09-2311-mb *To Be Argued By:*
JEANNETTE A. VARGAS

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
Docket No. 09-2311-mb

Chrysler LLC, aka Chrysler Aspen, aka Chrysler Town & Country, aka Chrysler 300, aka Chrysler Sebring, aka Chrysler PT Cruiser, *et al.*,

Debtor-Plaintiff-Petitioners.

ON APPEAL FROM THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF APPELLEE THE UNITED STATES OF AMERICA

JOHN S. RAPISARDI
Cadwalder, Wickersham & Taft LLP
One World Financial Center
New York, New York 10281
(212) 504-6000
Of Counsel to the Presidential Task Force on the Auto Industry.

LEV L. DASSIN,
Acting United States Attorney for the Southern District of New York,
JEANNETTE A. VARGAS,
TARA LaMORTE,
LI YU,
DAVID S. JONES,
Assistant United States Attorneys,
Of Counsel.
86 Chambers Street, 3rd Floor
New York, New York 10007
(212) 637-2678

TABLE OF CONTENTS

PRELIMINARY STATEMENT 1

COUNTERSTATEMENT OF JURISDICTION 3

ISSUES PRESENTED FOR REVIEW 5

STATEMENT OF FACTS 5

A. Treasury Has Provided TARP Loans to Chrysler at Its Request and on Conditions Accepted by Chrysler's Management 8

1. Chrysler's November 2008 Request for a Federal Loan and Treasury's Initial Disbursement of $4 Billion in TARP Funds to Chrysler 9

2. Chrysler's Second Request for a Federal Loan 9

B. The Negotiation of the Proposed Sale to New Chrysler and the Proceeding Below 11

1. Chrysler's Stakeholders Negotiated the Proposed Sale at Arm's-Length 11

2. The Refusal of Some First-Lien Lenders to Accept Restructuring of the Debt Leads to Filing of Chapter 11 Petition 12

SUMMARY OF ARGUMENT 14

ARGUMENT 16

POINT I. STANDARD OF REVIEW 16

POINT II. THE INDIANA FUNDS LACK STANDING TO CHALLENGE THE SALE ORDER 17

A. Status as a "Party in Interest" Pursuant to Section 1109(b) of the Bankruptcy Code Does Not Establish Appellate, Constitutional or Prudential Standing 20

B. The Indiana Funds Have Suffered No Injury in Fact Sufficient to Confer Constitutional or Appellate Standing 21

1. The Indiana Funds Bore the Burden of Proving Injury 21

2. The Indiana Funds Are Legally Entitled to the Market Valuation of Their Collateral 24

3. The Evidence at the Sale Hearing Established That the Indiana Funds Will Receive the Value to Which They Are Legally Entitled 25

C. Any Purported Injury Is Not Fairly Traceable to Treasury's Use of TARP Funds to Finance the Sale 28

D. The Indiana Funds Do Not Fall Within the Zone of Interests That the EESA Was Designed to Protect 32

E. EESA'S Saving Clause Does Not Confer Standing Upon the Indiana Funds 36

F. The Indiana Funds Do Not Have Standing as Taxpayers to Challenge the Government's Expenditure of Funds Under EESA 38

POINT III. THE INDIANA FUNDS' SUBSTANTIVE CHALLENGE TO THE SECRETARY OF THE TREASURY'S EXERCISE OF AUTHORITY UNDER EESA LACKS MERIT 40

POINT IV. NEW CHRYSLER IS A GOOD FAITH PURCHASER BECAUSE TREASURY HAS NOT SEIZED CONTROL OF CHRYSLER 52

POINT V. THE PROPOSED SALE DOES NOT CONSTITUTE AN UNCONSTITUTIONAL TAKING 57

POINT VI. THE INDIANA FUNDS CANNOT BE HEARD TO COMPLAIN ABOUT THE SCHEDULING OF THE SALE HEARING AS THEY DID NOT OBJECT BELOW 60

CONCLUSION 61

TABLE OF AUTHORITIES

Cases **Page**

In re A.P.I., Inc.,
331 B.R. 828 (Bankr. D. Minn. 2005) 20

Allen v. Wright,
468 U.S. 737 (1984) 18

In re American Ready Mix, Inc.,
14 F.3d 1497 (10th Cir. 1994) 22

AppliedTheory Corp. v. Halifax Fund, L.P. (In re AppliedTheory Corp.),
493 F.3d 82 (2d Cir. 2007) 16

Associates Commercial Corp. v. Rash,
520 U.S. 953 (1997) 24

Association of Data Processing Service Organizations, Inc. v. Camp,
397 U.S. 150 (1970) 33, 36

Bay View, Inc. v. Ahtna, Inc.,
105 F.3d 1281 (9th Cir. 1997) 60

In re Beker Indus. Corp.,
63 B.R. 474 (Bankr. S.D.N.Y. 1986) 27

Block v. Community Nutrition Institute,
467 U.S. 340 (1984) 34

In re Chrysler LLP,
No. 09-2311-mb (2d Cir. June 2, 2009) 5

Colt Indus., Inc. v. United States,
880 F.2d 1311 (Fed. Cir. 1989) 48

Cooper Distributing Co., Inc. v. Amana Refrigeration, Inc.,
63 F.3d 262 (3d Cir. 1995) 45

Daimler-Chrysler Corp. v. Cuno,
547 U.S. 332 (2006) 18

Elk Grove Unified School District v. Newdow,
542 U.S. 1 (2004) 17, 18

In re Enron Corp.,
No. 02 Civ. 5638 (BSJ), 2003 WL 223455 (S.D.N.Y. Feb. 3, 2003) 23

Fed. Land Bank of St. Paul v. Bismarck Lumber Co.,
314 U.S. 95 (1941) 45

Greer v. Gaston & Snow (In re Gaston & Snow),
No. 93 Civ. 8517(JGK), 1996 WL 694421 (S.D.N.Y. Dec. 4, 1996) 28

In re Gucci,
126 F.3d 380 (2d Cir. 1997) 17, 22, 23, 52

Hagen v. Utah,
510 U.S. 399 (1994) 49

Harrington v. Bush,
553 F.2d 190 (D.C. Cir. 1977) 32

Hegeman-Harris & Co. v. United States,
440 F.2d 1009 (Ct. Cl. 1971) 49

Hein v. Freedom From Religion Found., Inc.,
551 U.S. 587 (2007) 38, 39

Henry Builders, Inc. v. United States,
No. 1:09-CV-0288, 2009 WL 185419 (E.D.N.Y. Jan. 26, 2009) 40

Jackson v. Okaloosa County, Florida,
21 F.3d 1531 (11th Cir. 1994) 23

Matter of James Wilson Assoc.,
965 F.2d 160 (7th Cir. 1992) 20

Kane v. Johns-Manville Corp.,
843 F.2d 636 (2d Cir. 1988) 19, 20, 22

In re Krisch,
174 B.R. 914 (Bankr. W.D.Va. 1994) 56

Leaf Tobacco Exporters Ass'n, Inc. v. Block,

749 F.2d 1106 (4th Cir. 1984) 19, 33

Louisville Joint Stock Land Bank v. Radford,
295 U.S. 555 (1935) 58, 59

Loving v. Boren,
133 F.3d 771 (10th Cir. 1998) 23

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992) 18, 22, 23, 28

Meeks v. Bank of Rison (In re Armstrong),
231 B.R. 746 (Bankr. E.D. Ark. 1999) 56

Midland Cogeneration Venture L.P. v. Enron Corp. (In re Enron Corp.),
419 F.3d 115 (2d Cir. 2005) 17

Miller v. Rite Aid Corp.,
334 F.3d 335 (3rd Cir. 2003) 23

OHC Liquidation Trust v. Credit Suisse First Boston (In re Oakwood HomesCorp.),
389 B.R. 357 (D. Del. 2008) 57

In re Oneida Lake Devel., Inc.,
114 B.R. 352 (Bankr. N.D.N.Y. 1990) 27

PBGC v. LTV Corp.,
496 U.S. 633 (1990) 49

In re Pillow,
8 B.R. 404 (Bankr. D. Utah 1981) 58, 59

Preseault v. ICC,
494 U.S. 1 (1990) 59, 60

In re Quigley Co., Inc.,
391 B.R. 695 (Bankr. S.D.N.Y. 2008) 19, 20

In re Radnor Holdings Corp.,
353 B.R. 820 (Bankr. D. Del. 2006) 56

Regions Hosp. v. Shalala,
522 U.S. 448 (1998) 42

In re Rock Indus. Mach. Corp.,
572 F.2d 1195 (7th Cir. 1978) 52

Ruckelshaus v. Monsanto Co.,
467 U.S. 986 (1984) 59

In re Salant Corp.,
176 B.R. 131 (S.D.N.Y. 1994) 22

Schulz v. United States Federal Reserve Sys.,
Nos. 1:08-CV-991 (GLS/DRH), 1:08-CV-1011 (GLS/DRH), 2009 WL 466385
(N.D.N.Y. Feb. 24, 2009) 39

Skidmore v. Swift & Co.,
323 U.S. 134 (1944) 48

Southern Blvd., Inc. v. Martin Paint Stores,
207 B.R. 57 (S.D.N.Y. 1997) 20

Swift & Co. v. Hocking Valley Ry. Co.,
243 U.S. 281 (1917) 49

In re Tascosa Petroleum Corp.,
196 B.R. 856 (D. Kan. 1996) 19

Tax Analysts & Advocates v. Blumenthal,
566 F.2d 130 (D.C. Cir. 1977) 18

Texans Against Governmental Waste and Unconstitutional Governmental
Conduct v. United States Dep't of Treasury,
Civ. No. 4:08-CV-744-Y, 2009 WL 1469752 (N.D. Tex. May 29, 2009) 39

Travelers Ins. Co. v. Bullington,
878 F.2d 354 (11th Cir. 1989) 59

Turtle Island Restoration Network v. Nat'l Marine Fisheries Serv.,
340 F.3d 969 (9th Cir. 2003) 45

United States Nat. Bank of Ore. v. Indep. Ins. Agents of Am., Inc.,
508 U.S. 439 (1993) 42

United States v. Craft,
535 U.S. 274 (2002) 49

United States v. Gagliardi,
506 F.3d 140 (2d Cir. 2007) 50

United States v. Goldberg,
756 F.2d 949 (2d Cir. 1985) 47

United States v. Mead,
533 U.S. 218 (2001) 48

United States v. Price,
361 U.S. 304 (1960) 49

Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.,
454 U.S. 464 (1982) 39

Warth v. Seldin,
422 U.S. 490 (1975) 18, 33

Whitmore v. Arkansas,
495 U.S. 149 (1990) 22

In re Wonder Corp. of America,
70 B.R. 1018 (D. Conn. 1987) 19, 61

Wright v. Vinton Branch of Mountain Trust Bank,
300 U.S. 440 (1937) 58

In re Yi,
219 B.R. 394 (Bankr. E.D. Va. 1998) 58, 59

Youngstown Sheet & Tube Co. v. Sawyer,
343 U.S. 579 (1952) 58

Statutes

11 U.S.C. § 1109(b) 20

11 U.S.C. § 363(m) 17, 37

11 U.S.C. § 506(a)(1) 29

12 U.S.C. § 5201 *et seq* 7, 34, 42,43

12 U.S.C.A. § 5202(9) (West Supp. 2009) 8

12 U.S.C. § 5202(9)(B) 35, 45

12 U.S.C. § 5211 . . . . 33, 50, 51

12 U.S.C.A. § 5211 (West Supp. 2009) 7, 8

12 U.S.C. § 5215 35

12 U.S.C. § 5229(a)(2)(A) 34, 37

12 U.S.C.A. § 5229 (b)(2) (West Supp. 2009) 36

28 U.S.C. § 157 30

28 U.S.C. § 158(d)(2)(A) 4

28 U.S.C. § 1334 3

28 U.S.C. § 1491 60

31 U.S.C. § 5311 47

31 U.S.C. § 5312(a)(2)(T) 47

Emergency Economic Stabilization Act of 2008,
Pub. L. No. 110-343, 122 Stat. 3765 (Oct. 3, 2008) 7

