U.S. Dep't of the Treas. v. Pension Benefit Guar. Corp.
No. 1:12-mc-00100-EGS

Pet. Opp'n Resp. Mot. Compel

Ex. B

Congressional Oversight Panel

September 9, 2009

SEPTEMBER OVERSIGHT REPORT*

The Use of TARP Funds in the Support and Reorganization of the Domestic Automotive Industry

*Submitted under Section 125(b)(1) of Title 1 of the Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343

Table of Contents

Executive Summary*

Even before last year's financial crisis, the American automotive industry was facing severe strains. Foreign competitors had steadily eroded its market share. Rising fuel prices had softened demand for its products. Legacy costs had constrained its flexibility. And a series of poor strategic decisions by its executives had compounded these problems. In 2008, U.S. automotive sales fell to a 26-year low.

The financial crisis weakened American automakers even further, constricting credit and reducing demand, turning their long-term slump into an acute crisis. By early December, Chrysler and General Motors (GM) could no longer secure the credit they needed to conduct their day-to-day operations. Unless they could raise billions of dollars in new financing, they faced collapse – a potentially crippling blow to the American economy that Treasury estimated would eliminate nearly 1.1 million jobs.

Facing this prospect, the administration of former President George W. Bush stepped in and provided short-term financing to the automotive companies, using funds from the Troubled Asset Relief Program (TARP). The policy was later continued by the Obama Administration, which supplied additional loans that were used to finance the bankruptcy reorganizations of Chrysler and GM.

Treasury's financial assistance to the automotive industry differed significantly from its assistance to the banking industry. Assistance given to the banks has carried less stringent conditions, and money was made readily available without a review of business plans or without any demands that shareholders forfeit their stake in the company or top management forfeit their jobs. By contrast, Treasury was a tough negotiator as it invested taxpayer funds in the automotive industry. The bulk of the funds were available only after the companies had filed for bankruptcy, wiping out their old shareholders, cutting their labor costs, reducing their debt obligations and replacing some top management. The decision to provide financing for the automotive industry raises a number of questions about TARP and its use, including the decision to fund the automotive industry, the government as tough negotiator, the conflicts of interest that arise when the government owns a substantial stake in a private company, and the exit strategy. This report addresses each of these issues.

The decision to intervene also raises critical questions about Treasury's objectives. Was the primary purpose of this intervention to provide bridge funding to the automakers, with the expectation that these were viable companies that could eventually repay taxpayers in full? Was it to prevent an uncontrolled liquidation because such a prospect posed a systemic risk to the financial markets and the overall economy? Was it to advance broader policy goals, such as

* The Panel adopted this report with a 2-1 vote on September 8, 2009. Rep. Jeb Hensarling voted against the report. Additional views are available in Section Two of this report.

improving fuel efficiency or sustaining American manufacturing and jobs? Or was it some combination of these? To date, Treasury's public statements provide little clarity, as each of these objectives has been cited at various times.

Whether Treasury had the legal authority to use TARP funds to bail out Chrysler and GM is the subject of considerable debate. There was, however, enough ambiguity in the TARP legislation, and there continues to be ambiguity about congressional intent, so that Treasury has faced no effective challenge to its decision to use TARP funds for this purpose.

Given the size of the automotive companies, the historical importance of the industry, and the government's extensive engagement in this process, the bankruptcy proceedings were highly visible and invited much public scrutiny. Those creditors who saw their investments in the company sharply reduced in bankruptcy raised vigorous objections to the role of the government as tough negotiator. The Panel asked two experts on bankruptcy law, Professor Barry Adler of New York University and Professor Stephen Lubben of Seton Hall University, to provide the Panel with an analysis of the bankruptcy process.

When all had settled, substantial changes had been made in the businesses, shareholders had been wiped out, many creditors had taken substantial losses, and the American taxpayers emerged as the owners of 10 percent and 61 percent of post-bankruptcy Chrysler and GM, respectively.

Although taxpayers may recover some portion of their investment in Chrysler and GM, it is unlikely they will recover the entire amount. The estimates of loss vary. Treasury estimates that approximately $23 billion of the initial loans made will be subject to "much lower recoveries." Approximately $5.4 billion of the loans extended to the old Chrysler company are highly unlikely to be recovered. The Congressional Budget Office earlier calculated a subsidy rate of 73 percent for all automotive industry support under TARP and recently raised its estimate of the cost of that assistance by approximately $40 billion over the previous estimate. Because Treasury has not clearly articulated its objectives, it is impossible to know if this prospect, indeed, represents a failure of Treasury's strategy.

The government's emergence as the part-owner of a large, private company raises critical oversight questions. At times, in the ordinary course of business, natural tensions arise between the interests of a corporation's management team, its shareholders and the directors who represent them, its creditors, its workers, its regulators, and, and its customers. The government's investment in the American automotive industry has added a new complication, as the American public now directly or indirectly participates in many of these roles. This report explores the conflict between possibly competing objectives, including preventing significant job losses across the nation in the midst of an economic crisis against maximizing shareholder profits; changing the culture of these automotive companies against not interfering with day-to-day management; and public accountability against normal commercial operations. The Panel assesses how effectively Treasury has navigated these and other concerns, including its role in the bankruptcy process.

The Panel recommends that, to mitigate the potential conflicts of interest inherent in owning Chrysler and GM shares, Treasury should take exceptional care to explain its decision-making and provide a full, transparent picture of its actions. The Panel recommends that Treasury use its role as a significant shareholder in Chrysler and GM to ensure that these companies fully disclose their financial status and that the compensation of their executives is aligned to clear measures of long-term success. To limit the impact of conflicts of interest and to facilitate an effective exit strategy, Treasury should also consider placing its Chrysler and GM shares in an independent trust that would be insulated from political pressure and government interference.

Finally, because of the unprecedented nature of the assistance provided to the automotive industry, the Panel also recommends that Treasury provide its legal analysis justifying the use of TARP funds for this purpose. This analysis will inform policymakers' and taxpayers' understanding of the potential for Treasury to use its authority to assist other struggling industries.

Treasury must be clearer, more transparent, and more accountable in its TARP dealings, providing the American public with the information needed to determine the effectiveness of Treasury's efforts.

Section One: The Use of TARP Funds in the Support and Reorganization of the Domestic Automotive Industry

A. Introduction

Beginning in December 2008, Treasury broadened its allocation of funding under the Troubled Asset Relief Program (TARP) by using $85 billion in TARP funds to support the domestic automotive industry.[1] In this report, the Panel examines several key considerations relating to these disbursements, including: Treasury's justification for extending TARP funds to the automotive sector, how exactly this money has been used, and whether Treasury has properly and publicly articulated its objectives and taken action in furtherance of those objectives. This report also examines Treasury's role in the bankruptcy of Chrysler Holding LLC (Chrysler) and General Motors Corporation (GM), how Treasury plans to protect taxpayers' interests while the government controls these companies, and how Treasury intends to maximize taxpayers' returns when the government divests itself of ownership.

The Emergency Economic Stabilization Act of 2008 (EESA),[2] which governs Treasury's administration of TARP, specifically authorizes the Secretary of the Treasury "to establish the Troubled Asset Relief Program…to purchase, and to make and fund commitments to purchase, troubled assets from any financial institution."[3] EESA also established the Panel to oversee Treasury's administration of the program. According to its mandate, the Panel is obliged to review and oversee the Secretary of the Treasury's use of his authority under TARP, the impact of TARP on the financial markets and financial institutions, the extent to which information made available on TARP transactions has contributed to market transparency, and TARP's effectiveness in minimizing long-term costs and maximizing benefits to the taxpayers.

While these oversight objectives do not fit as neatly into an examination of Treasury's involvement in the automotive industry as they do with respect to its involvement in the financial industry, if Treasury is of the understanding that it has the authority to use TARP funds to assist the automotive industry, then the Panel has the obligation to "follow the money" and determine whether Treasury used that money in furtherance of the stated objectives of TARP.

---

[1] U.S. Department of Treasury, *TARP Transaction Report* (Aug. 18, 2009) (online at www.financialstability.gov/docs/transaction-reports/transactions-report_08182009.pdf) (hereinafter "August 18 Transactions Report").

