284. Dr. Nevin went on to explain that "[t]he lower the perceived risk associated with a franchisee's expected pre-tax earnings, the higher the blue sky multiple in the resulting franchise valuation." Tr.1982: 24-1983:2. Dr. Nevin testified that a number of commercial services accurately estimate blue sky value for auto brand franchises by considering such things as "earning growth expectation of the franchise, buyer demand for the products in the franchise, real estate, market vehicle preferences in the market, market representation, other dealers, and customer relations," and that the "blue sky" multiple usually ranges between two and eight times net profits from all income streams of the dealership. Tr.1984:14-1985:3.

Importantly, in the same article that Dr. Nevin relied on to explain "blue sky" value, the authors explained that a dealership may not have any "blue sky" or intangible value when there are extreme economic circumstances. The article "Auto Dealership Valuation: A Discussion of Applicable Methods, Part 1" stated "[t]here are rare instances when the net asset value is appropriate, such as when a dealership is valued in a liquidation setting, or during severe economic uncertainty, such as the Great Recession of 2008 and 2009. During the recession there were few dealership transactions, and it was not uncommon for the dealerships that did sell, particularly domestic dealerships (General Motors, Ford, and Chrysler), to sell at or near net asset value." PX295.

vii. Edward Stockton

Edward Stockton testified as the *Colonial* plaintiffs' valuation expert. Mr. Stockton has a bachelor's degree in economics for Western Michigan University and a master's degree from the Department of Agriculture in resource economics at the University of Arizona, where his concentration was applied econometrics. Tr. 2337:7-11. Mr. Stockton is currently the Vice President of Fontana, a company that "provides highly focused economic consulting services and expert testimony regarding the retail motor vehicle industry and other industries throughout the United States." Tr.2337:12-17. Mr. Stockton testified that during his time at Fontana he has performed 30,000 hours of work focused on issues related to the retail automotive industry, which includes studies on franchised operations that have sold various vehicle lines. Tr.2338:1-13. Mr. Stockton has provided expert testimony on behalf of the consumer class in the Volkswagen diesel emissions lawsuit and a lawsuit against Wells Fargo concerning the opening of unauthorized accounts, where he consulted on issues related to compensation and economic loss. Tr.2339:19-2340:20.

Mr. Stockton testified that he was retained to "calculate value associated with the Finnin and Guetterman dealerships under two families of scenarios. The first is . . . call[ed] the historical scenario, and this is not based on a hypothetical world. This is based on an estimate of the value of their franchises historically at the time of the taking. The second is, in a liquidation scenario, . . . the question whether Finnin and Guetterman could demonstrate value to continuing operations or have incremental value generated from their franchises within liquidation." Tr.2342:4-15. He went on to explain that he "wasn't asked to consider whether there would be a successor OEM [another car manufacturer] or a continuation of new vehicles. I don't have an opinion that there would or would not be." Tr.2342:15-18.

Before explaining his assumptions and calculations, Mr. Stockton explained his overall understanding about how a businesses' economic value is determined. Mr. Stockton explained that he understands the economic value of a business to be "equal to the discounted present value of the expected benefits provided by the firm to its owner." Tr.2348:15-19. Mr. Stockton further explained that a "discounted present value is the point of indifference between the acquisition or sale of a certain current amount of profit or benefit and an uncertain future amount." Tr.2348:24-2349:3. Mr. Stockton ultimately explained that "the economic value of the firm reflects the sum of current and expected future earnings after accounting for present judgments of risk, uncertainty, relative return, and liquidity." Tr.2350:17-20.

Mr. Stockton also testified that he believed that the "the property allegedly taken from Plaintiffs consisted of their Chrysler brands' franchises; namely, Chrysler and Jeep from Finnin and Chrysler-Jeep-Dodge RAM from Guetterman. Used here, the franchise includes items of value such as rights to use and display trademarks, contractual protections, territorial distinction, limited right to territorial exclusivity, access to training and marketing materials, opportunities associated with new products, statutory protections applied to franchisees, rights to purchase proprietary parts, products, tools, repair codes, market information, access to residual product demand in the market, and other elements of value associated with franchise operations." Tr.2356:3-16. He went on to explain that both Finnin and Guetterman were dual dealers which required a valuation based on the removal of economic value of capacity of their overall dealership operations. Tr.2357:5-14. However, he noted that "[t]he sale of a firm is not generally or necessarily equal to the economic value of the firm to its owners." Tr.2358:3-5.

Mr. Stockton testified that fair value "is an unbiased price at which a firm would change hands under an orderly exchange, in the absence of compulsion, where both parties enter the transaction with relevant and symmetrical knowledge." Tr.2358:18-21. However, Mr. Stockton testified that he was unable to calculate fair value for either the Guetterman or Finnin franchises because "[t]he factual circumstances surrounding the valuation of the Plaintiffs' dealerships at the time of the alleged taking creates a fissure between the prices at which the Plaintiffs' property might have sold and the concept of just compensation for the property taken." Tr.2359:4-9, Tr.2590:12-16 (explaining that fair market value "didn't exist at that time"). Instead he explained that "it is possible to form reasonable and reliable estimates of the economic value of property allegedly taken from plaintiffs by evaluating the profit stream that franchises would have generated." Tr.2360:16-20. He further explained that he calculated two sets of values: (1) historical values, i.e., the value of plaintiffs' franchise agreements if Chrysler had continued, and (2) "but for" values, i.e., the profits that plaintiffs would have earned if Chrysler had liquidated. He explained that in creating his calculations he only looked at financial data through December 2008. Tr.2363:23-24. He went on to explain that in his "but for world" he looked at "the incremental value that ongoing franchise affiliation would have conveyed to Plaintiffs in a liquidation environment versus what actually occurred." Tr.2365:9-12.

For his "but for world" scenario, Mr. Stockton testified that he "selected an effective date of May 2009 to assess incremental profitability but considered dealership data only through December 2008," which he maintained employed data that was highly conservative in calculating lost profit. Tr.2365:22-24. He further explained that in his liquidation analysis he did not assume a purchase of Chrysler or any value flowing from the production of new vehicles; he did, however, assume that Chrysler retains a minimum infrastructure throughout the bankruptcy and that its warranties would still be honored. Tr. 2366:5-20.

Mr. Stockton then detailed his assessment of the risk factors in his historical and "but for" scenarios. He explained that in "the historical scenario, the Government agrees to support ongoing Chrysler operations, but in connection with this agreement, mandates the rationalization of the dealer network, which ultimately results in a reduction in the count of Chrysler dealerships by approximately 25 percent." Tr.2413:16-21. Mr. Stockton explained that for Finnin he posited four fair value valuations and two profit contribution valuations in order to show that Finnin had value in his historical scenario. Mr. Stockton explained that in his four fair value valuations, he assumes that Finnin sells its Chrysler and Jeep franchises to a purchaser that "already holds the facility capacity to incorporate those lines" and who has some underutilized personnel capacity so that it can do so by adding non-facility fixed expenses equal to 66.7-75%. Tr.2424:15-21. Then he either gave a terminal multiple of either four or five. He further explained that he analyzed Finnin's profit contribution analysis for 2006 to 2008, financial statements from 2006 through 2008, Finnin's new and used vehicle and parts and service sales volume from 2006 to 2008, the sale volume forecast for the Chrysler group, and the Dealer Cut Discount Factor. Tr.2434:17-2437:18. As a result, Mr. Stockton concluded, based on the following historical scenarios, that Finnin would have had the following values:

Fair Value Based on 2/17/2009 Chrysler Viability Plan, One-Fourth reduction in Projected Non-Building Related Fixed Expenses and Terminal Value Calculated Using Multiple of 4	$1,242,192
Fair Value Based on 2/17/2009 Chrysler Viability Plan, One-Fourth reduction in Projected Non-Building Related Fixed Expenses and Terminal Value Calculated Using Multiple of 5	$1,358,928
Fair Value Based on 2/17/2009 Chrysler Viability Plan, One-Third reduction in Projected Non-Building Related Fixed Expenses and Terminal Value Calculated Using Multiple of 4	$1,465,048
Fair Value Based on 2/17/2009 Chrysler Viability Plan, One-Third reduction in Projected Non-Building Related Fixed Expenses and Terminal Value Calculated Using Multiple of 5	$1,602,843

Tr.2452:9-2453:1.

Mr. Stockton went on to explain that for his historical scenario he also proffered two valuations based on a profit contribution analysis. He explained that he estimated the sales volume of the business based on the 2006-08 averages for Finnin, taking into consideration Chrysler's forecasts in its February 2009 Viability Plan. Tr.2438:17-24. He further explained that "[t]he baseline figures also do not incorporate any benefit from restructure or the fact that survival would have occurred in a market with fewer intrabrand competitors." Tr.2439:9-12. Furthermore, Mr. Stockton noted that he spoke with Finnin's banker and was told that "Finnin regularly left its credit lines untapped and had extensive credit available," and thus would have been able to properly finance the dealership in the future. Tr.2440:23-2441:1. Mr. Stockton next explained that he applied a discount rate of 25% to Finnin, which means that for every dollar that Finnin could be expected to earn he would only count 75 cents. Tr.2442:7-10. Based on these assumptions, Mr. Stockton posited two different profit contribution values based on different terminal value multiples:

Profit Contribution Value Based on 2/17/2009 Chrysler Viability Plan and Terminal Value Calculated using Multiple of 4	$3,247,903
Profit Contribution Value Based on 2/17/2009 Chrysler Viability Plan and Terminal Value Calculated using Multiple of 5	$3,554,167

Tr.2453:5-10.

It was against this background (which was based on the government having given assistance to Chrysler but where the franchise agreements were not rejected) that Mr. Stockton offered his final opinions on value for each of the franchises in the "but for world" where the government did not provide Chrysler with financial assistance and the franchise agreements were not rejected. He explained that he had several alternative valuations, the first being "an immediate liquidation of Chrysler in which dealerships continue operation indefinitely. The second is a Chapter 11 scenario in which Chrysler's dealer network continues to operate for three years. The third contemplates an orderly wind-down of operations over a 17-month period." Tr.2442:19-24. He explained that he did not consider scenarios where the purchaser of Chrysler's assets continues the manufacture and sale of new vehicles, and that he did not attempt to calculate the fair value for these scenarios because there were too many complications. Tr.2442:24-2443:10.

For the first Chapter 11 scenario, Mr. Stockton assumed that the government would guarantee warranty obligations for incumbent customers and that the dealerships would acquire the rights to certain proprietary parts and would continue to be able to operate as branded Chrysler dealers. Tr.2446:5-10. For the second Chapter 11 scenario, Mr. Stockton assumed that the Chrysler dealership network would survive for another three years, and he discounted any value of operations for longer than three years and allowed for the ongoing service of existing customers to include used vehicles, parts, and customer pay and warranty service. Tr.2445:8-17, Tr.2446:21-25. Finally, he testified regarding his third scenario—an orderly-wind-down scenario in which, using the same assumptions as in the Chapter 11 scenario, he examined if the dealerships would continue for only seventeen months. Tr.2445:18-22. Mr. Stockton explained that for each of these scenarios he calculated the used car sale volume based on new sales volume between 2006 and 2008 and that he calculated warranty work based on three prior years of new vehicles sales, while customer pay was based on seven years of prior sales of new vehicles. Tr.2450:8-2451:16.

Based on these assumptions and calculations, Mr. Stockton came to the following conclusions as the Finnin's value in a "but for world" without government financing:

Chrysler Liquidation Scenario	$1,591,921
Chrysler Chapter 11 Scenario	$1,391,138
Chrysler Orderly Wind-Down Scenario	$775,040

Tr.2456:15-19.

Next, Mr. Stockton explained how he applied the valuation scenarios he used to value Finnin to value Guetterman's franchise agreements. Mr. Stockton acknowledged that he could not demonstrate that Guetterman would have had fair value had Chrysler not rejected his franchise agreements in the Chrysler bankruptcy because "it is not clearly demonstrable that Guetterman's value would have intersected with those of a hypothetical buyer such that an exchange could be developed." Tr.2454:20-23. Rather, Mr. Stockton explained that the profit contribution was the best way to determine Guetterman's historical value and that he employed a 40% discount rate to account for the risk of possible termination. Tr.2455:23-2456:3. The valuations were as follows:

Profit Contribution Value Based on 2/17/2009 Chrysler Viability Plan and Terminal Value Calculated using Multiple of 4	$114,106
Profit Contribution Value Based on 2/17/2009 Chrysler Viability Plan and Terminal Value Calculated using Multiple of 5	$124,434

Tr.2456:11-16.

Finally applying the same methodology and assumptions as outlined in his Finnin testimony, Mr. Stockton posited the following "but for" valuations for Guetterman:

Chrysler Liquidation Scenario	$122,761
Chrysler Chapter 11 Scenario	$112,942
Chrysler Orderly Wind-Down Scenario	$61,047

Tr.2456:16-19.

On cross examination, Mr. Stockton admitted that he was neither a certified public accountant, accredited in business valuation, or a bankruptcy expert. Tr.2474:12-2475:1. Mr. Stockton also clarified that he had "valued the suite of benefits associated with the franchise" and that he has not valued any other benefits. Tr.2479:25-2480:2.

III. The Government's Fact and Expert Evidence

A. The Government's Fact Witnesses

i. Robert Nardelli

Robert Nardelli was the CEO of Chrysler from late 2007 until early 2009. Mr. Nardelli explained that as CEO of Chrysler his job was to "provide oversight to [his] direct-reports, to lay out a strategic plan and provide . . . day-to-day operational inputs." Tr.3332:4-10. He explained that under Chrysler's corporate structure, Chrysler had a board of managers responsible for providing "oversight to the business, capital allocation, and strategic direction." Tr.3332:19-21. He explained that at the time he became CEO of

Chrysler in 2007, Chrysler was doing well but that it began experiencing financial difficulty in early 2008. Tr.3333:24-3334:24. Mr. Nardelli testified that prior to his going to Congress in November 2008 for a bridge loan from the federal government, Chrysler had sought other loans "but it was kind of for naught." Tr.3337:8-10.

Mr. Nardelli testified that he thought Chrysler would run out of cash early in 2009 if it did not get a loan from the government, and that without government financing Chrysler would have to entered into bankruptcy at that time. Tr.3345:5-7, Tr.3345:1-14. Mr. Nardelli explained that Chrysler provided a Viability Plan to Congress in December 2008 which estimated that in order to wind-down Chrysler and provide its dealers with support and floor plan financing Chrysler would need between $17 to $20 billion. Tr.3348:16-3349:11; DX956. He testified that Chrysler had gone to its first lien lenders and was told that they would not provide Chrysler with the DIP financing it would need for an orderly wind-down of its operations. Tr.3358:4-22. He explained that during the financial meltdown in 2008-09, dealers were having a difficult time obtaining the floor plan financing needed to keep buying Chrysler's cars and trucks. Tr.3356:7-3358:3.

Mr. Nardelli testified that Chrysler's board of managers voluntarily approved the terms of the $4 billion bridge loan Chrysler received from the federal government under TARP on January 2, 2009. DX1000; Tr.3367:24-3370:22. Mr. Nardelli went on to testify that after securing the government bridge loan, Chrysler "had been trying vigorously to get the First Lien Lenders to agree to a debt restructuring acceptable to the U.S. Treasury Department but that no progress had been made." Tr.3372:12-15; DX1263.

He testified that eventually Chrysler was presented with the prepackaged bankruptcy plan negotiated by the Auto Team. Tr.3373:6-11. He further testified that Chrysler understood that if it decided not to accept the prepackaged bankruptcy terms and instead decided to enter Chapter 11 on its own, the government would provide $750 million to Chrysler to facilitate an orderly liquidation. *Id.* He explained that when Chrysler voted in favor of the government's prepackaged Chapter 11 bankruptcy plan, including the 363 sale to Fiat, he did not feel that he was being "forced" to vote in favor of bankruptcy. He testified that every member of the board used "good business judgment" when voting in favor of bankruptcy. Tr.3382:21-3383:17, Tr.3384:3-17.

In deciding to accept the prepackaged bankruptcy terms presented by the government, Mr. Nardelli testified that he considered that if Chrysler did not accept the prepackaged plan, Chrysler would have to cancel its warranties, stop new car production, and force significant job losses. Tr.3384:21-3385:16. Mr. Nardelli explained that Chrysler had spent months trying to reach an agreement with key stakeholders on concessions that would allow Chrysler to reorganize outside of bankruptcy, but was unable to achieve the needed concessions. He thus concluded that the government's prepackaged bankruptcy plan was the only option available to keep the Chrysler brand alive in some form. Tr.3387:13-3389:4.

On cross examination, Mr. Nardelli testified that when he went to Congress in November and December 2008, he had hoped that Chrysler would remain a stand-alone company and would be able to avoid bankruptcy. Tr.3403:13-21; DX956 ("Chrysler believes that participating in the restoration of [Chrysler's] long-term viability without a bankruptcy filing significantly improves the outcome for all constituents."). Mr. Nardelli testified on cross examination that Chrysler's proposed stand-alone plan had the support of Chrysler's entire board. Tr.3414:3-7. Mr. Nardelli did not recall Project Genesis or any Chrysler dealership reduction plans. Tr.3412:14-22. Mr. Nardelli testified that he disagreed with the government's decision to reject Chrysler's Viability Plan and that when Mr. Rattner and Mr. Bloom informed him on March 9, 2009 that the government was rejecting the February 2009 plan, he wrote a letter reaffirming Chrysler's position. Tr.3424:7-3427:17, Tr.3428:7-18; PX637. He emphasized, in his letter, that Chrysler's viability would be enhanced by a strategic partnership with another car manufacturer but that an alliance was not critical to Chrysler's long-term viability. PX637; Tr.3428:19 3429:4. Finally, he reinforced in his March 10, 2009 letter Chrysler's desire to not go through a bankruptcy. PX637; Tr.3429:13-22.

Mr. Nardelli testified that, up until Chrysler's board voted to go into bankruptcy, Chrysler was continuing to work on a stand-alone plan. Tr.3441:23-3443:13; DX1203. Mr. Nardelli explained that with the April 17, 2009 re-engineered plan Chrysler submitted to the Auto Team he still hoped that Chrysler would be able to secure $11 billion in government financing. Tr.3441:4-13; DX1203. Mr. Nardelli testified that his re-engineered April 2009 plan still proposed the voluntary consolidation of dealerships and did not call for the forced termination of any franchises.

Tr.3444:1-19. Mr. Nardelli testified further on cross examination that after the Auto Team rejected his April 2009 re-engineered plan, Chrysler had "no more alternatives as far as going forward as a stand-alone business." Tr.3452:24-3453:7.

ii. Steven Landry

Steven Landry, the Executive Vice President of sales and marketing for North America and parts and service globally for Chrysler in 2008 and 2009 was called by the government to explain Chrysler's dealership rationalization, i.e., reduction programs. Tr.3458:5-6. Mr. Landry explained that he was in charge of the field organization that oversaw the dealership network. Tr.3460:2-16. He testified that he reported to Jim Press and that Peter Grady, Director of Dealer Operations, reported to him. Tr.3460:17-3461:9.

Mr. Landry testified about the history of the Chrysler dealership network and how beginning in 1998 Chrysler had been trying to reduce the number of Chrysler dealers. Tr.3463:24-3464:9. He explained that at first, Chrysler formulated "Project 2000" to try "to determine what is the right number of Chrysler dealers . . . [and] the best way to manage [Chrysler's] dealer network[.]" Tr.3464:10-15. Mr. Landry went on to explain that in 2003 Chrysler began "Project Alpha" to reduce the number of dealers. Tr.3465:9 14. He explained that Project Alpha "was designed to get three brands under one roof, give the dealer some elbow room," which grew in 2008 into Project Genesis, designed to reach the same goals as Project Alpha but at a faster rate. Tr.3479:14-3480:4. Mr. Landry further explained that in 2007 and 2008, Chrysler incurred some costs associated with the dealership network, including providing material and salaried individuals to run the field organization to assist the dealers. Tr.3467:18-3468:9. Mr. Landry testified that in 2008 he believed that there were too many dealerships in Chrysler's dealership network. Tr.3479:10-21.

Mr. Landry explained that he helped prepare the "Washington Plan," which was part of the Viability Plan, and that the Washington Plan had included a reduction in the dealership network. Tr.3517:2-3519:7; PX548. Mr. Landry then testified that Project Genesis grew into Project Tiger within the framework of a Chrysler bankruptcy. Tr.3561:23-3562:5. He explained that Project Tiger grew out of Chrysler realizing that it could achieve the goals set forth in Project Genesis at a much faster rate through the rejection of franchises in bankruptcy. Tr.3564:11-13, Tr.3573:17-25.

Mr. Landry further explained that he had a role in setting the criteria to determine what dealers would have their franchises rejected in the April 2009 bankruptcy. Tr.3575:9-15. Mr. Landry explained throughout his testimony that Chrysler attempted to judge dealers based on a variety of factors including Minimum Sale Responsibility ("MSR"),[37] facilities,

---

[37] Each franchise agreement required franchisees to meet MSR. Mr. Landry explained that the MSR was calculated by taking the number of new Chrysler vehicles registered in a state and comparing that number to the number of total new vehicles registered in that state to determine the market share for Chrysler vehicles in that location. An MSR was then set based on the number of new vehicles the franchisee would need to sell for Chrysler to maintain its market share. Put another way, the MSR was used to determine if a dealership held the same

sales, etc., in order to retain the best dealers to preserve the Chrysler brand. Mr. Landry testified that the decision to reject the dealers in bankruptcy was necessary for Chrysler's survival. Tr.3611:23-3612:4.

On cross examination, Mr. Landry admitted that when Chrysler presented the Washington Plan, Chrysler believed that Project Genesis was a successful means for rationalizing its dealership network. PX548; Tr.3642:17-3643:16. He also admitted that it was Chrysler's position that the best way to rationalize the dealership network was through encouraging dealers to combine or sell to one another on a voluntary basis. Tr.3654:20-3655:7, Tr.3673:9-11. Mr. Landry admitted that he was opposed to a Chrysler bankruptcy and acknowledged that he sent an email to others within Chrysler stating to "Fight against 363" because they could "do it cheaper outside BK" and that he could move 650 dealers cheaper than bankruptcy would cost. PX646; Tr.3679:15-23.

iii. Peter Grady

As discussed above, Peter Grady, Director of Dealer Operations for Chrysler beginning in January 2009 until June 2009, also testified on behalf of the government. Tr.3758:15-17, Tr.3759:3-5. Mr. Grady explained that as the Director of Dealer Operations he oversaw the management of Chrysler's U.S. dealership network. Tr.3758:20-3759:2. He explained that Chrysler was trying to combine all of its brands under one roof in order to strengthen the profitability of its dealerships. Tr.3762:1-10. Mr. Grady testified

---

market share in its sales locality as Chrysler held either on the state or national level.

that when Chrysler learned that bankruptcy was likely, Chrysler "viewed that as an opportunity to accelerate the rationalization of the dealer network." Tr.3763:20-24. He explained that he believed that dealer rationalization by rejecting franchise agreements in bankruptcy would increase Chrysler's profitability in the long term because it would allow for a leaner and more efficient dealership network, which would help maximize sales. Tr.3764:15-3765:11. He explained that in creating the criteria for those franchise agreements to reject in bankruptcy, Chrysler relied on assessments of the dealers from the various regional business centers. Tr.3766:8-23. Mr. Grady testified that the government played no role in selecting the criteria for rejecting the 789 franchise agreements in bankruptcy, or in deciding which specific franchise agreements to reject. Tr.3766:25-3767:11.

Mr. Grady went on to explain that Fiat supported Chrysler's decision to reject 789 franchise agreements. Tr.3768:4-6. He explained that Chrysler worked with Fiat to determine the best dealership network for Chrysler after it emerged from bankruptcy. Tr.3768:8-18; DX1038. Mr. Grady testified that he worked with Piertro Gurlier, the head of network development for Fiat, and another Fiat executive in developing the final post-bankruptcy Chrysler dealership network. Tr.3768:19-3769:13.

As discussed above, Mr. Grady explained that 789 dealers were rejected based on an evaluation of eight criteria: (1) whether the franchise was meeting its MSR, (2) the franchise's Scorecard for Sales,[38] (3)

---

[38] Mr. Landry explained that each year a dealer received a scorecard for its performance where the dealers' "service and

whether the franchise facility had adequate capacity and met Chrysler's standards, (4) the franchise location, (5) the franchise's financial strength, (6) the franchise's management, (7) whether the franchise had a "dual" or competitor's dealership under the same roof, and (8) whether it was a single point franchise, meaning it did not have all three Chrysler brands under one roof. Tr.3598:18-3602:21.

As discussed above, Mr. Grady then went through the criteria for each of the representative plaintiffs and explained why each was rejected. Mr. Grady explained that Taylor's three franchises were rejected because together they had only met 36% of its MSR, sold less than 100 new Chrysler vehicles the previous year, and were co-located under one roof with a Chevrolet franchise. DX1315. Mr. Grady testified that Theel's Dodge franchise agreement was rejected because Theel's MSR was only 70%, it was a single Dodge franchise dealer, and it had a dual dealership with Toyota. DX1315. Mr. Grady explained that Whitey's Chrysler franchise was rejected because it only met 45% of its MSR, was a dual dealership with a Lincoln franchise, and was only a single Chrysler franchise dealer. DX1315. Mr. Grady explained that RFJS's Chrysler, Dodge, and Jeep franchise agreements were rejected because the RFJS dealership was an excess point, i.e., a location that Chrysler determined was no longer valuable and because the dealership was operating at a loss and was placed on a finance

---

parts operations, their profitability, their ability to go forward with working capital, [and] things of this nature, which are typical OEM dealer placement metrics." Tr.3766:14-19.

hold by Chrysler Financial.[39] DX1315. Mr. Grady explained that Marsh's Chrysler and Jeep franchise agreements were rejected because Marsh had only met 38% of its MSR, it lacked a Dodge franchise agreement, and because Chrysler wanted a third-party candidate to run a Chrysler, Dodge, and Jeep dealership in a different part of Las Vegas. DX1315. Mr. Grady explained that Livonia's Chrysler and Jeep franchise agreements were rejected in the Chrysler bankruptcy because Chrysler did not like the location of the dealership and thought that it would be more profitable to move the Chrysler and Jeep franchises to a Dodge dealership a few miles away. DX1315. Mr. Grady explained that Barry's Chrysler, Dodge, and Jeep franchise agreements were rejected because it only met 42% of its MSR and because it was considered an excess point and Chrysler wanted to reduce the number of dealers in the Brockport area. DX1315. Mr. Grady explained that the Guetterman Chrysler, Dodge, and Jeep franchise agreements

---

[39] Leland Wilson, the Chief Financial Officer of Chrysler Financial between 2007 and 2010 explained that "floor plan" financing involved dealers "order[ing] cars through Chrysler, Chrysler would ship those cars to the dealers. Each of those dealers that [Chrysler Financial] financed would have a dealer credit line" that would be used to finance the purchase. Tr.3855:9-11. He went on to explain that "the first lien collateral [for the loan] was the vehicle" and that when the car was sold the proceeds were used to pay off the loan the dealer incurred to purchase the car and allowed the dealer to continue purchasing more new vehicles. Tr.3855:17-23. RFJS was one of the Chrysler franchisees to which Chrysler Financial provided floor plan financing. "Financial hold" meant that Chrysler Financial was no longer willing to extend floor plan financing to RFJS and thus they could not obtain new inventory through their Chrysler Financial credit line.

were rejected because the dealership only met 53% of its MSR, was considered an excess point in the Cairo area where Chrysler wanted to reduce its number of franchisees, was placed on a financial hold by Chrysler Financial, and had a competitive dual Ford dealership attached to the Chrysler showroom. DX1315. Finally, Mr. Grady explained that Finnin's Chrysler and Jeep franchise agreements were rejected because the dealership only met 66% of its MSR and because Chrysler believed that a nearby Dodge dealer was a better dealer and wanted that dealer to have the Finnin Chrysler and Jeep franchises so that this other dealer could have all three under one roof. DX1315.

