



IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

FIAT NORTH AMERICA LLC,

Plaintiff and  
Counterclaim  
Defendant,

v.

C.A. No. 7903-VCP

UAW RETIREE MEDICAL  
BENEFITS TRUST,

Defendant and  
Counterclaim Plaintiff.

**MEMORANDUM OPINION**

Submitted: April 25, 2013

Decided: July 30, 2013

Raymond J. DiCamillo, Esquire, Kevin M. Gallagher, Esquire, RICHARDS, LAYTON & FINGER, P.A., Wilmington, Delaware; *Attorneys for Plaintiff Fiat North America LLC.*

Kenneth J. Nachbar, Esquire, Jay N. Moffitt, Esquire, MORRIS, NICHOLS, ARSHT & TUNNELL LLP, Wilmington, Delaware; Robert W. Hirth, Esquire, Isaac S. Greaney, Esquire, SIDLEY AUSTIN LLP, New York, New York; *Attorneys for Defendant Brock Fiduciary Services LLC, Appearing on behalf of Defendant and Counterclaim Plaintiff UAW Retiree Medical Benefits Trust in its capacity as the Independent Fiduciary for the UAW Retiree Medical Benefit Trust (Chrysler Separate Retiree Account).*

**PARSONS, Vice Chancellor.**

This action is before me on cross motions for judgment on the pleadings related to the redemption of an option to purchase shares of Chrysler after it had emerged from bankruptcy. In 2009, during the throes of the financial crisis, the old Chrysler, one of America's "Big Three" automakers, filed for bankruptcy. Ultimately, the automaker sold its assets to a newly formed entity, new Chrysler, which issued membership interests to, among others, the United States Department of the Treasury ("U.S. Treasury"), a subsidiary of Fiat, and a trust that provides benefits for current and future retirees of Chrysler. To settle claims that the newly formed entity was responsible for providing retiree medical benefits to one of North America's largest unions, the newly formed entity issued to a health care trust a large note and membership units in new Chrysler and transferred certain assets to that trust. Fiat, the health care trust, and the U.S. Treasury also entered into an agreement whereby Fiat could purchase a percentage of the health care trust's shares pursuant to a set formula.

In July 2012, Fiat exercised its option to purchase shares from the health care trust for a purchase price of \$139.7 million. The health care trust did not deliver the shares, and Fiat filed this suit to force delivery of the shares at that price. The health care trust counterclaimed asserting that Fiat had misinterpreted and misapplied the formula, and that the shares involved were worth approximately \$343.1 million.

Therefore, an agreement that was intended to avoid disputes and provide a set method for valuing the shares subject to the option has led to a substantial disagreement. Indeed, when one considers that Fiat still possesses an option for many more shares, the value of this dispute potentially could exceed a billion dollars.

Two of the largest drivers of the difference in the parties' respective price calculations are whether: (1) notes worth billions of dollars issued to two health care trusts are debt of Fiat and new Chrysler; and (2) whether net income attributable to non-controlling interests in new Chrysler should be included in Fiat's EBITDA. According to the plaintiff health care trust, those two disputed items account for \$78.2 million and \$12.2 million of the difference in price, respectively. The health care trust also disputes other parts of Fiat's price calculation, but contends that discovery is necessary to resolve those issues. Finally, the health care trust argues that a purchase of the shares at the \$139.7 million price would violate the conditions of an exemption granted by the United States Department of Labor (the "DOL"), and that absent that exemption the Employee Retirement Income Security Act of 1974 ("ERISA") would prohibit the exercise of the option.

Having considered the parties' briefing and heard oral argument on the cross motions for judgment on the pleadings, I find that Fiat's interpretation of the notes as debt and its handling of income attributable to non-controlling interests reflect the only reasonable interpretations of the contract in issue. Therefore, I grant judgment on the pleadings in favor of Fiat on those issues. As to the remaining questions, discovery is needed to determine, for example, the correct way to calculate or interpret the other items in dispute. Finally, I decline to consider at this point whether Fiat's contemplated purchase of shares would violate the conditions of an exemption granted by the DOL. My preliminary view is that this Court lacks subject matter jurisdiction to resolve that question. Because the parties did not address that issue directly in their briefing on the

pending motions, my decision on the subject matter jurisdiction question is without prejudice to their ability to pursue that issue further in this proceeding or elsewhere.

## **I. BACKGROUND**

### **A. The Parties**

Plaintiff and Counterclaim Defendant, Fiat North America LLC (“Fiat”), is a limited liability company organized under the laws of Delaware and a wholly owned subsidiary of Fiat S.p.A. (“Fiat Parent”). Both Fiat and Fiat Parent are engaged in the design, manufacture, and sale of automobiles.

