CORRECTED BRIEF FOR PLAINTIFF-APPELLEE

IN THE UNITED STATES COURT OF
APPEALS FOR THE FEDERAL CIRCUIT

2013-5020

COLONIAL CHEVROLET CO., INC., *et al.,*
Plaintiffs-Appellees,

v.

THE UNITED STATES,
Defendant-Appellant.

Appeal from the United States Court of Federal Claims
in case no. 10-647C, Senior Judge Hodges

Blume, Faulkner Skeen &
Northam, PLLC
Richard D. Faulkner
James D. Blume
111 W. Spring Valley Rd.,
Suite 250
Richardson, Texas 75081
P: (214) 373-7788

Harry Zanville
500 West Harbor Dr., Suite 1201
San Diego, California 92101
P: (619) 269-9227

Buchanan & Bellan, L.L.P.
G. Kevin Buchanan
900 Jackson Street
Dallas, Texas 75202
P: (214) 378-9500

Steven J. Eagle
3301 Fairfax Drive
Arlington, Virginia 22201
P: (703) 993-8054

Attorneys for Plaintiffs-Appellees

Date: May 9, 2013

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

COURT RULES

LEGISLATIVE AND AGENCY MATERIALS

BOOKS

PERIODICALS

CORRECTED BRIEF FOR PLAINTIFF-APPELLEE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

2013-5020

COLONIAL CHEVROLET CO., INC., *et al.*,
Plaintiffs-Appellees,

v.

UNITED STATES,
Defendant-Appellant.

STATEMENT OF COUNSEL

Pursuant to Rule 47.5, counsel for Plaintiff-Appellees' state that they agree with and adopt Defendant-Appellant's Statement of Counsel.

STATEMENT OF THE ISSUES

1. Did the Motions Panel improvidently grant interlocutory appeal in this case?

2. Does a viable Takings claim arise under the Fifth Amendment if, as here, the United States, using its regulatory powers to restructure an entire section of the American economy, targeted for termination private contracts, and assumed the substantive property rights embodied therein, for itself and for retransfer to others?

3. Did the Court of Federal Claims ("CFC") err in finding that the Amended Complaint ("Complaint") (CFC Doc. 20) and supporting materials plausibly alleged sufficient facts to support the required elements of such claims?

4. What, if any, legal impact do the bankruptcy proceedings of General Motors and Chrysler, initiated and caused by the United States, have upon these claims?

COUNTER-STATEMENT OF CASE

Plaintiffs disagree with Defendant's incorrect characterization of the allegations in Plaintiffs' Amended Complaint (App. JA 17-43) and the basis of CFC decision (App. JA 1-7) in the "Course of Proceedings" section of its brief. Plaintiffs' Summary of Argument provides the necessary correction and Judge Hodges' careful orders speak for themselves.

I. Counter-Statement of Facts[1]

[1] Plaintiffs move this Court to take judicial notice of the following referenced herein: the SIGNTARP Report, the COP Reports, the GAO Reports, GAT Report, Rattner's Overhaul, Barofsky's Bailout, Spitzer's Grand Theft Auto, the newspaper articles and media statements of Rattner, Timothy Massad, Assistant Secretary of Treasury, the transcript from January 26, 2012, oral argument in the CFC, and the pleadings, transcripts, exhibits and other papers on file in the bankruptcy courts in *In re Chrysler, LLC*, 405 B.R. 84 (S.D.N.Y. 2009); *In re General Motors Corp.*, 407 B.R. 463 (S.D.N.Y. 2009); *In re Motors Liquidation Co*., 430 B.R. 65 (S.D.N.Y. 2010); *In re Old Carco LLC*, 406 B.R. 180 (S.D.N.Y. 2009). *See* FED. R. EVID. 201; *Kramer v. Time Warner, Inc*., 937 F.2d 767 (2nd Cir. 1991); *Kalos v. United States*, 87 Fed. Cl. 230, 241, n.1(2009); *Jefferson v. Lead Indus. Ass'n, Inc.*, 106 F.3d 1245, 1250 n.14 (5th Cir. 1997).

A. Using its unprecedented authority, Treasury executed an end-run around Congress' refusal to bailout the auto industry.

The EESA was enacted during the financial panic of 2008. 12 U.S.C. § 5201 *et seq*. (2008). It authorized creation of the Troubled Asset Relief Program ("TARP") to purchase up to $700 billion of troubled assets from financial institutions, handed unsupervised regulatory authority to Treasury to manage them, and precluded federal courts from blocking any TARP decisions. *Id*. at § 5211; Marcel Kahan & Edward Rock, *When the Government Is the Controlling Shareholder,* 89 TEX. L. REV. 1293, 1334 n.11 (2011); 12 U.S.C. § 5229(a). Treasury, unleashed to act as a government regulator free from legislative control and judicial review,[2] did just that[3] as "…the program quickly morphed - from one designed to buy and secure troubled assets to a scheme equipped to inject capital directly into financial institutions by acquiring their stock." Ilya Shapiro & Carl G. DeNigris, *Constitutional Law Symposium: Constitutionalism and The Poor: Symposium Article: Occupy Pennsylvania Avenue: How The Government's Unconstitutional Actions Hurt The 99%,* 60 DRAKE L. REV. 1085, 1099 (2012).

Treasury Secretary Paulsen testified before Congress that TARP could not be used to bailout the auto industry, Peter Whoriskey*, Treasury Redefines Its*

[2] Eric A. Posner & Adrian Vermeule, *Crisis Governance in the Administrative State: 9/11 and the Financial Meltdown of 2008*, 76 U. CHI. L. REV. 1613 (2009).
[3] David Zaring, *The Post-Crisis & Its Critics*, 12 U. PA. J. BUS. L. 1169 (2010).

Rescue Program, WASH. POST, Nov. 13, 2008,[4] but less than thirty days later, Treasury used its self-defined EESA regulatory authority to begin the auto industry bailout. Treasury created the Automotive Industry Financing Program ("AIFP") and the Auto Task Force ("ATF") to restructure the American auto industry.

B. The Executive Branch decided to bailout GM, Chrysler, and related entities because it considered them 'too big to fail'.

The Executive Branch decided not let GM, Chrysler, and related entities fail:

> AIFP was launched … to prevent the uncontrolled liquidation of Chrysler and General Motors and the collapse of the U.S. auto industry … such a disruption … posed a significant risk to financial market stability and … could have had disastrous consequences for the auto manufacturers and the many suppliers and ancillary businesses that depend on the automotive industry. This could have led to a loss of as many as one million American jobs.

Financial Stability, Auto Industry, July 13, 2012, *available at* http://www.treasury.gov/initiatives/financial-stability/TARP-Programs/automotive-programs/Pages/overview.aspx (last visited May 8, 2013). ATF Chief Steven Rattner explained:

> "…the Obama administration had little choice but to save GM and Chrysler from collapse. 'It would have been an economic calamity. You would have had a couple million people out of work. We just felt it was an unacceptable risk to take'."

[4] " … [I]t is crystal clear that when the EESA was … enacted, Congress was not thinking about direct investments in equity, much less direct and controlling equity investments in auto companies," Kahan & Rock, 89 TEX. L. REV. at 1343.

Maria Shao, *The 2009 U.S. Auto Bailout Was Necessary Argues Rattner* (Mar. 16, 2011), *available at* http://www.stanford.edu/group/ knowledgebase/cgi-bin/2011/03/16. Rattner conceded that the automakers were too big to fail ("TBTF"): "[t]he Obama administration had never seriously considered just letting GM liquidate." Steven Rattner, Overhaul: An Insider's Account of the Obama Administration's Emergency Rescue of the Auto Industry 183 (2010) (hereinafter, "Rattner").

Long a part of regulatory policy,[5] "[f]ederal TBTF policies were expanded during the 2007-2008 economic crisis." Cheryl D. Block, *A Continuum Approach To Systemic Risk and Too-Big-To-Fail*, 6 BROOK. J. CORP. FIN. & COM. L. 289, 340 (2012). While

> …too big to fail had existed for years, the TARP and other extraordinary government interventions in 2008 transformed it into stark reality.

Congressional Oversight Panel ("COP"), *March Oversight Report, The Final*

[5] "From the Great Depression to the Savings and Loan crisis of the 1980s, the government has shown a willingness to intervene in private markets when national interests are at stake. It has undertaken financial assistance efforts on a large scale, including to private companies and municipalities—for example, Congress created separate financial assistance programs totaling over $12 billion to stabilize Conrail, Lockheed, Chrysler, and the New York City government during the 1970s." U.S. Government Accountability Office ("GAO"), *The U.S. Government Role as Shareholder in AIG, Citigroup, Chrysler, and General Motors and Preliminary Views on its Investment Management Activities,* at 6 & 37 (Dec. 16, 2009).

Report of the COP, at 182, March 16, 2011 ("COP Final Report").

In 2008, "[t]he criteria forcing the government to act…mainly was the "too big to fail" doctrine." Steven M. Davidoff & David Zaring, *Regulation By Deal: The Government's Response To The Financial Crisis,* 61 ADMIN. L. REV. 463, 474 (2009).

The Government's TBTF policy created "…free riding -- institutions [that] now knew that if they were too big to fail the government would help them and market solutions would disappear." Zaring, *supra* at 477. TBTF eliminates the entry of private capital lenders to distressed large businesses.

> Treasury's intervention in the automotive industry … extended the too big to fail guarantee … to non-financial firms. The implication may seem to be that any company in America can receive a government backstop, so long as its collapse would cost enough jobs or deal enough economic damage.

COP Final Report, *supra* at 10. Some COP members believed:

> [o]nce the government entered the picture and signaled its intent to bail out the institutions with its unlimited tax-payer-financed checkbook, it is hardly surprising that private sector participants demurred. Under such circumstances, it is not possible for even the most sophisticated, motivated, and financially secure of private sector firms to prevail.

COP, January Oversight Report, *An Update on TARP Support for the Domestic Auto Industry*, at 102, 115 (Jan. 13, 2011) ("COPR Jan. 13, 2011").

It addition to the TBTF problem, the Government also expected political

dividends from appearing to save jobs.