[2] Emergency Economic Stablization Act of 2008 (EESA), Pub. L. No. 110-343 (hereinafter "EESA").

[3] EESA § 101(a)(1).

B. What Happened? The Sequence of Events

Despite increasing competition from abroad, the U.S. automotive industry continues to account for a significant portion of America's economic output. As recently as early 2004, the industry produced almost four percent of this nation's gross domestic product.[4] Even though the industry lost approximately 435,000 jobs between 2000 and 2008, approximately 880,000 people continued to be employed in the industry in 2008.[5] This represents more than 6.5 percent of the total manufacturing jobs in the United States.[6] Notably, the American steel industry shipped almost 13 percent of its output to automotive manufacturers in 2008.[7]

However, in the fall of 2008, the combination of rising gasoline prices, tightening credit markets, eroding consumer confidence, high unemployment, and discretionary spending concerns prompted a significant downturn in automobile sales in the United States and abroad, with 2008 sales 18 percent lower than the previous year's.[8] U.S. automobile sales fell to a 26-year low, from a high point of 17.3 million cars and light trucks in 2000 to 13.2 million in 2008. Sales fell much further in the first half of 2009 as a result of deteriorating economic conditions, and are projected to be roughly 10.3 million units for 2009 and 11.1 million in 2010.[9] The tightened credit market was especially significant because 90 percent of consumers finance automobile purchases through loans, either directly from the manufacturers' financing arms or through third-party financial institutions, all of which experienced increased difficulty in raising capital to finance the loans.[10] The particularly weak condition of the financing arms of Chrysler and GM – Chrysler Financial and GMAC, respectively – exacerbated the manufacturers' plummeting sales as the credit markets seized up.[11]

[4] Bureau of Economic Analysis, *National Income and Product Accounts Table: Table 1.5.5 – Gross Domestic Product, Expanded Detail* (Aug. 27, 2009) (online at www.bea.gov/national/nipaweb/TableView.asp?SelectedTable=35&ViewSeries=NO&Java=no&Request3Place=N&3Place=N&FromView=YES&Freq=Year&FirstYear=1990&LastYear=2008&3Place=N&Update=Update&JavaBox=no) (hereinafter "National Income Table").

[5] Bureau of Labor Statistics, *Automotive Industry: Employment, Earnings, and Hours* (accessed on Aug. 21, 2009) (online at www.bls.gov/iag/tgs/iagauto.htm) (hereinafter "Employment, Earnings, and Hours Report").

[6] *Id.*

[7] Center for Automotive Research, Sean McAlinden, Kim Hill, and Bernard Swiecki, *Economic Contribution of the Automotive Industry to the U.S. Economy – An Update*, at 21-25 (Fall 2003) (online at www.cargroup.org/pdfs/Alliance-Final.pdf).

[8] IHS Global Insights, *U.S. Executive Summary* at 9 (Aug. 2009) (hereinafter "U.S. Executive Summary").

[9] *Id.* at 2.

[10] House Committee on the Judiciary, Administrative Law Subcommittee, Testimony of Ron Bloom, Senior Advisor at the U.S. Department of Treasury, *Ramifications of Automotive Industry Bankruptcies, Part II*, 111th Cong., at 1 (July 21, 2009) (online at judiciary.house.gov/hearings/pdf/Bloom090721.pdf) (hereinafter "Ramifications of Automotive Industry Bankruptcies Part II").

[11] *Id.* at 19. The decline arose in no small part due to a history of actual and consumer-perceived inferior product quality relative to foreign competitors. U.S. Department of Treasury, *Chrysler February 17 Plan:*

In December 2008, Chrysler and GM faced a crippling lack of access to credit due to the global financial crisis.[12] Their CEOs appeared before Congress and appealed for government assistance to help them stay afloat.[13] The House of Representatives responded on December 10 by passing legislation to provide a total of $14 billion in loans to the two companies, allocating the funds from a previously enacted Department of Energy program for advanced vehicle technology.[14] The bill was blocked in the Senate on December 11, which effectively prevented the legislation from being signed into law.[15] The Bush Administration then announced that it would consider making TARP funds available to the automotive industry – a reversal of its previous stance that automakers were ineligible to receive TARP assistance – and on December 19 announced that Chrysler and GM would both receive TARP funds.[16] The White House Fact Sheet accompanying the announcement estimated that "the direct costs of American automakers failing and laying off their workers in the near term would result in a more than one percent reduction in real GDP growth and about 1.1 million workers losing their jobs, including workers for automotive suppliers and dealers."[17]

Under the Automobile Industry Financing Program (AIFP) that was announced on December 19, Chrysler and GM received bridge loans of $4 billion and $13.4 billion, respectively, under separate loan and security agreements.[18] The GM loan and security

---

Determination of Viability, at 3 (Mar. 30, 2009) (online at www.financialstability.gov/docs/AIFP/Chrysler-Viability-Assessment.pdf) (hereinafter "Chrysler February 17 Viability Plan").

[12] Senate Committee on Banking, Housing, and Urban Affairs, Testimony of Chrysler Chairman and CEO Richard Nardelli, *State of the Domestic Automobile Industry: Part II*, 110th Cong., at 2 (Dec. 4, 2008) (online at banking.senate.gov/public/index.cfm?FuseAction=Hearings.Testimony&Hearing_ID=299be20f-5e40-4c5f-89ee-2ade064d4226&Witness_ID=45d1bc44-ac76-4539-be69-32e09c50b3b8) (hereinafter "Nardelli Senate Testimony").

[13] *Id.* The President and Chief Executive Officer of Ford Motor Company also testified at this hearing.

[14] H.R. 7321, Auto Industry Financing and Restructuring Act, 110th Cong (hereinafter "H.R. 7321").

[15] The failure to invoke cloture on the proposed legislation by a vote of 52 to 35. U.S. Senate, *Roll Call Vote on the Motion to Invoke Cloture on the Motion to Proceed to Consider H.R. 7005* (online at www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=110&session=2&vote=00215).

[16] White House Office of the Press Secretary, *President Bush Discusses Administration's Plan to Assist Automakers* (Dec. 19, 2008) (online at georgewbushwhitehouse.archives.gov/news/releases/2008/12/20081219.html) (hereinafter "Bush Plan to Assist Automakers").

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

[18] The loans were documented in two separate documents released by Treasury, both entitled *Loan and Security Agreement*, on December 31, 2008. In total, up to $13.4 billion was made incrementally available to GM (with $4 billion available upon the effective date of December 31, 2008) in the first TARP financing. In total, $4 billion was made available to Chrysler on the same effective date. Each agreement was for a secured term loan facility with a first lien on all unencumbered assets of each company. Treasury accepted junior liens on encumbered assets. The loans expire December 30, 2011. U.S. Department of the Treasury, *Loan and Security Agreement [GM]* (Dec. 31, 2008) (online at www.financialstability.gov/docs/agreements/GM%20Agreement%20Dated%2031%20December%202008.pdf)

agreement was signed on December 31, 2008 and GM drew the first $4 billion total loan amount on that date. The Chrysler loan and security agreement was signed on January 2, 2009, and Chrysler drew the entire $4 billion loan amount on that date. On January 16, 2009, GM drew an additional $5.4 billion installment.[19] These three loan installments used the last of the $350 billion first "tranche" of TARP under EESA. Beyond that, the President had to transmit to Congress a written report of the plan to exercise the authority to use the remaining half of the funding, after which Congress had 15 calendar days to enact a joint resolution of disapproval. Congress failed to pass the disapproval resolution for the second tranche of TARP funds on January 15, and GM then drew a third installment of $4 billion on February 17, 2009.[20] The term sheets for both companies established a loan interest rate of LIBOR plus three percent, with an additional five percent penalty on any amount in default.[21]

The AIFP loans were extended to Chrysler and GM under terms and conditions specified in the loan agreements.[22] The most important condition required each company to demonstrate that the assistance would allow it to achieve "financial viability," which was defined as "positive net value, taking into account all current and future costs, and [the ability to] fully repay the government loan."[23] Both companies were required to submit viability plans designed "to achieve and sustain [their] long-term viability, international competitiveness and energy efficiency."[24] Key to such viability would be "meaningful concessions from all involved in the automotive industry."[25] The loans also imposed conditions and covenants related to their operations, expenditures, and reporting thereof to the President's designee, including divestiture

(hereinafter "GM Loan and Security Agreement"); U.S. Department of the Treasury, *Loan and Security Agreement [Chrysler]* (Dec. 31, 2008) (online at www.financialstability.gov/docs/agreements/Chysler_12312008.pdf) (hereinafter "Chrysler Loan and Security Agreement").

