No. 15-717C
Judge V. Wolski

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

CALLAN CAMPBELL, et al.,
on behalf of themselves and on behalf of
a class of all others similarly situated,

Plaintiffs,

v.

THE UNITED STATES,

Defendant.

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT

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Plaintiffs, by and through their undersigned counsel of record, respectfully oppose the Government's motion to dismiss Plaintiffs' Amended Complaint (Dkt. No. 4) (the "Complaint") pursuant to RCFC 12(b)(1) and 12(b)(6) (the "Motion") filed on October 8, 2015 (Dkt. No. 8).[1]

PRELIMINARY STATEMENT

The Complaint presents the Court with fundamental constitutional questions under the Takings Clause of the Fifth Amendment:

- When has the Government "gone too far" in extinguishing the successor liability rights of personal injury products liability claimants in bailing out a company when the liquidation alternative was "unthinkable" and "never seriously considered" by the Government?

- Has it gone too far when it accomplishes its bailout through the most coercive of means (characterized by the Government's team leader as "the financial equivalent of holding a gun to the head of the bankruptcy judge") in order to compel a result that at the time was uncertain and involved novel issues of bankruptcy law, such as whether the Government's acquisition of substantially all the assets of Old GM was a *sub rosa* plan of reorganization, violated bankruptcy law's fundamental principle of equality of distribution among creditors of the same priority, or could be effected free and clear of successor liability claims of personal injury claimants?

- Has it gone too far when it singles out a small group of claimants for far worse treatment in bankruptcy than the full payment the Government was willing to pay them in an out-of-court restructuring less than one week before the bankruptcy filing?

- Has it gone too far when it compels the bankruptcy judge to enjoin these claimants' successor liability claims despite the Government's financial indifference to their assumption, especially when these claimants were left with nothing to compensate them for their past and future medical bills, pain, and suffering except a contingent interest in a bankruptcy recovery that was wholly uncertain?

[1] Capitalized terms used herein and not defined have the meanings set forth in the Complaint.

The Complaint poses these questions through a detailed recitation of facts that clearly have the requisite specificity under RCFC 12(b)(6) and give the Government fair notice of the claims and the grounds upon which they rest. The Complaint's 109 allegations of fact in Section V of the Complaint provide more than labels, conclusions, or formulaic incantations. They tell a tragic story, rooted in fact, warranting the requested relief.

The Government's Motion raises several arguments, but they have no merit. Causes of action have long been recognized as legally cognizable property interests within the meaning of the Takings Clause. Moreover, the GM Bankruptcy Court held that state law successor liability claims are property interests as a matter of federal law, and the Government agreed. Further, the only matter before the GM Bankruptcy Court was Old GM's motion for authority to sell substantially all its assets to New GM under Section 363 of the Bankruptcy Code. The issue of whether the Government's actions targeting the Personal Injury Claimants violated the Takings Clause was never raised before the GM Bankruptcy Court. Nor could it have been since exclusive jurisdiction for such claims rests in this Court.

Finally, the Government's assertion that loss causation is lacking because the Personal Injury Claimants cannot establish that they would have received more "but for the Government's intervention" also fails. Unlike *A&D Auto Sales, Inc. v. United States*,[2] this is not a case where the central question before the Court is what remedy (or lack thereof) the Personal Injury Claimants would have had if the Government had not closed on the Sale (*i.e.*, "but for the Government's intervention").[3] Rather, the central question is whether the Government's unwarranted targeting in the bailout of the Personal Injury Claimants' rights to assert successor

[2] *A&D Auto Sales, Inc. v. United States*, 748 F.3d 1142 (Fed. Cir. 2014).

[3] *Id*. at 1158.

liability claims against New GM constituted a taking (and not whether the bailout itself was a taking). Regardless, the Government's "but for" world is just an abstract contrivance because the liquidation of Old GM was "unthinkable" and "never seriously considered" by the Government.

In sum, the Government ignores the detailed and well-pleaded factual allegations supporting the Complaint's three counts and raises spurious jurisdictional objections. The Motion, therefore, should be denied in its entirety.

QUESTIONS PRESENTED

1. Successor Liability Claims as Property Interests. The Federal Circuit holds that courts look to state, federal, and common law to define the scope of the property interests compensable under the Fifth Amendment. It also holds that causes of action are property interests within the meaning of the Fifth Amendment. In addition, the GM Bankruptcy Court held as a matter of federal bankruptcy law that state law successor liability claims constitute not just "interests," but "interests in property." Are the Personal Injury Claimants' rights to assert successor liability causes of action against New GM compensable property interests within the meaning of the Fifth Amendment?

2. "But-For" Causation. *A&D Auto Sales* held that "but-for" causation is a necessary element only in the regulatory takings context.[4] It did not—and could not—apply this test to the physical takings context where even the most minute intrusions are actionable. The Complaint does not challenge the Government's bailout generally, only those actions that specifically targeted the Personal Injury Claimants' rights to pursue successor liability claims against New GM despite the Government's financial indifference to their assumption in the Sale. Have Plaintiffs suffered a legally cognizable loss as a direct result of the Government's actions?

[4] *Id*. at 1157.

3. Preclusive Effect of Bankruptcy Court's Rulings. For the doctrine of claim preclusion or *res judicata* to apply, the party asserting the bar must prove that issues of fact and law raised in the later action were or could have been decided in the prior action. For the doctrine of issue preclusion or collateral estoppel to apply, the party asserting the bar must prove that the issues raised in the later action were actually raised in the earlier action. The GM Bankruptcy Court, like all federal bankruptcy courts, lacked subject matter jurisdiction to consider a non-debtor third party's Fifth Amendment takings claim against the United States. Further, the GM Bankruptcy Court only ruled on Old GM's motion for authority under Bankruptcy Code section 363 to sell substantially all its assets to New GM. Are Plaintiffs now precluded from litigating in the Court of Federal Claims, the only Court that can hear takings claims against the United States, whether the Government's actions in connection with the Sale constituted a taking of the Personal Injury Claimants' rights to assert successor liability claims against New GM?

4. Sufficiency of Allegations.

A. *Per Se* Physical Taking. When the Government commands the relinquishment of a specific, identifiable property interest, a *per se* takings analysis is appropriate under applicable Supreme Court precedent. The Government conditioned its willingness to close the Sale on the GM Bankruptcy Court's including a provision in the Sale Order extinguishing the Personal Injury Claimants' rights to assert successor liability claims against New GM despite the Government's financial indifference to their assumption in the Sale. Was this a *per se* taking by the Government without just compensation?

B. Categorical Regulatory Taking. A precondition to a finding of a categorical regulatory taking is the complete elimination of value at the time of the taking. Here, the taking occurred on July 10, 2009, the date the Sale closed and the provisions in the Sale

Order extinguishing the Personal Injury Claimants' rights to assert successor liability claims against New GM took effect. On that date, (i) none of the consideration paid to Old GM in the 363 Sale was distributed or guaranteed to be distributed to the Personal Injury Claimants for their direct claims against Old GM and (ii) these claimants' rights to assert successor liability claims against New GM were extinguished. Can the Government avoid the categorical duty to pay just compensation for a regulatory taking of the entire value of these property rights when, at the time of the taking, the Personal Injury Claimants were left with no more than a contingent interest in an indeterminate portion, if any, of the proceeds of the Sale?

C. *Penn Central* Regulatory Taking. Determining whether a non-categorical regulatory taking occurred requires an analysis of (i) the economic impact of the regulation on the Personal Injury Claimants, (ii) the extent to which the regulation interferes with their objectively determined investment-backed expectations, and (iii) the character of the government action and whether it has "gone too far" by disproportionately burdening a small class of persons for the public's benefit. Assumption by New GM of the successor liability claims of the Personal Injury Claimants represented a *de minimis* fraction (less than 0.5%) of the consideration paid by the Government in the Sale. Further, in directing that the Personal Injury Claimants receive markedly worse treatment in the Sale than the full payment the Government was willing to pay in the Exchange Offers less than one week before the GM Bankruptcy filing, the Government singled out the Personal Injury Claimants to bear the brunt of its pre-filing goal of squeezing out those creditors that the Government considered marginal, despite the devastating personal impact this decision would have on these claimants' health. Given the Government's financial indifference to assumption of the Personal Injury Claimants' successor liability rights, did the

Government "go too far" when it conditioned its willingness to close the Sale on the GM Bankruptcy Court's inclusion of a provision in the Sale Order extinguishing these rights?

D. Unconstitutional Conditions Doctrine. The unconstitutional conditions doctrine upholds the Constitution's enumerated rights, including the right to just compensation under the Fifth Amendment, by preventing the Government from unreasonably conditioning its willingness to act on the extinguishment of private property rights. In the GM Bankruptcy, even though the Government was financially indifferent to New GM's assumption of Personal Injury Claims, it conditioned its willingness to close on inclusion of a provision in the Sale Order enjoining the Personal Injury Claimants from pursuing successor liability claims against New GM. Did the Government violate the unconstitutional conditions doctrine because an essential nexus and rough proportionality was lacking between the condition's coercive means and the Government's desired ends of making New GM financially viable?

ARGUMENT

I. Successor liability causes of action are compensable property interests.

The Constitution "protects rather than creates property interests."[5] It "neither creates nor defines the scope of property interests compensable under the Fifth Amendment."[6] "Existing rules and understandings" and "background principles" under state, federal, or common law "define the dimensions of the requisite property rights for purposes of establishing a cognizable taking."[7]

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[5] *Phillips v. Washington Legal Found.*, 524 U.S. 156, 164 (1998) (*citing Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972)).

[6] *Maritrans, Inc. v. United States*, 342 F.3d 1344, 1352 (Fed. Cir. 2003) (*citing Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972)).

[7] *Id.* (*citing Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1030 (1992)).

The Government contends in the Motion that the successor liability causes of action against New GM extinguished by the Sale Order at the insistence of the Government were mere "tort claims" that "amount to a claim of 'right to be paid money' rather than a cause of action that protects a separate, legally-recognized property interest."[8] The Government is wrong for several reasons.[9]

First, the Government fails to distinguish between Plaintiffs' underlying tort claims against Old GM and the wholly separate right to assert successor liability claims against New GM.[10] It is the latter that were extinguished in the Sale Order, not the former. Nor is *In re Motors Liquidation Co.*[11] to the contrary. That case does not address the effects of the Sale on successor liability claims against New GM. It only stated, in dicta, that general unsecured creditors of Old GM could not challenge the Sale itself as a taking. But Plaintiffs do not allege the Sale itself was a taking. Rather, they allege a taking occurred *not*—as in *In re Motor Liquidation Co*.—because of the effect of the Sale on their unsecured claims against Old GM but because of the Government's unreasonable coercive condition that it would close the Sale only if the Sale Order included a provision that enjoined the Personal Injury Claimants from pursuing successor liability claims against New GM. The Government's failure to recognize this distinction is the reason its standing argument fails.