Regulations & Rules

Fed. R. Bankr. P. 8013 17

Congressional Materials

154 Cong. Rec. H10712-2 35

154 Cong. Rec. H10712 (Oct. 3, 2008) 36, 37

154 Cong. Rec. S10220-02 (Oct. 1, 2008) 34

154 Cong. Rec. S10222 (Oct. 1, 2008) 41, 42

154 Cong. Rec. S10922-01 50

Auto Industry Financing and Restructuring Act of 2008 (H.R. 7321) 49

H.R. 7321, 110th Cong. § 10 (2008) 50

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 09-2311-bk

CHRYSLER LLC, aka CHRYSLER ASPEN, aka CHRYSLER TOWN & COUNTRY, aka CHRYSLER 300, aka CHRYSLER SEBRING, aka CHRYSLER PT CRUISER, aka DODGE, aka DODGE AVENGER, aka DODGE CALIBER, aka DODGE CHALLENGER, aka DODGE DAKOTA, aka DODGE DURANGO, aka DODGE GRAND CARAVAN, aka DODGE JOURNEY, aka DODGE NITRO, aka DODGE RAM, aka DODGE SPRINTER, aka DODGE VIPER, aka JEEP, aka JEEP COMMANDER, aka JEEP COMPASS, aka JEEP GRAND CHEROKEE, aka JEEP LIBERTY, aka JEEP PATRIOT, aka JEEP WRANGLER, aka MOPAR, aka PLYMOUTH, aka DODGE CHARGER; INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE, and AGRICULTURAL IMPLEMENT WORKES OF AMERICA, AFL-CIO (“UAW”),

Appellees,

INDIANA PENSIONERS, INDIANA STATE TEACHERS RETIREMENT FUND,

Appellants.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

The Indiana State Teachers Retirement Fund, Indiana State Police Pension Trust, and Indiana Major Move Construction (collectively, the “Indiana Funds”) appeal from an order (“Sale Order”) entered by the United States Bankruptcy Court for the Southern District of New York (Hon. Arthur J. Gonzalez, J.), dated

June 1, 2009, authorizing Chrysler LLC to sell substantially all of its assets to New Carco Acquisition Ltd. ("New Chrysler"). (Special Joint Appendix "SPA" 54-102).

On April 30, 2009, Chrysler LLC and twenty-four of its subsidiaries (collectively, "Chrysler" or "Debtors"), faced with sharply reduced consumer demand, severe operating losses, and a lack of access to credit, filed for Chapter 11 bankruptcy protection. Before it filed for bankruptcy, Chrysler exhaustively pursued all other options, including a possible sale, possible joint ventures, and possible new financing. Only the United States Department of the Treasury ("Treasury" or the "Government"), Export Development Canada and Fiat S.p.A. ("Fiat") proved willing to ally themselves with Chrysler.

Both before and after Chrysler filed for bankruptcy, Treasury, acting pursuant to its statutory authority under the Emergency Economic Stabilization Act of 2008 ("EESA"), which established the Troubled Asset Relief Program ("TARP"), committed billions of dollars in federal financing to Chrysler, thereby staving off an immediate, catastrophic and value-destroying liquidation. Treasury stands willing again to aid Chrysler. Treasury is ready to commit $2 billion to finance a sale that will simultaneously ensure that Chrysler's assets will survive as a going concern and that the estate will realize more value than in the only

alternative, piecemeal liquidation. Yet the Indiana Funds object to the proposed sale, arguing that the use of TARP funds to finance an automobile manufacturer violates EESA.

As the bankruptcy court found, however — and as appellants' own counsel acknowledged below — the gravamen of the Indiana Funds' complaint is not that Treasury relies upon EESA to finance the asset sale, but that the United States is not paying them as much as they want. Put another way, they do not object to TARP funds being used — they just want more. Because they will receive more than they are otherwise entitled to in the absence of this sale, they have not suffered a cognizable injury. Thus, they lack standing to attack the expenditure of funds under EESA and the appeal should be denied.

Counterstatement of Jurisdiction

The bankruptcy court had jurisdiction over the Chrysler bankruptcy proceedings, and specifically over the motion to approve the asset sale that gives rise to this appeal, pursuant to 28 U.S.C. §§ 1334 and 157. As the bankruptcy court found, however, notwithstanding that the Indiana Funds had general standing to participate in the bankruptcy proceedings under section 1109(b) of Title 11 (the "Bankruptcy Code"), they did not present any justiciable case or controversy as to whether EESA authorizes the United States to use TARP funds

in connection with Chrysler's restructuring. As we explain in greater detail in Point II, *infra*, the Indiana Funds lack standing as to that question because the use of TARP funds caused them no injury in fact. This is true both because the use of TARP funds here actually increases the financial benefit they will receive on account of their claims against the Debtors, and because the Indiana Funds are bound by the Administrative Agent's actions. Relatedly, even if the Indiana Funds did sustain an injury in fact, that injury was not fairly traceable to the Government's use of TARP funds here.

But for the Indiana Funds' lack of standing as to their arguments relating to EESA, this Court has appellate jurisdiction pursuant to 28 U.S.C. § 158(d)(2)(A). Section 158(a) provides that, ordinarily, district courts have jurisdiction to hear appeals "from final judgments, orders, and decrees" of the bankruptcy courts, as well as from certain interlocutory orders. 28 U.S.C. § 158(a)(1). Section 158(d), however, vests this Court with jurisdiction over a direct appeal from bankruptcy court if, as has occurred here, this Court "authorizes the direct appeal" upon proper certification: "The appropriate court of appeals shall have jurisdiction of appeals described in the first sentence of subsection (a) if the bankruptcy court, . . . acting on its own motion or on the request of a party to the judgment, order, or decree . . . certify that – . . . (iii) an immediate appeal . . . may materially advance

the progress of the case." 28 U.S.C. § 158(d)(2). Here, the bankruptcy court "certifie[d] that an immediate Appeal of the Sale Opinion, the TARP Opinion and Sale Order is appropriate . . . and . . . may materially advance the progress of this case." (*See* SPA 304-305). By order dated June 2, 2009, this Court granted the petition of debtor-appellee Chrysler LLC for direct appeal to this Court pursuant to section 158(d)(2). *See* Order, *In re Chrysler LLP*, No. 09-2311-mb (2d Cir. June 2, 2009).

Issues Presented for Review

1. Whether the Indiana Funds have standing to appeal from the Sale Order.

2. Whether the Indiana Funds have standing to challenge the Secretary of the Treasury's discretionary determination to provide financing through the TARP to New Chrysler.

3. Whether the bankruptcy court committed clear error in finding that the $2 billion that the First Lien Creditors will receive in consideration for the sale of their collateral exceeds the collateral's liquidation value.

4. Whether the bankruptcy court's finding that the Government engaged in good faith, arm's-length negotiations with the Debtors constitutes clear error.

5. Whether the Secretary of the Treasury properly exercised his statutory authority under EESA in committing to loan TARP funds to New

Chrysler.

Statement of Facts

Judge Gonzalez held a hearing on the proposed sale at which he heard approximately 40 hours of testimony from numerous witnesses, listened to exhaustive argument from counsel and considered thousands of pages of documentary evidence and legal briefing on a wide variety of issues ("Sale Hearing"). Based upon a full record, the bankruptcy court wrote two opinions and entered an order with extensive findings of fact and conclusions of law in support of its determination that the Debtors' sale of substantially all of its assets pursuant to Section 363 of the Bankruptcy Code was appropriate. (SPA 54-102 (the "Sale Order")). In the Sale Order, the Bankruptcy Court set out, in painstaking detail: findings of fact regarding the necessity of the sale; why the proposed sale is in the best interest of the Debtor's estates; that the sale price exceeded the economic value of any liens encumbering the collateral sold; that the sale constituted an exercise of the Debtor's sound business judgment; and the good faith of the purchasers, including Treasury. These findings of fact may not be disturbed on appeal unless clearly erroneous.

Given the thorough and thoughtful nature of these findings of fact – as well

as this Court's statement that the parties should assume the Court's familiarity with Judge Gonzalez's decisions, the necessary expediency of these proceedings and the need for economy in the pleadings in this appeal – Treasury relies on the findings of fact contained in the Bankruptcy Court's order as comprising the relevant background facts for this matter.

To provide fuller context to the Government's arguments below, however, the Government also notes the following facts regarding Treasury's legal authority to provide financing to the Debtors under the Emergency Economic Stabilization Act of 2008 ("EESA"), Pub. L. No. 110-343, 122 Stat. 3765 (Oct. 3, 2008) (codified at 12 U.S.C. §§ 5201 *et seq*.), as well as facts concerning the Government's role in the transaction before the Court.

Congress enacted EESA on October 3, 2008, to "provide authority and facilities that the Secretary of the Treasury can use to restore liquidity and stability to the financial system of the United States." 12 U.S.C. § 5201(1) (West Supp. 2009). To accomplish this purpose, EESA authorized the Secretary of the Treasury to establish the Troubled Asset Relief Program ("TARP") in order to purchase "troubled assets from any financial institution, on such terms and conditions as are determined by the Secretary . . . ." 12 U.S.C.A. § 5211 (West Supp. 2009). EESA defines "troubled assets" as "(A) residential or commercial

mortgages and any securities, obligations, or other instruments that are based on or related to such mortgages . . . . ; and (B) any other financial instrument that the Secretary, after consultation with the Chairman of the Board of Governors of the Federal Reserve System, determines the purchase of which is necessary to promote financial market stability, but only upon transmittal of such determination, in writing, to the appropriate committees of Congress." 12 U.S.C.A. § 5202(9) (West Supp. 2009).

The Treasury Department has promulgated guidelines pursuant to the authority granted in section 101(d) of EESA, 12 U.S.C.A. § 5211(d) (West Supp. 2009), for allocation of TARP resources to establish the Automotive Industry Financing Program ("AIFP"). The AIFP was designed to "prevent a significant disruption of the American automotive industry that poses a systemic risk to financial market stability and will have a negative effect on the real economy of the United States." *See* Guidelines for Automotive Industry Financing Program, http://www.financialstability.gov/docs/AIFP/AIFP_guidelines.pdf. Accordingly, the AIFP establishes procedures for automobile companies to apply for TARP loans.

In addition, on December 19, 2008, then-Treasury Secretary Paulson transmitted to Congress a written determination that certain holding companies

engaged in the manufacturing of automotive vehicles were eligible for funding under the TARP Systemically Significant Failing Institution Program. (*See* A 239-52).

A. Treasury Has Provided TARP Loans to Chrysler at Its Request and on Conditions Accepted by Chrysler's Management

1. Chrysler's November 2008 Request for a Federal Loan and Treasury's Initial Disbursement of $4 Billion in TARP Funds to Chrysler

In November 2008, Treasury received a request from Chrysler for a $7 billion loan. (*See* A 1931). Chrysler made that request because its operations were using up cash at "unprecedented rates" and because it could find no lender willing to "give [it] any additional funds." (*See id*. at A 1931, 2963-64; *see also* SPA 60). Chrysler's dire predicament resulted, in part, from two economic developments in late 2008 – a liquidity crisis in the market for asset-backed financing, and a dramatic erosion of customer confidence. The liquidity crisis effectively foreclosed Chrysler's ability to obtain funds to provide customer financing, thus forcing Chrysler to consume its cash reserves. (*See* A 2994-95 (describing effect of the "frozen" credit markets); *see also* SPA 6). The erosion in consumer confidence, in turn, led to a drastic reduction in the volume of

automobile sales. (*See* A 2995-96; A 3005 (erosion in consumer confidence led to "lowest U.S. auto sales in decades"); *see also* SPA 6).