[19] U.S. Department of Treasury, *Fourth Tranche Report to Congress* (Jan. 7, 2009) (online at www.financialstability.gov/docs/TrancheReports/Fourth-Tranche-Report.pdf).

[20] U.S. Department of Treasury, *Section 105(a) Troubled Asset Relief Program Report to Congress for the period February 1, 2009 to February 28, 2009* (Mar. 6, 2009) (online at www.financialstability.gov/docs/105CongressionalReports/105aReport_03062009.pdf) (hereinafter "Fourth Tranche Report").

[21] *GM Loan and Security Agreement*, *supra* note 18; *Chrylser Loan and Security Agreement*, *supra* note 18.

[22] *Auto Viability Financing Fact-Sheet*, *supra* note 17.

[23] *Auto Viability Financing Fact-Sheet*, *supra* note 17.

[24] U.S. Department of the Treasury, *Indicative Summary of Terms for Secured Term Loan Facility [GM]*, at 5 (Dec. 19, 2008) (online at www.ustreas.gov/press/releases/reports/gm%20final%20term%20&%20appendix.pdf) (hereinafter "GM Secured Term Loan Facility Summary"); U.S. Department of the Treasury, *Indicative Summary of Terms for Secured Term Loan Facility [Chrysler]*, at 5 (Dec. 19, 2008) (online at www.ustreas.gov/press/releases/reports/chrysler%20final%20term%20&%20appendix.pdf) (hereinafter "Chrysler Secured Term Loan Facility Summary").

[25] *Bush Plan to Assist Automakers*, *supra* note 16.

of interests in all private passenger aircraft and nonpayment of unapproved bonuses to certain executives.[26]

Both companies submitted plans demonstrating their financial viability in February 2009. GM's plan called for reductions in plants, dealers, employees, and nameplates (Saturn, Saab and Hummer would be eliminated).[27] Chrysler's plan presented three scenarios:

1. Chrysler could continue as a stand-alone company with the help of $11 billion in loans from the government;

2. Chrysler could pursue a non-binding agreement already signed with the Italian automaker Fiat S.p.A. (Fiat) and, with additional government assistance, aim to sell more fuel efficient cars to a wider range of markets; or

3. Chrysler could file for bankruptcy and embark on an orderly wind down of the company.[28]

On February 15, 2009, President Obama announced the creation of an interagency Presidential Task Force on the Auto Industry (Task Force), that would assume responsibility for reviewing the Chrysler and GM viability plans. The Task Force is co-chaired by Treasury Secretary Timothy Geithner and Director of the National Economic Council Lawrence Summers and includes a number of ex-officio designees[29] and government staffers.[30] In addition, the President named two advisors to lead the Treasury auto team,[31] which had responsibility for evaluating the companies' viability plans and negotiating the terms of any further assistance:

---

[26] *GM Secured Term Loan Facility Summary*, *supra* note 24 at 3-4; *Chrysler Secured Term Loan Facility Summary*, *supra* note 24 at 3-4.

[27] General Motors Corporation, *2009-2014 Restructuring Plan* (Feb. 17, 2009) (online at media.gm.com/us/gm/en/news/govt/docs/plan.pdf) (hereinafter "GM Restructuring Plan).

[28] Chrysler Group LLC, *Chrysler Restructuring Plan for Long-Term Viability* (Feb. 17, 2009) (online at www.media.chrysler.com/dcxms/assets/attachments/Restructuring_Plan_for_LongTerm_Viability.pdf) (hereinafter "Chrysler Restructuring Plan").

[29] Secretary of Transportation, Secretary of Commerce, Secretary of Labor, Secretary of Energy, Chair of President's Council of Economic Advisors, Director of the Office of Management and Budget, Environmental Protection Agency Administrator, Director of the White House Office of Energy and Climate Change.

[30] Diana Farrell, Deputy Director, National Economic Council; Gene Sperling, Counselor to the Secretary of the Treasury; Jared Bernstein, Chief Economist to Vice President Biden; Edward Montgomery, then Senior Advisor, Department of Labor, Lisa Heinzerling, Senior Climate Counsel to the EPA Administrator; Austan Goolsbee, Staff Director and Chief Economist of the Economic Recovery Advisory Board; Dan Utech, Senior Advisor to the Secretary of Energy; Heather Zichal, Deputy Director, White House Office of Energy and Climate Change; Joan DeBoer, Chief of Staff, Department of Transportation; Rick Wade, Senior Advisor, Department of Commerce.

[31] The missions and personnel of the Task Force and Treasury auto team – a joint Treasury-National Economic Council team which staffs the Task Force – overlap considerably, therefore these entities are often cited interchangeably. The auto team's analysis of the viability plans is discussed in more detail in Sections D and G below.

Ron Bloom, a former investment banker and advisor to the president of the United Steelworkers union, and Steven Rattner, the co-founder of the Quadrangle Group, a private equity firm. (Mr. Rattner subsequently left the Treasury auto team on July 13, 2009, leaving Mr. Bloom as the auto team's head.) The auto team reports to the Task Force and its co-chairs, who then report up to the President.

President Obama announced the results of the Treasury auto team's review on March 30. According to the auto team, the most important indicator of the companies' viability was their ability to "generate positive cash flow and earn an adequate return on capital over the course of a normal business cycle."[32] In making the individual determinations, the auto team generally assumed no significant changes in the operations of the companies' competitors, although they ran various scenarios to take into account changes in the competitive environment.

The auto team found GM's plan "not viable as it's currently structured,"[33] chiefly because it relied on overly optimistic assumptions about the company and the economy's recovery. The auto team focused on:

- GM's consistently decreasing market share over the past 30 years, which the auto team calculated at a 0.7 percent annual decrease – much greater than GM's assumption of 0.3 percent annual decrease going forward to 2014;
- consumer perception of GM's poor product quality compared to competitors;
- GM's large network of underperforming dealers;
- GM's costly and unprofitable European operations;
- GM's vulnerability to higher energy costs due to its disproportionate profit share from SUVs; and
- increasing legacy liabilities that would require GM to sell almost a million more cars in both 2013 and 2014.

In short, GM had too much catching-up to do, even without accounting for the sunk costs of restructuring, to generate positive cash flow over the projection period. GM was therefore asked to submit a "substantially more aggressive plan" and was provided an additional 60 days

[32] *Chrysler February 17 Viability Plan*, *supra* note 11.

[33] *Chrysler February 17 Viability Plan*, *supra* note 11.

of working capital.[34] Between March 30 and May 30, GM received another $6.36 billion in loans (including $361 million for the warranty program).[35]

In its analysis, the auto team found that Chrysler had an even poorer outlook than GM because of problems with scale, quality, product mix, lack of manufacturing flexibility, and geographic over-concentration. The auto team concluded Chrysler could succeed only if it developed a partnership with another automotive company.[36] Chrysler was offered working capital for 30 more days while it sought an agreement with Fiat.[37] Between March 30 and April

[34] U.S. Department of Treasury, *GM February 17 Plan: Determination of Viability* (Mar. 30, 2009) (online at www.whitehouse.gov/assets/documents/GM_Viability_Assessment.pdf) (hereinafter "GM February 17 Viability Plan").

[35] Aug. 18 Transactions Report, *supra* note 1 at 16.