On cross examination, Mr. Grady stated that he did not have any discussions with the United States government until May 11, 2009 regarding dealer rationalization but would not necessarily have been aware if there had been any conversations about dealership rationalization with other Chrysler officials and Treasury. Tr.3818:1-3819:10. Mr. Grady also acknowledged that the February 17, 2009 Viability Plan envisioned the continuation of Project Genesis, not involuntary dealership terminations. Tr.3824:12-15.

iv. Thomas LaSorda

The government called Thomas LaSorda, who was the CEO of Chrysler from September 2005 until August 2007 to testify. Tr.4342:21-23. Mr. LaSorda became the Vice Chairman and President of Chrysler when Cerberus bought Chrysler in 2007 until he retired on April 30, 2009. Tr.4343:2-24. Mr. LaSorda explained that during his tenure as CEO he consistently sought alliances and partnerships with other auto manufacturers from around the world. He testified that he wasn't, however, able to accomplish such an alliance by the time that Chrysler was purchased by Cerberus in 2007. Tr.4357:24 4358:22. He testified that he attempted to form an alliance with Nissan Renault, but nothing came of it. Tr.4359:6-9. He went on to explain that the purpose of seeking an alliance was to combine product lines and to attempt to get additional cash investment into Chrysler. Tr.4360:2-4361:23. He explained that he went to Honda, Kia, and Hyundai during this time frame but "[t]hey were not interested in doing any joint programs at all" and that Toyota also expressed no interest in an alliance with Chrysler. Tr.4365:11-22. He went on to explain that he also reached out to Volkswagen, various Chinese manufacturers, and Tata Motors, but he was rejected each time. Tr.4366:1-4368:3. He explained that he had no interest in forming an alliance with GM because such an alliance would essentially wipe Chrysler out and destroy all of its jobs and factories because of the extensive overlap in product lines between the two companies. Tr.4373:17-25. Mr. LaSorda testified that the only company that expressed any real interest in forming an alliance with Chrysler was Fiat, but that Fiat was not interest in injecting any cash into the alliance to help sustain Chrysler. Tr.4365:21-22, Tr.4379:10-20. He explained that Fiat's interest was because Chrysler and Fiat had different product lines and that their markets did not overlap. Tr.4375:2-4377:17.

Mr. LaSorda testified that during the 2008-09 financial crisis he recognized the huge impact a Chrysler bankruptcy would have had, not only on Chrysler's employees and its dealers, but also on the companies that supplied Chrysler with auto parts. Tr.4382:11-4383:19. He explained that he supported the strategic partnership path that was outlined in Chrysler's February 17, 2009 Viability Plan because he knew that an alliance would be important to the long-term survival of Chrysler. Tr.4384:23-4385:5. He explained that at no time did he feel that the government was forcing an alliance with Fiat. Tr.4385:16-25. He further explained that he did not feel like the government had forced Chrysler into bankruptcy. Tr.4389:25-4390:3.

v. Robert Manzo

The government called Robert Manzo to testify. Mr. Manzo was the restructuring consultant from Capstone, hired by Chrysler in 2008 to address Chrysler's financial difficulties. He served "as the lead financial advisor to help lead [Chrysler] through the series of challenges that [it] faced regarding retaining their viability in terms of a standalone company." Tr.3928:18-24. Mr. Manzo explained that he worked on a daily basis with Chrysler management including CEO Bob Nardelli and CFO Ron Kolka. Tr.3930:8 12. He explained that when he was first contacted by Mr. Nardelli and Mr. Kolka, Chrysler was in financial straits due to the decline in its sales volume and its high cash burn rate of $2 billion. Chrysler's cash burn rate meant that Chrysler had three to four months to address its problems in before it ran out of cash. Tr.3931:18-3932:9.

Mr. Manzo explained that he was involved in Chrysler's plan to seek financial assistance from the government beginning in late 2008. Tr.3932:13-24.

As part of that process, he explained he created a hypothetical liquidation analysis Tr.3936:10-23. He explained that as part of this analysis he assumed that all of Chrysler's manufacturing would cease and that Chrysler would have twenty-four to thirty months to complete an orderly liquidation. Tr.3937:13-20; DX1029. He testified that during that time frame there "are a number of operational, financial, and legal activities that are occurring" such as selling equipment off either directly or through auction and taking care of several outstanding issues. Tr.3939:13-24. He also explained that his liquidation analysis assumed Chrysler was the only auto manufacturer liquidating at the time and that if there were other liquidations it would lower the range Chrysler could recover for its assets. Tr.3940:5-15. Mr. Manzo explained that if any auto part suppliers went bankrupt during this period, those bankruptcies would have a negative effect on Chrysler's potential recovery. Tr.3940:21-3941:5. Mr. Manzo noted that if Chrysler filed for bankruptcy and received no government assistance, it would immediately cease operating as an ongoing concern. This would mean that Chrysler would have to shut down vehicle production during the bankruptcy process. Tr.3941:6-21.

Mr. Manzo discussed in detail his views on which Chrysler lines would likely be sold in a Section 363 bankruptcy sale. Initially, he determined that the Dodge Ram Truck, Jeep Wrangler, Dodge Challenger/Chrysler 3000, and Dodge Viper vehicle lines would be able to have likely been sold to a third-party purchaser. DX1029. He explained that these were the only profitable Chrysler lines in 2008. Tr.3941:25-3942:19. He further explained that due to the Great

Recession, the proceeds from Chrysler's sale of the assets in a liquidation would be depressed. Tr.3943:16-3944:23. Mr. Manzo ultimately concluded that in a liquidation of Chrysler's assets in bankruptcy, the first lien lenders would likely recover between $654 million to $2.6 billion on a total debt of nearly $7 billion. DX1029.

Mr. Manzo went on to explain that, in his liquidation analysis, he assumed that the relaunch of any of the Chrysler product lines purchased by a third party would take between twelve to twenty-four months. Tr.3944:24-3946:1. He also explained that in his liquidation analysis he assumed that there would be no DIP financing, because he understood that the first lien lenders were unwilling to loan Chrysler any more money. Tr.3946:2-3947:18. He further explained that he assumed in his liquidation analysis that no more warranty coverage would be provided by Chrysler. Tr.3954:4-9. Mr. Manzo also talked about his meetings with John Haeckel, the restructuring advisor hired by JP Morgan on behalf of the first lien lenders. Tr.3964:1-3. He explained that his conversations with Mr. Haeckel were part of the back and forth a company conducts with its creditors in order to fully understand the fiscal picture of the company facing liquidation. Tr.3965:3-21.

Mr. Manzo testified that he was intimately involved in preparing many aspects of Chrysler's February 2009 Viability Plan. Tr.3958:15-18. He explained that in a typical commercial transaction companies will provide lenders with different alternatives as Chrysler did in its February 2009 Viability Plan. Tr.3960:2-15. He went on to explain that throughout the Viability Plan review process he participated in the negotiations with the government, as is typical for a restructuring professional dealing with a company's lenders. Tr.3968:3-17. He further explained that throughout this process he was constantly briefing Mr. Nardelli on the Auto Team's negotiations. Tr.3969: 22-3970:2. This included preparing a presentation about what Chrysler could expect if it had to go through a Chapter 11 bankruptcy. DX1083. Mr. Manzo testified that Fiat was very involved with the negotiations. Tr.3972:7-10. Mr. Manzo explained that he was part of the April 30, 2009 Chrysler board meeting where the board voted in favor of filing for bankruptcy under the prepackaged terms the Auto Team helped negotiate. Tr.3998:2-21.

On cross examination, Mr. Manzo admitted that when Chrysler filed its Viability Plan it clearly did not want to file for bankruptcy. Tr.4002:1-7. He further explained that up until the last minute Chrysler did not want to file for bankruptcy, but that the government brought the negotiations to an end. Tr.4002 :1-4003:25. Specifically, he recounted an email that the Auto Team's bankruptcy lawyer, Matthew Feldman, sent on the early morning of April 30, 2009, the day Chrysler was to file for bankruptcy, which explained that the Auto Team was not willing to negotiate any longer with the first lien lenders or any other interested party. PX538; Tr.4012:1-4013:10.

vi. Leland Wilson

The government also called Leland Wilson, the CFO of Chrysler Financial from 2007 until 2011, to testify. Tr.3851:1-9. Mr. Wilson explained that as CFO of Chrysler Financial he was responsible for "the traditional finance activities, accounting, financing, financial planning . . . treasury, capital markets . . . risk management . . . [and] insurance." Tr.3851:15-19. He explained that when Cerberus bought Chrysler it made Chrysler Financial a sister company that reported to the same holding company as Chrysler, rather than being a subsidiary of Chrysler. Tr.3852:7-10. Mr. Wilson testified that Chrysler Financial was the captive finance company for Chrysler and provided both dealer floor plan financing to 75 to 80 percent of the dealers and retail financing to the customers. Tr.3852:25-3853:10. He went on to explain that Chrysler Financial provided financing for leasing Chrysler vehicles, which amounted to approximately twenty percent of Chrysler's business. Tr.3854:9-14. Mr. Wilson explained that Chrysler Financial also offered services to dealers such as capital and real estate loans and various insurance products. Tr.3854: 24-3855:11.

Mr. Wilson explained how floor plan financing with Chrysler Financial worked for dealers. He testified that dealers would take out loans to purchase new cars from Chrysler, they would use those new cars as collateral for the loans, and when dealers sold the cars they would use the profits in order to pay off the loan and free up their credit line to purchase new cars and begin the cycle again. Tr.3855:12-23.

Mr. Wilson also testified about how Chrysler Financial operated. He explained that before 2008, Chrysler Financial had $30 billion to conduct its business with funding from a syndicate of banks. Tr.3857:3-18. The $30 billion was available for 364 days. *Id.* He explained that if Chrysler Financial went through the $30 billion it would then securitize its loans and sell them to investment firms in order to raise more money, which it would then loan out. Tr.3858:9-19. He testified that when the security market collapsed in 2008, Chrysler Financial could not sell asset-backed securities any longer and its creditors became less willing to offer financing. Tr.3860:1-8. He explained that when Chrysler Financial went to renew its financing in August of 2008, it could only get $23 billion. Tr.3862:17-20. He went on to explain that, because of its reduced financing capacity, Chrysler Financial had to become more conservative in its loaning practices and, as a result, Chrysler was not able to sell as many cars to its dealers or customers. Tr.3869:18-21.

Mr. Wilson testified that Chrysler Financials' relationship with Chrysler was terminated at the end of April 2009 when Chrysler filed for bankruptcy. Tr.3903:1-4. Afterward, he explained that Chrysler Financial redirected itself to become a used car lender. Ultimately, Chrysler Financial was sold to TD bank in 2011. Tr.3905:10-3906:11.

On cross examination, Mr. Wilson admitted that his opinions about dealer's accessibility to floor plan financing and the health of the credit market were only his own. He stated that his conclusions about floor plan financing would not apply to the representative plaintiffs that did not have floor plan financing. Tr.3910:14-3911:21.

vii. John Haeckel

The government also called John Haeckel, a restructuring representative from Chilmark Partners, to testify. Tr.2846:5-2847-9. Mr. Haeckel was hired by JP Morgan and explained that JP Morgan was the lead agent that negotiated with Chrysler on behalf of the first lien lenders. Tr.2848:9-23. He explained that Chilmark was brought in to "advise JP Morgan and the bank group more broadly with respect to the loan that they had made to Chrysler." Tr.2850:13-15. He explained that he examined the prospects for the first lien lenders to recover the debt owned by Chrysler in a Chrysler bankruptcy. *See* Tr.2852:25-2853:9. He determined that the first lien lenders, as of April 30, 2009, would likely receive only $680 million on their $6.9 billion in debt if Chrysler did not receive government assistance. Tr.2865:25-2866:9. He testified that, based his review, he advised JP Morgan and the first lien lenders that the $2 billion buyout offered by the government was more than they would recover if Chrysler filed for bankruptcy without government financing. Tr.2868:22-2869:8.

On cross examination, Mr. Haeckel testified that his analysis was based on a variety of assumptions that influenced his valuation and that a change to any of those assumptions could have had an impact on the value of Chrysler. Tr.2879:20-2880:25. He also testified that he did not come to any conclusions about Chrysler's plan to rationalize its dealership network or the appropriate size of the dealership network. Tr.2892:2-10. He also admitted that he did not personally know if any of the first lien lenders other than JP Morgan, which had refused to provide DIP financing, would have provided Chrysler with DIP financing or other funding if government financing was not available. Tr.2899:4-15.

viii. Ronald Bloom

The government called Ronald Bloom, Mr. Rattner's first Auto Team hire. Mr. Bloom was put in charge of hiring the rest of the Auto Team. Tr.2685:7-15. He described his position as Mr. Rattner's deputy and that after Mr. Rattner's departure in July 2009 he became the head of the Auto Team. Tr.2685:7-15. Mr. Bloom explained that while Mr. Rattner primarily focused on GM, he was the leader of the Chrysler team and was assigned to review Chrysler's Viability Plan. Tr.2685:16-21. He explained that Mr. Osias and Mr. Calhoon were on the Chrysler team and that others, including Mr. Wilson, Mr. Markowitz, and Mr. Malik, were on the GM team. Tr.2686:1-4.

Mr. Bloom testified that "[f]rom the start, the Auto Team followed two clear directives by Secretary Geithner and Director Summers regarding our approach to Chrysler and GM. The first directive was to behave in a commercial manner, ensuring all stakeholders were treated in accordance with business, not political considerations. The second was to refrain from intervening in the day-to-day management of these companies." Tr.2686:12-19. He explained that "[a]lthough [the Auto Team] engaged in dialogue and discussion with company management about the companies' approaches, we were not to substitute our judgment about specific decisions for theirs." Tr.2686:22-25.

He testified regarding the long-term Viability Plan Chrysler submitted to Treasury on February 17, 2009. Tr.2687:1-19; DX1056. He explained that Chrysler made clear in its plan that it was "critical that each of Chrysler's constituents make significant sacrifices to accomplish our restructuring plan, including our creditor groups, shareholders, suppliers, dealers, the United Automobile Workers, and, of course, our own employees." Tr.2688:3-8. He testified that this was a sentiment that he also shared. Tr.2688:12-21. He went on to describe the three different paths Chrysler proposed. He noted that each required billions of dollars in additional government financial assistance beyond the $4 billion TARP loan. Tr.2689:1-3. He also noted that Chrysler represented that all its plans included a commitment to continue working "with its dealer body to rationalize the number of dealerships" to enhance Chrysler's long-term viability. Tr.2691:11-12; DX1058.

Mr. Bloom testified that upon receipt of the February 17, 2009 Viability Plan, he reviewed it to determine if restructuring Chrysler was viable and if Chrysler would be able to survive in the long term. Tr.2692:3-19. Mr. Bloom explained that in addition to the February 17, 2009 Viability Plan, Chrysler sent a confidential submission supporting its reasoning on February 18, 2009. Tr.2691:13-15; DX1058. As part of that submission, Chrysler offered an accelerated Project Genesis, whereby it proposed to reduce the number of dealers from 3298 to 2005 over the course of four years. Tr.2822:1-10; DX1058. Mr. Bloom explained that "[t]he Auto Team spent hundreds of hours studying the Chrysler plan, analyzing it, testing its assumptions, and critiquing it, all to determine whether the plan was likely to lead to Chrysler's long-term viability." Tr.2693:8-12. Mr. Bloom further testified that "[a]mong other things, we analyzed whether a reduction in Chrysler's deal-in Chrysler's dealership network would improve its chances at viability." Tr.2695:25-2696:3. Mr. Bloom went on to explain that "[a]fter studying the issue, we ultimately agreed with Chrysler, that their dealer network was too large, and we supported their plans to reduce the size of their dealer network." Tr.2696:14-18.

During the Auto Team's evaluation process, Mr. Bloom testified that he and other members of the Auto Team met with Mr. Nardelli at Chrysler's Warren Michigan truck plant on March 9, 2009. Tr.2697:15-22. He testified that after the meeting Mr. Nardelli wrote a letter to him and Mr. Rattner advocating for a Chrysler stand-alone plan. Tr.2697:23-2698:13.

Mr. Bloom testified that he and the Auto Team came to understand that if Chrysler was to remain a viable company, the government would have to support the auto part suppliers. This led to the Auto Supplier Support Program announced on March 19, 2009. Tr.2700:11-24; DX1095. He testified that the Supplier Support Program "was designed to provide suppliers with access to up to $5 billion in government-backed protection." Tr.2701:1-2.

Mr. Bloom explained that on March 30, 2009 the Auto Team concluded that "even though Chrysler had made meaningful changes to its cost structure in the years prior to 2009, a combination of a fundamentally disadvantaged operating structure and a limited set of desirable products made stand-alone viability for Chrysler unlikely." Tr.2706:18 24. Mr. Bloom explained that on March 30, 2009 President Obama announced that the government had rejected Chrysler's Viability Plan, but that Chrysler would have thirty more days to form an alliance with Fiat that was acceptable, and that the government would provide up to $6 billion to help the plan succeed. Tr.2709:4-24; DX1137. Mr. Bloom explained that on that same day, President Obama announced a Warranty Commitment Program, "to give confidence to GM and Chrysler's customers" that the warranty for newly purchased cars would be honored. Tr.2711:17-2712:1; DX1137.

Having concluded that Chrysler would need to partner with Fiat to survive, Mr. Bloom testified that he "served as the principle negotiator during the Auto Team's negotiation of the term sheet with Fiat." Tr.2703:7-8. As a result of the negotiations, Chrysler and Fiat signed a new term sheet, in which "Fiat would contribute among other things, technology, management, and consolidated purchasing power in exchange for twenty percent of the equity in Chrysler, with the opportunity to receive an additional fifteen percent if certain performance targets were met." Tr.2704:23-2705:3. Additionally, the term sheet was conditioned on $6 billion in government loans, a restructuring of Chrysler debt, and an industrial restructuring of Chrysler, including its dealership network. Tr.2705:4-9.

Mr. Bloom testified that from March 31, 2009 until April 30, 2009 there were a series of meetings between members of the Auto Team and stakeholders in Chrysler, including Chrysler, Fiat, UAW, and JP Morgan. Tr.2712:23-2713:13. Mr. Bloom explained that although every party "worked hard to find a path to viability without bankruptcy, all parties, including Chrysler and Fiat, came to the conclusion in late April 2009 that the Fiat-Chrysler alliance could only be accomplished through a restructuring in bankruptcy." Tr.2715:11-15. Mr. Bloom stressed that "[u]ltimately, it was Chrysler's decision to accept the Government's financial assistance, to file for bankruptcy in April 2009, and to execute a master transaction agreement with Fiat on April 30th, 2009." Tr.2715:16-19. Mr. Bloom testified that the Auto Team "informed Chrysler that Treasury and the Government of Canada would provide up to $4.5 billion in debtor-in-possession financing to support Chrysler in bankruptcy if Chrysler elected to move forward with the Fiat alliance memorialized in the master transaction agreement." Tr.2716:4-9; DX1277, DX1287. He went on to explain "the Auto Team, including myself, talked with multiple banks in an effort to raise debtor-in-possession financing from private sources instead of the Government. Although we would have welcomed a private entity providing financing, no private entity was interested, therefore leaving the Government as the lender of last resort." Tr.2716:20-2717:1. Mr. Bloom maintained "[a]lthough the sacrifices made by Chrysler and its stakeholders were difficult, the alternative to Chrysler's successful restructuring was liquidation, which would have been worse for everyone concerned." Tr.2719:11-14.

Mr. Bloom testified regarding the dealerships, "Early on in our evaluation process, Chrysler explained to us that the objective of Project Genesis was to realign its dealership network so that its dealerships sold all three Chrysler brands, Chrysler, Jeep, and Dodge, and that the number of dealers was better aligned with the sales volume of Chrysler dealers. Under its then-current network structure, many dealers were selling only one or two brands, and many dealers sold a relatively small number of vehicles. We understood from Chrysler that, in its judgment, having too many dealers placed a burden on its prospects for achieving long-term viability and success. This was because, according to Chrysler, too many dealers eroded the brand equity and Chrysler's ability to get a fair price for its products. Chrysler also advised us that having too many dealers forced the dealers to compete against each other, which led to price-cutting and lower dealer profits, reducing the ability of the dealers to re-invest in their facilities." Tr.2721:4-23. He went on to explain that "[C]hrysler also advised the Auto Team that a more aggressive dealer rationalization effort would further enhance the prospects for achieving long-term viability, a judgment we supported." Tr.2722:2-5. However, he made clear that "[a]s part of the Auto Team's due diligence responsibilities, we continued to have some general discussions with Chrysler during the month of May regarding the status of its dealership network plans. I did not request and Chrysler did not provide any update to either the number of dealers Chrysler was considering rejecting or the names of any potential dealers the company would put forward for rejection." Tr.2723:15-21. He explained that the Auto Team "did not get into the details of management decisions behind Chrysler's selection of individual dealers to reject." Tr.2724:15-18. He stated that the only requirement placed on Chrysler was that the dealer rationalization plan be "based on objective criteria and be fair and impartial." Tr.2724:23-2725:3. Mr. Bloom explained he recalled learning that Chrysler would reject 789 dealership agreements during a May 11, 2009 presentation made by Chrysler. Tr.2725:4-15; DX1309.

On cross examination, Mr. Bloom admitted that prior to working for the government, he had spent twelve years working for the steelworkers' union negotiating collective bargaining agreements. Tr.2737:7-10. Mr. Bloom also acknowledged that the February 2009 Viability Plan only included an accelerated Project Genesis that would reduce the dealership count through voluntary consolidation. Tr.2741:1-15; DX1056, DX-1058. He agreed that the Chrysler stand-alone plan was off the table because the Auto Team had determined that Chrysler could not survive long term as a stand-alone entity. He also agreed that in 2008, he had believed that bankruptcy was the likely outcome for Chrysler, before he joined the Auto Team. Tr.2770:6-10.

Mr. Bloom further admitted that the government's idea of shared sacrifice came to include dealer terminations. Tr.2775:4-14. He also admitted that when the Auto Team rejected the Viability Plan in March 2009, it required a more aggressive dealer rationalization approach from Chrysler along with other concessions. Tr.2755:2-14. As part of that more aggressive rationalization approach, Mr. Bloom understood that Chrysler had proposed Project Tiger and termination of franchise agreements in bankruptcy. Tr.2778:8-21. Mr. Bloom received the first draft of Project Tiger on April 7, 2009, one week after President Obama had announced that he was rejecting Chrysler's February 2009 Viability Plan. Tr.2820:18-23; DX1167.

Mr. Bloom admitted that Chrysler was not really involved in the negotiations concerning the Voluntary Employee Beneficiary Association Plan ("VEBA") and union benefits, and that during April 2009 the government facilitated negotiations between Fiat and UAW. Tr.2783:1-5. He also admitted that the VEBA claims would most likely not have recovered in a Chrysler bankruptcy without government assistance because they were unsecured debts, and there was a substantial amount of secured debt that had a higher priority in a bankruptcy. Tr.2792:14-24. Mr. Bloom testified that the bankruptcy was structured in a manner to give value to the unsecured creditors such as the VEBA and key auto part suppliers, that would have presumably not recovered anything if Chrysler had filed for bankruptcy without government assistance. Tr.2792:14-24.

Mr. Bloom testified that he understood that, under the government's negotiated prepackaged bankruptcy plan, Fiat would take over the management of Chrysler. Tr.2799:14-17. Mr. Bloom also admitted that the Auto Team viewed providing assistance to Chrysler and GM as a "multiplier" because there were dozens of companies that might have gone bankrupt if Chrysler and GM liquidated. Tr.2812:2-9; *see also* PX635.

ix. Brian Osias

Mr. Osias also testified as a former member of the Auto Team. Prior to serving on the Auto Team, Mr. Osias worked on President Obama's transition team "focusing on tracking and evaluating the Bush Administration's efforts to support the auto industry." Tr.3138:7-10. He explained that he began working at Treasury in January 2009 and quickly gravitated to the Auto Team. Tr.3138:11-16. He testified that when he became a member of the Auto Team, he "was brought in as an analyst with skills in research, forecasting, and analyzing companies' financials and viability[.]" Tr.3138:21-25.

Mr. Osias explained that he was tasked with analyzing Chrysler's February 17, 2009 Viability Plan. Tr.3139:14-25. To perform this analysis, he familiarized himself with the auto industry including "Chrysler's operational framework, . . . its manufacturing footprint, dealer network, capital equipment efficiency, power train technology, and a long list of other important variables." Tr.3140:9-14. Mr. Osias explained that "[i]f an investment could not be justified on the basis of the submitted Viability Plan, we sought to understand what changes Chrysler might need to ensure that if further taxpayer support were provided to the company, the taxpayers had a strong chance of repayment." Tr.3144:8-13. He explained that "to accomplish these tasks we attempted to make every transaction and interaction as commercial as possible." Tr.3144:18-20.

He testified "[t]he task force definition of viability had three parts. First, to be viable, a business must be able to generate positive cash flow and earn an adequate return on capital over the course of a normal business cycle. Second, the positive cash flow must account for spending on research and development and capital expenditures necessary to maintain and enhance the company's competitive position. Third, a viable company must have a balance sheet consistent with the cash flow dynamics of the business and must be capable of weathering typical industry downturns." Tr.3145:1-12. He explained that part of the problem with the Chrysler Viability Plan was that Chrysler had made too many positive assumptions about the auto market to justify its stand-alone plan. Tr.3150:12-23. He stated that the Auto Team concluded that "[e]ven under generous assumptions, Chrysler was not viable under its stand-alone viability plan. It was not close. In all but the most favorable macroeconomic and company-specific cases, some of which defied logic and history, Chrysler was destined to suffer or fail in the medium term, and any taxpayer support provided by Treasury would quickly be spent by the company with little hope of recovery." Tr.3153:12-19.

Mr. Osias went on to discuss the Auto Team's examination of a potential merger between Fiat and Chrysler. Tr.3154:11-17. He explained that Fiat made a powerful argument for the viability of a merger using more conservative assumptions. Tr.3154:18 3155:4. Mr. Osias explained that after President Obama stated that the government had rejected Chrysler's Viability Plan, he began "analyzing whether the alliance between Fiat and Chrysler was feasible and would result in a viable company." Tr.3162:23-3163:1. He explained he "continued to perform due diligence on the potential Chrysler-Fiat alliance to determine if the proposed alliance would result in a viable company, one with positive cash flow the Treasury would feel comfortable underwriting with taxpayer money." Tr.3163:7-13. He went on to explain that during the viability review process "Chrysler recognized that one benefit to a bankruptcy process is that it would allow them to accelerate their dealer rationalization process, . . . at a substantially lower cost than could be achieved outside of bankruptcy." Tr.3167:16-20. He further explained "[a]s with other aspects of the Chrysler-Fiat alliance, Treasury did not have a specific strategy with regard to the dealers, other than that the company's dealer network plan must contribute to the company's overall viability." Tr.3168:5-9.

Mr. Osias noted that he understood that "Treasury obviously was not a purely commercial actor. No wholly commercial actor would have agreed to give Chrysler money at this point because its prospects were so bleak. We understood that the potential for return in a structure that actually made sense for Chrysler was very low. Treasury had other priorities beyond earning a fair return for taxpayers, including preserving jobs and limiting damages to auto-related communities." Tr.3170:5-13. Mr. Osias testified that the Auto Team was "performing this diligence to ensure that if the company was going to be restructured through a 363 sale, that such a sale was the most efficient option." Tr.3176:7-10. The Auto Team, he testified, "had neither the interest nor the ability nor the mandate to play any specific part in determining which dealers Chrysler and Fiat wanted to cut" but wanted to ensure that any franchise rejections were based on a reasonable and fair methodology. Tr.3182:3-19.

On cross examination, Mr. Osias admitted that he evaluated all three viability scenarios equally despite Chrysler advocating for a stand-alone plan. Tr.3195:16-3196:17. Mr. Osias also admitted that he did not continuously work for the Auto Team; he did not work for the Auto Team from late February 2009 until March 20, 2009. Tr.3261:19-3262:8. He reemphasized that his role was to look at the financial practicability of Chrysler's viability rather than the political consequences of Chrysler potentially failing. Tr.3271:5-21. He also explained that the Auto Team only evaluated whether the franchise rejection criteria were fair and reasonable and was never involved in identifying any of the franchise agreements to be rejected. Tr.3324:9-3325:11. According to Mr. Osias, Fiat was not concerned with Chrysler's dealer rationalization plans. Tr.3308:15-24.

x. Brian Stern

In addition to Mr. Rattner, Mr. Bloom, and Mr. Osias, the government also called Brian Stern from the Auto Team to testify. He was with the Auto Team from March 2009 until August 2009. Tr.4308:23-25. Mr. Stern explained that he was recruited by Mr. Rattner based on his experience as a member of the private equity group at Bank of America Merrill Lynch Global Private Equity. Tr.4309:4-8. Mr. Stern testified that he "worked on issues related to Chrysler Financial and General Motors Acceptance Corp., GMAC, the financial companies affiliated with Chrysler and General Motors." Tr.4309:15-19. He testified that he was on "what was known as the finance companies or FinCos team because our work focused on Chrysler Financial and GMAC, which were collectively known as the FinCos." Tr.4310:16-21.

Mr. Stern explained that the "Auto Team worked with Chrysler Financial and GMAC because Chrysler's viability depended on financing being available for Chrysler's dealers and customers." Tr.4311:1-2. He went on to explain that this was "[b]ecause Chrysler was wholly dependent on dealers to sell its automobiles, Chrysler would not be viable if the dealer network was incapable of financing the purchase of new cars that would then be offered to consumers to purchase off the dealer's lot." Tr.4311:17-21. Mr. Stern testified that leading up to the financial crisis, Chrysler Financial was the main financier for Chrysler dealers. Tr.4311:22-24.