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8 Motion at 15 (*citing Adams v. United States*, 391 F.3d 1212, 1225 (Fed Cir. 2004)).

9 Plaintiffs agree with the Government's statement regarding the standard of review that the Court should adopt in assessing the Government's subject matter jurisdiction challenge. *See* Motion at 13-14.

10 Motion at 15.

11 *In re Motors Liquidation Co.*, 430 B.R. 65, 96 (S.D.N.Y. 2010).

Second, as explained in *Alimanestianu v. United States*,[12] recent cases from the Federal Circuit and the Court of Federal Claims hold that causes of action at law are cognizable property interests. These cases distinguish between causes of action arising at law (which are compensable property interests) and entitlement claims like those in *Adams* (which are not compensable property interests because they represent nothing more than "a due process right to payment of a monetary entitlement under a compensation statute").[13] The Court in *Aureus Asset Managers, Ltd. v. United States*,[14] for example, found that legally cognizable property interests under the Fifth Amendment included the right of subrogees to sue on behalf of their insureds for covered losses. Going even further, the Supreme Court in *Kimball Laundry Co. v. United States*[15] held that intangibles like going concern value and goodwill are compensable property interests under the Fifth Amendment. If intangible assets as fleeting as going concern value and goodwill are cognizable interests under the Takings Clause, then surely the successor liability causes of action of the Personal Injury Claimants are too.

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[12] *Alimanestianu v. United States*, 14-704C, 2015 WL 6560537, at *5 (Ct. Cl. Oct. 29, 2015) (*citing Alliance of Descendants of Tex. Land Grants v. United States*, 37 F.3d 1478, 1481 (Fed. Cir. 1994) and *Aviation & Gen. Ins. Co. v. United States*, 121 Fed. Cl. 357, 365 (2015)).

[13] *Adams*, 391 F.3d at 1220.

[14] *Aureus Asset Managers, Ltd. v. United States*, 121 Fed. Cl. 206, 213 (2015).

[15] *Kimball Laundry Co. v. United States*, 338 U.S. 1, 11 (1949) ("In determining the value of a business as between buyer and seller, the good will and earning power due to effective organization are often more important elements than tangible property. Where the public acquires the business, compensation must be made for these, at least under some circumstances.") (*citing Galveston Elec. Co. v. Galveston*, 258 U.S. 388, 396 (1922)).

Third, the GM Bankruptcy Court held as a matter of federal bankruptcy law that successor liability claims constitute not just "interests," but "interests in property."[16] In so doing, the Court stated that it was following the Second Circuit's holding in *In re Chrysler, LLC*,[17] that personal injury claimants' rights to assert successor liability claims against the buyer of Chrysler's assets constitute "interests in property" because these claims "arise from the property being sold."[18]

The Government contends that federal bankruptcy law "has no bearing on whether [Plaintiffs' successor liability claims] are valid property interests for purposes of the Takings Clause."[19] But this argument was soundly rejected by the Federal Circuit in *Bair v. United States*,[20] which held that a federal statute does constitute a "background principle of law" under the takings clause.

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[16] *See* **Compl., Exhibit 2** (the "**Sale Opinion**") at 57-61 (also at *In re Gen. Motors Corp.*, 407 B.R. 463, 475 (Bankr. S.D.N.Y. 2009), *aff'd sub nom. In re Motors Liquidation Co.*, 428 B.R. 43 (S.D.N.Y. 2010), *aff'd sub nom. In re Motors Liquidation Co.*, 430 B.R. 65 (S.D.N.Y. 2010) (following authority of the Second and Third Circuit Court of Appeals that successor liability claims are "interests in property" that can be extinguished by a free and clear sale of a bankrupt debtor's assets under Bankruptcy Code section 363).

[17] *In re Chrysler LLC*, 405 B.R. 84, 89 (Bankr. S.D.N.Y. 2009), *aff'd*, 576 F.3d 108 (2d Cir. 2009), *cert. granted, judgment vacated sub nom. Indiana State Police Pension Trust v. Chrysler LLC*, 558 U.S. 1087 (2009), *vacated sub nom. In re Chrysler, LLC*, 592 F.3d 370 (2d Cir. 2010)).

[18] Sale Opinion, Compl. Ex. 2, at 60 n.109 (also at *Gen. Motors Corp.*, 407 B.R. at 505 n.109) (*citing* 3 *Collier on Bankruptcy* at ¶ 363.06[1] ("the trend seems to be in favor of a broader definition [of "interests in property"] that encompasses other obligations that may flow from ownership of the property")).

[19] Motion at 16.

[20] *Bair v. United States*, 515 F.3d 1323, 1327 (Fed. Cir. 2008) ("Appellants argue . . . that only the states, and not the federal government, have the power to create and define property rights, and that the federal statute therefore cannot constitute a "background principle" of law

Fourth, in pressing its case before the Bankruptcy Court for an injunction barring the assertion of successor liability claims against New GM, the Government agreed that such rights are "interests in property" that could be extinguished in a "free and clear" sale under section 363(f) of the Bankruptcy Code.[21] The Court should disregard the Government's standing argument under the doctrine of judicial estoppel, which precludes a litigant from "playing fast and loose" with the Courts by invoking "intentional self-contradiction[s] . . . as a means of obtaining unfair advantage."[22]

Because Plaintiffs' successor liability claims are compensable property interests for purposes of the Takings Clause, Plaintiffs have the requisite standing to bring this action against the Government.

II. *A&D Auto Sales'* "but-for" causation standard is not the only causation test, nor should it be applied to this case.

The Government's other jurisdictional argument is that *A&D Auto Sales* mandates dismissal of the Complaint because Plaintiffs are "collaterally estopped from arguing that [Old GM] could have avoided bankruptcy or that their personal injury claims would have had greater value without Government assistance."[23] Unlike *A&D Auto Sales*, however, this is not a case where the central question before the Court is what remedy (or lack thereof) the Personal Injury Claimants would have had if the Government had not closed on the Sale (*i.e.*, "but for the

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in derogation of appellants' state-created right to lien priority. We reject appellants' argument.").

[21] Compl. ¶ 125.

[22] *Wang Labs. v. Applied Computer Scis.*, 958 F.2d 355, 358 (Fed. Cir. 1992).

[23] Motion at 23.

Government's intervention").[24] Rather, the central question before this Court is whether the Government's actions in connection with its intervention (and not the fact of the intervention itself) constituted a taking.

To that end, the Complaint alleges that, as a condition to closing, the Government demanded that the Sale Order include a provision that enjoined the Personal Injury Claimants from pursuing successor liability claims against New GM even though the Government was financially indifferent to New GM's assumption of Personal Injury Claims because it agreed with Old GM that it would still close the Sale without any reduction to the purchase price if required to assume these claims.[25] Moreover, nothing in *A&D Auto Sales* requires that loss causation on these facts be established based on whether Plaintiffs would have recovered anything "but for the Government's intervention." Indeed, *A&D Auto Sales* itself focuses on the Government's "action," not the mere fact of its intervention.[26]

Consequently, the Government is incorrect when it claims that Plaintiffs cannot establish "but-for" causation. Plaintiffs have adequately alleged that "but for" the Government's unreasonably coercive demand that the Personal Injury Claimants' rights to assert successor liability claims be eliminated through the Sale Order, these valuable rights would have been preserved. The Court, therefore, should reject the Government's attempt to use the "but-for" test offensively to insulate it from liability for takings claims where it directly targeted the elimination of the Personal Injury Claimants' property rights.

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[24] Motion at 23.

[25] *See, e.g.*, Compl. ¶¶ 7-9, 15, 169, 180, 187, 203, 212.

[26] *A&D Auto Sales, Inc.*, 748 F.3d at 1157.

Regardless, the Complaint alleges that the Government's "but-for" world is a theoretical construct only because the Government never intended to allow Old GM to liquidate. The Complaint alleges that the Government "determined by late March 2009 that a forced or orderly liquidation of Old GM was, in the words of the Government's Team leader, 'unthinkable' and an option that it 'never seriously considered.' "[27] Indeed, the Auto Team's leader himself acknowledged that the Government made demands that were "the financial equivalent of putting a gun to the head of the bankruptcy judge."[28] One such unreasonably coercive demand, the Complaint alleges, was that the Sale Order enjoin the Personal Injury Claimants from pursuing successor liability claims against New GM even though the Government was financially indifferent to assumption of these claims.[29]

Finally, even if the Court were to agree that the Government's "but for" loss causation argument applies in analyzing whether the Government's actions constituted a taking, dismissal of the Complaint is not warranted. *A&D Auto Sales* held that "but-for" causation is a "necessary element" only in the regulatory takings context.[30] Plaintiffs, however, have alleged a regulatory takings claim only as an alternative count. Plaintiffs' first count alleges a *per se* physical

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[27] Compl. ¶ 58.

[28] Compl. ¶ 87.

[29] *See, e.g.*, Compl. ¶¶ 7, 107, 123, 164, 169, 180, 203.

[30] *A&D Auto Sales, Inc.*, 748 F.3d at 1157.

taking,[31] the damages for which depend solely on the extent of their loss of value, not on what they might have received "but for" the Government's action.[32]

Judge Hughes in *Colonial Chevrolet v. United States*[33] followed this line of reasoning when he held that dismissal on the pleadings alone was "premature" because "[an]other theor[y] that may be under consideration by plaintiffs include[s] the possibility that plaintiffs' loss of personal property was the direct, natural, or probable result of the Government's actions"; or put another way, because it was a physical taking. This Court should follow suit and likewise sustain Count I of the Complaint as adequately alleging a *per se* physical taking.

Moreover, the "but-for" test articulated in *A&D Auto Sales* (*i.e.*, "but-for" the Government's intervention) cannot logically be applied in the physical takings context where the Government's action "is a physical occupation or invasion of the property, including the functional equivalent of 'a practical ouster of [the property owner's] possession.' "[34] As the Supreme Court said in *Lucas*, "no matter how minute the intrusion, and no matter how weighty the public purpose behind it, [the Supreme Court] ha[s] required compensation [for physical takings]."[35] *A&D Auto Sales*, therefore, appropriately limited the "but-for" test to regulatory takings, which are necessarily tied to governmental activities that merely impair the use of

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[31] Compl. ¶¶ 161-175.

[32] *See, e.g.*, *Horne v. Dep't of Agric.*, 135 S. Ct. 2419, 2426 (2015) (*Horne II*) ("a *per se* taking requires just compensation") (*citing Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426-35 (1982)).