[36] In fact, both Chrysler and GM had been contemplating mergers with other automotive companies for over a year. The contraction in domestic auto manufacturing that foreshadowed the economic crisis led Chrysler and GM to pursue possible strategic changes including mergers, the creation of partnerships, and sales. Chrysler, concerned with its viability, reached out to Nissan-Renault in the spring of 2007 and continued discussion on a wide range of possible scenarios until term sheets were exchanged in July 2008. *Declaration of Thomas W. LaSorda*, 11-12 (Apr. 30, 2009), *In Re* Chrysler LLC, S.D.N.Y. (No.09 B 50002 (AJG)) (online at chap11.epiqsystems.com/docket/docketlist.aspx?pk=1c8f7215-f675-41bf-a79b-e1b2cb9c18f0&l=1) (hereinafter "Thomas LaSorda Declaration"). Ultimately, only joint production agreements were signed and negotiations for a union between Chrysler and Nissan collapsed. Davis Welch, *Behind the Chrysler-Nissan Deal*, Business Week (April 14, 2008) (online at www.businessweek.com/bwdaily/dnflash/content/apr2008/db20080414_164988.htm?campaign_id=rss_daily) (hereinafter "Behind the Chrysler-Nissan Deal"). Chrysler executives then approached General Motors in August 2008. Some industry insiders believed that by folding Chrysler into GM, the proposed company would have easier access to the capital markets and would benefit from the increased market share. *Declaration of J. Stephen Worth*, 85-86 (May 31, 2009), *In Re* General Motors Corp., S.D.N.Y. (No. 09-50026 (REG)) (online at docs.motorsliquidationdocket.com/pdflib/425_50026.pdf) (hereinafter "Stephen Worth Declaration"). GM suspended the negotiations in November 2008 due to the lack of funding for the proposed arrangement and the company's impending liquidity crisis. After accepting the initial assistance from the Treasury, Chrysler contacted Nissan and GM in hopes of reviving negotiations, but both carmakers refused. These unsuccessful attempts, coupled with the lack of adequate funding in the capital markets and the rapidly deteriorating condition of the domestic automotive industry, led Chrysler and GM to seek assistance from the United States government. After receiving the initial bridge loans from the Bush Administration, Chrysler again reached out to GM in early January, but GM remained uninterested in further merger discussions. *Thomas LaSorda Declaration* at 13-14. The auto team has told the Panel that it did not discourage a merger between GM and Chrysler, that "[e]ach company made its own determination to pursue a future independent of the other." Congressional Oversight Panel, *Questions for the Record from the Congressional Oversight Panel at the Congressional Oversight Panel Hearing on July 27, 2009, Questions for Ron Bloom, Senior Advisor, U.S. Department of the Treasury*, at 8 (July 27, 2009) and Congressional Oversight Panel, *Ron Bloom Responses, Congressional Oversight Panel Hearing Transcript on July 27, 2009* (collectively, hereinafter "Ron Bloom COP Testimony").

[37] Chrysler had begun discussions with Fiat a year earlier, in March 2008, as part of its talks with other car companies about a partnership. By January 2009, "no party except Fiat emerged as a viable and willing partner." *Declaration of Thomas LaSorda*, *supra* note 36. Chrysler and Fiat agreed to an initial term sheet that became one of the options in the restructuring plan that Chrysler submitted to Treasury in February 2009. Chrysler's plan also included an option in which, with concessions and additional government support, it could have been viable as a stand-alone company. Declaration of Robert Manzo, 30 (Apr. 30, 2009) *In Re* Chrysler LLC, S.D.N.Y. (No. 09 B 50002 (AJG)) (online at chap11.epiqsystems.com/docket/docketlist.aspx?pk=1c8f7215-f675-41bf-a79b-e1b2cb9c18f0&l=1) (hereinafter "Robert Manzo Declaration"); *Chrysler Restructring Plan, supra* note 28. The auto team disagreed with the latter option, and informed Chrysler that it would only provide financing if Chrysler formed an alliance with Fiat – the only potential partner willing to form an alliance. It stated that:

30, Treasury agreed to commit up to $280 million in loans to Chrysler for the warranty program (no working capital loans were advanced).[38]

The auto team emphasized that, while Chrysler and GM presented different issues and problems, in each case, "their best chance of success may well require utilizing the bankruptcy code in a quick and surgical way."[39] In the Administration's vision, this would not entail liquidation or a "traditional," long, drawn-out bankruptcy, but rather a "structured" bankruptcy as a tool to "make it easier for Chrysler and General Motors to clear away old liabilities."[40]

1. New Chrysler

Chrysler was unable to complete a restructuring deal by the April 30 deadline.[41] A group of investors holding 30 percent of Chrysler's $6.9 billion in secured debt would not accept Treasury's $2 billion offer in exchange for the debt.[42] Chrysler filed for bankruptcy on April 30 under Chapter 11 of the U.S. Bankruptcy Code (the Code).[43] Forty-two days later the sale of the majority of its assets to a newly formed entity, Chrysler Group LLC (New Chrysler), under Section 363 of Chapter 11 of the Code, closed.

The technical details of the bankruptcy process and the precise manner of disposition of assets of Chrysler (often referred to as Old Chrysler, for clarity) and ownership of New Chrysler are discussed in more detail below.[44]. In essence, however, the arrangements, set out in a master transaction agreement,[45] were as follows. The secured creditors had to accept the original offer

---

> [Treasury] will provide Chrysler with working capital for 30 days to conclude a definitive agreement with Fiat and secure the support of necessary stakeholders. If successful, the government will consider investing up to the additional $6 billion requested by Chrysler to help this partnership succeed. If an agreement is not reached, the government will not invest any additional taxpayer funds in Chrysler.

White House, *Obama Administration New Path to Viability for GM & Chrysler* (Mar. 30, 2009) (online at www.whitehouse.gov/assets/documents/Fact_Sheet_GM_Chrysler_FIN.pdf) (hereinafter "New Path to Viability for GM & Chrysler").

[38] Aug. 18 Transactions Report, *supra* note 1.

[39] *New Path to Viability for GM & Chrysler*, *supra* note 37.

[40] *New Path to Viability for GM & Chrysler*, *supra* note 37.

[41] White House Office of the Press Secretary, *Obama Administration Auto Restructuring Initiative* (April 30, 2009) (www.whitehouse.gov/the_press_office/Obama-Administration-Auto-Restructuring-Initiative) (hereinafter "Chrysler Release").

[42] *Id.*

[43] *Id.*

[44] See Section C for a discussion of the precise disposition of assets, and Section E for a discussion of the Section 363 sale process.

[45] Master Transaction Agreement among Fiat SpA, NewCarCo. Acquisition LLC, Chrysler LLC, and the Other Sellers identified therein, Dated April 30, 2009 (May 12, 2009), *In Re* Chrysler LLC, S.D.N.Y. (No. 09 B 50002 (AJG) (online at chap11.epiqsystems.com/docket/docketlist.aspx?pk=1c8f7215-f675-41bf-a79b-e1b2cb9c18f0&l=1) (hereinafter "Chrysler Master Transaction Agreement").

of $2 billion. At the time of filing, Chrysler was privately owned by the private equity firm Cerberus Capital Management L.P. (Cerberus) and the automobile company Daimler AG (Daimler). Daimler, the minority shareholder, agreed to waive its share of Chrysler's $2 billion second lien debt, give up its 19 percent equity interest in Chrysler, and settle its pension guaranty obligation by agreeing to pay $600 million to Chrysler's pension funds. Cerberus agreed to waive its share of second lien debt and forfeit its equity stake in Chrysler. Cerberus also agreed to transfer its ownership of the Chrysler headquarters in Auburn Hills, Michigan to New Chrysler. Finally, Cerberus pledged to contribute a claim it had against Daimler to assist in the Daimler pension guaranty settlement.

Treasury provided a total of $8.5 billion in working capital and exit financing to facilitate the deal.[46] The U.S. government received approximately an eight percent equity stake in New Chrysler and the right to select the initial group of four independent directors. The governments of Canada and Ontario[47] together received two percent of the equity of New Chrysler, and Canada received the right to select one independent director. Fiat received a 20 percent equity stake and the right to select three directors of New Chrysler. In addition, Fiat has the right to earn up to 15 percent in additional equity, in three tranches of five percent each, if it meets certain performance metrics.[48]

As part of New Chrysler's purchase of Old Chrysler's assets, New Chrysler entered into an agreement with the United Auto Workers (UAW) regarding the funding of the UAW Retiree Medical Benefit Trust (the UAW Trust).[49] New Chrysler agreed to fund the UAW Trust with a

[46] U.S. Treasury Department, *AIFP Outlays for COP* (Aug. 18, 2009) (hereinafter "AIFP Outlays").