Mr. Stern then testified that during the financial crisis, Chrysler Financial experienced "an extreme liquidity crisis" and that in an email on April 17, 2009, Chrysler Financials' CEO Tom Gilman stated that in the event of a Chrysler bankruptcy, Chrysler Financial would cease lending to Chrysler dealers and retail customers. Tr.4312:1-19; DX1202. He went on to explain that by late 2008, Chrysler Financial had to shrink the amount of outstanding retail loans in order to not be in default, which negatively impacted Chrysler. Tr.4313:2-17; DX1182. Mr. Stern testified that the Auto Team concluded that Chrysler Financial would require too much assistance to continue as the financier for Chrysler and that the recapitalized GMAC was the most prudent and effective deployment of taxpayer capital to ensure that there was sufficient lending capacity in floor plan and retail auto loan markets. Tr.4314:15-22. He explained that "[u]ltimately, on April 30, 2009, the day that Chrysler filed for bankruptcy, Chrysler and GMAC executed a master financial services agreement term sheet" under which GMAC would provide the financial services to Chrysler dealers and customers. Tr.4316:18-24; DX1375. This required that Treasury provide $7.5 billion to GMAC and that the FDIC provide assistance to GMAC through its Temporary Liquidity Guarantee Program. Tr.4317:20-4318:9; DX1336a.

On cross examination, Mr. Stern admitted that he did not consider whether Chrysler dealers could have obtained floor plan financing from other sources. Tr.4321:3-11. He also admitted that on April 18, 2009, Chrysler Financial expressed its desire to continue to provide retail and floor plan financing in the event of a Chrysler Chapter 11 bankruptcy. Tr.4323:8-22. Mr. Stern further acknowledged that Treasury told Congress in 2011 that the reason it provided GMAC with financing was not because it was the most prudent investment but because of its importance in the auto industry. Tr.4330:11-15; PX485. He also stated that he had not had any conversations with Chrysler regarding the best path forward for Chrysler Financial. Tr.4336:9-14.

xi. James Lambright

The government also called James Lambright to testify. Mr. Lambright, from October 2008 until June 2009, served as the interim chief investment officer for TARP. Tr.3711:5-10. He explained that "[t]he overarching objective of TARP transactions was to protect the financial system; however, in structuring individual transactions with particular companies, our goal was to provide the necessary financial assistance, while at the same time protecting taxpayers whose funds were being put at risk." Tr.3713:6-11. He explained that President Bush took the action of providing loans to Chrysler and GM from TARP in January 2009 because "Chrysler and GM were on the brink of financial collapse but had not taken measures to prepare themselves for an orderly restructuring. Thus, our goal at the time was to provide sufficient financing to keep Chrysler, GM, and their associated financing companies alive, giving them some time and an incentive to develop paths towards long-term viability, and also give the incoming Obama Administration flexibility in deciding how and whether to provide further assistance to these companies." Tr.3714: 1-10.

He went on to explain that "[t]he bridge loans [to Chrysler and GM] were designed to provide the manufacturers sufficient capital to continue operations for a period of time, long enough to develop a plan for long-term viability that could be presented to the new administration." Tr.3714:16-20. Mr. Lambright further explained that "[t]he concept of a viability plan and the bridge loan was derived from the legislation that had passed the House on December 10th, 2008 [but was never enacted]." Tr.3717:19-21. He explained that his "understanding was that this provision called for Chrysler to include in its viability plan an explanation of the steps it would take to improve its operating efficiency in a manner that would allow it to continue manufacturing and selling cars for the long term." Tr.3725:20-25.

B. Government's Expert Witnesses

i. Dr. Andrew Carron

Dr. Andrew Carron, Ph.D., is an expert in financial economics, damages, and valuation. His testimony addressed plaintiff experts' opinions regarding the value of plaintiffs' franchise agreements in a "but for world" where Chrysler entered bankruptcy without government assistance. He holds a B.A. in economics from Harvard University and a Ph.D. in economics from Yale University with a concentration in industrial organization. Tr.2912:21-2913:5. Dr. Carron is currently an affiliated consultant at National Economic Research Associates ("NERA") Economic Consulting. Tr.2910:2-3. From 2013 to 2017, Dr. Carron was the chairman of NERA and from 2006 to 2012, he was NERA's president. Tr.2910:3-5. He has authored texts, book chapters, and articles on fixed-income securities. Tr.2912:11-13.

Dr. Carron was retained by the government to opine on two issues. First, Dr. Carron was asked to opine on "whether Plaintiffs' Chrysler franchise agreements would have had value had Chrysler foregone government financial assistance and conducted an orderly wind-down and liquidation in bankruptcy." Tr.2913:14-20. As discussed in detail below, Dr. Carron opined that the franchise agreements at issue would have been valueless in the plaintiffs' proposed "but for world"—where Chrysler was acquired in a Section 363 sale—because a willing buyer in an arms' length transaction would not have paid more than zero for their franchise agreements. Tr.2913:23-2914:13.

Second, Dr. Carron was asked to opine on "whether Plaintiffs' dealerships in the actual world had substantial value absent those franchise agreements." Tr.2914:14-16. As discussed in detail below, Dr. Carron opined that eight out of the nine plaintiffs' dealerships without franchise agreements with Chrysler retained substantial value in the actual world, both during and after the Chrysler bankruptcy. Tr.2914:21-24.

Dr. Carron began his testimony by discussing the difference between the income-producing activities plaintiffs received by having a franchise agreement with Chrysler and the income-producing activities that were not directly dependent on the franchise agreements. He explained that the franchise agreements allowed a franchise holder to sell the manufacturer's new cars and trucks, purchase new cars and trucks from the manufacturer, and provide warranty repair and maintenance work on those cars and trucks that is paid for by the manufacturer at a negotiated rate. Tr.2915:10-16. He went on to explain that other income streams are not franchise dependent. He testified that a "franchise agreement is not required for the sale of used cars[,] the sale of finance and insurance products[,] customer pay . . . repair service and parts[, and] physical assets, such as land, buildings, and general tools." Tr.2915:15-23.

Dr. Carron challenged the opinions of the plaintiffs' experts that evaluated the lost value of the plaintiffs' franchise agreements by not distinguishing between franchise dependent and non-franchise dependent income streams. Tr.2915:23-2916:2. As a result, he asserted, the plaintiffs' experts were "unable and . . . do not, in fact, isolate, identify, or estimate the value brought to a dealership by the Chrysler franchise agreement."[40] Tr.2916:3-2916:5.

Dr. Carron testified that for purposes of his valuation analysis he assumed a "but for world" where "Chrysler would have declared bankruptcy on December 31, 2008 or April 30, 2009 and subsequently

---

[40] As discussed above, Ms. Murphy testified on behalf of the *Alley's* plaintiffs that she did not separately value the "franchise agreement" because, in her opinion, there is no distinction between valuing a franchise and a dealership. Dr. Nevin, in his testimony on behalf of the *Colonial* plaintiffs, explained that in the auto dealership industry there is a unique method of measuring the value of the intangible benefit of having a franchise agreement with a specific manufacturer using what is called a "blue sky" multiple. This multiple is applied to the value of the assets of the franchise to determine how the "brand" franchise agreement increases the value of franchise to a potential buyer. As discussed above, the references Dr. Nevin relied upon in his testimony regarding blue sky indicated that in 2009, there was no "blue sky" value for Chrysler dealerships and thus a buyer wanting to purchase a Chrysler franchise would not have paid a multiple above "asset" value. Finally, Mr. Stockton, also on behalf of the *Colonial* plaintiffs, valued the Finnin and Guetterman franchises in his "but for world" to include income streams not directly related to what the manufacturer is obligated to provide under the franchise agreements.

liquidated its assets through an orderly wind-down without financial support from the Government." Tr.2916:12-16, Tr.2917:1-5. Dr. Carron explained that, for purposes of his analysis, Chrysler would have ceased manufacturing new vehicles during this wind-down period and would have stopped shipping parts to the dealers. Tr.2917:5-11. He further explained that he assumed plaintiffs would have been able to continue as Chrysler, Jeep and/or Dodge dealers during the wind-down. Tr.2916:16-24. He also assumed that the plaintiffs would generate income from their directly-related franchise activities, such as used car sales and customer pay service. *Id.*

Using the above-noted assumptions, Dr. Carron opined on the value of plaintiffs' franchise agreements. He focused on the income streams tied directly to the plaintiffs' franchise agreements: the right to sell new cars, the right to purchase new cars, and the right to be paid for warranty work. Dr. Carron concluded that with the assumptions he used, none of plaintiffs' franchise agreements would have had any value. Each of Dr. Carron's opinions will be discussed in turn.

Dr. Carron started by explaining why, in his opinion, plaintiffs would not see any value in being able to sell new Chrysler cars or trucks. Dr. Carron testified that "new car sales are typically the least profitable of a dealer's major activities and can often even lead to losses." Tr.2919:17-20. He explained that this least-profitable aspect of plaintiffs' dealerships would have become worse in a "but for world" where the new cars in the plaintiffs' inventory might be discontinued. Tr.2920:1-11. He stated that "[t]he cost of the vehicles purchased [by the franchisees] prior to the bankruptcy would have been significantly higher than the price customers would have been willing to pay for them after bankruptcy." Tr.2920:24-2921:2. Dr. Carron reasoned that "[b]uyers tend to be adverse to discontinued brands due to the lack of warranty coverage, ceased production of parts, among other reasons." Tr.2922:3-6. Dr. Carron thus concluded that no value to the franchise agreements could be attributed to the sale of existing vehicles on the plaintiffs' lots. *See* Tr.2922:17-19.

Dr. Carron also explained that the cars on plaintiffs' lots would have resulted in losses for plaintiffs because, contrary to plaintiffs' experts' opinions, without "government financial assistance, there would have been no manufacturer warranty coverage." Tr.2922:21-22. Dr. Carron testified that he rejected the notion, advocated by plaintiffs' experts, that the federal government would have paid for warranty work in a "but for world." He testified that "[p]laintiffs' experts did not provide support for their opinions that a program would have been established to provide warranty coverage during a hypothetical Chrysler liquidation." Tr.2923:13-16, Tr.2923:17-2924:16.[41] Dr. Carron opined that cars without a manufacturer's warranty would "signal a lower level of product quality to customers, lowering the price they would be willing to pay." Tr.2925:19-12. Dr. Carron further opined that even if

---

[41] Dr. Carron dismissed the notion that the limited warranty program offered by the government for March 2009 was evidence of a government commitment to a continued warranty program. He explained that the March warranty program was designed to encourage the sale of Chrysler cars and trucks but that without a government commitment to keep the Chrysler brand, there would have been no reason to continue the warranty. Tr.2923:19-2924:22.

dealers purchased third-party warranty coverage for their new vehicles, they would have discounted them by the amount of the cost of the warranty, around $2,000. Tr.2926:3-19.

In further support of his opinion that franchisees would not see any value associated with a franchisee's ability to sell new cars in the "but for world," Dr. Carron testified regarding the lack of retail financing. Dr. Carron testified that retail financing at the time of the "but for world" was hard to come by, and that all plaintiffs relied to some extent on Chrysler Financial to provide retail financing for their customers. Tr.2928:1-4. He explained that by 2008, Chrysler Financial was facing its own liquidity crisis and that, by the time that Chrysler would have filed for bankruptcy in a "but for world," Chrysler Financial would not have been in the position, without government assistance, to provide retail financing to customers. Tr.2932:8-18. Dr. Carron explained that even for those dealers who did not overly rely on financing from Chrysler Financial, obtaining retail financing would have been difficult during the year or two in question. He testified that the "overall volume of outstanding auto loans and leases in the US decreased eighteen percent between April 2008 and April 2009, as consumers paid down outstanding loans and fewer new loans were being made." Tr.2933:21-25.

Dr. Carron testified based on the data from the plaintiffs' financial statements that "[a]n average price decline of a little more than 3% would reduce the profits of new car sales to zero." Tr.2938:5-7. The plaintiffs' financial statements showed an average mark up in May 2009 of 3.18%. *See* Tr.2938:4-14. Dr.

Carron further opined that plaintiffs would have lost money on their inventory in a "but for world" without government assistance. Relying on data from other manufacturers with discontinued lines, including Mazda Tribute, Suzuki, and Saab, Dr. Carron opined that the new cars on plaintiffs' lots would have declined in value by at least 15% and up to 25%. Tr.2948:19-23.

Specifically, Dr. Carron explained that when Mazda discontinued the production of its Mazda Tribute SUV in 2011, the value declined by 4.5% during the six months following the announcement, while a similar SUV like the 2011 Ford Escape rose by 1.5% leading to an overall 6% decline of relative price of the Mazda Tribute. *See* Tr.2937:10-Tr.2946:1. Regarding the decline in the value of Suzuki cars during its bankruptcy, Dr. Carron noted that news reports during the Suzuki bankruptcy indicated that dealers were offering discounts ranging from twenty to twenty-five percent for their new vehicle inventory. Tr.2943:15-16.

Dr. Carron explained that he thought that the Saab bankruptcy provided the most reliable comparison to what would have happened in the "but for" without government financing world because like Chrysler, Saab as the manufacturer went bankrupt.[42] Dr. Carron explained that, where the manufacturer no longer manufactures cars and is not able to offer a warranty,

---

[42] Dr. Carron explained that plaintiffs' reliance on the Daewoo bankruptcy was misplaced because the Daewoo involved only the distributor and DIP financing was available, which Dr. Carron concluded would not have been available in a "but for" Chrysler bankruptcy. Tr.2943:20-2944:25.

it is very difficult for a dealer to sell its remaining new car inventory. In Saab's case, the new cars on dealer lots declined by an average of 42%. Tr.2945:16-2947:8. Dr. Carron further supported his opinion with the analysis done by Chrysler's first lien lenders who had estimated that new Chrysler cars and trucks would be discounted between 50% to 75%. Tr.2948:5-12.

Dr. Carron next explained why he believed that the franchisees would not see any value in the second right provided in franchise agreements, the right to purchase additional new cars from Chrysler. He challenged Mr. Berliner's contention that, in a "but for world," plaintiffs would have derived a benefit from having access to the 9,580 new cars Chrysler had not yet sold at the time of its bankruptcy. Dr. Carron opined that Chrysler would have likely sold these vehicles at a bulk auction open to both Chrysler dealers and non-Chrysler dealers to obtain maximum value for the cars. Tr.2953:16-21. Dr. Carron further opined that even if Chrysler were acquired by another manufacturer in a 363 sale, there "[was] no indication . . . at the time that an acquirer would have resumed production of any, much less of most or all, of Chrysler's existing brands." Tr.2956:3-6. Relying on the work of Mr. Manzo, Dr. Carron questioned whether any lines but for the Jeep Wrangler line would have been acquired and stated that he saw no evidence to suggest that production of all Chrysler lines would have resumed in bankruptcy without interruption. He also opined that the lack of floor plan financing for most dealers would have made the ability to purchase new cars difficult even if Chrysler continued to manufacture cars. It was for all of these reasons that Dr. Carron concluded that the right provided in the franchise agreement to buy and then sell additional Chrysler vehicles in the "but for world" would not have had any value. Tr.2957:20-22.

Regarding the value derived from the right to perform warranty work, the third value Dr. Carron attributed to a franchise agreement, Dr. Carron opined that this right was also valueless in a "but for world" without government financing. Dr. Carron testified that if Chrysler filed for bankruptcy without government assistance, all the outstanding warranty claims, which for these plaintiffs totaled $198,741 by the end of April 2009, would have gone unpaid. Tr.2961:21-2962:6. Dr. Carron explained, as noted above, that he believed it was unreasonable to assume that there would have been a program to honor outstanding warranties in a "but for world." He thus concluded that plaintiffs would have received no value for their franchise agreement based on their ability to perform warranty work. Instead, he opined that the plaintiffs would have lost the money due to them by Chrysler for warranty work they performed but for which they had not have been paid. Tr.2962:7-12.

Dr. Carron concluded his testimony regarding his first opinion by stating that, had the dealerships chosen to sell their Chrysler franchise agreements immediately before a Chrysler bankruptcy or during the bankruptcy, a willing buyer would not have paid anything for the franchise agreements because none of the express rights provided for in the intangible franchise agreements—the right to sell Chrysler cars and trucks, the right to purchase Chrysler cars and trucks directly from Chrysler, and the right to perform warranty work—would have produced any profit in a "but for world" where Chrysler went into bankruptcy without government assistance. *See* Tr.2963:7-12.

Dr. Carron did not consider any loss attributable to the plaintiffs' other income streams, which Ms. Murphy and Mr. Stockton asserted were also attributable to the franchise agreement, including customer pay work, used car sales, and the sale of insurance and other commercial products. He did, however, provide an analysis in his second opinion to show that, for most of the plaintiffs, there was no evidence that profits from these income streams diminished in the period that would have coincided with a bankruptcy wind-down of Chrysler in a "but for world."

Dr. Carron focused his second opinion on the value of the plaintiffs' dealerships in the actual world, after their franchise agreements were rejected in bankruptcy. Dr. Carron explained that in valuing the plaintiffs' dealerships without a Chrysler franchise agreement, he took into account the goodwill, expertise, and revenues the plaintiffs derived from their other business lines, such as new car sales and warranty repairs under their non-Chrysler franchise agreements, used car sales, and customer-pay repairs. Tr.2989:14-18. Dr. Carron explained that, in the actual world, several of the plaintiffs were able to retain much of the value associated with Chrysler-related work because, by virtue of the government's contribution, Chrysler continued as a brand. Thus, they were able to obtain Chrysler parts for repairs and sell their remaining Chrysler vehicles with warranties.[43] Tr.2990:20-2991:5.

---

[43] Aspects of Dr. Carron's opinion were confirmed by the fact that certain plaintiffs, as discussed *infra*, were able to sell their

For the six representative plaintiffs that continued in business as car dealerships under other franchise agreements (Theel, Marsh, Guetterman, Finnin, Taylor, and Whitey), Dr. Carron explained that, in the actual world, the termination of their Chrysler franchise agreements did not result in any discernible loss of income or net profits. Tr.2994:2-3002:3. Dr. Carron testified that he came to the same conclusion for Barry Dodge, the only dealership to continue as a used car dealership. Barry's net profits either remained stable or grew in the three years after the rejection of its Chrysler franchise agreements as compared to the three years before the rejection of the Chrysler franchise agreements. Tr.3002:4-3003:11.

For the two remaining plaintiffs, Livonia and RFJS, which did not continue their operations, he could not reach a conclusion about the value of the dealerships in the actual world. Tr.3003:12-3005:24. Dr. Carron explained that Livonia transferred its unsold used vehicles to another company owned by the same owner as Livonia, Century Sales, which also sold Mitsubishi vehicles and used vehicles. Tr.3003:12-22. He noted that although Livonia did not continue to operate after the rejection of its Chrysler franchise agreements, Livonia eventually was awarded Chrysler franchises in 2015 and is currently selling Chrysler and Jeep vehicles. Tr.3003:23-3004:12. Regarding RFJS, because it did not have a permanent franchise agreement it was not like the other plaintiffs and, therefore, Dr. Carron explained that he

---

new car Chrysler inventory to other Chrysler dealerships without sustaining a loss, and were also able to sell or use much of their remaining Chrysler parts and service equipment without taking a loss.

could not come up with a valuation. Tr.3004:13-23. The RFJS franchise agreement was set to expire in October 2009 and RFJS never turned a profit in the actual world. Tr.3004:24-3005:6.

On cross examination, Dr. Carron admitted that he did not consider the impact that the financial recovery had on the revenues of the plaintiffs' dealerships after the 2008-09 recession. Thus, he could not say if the steady profits or increased profits he examined in the actual world were attributable to the recovery or the value of the dealerships themselves. Tr.3014:2-3016:15. Dr. Carron also admitted that he did not consider what dealership profits would have been after 2009 if the plaintiffs had retained their Chrysler franchise agreements. Tr.3023:1-15. Dr. Carron further admitted that if the plaintiffs were required to purchase a third-party warranty in order to sell the new vehicles on their lots it was possible that they would see a profit (not a loss). Tr.3084:7-3085:11.

ii. Donald MacKenzie

The government called Donald MacKenzie, the "founder and CEO of Conway MacKenzie, Inc. . . . a global financial consulting and advisory firm," as its second expert. Tr.4022:24-4023:2. Mr. MacKenzie is a "certified turnaround professional, certified public accountant, and [has] a Bachelor of Science in accounting from Michigan State University." Tr.4023:5-7. Mr. MacKenzie is "frequently engaged to provide advice and counsel by auto-related entities, including original equipment manufacturers [OEMs,] . . . suppliers who manufacture and sell vehicle parts and systems directly to OEMS, which are commonly referred to as tier one suppliers; other suppliers further down the supply chain; which include tier two, tier three, and raw materials suppliers; and also, financial institutions and investors." Tr.4023:5-14. Mr. MacKenzie has also served as a Chief Restructuring Officer ("CRO") for numerous middle market companies, as well as for automotive companies including large tier one automotive parts suppliers. Tr.4024:23-4025:4.

Mr. MacKenzie offered two opinions on behalf of the government based on his experience with the auto industry. First, he opined that "without financing from the U.S. Treasury, Chrysler would have immediately liquidated in bankruptcy." Tr.4027:18-20. Second, he opined that "had Chrysler immediately liquidated in bankruptcy, all of Chrysler's dealer franchise agreements, including the Plaintiffs', would have been rejected and had no value." Tr.4027:21-24.

In support of his opinion that Chrysler would have been forced to liquidate in a "but for world" without government assistance, Mr. MacKenzie began by explaining the financial history leading up to the Chrysler bankruptcy, including Chrysler's 1979 financial difficulties, its sale to Daimler in 1998, and its sale to Cerberus in 2007. Tr.4029:8-4030:25. He testified about the $4 billion bridge loan Chrysler received from the government in December 2009, the credit crunches effecting the auto market, the actual world bankruptcy, and Fiat's purchase of Chrysler. He explained that in developing his "opinions . . . [he] assumed that Chrysler had received the $4 billion of bridge financing that was approved by the U.S. Treasury on December 31st, 2008 but did not receive any additional government financing and filed for bankruptcy protection on April 30th, 2009." Tr.4039:16-21.

Mr. MacKenzie explained that in the actual world on April 30th, 2009, Chrysler had $407 million in usable cash but was burning through tens of millions of dollars per day while it continued to manufacture cars. Tr.4046:12-18. He opined that Chrysler would have been forced to liquidate without government financing because no financial institution would have been willing to provide DIP financing or any other financial assistance to Chrysler in April 2009. Tr.4047:7-17. He explained that because Chrysler had a high cash burn rate and a low amount of cash on hand it could be insolvent, which would result in the Chapter 11 bankruptcy being converted into a Chapter 7 bankruptcy. Tr.4045:8-10.

Mr. MacKenzie explained that there would have been a significant negative impact on Chrysler's lenders, dealers, suppliers, employees, and consumers if it had been forced to liquidate. Tr.4050:19-23. Mr. MacKenzie further explained that in December 2008, Chrysler's warranty obligations totaled $3.75 billion, and that given the low amount of cash Chrysler had on hand it would not have had funds available to finance a warranty program during a liquidation. Tr. 4060:22-4063:24. He also testified that at the time Chrysler would have filed for bankruptcy all of Chrysler's vehicle lines were unprofitable. For example, in 2008 the Jeep brand had a negative $88 million worth, Dodge Ram Truck was worth a negative $111 million, and Chrysler Town & Country was worth a negative $25 million. Tr.4064:19-4065:2.

Mr. MacKenzie testified that, because Chrysler's manufacturing operations were all interconnected, the sale of any individual Chrysler vehicle line would have been difficult and that this would have reduced the value of Chrysler's lines in liquidation. Tr.4065:24-4067:9. Ultimately, Mr. MacKenzie concluded that under a liquidation of Chrysler, there would have been no recovery for any creditors beyond the secured lenders. Tr.4071:21-4072:4.

In his second opinion, Mr. MacKenzie opined that in a Chrysler liquidation, all of the Chrysler franchise agreements, including those of the plaintiffs, would have been rejected. He explained that franchise agreements are executory contracts that can be rejected in a Chapter 11 bankruptcy and if they are not rejected must be assumed by another entity. Tr.4073:5-20. In a Chapter 7 liquidation, Mr. MacKenzie explained that "if a contract is not explicitly assumed by the trustee, the contract is automatically deemed to be rejected." Tr.4073:21-23. Mr. MacKenzie further explained that if Chrysler entered bankruptcy and was no longer manufacturing new cars, or shipping new cars, or reimbursing warranty work, all of which Chrysler was obligated to do under its franchise agreements, the CRO would have had a fiduciary duty to reject the franchise agreements because they imposed obligations on Chrysler that Chrysler would not be able to fulfill. He explained that where the franchise agreements would not generate any profits but potentially subject Chrysler to financial claims from the franchisees, the franchise agreements would be rejected in bankruptcy as soon as possible. Tr.4075:18-4077:2.

Finally, Mr. MacKenzie explained how and why his opinions about a Chrysler bankruptcy without government financing differed from plaintiffs' experts.

Mr. MacKenzie testified that he could not find support for plaintiffs' assumption that Chrysler would have had $2 billion on hand rather than the $400 million he identified. According to Mr. MacKenzie, because some of that extra $1.6 billion was held by foreign entities and $846 million of that total was held as collateral by Chrysler's secured lenders, the extra dollars plaintiffs' experts identified would not have been available to help Chrysler get through a wind-down without the consent of Chrysler's creditors. Tr.4078:25-4079:18. Next, Mr. MacKenzie testified that Mr. Berliner's assumption that there would have been DIP financing was not supported. Mr. MacKenzie explained that in the actual world, it was understood that neither Cerberus nor JP Morgan, first lien creditors, were willing to provide DIP financing to keep Chrysler continuing as an ongoing concern. Tr.4079:19-4081:10. Mr. MacKenzie testified that if there would have been other sources of DIP financing Chrysler would not have needed the $4 billion bridge loan it sought from the government. *See* Tr.4081:8-10.

Mr. MacKenzie explained why he believed that Mr. Berliner's assumption that the government would have funded a warranty program was not supported. Mr. MacKenzie testified that there is no evidence that the government would have funded a warranty program if it had decided not to otherwise provide Chrysler with financial support. Tr.4084:23-4085:1. Mr. MacKenzie testified that Mr. Berliner's opinion that in the first few months of an unassisted Chrysler bankruptcy it would have been business as usual for the dealers was not supported. According to Mr. MacKenzie, Mr. Berliner failed to acknowledge that business as usual would not have been possible if no new vehicles were being produced and Chrysler was not able to meet its warranty obligations or supply franchisees with Chrysler parts. Tr.4087:13-4092:15.

Finally, Mr. MacKenzie testified that Mr. Berliner's reliance on the Daewoo, Saab, and Suzuki bankruptcies was misplaced. He explained several of the major differences between those bankruptcies and a Chrysler bankruptcy without government assistance. Specifically, he testified that in those bankruptcies there was no economic crisis, there was a parent company not going through bankruptcy, and there was continued production of supplies and service during the bankruptcy. Tr.4094:2-4104:8.

iii. Judge Robert Gerber

The government called Robert E. Gerber, a retired United States Bankruptcy Judge, who served for more than fifteen years in the United States Bankruptcy Court for the Southern District of New York to address the opinions offered by Judge Fitzgerald. Tr.4162:23-4163:2. Judge Gerber is currently Of Counsel to the law firm of Joseph Hage Aaronson LLC where he provides fiduciary, alternative dispute resolution, and consulting and expert testimony services. He is also an Adjunct Professor of Law at Columbia University Law School, a contributing author to Collier on Bankruptcy, and a Fellow of the American College of Bankruptcy. Tr.4170:11-22. During his judicial tenure, Judge Gerber oversaw many bankruptcy cases, including the GM bankruptcy which followed the Chrysler bankruptcy. Tr.4171:21-4172:3.

Judge Gerber broke his testimony into three parts (1) bankruptcy law and practice, (2) the real-world facts, and (3) a discussion of the bankruptcy cases that Judge Fitzgerald relied on. Judge Gerber first testified about bankruptcy law and practice. Tr. 4172:10-14. He explained that liquidity in a Chapter 11 bankruptcy is "paramount." Tr.4172:25. Judge Gerber stated that "Chapter 11 cases live, or die, based on their available liquidity, the cash they need to operate every day." Tr.4173:14-16. He also stated that when all the assets of a debtor are subject to liens, the lien holders have "substantial . . . influence over the Chapter 11 case." Tr.4174:16-25. Judge Gerber explained that when Section 363 sales are used in a Chapter 11 bankruptcy, "bankruptcy judges approve 363 sales, if, but only if, the debtors lack the liquidity to allow the Chapter 11 case to proceed by . . . confirmation of a reorganization plan." Tr.4175:15-21.