C. The ATF controlled the bailout of GM, Chrysler, and related entities.

The ATF decided to force the auto industry to conform to its model for the future. *Id*. at p. 117. Government dealmakers acted "significantly" differently with the automakers than the banking industry, COP Final Report, *supra* at 122, as "… it [Treasury] forced GM and Chrysler to enter bankruptcy", *Id*. at 184, forced changes of their boards and managements, COPR Jan. 13, 2011, *supra* at 16-17, decided that the bankruptcy would be the unique pre-packaged §363 procedure, Rattner, *supra*, at 60, and forced huge numbers of auto dealerships to be terminated without adequate compensation. COPR Jan. 13, 2011, *supra* at 16-17.

1. The inexperienced ATF imposed its rushed plans to restructure the auto industry.

a. ATF was inexperienced.

"Although [ATF] was responsible for managing AIFP, none of the Auto Team leaders or personnel had any experience or expertise in the auto industry." Office of the Special Inspector General ("OIG") For the Troubled Asset Relief Program, *Factors Affecting The Decisions Of General Motors And Chrysler To Reduce Their Dealership Networks,* SIGTARP-10-008, at 1 (July 19, 2010) ("SIGTARP Report").

> With almost no experience in the car business, the team's dozen core members have undergone a crash course in the myriad woes plaguing the U.S. auto industry. Within days, just over a month after setting to work, they'll begin announcing decisions. In session after session… the team has sat through tutorials on dealer financing, studied basic data and debated the future of U.S. car sales. They have spent days trying to understand the complexities of the hundreds of companies that supply the car companies with axles, seats and other parts.

Neil King, Jr. & John D. Stoll, *Auto Task Force Set to Back More Loans -With Strings*, WALL ST. J, Mar. 26, 2009, at A1.

b. <u>ATF created its auto industry restructuring plan at breakneck speed</u>.

ATF's plan to restructure the auto industry was created with breathtaking speed. ATF had only about five weeks to learn the auto industry, study the two companies' restructuring plans, develop a plan of action, and sell it to superiors, including the President. Government attorneys described it: "It was lawyering at the speed of Daytona."[6] Government lawyers admit that their sales pitch was a "strategy…to tell a story about the danger of time…." *Id.* Rattner explained the purpose of the Government's strategy to force a rushed outcome: "This was the financial equivalent of putting a gun to the heads of the bankruptcy judge…." *Id.* at 251.

[6]Vivia Chen, *Drive-Through Bankruptcy*, AM. LAWYER, Sept. 2009, *available at* http://www.jonesday.com/files/upload/001090902JonesDay.pdf.

2. ATF initiated and caused the termination of auto dealerships as a centerpiece of its auto industry restructuring.

The Government controlled the decisions related to the bailout of GM and Chrysler. Characterizing the destruction of auto dealerships as "dentistry" (like a diseased entity), Rattner admitted how the Government controlled its bailout recipients: "We noted the golden rule of Wall Street: He who has the gold makes the rules. Or as my father used to say to his unruly children, "He who eats my bread sings my song." Steven Rattner, *The Auto Bailout: How We Did It – The Man Who Led the Effort Gives an Inside Look at the Bankruptcies That Shook America*, FORTUNE MAGAZINE, Oct. 21, 2009, *available at* http://money.cnn.com/2009/10/21/autos/auto_bailout_rattner.fortune. This mirrored Secretary Paulsen's explanation of the Government's overwhelming negotiating power: "If you've got a bazooka, and people know you have it, then you may not have to take it out." Stephen Labaton & David Herszenhorn, *A Rescue for Fannie and Freddie Kindles Opposition and Political Duels,* N.Y. TIMES, Jul. 16, 2008, at C1.

Rattner referred to process the Government followed to conceal its decision-making role in the auto industry bailouts as a "caper". Rattner, *supra* at 118, 168. But he complained the ATF did not get credit for its decisions that were being announced by GM and Chrysler, Rattner, *supra* at 212, unhappily recalling: "I

would constantly force myself to write that 'GM' had done such and such. Just once I would like to write "we" instead." *Id*. at 210. The COP observed that many had concluded Treasury was in control and that "to pretend otherwise today begs credulity." COPR Jan. 13, 2011, *supra* at 118.

The Government controlled the decision to terminate massive numbers of Auto Dealers ("Dealers") through the bankruptcy process. "In the weeks leading to the bankruptcy filing,… Treasury and the [ATF] and their outside counsel, Cadwalader, Wickersham & Taft—called the key shots." Rattner, *supra* at 107. Rattner admits the depth of this control through the use of the words "condition", "impose" and "manipulate". Rattner, *supra* at 33, 38. Examples of control include that the Government:

- manipulated the cash balances of the automakers' checking accounts;
- tried to reshape the corporate culture of the auto makers;
- controlled the timing of the bankruptcy filing (forcing a bankruptcy court clerk to give the petition back after its filing and making Chrysler's lawyer sit in a corner waiting ninety (90) minutes for ATF permission to re-file after President Obama spoke;
- managed the GM and Chrysler bankruptcies, Neil Barofsky, Bailout 177 (2012);

- wrote automakers press releases;
- fired and replaced Chrysler's CEO;
- replaced the GM and Chrysler boards of directors with Government appointees; and
- even before release of the Viability Findings, forced GM's CEO to quit. Alan & Alison Spitzer, Grand Theft Auto (2011); Rattner, *supra* at 128, 134, 137, 172, 179, 203, 220, 250, 257; COPR Jan. 13, 2011, *supra* at 16-17.

The Government reshaped the conflicting interests of the automakers and their related entities, Rattner, *supra* at 120, 198, something that would be a *per se* violation of the antitrust laws if attempted by private parties. Demonstrating that these were Government's decisions is Rattner's frank admission that "we discussed none of this with GM or Chrysler." Rattner, *supra* at 108. Chrysler's CEO, referring to Treasury as "UST," described who was in charge in an email: "I guess the UST is running it." Paul Ingrassia, Crash Course 248 (2010). ATF told the unions what they "must" do. Rattner, *supra* at 227. This was the Government's plan of action. Rattner, *supra* at 208, 210-11.

a. ATF demanded more dealer terminations.

The Special Inspector General for the TARP ("SIGTARP") reviewed the auto dealership terminations "to determine the role of the … Treasury Auto Team in the decisions to reduce dealership networks." SIGTARP Report, *supra* at p. 1.

SIGTARP found that the Government dictated the decisions to reduce dealership networks. *Id*. at 10-14.[7] SIGTARP found that in December, 2008, well before the decision to force these companies into bankruptcy, the ATF decided it would drastically reduce the number of Dealers.[8]

ATF decided that the automakers' franchise system was uncompetitive and that the Toyota franchise system needed to be emulated. Rattner, *supra* at 194-95. Despite the fact that a voluntary free-market reduction of thousands of Dealers had been occurring for decades, SIGTARP Report, *supra* at 4, and without any studies upon which to verify its opinion, the inexperienced and hurried ATF concluded the proposed future pace of closing dealerships was too slow. *Id*.

SIGTARP, contradicting the righteousness displayed by Rattner, chronicled how ATF's unsupported "Toyota model" theory drove its decision that the auto dealerships had to be terminated. SIGTARP Report, *supra* at 12, 28. The automakers agreed to imposition of the "Toyota model" of dealerships only

[7] Treasury reviewed the SIGTARP Report before its completion and questioned none of the facts on which it is based. *Id*. at 33.

[8] "Here, before the Auto Team rejected GM's original, more gradual termination plan as an obstacle to its continued viability and then encouraged the companies to accelerate their planned dealership closures to take advantage of bankruptcy proceedings, Treasury (a) should have taken every reasonable step to ensure that accelerating the dealership terminations was truly necessary for the long-term viability of the companies and (b) should have at least considered whether the benefits to the companies from the accelerated terminations outweighed the costs to the economy that would result from potentially tens of thousands of accelerated job losses. SIGTARP Report, *supra* at 31.

because it was an "upfront condition" demanded by the Government. COPR Jan. 13, 2011, *supra* at 36. SIGTARP described as "not surprising" the cause and effect of these Government demands. SIGTARP Report, *supra* at p. 14, 28. Even though the Government repeats its mantra that it was not involved in the decision-making of which Dealers were to be extinguished, Rattner admits that ATF "painstakingly" reviewed each of the terminations related to any complaints received, thereby ratifying the decision to terminate those Dealers. Rattner, *supra* at 248.

SIGTARP reviewed ATF's decisions to compel the dealership terminations and concluded they were unnecessary. SIGTARP Report, *supra* at 29-30. "In fact, when asked what GM would save by closing any particular dealership, one GM official stated the answer is usually 'not one damn cent.'" SIGTARP Report, *supra* at 25. GM admitted that the dealership closures might even cost it money. *Id*. The automakers knew that closing dealerships would not make them healthier. Chrysler's President admitted that the carmakers would not financially gain from the closures. Spitzer, *supra* at 43. Ron Bloom, then ATF chief, admitted that the termination of the dealerships was **not** necessary to save the auto industry. When asked whether ATF could have left the dealerships out of the restructurings, "Bloom confirmed that the ATF '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." SIGTARP Report, *supra* at 33.

The automakers knew that ATF's plan not only was not going to help, it might financially hurt them. Automaker officials said the ATF demand to adopt the "Toyota model" of dealerships would not work, would not save them money, and could negatively impact them. *Id*. at 12, 25, 30. Specifically, the automakers believed that the terminations would not increase and might reduce their market share of cars. *Id*. at 9, 12.[9] Chrysler believed that the forced termination of the dealerships would hurt its market share. *Id*. at 12.

b. ATF demanded faster dealer terminations.

Even the ATF did not explicitly assume that the accelerated dealer closing would produce any cost savings for GM and Chrysler. *Id.* at 29. The only reason for the rushed terminations was the window of opportunity ATF believed it had to use the §363 process to terminate the Dealers without any cost whatsoever to the automakers, thereby saving about $2.25 billion. SIGTARP Report, *supra* at 16; Rattner, *supra* at 60, 195, 248.