[47] During a meeting with Panel staff on July 11, 2009, Ron Bloom explained that the Canadian governments approached the U.S. government with an offer to provide assistance to the American automotive industry. Mr. Bloom stated his belief that the Canadian governments were concerned about the impact of the troubled American auto makers on the Canadian economy and therefore had an interest in providing such support.

[48] Chrysler Release, *supra* note 41.

[49] By the end of the last century, Ford, Chrysler and GM found themselves faced with tens of billions of dollars in employee health obligations. In 2007 and 2008, after it became clear to both the companies and their unions that the state of the American automotive industry made these healthcare obligations unsustainable, the UAW and each of the three companies ultimately entered into an agreement whereby, in exchange for significant upfront payments principally in the form of cash and notes, healthcare obligations for retired union employees would be transferred off the books of the companies and into a trust (an independent entity totally separate from either the union or the automotive companies), the UAW Retiree Medical Benefits Trust, also known as a Voluntary Employees' Beneficiary Association (VEBA). VEBAs are tax free entities that pay health, life, or similar benefits. Although subject to the fiduciary requirements of the Employee Retirement Income Security Act of 1974 (ERISA), they are not subject to ERISA funding rules as are qualified retirement plans – a company's funding obligation is solely contractual. The threat of a Chapter 11 bankruptcy filing by Chrysler and GM made it clear that these companies would not be able to meet the cash commitments they had made to the UAW Trust. As part of a new agreement reached with representatives from both the old and new Chrysler and GM entities to enable them to emerge from bankruptcy, the UAW agreed to significant changes to the funding structure of the UAW Trust. While the UAW was able to get these companies to transfer cash amounts already set aside by the old Chrysler and GM entities (about $10 billion from GM and about $1.5 billion from Chrysler), the balance of the commitments these companies had made will no longer be paid up front in cash. Instead, New GM and New Chrysler have agreed to contribute large portions of equity, as well as notes that will allow cash commitments to be deferred and paid over

$4.6 billion unsecured note and a 55 percent ownership stake in New Chrysler.[50] The UAW Trust, subject to approval of the UAW, has the right to select one independent director and no other governance rights.[51]

During the bankruptcy proceedings, three Indiana state pension funds, which were secured first lien debt holders of Chrysler, objected to the Section 363 sale to New Chrysler. The funds argued that the sale would violate the Code by impermissibly subordinating their interests as secured lenders and allowing assets on which they had a lien to pass free of liens to other creditors and parties.[52] Moreover, they claimed that the sale would violate bankruptcy priority rules by paying unsecured creditors, even though secured creditors were receiving only 29 cents on the dollar. The funds stated that they believed that Chrysler could sell the assets for more money if they did not rush the sale, or that first lien debt holders could recover more in liquidation. The bankruptcy court denied the funds' motion.[53] Of the other first lien debt holders, 92 percent had not opposed the sale.

The funds immediately began the appellate process. The Second Circuit issued a short order ratifying the bankruptcy court's decision and issuing a stay to allow for the U.S. Supreme Court's review. The Supreme Court denied a request for a stay of the bankruptcy reorganization.[54] Upon remand, the Second Circuit affirmed[55] the bankruptcy court's decision.[56]

---

time, into the UAW Trust. In order to help it remain competitive and avert bankruptcy, Ford negotiated similar alterations to its settlement with the UAW. Starting January 1, 2010, UAW retirees' healthcare benefits will be funded solely by the assets in the UAW Trust, and will receive no further commitments from Old Chrysler, Old GM or Ford. New GM and New Chrysler – as with Ford – will no longer have the healthcare obligations that have been weighing down their predecessor companies' books for decades, while the healthcare benefits of the UAW's retired members will still be linked to the fortunes of all three companies through the tens of billions in stock and notes.

[50] Chrysler Release, *supra* note 41.

[51] Form of Amended and Restated Operating Agreement of New Carco Acquisition LLC, 17 (May 12, 2009) *In re* Chrysler LLC, S.D.N.Y. (No. 09 B 50002 (AJG) (online at chap11.epiqsystems.com/docket/docketlist.aspx?pk=1c8f7215-f675-41bf-a79b-e1b2cb9c18f0&l=1) (hereinafter "New Carco Operating Agreement").

[52] Emergency Motion of the Indiana Pensioners For Stay of Proceedings Pending Determination of Motion to Withdraw the Reference, 2-3 (May 20, 2009) *In re* Chrysler LLC, S.D.N.Y. (No. 09 B 50002 (AJG) (online at chap11.epiqsystems.com/docket/docketlist.aspx?pk=1c8f7215-f675-41bf-a79b-e1b2cb9c18f0&l=1) (hereinafter "Indiana Pensioners' Emergency Stay Motion").

[53] Order Denying Emergency Motion of the Indiana Pensioners for Stay of Proceedings Pending Determination of Motion to Withdraw the Reference (May 20, 2009), *In Re* Chrysler LLC, S.D.N.Y. (No. 09 B 50002 (AJG)) (online at chap11.epiqsystems.com/docket/docketlist.aspx?pk=1c8f7215-f675-41bf-a79b-e1b2cb9c18f0&l=1) (hereinafter "Order Denying Indiana Pensioners' Emergency Stay Motion").

[54] 556 U.S. ___ (2009) (Per Curiam) (online at www.supremecourtus.gov/opinions/08pdf/08A1096.pdf).

[55] *In re Chrysler LLC*, 2009 WL 2382766 (2d Cir. 2009). The funds then filed a petition for writ of certiorari to the Supreme Court in which the sole question presented is "is whether Section 363 may freely be used as a 'side door' to reorganize a debtor's financial affairs without adherence to the creditor protections provided by the chapter 11 plan confirmation process." Petition for Writ of Certiorari for Petitioners Indiana State Police

Treasury appointed four directors to New Chrysler's nine-member board of directors: C. Robert Kidder, chairman and CEO of 3Stone Advisors LLC; Douglas Steenland, former CEO of Northwest Airlines; Scott Stuart, a partner at Sageview Capital LP, and Ronald L. Thompson, chairman of the board of trustees for the nonprofit Teachers Insurance and Annuity Association and College Retirement Equities Fund (TIAA/CREF).[57] Mr. Kidder is chairman of the new board.[58] The Trustees of the UAW Trust appointed James J. Blanchard, a former Michigan governor, to the board.[59] As New Chrysler began operations, it was announced that Robert Nardelli would be departing as CEO.[60] Fiat CEO Sergio Marchionne subsequently replaced him.[61] The Obama Administration announced that Fiat would shake up other management in an effort to reorganize the company.[62]

Chrysler announced that it would retain an "overwhelming majority" of its suppliers[63] and would close 789 of its nearly 3,200 U.S. dealerships.[64] These dealerships employed more than 40,000 people.[65] State governments heavily regulate the relationship between dealerships

---

Pension Trust, et al., at 2 No. ___ (Sept. 3, 2009) (hereinafter "Indiana Pensioners' Appeal"). It did, however, allude to Treasury's broad definition of "financial institution." *Id.* at 29.

[56] *In re Chrysler LLC*, 405 B.R. 79, 83 (Bankr. S.D.N.Y. 2009).

[57] U.S. Department of the Treasury, *Treasury Department Statement on Chrysler's Board of Directors Appointments* (July 5, 2009) (online at www.financialstability.gov/latest/tg197.html) (hereinafter "Statements on Chrysler Directors Appointments").

[58] Chrysler Group LLC, *Formation of Chrysler Group LLC Board is Completed* (July 5, 2009) (online at www.chryslergroupllc.com/en/news/article/?lid=formation_board&year=2009&month=7) (hereinafter "Formation of New Chrysler Board Completed").

[59] United Auto Workers, *Chrysler Update: VEBA Trust Names James Blanchard to Board of Chrysler Holding, LLC* (June 10, 2009) (online at www.uaw.org/chrysler/chry12.cfm) ("VEBA Trust Director Announcement").

[60] Letter from Robert Nardelli to Chrysler employees (Apr. 30, 2009) (online at images.businessweek.com/extras/09/nardelli_email.pdf?chan=top+news_special+report+–+auto+bailout+2009_special+report+–+auto+bailout+2009) (hereinafter "Richard Nardelli Letter to Chrysler Employees").