[33] *Colonial Chevrolet, Inc. v. United States*, 103 Fed Cl. 570, 575 (2012).

[34] *Olajide v. United States*, No. 15-549C, 2015 WL 7496230, at *6 (Ct. Cl. Nov. 23, 2015) (*citing Loretto*, 458 U.S. 419, 428 (1982)).

[35] *Lucas*, 505 U.S. at 1015.

property, as compared with physical takings that are "so immediate and direct as to subtract from the owner's full enjoyment of the property and to limit his exploitation of it."[36]

That "but-for" causation does not apply in the physical takings context is amply demonstrated by Supreme Court precedent. In *Horne II*, the Supreme Court rejected the government's argument that the raisin growers were economically better off under the government program because keeping a percentage of their crops off the market artificially kept prices high.[37] In *Phillips v. Washington Legal Foundation*,[38] the Supreme Court held that interest income in attorney IOLTA accounts was the private property of the owner of the principal in the account for purposes of the Takings Clause. The Supreme Court so ruled despite recognizing that "the interest income at issue may have no economically realizable value to its owner."[39] For the same reason, the Court held, "the government may not seize rents received by the owner of a building simply because it can prove that the costs incurred in collecting the rents exceed the amount collected."[40] In *Webb's Fabulous Pharmacies, Inc. v. Beckwith*,[41] the Supreme Court unanimously rejected the contention that a state regulatory scheme's generation of interest that

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[36] *Olajide*, 2015 WL 7496230, at *6 (*citing United States v. Causby*, 328 U.S. 256, 265 (1946)).

[37] *Horne II*, 135 S. Ct. at 2432 (just compensation for a physical taking should be measured according to "the market value of the property at the time of the taking").

[38] *Phillips v. Wash. Legal Found.*, 524 U.S. 156 (1998).

[39] *Id*. at 170.

[40] *Id*.

[41] *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980).

would otherwise not have come into existence gave license for the State to claim the interest for itself.[42]

Finally, applying different causation standards to regulatory and physical takings comports with the hornbook principle stated in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*[43] that "the longstanding distinction between acquisitions of property for public use, on the one hand, and regulations prohibiting private uses, on the other, makes it inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a 'regulatory taking,' and vice versa." The Court, therefore, should reject the Government's arguments that the Complaint fails to allege the requisite causation between the Government's actions and the Personal Injury Claimants' loss.

III. The GM Bankruptcy Court's rulings have no preclusive effect on the Personal Injury Claimants' rights to assert takings claims against the Government.

For the doctrine of claim preclusion or *res judicata* to apply, the party asserting the bar must prove that issues of fact and law raised in the later action were or could have been decided in the prior action.[44] For the doctrine of issue preclusion or collateral estoppel to apply, the party asserting the bar must prove that the issues raised in the later action were actually raised in the earlier action.[45] Neither doctrine bars Plaintiffs' action against the Government.

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[42] *Id*. at 163 ("The Florida Supreme Court . . . proceeded on the theory that without the statute the clerk would have no authority to invest money held in the registry . . . and that the statute 'takes only what it creates.' ").

[43] *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 323 (2002).

[44] *United Techs. Corp. v. Chromalloy Gas Turbine Corp.*, 189 F.3d 1338, 1343 (Fed. Cir. 1999).

[45] *Ammex, Inc. v. United States*, 384 F.3d 1368, 1371 (Fed. Cir. 2004).

All of the GM Bankruptcy Court's factual findings and conclusions of law are set forth in the Sale Opinion and the Sale Order.[46] Nowhere in the Sale Opinion or the Sale Order, however, does the Court employ the words "takings," "unconstitutional," or "Fifth Amendment." Nor could Plaintiffs have even raised a takings claim before the GM Bankruptcy Court. As the Supreme Court held in *Horne v. Dep't of Agriculture* ("*Horne I*"),[47] "a Fifth Amendment claim is premature until it is clear that the Government has both taken property *and* denied just compensation." Here, Plaintiffs' takings claim did not ripen until July 10, 2009, the day that the Sale closed and the provisions in the Sale Order extinguishing Plaintiffs' rights to pursue successor liability claims against New GM took effect. As such, Plaintiffs' takings claim could not have been presented to the GM Bankruptcy Court because of a lack of "prudential ripeness."[48]

The GM Bankruptcy Court also lacked subject matter jurisdiction to consider Plaintiffs' takings claims against the Government. As stated in *Horne I*, "a claim for just compensation under the Takings Clause must be brought to the Court of Federal Claims in the first instance, unless Congress has withdrawn the Tucker Act grant of jurisdiction in the relevant statute."[49] Most recently, in *Olajide v. United States*,[50] Judge Griggsby reaffirmed the uncontroverted rule

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[46] Copies of the Sale Order and Sale Opinion are attached to the Complaint as **Exhibit 1** and **Exhibit 2**, respectively.

[47] *Horne v. Dep't of Agric.*, 133 S. Ct. 2053, 2062 (2013) (*Horne I*) (*citing Lucas*, 505 U.S. at 1013) (emphasis in original).

[48] *Horne I*, 133 S. Ct. at 2062.

[49] *Id.* (*citing Eastern Enters. v. Apfel*, 524 U.S. 498, 520 (1998)) and *United States v. Bormes*, 133 S. Ct. 12, 17 (2012) (where "a statute contains its own self-executing remedial scheme," a court "look[s] only to that statute")).

[50] *Olajide*, 2015 WL 7496230, at *5 ("Court of Federal Claims has exclusive jurisdiction over Fifth Amendment takings claims in excess of $10,000") (*citing* 28 U.S.C. § 1491(a)).

that exclusive jurisdiction over Fifth Amendment takings claims resides in the Court of Federal Claims.

Since nothing in the U.S. Bankruptcy Code withdraws the Tucker Act grant of jurisdiction from the Court of Federal Claims, Plaintiffs were barred from asserting their takings claim before the GM Bankruptcy Court. Accordingly, even though the action before this Court may share some of the same factual circumstances raised in connection with Old GM's motion to approve the Sale, the doctrine of *res judicata* is inapplicable here because formal jurisdictional and statutory barriers precluded Plaintiffs from asserting their takings claims in the GM Bankruptcy itself.[51]

Putting aside these prudential ripeness and jurisdictional bars to Plaintiffs' ability to raise takings claims before the GM Bankruptcy Court, the factual and legal issues raised there were entirely different than those raised here. The proceeding before the GM Bankruptcy Court was a "contested matter" that the GM Bankruptcy Court considered in summary fashion (as distinguished from an "adversary proceeding").[52] The Government asserts that the GM Bankruptcy Court considered "hundreds of thousands of pages of evidence," but this is not true. Unlike the *Starr International v. United States* trial, in which thousands of exhibits were

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[51] *See* RESTATEMENT (SECOND) OF JUDGMENTS, § 26, subsection (1)(c) and cmt. c (1982) ("[*Res judicata*] is largely predicated on the assumption that the jurisdiction in which the first judgment was rendered was one which put no formal barriers in the way of a litigant's presenting to a court in one action the entire claim including any theories of recovery or demands for relief that might have been available to him under applicable law. When such formal barriers in fact existed and were operative against a plaintiff in the first action, it is unfair to preclude him from a second action in which he can present those phases of the claim which he was disabled from presenting in the first.").

[52] A "contested matter" involves a contested request for relief in the context of the main bankruptcy proceeding pursuant to FED. R. BANKR. P. 9014. An adversary proceeding involves the filing of a complaint that commences a separate lawsuit and is governed by FED. R. BANKR. P. 7001, *et seq*.

introduced and nearly 9,000 pages of trial transcript were generated in hearings extending over two months,[53] the hearing before the GM Bankruptcy Court to consider Old GM's motion to approve the Sale was held over three days and the entire record comprised less than 50 exhibits and 850 pages of trial transcript (including almost 225 pages of opening and closing arguments).

As for the findings themselves, the GM Bankruptcy Court listed only 11 "findings of ultimate facts" in the Sale Opinion.[54] The first ten addressed issues relevant to the business judgment of Old GM, the absence of alternatives to the Sale, New GM's good faith within the meaning of Bankruptcy Code section 363(m), the fairness of the deal reached with the United Auto Workers union, and the right of the Government under federal bankruptcy law to purchase Old GM's assets through a "credit bid" of its secured claims against Old GM.

The GM Bankruptcy Court then incorporated these findings into the Sale Order, while making additional findings of fact (in Sections A-MM of the Sale Order).[55] Only the finding in Section DD, however, is relevant to the most critical issue facing the Court here. It states:

> The Purchaser would not have entered into the MPA and would not consummate the 363 Transaction (i) if the sale of the Purchased Assets was not free and clear of all liens, claims, encumbrances, and other interests (other than Permitted Encumbrances), including rights or claims based on any successor or transferee liability or (ii) if the Purchaser would, or in the future could, be liable for any such liens, claims, encumbrances, and other interests, including rights or claims based on any successor or transferee liability (collectively, the "Retained Liabilities"), other than, in each case, the Assumed Liabilities. The Purchaser will not consummate the 363 Transaction unless this Court expressly orders that none of the Purchaser, its affiliates, their present or contemplated members or shareholders (other than the Debtors as the holder of equity in the Purchaser), or the Purchased Assets will have any liability whatsoever with respect to, or be required to satisfy in any manner, whether at law or equity, or by payment, setoff,

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53 *See Starr Int'l v. United States*, 121 Fed. Cl. 428, 461-63 (2015) (citing to DX 2802, PTX 5371, and Trial Transcript, p. 8436).

54 Sale Opinion, Compl. Ex. 2, at 25 (also at *Gen. Motors Corp.*, 407 B.R. at 485-86).

55 Sale Order, Compl. Ex. 1, at 3-19.

> or otherwise, directly or indirectly, any liens, claims, encumbrances, and other interests, including rights or claims based on any successor or transferee liability or Retained Liabilities, other than as expressly provided herein or in agreements made by the Debtors and/or the Purchaser on the record at the Sale Hearing or in the MPA.[56]

This finding, however, is only the start of the matter, not—as the Government argues—its conclusion. As the Federal Circuit recently held in *Dimare Fresh, Inc. v. United States*,[57] "the Constitution measures a taking of property not by 'what [the] government said it was doing, or what it later says its intent was. . . . *What counts is what the government did.*' " The crux of Plaintiffs' Complaint is that the Government's demand that the Personal Injury Claimants' rights to assert successor liability claims be eliminated through the Sale Order was unreasonably coercive, and therefore a taking, because the Government was financially indifferent to New GM's assumption of these claims.[58]

With respect to the Government's conduct in the Sale, other than finding that the Government was a good faith purchaser under Bankruptcy Code sections 363(m) and 363(n),[59] nowhere did the GM Bankruptcy Court rule—as the Government claims—that "the Government did not . . . act inequitably."[60] And certainly the Bankruptcy Court did not rule on the central issue in this case as to whether the Government's demand was so unreasonably coercive as to constitute a taking. Rather, as alleged in the Complaint, the GM Bankruptcy Court only found that the Government was conditioning its willingness to close the Sale on inclusion of a

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[56] Sale Order, Compl. Ex. 1, ¶ DD, p. 15.

