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.

DEFENDANT'S MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT

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Pursuant to Rules 12(b)(1) and 12(b)(6) of the Rules of the United States Court of Federal Claims ("RCFC"), defendant, the United States, respectfully requests that the Court dismiss the amended complaint filed by plaintiffs, Callan Campbell, et al., for lack of jurisdiction and failure to state a claim upon which relief may be granted. In support of this motion, we rely on plaintiffs' amended complaint, matters of public record, and the following brief.

INTRODUCTION

In 2009, following years of decline and in the wake of the financial crisis, General Motors Corporation ("GM") was deeply insolvent with dwindling cash for daily operations. This crisis threatened GM's ability to continue operating. In response, GM sought Government assistance and bankruptcy protection. With bankruptcy court approval pursuant to section 363 of the United States Bankruptcy Code (11 U.S.C. § 363), and with Government financing, the bankrupt GM entity ("Old GM") sold substantially all of its assets, and transferred certain liabilities, to a new entity ("New GM") that was organized to acquire the assets of Old GM..

Plaintiffs – personal injury claimants with unsecured product liability claims against Old GM – allege that, as a condition of the Government financing that allowed GM to stay viable through bankruptcy, the Government demanded that, in the section 363 sale, New GM would not

assume successor liability for plaintiffs' personal injury claims against Old GM. Although plaintiffs concede that they have received payments upon their claims against Old GM, they allege that the payments were for a fraction of the value of their claims and that they are owed additional compensation for the Fifth Amendment taking of their property that was allegedly effectuated through the section 363 sale.

This Court should dismiss plaintiffs' amended complaint for several reasons. First, plaintiffs lack standing because their personal injury claims are unsecured claims, a type of property interest that does not confer standing for a Fifth Amendment takings claim, which must be vested and particularized. Plaintiffs' unsecured claim in the GM bankruptcy does not meet this standard. Accordingly, plaintiffs have failed to demonstrate standing.

Second, this Court lacks jurisdiction to entertain plaintiffs' complaint because their claims conflict with the bankruptcy court's findings of fact and conclusions of law, which the court reached following three days of hearings – in which plaintiffs actively participated – and which were affirmed by the United States District Court for the Southern District of New York. When the auto manufacturers sold their operating assets, the bankruptcy court found that the Government did not control the automakers, act inequitably, or alter the ordinary marketplace dynamic. *In re Gen. Motors Corp,*, 407 B.R. 463, 474-81, 485-499, 513-14 (Bankr. S.D.N.Y. 2009), *aff'd*, *In re Motors Liquidation Co.*, 430 B.R. 65 (S.D.N.Y. 2010) ("*GM Sale Op'n*").

The bankruptcy court also found that, but for the bankruptcy sale, the only alternative was the immediate liquidation of GM, in which case plaintiffs, like all unsecured creditors, would have received nothing for their claims. *GM Sale Op'n*, 407 B.R. at 484.[1] The bankruptcy court

[1] By contrast, under the plan approved by the bankruptcy court, ten percent of New GM's stock plus warrants were set aside to pay for claims of unsecured creditors. *See GM Sale Op'n*, 407 B.R. at 485.

also approved the sale "free and clear" of plaintiffs' personal injury claims under section 363, which permits a sale of assets in bankruptcy while excluding liabilities under certain circumstances. *See id.* at 499-506; *see also* 11 U.S.C. § 363(f) (specifying conditions for "free and clear" sale). Plaintiffs' allegations would require this Court to decide issues already decided in the bankruptcy action. Consequently, this Court does not possess subject matter jurisdiction to entertain plaintiffs' claims.

In the alternative, the Court should dismiss plaintiffs' complaint because they have failed to allege the necessary elements for a takings claim. In order to succeed in a regulatory taking claim, a plaintiff must establish that the challenged Government action caused an economic loss that the plaintiff would not have otherwise suffered. In another case dealing with the same rescue of the domestic auto industry as this case, in *A&D Auto Sales, Inc. v. United States*, 748 F.3d 1142 (Fed. Cir. 2014), the United States Court of Appeals for the Federal Circuit held that plaintiffs had failed to state a regulatory taking claim because their complaint contained "no allegations regarding the but-for economic loss of value of the plaintiffs' franchises." *A&D Auto Sales*, 748 F.3d at 1158. In finding plaintiffs' complaint deficient, the Court reasoned:

> Absent an allegation that GM and Chrysler would have avoided bankruptcy *but for the government's intervention and that the franchises would have had value in that scenario*, or that such bankruptcies would have preserved some value for the plaintiffs' franchises, the terminations actually had no net negative economic impact on the plaintiffs *because their franchises would have lost all value regardless of the government action*.

Id. (emphasis added).

The *A&D Auto Sales* Court remanded that claim to this Court to allow plaintiffs "to include specific allegations establishing loss of value." *Id.* at 1159. The Federal Circuit cautioned, however, that "it would not be sufficient to include conclusory loss of value

allegations." *Id.* (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), and quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

Thus, in this case, plaintiffs must allege facts that show a loss of value "but for the government's intervention." Plaintiffs' amended complaint fails to satisfy that burden. Instead, contrary to the Federal Circuit's instruction, plaintiffs depicts a "but for" world in which the Government provided financing to GM on terms that plaintiffs would have preferred. Despite the fact that they allege that the Government required GM to file bankruptcy and to exclude their personal injury claims as a condition of providing further financing to GM, plaintiffs implausibly contend that the Government was "indifferent" to whether New GM would assume their claims. Because plaintiffs' conclusory and speculative allegations fail to cross "the line from conceivable to plausible," plaintiffs' amended complaint falls far short of satisfying the minimum pleading standards required by the Supreme Court's *Iqbal* and *Twombly* decisions. Accordingly, the Court should dismiss the complaint. *Id.*

The implausibility of plaintiffs' allegations is confirmed by the bankruptcy court decision approving GM's bankruptcy and sale of assets The bankruptcy court held that GM *would have faced immediate liquidation absent the proposed sale of assets supported by Government funding*, and that all unsecured creditors – including plaintiffs – would have received *nothing* in a liquidation. Plaintiffs thus cannot demonstrate the economic impact required by the Federal Circuit in *A&D Auto Sales*.

The deficiencies in plaintiffs' complaint are not confined to its failure to meet the threshold "economic impact" requirement. Even assuming that plaintiffs have alleged *some* economic loss (which they have not), the complaint falls far short of adequately pleading facts required to support the other elements of either the *Penn Central* or the *Lucas* regulatory taking

tests. Plaintiffs have not adequately alleged, as required by *Penn Central*, interference with investment-backed expectations or that the character of the governmental action supports a regulatory taking claim. Nor have plaintiffs adequately pled a complete deprivation of all value of the property allegedly taken, as required by *Lucas*. Similarly, plaintiffs have failed to plead that the Government seized their property or directed it to a third party, defeating their *per se* taking claim.

Although we are not unsympathetic to the plight of personal injury claimants, had GM been liquidated without Government intervention, plaintiffs' claims would have had no value at all. Although the plaintiffs might have fared better if GM had been financially viable and never had to declare bankruptcy, as the Federal Circuit instructed in *A&D Auto Sales*, a takings claim requires the measurement of what would have happened "but for the government's intervention," not under a more favorable intervention. Consequently, the amended complaint should be dismissed.

STATEMENT OF FACTS

I. The United States Invested In GM On The Verge Of Bankruptcy

In the fall of 2008, the midst of the global credit crisis, GM faced serious financial difficulties, and bankruptcy loomed. *See* Amended Complaint, Jul. 30, 2015, ECF No. 4 ("Am. Compl.") ¶¶ 30-31. Credit markets froze and automobile sales plummeted. *See* Am. Compl. ¶¶ 30-31; *see A&D Auto Sales v. United States*, 748 F.3d 1142, 1147 (Fed. Cir. 2013). GM could not obtain financing from the credit markets and, as a result, requested financial assistance from the Government. Am. Compl. ¶ 32. The American economy's sudden collapse and the tightened credit markets crippled GM, turning its liquidity problems into an acute crisis. Am. Compl.

¶¶ 31-32. Without billions of dollars in financial assistance, GM faced collapse. *See* Am. Compl. ¶¶ 31-32.