[61] Chrysler Group LLC, *Chrysler Group LLC Announces Organizational Structure Focused on Chrysler, Jeep, Dodge and Mopar Brands* (Jun. 10, 2009) (online at www.chryslergroupllc.com/en/news/article/?lid=new_organizational_structure&year=2009&month=60) (hereinafter Chrysler Org Structure Announcement").

[62] *Chrysler and Fiat facing a long road*, Pittsburgh Post Gazette (June 11, 2009) (online at www.post-gazette.com/pg/09162/976675-185.stm) (hereinafter "Chrysler/Fiat Face Long Road").

[63] Chrysler Group LLC, *Chrysler LLC to Assume Supplier Agreements* (May 15, 2009) (online at www.chryslerrestructuring.com/chr/Press%20Release%20May%2015%202009.pdf) (hereinafter "Chrysler Assumes Supplier Agreements").

[64] Chrysler Vice President Peter Grady, *The Real Story on Chrysler's Dealer Network*, Chrysler Corporate Blog (July 16, 2009) (online at blog.chryslerllc.com/blog.do?id=717&p=entry) (hereinafter "Real Story on Chrysler's Dealer Network").

[65] National Automobile Dealers Association, *NADA Statement on Chrysler's Dealership Reduction Announcement* (May 14, 2009) (online at

and automotive companies, usually claiming that close oversight is necessary to equalize the bargaining power of dealerships and automakers.[66] Generally, states only allow an automotive manufacturer to terminate a dealer contract if it has good cause.[67] However, the bankruptcy process provided the automotive manufacturers with greater flexibility in terminating dealership contracts.[68] Congress is currently considering a number of bills to restore the terminated dealers' contracts.[69]

Both Chrysler and GM maintain that their dealer networks were oversized and that downsizing was necessary to regain viability.[70] Domestic brands in 2008 accounted for about two thirds of U.S. dealerships,[71] but only 48 percent of new vehicle sales.[72] Chrysler, for

www.nada.org/MediaCenter/News+Releases/NADA+Statement+on+Chrysler%E2%80%99s+Dealership+Reduction+Announcement.htm) (hereinafter "NADA Chrysler Statement").

[66] New Motor Vehicle Board of Cal.v. Fox, 439 U.S. 96, 100-01 (1978).

[67] National Automobile Dealers Association, *The Benefits of the Franchised Dealer Network: The Economic and Statutory Framework*, at 5 (Nov. 24, 2008) (online at www.magnetmail.net/images/clients/NADA/attach/BenefitsDealerNetwork.doc) (hereinafter "Benefits of the Franchised Dealer Network").

[68] In light of the recent news that Chrysler plans to open new dealerships, often nearby the ones that were closed, some assert that Chrysler used the bankruptcy to get rid of dealerships that it had wanted to close otherwise. See Greg Gardner, *Chrysler Plans New Dealerships*, Detroit Free Press (Aug. 13, 2009) (online at freep.com/article/20090813/BUSINESS01/908130448/1333/Chrysler-plans-new-dealerships) (hereinafter "Chrysler Plans New Dealerships"); see also *Chrysler Green Lights New Dealerships*, American Public Media (accessed Aug. 31, 2009) (online at marketplace.publicradio.org/display/web/2009/08/14/am-chrysler/) (hereinafter "Chrysler Green Lights New Dealerships").

[69] The Financial Services and General Government Appropriations Act of 2010, passed by the House on July 16, 2009, includes an amendment that would require Chrysler and GM to reinstate contracts with dealers that had agreements prior to the Chapter 11 filings. H.R. 3170, Sec. 745(b), Financial Services and General Government Appropriations Act of 2010, 111th Cong. (hereinafter "H.R. 3170").

[70] House Committee on Energy and Commerce, Subcommittee for Investigations and Oversight, Testimony of General Motors President and Chief Executive Officer Frederick A. Henderson, *Auto Dealership Closures*, 111th Cong., at 2-3 (June 12, 2009) (online at energycommerce.house.gov/Press_111/20090612/testimony_henderson.pdf) (hereinafter "Fritz Henderson House Testimony"); House Committee on Energy and Commerce, Subcommittee for Investigations and Oversight, Testimony of Chrysler Vice Chairman and President James Press, *Auto Dealership Closures*, 111th, Cong., at 3-5 (June 12, 2009) (online at energycommerce.house.gov/Press_111/20090612/testimony_press.pdf) (hereinafter "James Press House Testimony").

[71] General Motors has stated that it had 6,450 U.S. dealerships in 2008. Ford has said that it had 4,106 U.S. dealerships the same year. And Chrysler has reported that it had more than 3,330 U.S. dealerships in 2008. Summing those numbers, the "Big Three" had roughly 13,856 U.S. dealerships out of a total of 20,700 U.S. auto dealerships in 2008, or about 67 percent. See General Motors Corp., *Restructuring Plan for Long-Term Viability*, at 19 (Dec. 2, 2008) (online at online.wsj.com/public/resources/documents/gm_restructuring_plan120208.pdf) (hereinafter "GM December 2008 Viability Plan"). See alsoFord Sustainability Report 2008/9 – Dealers (accessed Aug. 30, 2009) (online at www.ford.com/microsites/sustainability-report-2008-09/society-dealers) (hereinafter "Ford Sustainability Report"); Patti Georgevich, *Chrysler's Economic Impact*, Chrysler Corporate Blog (Dec. 5, 2008) (online at blog.chryslerllc.com/blog.do?id=552&p=entry) (hereinafter "Chrysler's Economic Impact"); Casesa Shapiro Group, *The Franchised Automobile Dealer: The Automaker's Lifeline*, report prepared for the National Automobile Dealers Association, at 2 (Nov. 26, 2008) (online at www.nada.org/nr/rdonlyres/5c36b316-e765-4876-8d69-3bf3a57e7789/0/benefitsoffranchisedealers.pdf).

example, has less domestic market share than Toyota,[73] but even after its intended closings will have many more dealers.[74] In 2008, Chrysler's dealers lost on average $3,431.[75] By consolidating dealerships, the companies argue, they can drive more sales through more profitable businesses that can afford to invest in their businesses.[76] The remaining dealers may also be able to negotiate more favorable terms with their floor-plan financers.[77] This may in turn help dealers acquire more stock and sell it to consumers at lower prices, thereby increasing sales and profits for the dealers and for Chrysler and GM.

UAW Chrysler workers agreed to make concessions on compensation and retiree health benefits. These changes include the adjustments to the funding of the UAW Trust (as discussed above), cancellation of cost-of-living adjustments for the current workforce, and a restructuring of skilled trade classifications, among other concessions.[78] As Mr. Bloom told the Panel at its

---

[72] Autodata Corp.'s Motor Intelligence Web site (accessed Aug. 30, 2009) (online at www.motorintelligence.com/fileopen.asp?File=SR_Sales-4.xls).

[73] In 2008, Toyota had 1,649,045 light-vehicle retail sales, compared with 1,076,170 for Chrysler. *Id.*

[74] Toyota, *United States Operations 2009*, at 5 (accessed Aug. 30, 2009) (online at pressroom.toyota.com/pr/tms/document/TNA_OPS_MAP_2009.pdf) (hereinafter "Toyota US Operations 2009").

[75] Senate Commerce, Science, and Transportation Committee, Testimony of Vice Chairman and President Chrysler LLC James Press, *Chrysler's Dealership Network*, 111th Cong., at 3 (June 3, 2009) (online at commerce.senate.gov/public/_files/PressTestimonyDealerships.pdf) (hereinafter "James Press Senate Testimony").

[76] Senate Commerce, Science, and Transportation Committee, Testimony of General Motors President and CEO Fritz Henderson, *GM and Chrysler Dealership Closures: Protecting Dealers and Consumers*, 111th Cong., at 3, 5 (June 3, 2009) (online at commerce.senate.gov/public/_files/HendersonTestimonyDealerships.pdf) (hereinafter "Fritz Henderson Senate Testimony"); James Press Senate Testimony, *supra* note 75 at 5-6.

[77] Comptroller of the Currency, *Comptroller's Handbook on Floor Plan Loans*, at 3 (accessed Aug. 30, 2009) (online at www.occ.treas.gov/handbook/floorplan1.pdf) (hereinafter "Comptroller Floor Plan Handbook") ("Dealers selling in large volume are usually granted a three-day leeway before proceeds from inventory sold are required to be received by the bank."); Lynn M. LoPucki & Elizabeth Warren, *Secured Credit: A Systems Approach*, at 252-53, 263 (hereinafter "Secured Credit: A Systems Approach").