3. ATF refused to compensate owners for the terminations of auto dealerships it initiated and caused.

The Government knew the dealerships enjoyed strong state statutory protection and could only be terminated by compensating their owners. Rattner,

[9] ATF decided to impose the dealership reduction mandate despite recognizing the high level of risk in its decision because it disagreed with the automakers over the impact of the terminations. SIGTARP Report, *supra* at 13; Rattner, *supra* at 76.

supra at 107. The Government roughly calculated it would cost about $2.25 billion to pay the Dealers for their dealerships and decided it would not do so unless the price was close to the net cost of the bankruptcies. Rattner, *supra* at 176. ATF admitted that it decided to reduce the Government's bailout costs by not compensating the Dealers for dealerships being terminated. SIGTARP Report, *supra* at 28. The ATF coldly concluded that it would be a *"waste of taxpayer resources"* to pay for the destruction of the dealerships it initiated and caused. SIGTARP Report, *supra* at 13, 28. (emphasis added). *Significantly, the Government never called this a waste of GM or Chrysler money*.

The Government admitted that it knew its decisions were going to damage the Dealers but callously explained to SIGTARP it expected the disenfranchised Dealers to be "taking the pain and getting past it." SIGTARP Report, *supra* at 13. The President and his team proclaimed widely that dealerships had to be eliminated without compensation as part of its policy of "shared sacrifice."[10] Despite the risk-free cash flow provided by Dealers, Rattner, *supra* at 87, 169, and

[10] It is unknown whether Treasury complied with Executive Order 12,630, 53 FR 8859 (Mar. 15, 1988) or its requirements to evaluate government exposure to Takings liabilities before it acted. *Cf.* Executive Order 13,406 (2006); *Attorney General's Guidelines For The Evaluation Of Risk And Avoidance Of Unanticipated Takings* (1988); GAO Report, *Regulatory Takings: Implementation of Executive Order on Government Actions Affecting Private Property Use* (Sept. 19, 2003) Some Takings concerns were raised by Government counsel. Rattner, *supra* at 107.

the 200,000 job losses associated with their needless terminations, SIGTARP Report, *supra* at 31, the Government targeted the Dealers for commercial extinction. Rattner, *supra* at 64. It is legally irrelevant whether Treasury's goal to reduce TARP expenditures was based on its EESA authority to minimize cost to the taxpayers under Section 101 or its guiding goal of "Minimizing Negative Impact" ("…to minimize any potential long-term negative impact on the taxpayer) under Section 113(1): the Government cannot avoid Takings liability simply by deciding not to pay for its actions to save money. Rattner admitted, "[f]inally, we were advised that efforts to shortcut bankruptcy procedures could well run afoul of the 'takings clause' of the U.S. Constitution . . . ., Rattner, *supra* at 107.

SUMMARY OF ARGUMENT

The federal government regarded financially troubled General Motors ("GM") and Chrysler as "too big to fail" ("TBTF") during the economic crisis of 2008-09. Presidents Bush and Obama assigned the U.S. Treasury ("Treasury") responsibility to address the economic issues raised by the automakers' financial problems.

Treasury responded by using its unprecedented and unreviewable authority under the Economic Emergency Stabilization Act of 2008 ("EESA") to execute an end-run around Congress' refusal to bailout the auto industry. 12 U.S.C. §§ 5201 *et. seq*. It created the Automotive Industry Financing Program ("AIFP") and

appointed the Auto Task Force ("ATF") to decide how to save jobs and restructure the American auto industry.

The members of the ATF were largely Wall Street dealmakers, and none had any experience or knowledge about the industry they were charged to "save". The ATF asked GM and Chrysler to present their plans for improving their economic outlook. Both, as part of their viability plans, informed the ATF they would continue to steadily reduce the total number of their dealerships through purchasing them as required by various state laws. However, the ATF, having taken just five weeks to create a complex political and economic plan intended to save jobs and to restructure the entire United States auto industry, rejected the automakers measured reduction of dealerships.

Instead, a key part of the Government's plan was a decree to GM and Chrysler to terminate a massive number of auto dealerships. The ATF edict, without any studies to support it, was based on ATF's hypothesis that if GM and Chrysler emulated the auto dealership franchise model used by Toyota, they would take market share from Toyota and other foreign manufacturers. The ATF rejected contrary opinions from GM, Chrysler, and others who disagreed and assured that doing so might make GM and Chrysler's economic plight worse.

The ATF calculated an approximate value of the dealerships being terminated at about $2.25 billion and decided it did not want to pay. It instead

devised a ploy utilizing a special section of the bankruptcy code to try to avoid paying for the termination of the dealerships it considered "excess." Thus, the ATF's requirement to terminate the dealerships was forced upon the automakers before their bankruptcies and the Government coldly justified it with the political slogan "shared sacrifice".

After the Government targeted and wiped out their dealership agreements, it transferred the underlying dealer rights to itself as the majority and controlling shareholders of GM and Chrysler. The Government was acting as a sovereign central economic planner, not as an ordinary commercial lender, when it decided the winners and losers in the marketplace. The taking of their dealerships, without compensation, had a devastating economic impact on the Dealers. Their reasonable investment-backed expectations were destroyed by the Government in a way they could never have predicted. The Plaintiffs did not share the sacrifice: they were the sacrifice.

The only source of justice for Dealers is the Fifth Amendment's prohibition against the federal government taking private property without just compensation. The bankruptcy courts had no jurisdiction to hear such a claim, the taking of their private property could not have been enjoined because federal judicial review of the Government actions under EESA are prohibited, and, in any event, would have been found equitably moot.

Judge Hodges, fully informed as to the facts and law, denied the Government's repeated motions to dismiss. Because justice and fairness require the United States to compensate the Dealers for their economic loss, Dealers request that the Court affirm his decision.

ARGUMENT

I. The Motions Panel incorrectly permitted this interlocutory appeal.

A. It should be reversed as improvidently granted.

This Court is empowered to reverse as improvidently granted the Motion Panel's permission to file this interlocutory appeal. *Boyer v. Louisiana*, 185 L. Ed. 2d 774, 774, 776 (2013).

"A motions panel's decision to allow an interlocutory appeal is not binding upon the panel that subsequently considers the appeal's merits"; "the merits panel may conclude that the initial decision to hear the appeal was, or was later rendered, improvident." *Castellanos-Contreras v. Decatur Hotels LLC*, 576 F.3d 274 (5th Cir. 2009).

Caraballo-Seda v. Hormigueros, 395 F.3d 7 (1st Cir. 2005), articulated the basis for vacating interlocutory appeal:

> As a general rule, we do not grant interlocutory appeals from a denial of a motion to dismiss. … with the benefit of hindsight, we admit our error in doing so in this case. This reflects our policy preference against piecemeal litigation, as well as prudential concerns about mootness, ripeness, and

> lengthy appellate proceedings. Thus, the fact that appreciable trial time may be saved is not determinative,' and neither is the fact that the case has tremendous implications or might materially advance the ultimate termination of the litigation. Finally, we emphasize that interlocutory appeals are granted at our "discretion."

Id. (internal citations omitted). There is no substantial reason for this case to proceed as an interlocutory appeal. Dealers submit that the rationale for disfavoring interlocutory appeal, coupled with the weakness of the Government position, militates sending the case back to Judge Hodges. This case deserves to continue to discovery so that Dealers can demonstrate entitlement to just compensation for the Government's actions. Plaintiffs request that the court review the Motion Panel's decision for improvidence, vacate its order, and remand the case for further proceedings.

B. Alternatively, the Court should limit its interlocutory review to the single issue certified by Judge Hodges.

The Court, under 28 U.S.C. § 1292(b), may exercise jurisdiction over any question included within the order certified by the trial court. *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199 (1996). However, it is not required to do so. It has discretion to decide all, some, or none of the issues contained in the order from which an interlocutory appeal is taken.

The Court, if not inclined to reverse the Motions Panel's order, should only consider the issue certified by Judge Hodges. The Government's wholesale appeal

of every issue it raised below (not just the one certified by the trial court) is an attempt by the Government to get a fourth bite at the apple. The trial court heard and rejected the Government estoppel arguments twice (App. JA1-7, JA8, CFC Doc. No. 48, 51) and denied them for interlocutory appeal (App. JA 4445-46). This court should not consider them again here.

II. Counter-Statement of standard of review of 12(b)(6) orders on appeal.[11]

The Government bears the burden of proof to prevail on a motion to dismiss. *Total Benefits Planning Agency, Inc. v. Anthem Blue Cross & Blue Shield*, 552 F.3d 430, 434 (6th Cir. 2008).

"Rule 12(b)(6) does not countenance…dismissals based on a judge's disbelief of a complaint's factual allegations". *Neitzke v. Williams*, 490 U.S. 319, 327 (1989). A well-pleaded complaint may proceed even if it appears "that a recovery is very remote and unlikely". *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974) *overruled, on other grounds, Davis v. Scherer*, 468 U.S. 183 (1984). "…[A] well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007); *see also Ashcroft v. Iqbal,* 556 U.S. 662 (2009).

Complaints are construed liberally in favor of complainants, the factual

[11] This section was necessitated by the failure of the Government to provide a statement of the standards of application of 12(b)(6) during appellate review.

allegations are presumed true, and all doubts and inferences are resolved in pleader's favor. *See Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 249 (2009). The plaintiff "…must be granted the benefit of all inferences that can be derived from the facts alleged." *Hettinga v. United States*, 677 F.3d 471, 476 (D.C. Cir. 2012). Allegations must be factual and suggestive to cross into "the realm of plausible liability" and only pleadings that fail to show plausible entitlement to relief may be dismissed under Rule 12(b)(6). *Twombly,* 550 U.S. at 557 n.5. The complaint must plead facts, not evidence, that satisfy FRCP Rule 11(b)(3)'s requirement that "factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery." FED. R. CIV. P. 11(b); Louis Kaplow, *Multistage Adjudication*, 126 HARV. L. REV. 1179, 1260 (2013).

As in *Twombly*,[12] this Court should consider the contents of the complaint, materials incorporated by reference, matters of judicial notice, and other material including views of knowledgeable commentators. *Tellabs, Inc. v. Makor Issues & Rights, Ltd*., 551 U.S. 308, 322-34 (2007); *Westlands Water District v. United States*, 109 Fed. Cl. 177, 190 (2013); *Bell/Heery v. United States,* 106 Fed. Cl. 300, 307 (2012).

[12] "In identifying facts that are suggestive enough to render a [complaint] plausible, we have the benefit of the prior rulings and considered views of leading commentators,…. *Twombly*, 550 U.S. at 556.