[57] *Dimare Fresh, Inc. v. United States*, No. 2015-5006, 2015 WL 6500337, at *5 (Fed. Cir. Oct. 28, 2015) (*quoting Hughes v. Washington*, 389 U.S. 290, 298 (1967)) (emphasis in original).

[58] *See, e.g.*, Compl. ¶¶ 15, 180, 187, 203, 212.

[59] Sale Order, Compl. Ex. 1. at Sec. Q, p. 8.

[60] Motion at 17.

provision in the Sale Order extinguishing the Personal Injury Claimants' rights to assert successor liability claims against New GM.

That the Sale Opinion and Sale Order were narrowly decided under Bankruptcy Code section 363 is further demonstrated by Judge Gerber's comment in the Sale Opinion that the actions of the Government in the Sale, such as "whether the U.S. . . . Government[] would have lent and ultimately bid a lesser amount here . . . provides the context for deciding legal issues that presumably will extend beyond this case."[61] The allegations in Plaintiffs' Complaint provide the context for deciding a legal issue not decided by the GM Bankruptcy Court; that is, whether the Government's coercive demand that successor liability claims of the Personal Injury Claimants be extinguished in the Sale Order constituted a taking under the Fifth Amendment.

In *A&D Auto Sales*, the Federal Circuit held that the narrow findings of the GM Bankruptcy Court regarding the "good faith" of the Government "are not collateral estoppel on the issue of coercion."[62] In language equally applicable here, the Federal Circuit stated:

> [T]he bankruptcy court's findings do not estop the plaintiffs from arguing that the government coerced the automakers into action. Collateral estoppel only applies if "the issue [in the instant action] is *identical* to one decided in the first action." The issue here is whether the government coerced GM and Chrysler through a coercive offer of financial assistance. The issue before the bankruptcy court was whether New GM and New Chrysler purchased the assets of Old GM and Old Chrysler "in good faith" [under] 11 U.S.C. § 363(m). Whatever the bankruptcy court found is immaterial. Its findings on good faith are not collateral estoppel on the issue of coercion.[63]

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[61] Sale Opinion, Compl. Ex. 2, at 51 n.91 (also at *Gen. Motors Corp.*, 407 B.R at 500 n.91).

[62] *A&D Auto Sales, Inc.*, 748 F.3d at 1156.

[63] *Id*. (internal citations omitted) (emphasis in original).

This Court should also look to *Colonial Chevrolet*[64] in ruling on whether it has the requisite subject matter jurisdiction to consider the Complaint. In *Colonial Chevrolet*, the plaintiff car dealers alleged an unconstitutional taking occurred when the Government required Old GM to terminate the dealers' franchise agreements as a condition of Old GM's obtaining financial assistance through TARP. The Government argued that the Court of Federal Claims lacked jurisdiction because the GM Bankruptcy Court approved Old GM's rejection of the dealers' franchise agreements. In rejecting the Government's argument that it lacked jurisdiction over the dealers' complaint, Judge Hodges stated:

> [The plaintiffs] do not contest decisions of the bankruptcy judges. They do not ask that we review those decisions. Instead, they complain that the Government's alleged control of the TARP restructuring process resulted in a Fifth Amendment taking as defendant applied TARP to the automobile industry. This court's jurisdiction to hear and adjudicate takings claims against the United States is undisputed.[65]

Though the Federal Circuit in *A&D Auto Sales* remanded the interlocutory decision of Judge Hodges on appeal, it did so only on the issue of loss causation, not on the issue of the "undisputed" jurisdiction of this Court to hear the case in the first instance.[66]

As for the two District Court opinions affirming the Sale Order, they too provide no basis for dismissing the Complaint. All the statements from these opinions that were cited by the Government in its Motion were wholly unnecessary to affirmance of the Sale Order. Indeed, both courts based their rulings exclusively on the fact that the appeals were moot under Bankruptcy Code section 363(m) because neither of the appellants in either of those cases sought a stay

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64 *Colonial Chevrolet, Inc*., 103 Fed. Cl. at 573.

65 *Id*. at 573.

66 *A&D Auto Sales, Inc.*, 748 F.3d at 1159 ("We conclude that the Claims Court properly declined to dismiss the plaintiffs' complaints at this preliminary stage.").

pending appeal or challenged the Government's "good faith" within the meaning of Bankruptcy Code section 363(m).[67]

Further, in rejecting Plaintiffs' direct appeal of the Sale Order, United States District Judge Buchwald nowhere addressed issues relevant to Plaintiffs' taking claims before this Court. In fact, as noted above, her only actual ruling was to deny the appeal as moot under Bankruptcy Code section 363(m).[68] Everything else in her opinion was mere dicta, including her expansive (and incorrect) commentary on Section DD of the Sale Order, which on its face simply acknowledged the fact that the Government had conditioned its willingness to close the Sale on the GM Bankruptcy Court's including a provision in the Sale Order extinguishing all successor liability claims. Nowhere in the Sale Opinion or Sale Order did the GM Bankruptcy Court find extinguishing of the Personal Injury Claimants' successor liability rights was of "critical significance" to the Government.[69] Yet, to the extent that the Government wants to characterize Judge Buchwald's statements, issued "for the sake of completeness," as an alternative holding to her dismissal of the appeal as moot,[70] the Federal Circuit in *TecSec, Inc. v. Int'l Bus. Machines*

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67 *See In re Motors Liquidation Co.*, 428 B.R. 43, 60, 64 (S.D.N.Y. 2010) ([Bankruptcy Code] section 363(m) is dispositive of this appeal, which is denied on that basis[;] the appeal is denied as moot, and the judgment of the Bankruptcy Court is AFFIRMED."); *In re Motors Liquidation Co.*, 430 B.R. 65, 83 (S.D.N.Y. 2010) ("Parker did not comply with the Second Circuit's admonition that a party seek a stay or lose the right to appeal. . . . Under these circumstances, the appeal is moot.").

68 *In re Motors Liquidation Co.*, 428 B.R. 43, 60, 64 (S.D.N.Y. 2010)

69 *Id*. at 60.

70 *Id*.

Corp.[71] made clear that such alternative holdings have no collateral estoppel effect when it stated:

> Among other elements, the party that seeks to invoke collateral estoppel must show that the litigated issue was "actually determined in the prior proceeding" and was a "critical and necessary part of the decision in the prior proceeding." A corollary to this requirement is "where the court in the prior suit has determined two issues, either of which could independently support the result, then neither determination is considered essential to the judgment."[72]

Equally irrelevant is the opinion of United States District Judge Sweet,[73] who affirmed the Sale Order from an appeal by Oliver Addison Parker ("Parker"), an unsecured bondholder of Old GM. Like Judge Buchwald, Judge Sweet ruled that Parker's appeal was moot under Bankruptcy Code section 363(m).[74] Notwithstanding, he too addressed the merits of Parker's appeal in his opinion and concluded that "the Sale was not an unconstitutional taking."[75]

Even if this were the only holding in the case, however, it would not be binding on Plaintiffs since they were not parties to Parker's appeal. Also, Parker raised his takings argument for the first time on appeal and, as noted above, neither the Sale Opinion nor the Sale Order addressed whether the Government's actions in connection with the Sale constituted a taking. The issue raised on appeal by Parker also was only whether the Sale itself was a taking, which Plaintiffs do not challenge in the Complaint.

Judge Sweet's opinion, therefore, does not collaterally estop Plaintiffs in this case from asserting that the Government's demand that the Personal Injury Claimants' rights to assert

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[71] *TecSec, Inc. v. Int'l Bus. Machines Corp.*, 731 F.3d 1336 (Fed. Cir. 2013), *cert. denied sub nom. Cisco Sys., Inc. v. TecSec, Inc.*, 134 S. Ct. 2698 (2014).

[72] *Id*. at 1343-44 (internal citations omitted).

[73] *In re Motors Liquidation Co.*, 430 B.R. 65 (S.D.N.Y. 2010).

[74] *Id*. at 83.

[75] *Id*. at 95-96.

successor liability claims be eliminated in the Sale Order was arbitrary and coercive, and therefore a taking. Judge Sweet did not address this issue, and neither has any other Court.

As such, this Court should reject the Government's reliance on *Allustiarte v. United States*[76] as support for its argument that this Court lacks jurisdiction. In *Allustiarte*, jurisdiction was found to be lacking because the case required review of a bankruptcy judge's approval of a bankruptcy trustee's actions.[77] Conversely, in *Colonial Chevrolet*, Judge Hodges rejected the Government's argument, also based on *Allustiarte*, that Old GM's dealers were collaterally estopped from bringing a takings claim, holding that (i) "[the Court is] not asked to review bankruptcy court rulings in the administration of a bankruptcy, but to hear a taking claim against the United States" and (ii) "bankruptcy law prevents unsecured creditors from arguing takings in bankruptcy court."[78]

The Federal Circuit in *A&D Auto Sales* also rejected the Government's collateral estoppel argument that the findings of good faith by the GM Bankruptcy Court estopped the plaintiffs from arguing that the Government coerced Old GM into action. Rather, in language equally applicable here, the Federal Circuit held that "[w]hatever the bankruptcy court found is immaterial; [i]ts findings on good faith are not collateral estoppel on the issue of coercion."[79]

Because Plaintiffs assert claims that were not and could not have been adjudicated in the bankruptcy proceedings, the Complaint is not barred by the doctrines of issue or claim preclusion.

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[76] *Allustiarte v. United States*, 256 F.3d 1349 (Fed. Cir. 2001).

[77] *Id*. at 1351-52.

[78] *Colonial Chevrolet Co., Inc.*, 103 Fed. Cl. at 572.

[79] *A&D Auto Sales, Inc.*, 748 F.3d at 1156.

IV. The Complaint sufficiently alleges a taking based on the Government's coercive demand that the Sale Order extinguish Plaintiffs' successor liability rights.

Plaintiffs agree with the Government regarding the appropriate standard of review under RCFC 12(b)(6).[80] That is where the agreement ends, however. The minimum level of specificity advocated by the Government to survive a RCFC 12(b)(6) motion is far greater than has been required by this Court in takings cases.