[78] UAW Chrysler, *Modifications to 2007 Agreement and Addendum to VEBA Agreement* (Apr. 2009) (online at download.gannett.edgesuite.net/detnews/2009/pdf/UAWChrysler.pdf); Congressional Oversight Panel, *Testimony of Ron Bloom before the Congressional Oversight Panel: Regarding the Treasury's Automotive Industry Financing Program* (July 27, 2009) (online at cop.senate.gov/documents/testimony-072709-bloom.pdf) (hereinafter "UAW Statements on VEBA Modifications") ("The UAW made important concessions on wages, benefits, and retiree health care. These concessions brought New Chrysler's compensation in line with that of Toyota and other foreign automotive manufacturers at their US operations. In addition, the UAW retirees exchanged an almost $8 billion fixed obligation to the Voluntary Employees' Beneficiary Association (VEBA) retiree health trust for a $4.6 billion unsecured note and stock in New Chrysler. This arrangement shifts substantial risk onto the retiree health care trust and will likely result in meaningful reductions in health care benefits for New Chrysler's 150,000 retirees. The Trust, which is managed by an independent committee of legally bound fiduciaries, will, other than a single seat on the Company's Board of directors, will [sic] have no role in the governance of the Company. However, the ability of the Trust to provide decent benefits over the long-term will require that the Company's stock become valuable, thus significantly aligning the interests of the Company and the VEBA as a key stakeholder.") (hereinafter "Ron Bloom Prepared COP Testimony").

hearing in Detroit on July 27, "these concessions brought New Chrysler's compensation in line with that of Toyota and other foreign automotive manufacturers at their U.S. operations."[79]

New Chrysler is not a public company and is not required to file reports with the Securities and Exchange Commission (SEC). However, Mr. Bloom has stated that both New Chrysler and the New GM will file quarterly reports with the SEC.[80]

2. New General Motors

A month after Chrysler entered bankruptcy, GM followed on June 1, 2009.[81] On July 5, GM sold its "good" assets under Section 363 of the Code to a new, government-owned entity, General Motors Company (New GM).[82] The new company purchased substantially all of the assets of Old GM needed to implement its new, leaner viability plan, which will focus on four core brands: Chevrolet, Cadillac, Buick, and GMC. New GM plans to close 11 facilities and idle another three facilities.

Again, the technical details of the disposition of assets are discussed in more detail below. Under the terms of a Master Purchase and Sale Agreement, Old GM unsecured creditors will receive a pro-rata share of 10 percent of the equity of New GM, plus warrants for an additional 15 percent of New GM.[83] At least 54 percent of Old GM bondholders voted to approve the transaction.[84] New GM issued 17.5 percent equity to the UAW Trust, as well as warrants to purchase an additional two and a half percent of the company. The UAW Trust will also be funded by a $2.5 billion note maturing in 2017, and $6.5 billion in nine percent perpetual

[79] *Id.*

[80] Nick Bunkley, *U.S. Likely to Sell G.M. Stake Before Chrysler*, New York Times (Aug. 5, 2009) (online at www.nytimes.com/2009/08/06/business/06auto.html).

[81] Voluntary Chapter 11 Petition, at 1 (June 1, 2009), *In Re* General Motors Corp., S.D.N.Y (No.09-50026 (REG)) (online at docs.motorsliquidationdocket.com/pdflib/01_50026.pdf) (hereinafter "GM Bankruptcy Petition").

[82] Order (I) Authorizing Sale of Assets Pursuant to Amended and Restated Master Sale and Purchase Agreement with NGMCO, Inc., a Treasury-Sponsored Purchaser; (II) Authorizing Assumption and Assignment of Certain Executory Contracts and Unexpired Leases in Connection with the Sale; and (III) Granting Related Relief, (July 5, 2009), *In Re* General Motors Corp., S.D.N.Y. (No. 09-50026 (REG)) (online at docs.motorsliquidationdocket.com/pdflib/2968_order.pdf) (hereinafter "Order Authorizing GM 363 Sale").

[83] *First Amendment to Amended and Restated Master Sale & Purchase Agreement* (June 26, 2009) *In Re* General Motors Corp., S.D.N.Y. (No. 09-50026 (REG)) (online at docs.motorsliquidationdocket.com/pdflib/amendment_630.pdf) (hereinafter "First Amendment to GM Master Sale Agreement").

[84] Rod Lache, *Industry Update: Implication of GM's Bankruptcy Filing Today*, Deutsche Bank (May 31, 2009) (hereinafter "Deutsche Bank Report on Implications of GM Bankruptcy").

preferred stock.[85] The UAW Trust has the right to select one independent director, but no right to vote its shares nor any other governance rights.

Treasury received 61 percent of the equity of New GM and $9.2 billion in debt and preferred stock.[86] It also received the right to select 10 initial members of the GM board of directors. The governments of Canada and Ontario received approximately 12 percent of the equity in New GM, approximately $1.7 billion in debt and preferred stock, and the right to select one director for as long as they hold their current share of New GM equity.[87]

Treasury provided approximately $30.1 billion of financing to support GM through an expedited Chapter 11 proceeding and restructuring.[88] Treasury has no plans to provide any additional assistance to GM beyond this commitment.[89]

By the end of July, New GM had filled all of the positions on its board of directors.[90] The 13 members bring experience from a wide range of industries and backgrounds. Ten of these directors were appointed or reinstated by Treasury: Daniel Akerson, managing director and head of global buyout at private equity firm The Carlyle Group; David Bonderman, co-founder of private equity firm Texas Pacific Group; Erroll B. Davis, Jr., chancellor of the University System of Georgia; E. Neville Isdell, retired chairman and CEO of Coca-Cola; Robert D. Krebs, retired chairman and CEO of Burlington Northern Santa Fe Corporation; Kent Kresa, chairman emeritus of Northrop Grumman Corporation; Philip A. Laskawy, retired chairman and CEO of Ernst & Young LLP; Kathryn V. Marinello, chairman and CEO of Ceridian Corporation; Patricia F. Russo former chief executive officer of Alcatel-Lucent; and Edward E. Whitacre, Jr. former chairman of the board of AT&T, who was chosen to be chairman of the board. Carol M. Stephenson, dean of the Richard Ivey School of Business at the University of Western Ontario, was appointed by the Canadian government.

---

85 White House, *Fact Sheet: Obama Administration Auto Restructuring Initiative General Motors Restructuring* (June 30, 2009) (online at financialstability.gov/latest/05312009_gm-factsheet.html) (hereinafter "White House GM Restructuring Fact Sheet").

86 General Motors Corp., *Form 8-K* (July 16, 2009) (online at www.sec.gov/Archives/edgar/data/1467858/000119312509150199/0001193125-09-150199-index.htm) (hereinafter "GM July 16, 2009 8-K").

87 Stockholder Agreement by and Among General Motors Company, United States Department of the Treasury, 7176384 Canada Inc., and UAW Retiree Medical Benefits Trust, 8 (July 10, 2009) (online at www.sec.gov/Archives/edgar/data/1467858/000119312509150199/dex101.htm) (hereinafter "New GM Stockholder Agreement").

88 *Declaration of J. Stephen Worth*, supra note 36 at appx. 18.

89 White House Office of the Press Secretary, *Remarks by the President on General Motors Restructuring* (June 1, 2009) (online at www.whitehouse.gov/the_press_office/Remarks-by-the-President-on-General-Motors-Restructuring/) (hereinafter "White House June 1 Remarks on GM Restructuring").

90 General Motors, *Board of Directors* (accessed on Aug. 11, 2009) (online at www.gm.com/corporate/about/board.jsp) (hereinafter "GM Description of Board of Directors").