Relying on Secretary Paulson's December 19, 2008 written determination to Congress, on January 2, 2009, Treasury provided a $4 billion loan to Chrysler Holding LLC. (*See* A 1931-32; *see also* SPA 6).

2. Chrysler's Second Request for a Federal Loan

As a condition for providing Chrysler with the $4 billion loan in January 2009, Treasury required Chrysler to submit a plan demonstrating its long-term viability. (*See* A 1931-32, 1799, 3091; *see also* SPA 6). On February 17, 2009, Treasury received such a long-term viability study from Chrysler, along with a request to borrow an additional $5 billion. (*See* A 1464-1465; *see also* SPA 7-8). Without an additional loan from Treasury, Chrysler would have had no option but to abruptly liquidate its assets. (*See* A 1482, 3092; *see also* SPA 17-19).

The viability study accompanying Chrysler's second loan request outlined three alternative scenarios: (*i*) continuing to operate as a stand-alone entity; (*ii*) entering into a partnership with Fiat – the only potential partner still interested in an alliance with Chrysler; and (*iii*) an orderly liquidation. (*See* A 1931). Treasury conducted its own evaluation of Chrysler in late February and March 2009 to determine whether to provide additional financing in response to the second loan

request and, if so, under what terms. (*See* A 1482-83). By the end of March, Treasury had concluded, based on internal analysis, consultation with outside experts and direct dialogues with Chrysler's management and with Fiat (*see* A 1465, A 1471), that Chrysler's stand-alone plan was not viable. (*See* A 4232). Treasury concluded that the only viable plan presented to it was for Chrysler to pursue a strategic partnership with Fiat or another appropriate strategic partner. (*See* A 1472, A 1475; *see also* SPA 33-36).

In light of its determination, on or about March 29, 2009, Treasury advised Chrysler that any additional federal loans would be contingent upon Chrysler, *inter alia*, forming a partnership with Fiat or another appropriate strategic partner on or before April 30, 2009. Weighing acceptance of federal monies versus what it believed would be an immediate liquidation (*see* A 910-911, 3105-06), Chrysler's management opted to accept the loan from Treasury and the attendant conditions. (*See* A 910-912, 3092; *see also* SPA 33-34, 37 (finding that Chrysler "was free to reject [Treasury's] funding offer")).

B. The Negotiation of the Proposed Sale to New Chrysler and the Proceeding Below

1. Chrysler's Stakeholders Negotiated the Proposed Sale at Arm's-Length

Chrysler's decision to accept the second loan from Treasury and to pursue a transaction with Fiat promptly triggered a 30-day period of intense negotiations among its many stakeholders. (*See*, *e.g.*, A 3092, 1800-01 (Fiat executive Altavilla stating that "it has been pretty tough negotiations [and] all parties [made] significant concessions"); A 3598-99 (UAW had "long and difficult negotiations" over new agreement with New Chrysler)). In these negotiations, each party pressed its own unique interests. (*See*, *e.g.*, A 1477, 1802, 3598-99). Chrysler's management sought to participate in negotiations with the First-Lien Lenders, yet their overtures were rebuffed by the administrative agent, who would only deal directly with Treasury. (*See* A 3092-93; *see also* SPA 32).

By late April, Chrysler had reached agreements with nearly all of its stakeholders on the terms of a transaction with Fiat. (*See* A 3093-94). On April 29, 2009, the Secretary of the Treasury transmitted to Congress a written determination that the debt obligations and equity of certain companies engaged in the manufacturing of automotive vehicles constituted troubled assets, as defined by EESA. (*See* A 253-54). The Secretary further informed Congress of his

conclusion that such companies constitute "financial institutions" within the meaning of the statute. (*Id.*). Pursuant to this determination, Treasury provided additional TARP funding to Chrysler.

2. The Refusal of Some First-Lien Lenders to Accept Restructuring of the Debt Leads to Filing of Chapter 11 Petition

Chrysler, Fiat, New Chrysler, Treasury, and other Chrysler stakeholders tentatively entered into a Master Transaction Agreement (the "MTA") on April 30, 2009. The MTA reflects many of the key terms that the stakeholders had been negotiating throughout April. Specifically, the MTA contemplates a sale of substantially all of Chrysler's assets to New Chrysler, in exchange for which New Chrysler would assume certain liabilities of Chrysler and pay Chrysler $2 billion in cash, *i.e.*, the proposed section 363 sale.[1]

On account of Fiat's concern for the deteriorating value of Chrysler's assets, and Treasury's concern about the continued expenditure of federal funds to support a company that is consuming more than $100 million a day, (*see* A 1441, 1447), the MTA sets June 15, 2009 as the deadline for the proposed sale to close. (*See* A 1809 (Altavilla discussing the need for the sale to close on a timely basis)).

[1] The other provisions of the MTA pertain to Fiat, Treasury, the UAW and other stakeholders. For example, under the MTA, Fiat would contribute access to production platforms, technology, and distribution capabilities to New Chrysler in exchange for a 20% stake.

Notwithstanding the substantial progress that Chrysler, Fiat, Treasury and other stakeholders made in April, however, Chrysler could not satisfy all of Treasury's financing conditions because a small minority of the First-Lien Lenders rejected an offer of $2 billion in cash in exchange for the release of their liens on the assets that were to be sold to New Chrysler. (*See* A 3093-94). Accordingly, on the morning of April 30, 2009, Chrysler's board chose to file for bankruptcy protection, instead of pursuing liquidation. (*See* A 3108, 3110-16). On that day, Chrysler and 24 of its subsidiaries commenced the Chapter 11 proceedings below. On May 3, 2009, Chrysler moved for approval of the sale contemplated in the Master Transaction Agreement pursuant to Rule 363 of the Bankruptcy Code.

Summary of Argument

The Indiana Funds lack standing to bring this appeal because they stand to suffer no injury in fact from the proposed asset sale, and because they were bound by the administrative agent's consent to the sale. After an exhaustive three-day evidentiary hearing, the bankruptcy court found that the sale transaction – which directed $2 billion to the First Lien Lenders – yielded substantially greater value to all such lenders than would the only other possible outcome, *i.e.*, an immediate, piecemeal liquidation. This factual finding, which this Court reviews for clear error, is amply supported by the record. *See* infra at Pt II.B.

The Indiana Funds also lack standing to challenge Treasury's disbursement of TARP funds to New Chrysler because, even assuming they somehow have been injured, that purported injury is not fairly traceable to the use of TARP funds. Rather, the Indiana Funds' real complaint is about their allocation of proceeds from the sale. This does not suffice to confer standing for their challenge to the expenditure of TARP funds. *See infra* at Pt.II.C. Nor do lienholders like the Indiana Funds fall within the zone of interests that EESA seeks to protect. *See infra* at Pt.II.D. For all these reasons, the bankruptcy court properly concluded that the Indiana Funds could not collaterally attack the Secretary of the Treasury's disbursement decisions in the guise of an objection to the Sale Order.

If the Court were to reach the merits, it should hold that use of TARP funds in the Automotive Industry Financing Program is a lawful exercise of the Treasury Secretary's authority under EESA. EESA authorizes the Secretary of the Treasury to purchase troubled assets from financial institutions, a term which the statute defines broadly as part of its urgent remedial purpose of responding to a severe national economic emergency. In light of the flexibility that Congress built into the statute, the clear mandate that the Secretary of the Treasury should act aggressively as he thought would best serve the Congressional goals of stabilizing financial markets, and the recognized interrelationship between automotive

companies and the broader financial system and overall economy, the Secretary's interpretation of the statute is reasonable and entitled to deference. *See infra* at Pt.III.

Finally, the bankruptcy court did not commit clear error – and in fact was correct – in finding that the Government negotiated the sale transaction at arm's length, and in good faith. The Indiana Funds have yet to point to any evidence of coercion or collusion. The record reflects merely that Treasury imposed conditions upon its willingness to extend billions of dollars in financing to a distressed borrower, that those conditions were designed to serve broad public purposes and safeguard Treasury's investment, and that Chrysler's board of directors exercised its independent business judgment in accepting financing on the terms proffered. *See infra* at Pt.IV. Further, the Indiana Funds' takings claims are unsupported by fact or law. *See infra* at Pt. V. Finally, the Indiana Funds cannot be heard to complain about the timing of the Sale Hearing, as they did not object to the entry of the Bidding Procedure Order, which set that schedule. *See infra* at Pt.VI.

ARGUMENT

POINT I

STANDARD OF REVIEW

The court of appeals exercises plenary review over a bankruptcy court's decision. *See AppliedTheory Corp. v. Halifax Fund, L.P. (In re AppliedTheory Corp.)*, 493 F.3d 82, 85 (2d Cir. 2007). The court of appeals will accept the bankruptcy court's "factual findings unless clearly erroneous but review[] its conclusions of law de novo." *Midland Cogeneration Venture L.P. v. Enron Corp. (In re Enron Corp.)*, 419 F.3d 115, 124 (2d Cir. 2005); *see also* Fed. R. Bankr. P. 8013. Whether a purchaser acted in "good faith" as required by 11 U.S.C. § 363(m) is a mixed question of law and fact. *In re Gucci*, 126 F.3d 380, 390 (2d Cir. 1997).

POINT II

THE INDIANA FUNDS LACK STANDING TO CHALLENGE THE SALE ORDER

Before this Court may consider the merits of the appeal, it must satisfy itself that the Indiana Funds have standing to bring each of their specific challenges to the Sale Order and supporting opinions. *See Elk Grove Unified School District v. Newdow*, 542 U.S. 1, 11 (2004) ("[T]he question of standing is whether the litigant

is entitled to have the court decide the merits of the dispute or of particular issues.”). As the bankruptcy court correctly found, following a three-day evidentiary hearing, the Indiana Funds will sustain no injury as a result of the consummation of the sale transaction. Accordingly, they lack standing to prosecute this appeal.

The case or controversy requirement under Article III of the Constitution is vital to “ensuring that the Federal Judiciary respects ‘the proper – and properly limited – role of the courts in a democratic society.’” *Daimler-Chrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006) (quoting *Allen v. Wright*, 468 U.S. 737, 750 (1984)). The “irreducible constitutional minimum of [Article III] standing contains three elements.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). “A plaintiff must allege personal injury fairly traceable to the defendant’s allegedly unlawful conduct and likely to be redressed by the requested relief.” *Daimler-Chrysler Corp.*, 547 U.S. at 342.

Closely related to these Article III requirements, the Supreme Court has also developed prudential limitations on standing. *See Warth v. Seldin*, 422 U.S. 490, 500 (1975). As relevant here, prudential standing encompasses the requirement that a litigant’s claim “fall within the zone of interests protected by the law invoked.” *Elk Grove*, 542 U.S. at 12 (quoting *Allen*, 468 U.S. at 751). Prudential

limitations on standing, although not arising under Article III of the Constitution, are nonetheless a mandatory component in the standing analysis. *Tax Analysts & Advocates v. Blumenthal*, 566 F.2d 130, 137 n.37 (D.C. Cir. 1977). They ensure that the courts will not intervene "into legislative provinces that neither invite nor warrant judicial review. In limiting such intervention, the zone test furthers the general recognition of standing doctrine that courts should 'exercise self-restraint in the utilization of our power to negative the actions of the other branches.'" *Leaf Tobacco Exporters Ass'n, Inc. v. Block*, 749 F.2d 1106, 1112 (4th Cir. 1984); *see also Warth*, 490 U.S. at 500 (prudential standing limitations are "essentially matters of judicial self-governance – the courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights.").