In *Alimanestianu*, for example, Judge Williams admonished the Government for "attempt[ing] to muddy the issue by injecting a regulatory taking analysis into what should be an assessment of Plaintiffs' pleading – a Rule 12(b)(6) inquiry into whether Plaintiffs have stated a plausible claim for a Fifth Amendment taking."[81] Regarding the level of scrutiny warranted in ruling on a motion to dismiss under RCFC 12(b)(6) in a takings case, Judge Williams stated:

> It would be premature to decide at this stage of the case whether Plaintiffs' allegations should be resolved under a 'per se' takings analysis or the *Penn Central* test for regulatory takings. While those factors may ultimately be relevant in deciding whether a taking has occurred, they do not assist the Court in deciding whether Plaintiffs have stated a plausible taking claim.[82]

As established below, the Government ignores the detailed and well-pleaded factual allegations supporting the Complaint's three counts, each of which provides the requisite factual specificity to reject the Government's claims that (i) "the [Complaint's] assertion that a physical taking occurred is entirely conclusory and unsupported by fact that could support a claim for

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[80] Motion at 13-14; *see also A&D Auto Sales, Inc.*, 748 F.3d at 1157-58 (The Claims Court rules require "a short and plain statement of the claim showing that the pleader is entitled to relief." This means the complaint must contain "sufficient factual matter, accepted as true, 'to state a claim to relief that is plausible on its face.' " A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable.") (internal citations omitted).

[81] *Alimanestianu*, 2015 WL 6560537, at *6.

[82] *Id*. (*citing Aviation & Gen Ins. Co. v. United States*, 121 Fed. Cl. 357, 366 (2015)).

relief,"[83] and (ii) "the Complaint falls far short of adequately pleading facts required to support the other elements of either the *Penn Central* or the *Lucas* regulatory tests."[84]

A. The Complaint sufficiently alleges a *per se* physical taking.

The Government relies on *A&D Auto Sales* in arguing that Plaintiffs have not plausibly alleged a physical taking in this case.[85] *A&D Auto Sales*, however, does not support the Government's position. Indeed, Judge Firestone ruled to the contrary on remand of the case from the Federal Circuit, holding that "Plaintiffs may be correct that their claims will ultimately be appropriately considered under the physical takings rubric of *Horne [II]* and other cases rather than the regulatory takings tests of *Lucas* or *Penn Central.*"[86]

The Government is also wrong when it argues that Plaintiffs' allegations "do not plausibly allege a physical taking because plaintiffs do not allege that the Government appropriated or transferred their underlying claims."[87] In *Stop the Beach Nourishment, Inc. v. Florida Department of Environmental Protection*,[88] the Supreme Court stated that physical takings are not limited to outright transfers or appropriations of property, but also include the destruction of property.[89] The Court stated:

> [T]hough the classic taking is a transfer of property to the State or to another private party by eminent domain, the Takings Clause applies to other state actions

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83 Motion at 39.

84 Motion at 4-5.

85 Motion at 38.

86 *Colonial Chevrolet, Inc. v. United States*, 123 Fed. Cl. 134, 138 (2015).

87 Motion at 39.

88 *Stop the Beach Nourishment, Inc. v. Florida Dep't of Envtl. Prot.*, 560 U.S. 702 (2010).

89 Motion at 39 ("these allegations do not plausibly allege a physical taking because plaintiffs do not allege that the Government appropriated or transferred their underlying claims").

> that achieve the same thing. Thus, when the government uses its own property in such a way that it destroys private property, it has taken that property.[90]

Other cases support the proposition that the destruction of property interests is the equivalent of an outright appropriation under the Takings Clause. In *Armstrong v. United States*,[91] as here, the Government's actions caused "the total destruction by the Government of all value of [the creditor's] . . . compensable property."[92] While *Armstrong* involved the total destruction of a creditor's liens, the rule applies to any "compensable property."[93] As such, *Armstrong*'s holding is equally applicable to Plaintiffs' successor liability rights, which the Government—for its own direct benefit as majority owner of New GM—required be extinguished in the Sale Order.[94] Similarly, in *Apfel*,[95] Justice Kennedy noted in his concurring opinion that "destruction of an existing obligation . . . relat[ing] to a specific property interest . . . implicate[s] the Takings Clause."

Plaintiffs further adequately allege a *per se* physical taking because their loss directly arises from the Government's demand that the Sale Order extinguish Plaintiffs' rights to assert

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90 *Stop the Beach Nourishment, Inc.*, 560 U.S. at 713 (*citing Causby*, 328 U.S. at 261-62 and *Pumpelly v. Green Bay & Mississippi Canal Co.*, 80 U.S. 160, 177-78 (1871)) (emphasis added).

91 *Armstrong v. United States*, 364 U.S. 40 (1960).

92 *Id*. at 48.

93 *Id*.

94 Compl. ¶¶ 128, 167; *see also Apfel*, 524 U.S. at 544 (1998) (Kennedy, J., concurring in the judgment and dissenting in part) ("the Government's self-enrichment may make it all the more evident a taking has occurred"); and *Cary v. United States*, 552 F.3d 1373, 1380 (Fed. Cir. 2009) ("to constitute a taking, an invasion must appropriate a benefit to the government at the expense of the property owner").

95 *Apfel*, 524 U.S. at 544 (Kennedy, J., concurring in the judgment and dissenting in part).

successor liability claims against New GM.[96] The Complaint alleges that the leader of the Auto Team in charge of the Government's restructuring efforts confided that the Government's demand that the Sale be consummated within 40 days after the GM Bankruptcy filing was "the financial equivalent of putting a gun to the head of the bankruptcy judge."[97] The Government's coercive demand conditioning its willingness to close the Sale on the inclusion of a provision in the Sale Order enjoining the Personal Injury Claimants from pursuing successor liability claims against New GM had the same effect and supports Plaintiffs' allegations of a *per se* physical taking.

Relying on *Palmyra Pac. Seafoods, L.L.C. v. United States*[98] and *Huntleigh USA Corp. v. United States,*[99] the Government argues that Count I of the Complaint fails because one "[can]not plead a physical taking by alleging that the Government frustrated their ability to pursue claims against third parties."[100] Nor is it a taking, the Government argues, when it "engag[es] in lawful action that affects the value of one of the parties' contract [or other intangible] rights."[101]

These cases, however, are readily distinguishable. In *Palmyra*, the Court itself recognized that the "lawful action" rule does not apply "when there has been an 'acquisition of the

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96 Compl. ¶¶ 168-69.

97 Compl. ¶ 87.

98 *Palmyra Pac. Seafoods, L.L.C. v. United States*, 561 F.3d 1361 (Fed. Cir. 2009).

99 *Huntleigh USA Corp. v. United States*, 525 F.3d 1370 (Fed. Cir. 2008).

100 Motion at 39.

101 Motion at 39 (*citing Palmyra*, 561 F.3d at 1365).

obligation or the right to enforce it' by the government."[102] In such instance, the Court held, "the government's action would qualify as a taking of contract [or other intangible] rights."[103] Here, the gravamen of the Complaint's *per se* physical takings claim is rooted in the Government's coercive demand that the Sale Order extinguish Plaintiffs' rights to assert successor liability claims against New GM. Under takings law, as noted above, destroying property rights is the functional equivalent of an outright appropriation, thus excepting this case from the "lawful action" rule of *Palmyra*.

Palmyra and *Huntleigh* are also distinguishable because, as stated in *A&D Auto Sales*, "the challenged government action [in *Palmyra* and *Huntleigh*] was of general application and the plaintiff was but one member of an affected class of persons."[104] Conversely, here, Plaintiffs do not simply challenge the effects of the Government's intervention generally on all unsecured creditors of Old GM. Rather, they challenge those actions that directly targeted the Personal Injury Claimants' rights to assert successor liability claims against New GM.[105] The significance of this distinction is explained in *Cienega Gardens v. United States*,[106] which stated:

> The Supreme Court explained in [*United States v. Winstar Corp.*, 518 U.S. 839 (1996)] that "governmental action will not be held against the Government for purposes of the impossibility defense so long as the action's impact upon public contracts is . . . *merely incidental* to the accomplishment of a broader governmental objective." 518 U.S. 898 (citation omitted, emphasis added). "The greater the Government's self-interest, however, the more suspect becomes the

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[102] *Palmyra*, 561 F.3d at 1365.

[103] *Id.*

[104] *See A&D Auto Sales, Inc.*, 748 F.3d at 1153 ("A number of our cases have found no taking where the challenged government action was of general application and the plaintiff was but one member of an affected class of persons.").

[105] *See, e.g.*, Compl. ¶¶ 7-9, 15, 169, 180, 187, 203, 212.

[106] *Cienega Gardens v. United States*, 331 F.3d 1319 (Fed. Cir. 2003).

> claim that its private contracting partners ought to bear the financial burden of the Government's own improvidence, and where a substantial part of the impact of the Government's action rendering performance impossible falls on its own contractual obligations, the defense will be unavailable." *Id.*[107]

The Complaint also sufficiently alleges that the Government's treatment of the successor liability rights of the Personal Injury Claimants in the GM Bankruptcy violated the unconstitutional conditions doctrine. The unconstitutional conditions doctrine operates as a shorthand response to the Government's view, running as an undercurrent throughout its Motion, that because it had the right to do nothing while Old GM floundered, it therefore had the power to impose whatever conditions it wanted once it decided to intervene. While the unconstitutional conditions doctrine has been generally applied in the takings context to land-use exactions cases, *Horne II* makes clear that the unconstitutional conditions doctrine applies to takings cases generally and—when found—can establish a *per se* taking.[108]

To avoid a violation of the unconstitutional conditions doctrine here, the Government must establish that there was a "nexus" and "rough proportionality" between advancement of its objective of making New GM financially viable and its concurrent condition that the Sale Order include a provision extinguishing the Personal Injury Claimants' successor liability claims against New GM.[109] Given the Government's financial indifference to assumption of such claims

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[107] *Id*. at 1335.

[108] *Horne II*, 135 S. Ct. at 2430 ("The third question presented asks 'Whether a governmental mandate to relinquish specific, identifiable property as a 'condition' on permission to engage in commerce effects a per se taking.' The answer, at least in this case, is yes.").

[109] *See e.g., Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2595 (2013) ("[T]he government may choose whether and how a permit applicant is required to mitigate the impacts of a proposed development, but it may not leverage its legitimate interest in mitigation to pursue governmental ends that lack an essential nexus and rough proportionality to those impacts."); *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994) ("Under the well-settled doctrine of 'unconstitutional conditions,' the government may not

if forced to do so by politics, court order, or otherwise, the Complaint alleges, there was no "nexus" and "rough proportionality" between the Government's objective and its demand regarding the treatment of the Personal Injury Claimants' successor liability rights in the Sale Order.[110]

Armstrong holds that "[t]he Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar the Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[111] The Complaint adequately alleges a physical taking because it identifies the specific manner in which the Government singled out the Personal Injury Claimants and targeted them for markedly worse treatment in the Sale than the full payment proposed for them in the Exchange Offers that expired less than one week before the GM Bankruptcy filing.[112] As in *Armstrong*, "[a] fair interpretation of this constitutional protection" entitles Plaintiffs and the other Personal Injury Claimants "to just compensation here."[113] Therefore, there is no basis to dismiss Count I of the Complaint under RCFC 12(b)(6).