Judge Gerber testified about DIP financing and how approval of DIP financing is secured. Tr.4184:10-13. He explained that DIP financing differs from the use of cash collateral which is subject to a lien. He testified that "DIP financing is required . . . when use of cash collateral alone will not do." Tr.4186:7-9. Judge Gerber explained that "[s]ources of DIP financing will vary with the amount of cash that's required[.]" Tr.4186:18-20. He explained that "[p]re[-bankruptcy petition secured lenders are, indeed, a fairly common source of DIP financing, but where the debtor's assets are already entirely subject to prepetition liens, and . . . the prepetition lenders are already underwater, generalizations as to prepetition lenders' willingness to lend more, based on observations of the broader universe of financing transactions, are of little or no value." Tr.4187:15-23. Judge Gerber thus took issue with Judge Fitzgerald's characterization of the government's control of the bankruptcy process as “unusual.” He opined that because the government was providing billions of dollars in DIP financing that the government’s involvement in shaping the bankruptcy terms was not unusual. Tr.4189:15-20. He explained that DIP lenders normally “exert significant influence over their borrowers as a condition to their providing DIP financing loans.” Tr.4190:4-6.

Judge Gerber testified that he also disagreed with Judge Fitzgerald’s contention that the speed with which the Chrysler 363 sale took place was unusual. Tr.4193:14-17. Judge Gerber testified that in large bankruptcies 363 sales have become the norm so that the bankruptcy estate can survive long enough to pay back its creditors. Tr.4193:18 4199:9.

Judge Gerber also testified about why the actual world facts needed to be considered in formulating a “but for world” bankruptcy without government assistance. Judge Gerber testified that he reviewed the declarations that Robert Manzo, Thomas LaSorda, and Robert Nardelli filed with the bankruptcy court, and that these declarations confirmed that there would not have been any DIP financing available to Chrysler. Tr.4208:4-4211:11. Judge Gerber thus found Judge Fitzgerald’s opinion that someone would have provided DIP financing to Chrysler in the “but for world” to be unsupported. He explained this was because her opinion rested solely on “what lenders sometimes do, and what the first lien lenders might theoretically have been motivated to do,” and not on real-world facts. Tr.4211:12-16. Judge Gerber further explained that the declarations filed in the actual Chrysler bankruptcy also would have ruled out financing by Fiat or from the dealers, as Judge Fitzgerald opined. Tr.4211:24-4212:8.

Judge Gerber next challenged Judge Fitzgerald's assertion that there would have been multiple bidders for Chrysler's assets if there had been an open 363 sale in a "but for world." Judge Gerber testified that Thomas LaSorda filed a declaration with the bankruptcy court in which LaSorda, consistent with his testimony in this court, stated that the government was the last hope because no other auto company was willing to form an alliance with Chrysler despite his extensive efforts. Tr.4217:4-23.

Finally, Judge Gerber took issue with Judge Fitzgerald's opinion that the Suzuki and Hostess bankruptcies were appropriate comparisons for what a Chrysler bankruptcy would have looked like without government financing. Tr.4233:8-20. Judge Gerber testified that American Suzuki "was a distributor but not a manufacturer," which distributed vehicles manufactured by its Japanese parent company Suzuki. Tr.4233:21 4234:4. Therefore, Judge Gerber explained, American Suzuki did not face the same financing and liquidity problems that Chrysler would have faced in its "but for world." Tr.4234:4-11. Judge Gerber further noted that American Suzuki had sufficient liquidity from its parent and thus would have enough cash to complete the Chapter 11 bankruptcy. Judge Gerber testified that Judge Fitzgerald "fail[ed] to note the essential role played by the Japanese parent in the American Suzuki bankruptcy and the absence of any such benefactor in Chrysler." Tr.4236:18-21.

Judge Gerber next explained that the Hostess bankruptcy was much smaller than that of Chrysler, Hostess was in a more stable financial position, and Hostess had the funding it needed to remain in business during its bankruptcy. Tr.4237:22-25. He also noted that the Hostess stores were owned and operated by Hostess, which meant that Hostess had the responsibility of exacting extra value from them. The Chrysler franchise agreements, in contrast, were not assets of Chrysler but liabilities. Tr.4239:13-24.

On cross examination, Judge Gerber acknowledged that the government's decision to become the DIP financing lender was not consistent with traditional lending practices because the government agreed to take a priority lower than preexisting creditors who already were not likely to be paid in full. Tr.4244:17-21, Tr.4246:4-9. Judge Gerber also acknowledged that the 363 sale in the actual Chrysler bankruptcy was different from a typical 363 sale in that any party wanting to bid for Chrysler's assets had to agree to honor the collective bargaining agreements and the UAW Retiree Settlement Agreement the government had negotiated. Tr.4282:3-25. He also agreed that Chrysler, as an entity, would not have had any interest in what would happen to its contracts with third parties once its assets were acquired by another entity. Tr.4281:21-24.

iv. Joseph T. Gardemal

The government presented the testimony of Joseph T. Gardemal III, a managing director with the firm Alvarez & Maral, an international consulting firm, to respond to the valuations performed by Ms. Murphy and Mr. Stockton. Tr.4417:9-22. Mr. Gardemal is a certified public accountant, a certified valuation analyst and a certified fraud examiner. He holds a certification in distress business valuation and is accredited in business valuation by the American Institute of

Certified Public Accountants. Tr.4418:2-7. He has been an auditor, forensic accountant, and valuation professional for over thirty years. Tr.4418:11-12. He testified that for the past twenty years he has served as an auditor, valuation professional, and financial consultant to the automotive retail industry and has valued over 100 dealerships. Tr.4418:13-19.

Mr. Gardemal offered the following five opinions regarding Ms. Murphy's expert report: (1) Ms. Murphy appropriately assumed that without government financing Chrysler would have had to enter bankruptcy, (2) Ms. Murphy erred in valuing the entire dealership and not just the franchise agreement, (3) Ms. Murphy's assumptions about the "but for world" were unreasonable and contradicted by the facts, (4) Ms. Murphy's assumption that a Section 363 purchaser would have assumed the franchise agreements of the entire Chrysler dealership network was unreasonable, and (5) Ms. Murphy's valuation opinions were faulty because her growth rate, discount rate, and the terminal value she selected were incorrect and unsupported. Tr.4422:3-4423:10.

Mr. Gardemal offered the following three opinions regarding Mr. Stockton's valuation analysis: (1) that Mr. Stockton appropriately assumed Chrysler would enter bankruptcy in his fair value and lost profit analysis, (2) that some of Mr. Stockton's assumptions were contradicted by the facts, and (3) Mr. Stockton's valuation and lost-profit scenarios were fundamentally flawed because he failed to provide guidance on which of his multiple (seventeen months, three years or ten years) liquidation scenarios was the appropriate measure, and because he ignored or under-allocated fixed expenses in reaching his profit contribution calculations. Tr.4423:13-4425:4.

Mr. Gardemal testified that, had Ms. Murphy and Mr. Stockton made the correct assumptions, they would have reached the same conclusion he reached: That at the time of the valuation dates of December 2008 or April 2009, the plaintiffs' franchise agreements would have had zero value. Tr.4426:4-9.

Turning first to Mr. Gardemal's disagreements with Ms. Murphy's valuation opinions, Mr. Gardemal testified that Ms. Murphy made a fundamental error by conflating the value of the plaintiffs' franchise agreements with the value of their dealerships. According to Mr. Gardemal, Ms. Murphy "inappropriately includes assets and profits unrelated to the Chrysler franchise agreement, and she therefore doesn't value the franchise agreement." Tr.4428:17-20. Specifically, Mr. Gardemal stated that Ms. Murphy failed to acknowledge that some of the plaintiffs' income streams were not dependent upon the plaintiff having a Chrysler franchise agreement. Tr.4428:24-4429:3. Mr. Gardemal testified, consistent with Dr. Carron's testimony, that Ms. Murphy should have limited her calculations to the income streams derived solely from new Chrysler vehicle sales, Chrysler warranty work, and discounted sales of Chrysler parts, the three sources of income provided by Chrysler to franchisees. Tr.4429:15-20.

Mr. Gardemal also testified that Ms. Murphy's various assumptions regarding the "but for world" were unreasonable and unsupported. Mr. Gardemal stated that Ms. Murphy's "assumption that the Chrysler franchise agreements continue on indefinitely is unreasonable and renders her analysis unreliable."

Tr.4436:18-20. Mr. Gardemal explained that Chrysler in the "but for world" would have immediately liquidated and terminated production of all of its vehicle lines upon entering bankruptcy. Tr.4437:8-4438:2. Mr. Gardemal thus determined that Ms. Murphy's conclusion that plaintiffs' franchise agreements should have been valued as ongoing Chrysler franchises was not supported. He noted that not only was her conclusion inconsistent with the reality of Chrysler's circumstances, but that plaintiffs' expert, Mr. Berliner, conceded that in the event of a bankruptcy Chrysler would have had to shut down all of its manufacturing facilities and part depots for a period. Tr.4439:24-4440:7.

Mr. Gardemal testified that Ms. Murphy's assumption that a Section 363 purchaser would have maintained or assumed the entire Chrysler dealership network was also unreasonable. Tr.4443:25-4444:4. He noted that Ms. Murphy's assumption was contradicted by the plaintiffs' expert, Mr. Berliner, who testified that some plaintiffs would likely have been eliminated during or right after the bankruptcy. Tr.4445:3-12. Mr. Gardemal noted that Ms. Murphy failed to consider the "risk that a new entity would choose to retain none or only some of Chrysler's prebankruptcy franchises." Tr.4446:15 17. He explained that she did not consider the fact that several of the plaintiffs had failed to meet the MSR over the course of four to five years and thus ran the risk of being rejected in a Chrysler bankruptcy as low-performing franchisees. Tr.4446:23-4447:12. He testified that "[i]n this case, with Chrysler in bankruptcy, and evaluating which dealership contracts to reject, dealers not meeting their MSR would necessarily be at a higher risk of rejection than dealerships meeting their contractual obligations." Tr.4448:18-22.

Mr. Gardemal concluded his critique of Ms. Murphy's valuation by discussing three methodological flaws. First, Mr. Gardemal challenged Ms. Murphy's "expected growth rate projections." He stated that the growth rate projections, "do not appear to be supported by the historical performance of the Model Plaintiffs and are not supported by automotive industry data known at the valuation dates." Tr.4449:21-25. Mr. Gardemal noted that Ms. Murphy assumed that during a Chrysler bankruptcy not only would Chrysler not lose any market share, but that Chrysler's annual sales would grow by 11 percent. Mr. Gardemal testified that this assumption ran counter to the data of what happened during the 2008-09 financial crisis. Tr.4450:13-22. Mr. Gardemal testified that even Chrysler, in its Viability Plan, estimated retail sales to increase only by 5.2 percent from 2009 to 2010, 4.4 percent from 2010 to 2011, and 4.5 percent from 2011 to 2012, with government assistance. Tr.4450:23-4451:2.

Mr. Gardemal also challenged Ms. Murphy's discount and capitalization rates. He testified that they were "understated and inconsistent with the economic facts," resulting in overstated values for the representative plaintiffs. Tr.4453:3-8. Specifically, Mr. Gardemal testified that her discount rate on future profits failed to capture the high risk associated with a potential purchase of the plaintiffs' Chrysler franchise agreements. Mr. Gardemal explained that Ms. Murphy used a small company risk premium ranging between 7.2 and 8.7 percent but should have used a 9.7 risk percentage premium. Tr.4457:1-8. Mr. Gardemal also testified that Ms. Murphy's discount rate was too low for individual franchises because she did not consider specific factors related to their businesses, such as which Chrysler brands they offered or their past performance. Tr.4457:12-4449:20.

Finally, Mr. Gardemal challenged Ms. Murphy's terminal value calculation because it failed to account for the distress faced by Chrysler and "the significant volatility to which the Model Plaintiffs were subject." Tr.4459:21-4460:1. Mr. Gardemal testified that Ms. Murphy's annual growth rate of 5%, was improper because the plaintiffs never saw such a high annual growth. Mr. Gardemal noted that Barry's Auto was the best performing dealer with an annual growth rate of 4% while Jim Marsh saw an annual decline of 22% between 2006 and April 2009. Tr.4461:10-15. Mr. Gardemal testified that the "perpetual growth rate of 5 percent is also in contrast to Chrysler's projections at February 2009 that the [Seasonally Adjusted Annual Rate ("SAAR")] would increase at an annualized rate of 4.5 percent—that's the SAAR for the industry, not specific—assuming receipt of government funding." Tr.4461:16-20. Thus, Mr. Gardemal concluded that Ms. Murphy's terminal rate was unfounded and thus unreliable.

Next, Mr. Gardemal disputed Mr. Stockton's valuation on two grounds. First, he opined that Mr. Stockton's "assumptions are unreasonable, inappropriate, and contradicted by the economic evidence" and thus his valuations are unreliable. Tr.4464:1-5. Specifically, Mr. Gardemal explained that Mr. Stockton assumed for his fair value and profit contribution value that the government would be providing some financial assistance. Tr.4465:16-18.

Second, Mr. Gardemal testified that "Mr. Stockton's profit contribution calculations for Finnin and Guetterman are flawed and, as I understand it, irrelevant to a taking case. But even if they were relevant, by either ignoring or underallocating fixed expenses, Mr. Stockton has overstated any hypothetical lost profits for these two Model Plaintiffs." Tr.4470:18-24. Mr. Gardemal explained that Mr. Stockton's profit contribution is flawed because he makes aggressive future sale volume projections for the income streams he valued and because he includes profits from income streams that were not associated with the franchise agreement. Tr.4472:1-5. Mr. Gardemal opined that these errors in Mr. Stockton's assumptions made Mr. Stockton's valuations based on lost net profits in a "but for world" unreliable.

v. Professor Daniel R. Fischel

The government's last expert was Daniel R. Fischel, the "president of Compass Lexecon, a consulting firm that specializes in the application of economics to a variety of legal and regulatory issues." Tr.4645:23-4646:1. Professor Fischel is also the Lee and Brena Freeman Professor of Law and Business Emeritus at the University of Chicago Law School. He previously served as the Dean of the University of Chicago Law School, the Director of the Law and Economics Program at the University of Chicago, and as Professor of Law and Business at the University of Chicago Graduate School of Business, the Kellogg School of Management at Northwestern University, and the Northwestern University Law School. Tr. 4646:2-10. He has "served as a consultant or advisor on economic issues to, among others, the United States Department of Justice, the United States Securities and Exchange Commission, the National Association of Securities Dealers, the New York Stock Exchange, the Chicago Board of Trade, the Chicago Mercantile Exchange, the New York Mercantile Exchange, the United States Department of Labor, the Federal Deposit Insurance Corporation, the Resolution Trust Corporation, the Federal Housing Finance Agency, and the Federal Trade Commission." Tr.4646:20-4647:5. He is also "a member of the American Economic Association and the American Finance Association." Tr.4647:6-7. Professor Fischel has testified in over 50 proceedings in federal and state courts as an expert in valuation, financial institutions, regulation of financial markets, the economic analysis of damage claims, and the economics of government contracts and public and private markets. Tr.4647:15-25.

Professor Fischel offered five opinions, as follows: (1) Chrysler would have needed to liquidate in December 2008 or April 2009, (2) Fiat would not have entered into a business combination with Chrysler absent government funding, (3) the $24 billion that Chrysler needed in DIP financing was unavailable in the private lending market, (4) the terms of the government's assistance were consistent with a commercial desire to protect capital, and (5) plaintiffs' claims are speculative and contradicted by the relevant economic evidence. Tr.4649:11-4650:4.

Professor Fischel testified that Chrysler was insolvent by December 2008 and that without government financial assistance Chrysler would have immediately liquidated. Tr.4655:16-4656:1. He stated that "Chrysler's liabilities exceeded its assets" and that "Chrysler's financial statements show that the fair value of its financial liabilities was only 59 percent of the book value of those same liabilities as of December 31st, 2008." Tr.4656:4-11. Professor Fischel further testified that the value of Chrysler's debt declined from sixty-three cents on the dollar in April 2008 to only twelve cents on the dollar in April 2009. Tr.4656:18-24. Professor Fischel noted that even with the $4 billion bridge loan, Chrysler would have been insolvent in April 2009. Tr.4659:22-4660:15. He explained that the value of Chrysler's assets declined substantially during this time, that Chrysler incurred more debt during this period, and that the value of that debt continued to decline. Tr.4660:8-4662:4.

Next, Professor Fischel opined that the economic evidence demonstrated that Fiat would not have entered into a business combination with Chrysler absent government funding. Tr.4665:2-8. Professor Fischel noted that in the actual world, Fiat and Chrysler signed a non-binding term sheet in January 2009 that was conditioned on Fiat not providing any cash and Chrysler receiving $7 billion more from the government. Tr.4665:17-4666:1. Professor Fischel noted that even the March 30, 2009 amended term sheet was conditioned on Chrysler receiving $6 billion in government funds. Tr.4666:10 13. Professor Fischel testified that Fiat's financial condition during 2008 and early 2009 was deteriorating and that Fiat expected to have a negative cash flow for portions of 2009. Tr.4666:13-4667:5. Additionally, Professor Fischel noted that Daimler was not interested in saving Chrysler, having just sold 80% of its stake in Chrysler in 2007 and wanting to offload its remaining 20% interest in late 2008. Tr.4667:17-4669:7.

Professor Fischel testified that the DIP financing Chrysler needed for an orderly bankruptcy would not have been available in the private lending market. Tr.4669:8-12. Professor Fischel explained that in December 2008, Chrysler estimated that it would need $12 to $15 billion for a short one-year bankruptcy and would need up to $17 to $20 billion if there was a lack of financing for its dealers. Tr.4669:13-20; DX956; Tr.4670:4 9; DX1056. Professor Fischel explained the absence of private lending was evident from the fact that no private DIP funding of the size required by Chrysler was provided to any company in 2008 or 2009. Tr.4670:10-16; DX1609. Professor Fischel also noted that plaintiffs did not identify any "plausible source of private DIP financing for Chrysler" and that their suggestion that the first lien lenders would have provided DIP financing is inconsistent with the economic evidence that shows that Chrysler's debt was continuously being devalued. Tr.4671:2-3, Tr.4671: 12-4672:2.

Professor Fischel opined that the conditions placed on Chrysler by the government were consistent with a lender that "seek[s] to reduce the ability of the borrowers to take on excessive risk" in order to ensure that the loan will be repaid. Tr.4676:7-11. However, on cross examination Professor Fischel conceded that the government had public policy goals in mind as well in providing financing to Chrysler. Tr.4766:11-16.

Professor Fischel testified at length about his disagreement with Ms. Keller's opinion that any of the companies identified by Ms. Keller would have been potential buyers of all Chrysler assets at a Section 363 sale. He testified that Blackstone would not have been a potential purchaser because it had experienced financial losses in late 2008 and lacked liquidity, and that Blackstone had stated in the first quarter of 2009 that "lenders continued to severely restrict commitments to new debt [which] limit[ed] industry-wide leveraged acquisition activity levels in both corporate and real estate markets." Tr.4696:2-24.

Next, Professor Fischel explained why Geely or any other Chinese automobile manufacturer would not have been potential purchasers of Chrysler. He explained that in Geely's 2008 annual report, Geely stated that it was not interested in investing in deteriorating automobile markets, and that the president of Shanghai Automotive Industry Corporation said in early 2009 said that there were no acquisition targets in 2009 and that Geely had no plans for acquisitions in the immediate future. Tr.4697:2-17.

Professor Fischel continued to explain that Magna, an Indian automobile manufacturer, would also not have been a potential 363 purchaser. Its credit rating was downgraded in late 2008 and early 2009 and it was reducing discretionary spending and deferring capital spending given the decline in auto sales. Tr.4697:18-4698:5. Professor Fischel testified that Mahindra & Mahindra, another Indian automotive company, would not have been a potential 363 purchaser because it had stated in January 2009 that it was not "interested in buying nonenvironmentally friendly vehicles, which likely would have limited its interest in Chrysler, and Mahindra planned to enter the U.S. market with its own fuel-efficient SUV." Tr.4698:6-11.

Professor Fischel then discussed Peugeot ("PSA") and Renault and explained why they also would not have been potential 363 purchasers of Chrysler's assets. He explained that PSA had been downgraded by Standard & Poor's and Moody's in late 2008 and early 2009 because of negative cash flow and a material deterioration in PSA's financial flexibility as a result of the reduction in global demand for cars. Tr.4698:12-20. Additionally, Professor Fischel explained that Renault's credit had also been downgraded by Standard & Poor's in late 2008 and early 2009 because of the global economic recession, which would have meant that Renault also would have been in no position to purchase Chrysler's assets. Tr.4698:21-25.

Professor Fischel explained that Tata Motors would not have been in a financial position to purchase Chrysler's assets because its credit had been downgraded by both Standard & Poor's and Moody's twice between November 2008 and March 2009, and Tata was facing a decreased amount of sales through 2008 and early 2009. Tr.4699:10 24. Professor Fischel also noted that by March 2009 "Tata faced imminent refinancing needs, tight liquidity position, weak capital structure, and challenging market conditions." Tr. 4699:21-24.

Professor Fischel next explained that Tracinda also would not have been a potential 363 purchaser given that it had sold 7.3 million shares of its common stock in Ford and intended to reduce its holdings in Ford by selling all of its remaining shares. He further explained that Tracinda had announced in October 2008 that it was shifting its investment strategy to gaming, hospitality, and energy. Tr.4699:25-4700:15.

Finally, Professor Fischel explained that neither GM or Ford would have been in a position to purchase Chrysler's assets because they were facing a liquidity and financial crisis of their own and both had their credit scores downgraded several times by the credit rating agencies between 2008 and 2009. Tr.4700:16-4701:15.

Professor Fischel also disputed Ms. Keller's claims that the economy was improving in early 2009. Professor Fischel testified that it was irrelevant that the economy in early 2009 was slightly better than in later 2008 because "[t]he economy was terrible in both periods, and the market for M&A was consequently very poor in both periods." Tr.4701:25-4702:3. Professor Fischel explained that Ms. Keller ignored broad evidence about the economy and instead cherry-picked four data series to suggest that there was a favorable climate for investors to purchase Chrysler's assets. Tr.4702:11-18. He testified that "[e]ven if these were the relevant economic indicators, it is well known that economic recovery does not mean an immediately favorable M&A environment." Tr.4702:19-21. Professor Fischel noted that Ms. Keller ignored other important measurements of economic activity such as unemployment claims, new manufacturing orders, and the sale of light duty vehicles. Tr.4704:15-4705:3.

Finally, Professor Fischel explained why Ms. Keller had not established that a 363 purchaser would have retained the entire dealership network, which Chrysler had on multiple occasions stated was over-dealered. Tr.4706:14-19. Professor Fischel explained that even if the examples that Ms. Keller relied on were relevant, "Ms. Keller appears to recognize that franchise agreements are often terminated in such situations . . . [i]n particular, she notes that in the cases of Saturn, Hummer, and Saab, the buyers sought to or did terminate many or all of the dealership franchises." Tr.4707:21-4708:1.

Professor Fischel testified that Judge Fitzgerald's assertions regarding a potential 363 purchaser were also speculative and unsupported. Professor Fischel testified that Judge Fitzgerald overlooked the economic facts known at the time, including the fact that several of the potential purchasers she identified were known to have no interest or were not in a financial position to make an offer. Tr.4708:10-4710:1. Professor Fischel noted that Judge Fitzgerald's assertion that DIP financing would have been available to Chrysler absent government assistance was also unsupported and inconsistent with known economic evidence. Specifically, Professor Fischel noted that despite stating that first lien lenders would have provided some DIP financing in the "but for world," it was known that no such financing was offered by the first lien lenders or anyone, which is why Chrysler had to approach the government as a lender of last resort. Tr.4710:2-4712:17. Professor Fischel noted the fact that there was some DIP financing available for other bankruptcies "provides no reliable evidence about what they would have done for Chrysler." Tr.4714:6-11.

Professor Fischel testified that Judge Fitzgerald also failed to establish how the plaintiffs' franchise agreements would have had value in a liquidation. He explained that Judge Fitzgerald did not have any support for her opinion that a hypothetical 363 purchaser would not have rejected the plaintiffs' franchise agreements just as Chrysler did. Tr.4714:15-25. Professor Fischel testified that he also found Mr. Berliner's opinions about a hypothetical Chrysler liquidation under Chapter 11 speculative and unsupported by the economic evidence. Tr.4718:5-10.

On cross examination, as noted above, Professor Fischel agreed that Treasury's investment in Chrysler was not made purely for the purposes of seeing a return on any prior investment. Tr.4765:1-25. Professor Fischel agreed that part of the government's motivation in aiding Chrysler was to save the American auto industry and economy. Tr.4736:5-8, Tr.4738:10-13, Tr.4766:11-16. Professor Fischel also acknowledged that he agreed with Judge Gerber's assessment that no rational lender would have provided DIP financing at a lower priority of repayment than preexisting creditors who were already unlikely to be paid in full. Tr.4738:24-4739:23.

IV. Findings of Fact and Conclusions of Law

A. Legal Framework

In *A&D Auto Sales*, the Federal Circuit held that there may be circumstances where the government is liable for a Fifth Amendment taking based on actions taken by a third party at the direction of the government or on the government's behalf. 748 F.3d at 1154. The Circuit in *A&D Auto Sales* distinguished between government actions that have unintended or collateral effects on third parties and do not give rise to a taking, citing *Omnia Comm. Co. v. United States*, 261 U.S. 502, 510-11 (1923), and government actions involving third parties that may give rise to a taking. *A&D Auto Sales*, 748 F.3d at 1153-54. The Circuit explained that there are two paths through which government action involving a third party may result in takings liability. First, the Circuit stated, "the government may be liable [for a taking] if a third party is acting as the government's agent." *Id.* at 1154. Here, the plaintiffs concede that Chrysler was not acting as the government's agent when it filed for bankruptcy in April 2009 and thus this avenue for liability outlined by the Circuit has been foreclosed. *See Supra* n.4. Second, the Circuit explained that plaintiffs may be able to establish a taking if "the government's influence over the third party [(here, Chrysler)] was coercive rather than merely persuasive." *A&D Auto Sales*, 748 F.3d at 1154 (citations omitted). The plaintiffs maintained throughout the course of this trial that the government's actions rose to the level of coercion.

The Circuit acknowledged in *A&D Auto Sales* that the "question of coercion is . . . complex." *Id.* The Circuit went on to discuss a case where the government's actions were deemed coercive enough to give rise to a taking, as well as cases where the government action at issue was not sufficiently coercive. *Id.* at 1154-56 (citing *Turney v. United States*, 125 Ct. Cl. 202, 207-08, 214 (1953); *Langenegger v. United States*, 756 F.2d 1565, 1572 (Fed. Cir. 1985); *B&G Enters. v. United States*, 220 F.3d. 1318, 1318-25 (Fed. Cir. 2000)). All the above-cited cases dealt with the federal government endeavoring to assert control over a foreign state or state government, situations that are very different from this case. *See Turney*, 125 Ct. Cl. at 208-08, 214 (finding that the government exercised unusual influence over the Philippines when it induced the Philippines to forbid the exportation of certain military equipment that the United States had sold in a surplus action to private parties after World War II); Langenegger, 756 F.2d at 1572 (finding that the United States' influence over an expropriation by the El Salvadoran government was not coercion but "friendly persuasion" because, in part, diplomatic persuasion among allies is a common occurrence and cannot be deemed sufficiently irresistible to be coercive for takings purposes); B&G Enters., 220 F.3d at 1318-25 (finding that California was not coerced into passing a law banning cigarette vending machines in order to receive a federal grant and that the federal government was not liable for a taking to those who owned cigarette vending machines). These cases do, however, demonstrate that to prove coercion by government action there must be evidence that the coerced did not act voluntarily.

To assist the court in deciding whether Chrysler did not act voluntarily and was coerced into filing for bankruptcy and rejecting plaintiffs' franchise agreements, the Circuit identified several issues it deemed relevant. As noted at the outset of this decision, the Circuit stated that the trial court should examine "whether the government insisted on the [franchise] terminations, whether the terminations would have occurred in any event absent government action, whether the government financing was essential to the companies, whether the government had any role in creating the economic circumstances alleged to give rise to coercion, and whether the government targeted the dealers for termination." *A&D Auto Sales*, 748 F.3d at 1155. The Circuit's list is consistent with the plain meaning of coercion. *See* Coercion, Black's Law Dictionary (11th ed. 2019) ("Compulsion of a free agent by physical, moral, or economic force or threat of physical force [or] . . . [c]onduct that constitutes the improper use of economic power to compel another to submit to the wishes of one who wields it."); Coerce, Merriam Webster Online Dictionary ("[T]o compel to an act or choice[,] to achieve by force or threat[.]").

Importantly, the plaintiffs did not focus their coercion evidence on Chrysler's need for government financing. Instead, the plaintiffs focused their evidence on the government's insistence on certain terms. Plaintiffs presented expert opinion testimony to the effect that the government's involvement limited the options that would have been available to Chrysler in a bankruptcy without government assistance. Specifically, plaintiffs presented expert opinion testimony which claimed that Chrysler would have remained operational during a bankruptcy without government assistance and that none of plaintiffs' franchise agreements would have been rejected.