In the bankruptcy context, the Court must assess whether appellants have standing not just to raise a general objection to an order, but whether they have standing to advance specific arguments in opposition to the order. *See Kane v. Johns-Manville Corp.*, 843 F.2d 636, 642-43 (2d Cir. 1988) (holding that, under the prudential standing doctrine, appellant had standing to raise only certain of his challenges to an order confirming a plan); *see also In re Quigley Co., Inc.*, 391 B.R. 695, 703-05 (Bankr. S.D.N.Y. 2008) (citing cases for proposition that "court

should decide questions of standing . . . on an issue-by-issue basis"); *In re Tascosa Petroleum Corp.*, 196 B.R. 856, 863 (D. Kan. 1996); *In re Wonder Corp. of America*, 70 B.R. 1018, 1023 (D. Conn. 1987).

Adopting this approach, the bankruptcy court here correctly held that the Indiana Funds lack standing to pursue their challenge to Treasury's disbursement of TARP funds to New Chrysler, whether directly or in the guise of an objection to the Sale Motion.

A. Status as a "Party in Interest" Pursuant to Section 1109(b) of the Bankruptcy Code Does Not Establish Appellate, Constitutional or Prudential Standing

In the proceedings below, the Indiana Funds relied upon 11 U.S.C. § 1109(b) in asserting their standing to challenge Treasury's provision of financing to New Chrysler. As creditors, the Indiana Funds fall within the scope of the provision. *See* 11 U.S.C. § 1109(b). The Bankruptcy Code confers upon parties in interest a broad right to participate in a chapter 11 case. *Id.*

Yet, contrary to the Indiana Funds' argument, section 1109(b) does not satisfy or replace the constitutional and prudential limitations on standing. Rather, in order to raise an objection in a bankruptcy proceeding, a party must establish both that it falls within the ambit of section 1109(b) *and* that it has standing to litigate a particular objection. *See, e.g.*, *Matter of James Wilson Assoc.*, 965 F.2d 160, 169 (7th Cir. 1992) ("[W]e do not think that [section 1109(b)] was intended

to waive other limitations on standing, such as that the claimant be within the class of intended beneficiaries of the statute that he is relying on for his claim.”); *Kane*, 843 F.2d at 644; *Southern Blvd., Inc. v. Martin Paint Stores*, 207 B.R. 57 (S.D.N.Y. 1997) (notwithstanding section 1109(b), a party must still satisfy general requirements of the standing doctrine); *In re Quigley Co., Inc.*, 391 B.R. 695, 702-03 (Bankr. S.D.N.Y. 2008) (same); *In re A.P.I., Inc.*, 331 B.R. 828, 859 (Bankr. D. Minn. 2005) (section 1109(b) does not “trump[] the doctrines of constitutional and prudential standing,” such that a party in interest can object to “any aspect of [a] proposed reorganization, on any substantive ground whatsoever, whether the provision or aspect would affect them in the consummation or not”).

B. The Indiana Funds Have Suffered No Injury in Fact Sufficient to Confer Constitutional or Appellate Standing

As the bankruptcy court correctly found, the Indiana Funds will not suffer a concrete and particularized injury stemming from the proposed sale transaction. Nor will they be injured by the Government's disbursement of TARP funds to New Chrysler. To the contrary, as a result of the Government’s largesse, they will receive value well in excess of the liquidation value of their collateral. In the absence of such injury, the Indiana Funds lack constitutional and appellate standing to challenge the entry of the Sale Order generally, or the Government’s commitment to provide TARP funding to New Chrysler specifically.

1. The Indiana Funds Bore the Burden of Proving Injury

To demonstrate constitutional standing, the Indiana Funds were required to prove at the Sale Hearing that the entry of the Sale Order would inflict upon them an "injury in fact," that is, "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) 'actual' or imminent, not 'conjectural' or 'hypothetical.'" *Lujan*, 504 U.S. at 560; *see also Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990) (injury must be "concrete in both a qualitative and temporal sense").

Injury in fact is also an element of the separate appellate standing requirements this Circuit imposes upon those who seek to challenge a bankruptcy court order. "A person who seeks to appeal an order of the bankruptcy court must be 'directly and adversely affected pecuniarily' by it." *Kane*, 843 F.2d at 641 (citation omitted); *see also In re American Ready Mix, Inc.*, 14 F.3d 1497, 1502 (10th Cir. 1994) (Section 1109(b) of Bankruptcy Code does not confer standing to appeal); *In re Salant Corp.*, 176 B.R. 131, 134 (S.D.N.Y. 1994) ("[M]erely being a party in interest is insufficient to confer appellate standing . . . . [T]he appellant must also have a pecuniary interest in the order being challenged."). "This standing limitation is more exacting than the constitutional case or controversy requirement imposed by Article III, for under the constitutional 'injury in fact' test, the injury need not be financial." *Id.* at 642 n.2. "The stringency of the

[Second Circuit] rule is rooted in a concern that freely granting open-ended appeals to those persons affected by bankruptcy court orders will sound the death knell of the orderly disposition of bankruptcy matters." *In re Gucci*, 126 F.3d 380, 388 (2d Cir. 1997).[1]

As the bankruptcy court found, the Indiana Funds failed to meet their burden of proving injury in fact at the Sale Hearing (SPA 51-52). *Lujan*, 504 U.S. at 561. Since injury in fact is "not merely a pleading requirement[] but rather an indispensable part" of the Indiana Funds' case, it "must be supported in the same way as any other matter on which the [litigant] bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Id.* Accordingly, at the evidentiary hearing held on the Sale Motion and the Indiana Funds' objection thereto, the Indiana Funds were required to adduce admissible evidence to prove injury in fact. *Id.*; *see also Miller v. Rite Aid Corp.*, 334 F.3d 335, 343 (3d Cir. 2003) ("Once Miller's purported claim was brought to trial . . . Miller had to prove 'by the evidence adduced at trial' that he actually [fell within the zone of interests of the statute]."); *Loving v. Boren*, 133

1 Although "creditors ordinarily have standing to appeal bankruptcy court orders that make a disposition of estate property since that sort of order directly affects the funds available to meet their claims," *In re Gucci*, 126 F.3d at 388, this rule is not absolute. For example, an "unsubstantiated, speculative and indirect effect on the party's pecuniary interests is not enough to establish appellate standing." *In re Enron Corp.*, 2003 WL 223455, at *1 (S.D.N.Y. 2003).

F.3d 771, 772 (10th Cir. 1998) (affirming judgment for defendant where plaintiff failed to adduce evidence of injury in fact at trial); *Jackson v. Okaloosa County, Florida*, 21 F.3d 1531, 1536 n.5 (11th Cir. 1994) ("The standing inquiry can be revisited at trial if it appears that facts necessary for standing are not supported by the evidence adduced at trial."). Having failed to establish such injury at the Sale Hearing, the Indiana Funds now lack standing to pursue their various challenges to the Sale Order.

2. The Indiana Funds Are Legally Entitled Only to the Market Valuation of Their Collateral

Under section 506(a) of the Bankruptcy Code,

> an allowed claim of a creditor secured by a lien on property in which the estate has an interest . . . is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property. . . . Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.

The U.S. Supreme Court has held that "the 'proposed disposition or use' of the collateral is of paramount importance to the valuation question." *Associates Commercial Corp. v. Rash*, 520 U.S. 953, 962 (1997).

In this case, the Debtors propose to sell their assets in a sale pursuant to section 363 of the Bankruptcy Code. The market value of those assets is the $2

billion being offered. There is no other offer for those assets and thus no other market value. The only alternative value worthy of consideration is the liquidation value, a value representing the only alternative transaction. All other potential valuations — such as the potential going concern value of New Chrysler, which will have the benefit of the synergies provided with its alliance with Fiat and a working capital facility — lack any relevance and the bankruptcy court properly gave them no weight.

3. The Evidence at the Sale Hearing Established That the Indiana Funds Will Receive the Value to Which They Are Legally Entitled

At the conclusion of the Sale Hearing, the bankruptcy court made a specific factual finding that the value that the First Lien Secured Creditors will receive from the sale transaction exceeds the liquidation value of their collateral. (*See* SPA 19-20; SPA 62-64). The bankruptcy court further found, based upon the unrebutted evidence, that the only alternative to the contemplated sale transaction would be an immediate liquidation of assets in a piecemeal fashion, which would result in far less value to the estate. (*See* SPA 18, 31, 36-37). In other words, the sale transaction not only does not harm the Indiana Funds, it will yield a greater recovery than the only other option available. Far from constituting clear error, these findings are amply supported by the record.

In reaching this conclusion, the bankruptcy court relied upon the testimony

of the Debtors' valuation expert, Robert Manzo. Mr. Manzo testified that, as of the date of the Sale Hearing, the liquidation of the assets that were the subject of the sale motion would generate between zero and $800 million. (*See* SPA 19). He supported this conclusion with a detailed valuation analysis. The bankruptcy court further took note of three key facts: 1) the Debtors adequately marketed the assets and no bidder other than New Chrysler came forward to purchase them; 2) the First-Lien Lenders had not only refused to credit bid for the assets, but had accepted the $2 billion offer, indicating their independent assessment that they were receiving fair value for their collateral; and 3) the Government's willingness to finance the sale transaction was premised on public interest considerations that were not shared by commercial lenders. (*See* SPA 19; SPA 62-64). Accordingly, the bankruptcy court held that the consideration to be received by the estate exceeded the liquidation value. (*See* SPA 19).

These findings of fact should not be disturbed on this record. The Indiana Funds did not proffer their own valuation expert to provide a contrary valuation for the collateral. Accordingly, and because the bankruptcy court's findings are supported by the record, findings as to the value of the collateral control here.

The bankruptcy court further found, based on the unrebutted record evidence, that the only option available to the Debtor, other than the sale of its assets to New Chrysler as the high bidder for the assets, would be an immediate,

piecemeal liquidation. (*See* SPA 18, 31, 36-37). As the Indiana Funds received the value to which they are legally entitled — the market value of the assets securing their liens — and as the only other option, the immediate liquidation of the assets in a fire sale, would have yielded them less money, the Indiana Funds are not harmed by the consummation of the contemplated sale. *See, e.g.*, *In re Oneida Lake Devel., Inc.*, 114 B.R. 352, 357 (Bankr. N.D.N.Y. 1990); *In re Beker Indus. Corp.*, 63 B.R. 474, 476 (Bankr. S.D.N.Y. 1986).

The bankruptcy court further found that the Indiana Funds had suffered no injury in fact for the additional reason that their agent consented to the sale of their collateral to New Chrysler. (*See* SPA 52; SPA 24-29). For the reasons discussed at length in the brief filed concurrently by the Debtors, the bankruptcy court properly found that the administrative agent's consent to the sale of Chrysler's assets free and clear of the First Lien Creditor's lien in consideration for $2 billion was binding upon the Indiana Funds, under the terms of the Amended and Restated First Lien Credit Agreement, dated November 29, 2007, and the Amended and Restated Collateral Trust Agreement, dated November 29, 2007. (*See* SPA 24-29).

In light of its finding (based on the collateral's value, and the agent's consent) that the Indiana Funds will suffer no financial injury from the sale of the collateral securing their debt, the bankruptcy court correctly concluded that they

had no standing to challenge the propriety of the Government's disbursement of TARP funds to Chrysler or New Chrysler. (*See* SPA 52). The finding that the Indiana Funds will not be injured by the sale has a broader import for the Indiana Funds' standing, however. As the Indiana Funds suffer no injury in fact from the contemplated sale of Chrysler assets to New Chrysler, they are without standing to raise *any* challenge to the Sale Order. *See, e.g.*, *Greer v. Gaston & Snow (In re Gaston & Snow)*, No. 93 Civ. 8517(JGK), 1996 WL 694421, at *7 (S.D.N.Y. Dec. 4, 1996) (creditor who did not show that he personally would receive more under a chapter 7 liquidation than under a proposed reorganization plan lacks standing to argue that the plan violated the "best interest of the creditors" test as to other creditors).