Special attention should be directed toward the Government's stonewalling access to critical information that it controls, despite multiple and specific requests for it during court conferences, initial disclosure requirements, a FOIA demand, and ethical requirements. CFC Doc. 78, Plaintiffs' Response, Aug. 20, 2012, Order. An important but unaddressed question arising from *Twombly/Iqbal* is the legal effect on the 12(b) appellate review where, as here, the Government has exclusive possession of, and refused to provide, substantial evidence bearing directly on the inferences arising from the Complaint.

> Consideration of what information may be in defendants' hands is relevant … [because] [p]art of the decision-making calculus involves how much may be learned from continuation [by denial of motion to dismiss] and the extent to which this prospect may remedy deficiencies in deterrence, augment chilling, and impose costs in identifying additional evidence (even when it exists).

Kaplow, *supra* at 1270.

The Dealers believe that "in analyzing the sufficiency of pleadings, "a plaintiff's pleading burden should be commensurate with the amount of information available to them." *Bausch v. Stryker Corp*, 630 F.3d 546, 561 (7th Cir. 2010). The adage of 'what did the Government know and when did it know it' may play a critical role in assessing the character of the governmental action element of *Penn Central. Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104

(1978); *Rose Acre Farms, Inc. v. United States*, 373 F.3d 1177, 1195 (Fed. Cir. 2004), *cert. den*., 545 U.S. 1104 (2005).

The Government intones *Twombly/Iqbal* as authority to dismiss the Complaint. In the former, the Supreme Court emphasized the need to plead facts moving the trial court from possibility to plausibility, *Twombly,* 550 U.S. at 570, while in the latter it added that the search for plausibility is "…a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). Neither case aids analysis here because the Government never made a *Twombly/Iqbal* attack. Instead, it claims only that the Complaint failed to allege (1) a proper property interest, (2) a governmental action, and (3) a lack of a recognized taking theory.[13]

The Government's Rule 12(b)(6) motion to dismiss is based almost entirely on its expectation that the court will accept the truth of the facts recited in GM and Chrysler bankruptcy documents, despite its not having moved the court to engage in judicial notice. FED. R. EVID. 201(b); *Gen. Elec. Capital Corp. v. Lease Resolution Corp.*, 128 F.3d 1074, 1081 (7th Cir. 1997). Judicial notice "… substitutes the acceptance of a universal truth for the conventional method of introducing evidence." *Gen. Electric*, 128 F.3d at 1081. Judicial notice is narrowly

[13] Kaplow*, supra*; Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1 (2010).

construed because it eliminates the customary rigorous evidentiary requirements of cross-examination and rebuttal evidence. *Id*. While courts may take judicial notice of court documents for the limited purpose of recognizing that litigation in fact occurred, they do not consider them for the truth of the matter asserted. *Id.* at 1081-82; *Kramer v. Time Warner, Inc.*, 937 F.2d 767, 774 (2nd Cir. 1991).

The Plaintiffs vigorously dispute the truth of many of the 'factual' statements the Government recited from the bankruptcy documents. For example, the Government demands the court accept as true that it "did not control or become insiders of the debtors [GM and Chrysler]" because the bankruptcy court so found. Def. Br., p. 36, 40. The Government demands the court to accept as true that Plaintiffs suffered no harm because without the "challenged actions of the United States and Canada, 'GM would have to liquidate,'" and that it had "acted as a private lender would" – again because the bankruptcy court so found. CFC Doc. No. 2, p. 7-8. Plaintiffs dispute these "facts" because they are wrong. Plaintiffs oppose the Government's motion using materials external to the pleadings such as a book written by the head of the ATF, about the issues here, from official reports and statements issued by the Government itself, and various news reports. *See generally*, Rattner, Overhaul; SIGTARP Report; COP December Oversight Report, *Taking Stock: What has the Troubled Asset Relief Program Achieved*?, at 69-74 (Dec. 9, 2009) ("COPR Dec. 9, 2009"); COP Jan. 13, 2011; COP Final Report, at

95-107, March 16, 2011. The Government relies on bankruptcy documents, to dispute the truth of findings made by the Government itself – having apparent amnesia that writings and statements of Rattner, Bloom, and SIGTARP are its own principals.

What is left is a clear dispute about facts that go to the core of the Plaintiffs' takings claims. The clash between the facts the Government alleges through bankruptcy court documents, and those Plaintiffs allege using Government-generated documents and written admissions from the key government decision-makers at the center of the process, affirm that Judge Hodges was correct in finding that the Plaintiffs have shown a plausible entitlement to judicial relief.

III. Judge Hodges correctly found the Complaint's takings allegations are sufficient.

The Dealers allege that the Government's arrogation of the property rights embodied in their dealership agreements constitutes a taking of property requiring just compensation under the Fifth Amendment. Judge Hodges found that the Complaint plausibly alleged a claim under current Takings doctrine albeit applied in a novel situation.

A. Defining the elements of Takings claims.

The powerful concept at the core of regulatory takings doctrine is:

> [t]he Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar

> Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.

Armstrong v. United States, 364 U.S. 40, 49 (1960). The Constitutional requirement that the public should pay for private property taken for public use, and that courts should guard against the burden being placed on "some people alone," was a foundational element in the seminal regulatory takings case. *Penn Cent.,* 438 U.S. at 123. The Supreme Court often emphasizes the fairness requirement of *Armstrong*. *See e.g.*, *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005 (1984); *First English Evangelical Lutheran Church of Glendale* v. *County of Los Angeles*, 482 U.S. 304, 318-319 (1987).

While property may be regulated to a certain extent, "if regulation goes too far it will be recognized as a taking. The rub, of course, has been -- and remains -- how to discern how far is 'too far'." *Lingle v. Chevron U.S.A. Inc*., 544 U.S. 528, 537-38 (2005). Observing that "most takings claims turn on situation-specific factual inquiries," the Supreme Court recently reiterated that "takings cases, should be assessed with reference to the 'particular circumstances of each case,' and not by resorting to blanket exclusionary rules." *Arkansas Game and Fish Comm'n v. United States*, 133 S. Ct. 511, 518, 521 (2012).

> …no magic formula enables a court to judge, in every case, whether a given government interference with property is a taking. In view of the nearly infinite variety of ways in which government actions or

> regulations can affect property interests, the Court has recognized few invariable rules in this area.

Id.

> …this Court … has been unable to develop any "set formula" for determining when "justice and fairness" require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons…

Penn Cent., 438 U.S. at 124. As this Court stressed,

> [t]he fact-intensive nature of just compensation jurisprudence to date, however disorienting in other contexts, argues against precipitous grants of summary judgment.

Yuba Goldfields, Inc. v. United States, 723 F.2d 884, 887 (Fed. Cir. 1983).

Regulatory Takings complaints must plausibly allege the Government was responsible for taking cognizable property owned by the complainant, as well as *Penn Central*'s additional factors:

> [i]n engaging in these essentially ad hoc, factual inquiries, the Court's decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations.

Penn Cent., 438 U.S. at 124. (internal citations omitted).

B. The Dealers plausibly allege they owned cognizable and valuable property rights.

The Court "must determine as a threshold matter whether the claimant has established a property interest for purposes of the Fifth Amendment." *Bair v. United States*, 515 F.3d 1323, 1327 (Fed. Cir. 2008).

Plaintiffs' property rights, embodied in the dealership contracts, are protected by the Takings Clause. In *Ruckelshaus v. Monsanto*, the Supreme Court held that trade secrets, "admittedly intangible," were "property for purposes of the Takings Clause," as were other intangible interests, including materialman's liens, and valid contracts, 467 U.S. at 1003. "That intangible property rights protected by state law are deserving of the protection of the Takings Clause has long been implicit in the thinking of this Court." *Id.; Conti v. United States*, 291 F.3d 1334, 1338–39 (Fed. Cir. 2002).

The Dealers' franchise agreements are particularly important property rights, for reasons strongly asserted in March 2013, by U.S. Solicitor General Donald Verrilli:

> The traditional concept of property in our legal system embraces intangible rights with economic value. At the core of those intangible rights protected as property is the right to pursue one's livelihood. The major source of wealth in the lives of most people is their business or job. The right to run a business or to pursue a job without unlawful outside interference is undoubtedly a "thing of value" to everyone who runs a business or has a job.

Sekhar v. United States, (No. 12-357), 2012 U.S. Briefs 357, Brief for the United States, on Writ of Certiorari to the U.S. Supreme Court, at 28-29 (asserting legal advice is 'property' subject to the Hobbs Act).

The Dealers pled facts creating supported inferences that they had a cognizable property interest, having fundamental characteristics of being identifiable, insurable, taxable, transferable, and protected by state laws.

The Government concedes that Dealers franchise agreements were valuable. At the time of the bailout, Rattner concluded that the required purchases of the dealerships GM proposed closing would be "expensive": GM valued them at "an average of about $1 million per dealership." Rattner, *supra*, at 195. Chrysler valued the dealerships it wanted to close at about $250 million, a "costly" result of the fact that "they'd have to be bought out one by one." *Id*. at 176.

Auto dealerships' agreements and state law provide virtually all owners with exclusive sales territories and freedom from arbitrary termination. These aspects of property add substantial value to auto franchise agreements. "The perceived importance of territorial security to dealers is well documented in C.M. Hewitt, Automobile Franchise Agreement 17-22 (1956)." Richard L. Smith II, *Franchise Regulation: An Economic Analysis of State Restrictions on Automobile Distribution,* 25 J.L. & ECON. 125, 127 (1982). This right to exclude means that their competitors cannot establish a physical presence to sell or service motor

vehicles. Giorgio Zanarone, *Vertical Restraints and the Law: Evidence from Automobile Franchising*, 52 J. LAW & ECON. 691, 692 (2009). Territorial protection is a highly valuable property right because it provides security to franchisees. Francine Lafontaine & Roger D. Blair, *The Evolution Of Franchising and Franchise Contracts: Evidence From the United States*, 3 ENTREPREN. BUS. L.J. 381, 419 (2009).

This right is so valuable it enjoys special state and federal statutory protection.[14] Rattner, *supra* at 59, 194. Congress recognized the value of these dealerships. *See,* H.R. Report No. 111-366 (2009) (Conf. Rep.), 155 Cong. Rec. H. 1446). Without a franchise agreement, an auto dealer is reduced to running a much less valuable used car lot.