In early December 2008, GM's chief executive appeared before Congress and appealed for emergency Government assistance to keep the company afloat. *See A&D Auto Sales*, 748 F.3d at 1147. GM requested $12 billion in short-terms loans and a $6 billion line of credit.[2]

Shortly thereafter, President Bush announced that the United States Department of the Treasury (Treasury) would make loans available to GM from the Troubled Asset Relief Program (TARP).[3] Am. Compl. ¶ 32; 12 U.S.C. § 5211(a)(1) (2008). Congress had enacted TARP as part of the Emergency Economic Stabilization Act (EESA) of 2008. *See* Am. Compl. ¶¶ 18-19; 12 U.S.C. § 5201 (2008). In a major public speech delivered on December 19, 2008, President Bush expressed concern that "[i]f we were to allow the free market to take its course now, it would almost certainly lead to disorderly bankruptcy and liquidation for the automakers."[4]

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[2] As the Federal Circuit recognized in *A&D Auto Sales*, while the Court primarily considers the allegations in the complaint when deciding a motion to dismiss, the Court "may also look to 'matters incorporated by reference or integral to the claim, items subject to judicial notice, [and] matters of public record.'" 748 F.3d at 1147 (quoting 5B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1357 (3d ed. 2004)); *see also Int'l Fed'n of Prof'l & Tech. Eng'rs v. United States*, 111 Fed. Cl. 175, 183 (2013) (noting that courts may consider "matters of public record when deciding a motion to dismiss") (internal quotations and citations omitted). The Court, therefore, "has discretion to consider materials beyond the pleadings and 'is not limited to the four corners of the complaint' when ruling upon an RCFC 12(b)(6) motion." *Love Terminal Partners v. United States*, 97 Fed. Cl. 355, 385 (2011) (quoting 5B Wright & Miller, *Federal Practice and Procedure* § 1357). All documents cited herein are either public records or concern matters incorporated by reference or integral to plaintiffs' claim.

[3] White House Office of the Press Secretary, *Fact Sheet: Financing Assistance to Facilitate the Restructuring of Auto Manufacturers to Attain Financial Viability* (Dec. 19, 2008) (available at http://georgewbush-whitehouse.archives.gov/news/releases/2008/12/20081219-6.html).

[4] President George W. Bush, *President Bush Discusses Administration's Plan to Assist Automakers* (Dec. 19, 2008) (transcript available at http://georgewbush-whitehouse.archives.gov/news/releases/2008/12/20081219.html), *quoted in A&D Auto Sales*,

On the same day, Treasury Secretary Henry Paulson created the Automotive Industry Financing Program (AIFP), through which Treasury could make loans to GM using TARP funds. Am. Compl. ¶ 34. The program's stated goal was to avoid the disorderly bankruptcy and collapse of the American automotive industry. Am. Compl. ¶ 34; *see also A&D Auto Sales*, 748 F.3d at 1147-48.

On December 31, 2008, GM voluntarily entered into a loan and security agreement with Treasury setting forth the terms and conditions of the Government's short-term assistance. Am. Compl. ¶¶ 35-36. As a condition of the Government's agreement to provide financing, GM was required to demonstrate that the assistance would allow it to achieve long-term viability. Am. Compl. ¶ 37.

In early January 2009, Treasury made an emergency loan of $13.4 billion to GM to keep it in business while it developed a restructuring plan for long-term viability. *See* Am. Compl. ¶¶ 35-37; *see also A&D Auto Sales*, 748 F.3d at 1148.

On February 15, 2009, President Obama announced the creation of the Presidential Task Force on the Auto Industry (Task Force) to review the viability plan submitted by GM. Am. Compl. ¶ 39. In addition, the Obama Administration created a Treasury Auto Team (Auto Team), which reported to the Task Force and was responsible for evaluating the automakers' viability plans and negotiating the terms of any further assistance. *See* Am. Compl.¶ 40.

GM submitted its restructuring plan on February 17, 2009. Am. Compl. ¶ 46. GM's Restructuring Plan for Long-Term Viability called for reductions in manufacturing facilities,

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748 F.3d at 1147.

employees, dealers, nameplates, and brands.[5] As part of its proposed plan, GM sought an $18 billion emergency loan. GM Restructuring Plan at 5.

Although GM's plan was predicated upon restructuring the company's operations and liability/capital structure without filing for bankruptcy, GM informed Treasury that "[t]o the extent the company enters bankruptcy, there can be **no assurances that the company will be able to exit quickly, if at all.**" GM Restructuring Plan at 102-03 (emphasis in original). Under a traditional chapter 11 bankruptcy scenario, GM would need "[u]nprecedented amounts of debtor-in-possession financing" from the Government, with "incremental funding requirements surg[ing] close to $100 billion or more." *Id.* at 102, 105; *see also id.* at 104.

On March 30, 2009, President Obama announced the results of the Auto Team's review of Chrysler's and GM's restructuring plans.[6] The Auto Team found that GM's plan was based on a number of overly optimistic assumptions that would be challenging to meet without a more aggressive restructuring. Am. Compl. ¶ 55; GM Viability Determination at 1, 3. Rather than leaving GM to fail and cease operations, Treasury agreed to provide GM with working capital for 60 more days to develop a stronger restructuring plan.[7] New Path to Viability for GM & Chrysler at 1, 2; Am. Compl. ¶ 56. No private sector lenders emerged to offer GM financing.

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[5] General Motors Corporation, *2009-2014 Restructuring Plan*, at 12-17 (Feb. 17, 2009) (available at http://graphics8.nytimes.com/packages/pdf/business/20090217GMRestructuringPlan.pdf) (GM Restructuring Plan).

[6] White House, *Obama Administration New Path to Viability for GM & Chrysler* (Mar. 30, 2009) (available at http://www.whitehouse.gov/assets/documents/Fact_Sheet_GM_Chrysler.pdf) (New Path to Viability for GM & Chrysler).

[7] In particular, Treasury informed GM that the company's "new, more aggressive restructuring plan" must show, among other things, that GM would be able to "substantially reduce [its] outstanding debt and existing liabilities," which would "require substantially greater balance sheet concessions than those called for in the existing loan agreements." In addition, the

II. The United States Provided GM With Billions Of Dollars In Financing To Support Its Restructuring Through Bankruptcy

GM filed for bankruptcy protection on June 1, 2009. Am. Compl. ¶ 88. GM then filed a motion seeking court approval to sell substantially all of its assets to a new corporation, referred to as "New GM," with financing from the Government, pursuant to section 363 of the Bankruptcy Code (the "363 Transaction" or "363 sale"). *In re Gen. Motors Corp.*, 407 B.R. 463, 473-74, 479-80 (Bankr. S.D.N.Y. 2009) (*GM Sale Op'n*), *aff'd, In re Motors Liquidation Co.*, 430 B.R. 65 (S.D.N.Y. 2010); *see* 11 U.S.C. § 363. The motion was supported by the Creditors' Committee for GM creditors, the United States, the governments of Canada and Ontario (which advanced $9.1 billion to GM), the United Auto Workers (an affiliate of which was GM's largest creditor), the indenture trustee for GM's approximately $27 billion in unsecured bonds, and an ad hoc committee of a majority of those bonds. *GM Sale Op'n* at 473-74.

The GM bankruptcy court issued an order granting GM's motion on July 5, 2009. *GM Sale Op'n* at 475, 520. To facilitate the sale, the United States and Canada agreed to provide debtor-in-possession financing for GM through the chapter 11 process. *Id.* at 480. Treasury, in particular, provided approximately $30.1 billion in financing to support GM through its bankruptcy and restructuring. *See id.* at 473, 479. In total, Treasury advanced approximately $50 billion to GM – $19.4 billion of which enabled the company to continue operating from December 2008 through the date it filed for bankruptcy protection and the balance to finance the bankruptcy and new GM's ongoing operations. *See id.* In exchange, the United States received $8.8 billion in debt and preferred stock of new GM and approximately 60 percent of its equity.[8]

United States agreed to guarantee warranties for GM cars and assisted GM in financing its suppliers. *See* New Path to Viability for GM & Chrysler at 2-3.

[8] *See GM Sale Op'n*, 407 B.R. at 482; *see also* "FACT Sheet: Obama Administration Auto Restructuring Initiative General Motors Restructuring," May 31, 2009, available at

Before considering motion to approve the Section 363 sale, the bankruptcy court ordered discovery and conducted a three day evidentiary hearing in which it considered extensive testimony and exhibits. Plaintiffs actively participated in discovery and the hearing, cross examining witnesses, making oral argument, and filing briefs in support of their position that the 363 sale would frustrate their ability to pursue successor liability claims against New GM. The bankruptcy court held that the 363 sale was the best alternative available to GM and that GM faced "immediate liquidation" if the 363 sale was not approved: "The continued availability of the financing provided by Treasury is expressly conditioned upon approval of this motion by July 10, and prompt closing of the 363 Transaction by August 15. Without such financing, GM faces immediate liquidation." *Id.* at 485. The bankruptcy court specifically found that, "[a]bsent prompt confirmation that the sale has been approved and that the transfer of the assets will be implemented, GM will have to liquidate. There are no realistic alternatives available." *Id.*

The bankruptcy court further found that, "if GM were to liquidate, its unsecured creditors would receive nothing on their claims." *Id.* at 475. This included plaintiffs, who were unsecured creditors in the bankruptcy. In response to a stockholder objection, the bankruptcy court further held that, "GM is hopelessly insolvent, and there is nothing for stockholders now. And if GM liquidates, there will not only be nothing for stockholders; there will be nothing for unsecured creditors." *Id.* at 520. Plaintiffs allege that the terms of the 363 sale excluded certain personal injury claims from being assumed by New GM. Am. Compl. ¶¶ 82-83; *Gm Sale Op'n*, 407 B.R. at 499-506. The bankruptcy court considered plaintiffs' objections but ultimately

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www.treasury.gov/press-center/press-releases/Pages/tg179.aspx. The governments of Canada and Ontario also advanced $9.5 billion to GM and received $1.7 billion in new GM debt and preferred stock and approximately 12 percent of New GM's equity. The United Auto Workers' voluntary employee beneficiary association ("VEBA") trust, for the health care of retired workers, also received stock and warrants.

decided to approve the 363 sale, including the exclusion of certain personal injury claims from claims against new GM. *Id.* at 505-06.