C. Any Purported Injury Is Not Fairly Traceable to Treasury's Use of TARP Funds to Finance the Sale

The Indiana Funds also lack standing to pursue their collateral attack upon Treasury's spending decisions for the additional reason that they cannot establish a causal connection between their asserted injury and the use of TARP funds to finance the purchase of the Chrysler assets. In other words, the Indiana Funds cannot show that their purported injury, whatever it is, is fairly traceable to the challenged action. *Lujan*, 504 U.S. at 560.

Notably, the Indiana Funds make no attempt to link their purported

"injuries" to Treasury's use of TARP funds. Nor could they. The Indiana Funds have received substantial benefit from Treasury's loans to the Debtors prior to and during the chapter 11 proceedings. Indeed, the bankruptcy court made a factual finding, after a lengthy evidentiary hearing, that the billions of dollars in DIP financing provided by Treasury has been all that stands between Chrysler and immediate liquidation. (*See* A 613-734). Without doubt, such liquidation would have devastated the value of the very collateral that secures the Indiana Funds' debt.

Similarly, the Indiana Funds cannot identify any injury that is fairly traceable to Treasury's allegedly unauthorized use of TARP funds to finance the purchase of Chrysler's assets. The only "injury" that the Indiana Funds would suffer should the section 363 sale go forward is that they would receive a *pro rata* distribution from the $2 billion in proceeds — money which exceeds the liquidation value of their collateral, which is all that they would be entitled to should the sale not consummate. *See* 11 U.S.C. § 506(a)(1) (recognizing secured claims only "to the extent of the value of such creditor's interest," with value "determined in light of," *inter alia*, "proposed disposition or use of such property"). The bankruptcy court stated the problem with this theory of standing quite succinctly:

> [T]he record reflects that the debtor-in-possession loan

> of nearly $5 billion, made to preserve the value of the collateral, was not objected to by the Indiana Funds. Most striking, however, is that the Indiana Funds' main argument regarding breach of fiduciary duty by management, is that management did not hold out for more TARP funding. Further, the Indiana Funds argue that the U.S. Treasury acted unlawfully by providing TARP funds to the Debtors and New Chrysler, but premise most of their other arguments and developments of the record by maintaining that more TARP funds should have gone to them. In essence, their position is that the U.S. Treasury's alleged unlawful acts did not benefit them enough; therefore, they object.

(SPA 35 n.23). The fact that Indiana Funds desire to receive more money from Treasury in connection with the contemplated sale is hardly an injury that is fairly traceable to Treasury's purportedly unauthorized use of TARP funds.

Astonishingly, the Indiana Funds have admitted that they have no real objection to a sale of Chrysler assets financed by the Government using TARP funds. During the argument before the district court on the Indiana Funds' motion to withdraw the bankruptcy reference pursuant to 28 U.S.C. § 157, the district court repeatedly asked counsel what his clients' objectives were, and whether his clients would prefer a liquidation — the only alternative to a sale financed by the Government. (A 1698-99). Counsel for the Indiana Funds denied that they desired a liquidation, despite the logical implication of their argument regarding the misuse of TARP funds. Instead, he explained:

> I guess what I am trying to say is we want to capture

> more of the value associated with our collateral. The new entity is worth a minimum I believe of $20 billion just based on the reinstatement of unsecured notes and obligations and the like. So we believe we are getting a diversion of value. All we want is more of the value.
>
> . . . .
>
> We have no problem with the sale. We have a problem with the distribution of consideration to unsecured creditors in connection with the sale.

(*Id.*). In light of counsel's admission that his clients do not have an issue with the sale itself — a sale which brings more value for the collateral than would be realized under a liquidation — the Indiana Funds' challenge to Treasury's actions is at best disingenuous, if not precluded by counsel's concession.

As the bankruptcy court noted, the Indiana Funds' various challenges to the Sale Order are not only unrelated to the source of New Chrysler's financing — these challenges are fundamentally inconsistent with a position that the sale itself cannot go forward because financing the transaction with TARP funds assertedly violates EESA. The Indiana Funds cannot have it both ways. They cannot argue before this Court that more TARP funding be directed towards themselves, yet simultaneously complain that no TARP funding should be used for this transaction.

The lack of harm attributable to the specific unlawful action alleged is perhaps best illustrated by the following hypotheticals. If Export Development

Canada were to provide all of the funding to New Chrysler for its purchase of Chrysler assets, the Indiana Funds' alleged injury would be the same. If a commercial bank were to step forward tomorrow and finance this identical transaction, the Indiana Funds alleged injury would be the same. In other words, their purported harm is not attributable to the source of the funding. (*See* SPA 52 ("If a non-governmental entity were providing the funding in this case, the Indiana Funds would be alleging the same injury, *i.e.*, interference with their collateral.")). As they themselves admit, their real issue is with how that money will get divided up between the various constituencies. Such a claim does not suffice to confer upon them standing to challenge a federal regulatory program that was instituted by Treasury in order to forestall systemic and potentially devastating consequences for the financial markets, and that was undertaken in the exercise of the discretionary authority granted exclusively to the Treasury Secretary by Congress. *See infra* Part II.

D. The Indiana Funds Do Not Fall Within the Zone of Interests That EESA Was Designed to Protect

The Indiana Funds also lack standing to collaterally attack Treasury's exercise of authority under EESA, for the independent reason that they do not seek to vindicate any of the interests served by the statute. "A valid claim of standing rests upon more than [the] assertion of a [judicially] cognizable injury."

Harrington v. Bush, 553 F.2d 190, 206 n.68 (D.C. Cir. 1977). Rather, the Court must also determine "whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Ass'n of Data Processing Service Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970).

The Indiana Funds' alleged injury bears no relation to the interests that are to be served by section 101 of EESA, 12 U.S.C.A. § 5211. An inquiry into whether a litigant falls within the zone of interests of a particular statutory provision must start with an examination of the statute itself. *See Warth v. Seldin*, 422 U.S. 490, 500 (1975). Nothing in the language of EESA indicates that Congress, in limiting eligibility for TARP funds to a "financial institution," as that term is defined by the statute, was seeking to protect the contract rights of senior lenders. Section 5211 does not speak to the rights of senior lienholders — it does not purport to regulate their activities, nor confer rights upon them. 12 U.S.C. § 5211. Instead, the section speaks only to the authority and duties of the Secretary in purchasing troubled assets, *id.* *See Leaf Tobacco Exporters*, 749 F.2d at 1113-14 (holding that plaintiffs did not fall within zone of interests protected by a statute when their interests were not regulated by the statute and the particular interest they asserted did not fall within the zone protected by the statute).

It is clear from the legislative history that Congress's primary concern in directing that TARP funds be used to purchase the troubled assets from "financial institutions" was to ensure that this money was spent in such a manner as to "restore liquidity and stability to the financial system of the United States." 12 U.S.C. § 5201(1); *see also*, *e.g.*, 154 Cong. Rec. S10220-02, at S10224 (Oct. 1, 2008) (remarks of Senator Dodd) ("This bill gives the Treasury Secretary the authority to respond quickly, forcibly, but responsibly to the current crisis."). Again, this purpose is unrelated to the rights of the lienholders of such assets.

An examination of the statutory scheme created by Congress further evidences that Congress did not intend to confer upon those with secured interests in property the right to challenge the Secretary's exercise of his discretionary authority to purchase such troubled assets. *See, e.g.*, *Block v. Community Nutrition Institute*, 467 U.S. 340, 345-46 (1984) (examining statutory scheme to determine whether Congress intended to confer standing upon specific group to challenge agency action). To the contrary, Congress enacted an anti-injunction provision which specifically curtailed judicial review of actions taken by the Secretary pursuant to his authority to purchase the assets of financial institutions: "No injunction or other form of equitable relief shall be issued against the Secretary for actions pursuant to section 5211 . . . of this title, other than to remedy

a violation of the Constitution." 12 U.S.C. § 5229(a)(2)(A).

Rather than permit aggrieved citizens to interfere with Treasury's exercise of its authority to enter into time-critical transactions in circumstances where delay could result in catastrophic effects on the national economy, *see* 154 Cong. Rec. H10712-2 (daily ed. Oct. 3, 2008) (statement of Rep. Conyers), Congress chose instead to exercise an extraordinary degree of direct oversight of the Secretary's exercise of authority to purchase troubled assets. Indeed, EESA has no less than six separate oversight mechanisms. First, before the Secretary may purchase the troubled assets of a financial institution other than mortgage-related assets, the Secretary must transmit to Congress a written determination that the purchase of such troubled assets is necessary to promote financial market stability. 12 U.S.C. § 5202(9)(B). Second, Congress required that the Secretary submit reports to Congress on a monthly basis, describing the transactions entered into during that period. 12 U.S.C. § 5215. Third, Congress created a Congressional Oversight Panel, which prepares reports on the Secretary's use of his authority under EESA. *Id.* § 5233(b)(1). Fourth, EESA established the Special Inspector General for the Troubled Asset Relief Program. *Id.* § 5231. Fifth, EESA instituted the Financial Stability Oversight Board, which reviews the policies implemented by the Secretary to ensure that they are "in accordance with the purposes of the Act." *Id.*

§ 5214(e)(1). And sixth, pursuant to EESA, the Comptroller General of the United States oversees the activities and performance of the TARP. *Id.* at § 5226.

Particularly given both EESA's preclusion of judicial review and its careful crafting of legislative oversight, it is clear that Congress did not intend to confer rights upon the secured creditors of purchased assets to challenge the Secretary's exercise of authority under section 5211. Accordingly, Indiana Funds do not fall within the relevant "zone of interests," and they accordingly lack standing. *Camp*, 397 U.S. at 153.

E. EESA's Savings Clause Does Not Confer Standing Upon the Indiana Funds

Notwithstanding the explicit anti-injunction provision of the statute, the Indiana Funds contend that they have standing to challenge the Secretary's actions taken pursuant to section 5211 of the statute by virtue of EESA's savings clause, section 5229(b)(2). Section 5229(b)(2) provides that "any exercise of the authority of the Secretary pursuant to this chapter shall not impair the claims or defenses that would otherwise apply with respect to persons other than the Secretary." 12 U.S.C.A. § 5229 (b)(2) (West Supp. 2009). The Indiana Funds misinterpret the statute.

The pertinent language in the savings clause has two purposes. First, it was designed to preserve the rights of borrowers whose loans were sold to the Treasury

Department pursuant to TARP. 154 Cong. Rec. H10712, H 10789 (Oct. 3, 2008) (statement of Rep. Conyers) (the relevant part of § 5229(b)(2) is enacted "to clarify . . . that a transfer of nonmortgage financial assets to the TARP does not impair any of the underlying rights, claims, and defenses of borrowers who are not in privity with the TARP and have not contracted for or consented to any such impairment"). Second, it was intended "to preserve current and future responsibility for wrongdoing." *Id.* Thus, for example, Treasury's purchase of a troubled asset would not impair any claims that shareholders or ERISA participants might have against the financial institution whose assets were purchased. *See, e.g.*, *id.*

This section is not implicated by the proposed sale. Neither the Debtors nor the Government have argued that the use of TARP funds, or any action taken by Treasury, somehow serves to strip the secured lenders of their liens. Rather, it is the operation of section 363(f) of the Bankruptcy Code that permits the Debtors to sell their assets free and clear of liens.