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require a person to give up a constitutional right – here the right to receive just compensation when property is taken for a public use – in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property.").

[110] Compl. ¶¶ 7, 9, 107, 123, 124, 164, 169, 180.

[111] *Armstrong*, 364 U.S. at 49.

[112] *See, e.g.*, Compl. ¶¶ 5, 12-13, 15, 96-104, 106, 117-121, 181, 204-10.

[113] *Armstrong*, 364 U.S. at 49.

B. The Complaint sufficiently alleges a categorical regulatory taking.

That the Government's actions constituted a physical taking is clear from *Penn Central Transp. Co. v. City of New York*,[114] which distinguished physical takings (which "may more readily be found when the interference with property can be characterized as a physical invasion by government") from regulatory takings (where "the interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good").[115] As noted above, the Government's actions directly targeted the Personal Injury Claimants and did not result, as the Government suggests, from the adverse impact of Old GM's bankruptcy on creditors generally.[116] As alleged in the Complaint:

> [T]he Government was not simply adjusting the benefits and burdens of economic life in a manner that secures an average reciprocity of advantage to the Personal Injury Claimants. Rather, the Government singled out [the Personal Injury Claimants] to unjustly bear the burden of a broader problem not of their making that, in all fairness and justice, should be borne by the public as a whole. These claimants were victims of Old GM's defective products, not the cause of Old GM's problems.[117]

Even if the Court were to find that the actions of the Government were not direct but the result of the Government's actions generally in connection with its bailout of Old GM, the

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[114] *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

[115] *Id.* at 124.

[116] Motion at 35 ("the Government's actions in rescuing the auto industry if anything bestowed a benefit upon plaintiffs, not a burden").

[117] Compl. ¶ 181; *see also Lucas*, 505 U.S. at 1017-18 (when no productive or economically beneficial use of property is permitted, "it is less realistic to indulge our usual assumption that the legislature is simply 'adjusting the benefits and burdens of economic life' in a manner that secures an 'average reciprocity of advantage' to everyone concerned") (internal citations omitted)).

Government's actions effected a regulatory taking by "go[ing] too far."[118] The Supreme Court in *Lingle v. Chevron U.S.A. Inc.*[119] identified two categories of regulatory action that will be deemed *per se* or "categorical" takings under the Takings Clause. The first is "where government requires an owner to suffer a permanent physical invasion of her property-however minor."[120] The second is where the regulations "completely deprive an owner of '*all* economically beneficial us[e]' of her property."[121] In both instances, *Lingle* holds, the Government "must provide just compensation."[122]

Relying on *A&D Auto Sales*, the Government argues that the "*Lucas* analysis has never before been applied in this Circuit to cases involving an alleged taking of intangible property such as tort claims, and every other circuit has rejected such an expansion."[123] *A&D Auto Sales*, however, was not saying that *Lucas* should not be applied to such cases, only that it would "decline to decide the issue at this stage of the litigation since the issue has not been briefed by the parties."[124]

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[118] *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001) ("there will be instances when government actions do not encroach upon or occupy the property yet still affect and limit its use to such an extent that a taking occurs").

[119] *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538 (2005).

[120] *Id.*

[121] *Id.* (*citing Lucas*, 505 U.S. at 1019).

[122] *Id.*

[123] Motion at 22 (*citing A&D Auto Sales, Inc.*, 748 F.3d at 1151).

[124] *A&D Auto Sales Inc.*, 748 F.3d at 1152.

Much has changed, however, with the advent of *Horne II*, which clarified that *Loretto* applies to appropriations of personal property[125] and rejected the notion that the Takings Clause distinguishes between real and personal property.[126] This Court, therefore, must now reject the Government's artificial distinction between real and personal property.

The Supreme Court in *Lucas* also held that *Loretto* applies to "confiscatory" regulations that "prohibit all economically beneficial use" of property.[127] Though *Lucas* holds that the Government might be absolved "in cases of actual necessity," such as "to prevent the spreading of fire or to forestall other grave threats to the lives and property of others,"[128] no such threats were presented by the successor liability rights of the Personal Injury Claimants. Here, Plaintiffs allege that the Government specifically represented to Old GM's board of directors at a meeting held three days before the filing that if the Government decided to assume the "politically sensitive" liabilities owing to the Personal Injury Claimants as part of the Sale, the Government would still close the deal without any downward adjustment to the purchase price. The Complaint, therefore adequately alleges a categorical regulatory taking under *Lucas*.

The Court should also reject the Government's argument that Plaintiffs failed to adequately plead a complete deprivation of value under *Lucas.*[129] The Government believes that Plaintiffs' acknowledgement that the Personal Injury Claimants retained a "contingent interest"

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[125] *Horne II*, 135 S. Ct. at 2427 ("[*Loretto*'s] reasoning—both with respect to history and logic—is equally applicable to a physical appropriation of personal *property*.").

[126] *Id*. at 2426 (reflecting a principle that "goes back to the Magna Carta," the Takings Clause "protects 'private property' without any distinction between different types").

[127] *Lucas*, 505 U.S. at 1029.

[128] *Id*. at 1029 n.16.

[129] Motion at 20 ("Since plaintiffs retained the right to make claims against Old GM's estate and the billions of value it possessed, *Lucas* has no application here.").

in the Sale consideration paid to Old GM defeats their claims under *Lucas*. *Horne II*, however, holds otherwise. There, the Supreme Court held that the Government may not avoid the categorical duty to pay just compensation for a taking "by reserving to the property owner a contingent interest in a portion of the value of the property, set at the government's discretion," especially when that value "may be worthless."[130]

Similarly, Plaintiffs here allege that on the July 10, 2009 closing date of the Sale (representing the date the Sale Order took effect and the Personal Injury Claimants' rights to assert successor liability claims against New GM were extinguished), the Personal Injury Claimants were left with nothing more than a contingent interest in an indeterminate portion, if any, of the Sale consideration paid by New GM to Old GM's bankruptcy estate.[131] Plaintiffs' recoveries were "contingent" because they were neither determinable nor guaranteed at the time their rights were extinguished.[132] No bar date for the filing of proofs of claim had been set as of the closing of the Sale, and when it finally was set about four months later, over 70,000 proofs of claim were filed having an aggregate face value of approximately $270 billion.[133] Further, no additional consideration was paid to the Personal Injury Claimants for the rights that were extinguished in the Sale. Under *Horne II*, therefore, the Complaint sufficiently alleges a complete deprivation of value at the time of the taking.[134] As such, there is no basis to dismiss Count II of the Complaint under RCFC 12(b)(6).

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[130] *Horne II*, 135 S. Ct. at 2428-29.

[131] Compl. ¶ 132.

[132] Compl. ¶¶ 135, 171.

[133] Compl. ¶¶ 135, 171.

[134] *Horne II*, 135 S. Ct. at 2432 ("The clear and administrable rule is that 'just compensation normally is measured . . . at the time of the taking.' "); *see also First English Evangelical*

C. The Complaint sufficiently alleges a *Penn Central* regulatory taking.

Since *Pennsylvania Coal Co. v. Mahon*,[135] the Supreme Court has recognized that governmental action becomes a compensable taking under the Takings Clause if the government's regulation or interference with private property "goes too far."[136] The Supreme Court said in *Palazzolo* that this inquiry "is informed by the purpose of the Takings Clause, which is to prevent the government from 'forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.' "[137]

Even if not a *per se* physical or regulatory taking, governmental action that falls short of eliminating all economically beneficial use may be a taking "depending on a complex of factors including the regulation's economic effect on the [property] owner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action."[138] The Supreme Court stated in *Palazzolo* that *Penn Central* "does not supply mathematically precise variables."[139] Rather, it "provides important guideposts that lead to the ultimate determination whether just compensation is required."[140]

Lutheran Church of Glendale v. Los Angeles County, 482 U.S. 304, 320 (1987) (value of property is measured when it is taken); and *Almota Farmers Elevator & Warehouse Co. v. United States*, 409 U.S. 470, 474 (1973) ("the owner is entitled to the fair market value of his property at the time of the taking").

[135] *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

[136] *Id.* at 415 ("while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking").

[137] *Palazzolo*, 533 U.S. at 617-18 (*citing Armstrong*, 364 U.S. at 49).

[138] *Palazzolo*, 533 U.S. at 617 (*citing Penn Central*, 438 U.S. at 124).

[139] *Id.* at 634.

[140] *Id.*

The Federal Circuit has instructed that when balancing the *Penn Central* factors, the "objective is to ascertain whether, in light of those factors, it is unfair to force the property owner to bear the cost of the regulatory action."[141] But in so doing, the Federal Circuit cautioned, the Court should recognize that "reference to isolated facts in other takings cases provides limited guidance" since "a regulatory takings analysis is generally an 'ad hoc' analysis."[142]

1. The Complaint's allegations regarding the character of the Government's actions are sufficient to support a finding of a *Penn Central* regulatory taking.

The Supreme Court in *Lingle* set guidelines on how to view the character of the Government's actions in a *Penn Central* analysis. *Lingle* requires courts to consider "the actual burden imposed on property rights, or how that burden is allocated"[143] as well as "the *magnitude or character of the burden* a particular regulation imposes upon private property rights."[144] To that end, the Government's restrictions must be "reasonably related to implementation of a policy."[145]

The Complaint sufficiently alleges how the character of the Government's actions went too far by requiring that the Sale extinguish the Personal Injury Claimants' successor liability rights when, in all fairness and justice, these liabilities should have been borne by the public as a whole through their assumption by New GM. The Complaint alleges that the Government exercised undue coercion when it conditioned the Sale's closing on the inclusion of a provision

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[141] *Rose Acre Farms, Inc. v. United States*, 559 F.3d 1260, 1282 (Fed. Cir. 2009).

[142] *Id*.

[143] *Lingle*, 544 U.S. at 543.

[144] *Id*. at 542 (emphasis in original).

[145] *Lucas*, 505 U.S. at 1023 (*citing Penn Central*, 438 U.S. at 133 n.30).

in the Sale Order that extinguished the Personal Injury Claimants' rights to assert successor liability claims against New GM.