C. The Dealers plausibly allege that the Government targeted and assumed their private property rights.

First, the Government incorrectly stated that "Colonial does not allege that the Government's actions diminished or destroyed the value of the plaintiffs' dealerships." Def. Br. at 52. That is simply untrue. *Inter alia,* the following paragraphs allege that which the Government stubbornly refuses to acknowledge.

[14] *See*, *e.g.* 15 U.S.C. §§ 1221, et seq. providing right of action for failure of manufacturer to act in good faith regarding franchise agreement). Protection of such a valuable right is not unique to auto franchise and has been provided to other types of franchises. *See,* Petroleum Marketing Protection Act, 15 U.S.C. §2801-06 (2007).

CFC Doc. 20, ¶ 43, 47, 48, 54(a), 55, 72, 74, 75. For example, ¶ 72 alleges the Government injured the Dealers by proximately causing their property (as defined in ¶ 47) to now have no value, little value, or limited value.

Second, based on its newly-invented *Penn Central* pleading requirement, the Government demands dismissal because the Dealers purportedly 'failed' to negate hypothesized affirmative defenses of negative proximate causation. Def. Br. at 53.[15]

The Government says the value of Plaintiffs' dealerships would be zero if the automakers permanently closed but its premise requires pure speculation about a scenario that could not, and did not happen. The automakers still produce vehicles, and dealerships that sell those vehicles are highly valuable. It is a fact that the automakers were considered TBTF for political and economic reasons. If these dealerships were valueless, why did so many Dealers pay to protect their rights in §747 proceedings, why did the automakers restore large numbers of Dealers after the Government provided the bailout money, and why would Dealers have accepted the dealerships back? SIGTARP Report, *supra*, at 29. It necessarily follows that since the automakers were deemed TBTF, but for having been the target of Rattner and the ATF, the Dealers' property interests would not

[15] The Government did not raise these alleged pleading deficiencies below. It may not raise them here on appeal for the first time. See, *infra* at III.H.

have been wiped out.

The Government claim that the automakers themselves would have terminated them without compensation is frivolous. The Complaint acknowledges that the automakers planned to reduce the number of auto dealerships, but, to whatever extent the reduction would have occurred, it would have been the outcome of a free market without governmental interference. Rattner admits that the anticipated reduction of additional auto dealerships would have required more than $2 billion be paid to dealerships. The Government argument that the Complaint can be interpreted to mean the Dealers expected to give away their property for free is preposterous.

Finally, the Government denies that it assumed Plaintiffs' property rights, because it "did not step into the shoes of either party to the dealership agreements." Def's Br. at 28. It cites *Omnia Commercial Co. v. United States*, 261 U.S. 502, 511-13 (1923) for the proposition that "only where the Government actually assumes a private party's contract as its own does a taking occur," and that the United States did not "assume plaintiffs' contractual obligations." Def. Br. at 28-29. The Government confuses frustration resulting from the loss of advantages expected by dint of a contract the termination of the contract with the intent of taking its substantive property rights. And, as a practical matter, in *Omnia* the government already had paid the steel suppler and numerous other wartime

suppliers whose output it had commandeered. *Omnia*, 261 U.S. at 511-513. Here, it faces no risk of multiple liability.

The Government *did* assume the rights Plaintiffs owned under the franchise agreements. Through its analysis claiming that the Government did not acquire the nominal franchise agreements (although, in fact, acquiring the substantive rights), it exalts form over substance. The Government had a substantial interest in acquiring the underlying rights that gave franchises their value, such as the exclusive right to sell 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*. The Government's claim never was that these underlying rights were undesirable, but merely that they could be utilized by others (including designated Dealers whose territories would be expanded) more efficiently.

Government transfers to others of what it had taken does not obviate its takings.

> While the usual taking occurs when the government physically acquires property for itself, *e.g.*, *Chicago, B. & Q.R. Co. v. Chicago*, 166 U.S. 226 (1897), our regulatory takings analysis recognizes a taking may occur when property is not appropriated by the government or is transferred to other private parties.

Eastern Enters. v. Apfel, 524 U.S 498, 542-43 (1998) (Kennedy, J., concurring). *See also*, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (transfer of physical space from landlords to cable companies).

D. The Dealers plausibly allege that the Government acted as a sovereign, not as an ordinary commercial lender, when it took their property as part of the auto industry bailout.

Despite the distortions of the Government's Brief, the Complaint clearly alleged that Government acted as a sovereign in its subsidized bailout of the auto industry.

1. The Complaint alleges the Government acted as a central economic planner when requiring termination of the auto dealerships.

The Complaint asserts the Government('s) 1) engaged in central economic planning to restructure the automobile industry under the political slogan of shared sacrifice, CFC Doc. 20 at ¶¶22, 48; 2) regulatory plan demanded GM and Chrysler terminate a huge number of Dealers, CFC Doc. 20 at ¶23; 3) negotiations with GM and Chrysler were not ordinary debtor-creditor-lender negotiations, CFC Doc. 20 at ¶26; 4) forcibly re-shaped the structure of the automakers' dealership network into a model of its own choosing, CFC Doc. 20 at ¶35; and 5) required that the auto dealerships be terminated without adequate compensation specifically to reduce its cost of bailing out the automakers. CFC Doc. 20 at ¶43.

By their nature, these allegations exclude the possibility that the Government acted in a purely commercial capacity.

2. <u>The sovereign-proprietary distinction is not determinative and, at worst, necessitates a factual inquiry</u>.

The Government attempts alchemy by trying to convert the sovereign-proprietary distinction into an absolute test of a viable complaint. However, in this Court "the resolution of the "proprietary-sovereign" dichotomy is not in itself controlling in just compensation jurisprudence". *Yuba Goldfields, Inc. v. United States*, 723 F.2d 884 (Fed. Cir. 1983).

> The determination of whether the United States has acted in a proprietary or governmental-sovereign capacity is of little, if any, use in Fifth Amendment-just compensation analysis. … what counts is not what government said it was doing, or what it later says its intent was, or whether it may have used the language of a proprietor. What counts is what the government did.

Id. "That differentiation does not materially advance the analysis of either a breach of contract or a takings claim." *Henry Hous. Ltd. P'ship v. United States*, 95 Fed. Cl. 250, 255 (2010). "Whether in a property conflict the actions of the government may be equated with those normal to a private citizen is determinable only in light of all the facts." *Yuba,* 723 F.2d at 889.

3. <u>The Government cannot raise this issue here</u>.

The Government cannot raise this issue here, not having asserted its claim

before the CFC. "[T]his court does not 'review' that which was not presented to the district court." *Sage Prod., Inc. v. Devon Indus.*, 126 F.3d 1420 (Fed. Cir. 1997). The Government raised its "ordinary lender" claim only in arguments related to the *Penn Central* element economic causation of damages, not as a claimed pleading defect.

4. The allegation that the Government acted as a sovereign must be accepted as true under 12(b)(6).

The Government's sovereign-proprietary argument necessarily rests on whether it is true that it acted as an ordinary lender. Having chosen to appeal the denial of its 12(b) motions, the Government must admit that it is premature for the Court to make that decision, since the Court is required to accept all Plaintiffs' allegations as true. *Gould, Inc. v. United States*, 935 F.2d 1271 (Fed. Cir. 1999).

5. There is a plausible inference the Government acted as a sovereign in the auto industry bailout.

Precedent provides an ample analytical route in ascertaining whether or not the Government acted here in its sovereign capacity.

> Proprietary governmental functions include essentially commercial transactions involving the purchase or sale of goods and services and other activities for the commercial benefit of a particular government agency. Whereas in its sovereign role, the government carries out unique governmental functions for the benefit of the whole public, in its proprietary capacity the government's activities are analogous to those of a private concern.

Fed. Deposit Ins. Corp. v. Harrison, 735 F.2d 408, 411 (11th Cir. 1984). In *U.S. Postal Serv. v. Flamingo Ind. (USA) Ltd*., 540 U.S. 736, 747 (2004), the Supreme Court illustrated the necessary factual inquiry. Although it is a market participant in the shipping industry, the Court found:

> The Postal Service has different goals, obligations, and powers from private corporations. Its goals are not those of private enterprise. The most important difference is that it does not seek profits, but only to break even, … which is consistent with its public character. … Finally, the Postal Service has many powers more characteristic of Government than of private enterprise, including its state-conferred monopoly on mail delivery, the power of eminent domain, and the power to conclude international postal agreements.

Id. The Government cannot satisfy the exacting conditions necessary to qualify it as an ordinary lender. *United States v. Kimbell Foods, Inc.,* provided guidance so the Government would understand when it is in "substantially the same position as private lenders":

> The lending agencies do not indiscriminately distribute public funds and hope that reimbursement will follow. SBA loans must be "of such sound value or so secured as reasonably to assure repayment." The FHA operates under a similar restriction. Both agencies have promulgated exhaustive instructions to ensure that loan recipients are financially reliable and to prevent improvident loans.

Id. 440 U.S. 715, 729-30 (1979) (statutory citations omitted). Unlike its role in *Kimbell Foods*, here the Government lacked reasonable assurance of full

repayment and never promulgated exhaustive instructions to ensure the financial reliability of GM and Chrysler. The Government, having already written off losses of $7.4 billion, expects to lose $23.6 billion. GAO, *As Treasury Continues to Exit Programs, Opportunities to Enhance Communication on Costs Exist,* at 18 and Fig. 6 at 20 (Jan 9, 2012) ("GAO-12-229").

The issue of whether the Government acted as a sovereign when subsidizing troubled industries arises under GATT and under TREAS. REG. § 1.901-2(e)(3)(ii). As in *Kimbell Foods*, this decision requires the kind of highly fact-intensive inquiry that is impermissible in this interlocutory appeal. *Compare*, *Delverde, SRL v. United States*, 202 F.3d 1360 (Fed. Cir. 2000) *with Inland Steel Bar Co. v. United States*, 155 F.3d 1370 (Fed. Cir. 1998) *with* U.S. Commerce Department Regulations, 58 FR 37217 (1993).