It is clear that EESA does not impair a creditor's pre-existing rights. Yet nothing in EESA vests any new rights in a creditor, such as the right to veto a sale in bankruptcy that a court otherwise finds to comply with the requirements of 11 U.S.C. § 363. In the bankruptcy context, put simply, 12 U.S.C. § 5229(b)(2)

ensures that creditors retain their right to raise any objection to a proposed section 363 sale — as the Indiana Funds have done. But, as Chrysler has established that the terms of the proposed sale fully comply with section 363 of the Bankruptcy Code, the savings clause offers no basis for the Indiana Funds to object to the use of TARP funds in connection with the sale.

F. The Indiana Funds Do Not Have Standing as Taxpayers to Challenge the Government's Expenditure of Funds Under EESA

The Indiana Funds, unable to point to a particularized injury that is fairly traceable to the Government's disbursement of TARP funds to the automotive industry, have no greater standing to challenge the Government's distribution of appropriated funds than any other taxpayer. The expenditure of public funds in an allegedly unlawful manner is not an injury sufficient to confer standing.

It is well-established that generalized allegations of government misconduct do not confer standing on each and every citizen absent an injury specific to that person. *Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587, 127 S. Ct. 2553, 2563 (2007). A court may not arrogate to itself the power to determine the "interests of the public at large," as to do so "would be[,] not to decide a judicial controversy, but to assume a position of authority over the governmental acts of another and co-equal department, an authority which plainly we do not possess." *Id.* (internal quotation marks omitted; alteration in original). In short, it is a "basic

constitutional principle that 'a plaintiff raising only a generally available grievance about government — claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large — does not state an Article III case or controversy.'" *Id.* at 2564.

It is precisely such generalized grievances that the Indiana Funds seek to air in this appeal. The Indiana Funds primarily argue that Treasury lacks statutory authority to commit TARP funds to the purchase of Chrysler's assets. Yet "the expenditure of public funds in an allegedly [unlawful] manner is not an injury sufficient to confer standing, even though the plaintiff contributes to the public coffers as a taxpayer." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 477 (1982).

The Indiana Funds' challenge here is exactly the sort of generalized attack on a government expenditure program that the law forbids. Indeed, each of the three courts that have considered this issue has squarely held that individual taxpayers lack standing to challenge the Secretary's exercise of his discretionary authority under TARP. *Texans Against Governmental Waste and Unconstitutional Governmental Conduct v. United States Dep't of Treasury*, Civ. No. 4:08-CV-744-Y, 2009 WL 1469752 (N.D. Tex. May 26, 2009) (no standing to

challenge TARP payments to automobile manufacturers under EESA); *Schulz v. United States Federal Reserve Sys.*, 2009 WL 466385, No. 1:08-CV-991 (GLS/DRH) (N.D.N.Y. Feb. 24, 2009); *Henry Builders, Inc. v. United States*, 2009 WL 185419, No. 1:09-cv-0288-ENV (E.D.N.Y. Jan. 26, 2009). Similarly, the Indiana Funds have no cognizable interest in the administration of TARP; they are similarly situated as the general public.

POINT III

THE INDIANA FUNDS' SUBSTANTIVE CHALLENGE TO THE SECRETARY OF THE TREASURY'S EXERCISE OF AUTHORITY UNDER EESA LACKS MERIT

The Indiana Funds claim that Treasury exceeded its statutory authority in providing TARP funding to New Chrysler for the purpose of financing the purchase of Chrysler's assets. Assuming the Indiana Funds have standing to raise this argument – and they do not – they are wrong. The Indiana Funds' narrow interpretation of EESA focuses exclusively on a portion of a particular provision while ignoring a host of important factors pertinent to the statutory analysis. In particular, the Indiana Funds ignore Congress's stated intent to prevent the imminent collapse of the Nation's economy, the sweeping authority Congress vested in the Secretary of the Treasury to stabilize the economy, the broad language of the relevant provision, the realities of the automobile industry, the

deference afforded to the Secretary's determinations under the Act, and, finally, Congress's substantial oversight of the Secretary's exercise of power. Because EESA authorizes Treasury to provide funding to the proposed purchaser, the Indiana Funds' statutory argument is meritless.

As its title implies, Congress enacted EESA in response to an economic crisis of monumental proportions. In urging swift passage of the bill, Senator Dodd described the economic turmoil gripping the nation and the necessity of a forceful Governmental response:

> There is a crisis in our country. That has been said so many times now. I hope the impact of that statement is not being lost because of the repetition of it. We need to address it swiftly and forcefully. That is why we are here today. . . .
>
> If Americans doubt we are living in perilous times in our Nation's history, they need to look no further than at what is happening in the financial markets over the last few days. Clearly, this is no ordinary time, no normal economic downturn. This is a day unlike other days. This crisis, and the choice it demands, is unlike few we have ever seen before, even those who have served in this Chamber for several decades.

154 Cong. Rec. S10222 (Oct. 1, 2008) (remarks of Senator Dodd); *see also, e.g.*, *id.* at S10227 (remarks of Senator Reed).

Many Senators echoed this call for an aggressive response. For example, Senator Reed declared, "we have to act, and we have to act decisively. Because what is threatened here is the welfare not just of a few but of all Americans. What

is at stake is their financial welfare and their financial future." *Id.* at S10227 (remarks of Senator Reed).

Consequently, in enacting EESA, Congress sought nothing less than to save the United States from impending economic disaster. *See id.* at S10223 (remarks of Senator Dodd) ("Our economy is on a precipice – and that is not an exaggeration, that is not hyperbole – and we must do what we can to move it back from that brink. The legislation before us and the amendment I have offered, this comprehensive amendment before the Senate today, represents an effort to do just that."). EESA, and the Secretary's actions thereunder, must be construed in this context. *See Regions Hosp. v. Shalala*, 522 U.S. 448, 460 n.5 (1998) ("'In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.'" (quoting *United States Nat. Bank of Ore. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 455 (1993)).

EESA thus vests the Secretary with the flexibility and power to take bold actions necessary to stabilize the economy. In particular, to combat the economic exigency facing the nation, Congress saw fit "to immediately provide authority and facilities that the Secretary of the Treasury can use to restore liquidity and stability to the financial system of the United States." 12 U.S.C. § 5201. EESA

requires the Secretary to "publish program guidelines" that set forth, *inter alia*, the mechanisms for purchasing troubled assets and the criteria Treasury will employ for identifying troubled assets for purchase. *Id.* at § 5211(d). The statute also empowers the Secretary "to take such actions as the Secretary deems necessary to carry out the authorities in this Act, including, without limitation . . . issuing such regulations and other guidance as may be necessary or appropriate to define terms or carry out the authorities or purposes of this Act." *Id*. at § 5211(c). Importantly, however, while the Executive Branch's authority to implement the Act is wide-ranging, it is not unfettered. As detailed *supra* at Point II.D, Congress legislated a number of mechanisms to maintain its significant oversight of the Executive's expenditure of TARP funds.

The Secretary appropriately exercised the expansive powers conveyed by Congress to prevent the widespread devastation he found would result from the threatened collapse of the troubled automobile industry. On December 19, 2008, then-Secretary Paulson transmitted to Congress a written determination that certain holding companies engaged in the manufacturing of automotive vehicles constituted troubled assets, as defined by EESA. (A 235-52). Similarly, on April 29, 2009, the Secretary of the Treasury, upon consultation with the Chairman of the Federal Reserve, determined that debt obligations and equity of certain

companies engaged in the manufacturing of automotive vehicles constituted troubled assets, as defined by EESA. (A 253-54). The Secretary further informed Congress of his conclusion that, *inter alia*, (1) the TARP's purchase of Chrysler's debt obligations or equity is "necessary to promote financial stability"; and (2) Chrysler constitutes a "financial institution" within the meaning of EESA. (*Id.*). Treasury thus extended TARP loans to Chrysler, and upon closing of the sale transaction, will use TARP funds to purchase debt obligations of New Chrysler under a term loan facility, approximately $2 billion of which will be used to finance the purchase of Chrysler's assets, with the remainder available to New Chrysler to finance its operational expenses. Treasury has promulgated guidelines for allocation of TARP resources to establish the AIFP. The AIFP was designed to "prevent a significant disruption of the American automotive industry that poses a systemic risk to financial market stability and will have a negative effect on the real economy of the United States." See Guidelines for Automotive Industry Financing Program,

http://www.financialstability.gov/docs/AIFP/AIFP_guidelines.pdf.

Consistent with its urgent and profound purpose, EESA defines the term "financial institution" broadly:

(5) FINANCIAL INSTITUTION.--The term "financial institution"

> means any institution, including, but not limited to, any bank, savings association, credit union, security broker or dealer, or insurance company, established and regulated under the laws of the United States or any State, territory, or possession of the United States . . . and having significant operations in the United States . . . .

12 U.S.C. § 5202(5). Expressly excluded from this definition is "any central bank of, or institution owned by, a foreign government." *Id.*

The plain language of the statute makes clear that, contrary to the Indiana Funds' cramped reading, the term "financial institution" is not limited solely to a "bank, savings association, credit union, security broker or dealer, or insurance company." Rather, consistent with the Act's overall purpose – to provide the Secretary with the flexibility needed to quickly and effectively counter an evolving and unpredictable economic crisis – the provision's plain language shows that the examples enumerated therein do not constitute an exhaustive list. *See, e.g.*, *Fed. Land Bank of St. Paul v. Bismarck Lumber Co.*, 314 U.S. 95, 99-100 (1941) ("We recently had occasion under other circumstances to point out that the term 'including' is not one of all-embracing definition, but connotes simply an illustrative application of the general principle."); *Turtle Island Restoration Network v. Nat'l Marine Fisheries Serv.*, 340 F.3d 969 (9th Cir. 2003) (inferring a broad construction from use of "including, but not limited to" language); *Cooper Distributing Co., Inc. v. Amana Refrigeration, Inc.*, 63 F.3d 262, 280 (3d Cir.

1995) (same and citing cases). To determine which other entities are appropriately encompassed within "financial institution," it is appropriate to examine EESA's underlying purpose as well as the relationship between automobile companies and financial institutions as they pertain to that purpose. The thrust of the statute and the interdependence of these entities further illustrate the reasonableness of the Secretary's construction.

The viability of the automotive industry in this country depends on the existence of both automobile companies and their financing arms; these entities are closely interrelated. (A 3197-3206, A 4232). Chrysler, and any new Chrysler, in whatever form it takes, will inherently and inevitably be engaged directly or through affiliates in providing financing. In addition, these bankruptcy proceedings demonstrate that the liquidity and other financial problems plaguing lending companies have had a systemic impact on the automotive industry, contributing to the near-demise of automobile companies like Chrysler, due to the as yet undefined scope of the economic crisis. (*See* A 1930-31, 2944-45, 2995-96; SPA 6). Indeed, as Senator Schumer observed, drastic action was necessary because "[r]ight now, you cannot get a car loan if you do not have a FICO score, a credit rating score that is very high, 720. If that stays, we will sell 6 million fewer cars this year, and tens of thousands of workers in Buffalo, in Detroit, and St.

Louis will be laid off through no fault of their own. That is not right. That is not fair." 154 Cong. Rec. at S10236-37.

In fact, Congress has expressly recognized the interconnected relationship between automobile companies and financial institutions in other contexts. The Bank Secrecy Act, 31 U.S.C. § 5311, for example, prescribes domestic reporting requirements for specified "financial institutions" to be used as a law enforcement tool for locating, *inter alia*, large transfers, in currency, of the proceeds of unlawful transactions. *See, e.g. United States v. Goldberg*, 756 F.2d 949, 953-54 (2d Cir. 1985). Congress promulgated the statute in light of its finding that criminals were increasingly employing financial institutions to preserve or conceal the proceeds of their crimes or violations. *Id.* In 1988, Congress expanded the statute's listing of "financial institutions" to include "a business engaged in vehicle sales, including automobile . . . sales." 31 U.S.C. § 5312(a)(2)(T).