The plaintiffs appealed the bankruptcy court's ruling to the United States District Court for the Southern District of New York, which affirmed the bankruptcy court's decision. *See In re Motors Liquidation Co.*, 428 B.R. 43 (S.D.N.Y. 2010). The district court held that plaintiffs failed to preserve their rights by seeking a stay of the bankruptcy court's order. *Id.* at 52 ("Because the Sale Order was not stayed pending appeal, and the 363 Transaction has since closed, the issues Appellants seek to raise on appeal are statutorily moot under Section 363(m) of the Bankruptcy Code.").

The district court further held that, "rewriting the Sale Order to eliminate the application of the 'free and clear' or injunctive provisions to these claimants would nonetheless unravel a fundamental aspect of the integrated 363 Transaction and undermine the subsequent transactions that have occurred since the Closing." *Id.* at 63. "Appellants' request to reapportion their Existing Products Claims to New GM cannot be considered '*de minimis*'. Even focusing solely on the products liability claims of the five appellants before us, the punitive damages that could potentially attach to those claims would greatly increase the amounts at issue." *Id.* at 63.

The district court stated that, although it was "not unsympathetic to the plight of the accident victims," plaintiffs' "position in the bankruptcy appears to be neither better nor worse than that of any other unsecured contingent creditor," and that "the only alternative to [the 363 Transaction] was a liquidation in which they and other unsecured creditors would have received nothing." *Id.* at 63-64.

III. Plaintiffs' Lawsuit

Plaintiffs filed suit in this Court on July 9, 2015, and later filed an amended complaint. *See* Compl. (July 9, 2015), ECF No. 1; Am. Compl. In their amended complaint, plaintiffs allege that their rights to pursue successor liability claims against New GM would have been preserved if the Government had decided to have New GM assume the potential liabilities associated with plaintiffs' personal injury claims. Plaintiffs allege (as alternatives) that the Government's actions effectuated: (1) a *per* se taking; (2) a categorical regulatory taking; or (3) a non-categorical regulatory taking. *See* Am. Compl. Plaintiffs also seek to certify a class of personal injury claimants who hold personal injury claims in the Old GM bankruptcy that the bankruptcy court classified as allowed claims. *See* Am. Compl. ¶¶ 138-60.[9]

QUESTIONS PRESENTED

1. Whether the Court should dismiss the amended complaint for lack of jurisdiction because plaintiffs' unsecured personal injury claims are not property interests for purposes of the Takings Clause.

2. Whether the Court should dismiss the amended complaint for lack of jurisdiction because the Court of Federal Claims is not authorized to review the decisions of a United States Bankruptcy Court.

3. Whether the Court should dismiss the amended complaint for failure to state claims upon which relief can be granted because plaintiffs' takings claims are inconsistent with bankruptcy court factual findings and legal holdings that they are collaterally estopped from relitigating.

4. Whether the Court should dismiss the amended complaint for failure to state claims upon which relief can be granted because plaintiffs' regulatory takings claims are not supported by

[9] We do not concede that class action certification is appropriate at this time but defer discussion of this issue until after resolution of this motion to dismiss, if necessary.

plausible allegations of economic harm (*i.e.*, a "but for" world free of *all* Government intervention), as contemplated by the Federal Circuit's decision in *A&D Auto Sale*s.

ARGUMENT

I. Standard Of Review

A. Standard For Motion To Dismiss Under RCFC 12(b)(1)

Subject matter jurisdiction is a threshold issue. Without jurisdiction, the Court cannot consider plaintiffs' complaint. *U.S. Ass'n of Importers of Textiles and Apparel v. United States*, 413 F.3d 1344, 1348 (Fed. Cir. 2005). When reviewing a motion to dismiss for lack of subject matter jurisdiction under RCFC 12(b)(1), the Court presumes factual allegations to be true and correct. *Reynolds v. Army and Air Force Exchange Serv.*, 846 F.2d 746, 747 (Fed. Cir. 1988). However, a plaintiff bears the burden of establishing the court's jurisdiction by a preponderance of the evidence. *Id.* Therefore, if the defendant mounts a factual challenge to the facts upon which jurisdiction is premised the plaintiff may lose the benefit of the foregoing presumption of truth. *Morris v. United States*, 33 Fed. Cl. 733, 742 (1995) (citing *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936)). In such a situation, the court may look outside the complaint and receive evidence for the purpose of resolving the jurisdictional issue of fact. *Morris*, 33 Fed. Cl. at 742.

B. Standard For Motion To Dismiss Under RCFC 12(b)(6)

To survive a challenge pursuant to RCFC 12(b)(6), plaintiffs must plead more than "labels and conclusions." *Twombly*, 550 U.S. at 555. "Legal conclusions, deductions, or opinions couched as factual allegations are not given a presumption of truthfulness." *Figueroa v. United States*, 57 Fed. Cl. 488, 497 (2003), *aff'd*, 466 F.3d 1023 (Fed. Cir. 2006). Factual allegations must raise a right to relief above the speculative level, on the assumption that all of

the complaint's allegations are true. *Twombly*, 550 U.S. at 555. The Court should begin its analysis by identifying and rejecting bare assertions, formulaic recitations of the elements of a cause of action, and other conclusory allegations, because they "are not entitled to the assumption of truth." *Iqbal*, 556 U.S. at 680. "Where there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Id.* at 679. If the well-pleaded factual allegations do not plausibly give rise to an entitlement of relief, the Court should dismiss the complaint. *Id.* at 678-80.

II. Plaintiffs' Claims Fail For Lack Of Jurisdiction

Plaintiffs' claims fail for a lack of jurisdiction because they lack standing to assert takings claims and because their claims seek to relitigate the factual underpinnings of the bankruptcy court's decision.

A. Plaintiffs Lack Standing Because They Do Not Have A Property Interest For The Purposes Of The Takings Clause And Have Not Shown Injury In Fact

"Standing is a threshold jurisdictional issue that implicates Article III of the Constitution." *Hoopa Valley Tribe v. United States*, 597 F.3d 1278, 1283 (Fed. Cir. 2010). The party invoking jurisdiction bears the burden of establishing the three elements of standing: "injury in fact, causation, and redressability." *Id.* Here, plaintiffs lack standing to raise takings claims because they have not established that they possess a property interest for the purposes of the Takings Clause. Moreover, plaintiffs have failed to show injury in fact because they have not plausibly alleged economic harm.

The Federal Circuit has recognized that a legal claim that does not seek to protect a separate, legally-recognized property interest does not constitute "a property interest for purposes of the Takings Clause." *See Adams v. United States*, 391 F.3d 1212, 1225-26 (Fed. Cir. 2004) (finding lack of a property right for Fair Labor Standards Act claim). The *Adams* court stated

that, "[w]e decline to treat a statutory right to be paid money as a legally-recognized property interest, as we would real property, physical property, or intellectual property. Instead, we view it as nothing more than an allegation that money is owed." *Id.* at 1225. With respect to causes of action, the *Adams* court found that although "sometimes a cause of action may fall within the definition of property recognized under the Takings Clause, we observe, like the Court of Federal Claims, that precedent has limited the application of the Takings Clause to cases in which the cause of action protects a legally-recognized property interest." *Id.* at 1225-26.

Here, as in *Adams*, plaintiffs' underlying tort claims amount to a claim of "right to be paid money" rather than a cause of action that protects a separate, legally-recognized property interest such as "real property, physical property, or intellectual property." *Id.* at 1225. Thus, plaintiffs have failed to establish that they possess a "property interest for purposes of the Takings Clause." *See id.*

Additionally, even if plaintiffs' tort claims could have been considered to be a property interest for purposes of the Takings Clause (which they were not), once Old GM filed bankruptcy, their tort claims became unsecured bankruptcy claims that do not constitute property interests for the purposes of the Takings Clause. It is well-settled in the bankruptcy context that if a "claim is unsecured, it is not 'property' for purposes of the Takings Clause." *In re Motors Liquidation Co.*, 430 B.R. at 96 (quoting *In re Treco*, 240 F.3d 148, 161 (2d Cir. 2001) (citing *Louisville Jt. Stock Land Bank v. Radford*, 295 U.S. 555, 602 (1935))). Unsecured creditors, like plaintiffs, have no standing to assert a takings claim. *See id*. Nor have plaintiffs alleged that their personal injury claims were secured by liens, or otherwise exempted from the operation of Federal bankruptcy law, including section 363 of the United States Bankruptcy Code, which authorizes sales of assets "free and clear" of liability. *See In re Motors Liquidation Co.*, 428

B.R. at 63 (plaintiffs' "position in the bankruptcy appears to be neither better nor worse than that of any other unsecured contingent creditor"); 11 U.S.C. § 363(f). Plaintiffs thus lack standing.