While the Government depicts itself as an ordinary commercial lender,[16] this Court refuses to accept Government euphemisms offered to explain its conduct and, instead, looks for the "real reason" behind governmental conduct as an element of 'character of the governmental action' of the *Penn Central* analysis. *See United Nuclear Corp. v. United States*, 912 F.2d 1432, 1437 (Fed. Cir. 1990) (CFC reversed after this Court discovered the "real reason" for the Government's action).

[16] The Government alleges no ordinary lender would provide financing to the automakers. By definition, it could not have acted as an ordinary lender providing financing no ordinary lender would provide.

The term "ordinary commercial lender" is merely the Government's euphemism for the truth: as a sovereign, in the economic/political context of TBTF, it massively subsidized the auto industry, including GM and Chrysler.[17]

The Government powers shaping the restructuring of an entire segment of the American economy[18] are infinitely beyond the power of normal lenders. As a sovereign providing subsidies, the Government assumed it would lose money in the TARP/AIFP program whose purpose was "… aimed to prevent a significant disruption of the American automotive industry through government investments in the major automakers." GAO, *Status of GAO Recommendations to Treasury,* at 3 (March 8, 2013) ("GAO-13-324R"); GAO-12-229, *supra* at 4.[19]

Treasury Secretary Geithner admitted "[w]e didn't do these [provide money to the auto makers] to maximize returns, we did it to save jobs." Jeff Bater,

[17] Treasury itself differentiates private lending from what it did in its TARP program: "To compare the Government's investments to what a private investor would have charged that misses the point of our programs." *Letter to Editor of Timothy Massad, Asst. Sec. of Treasury for Financial Stability*, N.Y. TIMES, May 27, 2012.

[18] In contrast, the bailout of Chrysler in 1979 was a debt-guarantee program (not a direct injection of capital) based on reasonable assurance Chrysler would pay the money back, compensation for the risk assumed in making guarantees, and imposition of creditor protective covenants. Kahan & Rock, *supra* at 1349.

[19] GAO, *Automaker Pension Funding and Multiple Federal Roles Pose Challenges for the Future,* at 4 (Apr. 6, 2010); GAO, *The U.S. Government Role as Shareholder in AIG, Citigroup, Chrysler, and General Motors and Preliminary Views on its Investment Management Activities,* at 6 (Dec. 16, 2009).

Geithner: Nation's Budget Deficits Must Be Reduced, WALL ST. J., Apr. 29, 2011. "Government officials have argued that the GM bailout was aimed at saving millions of jobs, not turning a profit." *Treasury to Start Selling Off GM Stake*, N. Y. TIMES, Jan. 19, 2013. Austan Goolsbee, Chairman of the Council of Economic Advisers, said the auto bailout ''… was about saving American jobs.'' COPR, Jan 13, 2011 *supra* at 111.

The Government took unprecedented steps to implement its political-economic decision to bailout the auto industry, Rattner, *supra* at 120. Decisions were made in the Oval Office by President Obama. *Id*. at 128. It directly financed automakers, Dealers, auto consumers, and auto parts suppliers. It bent the supply-demand curve for vehicles by implementing the "Cash for Clunkers" program to remove huge inventories of unsold new cars, providing Government warranties for buyers of new GM and Chrysler vehicles, and purchased enormous numbers of new vehicles for its sovereign purposes. *President Obama Announces Accelerated Purchase of 17,600 New American Vehicles for Government Fleet,* White House Press Release*,* Apr. 9, 2009. It waived federal regulations of the FDIC,[20] the Federal Reserve Board,[21] the IRS,[22] and the Treasury. It negotiated necessary

[20] Rattner, *supra* at 168.
[21] Rattner, *supra* at 145.
[22] It gave the 'new' automakers companies the right to offsets to future income taxes with millions of dollars of federal tax loss carryovers from the 'old' car

international financial matters with foreign governments. Rattner, *supra* at 203-05. It compelled automaker obedience to its plan of action. Rattner, *supra* at 48-49, 53, 120-121, 128, 147, 220. No non-governmental lender could achieve any of these results, much less all of them, simultaneously. And no private lender would ever consider doing this without having the goal of making a substantial profit and having ample security.

EESA does *not* require Treasury to act as an ordinary lender.[23] *See*, 12 U.S.C. § 5201, 5212. In particular, only one of the twelve lending-investing TARP goals in § 5213 is similar to goals of ordinary lenders and unlike ordinary lenders, § 5123(1) stipulates the economic goal of TARP was one of "Minimizing Negative Impact".

The Plaintiffs properly alleged the Government's sovereign role.

E. <u>The Complaint plausibly alleges that the Dealers' property was taken under the *Lucas* "deprivation of all economically beneficial use" test</u>.

Lucas v. S.C. Council, 505 U.S. 1003 (1992) provides an owner suffers a categorical taking "where regulation denies all economically beneficial or

---

companies. *GM's Tax Shelter, Another $16 Billion Not Available to Other Car Makers*, WALL ST. J., July 31, 2009.

[23] Congress tried but failed to require Treasury to manage TARP investments as would a normal lender. *The TARP Recipient Ownership Trust Act of 2009*, S. 1280, Sec. 3 (c)(3), proposed federal trustees would "… have a fiduciary duty to the American taxpayer for the maximization of the return on the investment … made under [EESA]."

productive use of land," *Id.* at 1015, or constitutes a "deprivation of all economically feasible use." *Id.* at 1016 n.7. This is a reiteration of the "numerous occasions" when the Supreme Court noted that "the Fifth Amendment is violated when land-use regulation "denies an owner economically viable use of his land." *Id.* at 1016.

While factually *Lucas* involved real property, nothing in its doctrine inherently limits its import to interests in land. In *Philip Morris, Inc. v. Reilly*, 267 F.3d 45 (1st Cir. 2001), the court's discussion of *Lucas* noted "a complete seizure of personal property may amount to a categorical taking, *Id.* at 56, citing *Armstrong,* 364 U.S. at 46 (seizure of boats on which plaintiff held mechanics lien a taking); *Nixon v. United States,* 978 F.2d 1269, 1284 (D.C. Cir.1992) (seizure of former President's papers a taking)). *Philip Morris* added: "To be sure, *Lucas* makes a brief distinction between personal property and landed interests, but the distinction is between the restrictions on commercial sale of personal property and the restrictions on commercial sale of land." 267 F.3d at 72 n.2. In *Nixon*, the D.C. Circuit reasoned the Government's argument that the *per se* doctrine applies only to physical occupations of real property "fails for want of authority or logic." 978 F.2d at 1284.

This Court cautioned "In *Lucas*, the Supreme Court indicated that, as to personal property, even retroactive application of a statute might permissibly alter

a state-created property interest." See *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"). *Bair v. U.S.*, 515 F.3d 1323, 1330 (Fed. Cir. 2008). *Philip Morris* and *Nixon* suggest that regulations regarding the treatment of property held for "commercial sale" in the ordinary course of business are dramatically different than acts constituting government's arrogation of the intangible property constituting the heart of the business itself. The rights to exclusive territories and other essentials of auto dealer franchise agreements occupy exactly that status.

While judicial fact-finding might explicate with more assurance whether the termination of the Dealers' franchise agreements should be treated as categorical takings, as opposed to only as *Penn Central* takings, the allegations plausibly support a *per se* takings claim.

F. The Complaint satisfies *Penn Central's* ad-hoc, multifactor test.

The Government incorrectly suggests that takings law must be based on rigid formulations. Def. Br. at 43. Its cramped view of the Takings Clause invites this Court to ignore established law. But "[t]he temptation to adopt what amount to *per se* rules in either direction must be resisted. The Takings Clause requires careful examination and weighing of all the relevant circumstances in this

context." *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Agency*, 535 U.S. 302, 326 n.23 (2002), quoting *Palazzolo v. Rhode Island*, 533 U.S. 606, 636 (2001) (O'Connor, J., concurring).

Penn Central requires at least three relevant considerations: (1) the "economic impact" of a regulation, (2) the property owner's "investment-backed expectations," and, (3) the "character of the government act." *Penn Central*, 438 U.S. at 124.

Penn Central cannot be applied in mechanical fashion, but must consider the facts with sensitivity in every particular case. Only after a requisite "fact-intensive inquiry" may a court conclude whether or not a taking has occurred. Thus, when Judge Hodges refused to dismiss the Complaint, noting this case has "unusual allegations…create the *prima facie* feel of a takings case," App. JA4, his decision captures the two essential elements of the Supreme Court's takings jurisprudence. It is based on fairness, and the imperative to make ad hoc, factual inquiries to balance those factors that "have particular significance." *Penn Central*, 438 U.S. at 124. "Determining whether a particular regulatory action constitutes a taking involves an ad hoc, fact-intensive inquiry." *Walcek v. United States*, 303 F.3d 1349, 1354 (2002). "It is a question of law based on factual underpinnings." *Id* .

1. Economic impact.

This court stated that "economic impact" is "[t]he first factor in a takings analysis." *CCA Assoc. v. United States*, 667 F.3d 1239 (Fed. Cir. 2011), and "[t]he economic impact of the government's regulatory action is mainly a factual question." *Rose Acre Farms v. United States*, 559 F.3d 1260, 1275 (Fed. Cir. 2009). That inquiry can be narrowed to measure the severity of the impact of the regulatory act. *Penn Central*, 438 U.S. at 136. While the Supreme Court has suggested no specific threshold for economic impact to constitute a taking, the loss must be substantial in light of its later injunction that regulatory takings analyses seek "to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property." *Lingle*, 544 U.S. at 539.

Here the losses are total – they are 100% wipeouts (except for those assumed class members with temporary takings). As a result, there is no need to consider the many cases illustrating the adequate and inadequate range of losses from 18% to 85%. *See, e.g.*, *CCA Assoc.*, 667 F.3d at 1247; *Yancey v. United States*, 915 F.2d 1534, 1539 (Fed. Cir. 1990).

2. Investment-backed expectations.

In *Penn Central*, 438 U.S. at 128, the Supreme Court's citation of Professor Frank Michelman's *Property, Utility, and Fairness: Comments on the Ethical Foundations of 'Just Compensation' Law*, 80 HARV. L. REV. 1165, 1229–1234 (1967), made it clear that its concern for fair to deserving claimants excluded speculators. *Id.* at 1234. Accordingly, "the role of investment-backed expectations in regulatory takings cases is well settled." *Rith Energy, Inc. v. U.S.*, 270 F.3d 1347, 1350 (Fed. Cir. 2001).