The Bank Secrecy Act demonstrates clearly that Congress previously considered an automobile company a "financial institution" where that designation directly served the statute's underlying purpose. Here, then, it was wholly reasonable for the Secretary to construe EESA's "financial institution" definition as encompassing automobile companies when Congress has previously defined the term as including these entities in a similarly expansive statute aimed

at curbing financial abuses.

In this case, EESA's broad definition of "financial institution" is flexible enough to encompass automobile companies. The legislation clearly indicates an intent to broadly enable the Secretary to respond to an evolving crisis. And, in light of EESA's stated purpose of enabling a quick and forceful response to a grave economic crisis of national import, as well as the Secretary's unchallenged determinations that stabilization of the economy required assistance to the automobile industry, and the integrated relationship between automobile companies and their financing arms, the Secretary's determination that "financial institution" reaches automobile companies is reasonable, worthy of deference, and should be upheld. *United States v. Mead*, 533 U.S. 218, 226 (2001) (agency interpretations of an ambiguous statute are entitled to "some deference"); *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944) (agency interpretations "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance" and therefore are accorded "considerable" weight).

The Indiana Funds' other arguments are unpersuasive. First, the Indiana Funds place undue weight upon statements made by former Treasury Secretary Paulson at a hearing before the House Committee on Financial Services to argue that providing TARP funds to the auto companies exceeds Treasury's authority

under EESA. However, reliance upon these statements is unfounded because the statements do not constitute “legislative history.” At best, these post-enactment statements are “subsequent legislative history,” which is “worthy of little weight,” *Colt Indus., Inc. v. United States*, 880 F.2d 1311, 1313 (Fed. Cir. 1989); *see also Hagen v. Utah*, 510 U.S. 399, 420 (1994); *PBGC v. LTV Corp.*, 496 U.S. 633, 650 (1990); *United States v. Price*, 361 U.S. 304 (1960). Nor are the statements relevant as a supposed “admission of law” by Treasury. Admissions of that kind do not, as a rule, bind either the Court or the parties. *Swift & Co. v. Hocking Valley Ry. Co.*, 243 U.S. 281, 289 (1917); *Hegeman-Harris & Co. v. United States*, 194 Ct. Cl. 574, 581, 440 F.2d 1009, 1012 (1971).

Moreover, Secretary Paulson subsequently executed and transmitted to Congress a determination finding that Treasury's investments in Chrysler under the Loan and Security Agreement fell within its TARP authority. (*See* A 235-52). Further, the current Treasury Secretary has executed and transmitted to Congress a determination finding that Treasury's transactions at issue here also fall within its TARP authority. (*See* A 253-54).

Next, the Indiana Funds claim that Congress's failure to pass the Auto Industry Financing and Restructuring Act of 2008 (H.R. 7321) evidences a legislative intent to exclude auto companies from receiving TARP financing.

However, it is axiomatic that failed legislative proposals are entitled to little or no weight in interpreting a prior statute. *See, e.g.*, *United States v. Craft*, 535 U.S. 274, 287 (2002); *United States v. Gagliardi*, 506 F.3d 140, 146 (2d Cir. 2007). It is just as likely that Congress declined to pass the legislation out of a view that the Treasury's TARP authority was adequate to protect the automotive industry. *See., e.g.*, Sara Rich, "Rout as US car bailout crashes," THE AUSTRALIAN, Dec. 13, 2008, at 31 (quoting Sen. Reid); "Auto bailout dies in Senate," CINCINNATI BUS. COURIER, Dec. 12, 2008 (Sen. Voinovich opining that TARP funds "can [be] use[d] for the auto industry"). In any event, because the Auto Industry Financing and Restructuring Act was to authorize the use of non-TARP funds to assist auto manufacturers like Chrysler, the non-passage of that legislative proposal says nothing about whether Chrysler is entitled to received TARP funds. See H.R. 7321, 110th Cong. § 10 (2008); see also 154 Cong. Rec. S10922-01 (daily ed. Dec. 11, 2008) (statement of Sen. Feingold).

Further, Executive Branch actions relating to Treasury's TARP loans, such as the requirement of a viable restructuring plan cited by the Indiana Funds, are actions that are within the terms and conditions of Treasury's Loan and Security Agreement and that were authorized by EESA. Congress authorized Treasury to enter into such transactions "to purchase, and to make and fund commitments to

purchase, troubled assets from any financial institution, on such terms and conditions as are determined by the Secretary, and in accordance with this Act and the policies and procedures developed and published by the Secretary." 12 U.S.C. 5211(a)(1) (emphasis added). All of Treasury's actions are consistent with the authority conferred by Congress through EESA.

Finally, the Executive has expressly made Congress aware of the Secretary's use of EESA to extend TARP funds to automobile companies. Numerous reports describe the Treasury's Automotive Industry Financing Program, implemented pursuant to 12 U.S.C. § 5211(d), and set forth in detail the terms and conditions of the Secretary's expenditure of TARP funds to the automotive companies, including Chrysler.[1] Congress mandated these reports "so that Members of Congress and the public at large will know how every dime of this program is being used." 154 Cong. Rec. at S10224 (remarks of Senator

---

1*See, e.g.*, "Assessing Treasury's Strategy: Six Months of TARP" (Apr. 7, 2009) (Congressional Oversight Panel ("COP"); "February Oversight Report: Valuing Treasury's Acquisitions" (Feb. 6, 2009) (COP); "Accountability for the Troubled Asset Relief Program" (Jan. 9, 2009) (COP); "Troubled Asset Relief Program: Status of Efforts to Address Transparency and Accountability Issue" (Jan. 2009) (GAO); "Initial Report to Congress" (Feb 6, 2009) (Office of the Special Inspector General for the Troubled Asset Relief Program). These reports are all available at http://cop.senate.gov/reports/. *See also* "First Quarterly Report to Congress pursuant to section 104(g) of the Emergency Economic Stabilization Act of 2008" (Dec. 31, 2008) (Financial Stability Oversight Board); "Quarterly Report to Congress pursuant to section 104(g) of the Emergency Economic Stabilization Act of 2008" (Mar. 31, 2009) (Financial Stability Oversight Board). These reports are available at http://www.financialstability.gov/about/oversight.html.

Dodd). The Indiana Funds have failed to cite any action taken by Congress to preclude the Secretary's use of TARP funds to prevent the collapse of the automotive industry.

EESA was enacted in response to an economic crisis that persists today, and was designed to encourage the Secretary to take bold action to stabilize the economy. For the foregoing reasons, if the Court reaches the issue despite the Indiana Funds' lack of standing, the Secretary's decision to extend TARP loans to the automotive sector should be sustained as comfortably within his undeniably broad statutory authority.

POINT IV

NEW CHRYSLER IS A GOOD FAITH PURCHASER AND TREASURY HAS NOT SEIZED CONTROL OF CHRYSLER

The Indiana Funds claim that Treasury has seized control of Chrysler and, therefore, the sale is not made in "good faith," as defined by Section 363(m) of the Bankruptcy Code. The Indiana Funds' argument is incorrect as a matter of fact and law.

While the Bankruptcy Code does not define "good faith," this Court has interpreted the term as follows:

> [g]ood faith of a purchaser is shown by the integrity of his conduct during the course of the sale proceedings; where there is a lack of such integrity, a good faith finding may not be made. A purchaser's good faith is lost by "fraud, collusion between the purchaser and other bidders or the trustee, or an attempt to take grossly unfair advantage of other bidders."

In re Gucci, 126 F.3d at 390 (quoting *In re Rock Indus. Mach. Corp.*, 572 F.2d 1195, 1198 (7th Cir. 1978)).

As the bankruptcy court found and the evidence from the sale hearing confirms, the terms of the proposed section 363 sale were the product of arm's-length negotiations among all the stakeholders, including Chrysler, Fiat, Treasury, Canada, the First-Lien Lenders, and the UAW. (*See* SPA 36-37). Chrysler's decision on April 29, 2009 to accept a second loan from Treasury and to pursue a transaction with Fiat led to a 30-day period of intense negotiations, in which each stakeholder vigorously pursued its own interests. (*See, e.g.*, A 1800-01 (Fiat executive Altavita stating that "it has been pretty tough negotiations [and] all parties [made] significant concessions")); A 3598-99 (UAW had "long and difficult negotiations" over a new collective bargaining agreement with New Chrysler, and UAW linked the new agreement with benefits for its retired members); A 1440 ("This was a commercial negotiation like other commercial negotiations. Sure, as the lender, and in particular as the lender of last resort, you

exert whatever leverage you think you have. . . . if Chrysler could be saved, the goal was to try to save it. And that means making compromises, just as in any negotiation; it means a give and take. And that's how we approached it, and I believe that's what happened."); A 1477 (Treasury's "objective was to act in a fair and reasonable way to all of Chrysler's stakeholders and the broad interests of the taxpayers").

Following these negotiations, it was Chrysler's board - consistent with its fiduciary obligations - that made the determination to file for bankruptcy, rather than pursue liquidation of the company. (*See* A 1482, 3108, 3110, 3116 ("I don't think we were interested in having anything die. The question was, was the government prepared to advance additional funds? The consequence of our not advancing additional funds, we certainly knew, was likely to be pretty grave for Chrysler, but it wasn't our responsibility to, if we couldn't satisfy ourselves that there was sufficient stakeholder support and the – and the plan didn't meet the viability test we had set out, then the consequences would obviously be negative, but it wouldn't be because of anything we did; it would – simply because we did not affirmatively choose to advance additional taxpayer support."); *see also id.* A 1500-01 ("The only entity that can make a decision to file for bankruptcy is the entity itself. And to the best of my knowledge, Chrysler had not made a final

decision until sometime late the night of the 29th or early in the morning of the 30th.")). And Fiat reached its own conclusion – independent of the Treasury and of Chrysler – as to the merits of the business transaction and the need to close the deal expeditiously. (*See, e.g.*, A 1800-02).

Moreover, while the Indiana Funds make much of the fact that Treasury negotiated directly with the First-Lien Lenders, in fact the First-Lien Lenders refused to negotiate with Chrysler prior to the bankruptcy and instead insisted that they negotiate directly with the Treasury. (*See* A 3092-93; SPA 32). As the First-Lien Lenders insisted upon the Government's direct involvement, the Indiana Funds cannot now complain of it. (*See* SPA 32).

In addition, the bankruptcy court explicitly and properly rejected the Indiana Funds' baseless contention that the First-Lien Lenders' consent to receive $2 billion in exchange for their collateral was the product of duress, rather than sound business judgment. (*See* SPA 30). In response to the Court's inquiry regarding whether the administrative agent was unduly influenced by the Treasury in light of the agent's status as a recipient of TARP loans, counsel for the Indiana Funds admitted that "[a]ll I can say is that they may have been." (A 2159). Yet despite repeated argument and suggestion, the Indiana Funds failed to adduce any evidence at the Sale Hearing of such coercion or influence. To the contrary, all

record evidence proves otherwise. (*See, e.g.*, A 1495-96).

Indeed, Treasury's actions here were consistent with its role as a pre-petition lender, as the source of debtor-in-possession financing, and as a lender to the proposed purchaser. As such a lender, and as steward of the public fisc, it would have been irresponsible for Treasury not to impose conditions upon the grant to Chrysler of billions of dollars of taxpayer dollars. The fact that Treasury's motivations may differ from those of a commercial lender is of no consequence.