In their complaint, plaintiffs appear to attempt to circumvent the unsecured nature of their claims by pointing to the provision that the court may reject "interests in property" in a 363 sale. *See* Am. Compl. ¶ 125 ("In pressing its case before the Bankruptcy Court for an injunction barring the assertion of successor liability claims against New GM, the Government agreed that such rights are "interests in property" that could be extinguished in a "free and clear" sale under section 363(f) of the Bankruptcy Code. Further, its attorneys expressly concurred on the record with the assessment that rights to assert successor liability claims are "interests in property"); 11 U.S.C. § 363(f) (conditions for sale "free and clear of any interest in such property").

Whether plaintiffs' personal injury claims are properly considered to be "interests in property" *for purposes of section 363*, however, has no bearing on whether they are valid property interests *for purposes of the Takings Clause*. In rejecting plaintiffs' argument that their injury claims were not "interests in property" for the purposes of the 363 sale, the bankruptcy court recognized that "'interest' has wholly different meanings as used in various places in the [Bankruptcy] Code, and assumptions that they mean the same thing here are unfounded." *GM Sale Op'n*, 407 B.R. at 502. Furthermore, in its opinion approving the 363 sale, the district court expressly held that unsecured interests did not confer standing for a takings claim. *See In re Motors Liquidation Co*., 430 B.R. at 96. Plaintiffs' citation to the term "interest in property" for the purposes of section 363 thus does not support their standing for a takings claim.

Furthermore, as discussed below, plaintiffs have not demonstrated injury in fact because they have not plausibly alleged economic harm. As the bankruptcy court held, the only alternative to the 363 sale of which plaintiffs complain would have been a liquidation in which

they and other unsecured creditors would have received nothing. *See GM Sale Op'n*, 407 B.R. at 475, 485; *In Re Motors Liquidation Co.*, 428 B.R. at 63; *see also* Am. Compl. ¶ 88 (admitting GM would have "face[d] certain liquidation" without Government assistance). Plaintiffs allege that they "had nothing more at the time of the [363] Sale than a contingent interest in an indeterminate portion, if any, of the consideration paid over by New GM in the Sale to Old GM's bankruptcy estate." *See* Am. Compl. ¶ 171. Such a "contingent interest" in Old GM's bankruptcy estate, however, is no different than what plaintiffs would have had there been no Government involvement at all. Plaintiffs thus have failed to allege injury in fact and thus their claim should be dismissed for lack of standing.

B. Plaintiffs' Claim Should Be Dismissed Because This Court Does Not Possess Jurisdiction To Review Bankruptcy Court Decisions

Plaintiffs assert that the Government forced New GM not to assume the liabilities associated with plaintiffs' personal injury claims and that such alleged conduct constitutes a taking under the Fifth Amendment. This Court lacks jurisdiction, however, to entertain claims that – although couched in the language of takings law – in fact seek review of bankruptcy court decisions. Here, the bankruptcy court has already decided that the 363 sale was a better result for unsecured creditors – including plaintiffs – than a continued GM bankruptcy, which would have resulted in GM being "immediately liquidated." *See GM Sale Op'n*, 407 B.R. at 484; *In re Motors Liquidation Corp.*, 428 B.R. at 63-64. The bankruptcy court also found that the Government did not control the automakers, act inequitably, or alter the ordinary marketplace dynamic. *GM Sale Op'n*, 407 B.R. 463, 474-81, 485-499, 513-14. Plaintiffs' claim would necessarily require this Court to relitigate those questions. Thus, plaintiffs' claims should be dismissed.

Plaintiffs do not allege wrongdoing by the bankruptcy court itself, nor would such a "judicial takings" theory be viable. *See Brace v. United States*, 72 Fed. Cl. 337, 359 & n.35 (2006) (rejecting judicial takings theory because Court would "constantly be called upon by disappointed litigants to act as a super appellate tribunal reviewing the decisions of other courts to determine whether they represented substantial departures from prior decisional law"); *see also Elks Nat'l Found. v. Weber*, 942 F.2d 1480, 1485 (9th Cir. 1991) (same). This Court has also repeatedly explained that normal bankruptcy proceedings "do not effect a taking." *Adams v. United States*, 20 Cl. Ct. 132, 139 n.8 (1990). Instead, to the extent plaintiffs allege any wrongdoing by the bankruptcy court, such a claim would have to take the form of an attack on the premises of the bankruptcy court's decision. Such an argument, however, contradicts this Circuit's precedent holding that this Court lacks jurisdiction to review a district court's decisions.

This Court has no authority to review or alter the holdings of the Federal district courts. *Joshua v. United States*, 17 F.3d 378, 380 (Fed. Cir. 1994); *see also Allustiarte v. United States*, 256 F.3d 1349, 1351 (Fed. Cir. 2001). The Bankruptcy Court for the Southern District of New York is a "unit of the district court." 28 U.S.C. § 151. The bankruptcy court exercises a district court's jurisdiction pursuant to 28 U.S.C. §§ 1334(b) and 157(a), and under the July 10, 1984 "Standing Order of Referral of Cases to Bankruptcy Judges" of the United States District Court for the Southern District of New York. *In re U.S. Lines, Inc.*, 169 B.R. 804, 814-815 (Bankr. S.D.N.Y. 1994). Accordingly, the Federal Circuit has approved the dismissal of claims that would require this Court to review bankruptcy court decisions – even when styled as takings claims.

In *Allustiarte*, the appellants argued that a taking occurred when the bankruptcy court approved an allegedly improper action by the bankruptcy trustee. Although the appellants

asserted that they were not requesting review of the bankruptcy court decisions, the Federal Circuit concluded that to entertain the takings claims, the Court would have to determine "whether appellants suffered a categorical taking of their property at the hands of the bankruptcy trustees and courts, or whether the courts' and trustees' actions defeated their reasonable, investment-backed expectations." 256 F.3d at 1351. "Such a determination would require the [C]ourt to scrutinize the actions of the bankruptcy trustees and courts." *Id.* at 1351-52. Because this Court "does not have jurisdiction to review the decisions of district courts," the Federal Circuit affirmed this Court's dismissal of the takings claim. *Id.* at 1352 (citing *Joshua*, 17 F.3d at 380).

In other decisions, the Federal Circuit (or its predecessor) has similarly disposed of arguments like plaintiffs', concluding that the Court lacks jurisdiction to entertain claims that a bankruptcy court's order constituted a taking. For example, the Court of Claims dismissed for lack of jurisdiction a creditor's claim that the bankruptcy court took real property for public use by allowing the debtor to remain in property that it leased from the creditor. *City Dev. Co. v. United States*, 618 F.2d 122 (table), 1979 WL 30894 (Ct. Cl. June 29, 1979) (unpublished), *1, *cited with approval in Adams v. United States*, 20 Cl. Ct. 132, 139 (1990). The Court explained that "[t]he power to enact bankruptcy laws is distinct in the Constitution from the power to take" and that "Plaintiff's avenue of relief, if not otherwise barred, is or was to appeal the decision." *Id.*

Here, plaintiffs had the opportunity to – and did – appeal the bankruptcy court's decision. The district court rejected plaintiffs' appeal, holding not only that plaintiffs had failed to seek a stay of the bankruptcy court order but that plaintiffs could not show harm because GM would have been "immediately liquidated" without approval of the 363 sale. *See In re Motors*

Liquidation Co., 428 B.R. at 63-64. Any claim by plaintiffs that the bankruptcy court's opinion approving the 363 sale constituted a taking would necessarily require this Court to review the factual underpinnings of the bankruptcy court's opinion and the district court's review of that decision. Plaintiffs' amended complaint thus fails for lack of jurisdiction.

III. Plaintiffs Fail To State A Regulatory Taking Claim

The Court should dismiss plaintiffs' amended complaint for failure to state a regulatory taking claim under either the *Lucas* or the *Penn Central* regulatory taking tests.

The *Lucas* "per se" rule applies only in the "extraordinary case" where three prerequisites are met. The regulation must: (1) permanently deprive; (2) the whole property; (3) of all its value. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 330, 332 (2002); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 n.8 (1992). Only a complete deprivation will constitute a "per se" taking. *Norman v. United States*, 429 F.3d 1081, 1090-91 (Fed. Cir. 2005) (citing *Lucas*, 505 U.S. at 1019 n.8, and *Tahoe-Sierra Preservation Council*, 535 U.S. at 324, 330). Since plaintiffs retained the right to make claims against the GM estate and the billions of value it possessed, *Lucas* has no application here. *See* Am. Compl. ¶¶ 2, 16, 145 (acknowledging that plaintiffs have received distributions on account of their allowed claims in the Old GM bankruptcy).