This was "economic dragooning,"[146] pure and simple, infused with an imperious desire to compel an unnecessary result through "the financial equivalent of putting a gun to the head of the bankruptcy judge."[147] As noted in *Horne II*, however, the law is as concerned with the means as it is with the end:

> The Constitution . . . is concerned with means as well as ends. The Government has broad powers, but the means it uses to achieve its ends must be "consist[ent] with the letter and spirit of the constitution." As Justice Holmes noted [in *Pennsylvania Coal*], "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way."[148]

The Government argues that the Complaint's allegations that the Government's conditioning its willingness to close the Sale on inclusion of a provision in the Sale Order enjoining the Personal Injury Claimants' successor liability claims "belie[s] this alleged indifference."[149] But the Government cannot rely on the offending provision itself to prove the conclusion. This provision was included in the Sale Order, the Complaint alleges, because the Government—powered by its unfettered leverage as a result of the credit markets' collapse—targeted the Personal Injury Claimants' successor liability rights despite its financial indifference to assumption of their claims. It did so, the Complaint alleges, by placing irresistible pressure on

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[146] *Nat'l Fed'n of Indep. Businesses v. Sebelius*, 132 S. Ct. 2566, 2604-05 (2012) ("[T]he financial 'inducement' Congress has chosen is much more than 'relatively mild encouragement'—it is a gun to the head. . . . [It] is economic dragooning that leaves the States with no real option but to acquiesce in the Medicaid expansion.").

[147] Compl. ¶¶ 87, 107, 123 (quoting the Auto Team's leader).

[148] *Horne II*, 135 S. Ct. at 2428 (internal citations omitted).

[149] Motion at 29.

the GM Bankruptcy Court to either include a provision in the Sale Order extinguishing the Personal Injury Claimants' successor liability rights or risk the Government's walking from the deal.[150] In light of the financial carnage such a decision by the Government would reap, it is not surprising that the GM Bankruptcy Court blinked and included this provision in the Sale Order.

The Government also asserts that the allegations of its financial indifference are pure "speculation" and unsupported by "any facts."[151] The Complaint, however, is replete with specifics of how the Government was financially indifferent to New GM's assumption of Personal Injury Claims. The Complaint alleges that on the eve of GM's Bankruptcy filing, as Old GM's board of directors considered whether to authorize the bankruptcy filing and Old GM's entry into the Sale Agreement, the Government represented to the board that "if, for whatever reason, [the Government] were to agree before the close of the Sale to assume Old GM's liabilities to the Personal Injury Claimants, the Government would neither attempt to renegotiate a reduction of the purchase price nor walk from the deal."[152] As proof of the Government's financial indifference, the Complaint further alleges, the Government agreed after the GM Bankruptcy filing to assume approximately $434 million of Personal Injury Products Liability Claims but it neither attempted to renegotiate a downward adjustment to the purchase price nor threatened to walk from the deal.[153]

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[150] *Cf.*, *A&D Auto Sales Inc.*, 748 F.3d at 1155 ("when the embargo [at issue in *Turney v. United States*, 115 F. Supp. 457, 463-64 (Ct. Cl. 1953)] placed "irresistible pressure" on the plaintiffs to turn the property over to the United States, it created a taking).

[151] Motion at 28.

[152] Compl. ¶¶ 6, 82-85.

[153] Compl. ¶¶ 118-121.

Plaintiffs also allege in the Complaint that the Government shrouded its coercive demand "under the guise of commercial necessity" despite the fact that the cash flow impact of assuming these claims would have been only approximately $55 million per year for the first five years following the Sale and $420 million in the aggregate (or a mere 0.5% of the purchase price).[154] The Complaint further challenges the Government's professed claim of "commercial necessity" by noting that in "cherry-picking" liabilities that would be assumed by New GM, the Government "went well beyond the agreements reached with Old GM in the Exchange Offers regarding the acceptable aggregate amount of liabilities for assumption by the restructured enterprise."[155] Unlike the debt owed Old GM's Bondholders, pensioners, and unions, the Complaint alleges, the obligations of Old GM to the Personal Injury Claimants were never regarded by the Government as an impediment to an out-of-court restructuring of Old GM.[156]

The Complaint also establishes how, in direct contravention of the "aim" of the Bankruptcy Code "to secure equal distribution among creditors,"[157] the Government singled out the Personal Injury Claimants for "markedly worse treatment in the Sale than the full payment proposed for them in the Exchange Offers, while concurrently agreeing that holders of at least $90 billion of other unsecured debt at Old GM (including the Bondholders) would receive the

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[154] Compl. ¶¶ 13, 119, 170, 205-09.

[155] Compl. ¶ 97.

[156] Compl. ¶¶ 10, 12, 62, 64, 65, 106 (Exchange Offer); ¶¶ 37, 55, 57 (March 30, 2009 Viability Plan).

[157] *Howard Delivery Serv., Inc. v. Zurich Am. Ins. Co.*, 547 U.S. 651, 655 (2006) ("[W]e are mindful that the Bankruptcy Code aims, in the main, to secure equal distribution among creditors. We take into account, as well, the complementary principle that preferential treatment of a class of creditors is in order only when clearly authorized by Congress.") (citations omitted).

same or far better treatment in the Sale than proposed for them in the Exchange Offers."[158] To that end, the Complaint notes, the Government agreed to assume $41.7 billion of Old GM's unsecured debt in full and to pay approximately 73%-82% of the $18 billion due from Old GM to the employee benefits trust (the "VEBA Trust") run by the UAW.[159]

This grossly disproportionate treatment of unsecured claims that were *pari passu* with the claims of the Personal Injury Claimants underscores the sizable burden the Government imposed on the Personal Injury Claimants.[160] Given the Government's highly unusual decision to disregard bankruptcy priorities and pay $60 billion of unsecured debt in full (or nearly so), the burdens imposed by the Government on the Personal Injury Claimants were not a "product of the economy," as alleged in the Motion.[161] Rather, they were a direct consequence of the Government's irresistible pressure on the GM Bankruptcy Court to either extinguish these claims in the Sale Order or—if it would not surrender to the Government's demand—be blamed for GM's collapse when the Government walked from the deal.

Palazzolo holds that the Government "may not secure a windfall for itself,"[162] yet that was precisely the result of the Government's coercive demand. Citing *Rose Acre Farms, Inc. v. United States*,[163] the Government asserts that sustaining the Complaint would deny the

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[158] Compl. ¶¶ 12, 203-04.

[159] Compl. ¶¶ 99-101.

[160] *Lingle*, 544 U.S. at 542 (courts must consider "the *magnitude or character of the burden* a particular regulation imposes upon private property rights") (emphasis in original).

[161] Motion at 35.

[162] *Palazzolo*, 533 U.S. at 627.

[163] *Rose Acre Farms, Inc.*, 559 F.3d at 1283.

Government *carte blanche* authority to fashion industrial bailouts and "would have the effect of creating a disincentive for the government to take publicly beneficial actions."[164]

But in citing to *Rose Acre Farms*, the Government ignores the backdrop to that case, which is inapposite here. In *Rose Acre Farms*, the Federal Circuit cited its concerns in the context discussing *Maritrans*,[165] a case in which the Federal Circuit "concluded that the character of the governmental action weighed against the property owner [and that] given the small diminution in value and the importance of the public safety aspect of the legislation, [it would affirm] the trial court's decision of no taking."[166] Unlike the plaintiffs in *Maritrans*, however, the Personal Injury Claimants suffered immensely as a result of the Government's overreaching, and public safety concerns were not implicated.

Further, Plaintiffs are not suggesting that every Government bailout must pay creditors in full, regardless of the circumstances. What they are saying, however, is that the Government could not make coercive demands on the GM Bankruptcy Court that lacked a "nexus" and "rough proportionality" to the Government's goal of making New GM financially viable.

Especially relevant here is the holding in *Rose Acre Farms* that it is "the right and duty of the state to protect and guard, as far as possible, the lives and health of its inhabitants."[167] Just as courts have consistently rejected takings claims challenging regulations of property uses that

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[164] Motion at 35-36 (*citing Rose Acre Farms*, 559 F.3d at 1283).

[165] *Maritrans v. United States*, 342 F.3d 1344 (Fed. Cir. 2003).

[166] *Rose Acre Farms, Inc.*, 559 F.3d at 1283 (*citing Maritrans*, 342 F.3d at 1358).

[167] *Id*. at 1281-82 ("government action designed to protect health and safety is within the character prong of *Penn Central*") (*citing Appolo Fuels, Inc. v. United States*, 381 F.3d 1338, 1351 (Fed. Cir. 2004) and *North Am. Cold Storage Co. v. City of Chicago*, 211 U.S. 306, 315 (1908)).

pose a great risk to the public's health, so too should the Government be held to a higher standard when, by extinguishing property rights, it undermines the health of its citizens.[168]

The Complaint details the debilitating, life-altering injuries, including the permanent loss of life and limb, that Plaintiffs have suffered.[169] When the Government demanded that the Personal Injury Claimants' rights to assert successor liability claims against New GM be extinguished in the Sale Order, it exacerbated—not eliminated—threats to the health of its citizens by depriving them of an estimated $200 million in desperately needed financial support for their past and future medical bills, pain, and suffering.[170]

The primary purpose of the Takings Clause is to bar the Government from forcing some people alone to bear public burdens that, in all fairness and justice, should be borne by the public as a whole.[171] The Personal Injury Claimants were victims of Old GM's defective products, not the cause of Old GM's problems.[172] Yet, as amply alleged in the Complaint, the Government singled out the Personal Injury Claimants to unjustly bear the burden of a broader problem not of their making. To that end, the Complaint alleges:

- Old GM's senior management wanted the Personal Injury Products Liability Claims assumed in full as part of any restructuring;[173]
- The Government viewed bankruptcy as a golden opportunity to rinse away these claims and so it excluded them from the nearly $60 billion in general

[168] *Cf. Moore v. City of East Cleveland, Ohio*, 431 U.S. 494, 499 (1977) ("when a city undertakes such intrusive regulation of the family, . . . the usual judicial deference to the legislature is inappropriate").

[169] Compl. ¶¶ 20-26 (describing the injuries and losses suffered by each of the Plaintiffs).

[170] Compl. ¶¶ 173, 190, 213.

[171] *Armstrong*, 364 U.S. at 49.

[172] Compl. ¶¶ 13, 205.