Finally, to the extent that the Indiana Funds contend that Treasury has financially dominated Chrysler to such a degree as to be deemed to have control of the company, this argument is meritless. First, as the above-discussion demonstrates, and as the bankruptcy court found, all parties to the transaction engaged in tough, arm's-length negotiations. Second, the argument rests on a legal premise - financial control is enough to establish insider status - that courts have repeatedly rejected. *See OHC Liquidation Trust v. Credit Suisse First Boston (In re Oakwood Homes Corp.)*, 389 B.R. 357, 371 (D. Del. 2008) (holding that despite fact that Credit Suisse "held all the bargaining cards in transactions between the parties," evidence did not establish that it was an insider of debtor); *In re Krisch*, 174 B.R. 914, 921 (Bankr. W.D.Va. 1994) ("the mere exercise by a lender of financial control over a debtor incident to the debtor-creditor relationship

does not make the lender an insider.") (internal quotations omitted); *In re Radnor Holdings Corp.*, 353 B.R. 820, 841 (Bankr. D. Del. 2006) (holding that lender's monitoring of the debtor's business, attendance at board meetings, and access to performance reports and other financial information of the debtor was insufficient to establish insider status because the lender did not exercise day-to-day control over the debtor's business); *Meeks v. Bank of Rison (In re Armstrong)*, 231 B.R. 746, 750 (Bankr. E.D. Ark. 1999) ("Even if the bank requires the debtor to submit frequent reports on receivables, invoices, and operations, receives all payments on the receivables, has the power to endorse checks, and obtain concessions from the debtor, the bank is not thereby an insider because there is no control of the day-to-day decision making of the debtor.").

In short, the record is replete with evidence supporting the bankruptcy court's finding that Treasury acted in good faith in negotiating the transaction at issue. The Indiana Funds' only response to this overwhelming evidence amounts to little more than unadorned speculation.

POINT V

THE PROPOSED SALE DOES NOT CONSTITUTE AN UNCONSTITUTIONAL TAKING

The Indiana Funds are legally and factually incorrect in claiming that the

sale here constitutes an unconstitutional taking.

First, there has simply been no taking. Rather, Treasury has offered economic support for Chrysler – and New Chrysler – to permit Chrysler's assets to be sold in a transaction that has been negotiated by many parties. The Indiana Funds' liens attach to the proceeds of that transaction. Thus, the value received by the Indiana Funds results from the bankruptcy court's approval of a sale under section 363 of the Bankruptcy Code — predicated upon the consent of the administrative agent to the sale of the collateral. In addition, it is difficult to fathom any circumstance upon which an unconstitutional taking can be predicated upon consent. Here, the First-Lien lenders consented to a transaction exchanging their collateral for $2 billion. Accordingly, this situation is far different from one in which the Government, by enacting a statute, regulation, or executive order, unilaterally and singlehandedly takes custody over the property of a private party. *See*, *e.g.*, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585-87 (1952) (enjoining seizures of steel mills). Moreover, as the bankruptcy court found, without Treasury's investments, the Indiana Funds and their fellow first-lien lenders would receive less than they will receive under the proposed sale. Thus, there is no taking here.

The Indiana Funds' legal arguments on takings are similarly flawed. For its

takings argument, Indiana Funds relied below upon *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935). But *Radford* "has been all but overruled by *Wright v. Vinton Branch of Mountain Trust Bank*, 300 U.S. 440" (1937). *In re Yi*, 219 B.R. 394, 401 (Bankr. E.D. Va. 1998). As one court has commented, "[i]t is fair to conclude that th[e] [takings] aspect of *Radford* has no precedential value[.]" *In re Pillow*, 8 B.R. 404, 411 (Bankr. D. Utah 1981). *Radford* considered provisions of a farmer's debt relief statute that granted farmers a five-year foreclosure moratorium and allowed them to redeem their farms from creditor-banks at the appraised value of the property, which was often less than the amount of secured debt. *Yi*, 219 B.R. at 401. "*Radford* held that these provisions took certain valuable property rights from the creditors without just compensation and thus violated the Fifth Amendment." *Id.* However, such Fifth Amendment protection only extends to "a creditor's rights … in the collateral as that interest is defined by the bankruptcy laws." *Id*. (citing *Travelers Ins. Co. v. Bullington*, 878 F.2d 354, 359 (11th Cir. 1989)). In *Pillow*, the court concluded that "[l]ien avoidance under section 522(f), pursuant to congressional power to regulate the subject of bankruptcies, and for the purpose of preventing enforcement of security interests which stifle a debtor's fresh start, does not come within the traditional definitions of taking under the Fifth Amendment." 8 B.R. at 411.

Finally, putting aside the merits of to the Indiana Funds' takings argument, the invocation of the takings clause is not a valid basis to enjoin the proposed sale from proceeding. The takings clause of the Fifth Amendment does not prohibit all takings of private property; it merely requires that when the government takes private property, it must pay just compensation. *See Preseault v. ICC*, 494 U.S. 1, 11 (1990); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1016 (1984) ("Equitable relief is not available to enjoin an alleged taking . . . when a suit for compensation can be brought against the sovereign subsequent[ly]." The Government has provided a process for obtaining such compensation under the Tucker Act, 28 U.S.C. § 1491. *See Bay View, Inc. v. Ahtna, Inc.*, 105 F.3d 1281, 1284-85 (9th Cir. 1997); *Preseault*, 494 U.S. at 11-12 (Tucker Act confers jurisdiction over any claims for money against the United States "founded . . . upon the Constitution" and vests jurisdiction upon the Court of Federal Claims to entertain takings claim). Accordingly, the Indiana Funds' Takings Clause argument is without merit.

POINT VI

THE INDIANA FUNDS CANNOT BE HEARD TO COMPLAIN ABOUT THE SCHEDULING OF THE SALE HEARING AS THEY DID NOT OBJECT BELOW

Finally, the Indiana Funds' complaints regarding the pace of proceedings

before the bankruptcy court are meritless. The need for an expedited hearing of this section 363 sale was well established before the bankruptcy court. (A 753-815). Moreover, the May 27, 2009 sale hearing date was established by order of the bankruptcy court, in response to a motion filed by debtors on May 3, 2009. (*See id.*). The Indiana Funds did not object to that motion, even though other parties did. (*See* A 603-12). Moreover, at the hearing on the scheduling motion, Debtors' counsel addressed the subject of discovery relating to the underlying sale motion, offering to "produce immediately" over 175,000 pages of documents. (*See* A 1607). Notwithstanding that offer, the Indiana Fund did not seek any discovery in this case until after they filed their objection on May 19, 2009.

CONCLUSION

For all the reasons stated above, as well as for the reasons stated in the briefs filed by the other appellees, the appeal should be denied.

Dated: New York, New York
June 4, 2009

Respectfully submitted,

JOHN J. RAPISARDI
Cadwalader, Wickersham & Taft LLP
Of Counsel to the Presidential
Task Force on the Auto Industry.

LEV L. DASSIN,
Acting United States Attorney for the
Southern District of New York,
Attorney for the United States of
America.
JEANNETTE A. VARGAS,
TARA M. La MORTE,
LI YU,

DAVID S. JONES,
Assistant United States Attorneys,
Of Counsel.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, the undersigned counsel hereby certifies that this brief complies with the type-volume limitation of Rule 32(a)(7)(B). As measured by the word processing system used to prepare this brief, there are 13,641 words in this brief.

LEV L. DASSIN,
Acting United States Attorney for the Southern District of New York

By: JEANNETTE A. VARGAS,
Assistant United States Attorney

ADDENDUM

12 U.S.C.A. § 5202 (West 2009). Definitions

For purposes of this chapter, the following definitions shall apply:

. . .

(5) Financial institution

The term "financial institution" means any institution, including, but not limited to, any bank, savings association, credit union, security broker or dealer, or insurance company, established and regulated under the laws of the United States or any State, territory, or possession of the United States, the District of Columbia, Commonwealth of Puerto Rico, Commonwealth of Northern Mariana Islands, Guam, American Samoa, or the United States Virgin Islands, and having significant operations in the United States, but excluding any central bank of, or institution owned by, a foreign government.

. . .

(9) Troubled assets

The term "troubled assets" means —

(A) residential or commercial mortgages and any securities, obligations, or other instruments that are based on or related to such mortgages, that in each case was originated or issued on or before March 14, 2008, the purchase of which the Secretary determines promotes financial market stability; and

(B) any other financial instrument that the Secretary, after consultation with the Chairman of the Board of Governors of the Federal Reserve System, determines the purchase of which is necessary to promote financial market stability, but only upon transmittal of such determination, in writing, to the

appropriate committees of Congress.

12 U.S.C.A. § 5211 (West 2009). Purchases of troubled assets

(a) Offices; authority

(1) Authority

The Secretary is authorized to establish the Troubled Asset Relief Program (or "TARP") to purchase, and to make and fund commitments to purchase, troubled assets from any financial institution, on such terms and conditions as are determined by the Secretary, and in accordance with this chapter and the policies and procedures developed and published by the Secretary.

(2) Commencement of program

Establishment of the policies and procedures and other similar administrative requirements imposed on the Secretary by this chapter are not intended to delay the commencement of the TARP.

(3) Establishment of Treasury Office

(A) In general

The Secretary shall implement any program under paragraph (1) through an Office of Financial Stability, established for such purpose within the Office of Domestic Finance of the Department of the Treasury, which office shall be headed by an Assistant Secretary of the Treasury, appointed by the President, by and with the advice and consent of the Senate, except that an interim Assistant Secretary may

be appointed by the Secretary.

. . .

(d) Program guidelines.--Before the earlier of the end of the 2-business-day period beginning on the date of the first purchase of troubled assets pursuant to the authority under this section or the end of the 45-day period beginning on October 3, 2008, the Secretary shall publish program guidelines, including the following:

(1) Mechanisms for purchasing troubled assets.

(2) Methods for pricing and valuing troubled assets.

(3) Procedures for selecting asset managers.

(4) Criteria for identifying troubled assets for purchase.

. . .

12 U.S.C.A. § 5229 (West 2009). Judicial review and related matters

(a) Judicial review

(1) Standard

Actions by the Secretary pursuant to the authority of this chapter shall be subject to chapter 7 of Title 5, including that such final actions shall be held unlawful and set aside if found to be arbitrary, capricious, an abuse of discretion, or not in accordance with law.

(2) Limitations on equitable relief

(A) Injunction

No injunction or other form of equitable relief shall be issued against the Secretary for actions pursuant to section 5211, 5212, 5216, and 5219 of this title, other than to remedy a violation of the Constitution.

(B) Temporary restraining order

Any request for a temporary restraining order against the Secretary for actions pursuant to this chapter shall be considered and granted or denied by the court within 3 days of the date of the request.

(C) Preliminary injunction

Any request for a preliminary injunction against the Secretary for actions pursuant to this chapter shall be considered and granted or denied by the court on an expedited basis consistent with the provisions of rule 65(b)(3) of the Federal Rules of Civil Procedure, or any successor thereto.

(D) Permanent injunction

Any request for a permanent injunction against the Secretary for actions pursuant to this chapter shall be considered and granted or denied by the court on an expedited basis. Whenever possible, the court shall consolidate trial on the merits with any hearing on a request for a preliminary injunction, consistent with the provisions of rule 65(a)(2) of the Federal Rules of Civil Procedure, or any successor thereto.

. . .

(b) Related matters

. . .

(2) Savings clause

Any exercise of the authority of the Secretary pursuant to this chapter shall not impair the claims or defenses that would otherwise apply with respect to persons other than the Secretary. Except as established in any contract, a servicer of pooled residential mortgages owes any duty to determine whether the net present value of the payments on the loan, as modified, is likely to be greater than the anticipated net recovery that would result from foreclosure to all investors and holders of beneficial interests in such investment, but not to any individual or groups of investors or beneficial interest holders, and shall be deemed to act in the best interests of all such investors or holders of beneficial interests if the servicer agrees to or implements a modification or workout plan when the servicer takes reasonable loss mitigation actions, including partial payments.