In the majority of regulatory takings cases, the Court is required to apply the *Penn Central* balancing test, which requires the Court to weigh the following factors: (1) "[t]he economic impact of the regulation on the claimant;" (2) "the extent to which the regulation has interfered with distinct investment-backed expectations;" and (3) "the character of the governmental action." *Penn Centr. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978); *Norman*, 429 F.3d at 1091-92. "A pivotal criterion governing whether a regulatory taking has

occurred is the impact the regulatory imposition has had on the economic use, and hence value, of the property." *Hendler v. United States*, 175 F.3d 1374, 1385 (Fed. Cir. 1999); *see also Fla. Rock Indus., Inc. v. United States*, 18 F.3d 1560, 1564-65 (Fed. Cir. 1994). Thus, "if the regulatory action is not shown to have had a negative economic impact on the property, there is no regulatory taking." *Hendler*, 175 F.3d at 1385.

Here, plaintiffs have failed to prove economic loss because they are collaterally estopped from claiming that GM could have avoided bankruptcy or that their claims would have had greater value in a bankruptcy without Government assistance because the bankruptcy court has already decided these questions. *See A&D Auto Sales*, 748 F.3d at 1158. Plaintiffs have also failed to plead economic loss sufficiently. Plaintiffs' amended complaint offers only "conclusory loss of value allegations." *See id.* at 1159 (citing *Iqbal*, 556 U.S. at 678, and quoting *Twombly*, 550 U.S. at 555).

Even if plaintiffs could sufficiently allege economic loss (which they cannot), the complaint falls far short of adequately pleading facts that could support the second and third elements of the *Penn Central* test: interference with reasonable investment-backed expectations and character of the Governmental action. *See Penn Central*, 438 U.S. at 124. Plaintiffs' claims thus fail.

A. Plaintiffs Fail To Allege Facts Sufficient To Support A *Lucas* "*Per Se*" Regulatory Takings Claim

Although the *Penn Central* analysis should apply here, even if the Court were to apply the *Lucas* test, plaintiffs' taking claim still fails. Even assuming that plaintiffs have sufficiently alleged economic loss (which they have not), the *Lucas* test requires a complete deprivation of all value of the property allegedly taken. *Tahoe-Sierra Preservation Council*, 535 U.S. at 330; *Norman*, 429 F.3d at 1090 (citing *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992)). In

other words, a *Lucas* taking requires proof that the Government's conduct caused a "complete elimination of value." *Tahoe-Sierra Preservation Council*, 535 U.S. at 330 (quoting *Lucas*, 505 U.S. at 1019-20 n.8); *but see Lost Tree Village Corp. v. United States*, 787 F.3d 1111 (Fed. Cir. June 1, 2015) (pet. for reh'g *en banc* filed on Aug. 17, 2015) (holding that "residual value attributable to noneconomic uses" of real property would not foreclose a *Lucas* takings analysis).

Here, after the Government's investments and GM's exclusion of the product liability claims pursuant to the Bankruptcy Code, plaintiffs retained rights to make claims against Old GM's bankruptcy estate. *See* Am. Compl. ¶ 134 (acknowledging "contingent interest" retained in "Old GM's bankruptcy estate"); *GM Sale Op'n*, 407 B.R. at 514-16; 11 U.S.C. § 365(g); *see also A&D Auto Sales*, 748 F.3d at 1149. Consequently, plaintiffs' complaint fails to allege the complete elimination of value required to support a *Lucas* regulatory taking.

Furthermore, 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. *See A&D Auto Sales*, 748 F.3d at 1151 (collecting cases and acknowledging that "other circuits view the *Lucas* test as applying only to land" and that the Federal Circuit has only applied *Lucas* to "tangible property"). The Federal Circuit declined to reach this issue in *A&D Auto Sales* because the parties had not fully briefed the issue. *See, e.g.*, *A&D Auto Sales*, 748 F.3d at 1151-52 ("We have not had occasion to address whether the categorical takings test applies to takings of intangible property such as contract rights. We decline to decide the issue at this stage of the litigation since the issue has not been briefed by the parties."). Because all parties will have the opportunity to brief this issue fully here, it is appropriate for the Court to take up this issue and reject such an expansion of *Lucas* to intangible property.

B. Plaintiffs Cannot Prove Economic Loss Because They Are Collaterally Estopped From Arguing That GM Could Have Avoided Bankruptcy Or That Their Personal Injury Claims Would Have Had Greater Value Without Government Assistance

Collateral estoppel prevents plaintiffs from establishing the economic loss element of a regulatory takings claim. In *A&D Auto Sales*, the Federal Circuit held that, to avoid dismissal for failure to properly allege economic loss, the plaintiff auto dealers needed to amend their complaint to sufficiently allege either: (1) that Chrysler and GM would have avoided bankruptcy, with plaintiffs' franchises retaining value, "but for" the Government's intervention; or (2) that the bankruptcies would have preserved some value for the plaintiffs' franchises. 748 F.3d at 1158. Here, Plaintiffs are collaterally estopped from arguing that GM could have avoided bankruptcy, or whether their claims could have retained greater value in a GM bankruptcy without Government assistance, because the bankruptcy court has already decided those issues. Accordingly, plaintiffs cannot prove economic loss under *A&D Auto Sales*.

Collateral estoppel "bars the relitigation of an issue that was raised, litigated, and actually decided by a judgment in a prior proceeding, regardless of whether the two suits are based on the same cause of action." *Postlewaite v. McGraw-Hill*, 333 F.3d 42, 48 (2d Cir. 2003) (emphasis added); *see also Montana v. United States*, 440 U.S. 147, 153 (1979) ("Under collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation."); *United States v. Stauffer Chemical Co.*, 464 U.S. 165, 170-71 (1984) ("[T]he doctrine of collateral estoppel can apply to preclude relitigation of both issues of law and issues of fact if those issues were conclusively determined in a prior action.").

Here, collateral estoppel applies to any contention that GM could have avoided bankruptcy. This issue was litigated in the GM bankruptcy, in a proceeding in which plaintiffs

participated, and was integral to the bankruptcy court's decision approving the 363 sale. The bankruptcy court, upon considering testimony from numerous witnesses and hundreds of thousands of pages of evidence, unequivocally found that, absent Government intervention, GM would have faced "immediate liquidation." *GM Sale Op'n*, 407 B.R. at 484; *see also id.* at 476, 512-16; *In re Motors Liquidation Co.*, 430 B.R. at 98. Personal injury claimants, including the named lead plaintiffs in this action, participated in the bankruptcy proceeding through counsel. *See GM Sale Op'n*, 407 B.R. at 471 (listing plaintiffs and counsel as having argued in the proceeding). Thus, these plaintiffs are collaterally estopped from rearguing the issue of whether GM could have avoided bankruptcy without the Government's assistance.

The bankruptcy court also ruled that plaintiffs' personal injury claims would not have had greater value in a GM bankruptcy without Government assistance. *GM Sale Op'n*, 407 B.R. at 484; *In re Motors Liquidation Co.*, 428 B.R. at 63-64. In plaintiffs' appeal from the bankruptcy court's decision to the district court, in which plaintiffs had sought to overturn the 363 sale provision calling for a sale "free and clear" of personal injury claims, the district court specifically found that plaintiffs' "position in the bankruptcy appears to be neither better nor worse than that of any other unsecured contingent creditor," and that plaintiffs "would have received nothing" on their personal injury claims if GM had not received Government assistance resulting in the 363 sale. *In re Motors Liquidation Co.*, 428 B.R. at 63-64.

The collateral estoppel resulting from the bankruptcy court's rulings forecloses plaintiffs' ability to prove economic loss under *A&D Auto Sales*. In order to establish economic loss under *A&D Auto Sales*, plaintiffs must sufficiently allege either: (1) that GM would have avoided bankruptcy, with plaintiffs' claims retaining value "but for" the Government's intervention; or (2) that bankruptcy without Government assistance would have preserved greater value for the

plaintiffs' claims. *See* 748 F.3d at 1158. Because the bankruptcy court has already decided these issues with respect to plaintiffs' claims in the GM bankruptcy, plaintiffs are collaterally estopped from proving the required elements set forth in *A&D Auto Sales*.

The Federal Circuit's conclusion in *A&D Auto Sales* that the bankruptcy court's decision in that case did not collaterally estop the plaintiffs in that case from proving that the Government coerced GM into filing bankruptcy does not help plaintiffs here. *See A&D Auto Sales*, 748 F.3d at 1156. The Federal Circuit did not hold in *A&D Auto Sales* that collateral estoppel would not be appropriate for any of the bankruptcy court's holdings. To the contrary, the Federal Circuit held in *A&D Auto Sales* that collateral estoppel can be applied to issues litigated within the bankruptcy where "the issue . . . is identical to the one decided in the first action." 748 F.3d at 1156 (emphasis in original).