To meet their burden of proving that the government by its actions forced the involuntary reduction of Chrysler franchises by rejection of the franchise agreements in the Chrysler bankruptcy, the court finds that the plaintiffs needed to establish that the government either expressly directed Chrysler to accept the government's negotiated prepackaged bankruptcy plan or took away other options available to Chrysler at the time in question. In this connection, it is important to note that Chrysler came to the federal government voluntarily for financial assistance—outside of any formal federal government grant or lending program with specific requirements—and voluntarily agreed to submit a Viability Plan, in which Chrysler proposed a significant reduction in the number of its franchises. It is plaintiffs, not Chrysler, that claim they would have been better off had the government not gotten involved by providing assistance to Chrysler.

The court finds that the government's evidence overwhelmingly established that Chrysler's decision to accept the government's prepackaged bankruptcy plan was not forced on Chrysler by the government. The evidence established that Chrysler's decision to accept the government's terms for financial assistance through bankruptcy was voluntary and not coerced. The evidence established that Chrysler's decision to accept the government's prepackaged bankruptcy plan was based on Chrysler's best business judgment. Indeed, the evidence established that, without the government's financial assistance, Chrysler would have been liquidated under Chapter 7, which would have resulted in a worse outcome for not only the Chrysler brand but for all plaintiffs.

B. The Government's Prepackaged Bankruptcy Plan Was Negotiated for a Public Purpose, but the Government Did Not Force Chrysler to Accept Its Prepackaged Bankruptcy Plan, Was Not Responsible for Causing Chrysler's Financial Difficulties, and Did Not Interfere with Chrysler Pursuing Any Other Options

To begin, the court finds that the government's prepackaged bankruptcy plan included terms and conditions that would not have been required by traditional lenders and were included for various public purposes, including saving manufacturing jobs in Michigan and supporting the UAW's pension plan. The court finds that in negotiating certain terms in its prepackaged bankruptcy plan, the government was acting, at least in part, in its governmental capacity. To establish coercion, however, plaintiffs had to prove that the government by its actions forced Chrysler into bankruptcy to achieve the government's goals. This the plaintiffs failed to do.

i. Fact Witnesses Established That Chrysler Was Not Forced to Accept the Government's Terms but Did So Based on Its "Best Business Judgment," and That Chrysler's Financial Problems Pre-Dated the Great Recession and Were Not Caused by the Government.

The testimony of Chrysler's executives Mr. Nardelli, Mr. Landry, Mr. LaSorda, Mr. Grady, and the Auto Team leaders, Mr. Rattner and Mr. Bloom, established that the government never threatened Chrysler's management in order to secure acceptance of the government's prepackaged bankruptcy plan. While it was not disputed that Chrysler would have preferred for the government to have given Chrysler billions of dollars outside of bankruptcy, there was no evidence to show that Chrysler was directly forced into accepting the government's assistance when bankruptcy became Chrysler's only option. Each witness with personal knowledge testified that the government never forced Chrysler to take any action. *See, e.g.*, Tr.3383:14-17, Tr.3384:3-17. In this regard, it is important to note that the evidence established that Chrysler's bankruptcy was triggered when certain first lien holders refused to sign onto the government's negotiated deal outside of bankruptcy. Tr.1653:14-1654:11. Mr. Rattner testified that the government would have accepted Chrysler's negotiated plan outside of bankruptcy had an agreement been reached. Tr.1653:24-25 ("Nobody wanted to be in bankruptcy if we could avoid it."), Tr.1654:9-11 ("[T]here was some chance right up until the end of April that bankruptcy could have been avoided."); *see also* Tr.1642:4-11 (Mr. Rattner's testimony that the Auto Team considered a "variety of options . . . some of which didn't include bankruptcy"), Tr.2715:11-15 (Mr. Bloom's testimony that "we worked hard to find a path to viability without bankruptcy").

The evidence of the government's fact and expert witnesses also established that the government did not act to keep Chrysler from making any other deal outside of the government's prepackaged plan in order to achieve viability. The evidence established that Chrysler was always free to reject the government's prepackaged bankruptcy plan and go it alone in bankruptcy. Indeed, the government offered Chrysler $750 million to add to Chrysler's remaining cash in order to wind-down Chrysler in a bankruptcy outside of the government's prepackaged bankruptcy plan. DX1263 ("[E]ven if the Company were to liquidate . . . [Treasury] would provide additional funds to the Company so that it had $750 million to facilitate an orderly liquidation."); Tr.3373:6-11, Tr.3377:6-23.

The evidence further established that Chrysler accepted the government's prepackaged bankruptcy plan because Chrysler decided the plan was Chrysler's best business option. Mr. Manzo's testimony established, based on Chrysler's financial statements and contemporaneous economic data, that Chrysler would have been forced to liquidate without government assistance because it could not get any more money from any other source in late 2008. Specifically, Mr. Manzo explained that when Chrysler approached the government in 2008, it was experiencing a rapid cash burn rate of $2 billion a month, which meant that the company had only three to four months left before Chrysler would have to close down. Tr.3931:18-3932:9. Mr. Manzo's testimony also established that the first lien lenders (the lien holders represented by JP Morgan) were not willing to provide any more money to Chrysler either in or outside of bankruptcy. Tr.3946:2-3947:18. ("[The first lien lenders] rejected the invitation to lend more money."). Mr. Manzo further explained that due to the Great Recession and the financial problems potential purchasers were facing, the proceeds from Chrysler's sale of its assets in a liquidation would be depressed. Tr.3943:16-3944:23. Mr. Manzo estimated that in a liquidation the $7 billion lien holders would likely recover only between $654 million to $2.6 billion. DX1029.

The government's fact witnesses also established and the court finds that Chrysler had a history of financial problems that pre-dated the 2008-09 financial crisis and that these financial problems were not created by the government. The government's evidence established that Chrysler began exploring the possibility of an alliance with another automaker in 2007, well before the recession, after the merger with Daimler had proven unsuccessful. Mr. LaSorda, Chrysler's CEO from 2005 until 2007, testified at length about Chrysler needing to find an alliance with another car company to remain competitive. Tr.4342:20-23, Tr.4357:10-4358:22, Tr.4361:11-12 ("We needed the cash to survive and stay out of the ultimate case of bankruptcy."). Mr. LaSorda's undisputed testimony confirmed that Chrysler would not be viable without an alliance or partnership with a small car manufacturer. *Id.* Mr. LaSorda explained that during 2007 he attempted to form an alliance with Nissan Renault, Honda, Kia, Hyundai, Toyota, Volkswagen, Tata Motors, and various Chinese manufacturers, but none of these companies expressed any interest in forming an alliance with Chrysler, sharing vehicle platforms and technology, or in injecting any capital into Chrysler. Tr.4359:6-9, Tr.4360:2-4361:25, Tr. 4365:11-22, Tr.4366:1-4368:3. Mr. LaSorda specifically noted that the only company that expressed any interest in forming an alliance with Chrysler was Fiat, but that Fiat was not interested in injecting any cash into the alliance to help sustain Chrysler. Tr.4375:2-4377:17, Tr.4379:10-20 ("It was absolutely clear that [Fiat] would put no capital up, zero."). Mr. LaSorda's testimony, together with the testimony of Professor Fischel, discussed *infra*, convincingly refuted Ms. Keller's opinion, offered on behalf of the plaintiffs, that many companies were and would have been interested in purchasing or forming a partnership with Chrysler in 2009, but were likely dissuaded from approaching Chrysler because of the government's involvement. The court finds that Ms. Keller's opinion was unsupported and wholly speculative on this point.

Finally, Mr. Nardelli, Chrysler's CEO from 2007 until April 30, 2009, established through his testimony that the government did not force its prepackaged plan on Chrysler but that Chrysler's decision to accept the prepackaged bankruptcy terms negotiated by the government was voluntary on the part of Chrysler's board and dictated by Chrysler's "best business judgment." He explained that he believed that the government's prepackaged bankruptcy plan was the only way to ensure the continuation of the Chrysler brand. Tr.3382:21-3383:17, Tr.3384:9-3385:16.

ii. The Government's Expert Witnesses Confirmed That Acceptance of the Government's Plan Was Consistent with Chrysler's "Best Business Judgment" and Thus Was a Voluntary Decision and Not Coerced.

The government's expert witnesses confirmed for the court that accepting the government's prepackaged bankruptcy plan was in Chrysler's best business interest and thus was a voluntary decision and not coerced. The government's experts also confirmed that the government never interfered with Chrysler pursuing, on its own, any other option in 2009. The court finds that the testimony of Mr. MacKenzie, former Bankruptcy Judge Gerber, and Professor Fischel established that Chrysler would have been forced into immediate liquidation without government assistance and that, under that scenario, the plaintiffs would have suffered a worse fate than they experienced under the government's negotiated bankruptcy plan. As explained below, the evidence established that if Chrysler had immediately closed all its factories and parts depots, plaintiffs would not have had any ability to, among other things, do warranty and other service work requiring Chrysler parts while they closed their franchises.

Mr. MacKenzie, a certified turnaround professional with extensive auto industry experience, persuasively testified that Chrysler faced immediate liquidation in a bankruptcy without government assistance and that all of Chrysler's franchisees, in that circumstance, would have faced immediate rejection of their franchise agreements. Tr.4027:18-24. Mr. MacKenzie explained that in April 2009, at the time of the alleged taking, Chrysler had only $407 million left in useable cash and was burning through tens of millions a day. Tr. 4046:12-18. He persuasively explained why he rejected Mr. Berliner's contention that Chrysler had adequate resources for an orderly wind-down based on Chrysler's access to an additional $1 billion. Specifically, Mr. MacKenzie persuasively explained that Chrysler would not have been able to easily access the amounts of money it had outside the United States and that the $400 million was simply not enough to allow for an orderly wind-down in Chapter 11. Tr.4078:25-4079:18, Tr.4075:7-17.

Mr. MacKenzie also convincingly opined that there was no entity willing to offer debtor-in-possession or DIP financing to Chrysler in 2009. Tr.4079:19-4081:10. For this reason, Chrysler would have faced immediate liquidation under Chapter 7. He explained that in that circumstance all of Chrysler's factories would have had to have been closed and that Chrysler parts also would not have been available. Tr.4075:7-4076:3. He also claimed that suggestions that Chrysler would have been an attractive purchase to other auto manufacturers or private equity firms was without support because each of Chrysler's major brands was worth a negative amount. Tr.4064:11-4065:2.

He further testified that, contrary to the testimony of plaintiffs' witnesses, Chrysler franchisees would have put a significant potential drain on Chrysler's resources and thus would have had their franchise agreements rejected in bankruptcy. He testified that Chrysler owed $3.75 billion in warranty obligations to its franchisees. Tr.4060:22-23. This was money Chrysler did not have. Mr. MacKenzie explained that in a Chapter 7 liquidation, because Chrysler would have stopped making cars and trucks, the franchisees would no longer be needed to buy cars and trucks from Chrysler. Tr.4075:7-4076:16. Rather, the franchisees would have become Chrysler creditors. Chrysler would have continued to incur warranty debts from its franchisees as well as other expenses. Tr.4076:17-23 ("[I]f any warranty work was completed by the dealers, this would have generated new post-petition liabilities for Chrysler."). For these reasons, Mr. MacKenzie persuasively established that a bankruptcy trustee would have rejected the franchise agreements as soon as possible after the bankruptcy filing to avoid any additional franchisee drain on the bankruptcy estate. Tr.4076:24-4077:2 ("Considering all of this, the CRO would have had a fiduciary duty to reject each of the over 3100 dealer franchise agreements, including the Plaintiffs', as soon after the bankruptcy filing as possible."). In this connection, Mr. MacKenzie also persuasively explained that he saw no basis for plaintiffs' assumption that the government would have elected to continue to cover Chrysler warranties, once Chrysler began to liquidate. Tr.4084:23-4085:1. The court agrees with Mr. MacKenzie and finds that Mr. Berliner and Judge Fitzgerald's assumption regarding the government paying for warranties was not supported.

Mr. MacKenzie's opinions were confirmed by former Bankruptcy Judge Gerber. The court is mindful that Judge Gerber was the bankruptcy judge in the GM bankruptcy and thus came to this case with some inside knowledge of certain issues and a stake in supporting the approach taken by the bankruptcy judge in the Chrysler bankruptcy case. Nonetheless, the court found Judge Gerber to be a highly credible witness and was persuaded by his opinions, which were confirmed by facts.

First, Judge Gerber opined that Chrysler had no source of DIP financing if the government were not available and thus Chrysler would not have been able to continue as an ongoing business during a Chrysler bankruptcy without government funding, as plaintiffs' experts assumed. Tr.4211:12-4212:20. He persuasively opined that the many billions of dollars needed to keep Chrysler operational during a wind-down pending a potential Section 363 sale was not available from private parties during the Great Recession. Tr.4212:21-4213:4 ("Thus, we see the refusal to provide the necessary funding by the secured lenders and Chrysler's inability to get the funding from anyone else."). In this regard, he persuasively testified that the other bankruptcies Judge Fitzgerald relied on to support her opinion that DIP financing would have been available from the private sector were not comparable and thus not relevant to understanding the challenges Chrysler would have faced in bankruptcy without government assistance. Tr.4233: 8-20 ("I can't see how Suzuki and Hostess . . . are in any meaningful way analogous to Chrysler."). Judge Gerber opined that for these reasons Chrysler would have been quickly forced into a Chapter 7 bankruptcy which would have been a disaster for Chrysler and for all the plaintiffs.[44] Tr.4213:24-25 (noting the only other alternative is immediate liquidation).

---

[44] The court understands that Mr. Rattner testified that the government decided it could not let Chrysler fail because it would adversely affect the auto suppliers. How this would have played out had Chrysler not accepted the government's prepackaged bankruptcy was not, however, discussed at trial by

Professor Fischel, with his extensive expertise, provided persuasive testimony which confirmed to the court that Ms. Keller's opinions were based on pure speculation. Professor Fischel, who is an expert on a broad range of economic issues, explained that Chrysler's debt was selling for twelve cents on the dollar in April 2009, a clear indication of the market's lack of confidence. Tr.4656:18-4657:24. He explained that Chrysler would have needed $12 to $15 billion for a short one-year unplanned bankruptcy and the lack of private DIP financing was evident from the fact that the total amount of private DIP financing provided to all companies together was $12.5 billion in 2008 and $21.6 billion in 2009. Tr.4669:13-20; DX956; Tr.4670:4-9; DX1056.

In his testimony regarding each of the 12 potential buyers identified by Ms. Keller, Professor Fischel systematically and convincingly explained why none of the potential buyers identified by Ms. Keller either had the interest or the wherewithal to buy all of Chrysler's assets in a 363 sale. Tr.4696:2-4701:15. His testimony regarding potential Chrysler purchasers was well-supported and, based on his testimony and Mr. LaSorda's, the court finds that there was no purchaser for Chrysler among the 12 entities Ms. Keller identified. This evidence again confirmed for the court why Chrysler's decision to accept the government's prepackaged bankruptcy plan, which allowed the Chrysler brand to survive, was voluntary.

---

either party. There was no evidence introduced to suggest that in finding some way to save suppliers, the plaintiffs would have fared any better than they did in the actual world.

iii. Plaintiffs' Experts' Opinions Regarding Chrysler and Franchisees in a Bankruptcy Without Government Action Were Unsupported.

As noted at the outset of this opinion, plaintiffs concede that Chrysler would have had to enter bankruptcy if the government had not provided financial assistance in 2009. They contend, however, that Chrysler did not need government assistance and that Chrysler's fate in a bankruptcy without the government's aid would have allowed plaintiffs to have experienced a better outcome. Plaintiffs supported their position with expert testimony, which, as discussed above, was not supported by facts. None of the plaintiffs' experts presented facts to show that Chrysler had a viable option of going it alone in bankruptcy and surviving in a reorganization or with a purchaser as an ongoing business with all brands continuing to be manufactured. There was no evidence to support Mr. Berliner's or Judge Fitzgerald's opinions that Chrysler would have been able to obtain the more than the $10 billion in DIP financing Chrysler would have needed for a twelve- to twenty-four month period while waiting for a new purchaser to take over the manufacture of Chrysler's lines. *See* Tr.138:10-14, Tr.694:3-7. Mr. Berliner and Judge Fitzgerald failed to provide any economic data or facts from late 2008 and early 2009 to support their opinions that, despite economic conditions at that time, Chrysler would have been able to obtain billions in private DIP financing to continue manufacturing cars and trucks without disruption and thus Chrysler would have had a reason to keep all of its franchise agreements.[45]

As discussed above, Professor Fischel's testimony established that plaintiffs' claims of a successful Chapter 11 bankruptcy in which Chrysler would have been able to continue operations while interested purchasers bid for Chrysler was not supported. Indeed, Ms. Keller could not identify which of any of the 12 potential buyers she discussed had an actual interest in buying Chrysler in a 2009 bankruptcy. Nor could she estimate how much any Section 363 buyer would have been willing to pay for Chrysler in a Chrysler bankruptcy without government assistance. Tr.1123:11-23, Tr. 1124:2-14.

Ms. Keller also opined, without reference to any corroborating evidence, that the Auto Team's involvement in preparing Chrysler's Viability Plan discouraged interested buyers from coming forward to buy Chrysler in 2009. Tr.1086:22-1087:9, Tr.1155:21-24, Tr.1159:22-25, Tr.1160:15-16. She testified that in bankruptcy she believed Chrysler would have been attractive to many buyers. Tr.1121:11-17. This is not true. As discussed above, Mr. LaSorda testified that he had spoken to many of the potential buyers she identified, and none were interested, save for Fiat. Professor Fischel went through each of her proposed prospects and credibly explained based on facts why

---

[45] Importantly, Mr. Berliner testified that it was possible that some franchise agreements would have eventually been rejected in a Chrysler bankruptcy without government assistance. Tr.203:19-204:25. Ms. Keller also was confronted on cross examination with an article in which she stated that Chrysler had too many dealers. Tr.1148:1-1149:11.

none would have been interested or able to acquire Chrysler in April 2009. Ms. Keller's entire testimony was credibly refuted by Mr. LaSorda and Professor Fischel.

Without any source of DIP financing, and with only $400 million of cash in hand, the court finds that Chrysler would have been forced to liquidate under Chapter 7 without government assistance, which would have resulted in Chrysler stopping all car and truck production and would have resulted in all franchisees losing their franchise agreements in a Chapter 7 bankruptcy.

C. Plaintiffs Failed to Establish that the Government Coerced Chrysler to Reject Any of the Plaintiffs' Franchise Agreements in Bankruptcy

The court finds that plaintiffs also failed to establish that the government coerced Chrysler into using the bankruptcy as a means of ending plaintiffs' franchise agreements through the involuntary method of bankruptcy rejections. The evidence established that Chrysler had been working on reducing its franchise network for years. The fact that rejecting franchise agreements in bankruptcy would make the reduction of its franchise network easier was obvious to Chrysler while it was considering options during the viability planning process in 2009. Tr.3611:23-3612:4 (Mr. Landry's testimony that a reduction in the dealership network was necessary "for Chrysler's survival"); *see also* Tr.3463:25-3480:4 (Mr. Landry's testimony describing history of Chrysler's dealership network).

The evidence also established—and plaintiffs do not dispute—that the government did not have any hand in deciding the number of franchise agreements to reject or in identifying any individual franchise agreements to reject. *See, e.g.*, Tr.2724:15-18 (Mr. Bloom testified that the government "did not get into the details of management decisions behind Chrysler's selection of individual dealers to reject."). Rather, the decisions regarding which franchise agreements to reject were made by Chrysler based on a series of objective criteria developed by Chrysler. *See* Tr.3463:25-3480:4 (Mr. Landry's testimony describing history of Chrysler's dealership network), Tr.3598:8-3602:11 (Mr. Grady's testimony describing the criteria). At no time did any Chrysler witness testify that franchise reduction did not make good business sense and was only advanced to meet a government goal of "shared sacrifice," as plaintiffs contended. The Chrysler bankruptcy afforded Chrysler an opportunity to reduce its franchise network more expeditiously and Chrysler took advantage of that opportunity. *See* Tr.3564:11-13 (Mr. Landry's testimony that "after we were in bankruptcy . . . we were able to be more aggressive with Project Genesis, which created Project Tiger.").

The government accepted Chrysler's judgment that its franchise network needed to be reduced and Chrysler decided how many franchise agreements to keep and which ones to reject. *See* Tr.2686:22-25 (Mr. Bloom testified that "[a]lthough [the government] engaged in dialogue and discussion with company management about the companies' approaches, we were not to substitute our judgment about specific decisions for theirs."), Tr.1664:20-1665:12 (Mr. Rattner testified that the government "never got into the question of which dealers, how, or anything of that sort" but rather was looking at it from a macro level of how many.). The plaintiffs thus failed to prove that the decision to reduce the Chrysler franchise network by rejecting franchise agreements in bankruptcy, rather than terminating franchisees under various state laws, was imposed on Chrysler by the government through coercion.

D. Plaintiffs Failed to Establish by a Preponderance of the Evidence that Their Franchise Agreements Would Have Had Value in a "But for World" Without Government Assistance

The court also finds for the reasons set forth below that plaintiffs failed to establish by a preponderance of the evidence that their franchise agreements would have had value in a "but for world" without government assistance.

As discussed above, the *Alley's* and *Colonial* plaintiffs used different experts to establish that their franchise agreements would have had value in a "but for world" without government assistance. The *Alley's* plaintiffs offered in addition to Mr. Berliner, Judge Fitzgerald, and Ms. Keller the opinion testimony of Ms. Murphy, and the *Colonial* plaintiffs relied on the testimony of Mr. Stockton. Ms. Murphy and Mr. Stockton's opinions were based on different assumptions but neither of these expert opinions credibly established that plaintiffs' franchises had value in a "but for world" without government assistance.

i. The *Alley's* Plaintiffs Failed to Establish That Their Franchise Agreements Had Value in a "but for World."

Although Ms. Murphy has extensive experience valuing auto dealerships, because the assumptions she was given by counsel were not supported, the valuations she prepared for each of the *Alley's* plaintiffs were likewise unsupported. Specifically, Ms. Murphy's valuation opinions rested on her contention that in a "but for world" in which Chrysler went into bankruptcy without government assistance, Chrysler would have continued production of either all of its car and truck lines or all of its truck lines with little or no interruption and that plaintiffs would have continued to sell and service Chrysler cars without interruption indefinitely. Tr.1404:16-1410:3, Tr.1747:9-14, Tr.1748:24-1749:3. She also opined based on the assumptions she was given that Chrysler would have been sold in Chapter 11 and that any Section 363 purchaser would have assumed all of Chrysler's franchise agreements, including plaintiffs' agreements. *See* Tr.1408:15-1409:19. Relying on these assumptions, Ms. Murphy projected the sales volume growth of plaintiffs' franchises for a period of five years and with that number she applied a discount rate to find a fair market value for each franchise. Tr.1425:22-1426:5, Tr.1427:23-1428:8, Tr.1428:11-18, Tr.1431:18-21. Ms. Murphy admitted that her valuation included not only an estimated discounted cash flow but also included the value of all tangible assets of the dealership including the equipment, parts, land and other cash assets that would be part of any normal sale of a dealership with a franchise agreement. Tr.1542:2-22. She did not separately analyze how these tangible assets contributed to the plaintiffs' income stream profits, separate from the franchise agreement allegedly taken.

Because the court has found that Ms. Murphy's assumptions regarding Chrysler's fate in bankruptcy without government assistance were not supported and indeed were contrary to the facts known at the time in 2009, the court finds that Ms. Murphy's opinion of economic value in a "but for world" without government assistance for each of the 7 representative plaintiffs she analyzed must be rejected. As discussed above, the plaintiffs failed to prove that without government assistance Chrysler could have continued to manufacture cars or trucks. Rather, the outcome for Chrysler in a world without government assistance was liquidation under Chapter 7. Ms. Murphy did not consider the value of plaintiffs' franchise agreements in a Chrysler Chapter 7 bankruptcy.

The court therefore finds that, in a Chapter 7 bankruptcy, the plaintiffs' franchise agreements would have had zero fair market value.[46]

ii. The *Colonial* Plaintiffs Failed to Establish That Their Franchise Agreements Had Value in a "but for World."

The court finds that the *Colonial* plaintiffs failed to prove that the Guetterman and Finnin franchises would have had value in a "but for world" without government assistance. Mr. Stockton's valuation opinions were not based—as Ms. Murphy's was—on Chrysler's survival as an ongoing business during a

---

46 There were numerous other problems with Ms. Murphy's opinion. She assumed a growth rate of 5% that was wholly unsupported and a discount rate that was not supported by the economic circumstances of the time at issue. Tr.1469:19-24. It is not necessary to review all the other unsupported assumptions and problems raised by her opinions, because her fundamental assumption regarding Chrysler's fate in a bankruptcy without government assistance was not supported.

bankruptcy without government assistance. Rather, he valued the Finnin and Guetterman franchises using the assumption that Chrysler would have stopped manufacturing cars and trucks during a bankruptcy wind-down. *See* Tr.2366:5-20. Mr. Stockton nonetheless opined that Chrysler would not have had any reason to reject Finnin and Guetterman's franchise agreements during a Chapter 11 bankruptcy wind-down because Chrysler would have wanted the franchisees to sell Chrysler's existing inventory and because he believed the government would have funded Chrysler's warranty work, which would have provided plaintiffs with another income stream, along with used cars and other service, depending upon how many years it took to wind-down Chrysler.[47] Tr. 2446:5-10.

As discussed above, the court finds, based on Mr. MacKenzie's testimony, that there is no support for the assumption that the government would have funded warranty work in a "but for world" without government assistance. There was no evidence presented to show that the government paid for warranties during any other auto bankruptcy. While it is true that the government offered to pay for warranties on new Chrysler cars in March through April 2009, there was never a discussion of the government offering to continue that program. Mr. Stockton's

---

[47] Mr. Stockton also posited a valuation scenario where Chrysler went out of business but others licensed the Chrysler name, and that under that scenario franchisees could have continued on forever as "licensed Chrysler" dealers. That scenario, of course, does not involve a franchise agreement with Chrysler and is thus irrelevant.

assumption regarding government payment of warranty work was based on pure speculation.

In addition, the court finds based on Mr. MacKenzie and Judge Gerber's testimony that in a "but for world" without government assistance, Chrysler would have been forced into Chapter 7 and that a trustee in bankruptcy would have rejected all franchise agreements to protect the assets of the bankruptcy estate. In a Chapter 7 liquidation scenario, not only would Chrysler face continued liability for the warranty work it had not paid to franchisees, but Chrysler would have also faced liability under its franchise agreements for the cost of repurchasing inventory and parts. Thus, as Mr. MacKenzie and Judge Gerber explained, there would have been every reason for the bankruptcy trustee to immediately reject all franchise agreements.

Finally, Mr. Stockton's valuation opinions must be rejected on the grounds that the opinions are based on a lost profits model and not on fair market value. The government is not liable in a taking of lost profits unique to the owner but only for what the property is worth in a fair market. *See A&D Auto Sales*, 748 F.3d at 1157; *see also Yancy v. United States*, 915 F.2d 1534, 1542 (Fed. Cir. 1990) (citing *United States v. General Motors*, 323 U.S. 373, 380 (1945)). Here, Mr. Stockton conceded there was no fair market for the franchise agreements. Tr. 2359:4-9, Tr.2454:20-23, Tr.2590:12-16.

Based on the foregoing, the court finds all the representative plaintiffs failed to meet their burden of proving that their franchise agreements would have had economic value in a "but for world" without government assistance by a preponderance of the evidence. For this reason, as well, the plaintiffs' taking claims fail.

CONCLUSION

The taking claims of representative plaintiffs Taylor & Sons, Inc., Cedric Theel, Inc., Whitey's Inc., RFJS Company, Jim Marsh American Corp., Livonia Chrysler Jeep, Inc., Barry Dodge, Inc., Guetterman Motors, Inc., and Mike Finnin Motors, Inc. are hereby DENIED. There being no just reason for delay, the court directs the Clerk of the Court to enter judgment for the Defendant regarding these claims pursuant to Rule 54(b). The parties shall have until November 1, 2019 to file a status report proposing a schedule for next steps to resolve the litigation of the remaining rejected Chrysler and GM franchisees.

IT IS SO ORDERED.