[173] Compl. ¶ 5.

unsecured claims of Old GM that were being assumed in whole or substantial part by New GM;[174]

- After the Exchange Offers terminated [on May 25, 2009] and the Sale Agreement was filed with the Bankruptcy Court six days later [on June 1, 2009], the Government did not change the proposed payment in full for treatment of approximately $60 billion in prepetition unsecured liabilities described above;[175]

- Nor did the Government propose a worse treatment for Bondholders in the Sale Agreement despite the fact that the Bondholders' rejection of the Exchange Offers directly precipitated Old GM's bankruptcy filing. In fact, Old GM was projecting that recoveries to Bondholders would nearly double compared with what had been offered them in the Exchange Offers;[176]

- In stark contrast to the same or improved treatment given the nearly $90 billion of combined general unsecured and Bondholder Debt described above compared with the treatment proposed for those claims in the Exchange Offers, the Government inexplicably slashed the projected recoveries to Personal Injury Claimants by 80%-90% from the full payout proposed for them in the Exchange Offers less than one week before the bankruptcy filing.[177]

These allegations are not labels, conclusions, or formulaic incantations.[178] They are facts, and they are sufficient to satisfy the "character" prong of the *Penn Central* test.

2. The Complaint's allegations regarding the Personal Injury Claimants' losses are sufficient to support a finding of a *Penn Central* regulatory taking.

As noted above, the Court should reject the Government's assertion that the Complaint "ha[s] not plausibly alleged that GM could have avoided bankruptcy without Government

[174] Compl. ¶¶ 5, 108.

[175] Compl. ¶ 102.

[176] Compl. ¶ 103.

[177] Compl. ¶ 104.

[178] *Olajide*, 2015 WL 7496230, at *4 ("A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.' ") (*citing Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (*quoting Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

assistance."[179] Consideration of a "but-for" world in which Old GM liquidates is inappropriate in light of the Complaint's allegation that the Government had determined as early as March 2009, more than three months before the Sale closing, that a forced or orderly liquidation of Old GM was "unthinkable" and an option that the Government "never seriously considered."[180] The "but-for" world posited by the Government in which Old GM is forced to liquidate, therefore, is purely an abstraction that has no application in this case.

Further, any recoveries obtained by the Personal Injury Claimants on account of their allowed claims in the GM Bankruptcy are irrelevant to whether a taking has occurred. As the Supreme Court held in *Horne II*:

> The dissent suggests that the Hornes should be happy, because they might at least get *something* from what had been their raisins. . . . But once there is a taking, . . . any payment from the Government in connection with that action goes, at most, to the question of just compensation.[181]

Plaintiffs' recoveries in the GM Bankruptcy, therefore, are relevant only in determining the extent of the damages suffered by the Personal Injury Claimants, not whether the Government's actions constituted a taking at all.

3. The Complaint's allegations of the reasonableness of the Personal Injury Claimants' investment-backed expectations are sufficient to support a finding of a *Penn Central* regulatory taking.

The Government asserts that Plaintiffs could not have investment-backed expectations that were dashed in the Sale because "they were aware (or should have been aware)"[182] that tort

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[179] Motion at 29.

[180] Compl. ¶ 58.

[181] *Horne II*, 135 S. Ct. at 2429 (*citing Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 747–748 (1997)) (emphasis in original).

[182] Motion at 32.

claimants can be wiped out in a bankruptcy. This argument also lacks merit. The Complaint alleges that Old GM "consistently promised in its marketing campaigns" that it would "stand behind its cars."[183] Given these assurances, none of the Personal Injury Claimants could have expected when they bought their defective vehicle that their claims would be subsequently eliminated (and certainly not by the Government as protagonist of such malevolent action).[184]

Moreover, the Complaint alleges, before the Government forced out Old GM's chief executive officer, Rick Wagoner, in March 2009,[185] Old GM did not consider bankruptcy a viable option. Wagoner became president and chief executive officer of Old GM in June 2000 and was elected its chairman on May 1, 2003. As late as March 2009, the Complaint alleges, Old GM "had done little, if any, planning for the possibility [of bankruptcy] because [Wagoner] did not believe that Old GM could survive a bankruptcy."[186] Given Wagoner's aversion to the doomsday option of a bankruptcy filing, no buyer of an Old GM vehicle during his tenure (likely representing all Personal Injury Claimants in the putative Class) could have expected Old GM to ever file for bankruptcy.

As such, the Government misconstrues Plaintiffs' allegation that the Personal Injury Claimants "[could not] have expected that the Government, through a team of appointees with little or no auto industry experience, would eliminate their rights to assert successor liability claims, thereby annulling Old GM's promises of reliability as well as the recommendation of Old

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[183] Compl. ¶ 199.

[184] Compl. ¶ 202.

[185] Compl. ¶ 52.

[186] Compl. ¶¶ 50-51.

GM's CEO that these claims be assumed by New GM."[187] Plaintiffs' point is not, as the Government asserts, that the Personal Injury Claimants "had an expectation of a Government rescue" of Old GM.[188] Rather, it was that a bankruptcy filing by Old GM was highly remote given Wagoner's aversion to it. Further, the probability that the Government would force Wagoner out so that it could drive Old GM into bankruptcy under a "loan to own" strategy would have been viewed as sheer fantasy.[189]

Even after the Government replaced Wagoner, however, the Government continued to reassure Old GM's customers that its reorganization objectives did not include a restructuring of the Personal Injury Products Liability Claims.[190] Indeed, one headline in reporting on the administration's March 2009 "viability determination fact sheet"[191] was titled: "*U.S. to Guarantee GM, Chrysler Warranties Amid Restructuring.*"[192]

The Government also rewrites history when it says that the Personal Injury Claimants "should have been aware" that the Government might buy Old GM's assets in a 363 Sale.[193] After the Government announced in its "viability determination fact sheet" on March 30, 2009

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[187] Compl. ¶ 202.

[188] Motion at 33.

[189] *Cf. Cienega Gardens*, 331 F.3d at 1348 ("Once a plaintiff has shown that its expectation is reflected by a material contract term of which the government is aware, the government cannot establish a lack of reasonable expectations simply by showing that the regulations were amendable by HUD or nullifiable by Congress.").

[190] Compl. ¶¶ 55-57, 62.

[191] The "viability determination fact sheet" issued by the Government on March 30, 2009 is referenced at page 8 of the Motion (citing to http://www.whitehouse.gov/assets/documents/Fact_Sheet_ GM_Chrysler.pdf).

[192] Neal E. Boudette, "*U.S. to Guarantee GM, Chrysler Warranties Amid Restructuring*," WALL ST. J., March 30, 2009, available at http://www.wsj.com/articles/SB123838536264268763.

[193] Motion at 32.

that, if all else failed, Old GM might file for a "prearranged bankruptcy" and use the 363 Sale process to sell off the desirable assets to a new company financed by the Government, a leading bankruptcy practitioner commented that the Government's game plan was "*sui generis*, at least in my experience."[194] If the Government's bailout of Old GM through a 363 Sale was *sui generis* to a seasoned bankruptcy practitioner, then surely the Personal Injury Claimants could not have expected such an outcome.

The Government also suggests that sales free and clear of the successor liability rights of products liability claimants "have existed since the nineteenth century" and so "plaintiffs' ability to collect upon product liability claims was always contingent upon the continued viability of GM and its ability to avoid bankruptcy."[195] The Government, however, utterly mischaracterizes not only the history of bankruptcy law but the significant split among the circuits at the time of the Sale as to whether successor liability claims could be extinguished under Bankruptcy Code section 363. Even the GM Bankruptcy Court acknowledged that "[t]he issues as to the successor liability provisions in the approval order are the most debatable of the issues now before the Court."[196] "Viewed nationally," the GM Bankruptcy Court explained, "the caselaw is split in this area, both at the Circuit Court level and in the bankruptcy Courts" and it was only because of "principles of *stare decisis* . . . under the caselaw in this Circuit and District" that the GM

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[194] Michael J. de la Merced and Jonathan D. Glater, "*U.S. Hopes to Ease G.M. to Bankruptcy*," N.Y. TIMES, March 31, 2009, available at http://www.nytimes.com/2009/04/01/business/01bankruptcy.html.

[195] Motion at 32.

[196] Sale Opinion, Compl. Ex. 2, at 52 (also at *Gen. Motors Corp.*, 407 B.R. at 500-501).

Bankruptcy concluded that it "must rule that property can be sold free and clear of successor liability claims."[197]

Significantly, the successor liability claims of the Personal Injury Claimants could not have been extinguished had Old GM's bankruptcy case been filed in the Sixth Circuit, which rejected the notion that *in personam* claims—like those of the Personal Injury Claimants—could be extinguished in a 363 Sale.[198] Regardless, as the Supreme Court stated in *Palazzolo*, the Government cannot "put an expiration date on the Takings Clause. . . . Future generations, too, have a right to challenge unreasonable limitations on the use and value of [property]."[199]

The uncertain outcome of the treatment of successor liability claims nationally and in the Second Circuit establishes that a consumer unschooled in the nuances of corporate bankruptcy law would not have reasonably expectation that its successor liability claims against a Government-sponsored entity could be extinguished in a 363 Sale.

Finally, even if the Court believes the allegations of Plaintiffs' investment-backed expectations are of questionable plausibility, that is not a basis for dismissing Plaintiffs' *Penn Central* count at this preliminary stage. The Federal Circuit refused to do so in *A&D Auto Sales* and this Court should similarly refuse to do so here.[200]

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[197] Sale Opinion, Compl. Ex. 2, at 57 (also at *Gen. Motors Corp.*, 407 B.R. at 503-04).

[198] Sale Opinion, Compl. Ex. 2, at 57 n.101 (also at *Gen. Motors Corp.*, 407 B.R. at 503 n.101) (*citing Michigan Empl. Sec. Comm. v. Wolverine Radio Co., Inc. (In re Wolverine Radio Co., Inc.)*, 930 F.2d 1132, 1147-48 (6th Cir. 1992)).

[199] *Palazzolo*, 533 U.S. at 627.

[200] *A&D Auto Sales Inc.*, 748 F.3d at 1159 ("We express no opinion on the proper analysis of this factor. It will be up to the Claims Court to weigh the reasonableness of the plaintiffs' expectations in the first instance.").

CONCLUSION

The Motion should be denied in its entirety. Plaintiffs have standing to assert takings claims for their legally cognizable property interests based on the very specific, non-conclusory, allegations in the Complaint that the Government unfairly targeted these interests for extinguishment in the Sale. Moreover, these issues were not decided by the GM Bankruptcy Court or the federal district courts on appeal, nor could they have been given the exclusive jurisdiction of this Court over takings claims against the Government. Finally, the Complaint contains sufficient factual allegations that are not, as the Government alleges, "bare assertions, formulaic recitations of the elements of a cause of action, [and] conclusory allegations."[201] Should the Court, however, find that the Motion has any merit, Plaintiffs respectfully request the opportunity to amend the Complaint so that they may correct any identified deficiencies.

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Washington, D.C.

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[201] Motion at 14.

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