Here, the issue of whether GM would have faced immediate liquidation in the absence of Government assistance is "identical to the one decided in the first action," *A&D Auto Sales*, 748 F.3d at 1156, and was a necessary factual underpinning to the bankruptcy court's decision to approval the 363 sale. With respect to a question of *coercion* that is not relevant here, in *A&D Auto Sales* the Federal Circuit explained that "[t]he issue before the bankruptcy court was whether New GM and New Chrysler purchased the assets of Old GM and Old Chrysler 'in good faith.'" *Id.* (citations omitted). The bankruptcy court's resolution of that issue, the Federal Circuit held, "did not estop the plaintiffs from arguing that the government coerced the automakers into action." *Id.* Because, unlike the question of coercion, the question of whether GM would have faced immediate liquidation absent Government assistance was fully litigated in

the bankruptcy court, plaintiffs are collaterally estopped from proving economic loss under *A&D Auto Sales*.[10]

C. Plaintiffs Fail To Allege The Economic Impact Required To Establish A Regulatory Taking Under *Penn Central* And *A&D Auto Sales*

In *A&D Auto Sales*, the Federal Circuit held that, to avoid dismissal for failure to properly allege economic loss under the *Penn Central* test, the plaintiff auto dealers needed to allege sufficiently either: (1) that Chrysler and GM would have avoided bankruptcy, with plaintiffs' franchises retaining value, "but for" the Government's intervention; or (2) that the bankruptcies would have preserved some value for the plaintiffs' franchises. 748 F.3d at 1158. As in *A&D Auto Sales*, plaintiffs have not pled facts sufficient to support a plausible finding either that GM would have avoided bankruptcy or that their personal injury claims would have retained value in a bankruptcy without Government assistance. Thus, plaintiffs have failed to

[10] We recognize that in *Alley's of Kingsport, Inc. v. United States*, 103 Fed. Cl. 449, 453 (2012), and *Colonial Chevrolet Co. v. United States*, 103 Fed. Cl. 570, 572 (2012), this Court distinguished *Allustiarte* and held that this Court possessed subject matter jurisdiction and that the plaintiffs in those cases were not collaterally estopped from contesting the bankruptcy court's rulings. *See also Colonial Chevrolet Co. v. United States*, __ Fed. Cl. __, 2015 WL 5268941, *7-8 (same). Although we respectfully disagree with these decisions, their reasoning does not help plaintiffs here. Upon appeal from these decisions, in *A&D Auto Sales*, the Federal Circuit explained that the reason it found that "the bankruptcy court's findings do not estop the plaintiffs from arguing that the government coerced the automakers into action" was that the plaintiffs' claims in that case were premised on alleged coercion prior to bankruptcy rather than the bankruptcy court's decision. *A&D Auto Sales*, 748 F.3d at 1153. To the contrary, the *A&D Auto Sales* court concluded that, "the plaintiffs could have no compensable property interest if the government action were limited to the bankruptcy court's approval of the terminations." *Id.* Here, however, plaintiffs do base their claim upon "the bankruptcy court's approval" of the 363 sale, particularly since that is the only action plaintiffs cite that falls within the Court's six-year statute of limitations before the filing of their complaint on July 9, 2015. We also note that, unlike the plaintiffs in *Colonial Chevrolet*, plaintiffs here appeared in the bankruptcy court proceeding and were bound by its findings. *See Colonial Chevrolet*, 2015 WL 5268941, *7 (finding that "the plaintiff franchisees in this case were not parties to the bankruptcy proceedings are not bound by its conclusions"). Thus, although we respectfully disagree with the conclusion in *A&D Auto Sales* that the plaintiffs in that case were not collaterally estopped, under the reasoning in *A&D Auto Sales*, plaintiffs in this case are collaterally estopped.

allege specific facts sufficient to support a finding of economic loss under *Penn Central* or *A&D Auto Sales*.

As noted in *A&D Auto Sales*, a plaintiff is entitled to just compensation for a taking only when it has suffered economic loss. 748 F.3d at 1157-58. That is, "just compensation for a net loss of zero is zero." *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 240 n.11 (2003); *A&D Auto Sales*, 748 F.3d at 1157 (same). As this Court has recognized, "the facts alleged in the complaint must be plausible and not merely naked assertions devoid of a factual basis." *Evans v. United States*, 107 Fed. Cl. 442, 456 (2012) (citing *Iqbal*, 556 U.S. at 678). Because plaintiffs' amended complaint does not "contain sufficient factual matter . . . to state a claim to relief that is plausible on its face," *see Iqbal*, 556 U.S. at 678 (internal quotation marks and citation omitted), the Court should dismiss the complaint.

1. Plaintiffs Cannot Establish Economic Harm By Alleging That The Automakers Were Entitled To A Government Rescue On Terms More Favorable To The Personal Injury Claimants

First, plaintiffs' depiction of a "but for" world involving Government assistance to GM fails to satisfy its burden of establishing economic harm. In a misguided attempt to establish economic loss, plaintiffs premise their "but for" world on Government assistance to GM on terms more favorable to the personal injury claimants. *See* Am Compl. ¶ 187. ("Consequently, the appropriate 'but for' analysis in this case is that but for the Government's arbitrary demand that Personal Injury Claimants' rights to assert successor liability claims be eliminated through the Sale Order, even though the Government was indifferent to assumption of these claims by New GM, the Personal Injury Claimants' valuable rights to pursue successor liability claims against New GM would have been preserved."). This is insufficient.

Plaintiffs have fundamentally erred in depicting a "but for" world ***with*** Government action, contrary to the Federal Circuit's instruction in *A&D Auto Sales*. Plaintiffs have failed to allege sufficient facts to show what value their personal injury claims would have had "but for the government's intervention." 748 F.3d at 1157-58. The appropriate "but for" world, therefore, would depict the value of plaintiffs' personal injury claims without any Government assistance to GM. *Id.* at 1158. Thus, contrary to plaintiffs' suggestion, a sufficient "but for" allegation would not be one that appraised the value of plaintiffs' personal injury claims if the Government had intervened in a different manner, without the conditions of which plaintiffs complain. For example, a proper "but for" allegation would *not* measure the effect of having the Government Old GM financing without the condition of having New GM exclude the liabilities associated with plaintiffs' personal injury claims.

In any event, plaintiffs' allegations fail to meet the basic pleading standards. At a minimum, they are speculative in that they merely predict what plaintiffs believe would have happened had the Government provided the financing but decided to have New GM "assume the 'politically sensitive' liabilities owing to Personal Injury Claimants as part of the sale." Am. Compl. ¶ 186. Plaintiffs compound this speculation by asserting that, if the Government had decided to have New GM assume these liabilities, "the Government would still close the deal without any downward adjustment to the purchase price." *Id.* Absent any facts to support such speculation, the allegation falls far short of satisfying the *Iqbal* and *Twombly* pleading standards.

Plaintiffs' bare assertion that, in a "but for" world, New GM would have assumed the additional liabilities represented by their personal injury claims with no adjustment to the purchase price does not raise plaintiffs' "right to relief above the speculative level." *See Twombly*, 550 U.S. at 555. Plaintiffs repeatedly allege that the Government was "indifferent" to

New GM's assumption of these claims. *See* Am. Compl. ¶¶ 15, 169, 187, 189, 209. But plaintiffs' other allegations – especially plaintiffs' allegation, *see* Am. Compl. ¶ 83, that the Government required that plaintiffs' claims be excluded as a condition of the 363 sale – belie this alleged "indifference."

In any event, plaintiffs' argument proves too much. Taken to its logical conclusion, plaintiffs' argument would impose a duty upon the Government to pay off all creditors in full whenever it makes a rescue loan or else be liable to those same creditors under the Takings Clause for the full amount of their claims against the rescued party. This, however, is precisely the result that the Federal Circuit rejected in *A&D Auto Sales* by requiring that plaintiffs demonstrate the value of their claims without any Government intervention. Plaintiffs' argument thus fails.

2. Plaintiffs Have Failed To Plead That GM Could Have Avoided Bankruptcy Without Government Assistance

As noted above, plaintiffs have not plausibly alleged that GM could have avoided bankruptcy without Government assistance. To the contrary, plaintiffs allege that GM had "no option" but to accept Government assistance and file for bankruptcy or it would "face certain liquidation." *See* Am. Compl. ¶ 88 ("Left with no option but to comply with the Government's mandate or face certain liquidation, Old GM filed its bankruptcy petition for relief in the bankruptcy court for the Southern District of New York (the "Bankruptcy Court") on June 1, 2009.").

Plaintiffs further allege that "[a]s a condition to additional funding, the Government mandated that Old GM file its bankruptcy petition for relief on June 1, 2009, the day that a $1 billion interest payment would have been required to be paid on the Bondholder Debt." Am. Compl. ¶ 79. Again, plaintiffs do not allege that GM could have avoided bankruptcy without

receiving the "additional funding" from the Government referred to in their complaint. Plaintiffs thus do not plausibly allege facts sufficient to show that GM could have avoided bankruptcy absent Government assistance. *See Iqbal*, 556 U.S. at 678; *Twombly*, 550 U.S. at 555.