/s/ Nancy B. Firestone
Senior Judge

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT (APRIL 7, 2014)

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

A&D AUTO SALES, INC., ALLEY'S OF KINGSPORT, INC., ARCHER CHRYSLER JEEP WEST, INC., ARCHER CHRYSLER PLYMOUTH, INC., ARCHER DODGE, INC., ARCHER FINANCIAL HOLDINGS, INC., AXELROD CHRYSLER DODGE JEEP, INC., AXELROD CHRYSLER, INC., BARRY DODGE INC., BENNETT AUTOPLEX INC., BENSON MOTOR INC., ARROW FORD, INC., BILL KAY SUZUKI, INC., BOARDWALK AUTO CENTER, INC., BOB LUEGERS MOTORS, INC., BOB ROHRMAN MOTORS, INC., BOB TAYLOR JEEP, INC., BONDY'S FORD, INC., BROTHER'S MOTORS, INC., BURKE AUTOMOTIVE GROUP, INC., BY FISHEL'S JEEPS, INC., CARDENAS MOTORS, INC., CARSON AUTOMOTIVE INC., CDOHY, INC., CARSON CJ, LLC, CENTURY DODGE, INC., CHILSON, INC., CLARKSTON MOTORS, INC., COLEMAN AUTO GROUP, INC., COLEMAN CHRYSLER JEEP, INC., COUNTRY MOTORS, INC., CRAIN CDJ, LLC, CUNNINGHAM CHRYSLER JEEP, INC., CURFIN INVESTMENTS, INC., DJ-MACK INC., DET AUTOMOTIVE GROUP, INC., DAVE CROFT MOTORS, INC., BURKE BROTHERS, INC., DODGE OF ENGLEWOOD, INC., DON DRENNEN CHRYSLER JEEP, INC.,

DON PHILLIPS & SON SR. ENTERPRISES, INC., DONATO & SON'S JEEP, INC., DOUGLAS AUTOMOTIVE GROUP, INC., EJE, INC., EL DORADO MOTORS, INC., ELHART DODGE, INC., ELHART PONTIAC-GMC TRUCK, INC., ERTLEY CHRYSLER JEEP DODGE, LLC., FITZGERALD AUTO MALLS, INC., FT AUTOMOTIVE II, LLC, FT AUTOMOTIVE IV, LLC, FORT MORGANAUTO CENTER, INC., FOX HILLS MOTOR SALES, INC., G.K. ALCOMBRACK, INC., GOLDEN MOTORS, INC., GRAYSON PONTIAC, INC., GRESHAM CHRYSLER JEEP, INC., GRUBBS NISSAN MID-CITIES LIMITED, HAHN MOTOR COMPANY, HAMILTON CHRYSLER, INC., HARVEY M. HARPER CO., HOOVER MOTORS HOLDING CO., INC., HOOVER DODGE, INC., I.M. JARRETT & SON, INC., ISLAND JEEP, INC., JAMES W. HALTERMAN, INC., JIM MARSH AMERICAN CORPORATION, JOHN CULLEN DODGE, LLC, JOHNSON COUNTY MOTORS, L.C., KINGSTON DODGE, INC., KITAGAWA MOTORS, INC., KOVATCH FORD, INC., LFCJ, INC., LEE PETERSON MOTORS, INC., LENIHAN JEEP, INC., LIVONIA CHRYSLER JEEP, INC., LOU BACHRODT CHEVROLET, INC., MANCARI'S OF ORLAND HILLS, INC., MARKETPLACE SUZUKI, INC., MARSTALLER MOTORS, INC., MELCHIORRE, INC., MILLER-CAMPBELL COMPANY, MILLER MOTOR CAR CORPORATION, MILNER O'QUINN CHRYSLER DODGE JEEP, INC., MORONG BRUNSWICK, NEIL HUFFMAN ENTERPRISES, INC., NEIL HUFFMAN, INC., LUNT MOTOR COMPANY, MANUEL DODGE, INC., MATT MONTGOMERY, INC., MATTHEWS CHRYSLER, INC., MT.

CLEMENS DODGE, INC., NEW CITY AUTO SALES, INC., NORTHGLENN DODGE, INC., JEFF HUNTER MOTORS, INC., JELMAC LLC, PAINTER SALES AND LEASING, PAINTER'S SUN COUNTRY CHRYSLER, INC., PEN MOTORS, INC., PLEASANT VALLEY MOTORS, INC., PRESTON CHRYSLER JEEP, INC., PRIDE CHRYSLER JEEP, INC., QUALITY JEEP-CHRYSLER, INC., RFJS COMPANY, LLC, REUTHER DODGE LLC, REUTHER'S INVESTMENT COMPANY, RHODEN AUTO CENTER, INC., RICHARD CHRYSLER JEEP, INC., RIVERSIDE AUTO SALES OF MARQUETTE, INC., ROCK OF TEXAS AUTOMOTIVE, INC., ROHR-ALPHA MOTORS, INC., SCK, INC., SCOTIA MOTORS, INC., SCOTT CHEVROLET, INC., SHOEMAKER AUTO GROUP, INC., SIEMANS IMPORTS, INC., SOUTH SHORE AUTO LINES, INC., SOUTHEAST AUTOMOTIVE, INC., STAR CHRYSLER, INC., TAMAROFF 12 MILE MOTORS, INC., TARBOX CHRYSLER JEEP, LLC, TARBOX MOTORS INC., TAYLOR & SONS, INC., TED BRITT OF FREDERICKSBURG, INC., TENAFLY CHRYSLER JEEP, INC., TETON MOTORS, INC., THOMAS SALES & SERVICE, INC., TOMSIC MOTOR COMPANY, TRANSIT LLC, TRI-STATE AUTOMOTIVE ASSOCIATES, INC., THE UNION SALES COMPANY, URKA AUTO CENTER, INC., VALLEY DODGE, INC., VERONA MOTOR SALES, INC., VIC OSMAN LINCOLN-MERCURY, INC., VILLAGE CHRYSLER JEEP, INC., WACO DODGE SALES, INC., WALKER MOTORS, INC., WALLACE CHRYSLER JEEP, LLC, WESTMINSTER DODGE, INC., WESTSIDE DODGE, INC., WHEATON MOTOR CITY, INC., WHEELER LEASING CO. II, INC., WHITEY'S,

INC., WILLIAM T. PRITCHARD, INC., WRIGHT DODGE, LLC, WYCKOFF CHRYSLER, INC., AND YOUNG VOLKSWAGEN, INC.,

Plaintiffs-Appellees,

v.

UNITED STATES,

Defendant-Appellant.

No. 2013-5019

Appeal from the United States Court of Federal Claims in No. 11-CV-0100, Senior Judge Robert H. Hodges, Jr.

COLONIAL CHEVROLET CO., INC., AND MIKE FINNIN MOTORS, INC.

Plaintiffs-Appellees,

v.

UNITED STATES,

Defendant-Appellant.

No. 2013-5020

On Appeal from the United States Court of Federal Claims in No. 10-CV-0647, Senior Judge Robert H. Hodges, Jr.

Before: DYK, TARANTO,
and STOLL, Circuit Judges.

DYK, Circuit Judge.

These appeals arise from two takings suits related to the 2009 bankruptcies of General Motors Corporation ("GM") and Chrysler LLC ("Chrysler"). The plaintiffs are former dealers of those companies whose franchises were terminated in the bankruptcies. The plaintiffs allege that these terminations constituted a taking because the government required them as a condition of its providing financial assistance to GM and Chrysler and/or to the companies that succeeded them in the bankruptcies. The government moved to dismiss the suits for failure to state a claim. The United States Court of Federal Claims ("Claims Court") denied dismissal, and the government brought these interlocutory appeals.

Because we lack the benefit of a fully developed factual record, we do not at this stage address every issue the government raises. As to the issues we do address, we reject the government's arguments for dismissal. While we hold that the complaints are deficient because they do not sufficiently allege that the economic value of the plaintiffs' franchises was reduced or eliminated as a result of the government's actions, we nonetheless affirm the Claims Court's decision to deny dismissal at this point in the proceedings. The proper remedy is to grant the plaintiffs leave to amend their complaints to include the necessary allegations, and on remand the Claims Court shall do so.

BACKGROUND

At this stage in the proceedings, we accept the dealers' well-pleaded factual allegations as true. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). While we primarily consider the allegations in the complaint, we may also look to "matters incorporated by reference or integral to the claim, items subject to judicial notice, [and] matters of public record." 5B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1357 (3d ed. 2004).

I

The bankruptcies of GM and Chrysler took place in the historic recession and credit crisis of 2008–09. GM and Chrysler were in serious financial difficulty, as loans to automobile dealers and consumers had come to an "abrupt halt" and sales "plummeted." A&D J.A. 78.[1] Automobile sales were down more than 37% from the previous year, falling to their lowest level in 26 years. In a major public speech, President Bush expressed fears that "[i]f we were to allow the free market to take its course now, it would almost certainly lead to disorderly bankruptcy and liquidation for the automakers." President George W. Bush, President Bush Discusses Administration's Plan to Assist Automakers (Dec. 19, 2008) (transcript available at http://georgewbush-whitehouse.archives.gov/news/

---

1 This opinion refers to the joint appendix in No. 2013-5019, *A&D Auto Sales, Inc. v. United States*, as the "A&D J.A." The joint appendix in No. 2013-5020, *Colonial Chevrolet Co. v. United States*, is referred to as the "Colonial J.A." The government's briefs are referred to as "Gov't's A&D Br." And "Gov't's Colonial Br."

releases/2008/12/20081219.html). In late 2008, the chief executives of GM and Chrysler appeared before Congress to ask for emergency financial assistance in the form of loans and lines of credit. Shortly thereafter, Treasury Secretary Henry Paulson created the Automotive Industry Financing Program, through which the Department of Treasury ("Treasury") would make loans and other investments in the automakers using government funds. As the plaintiffs agree, the stated goal of the program was to avoid "disorderly bankruptcy and liquidation," which would entirely eliminate them as ongoing entities. *Id.* The program was created as a part of the wider Troubled Asset Relief Program ("TARP"), which made similar investments in a number of financial institutions. TARP had been established by Congress two months earlier, in the Emergency Economic Stabilization Act of 2008, Pub. L. 110-343, 122 Stat. 3765.

The government's first assistance to the automakers consisted of stopgap loans ($13.4 billion to GM, $4 billion to Chrysler) intended to keep the companies from having to cease operations pending talks over more comprehensive assistance. In connection with these loans, the government and the automakers entered formal agreements setting forth the conditions of the government's assistance. One condition was that the companies would submit viability plans demonstrating that they could achieve financial stability with the help of the government funds. GM and Chrysler submitted their viability plans in February 2009 as required.

The government rejected GM and Chrysler's initial viability plans and called for the submission of revised proposals. Executive branch officials in charge of overseeing the financial assistance suggested that the companies adopt various changes to improve their long-term viability, such as focusing on lighter, more fuel-efficient vehicles and (in GM's case) more quickly reducing the number of brands. The government specifically suggested that the automakers should significantly reduce the number of dealers within their franchise networks to improve their viability. Although the automakers were already reducing their dealer ranks over time and GM's initial viability plan had included additional dealer terminations, the government determined that the current and proposed pace of terminations was too slow, and that the companies' large dealer networks were an obstacle to viability. The government advised the companies they should expand their terminations and that they might accomplish the terminations expeditiously by opting to reject the franchise agreements in bankruptcy proceedings.[2] Outside bankruptcy, the dealer franchises had protections against termination under various state and federal franchise laws. The complaints allege that the government's proposals concerning franchise terminations were mandatory—that is, that the government required the automakers to include them or else forgo any further financial assistance. At this stage, we accept the plaintiffs' allegations as true, and proceed on the assumption that the govern-

---

[2] Two provisions of the Bankruptcy Code are central to the bankruptcies at issue. 11 U.S.C. § 363 authorizes certain sales of a debtor's assets. And 11 U.S.C. § 365 provides that a bankruptcy trustee "may assume or reject any executory contract or unexpired lease of the debtor." Debtors-in-possession in chapter 11 bankruptcies, like GM and Chrysler, generally have a trustee's powers. 11 U.S.C. § 1107.

ment required these terms as a condition of financial assistance.

The companies eventually adopted the government's suggestions for a bankruptcy filing, reduction of their dealer networks, and other changes. Each filed for Chapter 11 reorganization, and the government made available an additional $38 billion in financing ($30 billion in loans and equity investments to GM, $8 billion in loans to Chrysler) for restructuring the companies. After approval by the bankruptcy court under 11 U.S.C. § 363, the old GM and Chrysler entities sold most of their operating assets to newly created entities commonly called "New GM" and "New Chrysler"—in which the federal government, and other entities, acquired specified ownership interests. As a result of the sale, the government acquired a 60.8% ownership stake in New GM's common stock, as well as a portion of its preferred stock. The dealer franchises that were not terminated were transferred to the new entities along with other assets. The termination of the remaining franchises was handled differently by each company. In Chrysler's case, the franchises were eventually terminated by the bankruptcy estate. In GM's case, either the franchises were terminated by the bankruptcy estate or the dealers signed "Deferred Termination Agreements" providing for a transition to termination. To the extent the franchises were terminated by action of the bankruptcy estate, the affected dealers received unsecured claims against the estates, *see* 11 U.S.C. § 365(g); *In re Old Carco LLC*, 406 B.R. 180, 190 (Bankr. S.D.N.Y. 2009), but it is unclear whether they have received anything for those claims. It is unclear as well whether the dealers who signed termination agreements received any compensation.

II

The first of these two suits was filed in September 2010 by several terminated GM and Chrysler dealers. Suing on behalf of themselves and a putative class of others similarly situated, the plaintiffs alleged that the government had effected a taking of their dealer franchises (including rights conferred by state law) by "coerci[ng]" the automakers—that is, by requiring dealer terminations as a condition of financial assistance. Colonial J.A. 29; *see also* A&D J.A. 20. The plaintiffs alleged that this constituted a regulatory taking. They did not allege a physical taking.[3]

---

[3] In addition to the plaintiffs' franchise agreements, the Colonial complaint identified a handful of "distinct investment-backed expectation assets" including "real property," "enhancements to real property," "buildings," "fixtures," "specialized tools," "signage," and inventory of parts and vehicles. Colonial J.A. 32. It also identified intangible assets such as "debt collateralization and/or other specialized floor plan financing," "blue sky," and "good will." Colonial J.A. 32. The complaint did not allege a taking of those assets, however. It simply identified them as evidence of the plaintiffs' "distinct investment-backed expectation[s]" in their dealership franchises. Colonial J.A. 32.

The complaint also identified two government actions (aside from the alleged requirement of dealer terminations in exchange for financing) that were alleged to be takings: (1) the actions of the bankruptcy court that approved the terminations, and (2) a federal law that allowed terminated dealers to seek reinstatement through arbitration. Each government action was alleged to be a taking independent of the others. However, the plaintiffs later dismissed these claims.

In February 2011, a separate group of former Chrysler dealers brought a second suit in the Claims Court. The two complaints were largely identical in substance.

Both cases were assigned to the same judge of the Claims Court. Shortly after amended complaints were filed, the government moved pursuant to Claims Court Rule 12(b)(6) to dismiss each complaint for failure to state a claim.[4] The Claims Court denied both motions, issuing an identical order in each case. The Claims Court concluded that the plaintiffs' allegations were sufficient to make out a prima facie takings claim. The court noted that it was "not aware of a takings theory that resembles the legal and factual theories offered so far" and that the plaintiffs' "unusual allegations" did "not fit neatly into a normal takings framework." Colonial J.A. 4; A&D J.A. 4. Nonetheless, the court found that the "[p]laintiffs should have the opportunity to develop [their] case[s]." Colonial J.A. 6; A&D J.A. 6. The court reasoned that the possibility that the plaintiffs could prevail "demand[ed] rejection of [the government's] motion to dismiss on the pleadings as premature." Colonial J.A. 6; A&D J.A. 6.

After the Claims Court denied dismissal, the government moved the court to certify an interlocutory appeal under 28 U.S.C. § 1292(d)(2). The government asked the Claims Court to certify two questions: whether the complaints failed to state a claim upon

---

[4] The government also moved to dismiss for lack of subject matter jurisdiction. It is not clear that the government presses that issue on appeal. In any event, we see no lack of subject matter jurisdiction in the Claims Court.

which relief could be granted, and whether bankruptcy court findings precluded the suit. The Claims Court certified the first question only. The government then filed petitions for interlocutory appeal with this court. We granted the petitions, agreeing "that the criteria for interlocutory appeal . . . are met and that these petitions should be granted and heard on the merits by this court." Order Granting Petitions for Interlocutory Appeal 6, November 30, 2012, ECF No. 2-3. We review the denial of the government's motions to dismiss de novo. *See, e.g.*, *First Med. Health Plan, Inc. v. Vega-Ramos*, 479 F.3d 46, 50–51 (1st Cir. 2007) (on interlocutory appeal, denial of motion to dismiss is reviewed de novo).

DISCUSSION

I

We address initially the scope of our review in this case. Our appellate jurisdiction is ordinarily limited to the Claims Court's final decisions. *See* 28 U.S.C. § 1295(a)(3). But our jurisdiction extends to certain interlocutory orders as well pursuant to § 1292(d)(2). In interlocutory appeals, the scope of the issues is "limited to the order appealed from, but not to the specific stated question" articulated by the Claims Court. 16 Charles Alan Wright, Arthur R. Miller, & Edward H. Cooper, *Federal Practice and Procedure* § 3929, at 454 (3d ed. 2012). We may consider "any question reasonably bound up with the certified order, whether it is antecedent to, broader or narrower than, or different from the question specified by the [Claims Court]." *Id.* at 457; *see Sky Techs. LLC v. SAP AG*, 576 F.3d 1374, 1378–79 (Fed. Cir. 2009); *United States v. Connolly*, 716 F.2d 882, 884–85

(Fed. Cir. 1983). But we are not obligated to decide all questions presented by the order. *See* Wright, Miller, & Cooper, *supra*, at 448 (noting that courts of appeals have discretion to vacate an initial grant of permission to appeal). That is particularly so in cases where "an underdeveloped record may lead to ill-informed decision of an important question." *Id.* at 450–51.

The facts of this case are unique and raise issues that have not been decided before, and the record at this stage consists of little more than the plaintiffs' allegations. As discussed below, we decline to address some questions asked at this preliminary stage without the benefit of a full factual record. But we conclude that other issues are ripe for decision.

II

The Takings Clause of the Fifth Amendment guarantees just compensation whenever private property is "taken" for public use. U.S. Const. amend. V. The plaintiffs do not allege, and their complaints do not assert facts supporting an allegation of, a "direct government appropriation or physical invasion of [their] private property." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005); *see, e.g.*, *United States v. Pewee Coal Co.*, 341 U.S. 114 (1951) (seizure and operation of private coal mine); *United States v. Gen. Motors Corp.*, 323 U.S. 373 (1945) (occupation of private warehouse). Nor do they allege, or support an allegation, that the government stepped into the shoes of the dealers by assuming their contractual rights or transferring them to a third party.[5]

Government action that does not directly appropriate or invade, physically destroy, or oust an owner from property but is overly burdensome may be a regulatory taking. "The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Penn. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922); *see also Lingle*, 544 U.S. at 537 (regulation is a taking if it is "so onerous that its effect is tantamount to a direct appropriation or ouster"). The plaintiffs have alleged only regulatory takings.

The Supreme Court has treated certain regulatory actions as "categorical" takings. A categorical taking occurs where regulations "compel the property owner to suffer a physical invasion of his property" or "prohibit all economically beneficial or productive use." *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992) (internal quotation marks omitted). Beyond those categories, the Supreme Court has "generally eschewed any set formula, instead preferring to engage in essentially ad hoc, factual inquiries." *Id.* (internal quotation marks omitted). But three factors have "particular significance" in the analysis: (1) "the character of the governmental action," (2) "the extent to which the [action] has interfered with distinct investment-backed expectations," and (3) "[t]he economic

---

[5] In that sense, this case is distinguishable from *Armstrong v. United States*, 364 U.S. 40, 46–49 (1960) and *International Paper Co. v. United States*, 284 U.S. 399, 408 (1931). To the extent the Colonial plaintiffs suggest otherwise, there is no support for such a contention.

impact of the regulation on the claimant." *Penn. Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978). And of course, "the existence of a valid property interest is necessary in all takings claims." *Wyatt v. United States*, 271 F.3d 1090, 1097 (Fed. Cir. 2001).

The Supreme Court has mainly applied the categorical test to regulatory takings of real property. *See Lucas*, 505 U.S. at 1015–19. As the Claims Court recognized, other circuits view the *Lucas* test as applying only to land. *Hawkeye Commodity Promotions, Inc. v. Vilsack*, 486 F.3d 430, 441 (8th Cir. 2007) ("[I]t appears that *Lucas* protects real property only."); *Unity Real Estate Co. v. Hudson*, 178 F.3d 649, 674 (3d Cir. 1999) ("[T]he categorical approach has only been used in real property cases."); *see also Lucas*, 505 U.S. at 1027–28 ("[I]n the case of personal property, by reason of the State's traditionally high degree of control over commercial dealings, [the owner] ought to be aware of the possibility that new regulation might even render his property economically worthless. . . . "). We have applied the categorical test to personal property on occasion. *E.g.*, *Rose Acre Farms, Inc. v. United States*, 373 F.3d 1177, 1196–98 (Fed. Cir. 2004); *Maritrans, Inc. v. United States*, 342 F.3d 1344, 1353–55 (Fed. Cir. 2003). But those cases involved only tangible property. *Rose Acre Farms*, 373 F.3d at 1196 (chickens); *Maritrans*, 342 F.3d at 1354 (barges); *see also Brown v. Legal Found. of Wash.*, 538 U.S. 216, 220 (2003). We have not had occasion to address whether the categorical takings test applies to takings of intangible property such as contract rights. We decline to decide the issue at this stage of the litigation since the issue has not been briefed by the parties.

A

We begin our analysis in this case with the alleged property interest, an issue equally relevant to alleged categorical takings and to takings governed by the *Penn Central* analysis. There is no dispute that the plaintiffs' franchise agreements are property for purposes of the Takings Clause. In general, "[v]alid contracts are property, whether the obligor be a private individual, a municipality, a state, or the United States." *Lynch v. United States*, 292 U.S. 571, 579 (1934); *see also U.S. Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 19 n.16 (1977) ("Contract rights are a form of property and as such may be taken for a public purpose provided that just compensation is paid."). Franchise agreements are no exception to this general rule.

The government argues that the plaintiffs nonetheless lack a compensable property interest. As the government points out, during the lifetime of the agreements, the law of bankruptcy has always allowed a trustee or debtor-in-possession to reject executory contracts as GM and Chrysler did here. *See generally* 11 U.S.C. § 365(a). The government argues that this principle of bankruptcy law "inhere[d]" in the franchise agreements, and that termination of the agreements therefore did not concern a compensable property interest of the plaintiffs. Gov't's Colonial Br. 13; Gov't's A&D Br. 13.

We reject this argument. It is true that "background principles" of law may "inhere" in a plaintiff's title to his property and thereby limit his ability to recover for a taking. *Lucas*, 505 U.S. at 1029; *see also Bair v. United States*, 515 F.3d 1323, 1327–28 (Fed. Cir. 2008); *M & J Coal Co. v. United States*, 47 F.3d 1148, 1154 (Fed. Cir. 1995). For example, the common law of nuisance limits uses of real property that interfere with neighbors' rights of enjoyment. *See Lucas*, 505 U.S. at 1029–30. Thus a landowner may not recover for a taking when the government forbids a use that is a nuisance at common law. *Id.* The law of nuisance inheres in the landowner's title, so there is no taking if a use restriction falls within the scope of nuisance law. *Id.*; *see also Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 680–90 (1974) (no taking when innocent owner's property is subject to forfeiture due to criminal acts of lessee); *Commonwealth Edison Co. v. United States*, 271 F.3d 1327, 1352–53 (Fed. Cir. 2001) (en banc).

If a challenged restriction was enacted before the property interest was acquired, the restriction may be said to inhere in the title.[6] If a challenged restriction was enacted after the plaintiff's property interest was acquired, it cannot be said to "inhere" in the plaintiff's title. For example, in *Bair v. United States*, we held that a law giving priority to federal government liens inhered in the title of liens owned by other parties and created after the priority statute was enacted. 515 F.3d at 1331. The exercise of the government's lien did not effect a taking because the priority law predated the plaintiffs' liens and therefore inhered in their title. *Id.* Other circuits have similarly held that a law allowing bankrupt debtors to avoid

---

[6] This is not always true with respect to land use restrictions. *See Palazzolo v. Rhode Island*, 533 U.S. 606, 626–30 (2001).

certain liens inhered in the title of subsequently created liens. *See, e.g.*, *In re Weinstein*, 164 F.3d 677, 686 (1st Cir. 1999); *In re Thompson*, 867 F.2d 416, 422 (7th Cir. 1989). But though prospective application of such laws does not give rise to takings liability, retroactive application to existing property interests would raise "difficult and sensitive questions" of a taking. *United States v. Sec. Indus. Bank*, 459 U.S. 70, 82 (1982).

Here, the plaintiffs do not dispute that the bankruptcy law allowing trustees or debtors-in-possession to reject executory contracts predated the creation of their franchise agreements. Thus the plaintiffs could have no compensable property interest if the government action were limited to the bankruptcy court's approval of the terminations. The government's problem is the alleged government action here is not the bankruptcy court's approval of the franchise terminations (a theory that the plaintiffs have abandoned). The plaintiffs allege that the government action was requiring dealer terminations as a condition of financial assistance to the automakers. The challenged government action did not predate the acquisition of the plaintiffs' interests. The plaintiffs' franchise agreements are valid and compensable property interests.

B

We turn next to whether there has been government action sufficient to invoke a takings analysis either under *Lucas* or *Penn Central*. The question here is whether the government is liable for a taking where it offers financing to a third party as a way of inducing or requiring action that affects or eliminates the property rights of the plaintiff. We conclude that such actions may give rise to takings liability depending on the circumstances. There is no per se rule either precluding or imposing liability when the government instigates action by a third party. But two broad principles drawn from the cases may guide the analysis.

First, in some circumstances, government action directed to a third party does not give rise to a taking if its effects on the plaintiff are merely unintended or collateral. *See generally Omnia Comm. Co. v. United States*, 261 U.S. 502, 510–11 (1923). In *Omnia*, for example, the government requisitioned a steel producer's entire output for the war effort, thereby preventing the plaintiff from exercising purchase rights it had obtained through a contract with the producer. *Id.* at 507. The Supreme Court concluded that the plaintiff's loss was merely "consequential loss or injury" resulting from the requisition, and that no compensation was due the plaintiff. *Id.* at 510. Similarly, in *T.O.F.C., Inc. v. United States*, the government appropriated real property of a bankrupt railroad, terminating the plaintiff's contractual right to operate a particular rail facility and receive the profits. 231 Ct. Cl. 182, 183 (1982). Our predecessor court held that the plaintiff's loss was merely a "consequential injur[y] which result[ed] from the exercise of lawful power." *Id.* at 192. A number of our cases have found no taking where the challenged government action was of general application and the plaintiff was but one member of an affected class of persons. *See, e.g.*, *Palmyra Pac. Seafoods, LLC v. United States*, 561 F.3d 1361, 1365–66 (Fed. Cir. 2009); *Huntleigh USA Corp. v. United States*, 525 F.3d

1370, 1379–80 (Fed. Cir. 2008); *Air Pegasus of D.C., Inc. v. United States*, 424 F.3d 1206, 1216 (Fed. Cir. 2005). As the Supreme Court has explained, "A member of the class which is regulated may suffer economic losses not shared by others. His property may lose utility and depreciate in value as a consequence of regulation. But that has never been a barrier to the exercise of the police power." *Bowles v. Willingham*, 321 U.S. 503, 518 (1944).

In summary, in the cases relied on by the government, the effect of the government action upon the plaintiff was merely collateral or unintended or the action affected a general class. Here, the complaints allege that the effect of the government action on the plaintiffs' property was neither collateral nor unintended and the action affected only Chrysler and GM dealers. The complaints allege that dealer terminations were the direct and intended result of the government's actions directed to Chrysler and GM dealers because the financing was expressly conditioned on the terminations. This case is therefore different from the cases on which the government relies.

A second principle applies where the government's action was direct and intended. In such circumstances, the government may be liable if 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. *See Tex. State Bank v. United States*, 423 F.3d 1370, 1376–77 (Fed. Cir. 2005); *Lion Raisins, Inc. v. United States*, 416 F.3d 1356, 1362–63 (Fed. Cir. 2005); *Casa de Cambio Comdiv S.A., de C.V. v. United States*, 291 F.3d 1356, 1361–62 (Fed. Cir. 2002); *B & G Enters. v. United States*, 220 F.3d 1318, 1323–25 (Fed. Cir. 2000); *Langenegger v. United States*, 756 F.2d 1565, 1572 (Fed. Cir. 1985). An agency relationship may exist where the third party is hired or granted legal authority to carry out the government's business. *See, e.g.*, *Yearsley v. W.A. Ross Constr. Co.*, 309 U.S. 18, 21–23 (1940) (construction company hired to build river dikes); *Lion Raisins*, 416 F.3d at 1363–64 (quasi-public crop marketing committee authorized to set price floors for crops); *Hendler v. United States*, 952 F.2d 1364, 1378–79 (Fed. Cir. 1991) (state officials authorized to perform environmental tests on the plaintiffs' land). Here, GM and Chrysler were not acting as agents of the government in terminating the franchise agreements.