Here, the Dealers' franchise agreements were protected from arbitrary termination by well-established state and federal law. They had no reason to expect the Government would demand their rights be terminated, without compensation, and their exclusive sales territories be redistributed to others or held by the automakers for later use. This case represents a classic case of property investments that were subjectively and objectively reasonable. *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979).

3. Character of the regulation.

The "character of the governmental action" test, *Penn Central*, 438 U.S. at 124, is important in this case. The Supreme Court explained in *Lingle*:

> the "character of the governmental action" -- for instance whether it amounts to a physical invasion or instead merely affects property interests through "some public program adjusting the benefits and

> burdens of economic life to promote the common good" -- may be relevant in discerning whether a taking has occurred.

544 U.S. at 539. *Lingle* approved the example of the definition of this category provided by Justice O'Connor in *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001).

> Another is the character of the governmental action. The purposes served, as well as the effects produced, by a particular regulation inform the takings analysis. ("[A] use restriction on real property may constitute a "taking" if not reasonably necessary to the effectuation of a substantial public purpose … or perhaps if it has an unduly harsh impact upon the owner's use of the property."); *see also Yee v. Escondido*, 503 U.S. 519, 523 (1992) (Regulatory takings cases "necessarily entail complex factual assessments of the purposes and economic effects of government actions."). *Penn Central* does not supply mathematically precise variables, but instead provides important guideposts that lead to the ultimate determination whether just compensation is required.

Id. at 634 (O'Connor, J., concurring) (internal citations and quotations omitted).

"The disproportionate imposition on the Owners of the public's burden ... is not rendered any more acceptable by worthiness of purpose." *Cienega Gardens v. United States*, 331 F.3d 1319, 1340 (Fed. Cir. 2003). "It is not within Congress' power to promote a purpose, such as protecting the environment, without also providing compensation if the regulation to achieve the goal, as to a particular plaintiff, goes too far." *Cane Tenn., Inc. v. United States*, 57 Fed. Cl. 115, 128 (2003) (citation omitted).

Similarly, the Government here tried to mitigate economic effects of the Great Recession by restructuring the auto industry, but chose to do so, not by

honoring its duty to pay for valuable rights that it wanted to re-convey to others or hold for itself, but through the simple expedient of expropriating them without compensation. *Cf., Cienega Gardens*, 331 F.3d at 1338-39.

An appropriate determinate of whether the "character" test augurs in favor of a taking is whether the claimant is unfairly singled out to assume a disproportionate burden. In *Mehaffy v. United States*, 102 Fed. Cl. 755, 768 (Fed. Cl. 2012) *aff'd*, 499 Fed. Appx. 18 (Fed. Cir. 2012) (unpublished), the court observed that it "considered two factors in particular as being relevant: "(i) the extent to which the action is retroactive; and (ii) whether the action targets a particular individual.'" *Id*.

In *Am. Pelagic Fishing Co. v. United States*, 49 Fed. Cl. 36, 50-51 (2001) *rev'd on other grounds*, 379 F.3d 1363 (Fed. Cir. 2004), the court emphasized that the regulation was narrowly targeted at a particular owner or item of property. In *Lost Tree Village Corp. v. United States*, 100 Fed. Cl. 412, 438-39 (2011), *rev'd on other grounds*, 707 F.3d 1286 (Fed. Cir. 2013), the court noted "the character of the government's action tends to favor Lost Tree because the [Army] Corps [of Engineers] concededly treated Lost Tree more adversely than it would have treated other applicants for the same permit."

4. Bankruptcy law does not inhere in, and limit, Plaintiffs' property rights.

While logically part of the preceding "character of the governmental action" discussion, the role of bankruptcy law in limiting Plaintiffs' property rights is discussed separately because of the immense stress that Defendant places on this issue. The Government insists that "Regulations that predate the existence of an owner's property inherently limit the owner's property rights." Def. Br. at 13. While this statement has some validity, it cannot be applied without limit or without reason. In *Palazzolo*, the Supreme Court held that "petitioner's claim under *Penn Central* . . . is not barred by the mere fact that title was acquired after the effective date of the state-imposed restriction." 533 U.S. at 630. As this Court noted, "[t]he *Palazzolo* Court rejected the argument that when governmental action regulates the use of property, a person who purchases property after the date of the regulation may never challenge the regulation under the Takings Clause." *Rith Energy*, 270 F.3d at 1350.

Here, as in *Palazzolo*, the Government assertion should be rejected that property owners cannot challenge its extraordinary and targeted misuse of bankruptcy procedures simply because the bankruptcy law was enacted prior to their acquisition of the property of which they were deprived.

G. The CFC properly denied the motions to dismiss.

The Dealers' Complaint amply satisfied the terms of Rule 8(a)(2) as a short and plain statement of the claim showing they are entitled to relief giving "…the defendant fair notice of what the . . . claim is and the grounds upon which it rests," *Skinner v. Switzer*, 131 S. Ct. 1289, 1296 (2011). These allegations raised their right to relief above the speculative level. Charles Alan Wright & Arthur A. Miller, *Federal Practice and Procedure* § 1216, at p. 235-236 (3d ed. 2004). Based on the briefs, supporting materials, and unlimited oral arguments, Judge Hodge relied upon his experience, savvy, and common sense in refusing to dismiss the case.

The Government's disrespectful characterization of Judge Hodges' refusal to dismiss the Complaint was unfair. It repeatedly mocked his use of the term "feel" in his decision and scoffed at his reasoning process as containing "atmospherics." Def. Br., p. 6, 16, 19, 26, 58, 58-60. Judge Hodges deserves a defense – and our respect.[24] It is not wrong for judges to use the word 'feel' and even Government attorneys have been known to ask judges to do what they "feel" is correct. *See Alexander v. FBI*, 691 F. Supp. 2d 182, 188 (D.D.C. 2010); *Jarita Mesa Livestock Grazing Ass'n v. United States Forest Service*, 2013 U.S. Dist. LEXIS 1715, *105 (N.M. 2013).

[24] Neither partisan nor naïve, Judge Hodges rendered judgment in favor of the Government on 88% of Takings claims during his 22 years on the Court of Federal Claims.

Using "feel" in the phrase -- "*prima facie feel*" -- denotes that a plaintiff satisfied a requirement of pleading. When a court determines that a plaintiff pleaded a *prima facie* case, it creates a presumption --- it has not created a finding of fact but something more tentative. *See Tex. Dep't. of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254 (1981) ("[e]stablishment of the *prima facie* case in effect creates a presumption…").

The Government unfairly tried to shoehorn Judge Hodges' finding (that the Dealers should have an "opportunity to develop a case" through discovery) into a violation of the precept that "the Federal rules do not permit plaintiffs to search for viable claims in discovery". But the Government too conveniently ignored the Supreme Court's mandate that motions to dismiss are to be denied where there is "…enough facts to raise a reasonable expectation that discovery will reveal evidence." *Twombly*, 550 U.S. at 556. Judge Hodges' Order denying the 12(b)(6) motions specifically complied with *Twombly*.

The decision of the Government to engage in wholesale sarcasm to deride Judge Hodges' decision reflects poorly on its judgment and the weakness of its arguments.

H. The Dealers are not required to anticipatorily plead against possible affirmative defenses of the Government.

Many of the Government's arguments constitute affirmative defenses. For

example, it argues it was impossible for the dealerships being terminated to have any value and that the intervening acts of the bankruptcy and the economic crisis caused the diminishment of their value apart from the Government's conduct.

The Dealers are not required to plead against affirmative defenses such as impossibility and apportionment of cause. *See*, *Stockton E. Water Dist. v. United States*, 76 Fed. Cl. 497, 501 (2007); *Costa v. Secretary of the Dep't of Health and Human Servs.*, No. 90-1476V, 1992 U.S. Cl. Ct. LEXIS 105, *59 (Feb. 26, 1992); *Gomez v. Toledo*, 446 U.S. 635, 640 (1980); *K-Tech v. Time Warner Telecommunications, Inc.,* 2013 U.S. App. LEXIS 7766 C. (Fed. Cir., Apr. 18, 2013); *Bausch*, 630 F.3d 546. Furthermore, the Government's claims of estoppel and *res judicata* are also affirmative defenses. RCFC 8(c)(1). It is black-letter law that affirmative defenses may not be asserted in a motion to dismiss under Rule 12(b)(6). CHARLES ALAN WRIGHT, *et. al.*, 5 FED. PRAC. & PROC. CIV. § 1277 (3d ed.).

Furthermore, failure to plead against such affirmative defenses does not justify dismissal under 12(b)(6). *Doe v. GTE Corp*., 347 F.3d 655, 657 (7th Cir. 2003).

IV. Collateral estoppel is inapplicable - The CFC has exclusive subject matter jurisdiction of Takings claims.

The Government's position regarding preclusion and estoppel has been

repeatedly rejected by the CFC and excluded from the questions certified. It remains fatally flawed and inapplicable to the circumstances here. Essential to the Government's preclusion position are the requirements that the Bankruptcy courts possess jurisdiction to hear and determine "Takings" issues and that the "363 Bankruptcy" process provide Dealers a fair and adequate opportunity to assert their rights. *Montana v. United States,* 440 U.S. 147, 164 (1979). Neither requirement was met. Unlike the Government in *Montana*, Dealers asserted the "363" process was so inadequate and unfair that they were denied a "full and fair opportunity" to press their constitutional challenges. Redetermination of the "government control" issues is warranted because there is extensive reason to "doubt the quality, extensiveness and fairness of the procedures followed…" and there are critical differences in the allocation of jurisdiction between the CFC and the bankruptcy court. *Montana*, 440 U.S. at 164; *Griffen v. Big Spring I.S.D.*, 706 F.2d 645, 655 (5th Cir. 1983); *Henriksen v. Gleason*, 643 N.W. 2d 652, 656 (Neb. 2002). The Supreme Court anticipated the situation here when it stated preclusion may be particularly inappropriate in constitutional adjudication. "Unreflective invocation of collateral estoppel against parties with an ongoing interest in constitutional issues could freeze doctrine in areas of the law where responsiveness to changing patterns of conduct … is critical." *Montana*, 440 U.S. at 163.