Plaintiffs' own allegations foreclose their ability to satisfy the economic loss standard set forth in *A&D Auto Sales*. The "but for" scenario in plaintiffs' complaint is premised upon New GM assuming the liabilities associated with the plaintiffs' personal injury claims. *See* Am. Compl. ¶ 186. Such a scenario, however, is premised upon richer Government assistance within the GM bankruptcy rather than a world in which GM avoided bankruptcy. Thus, plaintiffs have failed to allege facts sufficient to show "GM would have avoided bankruptcy, with plaintiffs' [personal injury claims] retaining value, 'but for' the Government's intervention." *A&D Auto Sales*, 748 F.3d at 1158.

Plaintiffs also plead facts related to a failed exchange offer to bondholders made prior to GM's bankruptcy filing that plaintiffs claim would have involved GM avoiding bankruptcy and plaintiffs retaining the value of their personal injury claims. *See* Am. Compl. ¶¶ 66-78. Plaintiffs do not allege that the exchange offer failed because of any Government action, but rather because the offers "failed to garner the requisite acceptances from 90% of the Bondholders and expired on May 26, 2009." Am Compl. ¶ 79. Again, plaintiffs plead no facts that would show that GM could have avoided bankruptcy, so any allegations with respect to the value of their personal injury claims in a hypothetical exchange offer are irrelevant to their claims.

D. Even Assuming Plaintiffs Have Adequately Pled Economic Loss, Plaintiffs Fail To Satisfy The Other Elements Of The *Penn Central* Test

Even assuming that plaintiffs have pled facts sufficient to show that their personal injury claim would have retained some economic value absent Government intervention (which they have not), the complaint should nonetheless be dismissed because plaintiffs have failed to allege facts sufficient to satisfy the other two elements of the *Penn Central* regulatory taking test: interference with investment-backed expectations, and the character of the Governmental action. Plaintiffs' inadequate showings on each of the three factors of the *Penn Central* balancing test independently require dismissal.

1. Plaintiffs Have Not Sufficiently Alleged That They Reasonably Expected Their Personal Injury Claims To Survive Absent Government Action

Plaintiffs have failed to allege facts sufficient to satisfy the second prong of the *Penn Central* balancing test – interference with reasonable investment-backed expectations. A regulatory taking analysis requires consideration of "the extent to which the regulation has interfered with distinct investment-backed expectations." *Penn Central*, 438 U.S. at 124. A "taking does not lie where the restriction 'did not interfere with interests that were sufficiently bound up with the reasonable expectations of the claimant.'" *Cienega Gardens v. United States*, 503 F.3d 1266, 1289 (Fed. Cir. 2007) (quoting *Penn Central*, 438 U.S. at 124). "The purpose of consideration of plaintiffs' investment-backed expectations is to limit recoveries to property owners who can demonstrate that 'they bought their property in reliance on a state of affairs that did not include the challenged regulatory regime.'" *Cienega Gardens v. United States*, 331 F.3d 1319, 1345-46 (Fed. Cir. 2003) (quoting *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1177 (Fed. Cir. 1994)).

To support a regulatory taking claim, the plaintiff's "investment-backed expectation must be 'reasonable.'" *Id.* at 1346 (quoting *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005 (1984)). That is, the plaintiff's expectation "must be more than a 'unilateral expectation or an abstract need.'" *Monsanto*, 467 U.S. at 1005-06 (internal citation omitted). The plaintiff has the burden "to establish a reasonable investment-backed expectation in the property at the time it made the investment." *Cienega Gardens*, 503 F.3d at 1288 (citing *Forest Props., Inc. v. United States*, 177 F.3d 1360, 1367 (Fed. Cir. 1999)). Thus, the Court examines "what, under all the circumstances, the [plaintiff] should have anticipated." *A&D Auto Sales*, 748 F.3d at 1159 (quoting *Cienega Gardens*, 331 F.3d at 1346).

The Government's investments in GM did not interfere with plaintiffs' investment-backed expectations because they were aware (or should have been aware) that if GM – like any other company – later sought bankruptcy protection, any tort claims they might seek to pursue would be subject to a loss in value, including potentially all of their value. Federal bankruptcy laws, which allow debtors like GM to extinguish liabilities such as those of unsecured creditors, have existed since the nineteenth century, long before GM was incorporated. *See* Bankruptcy Act of 1898, ch. 541, 30 Stat. 544 (formerly codified throughout 11 U.S.C.) (bankruptcy statute passed pursuant to authority to enact "uniform Laws on the subject of Bankruptcies" under Article I, § 8 of the U.S. Constitution); *see also GM Sale Op'n*, 407 B.R. at 514. Thus, plaintiffs' ability to collect upon product liability claims was always contingent upon the continued viability of GM and its ability to avoid bankruptcy. *Cf. Chang v. United States*, 859 F.2d 893, 897 (Fed. Cir. 1988) (rejecting plaintiffs' claim that the Libyan Sanction Regulations interfered with distinct investment-backed expectations because plaintiffs' ability to perform

their employment contracts with a Libyan oil company was "contingent upon the continuation of friendly relations between" the United States and Libya).

Plaintiffs' sole allegation with respect to reasonable investment-backed expectations is conclusory: "The Personal Injury Claimants also had reasonable, investment-backed expectations that GM would stand behind its cars, as Old GM consistently promised in its marketing campaigns." Am. Compl. ¶ 199. Plaintiffs' allegations that "[n]one of these claimants could have expected such unfair treatment when they bought their defective vehicle given the assurances made to consumers about the reliability of Old GM," Am. Compl. ¶ 200, or plaintiffs' alleged surprise concerning GM's liability coverage, Am. Compl. ¶ 201, similarly only refers to plaintiffs' belief about Old GM's financial viability, not to the potential effects of bankruptcy upon any private company.

Lastly, plaintiffs' statement that they 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 GM's CEO that these claims be assumed by New GM," Am. Compl. ¶ 202, similarly implies that plaintiffs had an expectation of a Government rescue of GM on terms more favorable to personal injury claimants than what actually occurred. Plaintiffs thus fail to plead that they had reasonable investment-backed expectations – regarding their ability to recover from a bankrupt GM – that the Government somehow subverted.

Accordingly, plaintiffs have not alleged, and cannot allege, facts demonstrating that they reasonably expected to would be able to collect upon their unsecured personal injury claims in the event that GM were to become insolvent and seek bankruptcy protection. To the contrary, had the Government not intervened, GM would have faced "immediate liquidation." *GM Sale*

Op'n, 407 B.R. at 484. As the bankruptcy court held, "if GM were to liquidate, its unsecured creditors would receive nothing on their claims." *Id.* at 475. Thus, in that scenario, plaintiffs could not have expected to receive anything, much less the full value of their unsecured personal injury claims.

Plaintiffs have also failed to allege facts that could establish that they reasonably could have expected that their personal injury claims would have retained value absent Government action. *See A&D Auto Sales*, 748 F.3d at 1159. Instead, plaintiffs plead that the Government *could have* required New GM to assume the liabilities, but do not allege facts showing that they reasonably expected their claims to retain value absent Government action. Thus, plaintiffs fail to satisfy the reasonable expectations factor of the *Penn Central* analysis.

Because plaintiffs could not have had a reasonable investment-backed expectation that their personal injury claims would have survived a potential GM bankruptcy absent Government action, *see A&D Auto Sales*, 748 F.3d at 1159, the Court may dispose of plaintiffs' regulatory taking claim on this basis alone. *See, e.g.*, *Monsanto*, 467 U.S. at 1005-06 (finding that "the force of [the reasonable expectations] factor is so overwhelming . . . that it disposes of the taking question," where the plaintiff "could not have had a reasonable, investment-backed expectation"); *Golden Pac. Bancorp v. United States*, 15 F.3d 1066, 1074 (Fed. Cir. 1994) (concluding that the absence of reasonable investment-backed expectations was dispositive of a taking claim).

2. Penn Central's "Character Of The Governmental Action" Prong Weighs In Favor Of The Government

The third prong of the Penn Central balancing test requires the Court to analyze the character of the governmental action by considering "'the actual burden imposed on property

rights, or how that burden is allocated.'" *Rose Acre Farms, Inc. v. United States*, 559 F.3d 1260, 1278 (Fed. Cir. 2009) (quoting *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 543 (2005)).

In this case, plaintiffs concede that GM would have experienced liquidation or bankruptcy absent Government financing. *See* Am. Compl. ¶ 88 (GM had "no option" but to accept Government assistance and file for bankruptcy or "face certain liquidation."). Plaintiffs acknowledge that a failed GM bankruptcy would have resulted in the "demise of the entire domestic auto industry." Am. Compl. ¶ 87. Consistent with these admissions, the bankruptcy court held that the only alternative to a Government-financed bankruptcy for both Chrysler and GM was "immediate liquidation." *GM Sale Op'n*, 407 B.R. at 484. Similarly, the bankruptcy court acknowledged that unsecured creditors, a category that included plaintiffs, were better off under the bankruptcy plan that was actually implemented – and which left assets worth billions from which recovery could be sought – than they would have been had the automakers liquidated. *Id.* at 485 ("No unsecured creditor will here get less than it would receive in a liquidation.").