The question of coercion is more complex. While the complaints here allege that the government coerced GM and Chrysler into terminating the franchise agreements, they do not allege that the government either by statute, regulation, or direct order required the terminations.[7] Rather, the complaints allege that the government required the terminations as a condition of financial assistance, and that that action was coercive because the automakers could not survive without the financing. The line between coercion (which may create takings liability) and persuasion

---

[7] To the extent the A&D plaintiffs suggest in their brief that the government "command[ed]" the terminations apart from the financing arrangement, A&D Br. 33 (internal quotations marks omitted), that suggestion is unsupported by the complaint and identifies no mechanism of such "command." For example, the plaintiffs have not made allegations based on the government's ownership interests in New GM and New Chrysler, which chose the particular franchise agreements to include in their acquisitions under 11 U.S.C. § 363, leaving the rest with Old GM and Old Chrysler.

(which does not create takings liability) is highly fact-specific and hardly simple to determine.

Our predecessor court found coercion in *Turney v. United States*, where the government induced the Philippines to forbid exportation of certain military equipment within its borders that the United States had unwittingly sold to the plaintiffs in a surplus auction after World War II. 126 Ct. Cl. 202, 207–08 (1953). The court found that the government had exerted unusual influence over the Philippine government's decision: "Our armed forces had just liberated the Philippines from the Japanese. Our Government had given one hundred million dollars worth of surplus property to the Philippines. . . . When we requested that Government to place an embargo upon the exportation of any of the property, it, naturally, readily complied." *Id.* at 214. Thus, when the embargo placed "irresistible pressure" on the plaintiffs to turn the property over to the United States, it created a taking. *Id.*

In *Langenegger v. United States*, by contrast, this court concluded that the government's influence over an expropriation by the El Salvadoran government was not coercion but "friendly persuasion." 756 F.2d at 1572 (internal quotation marks omitted). Distinguishing *Turney*, we explained that

> the United States cannot be held responsible merely because its activity is that of "friendly" persuasion regarding general policy, common among allies, or when the sole benefit to the United States is the political stability of its neighbors. Diplomatic persuasion among allies is a common occurrence, and as a matter of law, cannot be deemed sufficiently irresistible

> to warrant a finding of [coercion], however difficult refusal may be as a practical matter.

Id. at 1572.

The plaintiffs have not alleged coercion flowing from an existing relationship between the government and a third party that gave the government the ability to exercise general control over the third party's action. Rather they allege monetary inducement designed to compel specific actions. The only appellate takings precedent cited to us involving monetary inducement of third party action is *B & G Enterprises v. United States*, 220 F.3d at 1318. In that case, Congress offered monetary grants to the states on the condition that they adopt laws prohibiting cigarette sales to minors. *Id.* at 1321. California fulfilled the condition by enacting a law banning cigarette vending machines in establishments open to minors, which resulted in the loss of valuable contracts to the plaintiff, a vending machine operator. *Id.* at 1322. We held that the federal government was not liable for a taking. *Id.* at 1323. We concluded that "it was California's decision to create restrictions on the placement of tobacco vending machines, not the federal government's. Congress may have provided the bait, but California decided to bite." *Id.* at 1325. In other words, coercion was not established.

The question here is whether the automakers were coerced by the government's offer of financial assistance.[8] Unfortunately there is a paucity of information as to the relevant circumstances of the gov-

---

[8] For present purposes we do not distinguish the Old and New companies. If that distinction is significant, it may be explored on remand.

ernment's financial assistance to the automakers. The circumstances relevant to the issue of coercion include but are not limited to whether the government insisted on the terminations, whether the terminations would have occurred in any event absent government action, whether the government financing was essential to the companies, whether the government had any role in creating the economic circumstances alleged to give rise to coercion, and whether the government targeted the dealers for termination. Under these circumstances, we think it is premature at this stage in the case to address the issue of coercion and whether, if coercion existed, takings liability follows. In this context coercion is a necessary—but not sufficient feature to establish takings liability.

In declining to decide the coercion issue on the present record, we can and do reject two arguments made by the government related to the issue of coercion.

First, the bankruptcy court's findings do not estop the plaintiffs from arguing that the government coerced the automakers into action. Collateral estoppel only applies if "the issue [in the instant action] is <u>identical</u> to one decided in the first action." *In re Freeman*, 30 F.3d 1459, 1465 (Fed. Cir. 1994) (emphasis added). The issue here is whether the government coerced GM and Chrysler through a coercive offer of financial assistance. The issue before the bankruptcy court was whether New GM and New Chrysler purchased the assets of Old GM and Old Chrysler "in good faith." 11 U.S.C. § 363(m); *see In re Chrysler, LLC*, 405 B.R. 84, 108 (Bankr. S.D.N.Y. 2009); *In re Gen. Motors Corp.*, 407 B.R. 463, 494 (Bankr. S.D.N.Y. 2009). Whatever the bankruptcy court found is immaterial. Its findings on good faith are not collateral estoppel on the issue of coercion.

Second, the government action in this case was not undertaken in a simply proprietary role. Proprietary government action typically involves bargaining with private actors for the provision or procurement of goods and services; the action is deemed proprietary even though the government may enter into the contractual relationship in pursuit of a larger governmental objective. *See, e.g.*, *St. Christopher Assocs., L.P. v. United States*, 511 F.3d 1376, 1385–86 (Fed. Cir. 2008) (mortgage); *Alaska Airlines, Inc. v. Johnson*, 8 F.3d 791, 792–93, 798 (Fed. Cir. 1993) (airfare); *Sun Oil Co. v. United States*, 215 Ct. Cl. 716, 724 (1978) (oil and gas lease). In those cases, the government is usually subject to contractual remedies that make takings liability redundant. *See Hughes Commc'ns Galaxy, Inc. v. United States*, 271 F.3d 1060, 1070 (Fed. Cir. 2002); *Sun Oil*, 215 Ct. Cl. at 770 ("[W]hen [the government] 'comes down from its position of sovereignty and enters the domain of commerce, it submits itself to the same laws that govern individuals there.'" (quoting *Cooke v. United States*, 91 U.S. 389, 398 (1875))). Here, the government did not bargain or contract with the plaintiffs, and the plaintiffs have no ordinary commercial remedy against the government. While the proprietary action doctrine might well bar a takings claim by GM and Chrysler, which signed loan agreements defining the rights between themselves and the government, that doctrine does not appear directly relevant to a takings claim by the plaintiffs.

Yet the government's purpose in requiring the dealer terminations may still be relevant to both the categorical takings and *Penn Central* analyses, as bearing on whether the government's actions were regulatory in nature or were designed to protect the government's financial interest in repayment. The government argues that in requiring a viability plan that included dealer terminations, it acted like a commercial lender, which would have ensured likely repayment of the assistance. *See* Gov't's Colonial Br. 25 (asserting that the government's conditions were "the sort of arrangement that a private party might demand in similar circumstances"); Gov't's A&D Br. 23 (same). Concerns about securing repayment of government loans exist even in loan programs having a predominantly public purpose. *See, e.g.*, *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 737 (1979). To the extent the dealer terminations were designed to protect the government's investment by assuring the viability of New GM and New Chrysler and the repayment of the loans and other assistance, that purpose could be viewed as non-regulatory. But that issue has not been fully developed at this stage, and so we defer its consideration in the first instance to the Claims Court.

C

We turn next to the alleged economic impact of the government action. In order to establish a regulatory taking, a plaintiff must show that his property suffered a diminution in value or a deprivation of economically beneficial use. This is equally true under the categorical test of *Lucas v. South Carolina Coastal Council* and the *Penn Central* test. *Lucas*, 505 U.S. at 1015 (plaintiff must show loss of "all economically beneficial or productive use"); *Penn Cent.*, 438 U.S. at 124 (court weighs "economic impact of the regulation on the claimant"); *see also Brown*, 538 U.S. at 240 n.11 ("[J]ust compensation for a net loss of zero is zero."). We have measured the diminution in value of the plaintiff's property by "'the change, if any, in the fair market value caused by the regulatory imposition," where the alleged taking is permanent rather than temporary. *Forest Props., Inc. v. United States*, 177 F.3d 1360, 1367 (Fed. Cir. 1999) (quoting *Fla. Rock Indus., Inc. v. United States*, 18 F.3d 1560, 1567 (Fed. Cir. 1994)). "[I]f the regulatory action is not shown to have had a negative economic impact on the [plaintiff's] property, there is no regulatory taking." *Hendler v. United States*, 175 F.3d 1374, 1385 (Fed. Cir. 1999).

Thus, by necessity, proving economic loss requires a plaintiff to show what use or value its property would have but for the government action. We have often rejected takings claims where plaintiffs failed to make such a showing. In *Forest Properties*, for example, we rejected a takings claim because the plaintiff "failed to introduce convincing evidence to show the amount, if any, by which the value of the relevant property . . . was reduced." 177 F.3d at 1367. The plaintiff had acquired 62 acres of land, 9.4 acres of which were protected wetlands that the plaintiff was denied a permit to develop. *Id.* at 1362–63. In its takings suit, the plaintiff introduced evidence that it had lost significant profits as a result of the permit denial. *Id.* at 1367. But the plaintiff failed to produce evidence that showed "the amount by which the fair market value of the 62 acres was reduced by the denial of the permit," and so we concluded there was insufficient evidence of a taking. *Id.* Similarly, in *Seiber v. United States*, we found no temporary taking where the plaintiffs failed to show the economic impact of a delay in approval of a logging permit. 364 F.3d 1356, 1371–72 (Fed. Cir. 2004). Thus, a showing of but-for economic use or value is a necessary element of a regulatory takings claim.

Since there can be no regulatory taking without a showing of but-for decline in value, a takings plaintiff must also allege sufficient facts in its complaint to show what use or value its property would have had. The Claims Court rules require "a short and plain statement of the claim showing that the pleader is entitled to relief." R. Ct. Fed. Cl. 8(a)(2). This means the complaint must contain "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable." *Id.* If the plaintiff fails to include such allegations in his complaint, it is deficient.

In an analogous case, the Supreme Court found a securities fraud complaint deficient because it only alleged that the plaintiffs paid "artificially inflated purchase prices" for the defendant's stock. *See Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 347 (2005) (internal quotation marks omitted). As a matter of securities law, the Court concluded that inflated purchase prices were not per se economic losses. *Id.* at 342. The Court, applying general requirements for pleading, held that the complaint was deficient—it only stated that the plaintiffs purchased stock at an inflated price, not that a later price drop caused them economic loss. *Id.* at 346–48. The Court drew a direct link between the substantive law and the sufficiency of the complaint: "Our holding about plaintiffs' need to *prove* proximate causation and economic loss leads us also to conclude that the plaintiffs' complaint here failed adequately to *allege* these requirements." *Id.* at 346 (emphasis in original).

In this case, the government argues that the plaintiffs have failed to sufficiently plead economic loss, and that in reality the franchise agreements were worthless absent the government's financial assistance to the automakers. We agree that the plaintiff's allegations are insufficient. The complaints contain no allegations regarding the but-for economic loss of value of the plaintiffs' franchises from which to establish an economic loss. Absent an allegation that GM and Chrysler would have avoided bankruptcy but for the government's intervention and that the franchises would have had value in that scenario, or that such bankruptcies would have preserved some value for the plaintiffs' franchises, the terminations actually had no net negative economic impact on the plaintiffs because their franchises would have lost all value regardless of the government action. Having failed to include such allegations, the dealers fail to satisfy the pleading standards necessary to survive a motion to dismiss.

However, we must disagree with the government that the proper remedy is to dismiss the complaints. The proper remedy is rather to grant the plaintiffs leave to amend their complaints. The Claims Court rules liberally provide for amendments of the complaint after the filing of the defendant's answer. *See* R. Ct. Fed. Cl. 15(a)(2) ("[A] party may amend its pleadings [before trial] only with the opposing party's written consent or the court's leave. The court should freely grant leave when justice so requires."). Interpreting an analogous provision of the Federal Rules of Civil Procedure, the Supreme Court explained that this mechanism should be liberally allowed:

> In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, be "freely given."

Foman v. Davis, 371 U.S. 178, 182 (1962) (quoting Fed. R. Civ. P. 15(a)).

We think those principles support a grant of leave to amend in this case. The plaintiffs have failed to properly allege economic loss, but at oral argument in this court they disputed the government's assertion that the franchises were valueless and made clear that they intended to establish loss of value. In this situation the appropriate remedy is to grant leave to amend to include specific allegations establishing loss of value. Of course it would not be sufficient to include conclusory loss of value allegations. *See Iqbal*, 556 U.S. at 678 ("A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" (quoting *Twombly*, 550 U.S. at 555)).

D

Finally, the "distinct investment-backed expectations" of the plaintiffs are a factor of the *Penn Central* analysis that the parties have not addressed. *See* 438 U.S. at 124. Subsequent cases have clarified that "to support a claim for a regulatory taking, an investment-backed expectation must be reasonable." *Cienega Gardens v. United States*, 331 F.3d 1319, 1346 (Fed. Cir. 2003) (internal quotation marks omitted); *see Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005 (1984) (stating that "reasonable investment-backed expectations" are one factor in the takings analysis). Assessing the reasonableness of a plaintiff's expectations "is an objective, but fact-specific inquiry into what, under all the circumstances, the [plaintiff] should have anticipated." *Cienega Gardens*, 331 F.3d at 1346; *see id.* at 1348–53 (engaging in extensive analysis of whether "a reasonable developer in the [plaintiff's] circumstances" would have held the same expectations).

While the parties do not address this factor in this appeal, it will necessarily be a feature of the Claims Court's analysis under *Penn Central*. The Claims Court should engage in "an objective, but fact-specific inquiry," *id.* at 1346, into the reasonableness of the plaintiffs' expectation that their franchise agreements would be continued absent government action. We express no opinion on the proper analysis of this factor. It will be up to the Claims Court to weigh the reasonableness of the plaintiffs' expectations in the first instance.

CONCLUSION

We conclude that the Claims Court properly declined to dismiss the plaintiffs' complaints at this preliminary stage. While the plaintiffs' allegations of economic loss are deficient in their present form, the deficiencies may be cured, and the Claims Court is instructed to grant the plaintiffs leave to make such curative amendments as may be necessary. Further proceedings must be consistent with this opinion.

REMANDED

COSTS

No costs.

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT DENYING PETITIONS FOR REHEARING EN BANC (MARCH 17, 2021)

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

TAYLOR & SONS, INC., CEDRIC THEEL, INC.,
WHITEY'S, INC., RFJS COMPANY, LLC,
JIM MARSH AMERICAN CORPORATION,
LIVONIA CHRYSLER JEEP, INC.,
BARRY DODGE INC.,

Plaintiffs-Appellants,

ALLEY'S OF KINGSPORT, INC., ET AL.,

Plaintiffs,

v.

UNITED STATES,

Defendant-Appellee.

MIKE FINNIN MOTORS, INC.,
GUETTERMAN MOTORS, INC.,

Plaintiffs-Appellants,

ALLEY'S OF KINGSPORT, INC., ET AL.,

Plaintiffs,

v.

UNITED STATES,

Defendant-Appellee.

No. 2020-1185, 2020-1205

Appeal from the United States Court of Federal Claims in Nos. 1:10-cv-00647-NBF, 1:11-cv-00100-NBF, 1:12-cv-00900-NBF, Senior Judge Nancy B. Firestone.

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

PER CURIAM.

Mike Finnin Motors, Inc. and Guetterman Motors, Inc. filed a combined petition for panel rehearing and rehearing en banc. Taylor & Sons, Inc., Cedric Theel, Inc., Whitey's, Inc., RFJS Company, LLC, Jim Marsh American Corporation, Livonia Chrysler Jeep, Inc., and Barry Dodge, Inc. separately filed a combined petition for panel rehearing and rehearing en banc. The petitions were referred to the panel that heard the appeal, and thereafter the petitions for rehearing en banc were referred to the circuit judges who are in regular active service.

Upon consideration thereof,

IT IS ORDERED THAT:

---

* Circuit Judge Hughes did not participate.

The petitions for panel rehearing are denied.

The petitions for rehearing en banc are denied.

The mandate of the court will issue on March 24, 2021.

FOR THE COURT

/s/ Peter R. Marksteiner
Clerk of Court

Date: March 17, 2021

FEDERAL CIRCUIT DISPOSITION OF CFC TRIAL VERDICTS, 2001-20

Year	Plaintiff name	Type	CFC Verdict	Fed Cir	Author/Agree/Dissent
2020	*Taylor&Sons*	Regulatory	USA	affirmed	Taranto / Dyk, Stoll
	Alford	Regulatory	Citizen	reversed	Dyk / O'Malley, Schall
	Gadsden	Direct	Citizen	reversed	Stoll /Taranto, Wallach
2019	none				
2018	*Katzin*	Direct	Citizen	reversed	Linn /Prost / Newman
	Love Terminal	Both	Citizen	reversed	Dyk / Clevinger, Prost
	St. Bernard Parish	Direct	Citizen	reversed	Dyk / Lourie, Moore
2017	*Banks*	Direct	Citizen	reversed	Wallach / Reyna, Stoll
	Starr	Exaction	Citizen	reversed	Prost / Reyna, Wallach
	Reforce	Regulatory	Citizen	reversed	Stoll / Clevinger, Newman
2016	none				
2015	*Lost Tree*	Reg-*Lucas*	Citizen	affirmed	Reyna / Prost, Newman
2014	none				
2013	*McGuire*	Regulatory	USA	affirmed	Dyk / Prost, Reyna

Year	Plaintiff name	Type	CFC Verdict	Fed Cir	Author/ Agree/Dissent
2012	*Hage*	Both	Citizen	reversed	Moore / Lourie, Linn
	Otay Mesa	Direct	Citizen	reversed	Schall / Newman, Moore
2011	*Arkansas Game*	Direct	Local Gov't	reversed	Dyk / Whyte, Gajarza
2010	none				
2009	*Rose Acres*	Regulatory	Citizen	reversed	Michel / Moore, Huff
2008	none				
2007	*Cienaga*	Regulatory	Citizen	reversed	Dyk / *en banc* / Newman
2006	*Ind. Park Apts.*	Regulatory	Citizen	reversed	Bryson / Michel, Newman
2005	none				
2004	*American Pelagic*	Regulatory	Citizen	reversed	Schall / Bryson, Clevinger
2003	Cooley	Regulatory	Citizen	remand	Rader / Mayer, Dyk
	Ridge Line	Direct	USA	remand	Michel / Clevinger, Bryson
	Maritrans	Regulatory	Citizen	remand	Schall / Bryson, Linn
2001-2	none				

FEDERAL CIRCUIT TAKINGS ANALYSIS: AWARDS OF MONEY TO PROPERTY OWNERS WERE AFFIRMED ONLY IN CAQUELIN (RTT) AND *LOST TREE*, THE OTHER 79 BEING REVERSED OR REMANDED

Plaintiff Name	Rails 2 Trails	Regulatory	Direct	Foreign, Extraction
2020				
Taylor & Sons	x			
Alford		x		
Swartzlander			x	
Gadsden			x	
Caquelin	x			
Taylor		x		
Anaheim Gardens		x		
2019				
Callaway Manor		x		
Am Bankers		x		
Campbell		x		
Rio Linda			x	
VI Port Authority				x

Plaintiff Name	Rails 2 Trails	Regulatory	Direct	Foreign, Extraction
Welty				
Saline Associates		x		
2018				
Katzin		x		
Martin			x	
Love Terminal		x	x	
Alimanestianu		x		
St. Bernard Parrish			x	
2017				
Banks			x	
Starr				
Freeman		x		
Petro Hunt			x	
Hage			x	

Plaintiff Name	Rails 2 Trails	Regulatory	Direct	Foreign, Extraction
Reoforce		x		
2016				
Abbas				x
Piszel		x		x
2015				
Normandy		x		
Dimare		x		
Barlow			x	
Res Investments		x		
Lost Tree		x		
2014				
Biafora		x		
A&D		x		

Plaintiff Name	Rails 2 Trails	Regulatory	Direct	Foreign, Extraction
2013				
Stueve			x	
Casitas		x		
McGuire		x		
2012				
Mehaffy		x		
Hage		x	x	
Otay Mesa			x	
Hearts Bluff		x		
2011				
Mildenberger			x	
Arkansas Game			x	

Plaintiff Name	Rails 2 Trails	Regulatory	Direct	Foreign, Extraction
2010				
CRV		x	x	
Kalos				x
2009				
Palmyra		x		
Rose Acres		x		
Cary		x		
NW LA			x	
Schooner		x		
Acceptance		x		
2008				
Bair		x		
Huntleigh		x		

Plaintiff Name	Rails 2 Trails	Regulatory	Direct	Foreign, Extraction
2007				
Cienega		x		
2006				
Ind. Park Apts.		x		
Barclay	x			
John Sand			x	
2005				
Peanut		x		
Norman				x
Lion Raisins		x		
Air Pegasus		x		
Modens				x
TX St Bank			x	

Plaintiff Name	Rails 2 Trails	Regulatory	Direct	Foreign, Extraction
2004				
Seiber		x		
Union El			x	
Bass Enter		x		
Caldwell	x			
American Pelagic		x		
Schall		x		
Morris		x		
2003				
Cooley		x		
C/Manor		x		
Washoe County			x	
Ridge Line			x	
Maritrans		x		

SELECT DOCUMENT EXCERPTS

Steven Rattner,
OVERHAUL: AN INSIDER'S ACCOUNT OF THE OBAMA ADMINISTRATION'S EMERGENCY RESCUE OF THE AUTO INDUSTRY
HMH Books: Kindle Ed. (2010)

"We had only five frenzied weeks to prepare for this moment." p. 2.

"I worried about . . . putting the automakers into 'controlled bankruptcy', a radical approach that defined conventional wisdom." p. 2.

"From our perspective, with bankruptcy came the silver lining that, under court protection, the company would have the right to tear up whatever franchise agreements it needed to." p. 195.

"In the fine print of the $33.3 billion of debtor-in-possession financing that we'd extended to the company, they set a deadline of July 10. At the end of that time—a scant forty days! — either the Treasury would have to extend its financing or GM would be forced to liquidate. This was the financial equivalent of putting a gun to the heads of the bankruptcy judge, GM's stakeholders, and of course Team Auto itself." p. 251.

"Harry [Wilson] had marshaled other . . . evidence, such as an analysis suggesting that Chrysler's disappearance need not completely destroy its dealers. Most of the jobs and profits in a dealership come not from sales of new cars but from service and used cars. Both would be needed if Chrysler liquidated." p. 165.

Office of the Speical Inspector General
for the Troubled Asset Relief Program (SIGTARP)
***Factors Affecting the Decisions of General Motors and Chrysler to Reduce their Dealership Networks*, SIGTARP-10-008 (JULY 19, 2010)**

"none of the Auto Team leaders or personnel had any experience or expertise in the auto industry." p. 2.

" . . . at a time when the country was experiencing the worst economic downturn in generations and the Government was asking its taxpayers to support a $787 billion stimulus package designed primarily to preserve jobs, Treasury made a series of decisions that may have substantially contributed to the accelerated shuttering of thousands of small businesses and thereby potentially adding tens of thousands of workers to the already lengthy unemployment rolls — all based on a theory and without sufficient consideration of the decisions' broader economic impact. That the automakers have offered reinstatement to hundreds of terminated dealerships in response to Congressional action without any apparent sacrifice to their ongoing viability further demonstrates the possibility that such dramatic and accelerated dealership closings may not have been necessary . . . " p. 31.

"When asked explicitly whether the Auto Team could have left the dealerships out of the restructurings, Mr. Bloom, the current head of the Auto Team, confirmed that the Auto Team "could have left any one component [of the restructuring plan] alone," but that doing so would have been inconsistent with the President's mandate for "shared sacrifice." p. 33.

"Mr. Bloom referred to this as "taking the pain and getting past it." p. 13.

"The Auto Team felt the companies' best chance of success required 'utilizing the bankruptcy code in a quick and surgical way' and noted it would have been a 'waste of taxpayer resources' for the auto manufacturers to exit bankruptcy when they knew the networks would still have to be reduced." p. 28.

"In an internal memo, Auto Team officials reiterated that their goal was to take advantage of the bankruptcy code to reject dealership franchise agreements without significant up-front costs." p. 13.

"GM expected that normal attrition would eventually lead to an 'ideal' network of approximately 3,00 dealerships." p. 16.

"Key members of the Auto Team — including Messrs. Rattner and Bloom — stated that they did not consider cost savings to be a factor in determining the need for dealership closures." p. 25

Dealers Second Amended Complaint
US Court of Federal Claims
Colonial Chevrolet Co., Inc. Et Al. v. USA
1:10-cv-00647-NBF, ECF 101, ¶ 97

"97. The Government assumed, and appropriated to itself as a direct Taking, the intangible rights the Plaintiffs owned under the franchise agreements. As majority shareholder of GM and controlling shareholder of Chrysler, the Government had a substantial interest in acquiring the underlying rights that gave franchises their value, such as the exclusive right to sell and service specified brands of vehicles in designated areas. While the franchise agreements were terminated, those valuable rights were neither destroyed nor abandoned. To the contrary, those rights (most importantly the right to sell the manufacturers' autos in the designated territories) were retained by the Government or retransferred to others."

Government's Answer to Complaint
US Court of Federal Claims
Colonial Chevrolet Co., Inc. Et Al. v. USA
1:10-cv-00647-NBF, ECF 133, ¶ 97

"Admits the allegations contained in the second sentence of paragraph 97 that the United States was (but is no longer) the majority shareholder in new GM and the controlling shareholder in Chrysler; otherwise denies the allegations contained in the second sentence of paragraph 97."

INDICATIVE SUMMARY OF TERMS FOR SECURED TERM LOAN FACILITY (DECEMBER 19, 2008)

Based upon the preliminary information provided to the United States Department of the Treasury (the "UST") regarding the proposed Facility, the following Summary of Terms outlines (for discussion purposes only) the key terms and conditions of a potential transaction. This Summary of Terms is not intended to be a comprehensive list of all relevant terms and conditions of the transactions contemplated herein. Further, these terms are subject to completion of due diligence, legal and other internal review and receipt of related approvals satisfactory to UST and any other approval procedures customary for a transaction of this nature. Final terms will be included in definitive documentation based on this Summary of Terms and executed by the applicable parties. This Summary of Terms is intended for the sole benefit of the Company identified on Appendix A and certain of its affiliates and shall not be relied upon by any other person.

Facility:

A term loan that is full recourse to Borrower(s) (except as provided on Appendix A), secured by a first or junior lien, as applicable, on all of Borrower(s)' assets, and is subject to the terms and conditions contained herein and in the definitive Facility documentation.

Borrower(s):

As set forth on Appendix A.

Lender:

UST, on a committed basis.

Guarantor(s):

As set forth on Appendix A. The Borrower(s) and the Guarantor(s) shall hereinafter each be referred to as a "Loan Party," and collectively, as "Loan Parties."

Closing Date:

As set forth on Appendix A.

Loan:

Lender will make available to Borrower(s) a loan in an aggregate amount up to the amount set forth on Appendix A (the "Loan Amount") in predetermined draw amounts, as further specified on Appendix A.

Availability:

On the dates specified in Appendix A, Borrower(s) may request Lender to fund a draw up to an amount set forth on Appendix A for such date (each such funding, an "Advance"). At the time of each funding of an Advance by the Lender (each, an "Advance Date"), Borrower(s) shall be in compliance with all of the covenants, representations and warranties of this Facility.

Unless otherwise agreed by the UST, Borrower(s) must provide the UST with its request at least two (2) business days' prior to the date on which an Advance will be funded by Lender. For the avoidance of doubt, notice received by the UST after 5:00 pm Washington, DC time on any business day shall be deemed to be received on the following business day.

Use of Funds:

The Borrower(s) shall utilize the proceeds from the Advances as set forth on Appendix A.

Currencies:

All Advances, prepayments and payments of fees and indemnities and any other payments under the Facility shall be made in United States Dollars.

Collateral:

As set forth on Appendix A. As security for Borrower(s)' performance of all of their obligations under the Facility and Guarantor(s)' performance of their obligations under the Guaranties, the applicable Loan Parties will grant to Lender a security interest in and to the Collateral (with the applicable lien priority specified with respect thereto on Appendix A).

Maturity Date:

The Facility will terminate and the aggregate outstanding Advances, together with interest thereon at the applicable Interest Rate and all fees, expenses, indemnities and other amounts owing to Lender, will be due and fully payable on the earliest of (i) the Expiration Date (as set forth on Appendix A), (ii) the occurrence of a Termination Event, or (iii) the occurrence of an Event of Default, at the option of the Lender.