In late March 2009, as Treasury sought to invest additional funds in GM, President Obama announced the departure of CEO Rick Wagoner, who was replaced by COO Fritz Henderson.[91] As part of the restructuring, the Motors Liquidation Company (MLC) board of directors and former CEO Wagoner reduced their 2009 compensation to one dollar, and several other executive officers took salary cuts between 10 and 30 percent.[92]

GM subsequently notified 1,300 of its approximate 6,000 U.S. dealers that they would be closing by year end 2010, aiming eventually to trim its total to about 4,000.[93] GM provided approximately $600 million in financial assistance in return for the dealers' selling down their existing inventory over the subsequent twelve months.[94] These payments could vary widely based on each dealer's situation.

GM's UAW workers agreed to make concessions on compensation and health benefits. These concessions were similar to those of Chrysler workers. GM workers gave up cost-of-living adjustments, performance bonuses, one paid holiday in each of 2010 and 2011, tuition assistance, and some health benefits.[95] The UAW estimated that these cuts would save GM between $1.2 and $1.3 billion per year.[96]

New GM is not a public company and is not required to file reports with the SEC, although as discussed above it is intended that GM will file financial statements with the SEC by 2010.

3. Warranties

The automotive companies' widely publicized vulnerability in late 2008 and early 2009 raised concerns that consumers might not purchase Chrysler and GM automobiles for fear that these companies could not back their warranties. When Treasury announced the results of the auto team's work on March 30, Treasury also created a new program to backstop the two companies' new vehicle warranties. This program applied to any new GM or Chrysler car

---

[91] White House, *Remarks by the President on the American Automotive Industry* (Mar. 30, 2009) (online at www.whitehouse.gov/the_press_office/Remarks-by-the-President-on-the-American-Automotive-Industry-3/30/09/) (hereinafter "March 30 Presidential Remarks").

[92] General Motors Corp., *Form 8-K*, at 39 (Aug. 7, 2009) (online at www.sec.gov/Archives/edgar/data/1467858/000119312509169233/d8k.htm) (hereinafter "GM August 7 8-K").

[93] House Committee on the Judiciary, Subcommittee on Commercial and Administrative Law, Testimony of Vice President and General Counsel of North America General Motors Company Michael J. Robinson, *Ramifications of Auto Industry Bankruptcies, Part III* 111th Cong., at 5 (July 22, 2009) (online at judiciary.house.gov/hearings/pdf/Robinson090722.pdf) (hereinafter "Michael Robinson House Testimony").

[94] *Id.*

[95] *Id.*

[96] Kimberly S. Johnson and Tim Trisher, *UAW Workers Approve General Motors Concessions*, USA Today (May 29, 2009) (online at www.usatoday.com/money/autos/2009-05-29-gm-uaw_N.htm) (hereinafter "Kim Johnson and Tim Trisher May 29 USA Today Report").

bought during the restructuring period.[97] The program was sized at 125 percent of the costs projected by the manufacturer to satisfy anticipated claims. Each of Chrysler and GM provided 15 percent of the projected funds necessary with Treasury providing the remaining 110 percent of the projected costs via loans.[98]

Prior to entering bankruptcy proceedings, Chrysler and GM created special purpose vehicles (SPVs) to hold those funds. Treasury lent Chrysler and GM $280 million[99] and $361 million,[100] respectively. Both Chrysler and GM have since repaid these loans.[101] To date, GM's repayment of its SPV facility has been its only repayment of TARP funds.[102]

4. Supplier Support Program

As a result of the downturn in the economy, automotive suppliers, upon whose functioning Chrysler and GM depend, had great difficulty accessing credit.[103] The viability plans of Chrysler and GM both pointed to the vulnerability of their suppliers.[104] Consequently, on March 19, Treasury announced the Auto Supplier Support Program (ASSP) to make available up to $5 billion in financing.[105] The government guaranteed the payment of products suppliers shipped, even if the automotive companies went under. In order to further unlock credit, participating suppliers could also sell their receivables into the program at a discount before maturity. The program would be run through American automotive companies that agreed to

---

[97] U.S. Department of Treasury, *Obama Administration's New Warranty Commitment Program* (Mar. 30, 2009) (online at www.financialstability.gov/docs/WarranteeCommitmentProgram.pdf) (hereinafter "White House Statement on New Warranty Commitment Program").

[98] *Id.*

[99] White House Office of the Press Secretary, *Obama Administration Auto Restructuring Initiative: Chrysler-Fiat Alliance* (hereinafter "Chrysler-Fiat Alliance") (Apr. 30, 2009) (online at www.whitehouse.gov/the_press_office/Obama-Administration-Auto-Restructuring-Initiative/) (hereinafter "Chrysler-Fiat Alliance").

[100] U.S. Department of Treasury, *Obama Administration Auto Restructuring Initiative: General Motors Restructuring* (Mar. 31, 2009) (online at www.financialstability.gov/latest/05312009_gm-factsheet.html) (hereinafter "White House March 31 Remarks on GM Restructuring").

[101] U.S. Department of Treasury, *TARP Transactions Report*, at 15 (Aug. 4, 2009) (online at www.financialstability.gov/docs/transaction-reports/transactions-report_08042009.pdf) (hereinafter "August 4 Transactions Report").

[102] U.S. Department of Treasury, *Transactions Report*, at 16 (Aug. 28, 2009) (online at financialstability.gov/docs/transaction-reports/transactions-report_08282009.pdf) (hereinafter "August 28 Transactions Report").

[103] U.S. Department of Treasury, *Auto Supplier Support Program: Stabilizing the Automotive Industry at a Time of Crisis* (Mar. 18, 2009) (online at www.treas.gov/press/releases/docs/supplier_support_program_3_18.pdf) (hereinafter "Stabilizing the Automotive Industry at a Time of Crisis").

[104] *Chrysler Restructuring Plan, supra* note 28; *GM Restructuring Plan, supra* note 27.

[105] U.S. Department of the Treasury, *Treasury Announces Auto Supplier Support Program* (Mar. 19, 2009) (online at www.financialstability.gov/latest/auto3_18.html) (hereinafter "Treasury Auto Supplier Support Program Announcement").

participate in the program. The supplier would pay a small fee for the right to participate in the program. Although all domestic automotive companies were eligible, only Chrysler and GM chose to participate. By April 9, $1.5 billion was made available to Chrysler and $3.5 billion to GM under the program.[106] The total commitment was reduced on July 8 to $1 billion for Chrysler and $2.5 billion for GM.[107]

5. White House Council on Automotive Communities and Workers

One aspect of TARP assistance to the automotive industry is the fallout created by the restructurings. In aiming to make Chrysler and GM more competitive and sustainable, President Obama has recognized the difficult sacrifices that many stakeholders and communities have made across the nation.[108] The government-backed restructurings have resulted in substantial sacrifices for many, including further job reductions and dealership and parts supplier closings that impact the welfare and livelihood of dealers, retirees, workers and the greater communities[109] surrounding automotive plants and dealerships. The Obama Administration has created a White House Council on Automotive Communities and Workers, co-chaired by Mr. Summers and Secretary of Labor Hilda L. Solis. Edward Montgomery, a former deputy secretary of labor, was appointed as the new director of recovery for auto communities and workers to work with autoworkers and auto communities to help offset the impact of these changes and assist communities as they reorient their local economies.[110] President Obama stated that the hardships currently being faced are necessary in order for the American automotive industry to reemerge as the "best automotive industry in the world"[111] and for the future of this nation to continue to be premised on the ingenuity and entrepreneurship of current generations and generations past.[112]

C. The Impact of the Reorganizations: Who Got What?

1. Chrysler

[106] August 18 Transactions Report, *supra* note 1.

[107] August 18 Transactions Report, *supra* note 1.

[108] *White House June 1 Remarks on GM Restructuring*, *supra* note 89.

[109] According to data from the Center for Automotive Research, more than 50 U.S. towns and cities have had a major automotive plant closure in the past five years.

[110] White House, *Executive Order Establishing a White House Council on Automotive Communities and Workers* (June 23, 2009) (online at www.whitehouse.gov/the_press_office/Establishing-a-White-House-Council-on-automotive-communities-and-workers/) (hereinafter "Executive Order Establishing White House Council on Automotive Communities and Workers").

[111] White House Office of Press Secretary, *Remarks by the President on the Auto Industry* (Apr. 30, 2009) (online at www.whitehouse.gov/the_press_office/Remarks-by-the-President-on-the-Auto-Industry/) (hereinafter "White House April 30 Remarks on Auto Industry").

[112] *Id.*