Thus, to the extent a burden was imposed on plaintiffs, it was a product of the economy and GM's financial condition – not the result of Government action. The character of the Government's actions – as rescue lender – cannot support a taking claim. Plaintiffs contend that the Government caused plaintiffs to "bear public burdens which, in all fairness and justice, should be borne by the public as a whole." Am. Compl. ¶ 170. Contrary to plaintiffs' assertions, however, the Government's actions in rescuing the auto industry if anything bestowed a benefit upon plaintiffs, not a burden. In rescuing the auto industry, the Government did not allocate any additional burden, much less an undue burden, on plaintiffs. Were the Court to find otherwise, it "would have the effect of creating a disincentive for the government" to take "publicly

beneficial" actions. *See Rose Acre Farms*, 559 F.3d at 1283 (quoting *Maritrans, Inc. v. United States*, 342 F.3d 1344, 1357 (Fed. Cir. 2003)). Even if, as plaintiffs appear to allege, New GM could have survived without excluding plaintiffs' personal injury claims while not assuming any of the other liabilities that GM rejected or excluded in bankruptcy, this does not equate to plaintiffs being singled out to bear a disproportionate burden. Plaintiffs do not plead plausible facts to show why their personal injury claims would have had any greater entitlement to being retained than any other unsecured creditor.

The magnitude of the potential claims also contradicts any conclusion that the Government would have been "indifferent' to their exclusion. Plaintiffs also estimate the aggregate amount of allowed personal injury claims in the GM bankruptcy at approximately $300 million. Am. Compl. ¶ 14. The district court similarly held that plaintiffs' "request to reapportion their Existing Products Claims to New GM cannot be considered '*de minimis*.'" *In re Motors Liquidation Co.*, 428 B.R. at 63. Given the magnitude of these claims, plaintiffs' allegation that the Government would have been "indifferent" to New GM's assumption of these additional liabilities in a "but for" world fails as unduly speculative.

Furthermore, by the terms of plaintiffs' complaint, the Government's alleged decision for New GM not to assume the liabilities associated with plaintiffs' personal injury claims was commercial rather than regulatory in nature. As the Federal Circuit acknowledged in *A&D Auto Sales*, "[t]o the extent the dealer terminations were designed to protect the government's investment by assuring the viability of New GM and New Chrysler and the repayment of the loans and other assistance, that purpose could be viewed as non-regulatory." *A&D Auto Sales*, 748 F.3d at 1156. In *A&D Auto Sales*, the Federal Circuit deferred consideration of this question

upon the grounds that "this issue has not been fully developed at this stage, and so we defer its consideration in the first instance to the Claims Court." *Id.*

Here, plaintiffs explicitly premise their claim upon the Government having acted like a commercial lender rather than treating the plaintiffs more favorably than a commercial lender would have. *See* Am. Compl. ¶ 45 (quoting auto task force member as explaining that, "our test had to be what a commercial buyer would do; we had a fiduciary duty to use taxpayer dollars in the most appropriate way, and that's the judgment that we had to ultimately make"). Plaintiffs do not allege that the Government either singled out personal injury claimants for adverse treatment or that the Government had any regulatory purpose for excluding their personal injury claims. To the contrary, plaintiffs' description of their personal injury claims as "politically sensitive liabilities," Am. Compl. ¶ 70, suggests that the Government might have been more hesitant to exclude them, not that it had a regulatory purpose to do so. Thus, by the terms of plaintiffs' complaint, the Government's decision not to have New GM assume the liabilities associated with plaintiffs' personal injury claims was consistent with the actions of a commercial lender, and accordingly was non-regulatory under that prong of the *Penn Central* analysis.

Furthermore, plaintiffs have pled no facts that would support a finding of coercion by the Government's actions toward GM or the plaintiffs. The Federal Circuit ruled in *A&D Auto Sales* that the bankruptcy court's ruling did not collaterally estop plaintiffs from pleading that the Government coerced GM into filing bankruptcy. *See id.* at 1156. Nevertheless, the bankruptcy court found that the Government did not control the automakers, act inequitably, or alter the ordinary marketplace dynamic. *GM Sale Op'n*, 407 B.R. 463, 474-81, 485-499, 513-14. Plaintiffs provide no basis other than GM's financial need for a rescue loan that would differentiate the Government's leverage as a rescue lender from a private lender in a similar

situation. Thus, the character of the Government's action prong in *Penn Central* weighs in favor of the Government.

Lastly, any allegations of coercion with respect to GM's decision to file bankruptcy or exclude plaintiffs' personal injury claims fail due to the Court's six-year statute of limitations. Plaintiffs are time-barred from pleading that GM would have been able to avoid bankruptcy because the bankruptcy filing occurred on June 1, 2009, more than six years before the filing of plaintiffs' complaint on July 9, 2015. See Compl.; Am. Compl. ¶ 4 (alleging that, "[t]he Government, as Old GM's sole funding source, however, said it would not fund Old GM's operations past June 1, 2009 except in a bankruptcy proceeding, thus forcing Old GM to file its bankruptcy petition for relief on June 1, 2009."). The only event plaintiffs point to within the six-year statute of limitations is the bankruptcy court's approval of the 363 sale on July 10, 2009. By definition, the bankruptcy filing had already occurred by this time, as had GM's decision to accept Government assistance and the negotiation with the Government of the allegedly coercive terms of the 363 sale. *See* Am. Compl. ¶¶ 82-83. Accordingly, plaintiffs are time-barred from any allegations with respect to GM's decision to file bankruptcy or accept the terms of the 363 sale.

IV. Plaintiffs Fail To State A Physical Taking Claim

Finally, plaintiffs fail to allege plausible facts to support a physical taking claim. *See* Am. Compl. ¶¶ 161-75. In *A&D Auto Sales*, the Federal Circuit observed that "plaintiffs do not allege, and their complaints do not assert facts supporting an allegation of, a 'direct government appropriation or physical invasion of [their] property.'" *A&D Auto Sales*, 748 F.3d at 1150 (citations omitted). "To the extent the Colonial plaintiffs suggest otherwise," the Federal Circuit concluded, "there is no support for such a contention." *Id.* at 1151 n.5.

Here, as in *A&D Auto* Sales, the assertion that a physical taking occurred is entirely conclusory and unsupported by facts that could support a claim for relief. Plaintiffs do not allege the transfer or appropriation of their personal injury claims to third parties. At most, plaintiffs appear to allege that the alleged physical taking was a frustration of their ability to claim a portion of the "consideration paid to Old GM in the 363 Sale," which was not "distributed or guaranteed to be distributed to the Personal Injury Claimants at the time of the Government's taking of their rights." Am. Compl. ¶ 171. Plaintiffs go on to state that "[t]he Personal Injury Claimants had nothing more at the time of the Sale than a contingent interest in an indeterminate portion, if any, of the consideration paid over by New GM in the Sale to Old GM's bankruptcy estate." *Id.* Even taken to be true for the purposes of this motion, these allegations do not plausibly allege a physical taking because plaintiffs do not allege that the Government appropriated or transferred their underlying claims. Plaintiffs thus fail to plead a physical taking.

Furthermore, relevant precedent forecloses any claim that the Government engaged in a physical taking by frustrating plaintiffs' personal injury claims against Old GM or New GM. "[T]he government does not 'take' contract rights pertaining to a contract between two private parties simply by engaging in lawful action that affects the value of one of the parties' contract rights." *Palmyra Pac. Seafoods, L.L.C. v. United States*, 561 F.3d 1361, 1365 (Fed. Cir. 2009); *Huntleigh USA Corp. v. United States*, 525 F.3d 1370, 1379, 1382 (Fed. Cir. 2008) (no taking when the action was directed at a third party, but resulted in the loss of business to plaintiffs). Just as in these contract cases, which dealt with intangible rights against third parties like plaintiffs' tort claims against GM, plaintiffs do not plead a physical taking by alleging that the Government frustrated their ability to pursue claims against third parties. Furthermore, even after the 363 sale, plaintiffs were able to make their personal injury claims against Old GM's

bankruptcy estate. *See* Am. Compl. ¶¶ 134, 171. Thus, the Government did not engage in a physical taking.

Similarly, to the extent plaintiffs' complaint could be read to say that the Government assumed the personal injury claims and transferred them to certain unidentified third parties, there is still no support for such an allegation. As plaintiffs allege in their amended complaint, the personal injury claimants retained their claims and were able to make claims with the Old GM bankruptcy estate. *See* Am. Compl. ¶¶ 134, 171. Accordingly, the Court should dismiss plaintiffs' physical taking claim.

CONCLUSION

For these reasons, we respectfully request that the Court dismiss plaintiffs' complaint for lack of jurisdiction, or, alternatively, for failure to state a claim for which relief may be granted.

Respectfully submitted,

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