Interest Rate:

Each Advance shall accrue interest at a rate per annum equal to (i) the sum of (x) the greater of (A) three-month LIBOR and (B) the LIBOR Floor, plus (y) the Spread Amount, multiplied by (ii) the outstanding principal balance of such Advance. The Interest Rate shall be determined on the Closing Date and reset on each Interest Payment Date and shall be calculated on a 360-day year basis for the actual number of days elapsed (including the first day but excluding the last day) occurring in the related Interest Period. Interest on the Advances shall be payable in arrears on each Interest Payment Date in respect of the previous Interest Period, and together with all outstanding principal and other amounts owing, on the Maturity Date.

Interest Period:

For each Advance, (i) initially, the period commencing on the related Advance Date and ending on the calendar day prior to the next succeeding Interest Payment Date, and (ii) thereafter, each period commencing on an Interest Payment Date and ending on the calendar day prior to next succeeding Interest Payment Date. Notwithstanding the foregoing, no Interest Period may end after the Maturity Date.

Interest Payment Date:

Set forth on Appendix A.

LIBOR Floor:

Set forth on Appendix A.

Spread Amount:

Set forth on Appendix A.

Mandatory Prepayments:

Subject to any mandatory prepayments from the following amounts required under existing secured credit agreements, Borrower(s) shall apply 100% of the net cash proceeds of any of the following transactions to prepay, on a pro rata basis, the aggregate outstanding Advances: (i) sales, liquidations or other transfers of any Collateral other than sales in the ordinary course of business, (ii) the incurrence by any Borrower of any debt (other than permitted indebtedness including the refinancing of prior indebtedness) or any equity or other capital raises (other than contributions of indemnity payments received by the Company and required to be applied to satisfy obligations of its subsidiaries), either public or private, whether in connection with a primary securities offering, a business combination of any kind, or otherwise, (iii) to the extent unencumbered, non-ordinary course asset sales (including aircraft divestments); provided that, with respect to clause (ii), in no event will any of the Collateral or Lender's security interest therein be released to the applicable Loan Party until the aggregate outstanding Advances, together with interest thereon at the applicable Interest Rate and all fees, expenses, indemnities and other amounts owing to Lender shall have been paid in full. Notwithstanding anything to the contrary contained herein, any amounts advanced and repaid cannot be reborrowed.

Optional Prepayments:

Upon written notice to the Lender at least two business days in advance, Borrower(s) may prepay all or a portion of the outstanding Advances, without penalty; provided that in no event will any of the

Collateral be released to the applicable Loan Party until the aggregate outstanding Advances, together with interest thereon at the applicable Interest Rate and all fees, expenses, indemnities and other amounts owing to Lender shall have been paid in full. Notwithstanding anything to the contrary contained herein, any amounts advanced and repaid cannot be reborrowed.

Executive Privileges and Compensation:

Until such time as the Facility is repaid in full and the UST ceases to own any equity securities of the Company acquired pursuant to this Facility (including any Warrants and underlying Equity Interests acquired by the UST upon exercise thereof) (the "Relevant Period"), the following restrictions on executive privileges and compensation shall apply to the "Relevant Companies," as defined on Annex A:

1. The Relevant Companies shall be subject to the executive compensation and corporate governance requirements of Section 111(b) of the EESA and the UST's guidelines that carry out the provisions of such subsection for systemically significant failing institutions as set forth in Notice 2008-PSSFI;

2. The Relevant Companies and their respective SEOs (as defined below) shall modify or terminate all benefit plans, arrangements and agreements (including golden parachute agreements) to the extent necessary to be in compliance with Section 111(b) of the EESA and the guidelines set forth in Notice 2008-PSSFI;

3. The Relevant Companies shall comply in all respects with the limits on annual executive compensation deductibles imposed by Section 162(m)(5) of Internal Revenue Code of 1986, as amended, as applicable;

4. None of the Relevant Companies shall pay or accrue any bonus or incentive compensation to the 25 most highly compensated employees (including the SEOs) (collectively, the "Senior Employees") except as approved by the President's Designee;

5. None of the Relevant Companies shall adopt or maintain any compensation plan that would encourage manipulation of their reported earnings to enhance the compensation of any of its employees; and

6. The Relevant Companies shall maintain all suspensions and other restrictions of contributions to Benefit Plans that are in place or initiated as of the Closing Date.

At any time during the Relevant Period, the Lender shall have the right to require any Relevant Company to claw back any bonuses or other compensation, including golden parachutes, paid to any Senior Employees in violation of any of the foregoing.

Within 120 days of the Closing Date, the principal executive officer (or person acting in a similar capacity) of each Relevant Company shall certify in writing, under penalty of perjury, to the Lender's Chief Compliance Officer that such Relevant Company's compensation committee has reviewed the compensation arrangements of the SEOs with its senior risk officers and determined that the compensation arrangements do not encourage the SEOs to take unnecessary and excessive risks that threaten the value of such Relevant Company. Each Relevant Company shall preserve appropriate documentation and records to substantiate such certification in an easily accessible place for a period not less than three (3) years following the Maturity Date.

"President's Designee" means one or more officers from the Executive Branch designated by the President. "SEOs" means the Loan Parties' "senior executive officers" as defined in subsection 111(b)(3) of the EESA and regulations issued thereunder, including the rules set forth in 31 C.F.R. Part 30, or as otherwise may be defined by the UST. "Benefit Plan" means, collectively, any compensation, bonus, incentive and other benefit plans (including supplemental executive retirement plans), arrangements and agreements (including golden parachute, severance and employment agreements).

Asset Divestment:

With respect to any private passenger aircraft or interest in such aircraft that is owned or held by any Loan Party or any subsidiary immediately prior to the Closing Date, such party shall demonstrate to the satisfaction of the President's Designee that it is taking all reasonable steps to divest itself of such aircraft or interest. Further, no Loan Party shall acquire or lease any such aircraft or interest in such aircraft.

Material Transactions:

The Loan Parties shall provide prompt notice to the President's Designee of any asset sale, investment, contract, commitment, or other transaction not in the ordinary course of business proposed to be entered into with a value in excess of $100 million (a "Material Transaction"). The President's Designee shall have the right to review and prohibit any such Material Transaction if the President's Designee determines that it would be inconsistent with or detrimental to the long¬term viability of such Loan Party.

Restrictions on Expenses:

During the Relevant Period, the Company shall maintain and implement its comprehensive written policy on corporate expenses ("Expense Policy") and distribute the Expense Policy to all employees of the Company and its subsidiaries covered under the policy. Any material amendments to the Expense Policy shall require the prior written consent of the President's Designee, and any material deviations from the Expense Policy, whether in contravention thereof or pursuant to waivers provided for thereunder, shall promptly be reported to the President's Designee.

The Expense Policy shall, at a minimum: (i) require compliance with all applicable law, (ii) apply to the Company and all of its subsidiaries, (iii) govern (a) the hosting, sponsorship or other payment for conferences and events, (b) travel accommodations and expenditures, (c) consulting arrangements with outside service providers, (d) any new lease or acquisition of real estate, (e) expenses relating to office or facility renovations or relocations, and (f) expenses relating to entertainment or holiday parties; and (iv) provide for (a) internal reporting and oversight, and (b) mechanisms for addressing non-compliance with the policy.

Restructuring Plan:

By no later than February 17, 2009, the Company shall submit to the President's Designee a plan to achieve and sustain the long-term viability, international competitiveness and energy efficiency of the Company and its subsidiaries (the "Restructuring Plan"), which Restructuring Plan shall include specific actions intended to result in the following:

1. Repayment of the Loan Amount and any other financing extended by the Government under all applicable terms and conditions;
2. Ability of the Company and its subsidiaries to (x) comply with applicable Federal fuel efficiency and emissions requirements, and (y) commence domestic manufacturing of advanced technology vehicles, as described in section 136 of the Energy Independence and Security Act of 2007 (Public Law 110-140; 42 U.S.C. 17013);
3. Achievement by the Company and its subsidiaries of a positive net present value, using reasonable assumptions and taking into account all existing and projected future costs, including repayment of the Loan Amount and any other financing extended by the Government;
4. Rationalization of costs, capitalization, and capacity with respect to the manufacturing workforce, suppliers and dealerships of the Company and its subsidiaries; and

5. A product mix and cost structure that is competitive in the United States marketplace.

The Restructuring Plan shall extend through 2010 monthly and annually through 2014 and shall include detailed historical and projected financial statements with supporting schedules and additional information as may be requested by the President's Designee.

Restructuring Targets:

In addition to the Restructuring Plan, the Company and its subsidiaries shall use their best efforts to achieve the following targets:

1. Reduction of their outstanding unsecured public indebtedness (other than with respect to pension and employee benefits obligations) by not less than two-thirds through conversion of existing public debt into equity or debt (a "Bond Exchange") and other appropriate means;

2. Reduction of the total amount of compensation, including wages and benefits, paid to their U.S. employees so that, by no later than December 31, 2009, the average of such total amount, per hour and per person, is an amount that is equal to the average total amount of such compensation, as certified by the Secretary of Labor, paid per hour and per person to employees of with Nissan Motor Company, Toyota Motor Corporation, or American Honda Motor Company whose site of employment is in the United States (the "Compensation Reductions");

3. Elimination of the payment of any compensation or benefits to U.S. employees of the Company or any subsidiary who have been fired, laid-off, furloughed, or idled, other than customary severance pay (the "Severance Rationalization").

4. Application of the work rules to their U.S. employees, beginning not later than December 31, 2009, in a manner that is competitive with Nissan Motor Company, Toyota Motor Corporation, or American Honda Motor Company whose site of employment is in the United States (the "Work Rule Modifications" and, together with the Compensation Reductions and Severance Rationalization, the "Labor Modifications"); and

5. Provision that not less than one-half of the value of each future payment or contribution made by them to the account of the voluntary employees beneficiary association (or similar account) ("VEBA") of a labor organization representing the employees of the Company and its subsidiaries shall be made in the form of the stock of the Company or one of its subsidiaries (the "VEBA Modifications"), and the total value of any such payment or contribution shall not exceed the amount of any such payment or contribution that was required for such time period under the collective bargaining agreement that applied as of the day before the Closing Date.

Term Sheet Requirements:

By no later than February 17, 2009, the Company shall submit to the President's Designee:

1. A term sheet signed on behalf of the Company and the leadership of each major U.S. labor organization that represents the employees of the Company and its subsidiaries (collectively, the "Unions") providing for the Labor Modifications; and

2. A term sheet signed on behalf of the Company and representatives of the VEBA providing for the VEBA Modifications; and

3. A term sheet signed on behalf of the Company and representatives of holders of the Company's public debt providing for the Bond Exchange.

Restructuring Plan Report:

On or before March 31, 2009, the Company shall submit to the President's Designee a written certification and report detailing the progress made by the Company and its subsidiaries in implementing the Restructuring Plan. The report shall identify any deviations from the Restructuring Targets and explain the rationale for these deviations, including an explanation of why such deviations do not jeopardize the Borrower's long-term viability. The report shall also include evidence satisfactory to the President's Designee that the following events have occurred:

1. Approval of the Labor Modifications by the members of the Unions:

2. Receipt of all necessary approvals of the VEBA Modifications other than regulatory and judicial approvals, provided that the Company must have filed and be diligently prosecuting applications for any necessary regulatory and judicial approvals; and

3. The commencement of an exchange offer to implement the Bond Exchange.

President's Designee Review/Certification:

The President's Designee will review the Restructuring Plan Report and other materials submitted by the Company to determine whether the Company and its subsidiaries have taken all steps necessary to achieve and sustain the long-term viability, international competitiveness and energy efficiency of the Company and its subsidiaries in accordance with its Restructuring Plan. If the President's Designee determines that these standards have been met, he will so certify (the "Plan Completion Certification").

Termination Event:

If the President's Designee has not issued the Plan Completion Certification by March 31, 2009 or such later date (not to exceed 30 days after March 31, 2009) as the President's Designee may specify (the "Certification Deadline"), the maturity of the Loan shall be automatically accelerated and any portion of the Loan Amount not invested in or loaned to the Borrower's principal financial subsidiaries shall become due and payable on the 30th day after the Certification Deadline, without any further action on the part of the Lender.

Reporting Requirements:

In addition to the foregoing, the Loan Parties shall deliver to Lender the following periodic reports and certifications:

1. Weekly status report, commencing with the week of December 15, 2008, detailing the 13-week rolling cash forecast for the Company and its subsidiaries (on a consolidated and consolidating basis);

2. Bi-weekly liquidity status report, commencing with the second week following the Closing Date, detailing, with respect to the Company and its subsidiaries (on a consolidated and consolidating basis): (i) the current liquidity profile; (ii) expected liquidity needs; (iii) any material changes in their business since the date of the last status report; (iv) any transfer, sale, pledge or other disposition of any material asset since the date of the last status report; and (v) any changes to their capital structure.

3. Monthly certification that (i) the Expense Policy conforms to the requirements set forth herein; (ii) the Company and its subsidiaries are in compliance with the Expense Policy; and (iii) there have been no material amendments thereto or deviations therefrom other than those that have been disclosed to and approved by Lender.

4. Monthly certification that all Benefit Plans with respect to Senior Executive Officers are in compliance with Section 111(b) of the EESA; and

5. Certified copies of all publicly filed financial reports and auditors opinions.

Access to Information and Right to Audit:

At all times while the Facility is in effect, the Borrower(s) and each of their direct and indirect subsidiaries shall permit the Lender and its agents, consultants, contractors and advisors, and the Special Inspector General of the Troubled Assets Relief Program, access to personnel and any books, papers, records or other data that may be relevant to the financial assistance, including compliance with the financing terms and conditions.

Representations and Warranties:

As of each day the Facility is in place, the Loan Parties shall be deemed to make customary corporate and asset-level representations and warranties to Lender.

In addition, with respect to Warrants currently issued to the UST and to be issued to the UST under the Facility as provided below, the Borrower(s) will represent and warrant to the UST that, as of the date of this Indicative Summary of Terms and each date any Warrants are delivered, (i) the Warrants have been duly authorized and constitute a valid and legally binding obligation of the Company enforceable against it in accordance with its terms; (ii) the shares of common stock issuable upon exercise of the Warrants (the "Warrant Shares") have been duly authorized and reserved for issuance upon exercise of the Warrants, and when so issued in accordance with the terms of the Warrants will be validly issued, fully paid, and non-assessable; (iii) Loan Parties have the corporate power to enter into this Facility, to execute and deliver the related Facility documentation and the Warrants and to carry out its obligations hereunder and thereunder (which includes the issuance of the Warrants and Warrant Shares); (iv) the execution, delivery, and performance by Loan Parties of the Facility documents and the Warrants, and the consummation of the transactions contemplated hereby and thereby, have been duly authorized by all necessary corporate action on their respective parts, and no further approval or authorization is required on their respective parts; (v) each Facility document, when executed and delivered by the applicable Loan Parties and Lender, is a valid, binding and enforceable obligation of each such Loan Party.

Conditions Precedent to Closing:

Closing of the Facility and the funding of the first Advance will be subject to, the satisfaction of customary conditions precedent, including but not limited to:

1. Execution of mutually satisfactory Facility documentation and completion of all conditions to funding contained therein;

2. Receipt of customary legal opinions from in-house, domestic and local foreign counsel to the Loan Parties acceptable to Lender including, but not limited to, security interest perfection, PTO filings and analogous foreign law opinions, general corporate matters and enforceability, and an Investment Company Act opinion;

3. Receipt of officer's certificates and standard closing documents and certificates with

respect to each Loan Party, each in a form acceptable to Lender;

4. The Lender's interests in the Collateral shall be perfected in accordance with applicable law (except to the extent the interests will be perfected on a post-closing basis, as may be agreed to by the Lender) and all necessary waivers, amendments, approvals and consents to the pledge of such Collateral shall have been obtained;

5. With respect to Collateral on which Lender will have a first priority lien, evidence that all then-existing liens thereon have been released or will be released simultaneously with the funding of the first Advance;

6. With respect to Collateral on which Lender will have a lien of junior priority, an intercreditor agreement duly executed by the other lienholders, in form and substance acceptable to Lender in its sole discretion;

7. With respect to any equity investments that constitute Collateral, receipt of approvals duly executed by the Loan Parties' applicable creditors consenting to the pledge of such equity investments, to the extent required;

8. With respect to any real property that constitutes Collateral, receipt of an environmental indemnity from the applicable Loan Party;

9. Receipt of approvals duly executed by the Guarantor(s)' applicable creditors consenting to the guaranty, to the extent required;

10. A waiver shall have been duly executed by the Loan Parties and each SEO and delivered to the UST releasing the UST from any claims that the Loan Parties and/or the SEOs may otherwise have as a result of any modification of the terms of any benefit plans, arrangements and agreements to eliminate any provisions that would not be in compliance with the executive compensation and corporate governance requirements of Section 111 of the EESA and the guidelines set forth in Notice 2008-PSSFI;

11. A waiver shall have been duly executed by each SEO and delivered to the Loan Parties (with a copy to the UST) releasing the Loan Parties from any claims the SEOs may otherwise have as a result of any modification of the terms of any benefit plans, arrangements and agreements to eliminate any provisions that would not be in compliance with the executive compensation and corporate governance requirements of Section 111 of the EESA and the guidelines set forth in Notice 2008-PSSFI;

12. A waiver shall have been duly executed by the Loan Parties and each Senior Employee and delivered to the UST releasing the UST from any claims that the Loan Parties and such Senior Employees may otherwise have as a result of the Loan Parties' failure to pay or accrue any bonus or incentive compensation as a result of the foregoing;

13. A waiver shall have been duly executed by each Senior Employee and delivered to the

Loan Parties (with a copy to the UST) releasing the Loan Parties any claims that the SEOs may otherwise have as a result of the Loan Parties' failure to pay or accrue any bonus or incentive compensation as a result of the foregoing;

14. No material pending or threatened litigation not otherwise disclosed to and approved by Lender;
15. Payment of all fees and expenses due at the Closing Date;
16. Satisfaction of the additional conditions precedent set forth on Appendix A; and
17. Delivery or performance (to the satisfaction of the Lender) of all other conditions to closing and due diligence items that may be requested by the Lender.

Conditions Precedent to each Advance:

The obligation of Lender to make each Advance (including the initial Advance) will be subject to the satisfaction of the following conditions precedent:

1. No unmatured Event of Default or Event of Default shall have occurred and be continuing; and
2. Other customary conditions precedent.

Covenants

Unless waived by Lender, the Loan Parties shall be subject to customary covenants for this type of transaction (with certain exceptions to be mutually agreed), including, but not limited to the following negative covenants: (i) prohibition on redemption or buyback of any capital stock of the Company (other than pursuant to contracts existing as of December 2, 2008), (ii) restriction on transfer of assets, (iii) restriction on issuance of stock that would dilute the Warrants, (iv) negative pledge, (v) no fundamental change, (vi) limitation on transactions with affiliates, (vii) prohibitions on any dividends and distributions (or the economic equivalent) other than what is owed to unaffiliated entities pursuant to contract or law as of December 2, 2008, (viii) prompt notice of material adverse change with respect to any Loan Party, (ix) prohibition on creation of any new U.S. pension obligations until all U.S. pension plans maintained by the Company or any of its subsidiaries have been fully funded, and (x) such other covenants as may be deemed appropriate by Lender.

Financial Covenants:

At all times, the Company must satisfy each of the financial covenants set forth on Appendix A.

Events of Default:

Will include, but not be limited to each of the following events (as the same relates to each Loan Party):

1. Breach of representations, warranties or covenants or other terms and conditions of the Facility;
2. Default on any payment obligation under the Facility;
3. Bankruptcy/insolvency of any Borrower;

4. Going concern qualification with respect to any Borrower or any Guarantor in any correspondence from its accountants;
5. Change in control of any Borrower or any Guarantor;
6. Any Borrower's or any Guarantor's default under any other debt or prepayment obligations the outstanding principal balance of which equals or exceeds $10 million;
7. Lender ceases to have a perfected first or junior (as applicable) security interest or ownership interest in any material portion of the Collateral;
8. Cross default to any other facility or arrangement between any Borrower or any Guarantor or any of their affiliates and Lender.

Upon the occurrence of any of the foregoing, Lender shall have the option to declare that an Event of Default has occurred, at which time the Facility will terminate and all amounts owing with respect to the Facility will be immediately due and payable without presentment, demand, protest or notice of any kind, all of which shall be waived by the Loan Parties; provided, however, it is understood and agreed that a bankruptcy or insolvency of any Loan Party shall be immediately deemed an automatic Event of Default without the need for Lender to declare it as such. Lender shall be entitled to any and all remedies pursuant to the Facility documents and applicable law, each of which shall be cumulative and in addition to every other remedy available to the Lender.

DIP Loan Conversion:

Upon the filing of a voluntary or involuntary bankruptcy petition by or in respect of any Loan Party, Lender shall have the exclusive right, exercisable at its option, to convert this Facility into a debtor-in-possession facility in form and substance acceptable to Lender.

Joint and Several Liability:

In the event of multiple Borrowers or Guarantors, such parties will be jointly and severally liable to Lender for all representations, warranties, covenants, obligations and liabilities of each of the Borrowers or Guarantors, as applicable, under the Facility. An unmatured Event of Default or an Event of Default of one party will be considered an unmatured Event of Default or an Event of Default by each party, and Lender shall have no obligation to proceed against one party before proceeding against the other party. Such parties shall waive any defense to their obligations under the Facility based upon or arising out of the disability or other defense or cessation of liability of one party versus the other. A party's subrogation claim arising from payments to Lender shall constitute a capital investment in another party subordinated to any claims of Lender, and equal to a ratable share of the equity interests in such party.

Summary of Warrant Terms

Warrant:

Under the terms of the commitment, the UST will receive warrants to purchase common shares of the Company.

Exercise Price Per Share:

The 15 day trailing average price determined as of December 2, 2008. The exercise price per share shall be subject to anti-dilution adjustments.

Amount:

The total number of warrants will be equal to 20% of the Maximum Loan amount divided by the Exercise Price per Share, provided that the number of Warrants will be capped at 20% of the issued and outstanding common equity interests of the company, before giving effect to the exercise of the Warrants ("The Warrant Limit").

Additional Notes:

In the event that the Warrant Limit reduces the number of Warrants issuable to the UST, the UST will receive Additional Notes in an amount equal to 6.67% of the Maximum Loan Amount less a sum equal to one-third of the number of Warrants actually granted to the UST times the Exercise Price Per Share.

Term:

Perpetual

Exercisability:

Immediately exercisable, in whole or in part, at 100% of its issue price plus all accrued and unpaid dividends.

Transferability:

The Warrants will not be subject to any contractual restrictions on transfer. The Company will file a shelf registration statement covering the Warrants and the Equity Interests underlying the Warrants as promptly as practicable after the date of the investment and, if necessary, shall take all action required to cause such shelf registration statement to be declared effective as soon as possible; provided, however, that if the Company is not subject to the periodic reporting requirements of Section 13 or 15(d) of the Exchange Act, it need not file a shelf registration statement unless and until it becomes subject to such requirements. The Company will also grant to the UST piggyback registration rights for the Warrants and the Warrant Shares and will take such other steps as may be reasonably requested to facilitate the transfer of the Warrants and the Warrant Shares. The Company will apply for the listing of the Warrant Shares on the national exchange, if applicable, on which its Equity Interests are traded and will take such other steps as may be reasonably requested to facilitate the transfer of the Warrants or the Warrant Shares.

Voting:

Prior to the occurrence of a Termination Event or an Event of Default, the UST will agree not to exercise voting power with respect to any shares of Equity Interests of the Company issued to it upon exercise of the Warrants.

Consent:

In the event that the Company does not have sufficient available authorized shares of Equity Interests to reserve for issuance upon exercise of the Warrants and/or equity holder approval is required for such issuance under applicable stock exchange rules, the Company will call a meeting of its equity holders as soon as practicable after the date of this investment to increase the number of authorized shares of Equity Interests and/or comply with such exchange rules, and to take any other measures deemed by the UST to be necessary to allow the exercise of Warrants into Equity Interests.

Substitution:

In the event that the Company is not listed or traded at any time on a national securities exchange or securities association, or the consent of the Company's stockholders described above has not been received within 6 months after the issuance date of the Warrants, the Warrants will be exchangeable, at the option of the UST, for senior term debt or another economic instrument or security of the Company such that the UST is appropriately compensated for the value of the Warrants, as determined by the UST.

Optional Warrant Redemption:

At any time after the aggregate outstanding Advances, with interest thereon at the applicable Interest Rate, fees, expenses, indemnities and other amounts due to Lender shall have been paid in full, the Company shall have the right to repurchase any equity security of the Company held by the UST at fair market value or, if no recognized market for such securities exists at the time of prepayment, at the value attributed to such securities by an independent third party appraiser reasonably acceptable to Lender.

Private Companies:

If the Company is privately held, in lieu of warrants, the UST will receive additional notes ("Additional Notes") with the same priority and general terms as the facility, in an amount equal to 6.67% of the Maximum Loan Amount.

Other Terms

Fees and Expenses:

The Loan Parties shall be responsible for any and all legal fees, due diligence and other out-of-pocket expenses incurred by or on behalf of the Lender in connection with this Facility, whether or not the Facility closes or funds.

Governing Law:

Applicable Federal law (including conflicts of law rules), and in the absence of applicable Federal law, the law of the State of New York, without regard to conflict of laws doctrine applied in such state (other than Section 5-1401 of the New York General Obligations Law).

Not a Commitment:

This term sheet is a summary of indicative terms and conditions purely for discussion purposes, does not constitute a commitment on the part of Lender and is not binding on Lender. All terms described herein are subject to due diligence satisfactory to Lender, receipt of all appropriate credit and other required internal and external approvals, final documentation satisfactory in form and substance to Lender and its legal counsel.

The undersigned hereby confirm that they have reached an agreement in principle consistent with the annexed Indicative Summary of Terms for Secured Term Bridge Loan Facility.

United States Department of the Treasury

/s/ Neel Kashkari
Interim Assistant Secretary
For Financial Stability

Dated: December 19, 2009

The undersigned hereby confirm that they have reached an agreement in principle consistent with the annexed Indicative Summary of Terms for Secured Term Bridge Loan Facility.

Chrysler Holding LLC

Signature not legible

Dated: December 19, 2009

The undersigned hereby confirm that they have reached an agreement in principle consistent with the annexed Indicative Summary of Terms for

Secured Term Bridge Loan Facility.

United States Department of the Treasury

/s/ Neel Kashkari
Interim Assitant Secretary
For Financial Stability

Dated: December 19, 2009

The undersigned hereby confirm that they have reached an agreement in principle consistent with the annexed indicative Summary of Terms for Secured Term Bridge Loan Facility.

Chrysler Holding LLC

Signature not legible

Dated: December 19, 2009

APPENDIX A TO SECURED TERM LOAN FACILITY

APPENDIX A TO SECURED BRIDGE LOAN FACILITY CHRYSLER

Additional Terms

Company:

Chrysler Holding LLC

Borrower(s):

The Company and any successor entities thereto.

Guarantor(s):

CarCo Intermediate HoldCo I and all of its direct and indirect domestic subsidiaries, on a joint and several basis.

To the extent permissible under existing agreements, FinCo Intermediate HoldCo LC and Daimler Chrysler Financial Services Americas LLC (the "Finance Companies") shall guarantee the Loan Amount up to $2.0 billion. Any portion of the $2.0 billion amount that cannot be guaranteed by Finance Companies shall be paid from distributions received by the Borrower from the Finance Companies.

Closing Date:

December 29, 2008

Loan Amount:

Up to $4.0 billion, available on the Closing Date.

Use of Funds:

The Borrower shall contribute the proceeds to Chrysler LLC simultaneously with the funding of Advances with respect thereto, to be used for general business purposes.

Expiration Date:

December 29, 2011 at 5:00 pm Washington, DC time.

Payment Date:

The last business day of each calendar quarter, commencing with the first calendar quarter in 2009.

LIBOR Floor:

2.00%

Spread Amount:

300 basis points; provided that upon the occurrence and during the continuance of an Event of Default, the Spread Amount shall be equal to 800 basis points.

Financial Covenants:

TBD

Additional Conditions Precedent:

The requisite majority of the holders of the Chrysler LLC first lien indebtedness and second lien indebtedness (under the Chrysler LLC First Lien Credit Agreement and Second Lien Credit Agreement) shall have consented in writing to the pledge to the Lender of the MOPAR Parts Inventory and the real estate collateral not mortgaged to such holders.

Due Diligence Items and Closing Checklist:

TBD

Collateral:

To the extent legally and contractually permissible, the applicable Loan Parties shall grant to Lender first-priority liens on all unencumbered assets, and junior liens on all encumbered assets. Notwithstanding anything herein to the contrary, the Loan Parties shall use their best efforts to obtain all necessary waivers, amendments, approvals, or consents, as the case may be, to enable the Loan Parties to grant any such lien to the Lender as security for their respective obligations under the Facility.

Relevant Companies:

Chrysler Holding LLC and Chrysler LLC