The Tucker Act provides jurisdiction to the CFC to determine Dealers'

claims. 28 U.S.C. § 1491(a)(1); *United States v. Causby*, 328 U.S. 256, 267 (1946). The Government cannot contradict that the bankruptcy courts lack jurisdiction over takings claims. Absent jurisdiction to determine "takings" issues, bankruptcy courts cannot make findings dispositive of Dealers' claims, especially when the claims were not asserted by or against the bankrupt estate and the expedited "363" process denied them a fair and adequate opportunity to litigate "takings" claims. The constitutional limits of bankruptcy court jurisdiction preclude any basis for preclusion of any elements of "takings" claims. *Stern v. Marshall*, 131 S. Ct. 2594 (2011). If the United States consents to be sued, jurisdiction is limited to those courts designated by Congress.

The Ninth Circuit, in *McGuire v. United States*, 550 F.3d 903 (9th Cir. 2008), provided a useful analysis of the relationship between CFC and bankruptcy court jurisdiction. There, the court held that the bankruptcy and district courts were barred from hearing the merits of a bankruptcy debtor's inverse condemnation claim against United States, notwithstanding the fact that the claim was "related to" debtor's bankruptcy case for purposes of 28 U.S.C. § 1334(b).

McGuire was transferred to the Claims Court, which held for the government on the takings issue. On appeal, this Court recently stated the "Ninth Circuit addressed ripeness in its opinion as a matter of 'courtesy' to the Claims Court. We conclude that we are not bound by the Ninth Circuit's ripeness decision

because the Ninth Circuit lacked authority to decide the question, which was a prudential inquiry not necessary to the transfer decision." *McGuire* at F.3d 1357.

The *McGuire* court's view of limited bankruptcy court jurisdiction is also supported by *Stern*. The careful analyses of those cases recognize important limits upon the jurisdiction of the bankruptcy court and demonstrate that the decisions and comments of the bankruptcy courts cannot establish any basis for preclusion or estoppel relating to "taking claims."

Preclusion is an equitable doctrine presupposing a fair process resulting in a valid, final judgment determining justiciable issues ripe for adjudication. Collateral estoppel is improper where inequitable or contrary to the interests of fairness and justice. Restatement (Second) of Judgments § 28 (1982). The Dealers' "takings claims" were never justiciably ripe in bankruptcy court. A "valid" judgment requires a judgment rendered by a court with subject matter jurisdiction. Restatement (Second) of Judgments § 27 (1982). The limitations of bankruptcy jurisdiction by §§ 106 and the lack of justiciable ripeness here prevent use of any preclusion doctrines.

Preclusion is further inappropriate because the issues and evidence before the bankruptcy court were not identical to those now at issue; determination of Fifth Amendment Takings claims were unnecessary to the bankruptcy courts decisions and the most critical evidence of government chicanery was then

unknowable by the Dealers. The admissions of the Government's key decision-makers to Congress, the TARP Inspector General and in the media were future events. Absent such identity and necessity, especially in light of recent revelations, no basis for equitable preclusion can arise from the bankruptcy courts.

A. CFC review of bankruptcy court unnecessary to decide Takings.

The decision in *Boise Cascade Corp. v. United States*, 296 F.3d 1339 (Fed. Cir. 2002) shows that the Government's reliance on *Allustiarte,* 256 F.3d at 1351, is misplaced. The *Boise Cascade* court noted it had no need to review the U.S. district court's injunction against logging to rule on the takings issue. Unlike the plaintiffs in *Allustiarte,* Boise accepted the validity of the injunction, and only filed suit in the CFC to determine whether the Fish and Wildlife Service's assertion that it required an "Incidental Take Permit" with respect to spotted owls protected by the Endangered Species Act worked a compensable taking of its property. *Id*. at 1344. Whether the government action took Boise's property was not before the district court, ―nor could it have been. *Id*.

The parallel between *Boise Cascade* and this case is striking. In *Boise Cascade*, the government chose to enforce an environmental mandate through court action rather than an administrative order. Here, the Government, as a creditor of GM and Chrysler, chose to pursue alleviation of the economic plight of

a critical domestic industry by mandating and manipulating bankruptcies rather than by negotiations. The government's intervention into GM and Chrysler and the economic and political ramifications of those interventions are unique. When central economic planners decide "shared sacrifice" is necessary, the critical constitutional questions relating to compensation for those "sacrificed" require nothing less than full and fair adjudication in a court of competent jurisdiction.

B. Bankruptcy court prohibited preclusion claims.

The Government participated in all of the GM and Chrysler bankruptcy proceedings and has comprehensive knowledge of them. Yet, it ignores the bankruptcy court's specific decision that *res judicata*, and collateral estoppel would not apply to Dealer claims.

> All issues relating to … any other claim, right or remedy asserted by the Affected Dealers are preserved. … None of the evidence … that was admitted … in connection with the Motion, the Objections, the Hearing and this Order shall be treated as *res judicata* or collateral estoppel as to … Affected Dealers … nor shall any such evidence have preclusive effect on … Affected Dealers … in connection with any other proceeding, including in connection with the assertion of … other claims, rights or remedies by an Affected Dealer.

See, In re Chrysler LLC, Rejection Order, *supra*, at 4-5. Even absent this provision of the Rejection Order, the Government's position utterly lacks legal support. It is nonsensical to assert the purported preclusive effect of a decision that itself expressly preserves the rights of the Dealers and pointedly denies any preclusive

effect in language best read as estopping the Government from asserting estoppel!

The Bankruptcy Court correctly relied upon *McGuire*, 550 F.3d 903, when it held that it had no jurisdiction over takings claims. Prohibited by the Bankruptcy Code from interfering in any way with federal government police or regulatory power, it any lacked power to interfere with the TARP termination of auto dealerships. *See*, 11 U.S.C. § 362(a)(1) and § 106; *Bd. of Governors of the FRS v. MCorp Fin.*, 502 U.S. 32, 50 (1991).

The Government misstates the doctrines of collateral estoppel and issue preclusion arising from bankruptcy court proceedings because, in the context of takings cases, invocation of those principles is limited to cases where the plaintiff could have obtained the relief sought, although preferring to litigate in a different forum. *San Remo Hotel, L.P. v. City of San Francisco*, 545 U.S. 323 (2005) (*Williamson County* ripening of federal takings claims in state court precludes subsequent consideration of same issues in federal court). The California courts could have awarded Fifth Amendment takings damages in *San Remo.* However, the bankruptcy courts could not have awarded takings damages to the Dealers as Congress did not grant the bankruptcy courts jurisdiction over takings claims against the Government.

The Government also claims the "facts" found by that bankruptcy courts are *res judicata* as to all Dealers, even though revelation of the true facts to Congress

and SIGTARP occurred AFTER the bankruptcies. The Dealers have never had a meaningful opportunity to challenge the government's actions in a proper court with jurisdiction to afford them relief. The bankruptcy court, adopting the break-neck speed urged upon it by government-controlled GM and Chrysler, jettisoned its normal bankruptcy protections, proceedings and time tables. The court acknowledged that the Government involvement in terminating plaintiffs' property rights were extraordinary political events, though the bankruptcy court also explicitly declined to express any further view. *See* CFC Doc 20 at ¶ 29 (quoting 407 BR 463, n.16).

CONCLUSION

I. The Court should affirm the CFC decision, or in the alternative, permit amendment of the Complaint.

Based on the arguments above,[25] the Dealers request the Court to reverse the Motions Panel's decision and remand the case to the Court of Federal Claims or, alternatively, affirm Judge Hodges' decision denying the Government's motion to dismiss. JA 1-7.

If the Court finds the Complaint deficient, the Dealers request permission to amend the Complaint here or instruct the CFC to permit amendment. This Court

[25] Pursuant to FED. R. APP. P. 28(i), all parts of the Plaintiff-Appellees' Brief filed in the companion case, *Alley's of Kingport v. United States,* are hereby incorporated by reference.

has statutory and inherent authority to permit the amendment to occur at the appellate level to avoid creating unnecessary work and the potential of avoidable appeals. *Beer v. United States*, 696 F.3d 1174 (Fed. Cir. 2012); *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 831 (1989); 28 U.S.C. § 1653. The right to make such an amendment has been recognized, in particular, where a court determined there is a duty to plead with more particularity after having been confronted with an affirmative defense. *Bausch*, 630 F.3d at 562 (7th Cir. 2010). Such amendment, if deemed necessary, is consistent with FED. R. APP. P. 15(a)(2) that provides permission to amend should be freely given when justice so requires. Denials of such rights to amend are disfavored. *Id*.

Respectfully submitted,

/s/ Richard D. Faulkner

_____

Harry W. Zanville – *Lead Counsel*
HARRY ZANVILLE
Iowa State Bar No. 1777878
harrywz@cox.net
500 West Harbor Drive, Suite 1201
San Diego, California 92101
(619) 269-9227 Telephone

Richard D. Faulkner – *Of Counsel*
BLUME, FAULKNER, SKEEN & NORTHAM, PLLC.
Louisiana State Bar No. 05470
rfaulkner@bfsnlaw.com
111 W. Spring Valley Rd., Suite 250
Richardson, Texas 75081
(214) 373-7788 Telephone
(214) 373-7783 Facsimile

May 9, 2013

FORM 30. Certificate of Service

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CERTIFICATE OF SERVICE

I certify that I served a copy on counsel of record on May 13, 2013 by:

- ☐ US mail
- ☐ Fax
- ☐ Hand
- ☒ Electronic Means
  (by email or CM/ECF)

Richard D. Faulkner
Name of Counsel

/s/ Richard D. Faulkner
Signature of Counsel

Law Firm: Blume, Faulkner, Skeen & Northam, PLLC

Address: 111 W. Spring Valley Road, Suite 250

City, State, ZIP: Richardson, TX 75081

Telephone Number: 214-373-7788

FAX Number: 214-373-7783

E-mail Address: rfaulkner@bfsnlaw.com

NOTE: For attorneys filing documents electronically, the name of the filer under whose log-in and password a document is submitted must be preceded by an "/s/" and typed in the space where the signature would otherwise appear. Graphic and other electronic signatures are discouraged.

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B). The brief contains 13,905 words, excluding parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). The brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 software in Times New Roman, 14 point font.

/s/ Richard D. Faulkner
Richard D. Faulkner

May 9, 2013