Defendant and Counterclaim Plaintiff, UAW Retiree Medical Benefits Trust (the “VEBA”), is a voluntary employees beneficiary association trust that funds medical health care benefits for retired and to-be-retired members of the International Union, United International Union, United Automobile, Aerospace and Agriculture Implement Workers of America (the “UAW”). The UAW Chrysler Retirees Medical Benefits Plan (the “Chrysler Plan”) provides retiree health care benefits to present and future retirees of Chrysler Group LLC (“Chrysler”). The Chrysler Plan is funded by the separately held assets in the VEBA’s Chrysler Separate Retiree Account. Brock Fiduciary Services LLC (“Brock”) is appearing on behalf of the VEBA in its capacity as the “Independent Fiduciary” for the Chrysler Plan.<sup>1</sup>

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<sup>1</sup> Countercl. ¶ 11.

## B. Facts<sup>2</sup>

### 1. The bankruptcy and settlement

On April 30, 2009, Old CarCo LLC (“Old CarCo,” formerly known as Chrysler LLC) filed for protection under title 11 of the United States Code in the United States Bankruptcy Court for the Southern District of New York (the “Bankruptcy Court”).<sup>3</sup> Old CarCo, Fiat, and New CarCo Acquisition LLC (now Chrysler), a Delaware limited liability company formed by Fiat, entered into a Master Transaction Agreement (the “MTA”), dated as of April 30, 2009, whereby: (1) Old CarCo would transfer all of its operating assets to Chrysler; (2) Chrysler would assume the liabilities of Old CarCo and pay Old CarCo \$2 billion in cash; (3) Fiat would contribute technologies and distribution capabilities to Chrysler; and (4) Chrysler would issue membership interests in itself to the VEBA, the U.S. Treasury, and Export Development Canada.<sup>4</sup>

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<sup>2</sup> Unless otherwise noted, the facts set forth in this Memorandum Opinion are undisputed and taken from the pleadings in this action—namely (1) Fiat’s Verified Complaint; (2) the VEBA’s Answer and Verified Counterclaims; and (3) Fiat’s Answer to the Verified Counterclaims—the exhibits thereto, admissions, and documents integral to or incorporated into the pleadings by reference. *See Graulich v. Dell Inc.*, 2011 WL 1843813, at \*1 (Del. Ch. May 16, 2011); *In re Tyson Foods, Inc.*, 2007 WL 2351071, at \*2 (Del. Ch. Aug. 15, 2007). The Court also takes judicial notice of public filings and proceedings in other litigation. *Id.*

<sup>3</sup> *See Hirth Aff. Ex. 3 at 2.* For further background on Chrysler’s bankruptcy, see *In re Chrysler LLC*, No. 09 B 50002(AJG) (Bankr. S.D.N.Y. 2009).

<sup>4</sup> *In re Chrysler LLC*, 405 B.R. 84, 92 (Bankr. S.D.N.Y. 2009).

In 2007 and 2009, Old CarCo previously had made commitments to provide retiree medical benefits to the UAW.<sup>5</sup> After Old CarCo’s bankruptcy, the UAW asserted that Chrysler was bound by those commitments.<sup>6</sup> Ultimately, on June 10, 2009, the UAW and Chrysler entered into a settlement agreement (the “Settlement Agreement”).<sup>7</sup> The Settlement Agreement provided, among other things, that the retiree medical benefits obligations would be transferred to the Chrysler Plan and that the VEBA would be responsible for funding the Chrysler Plan.<sup>8</sup> In return, Chrysler agreed to: (1) transfer assets valued at \$1,589,500,000 to the VEBA; (2) give certain Class A limited liability membership units representing 67.69% of the fully diluted ownership of Chrysler (the “Chrysler Shares”) to the VEBA; and (3) issue a note from Chrysler to the VEBA with a principal amount of \$4,587,000,000 and an implicit interest rate of nine percent to be paid pursuant to a defined schedule (the “VEBA Note”).<sup>9</sup> The VEBA Note is governed by an indenture (the “Indenture”).<sup>10</sup>

In August 2010, Chrysler Canada Inc. (“Chrysler Canada”) entered into a settlement agreement with the Canadian Auto Workers Union (the “CAW”) “to

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<sup>5</sup> Hirth Aff. Ex. 3 at 6.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* The Settlement Agreement is attached to the Hirth Affidavit as Exhibit 8.

<sup>8</sup> *Id.*

<sup>9</sup> Grant of Individual Exemption Involving Chrysler LLC, Located in Auburn Hills, MI, 75 Fed. Reg. 21,668–69 (Apr. 26, 2010).

<sup>10</sup> Gallagher Aff. Ex. G.

permanently transfer the responsibility for providing postretirement health care benefits . . . to a new retiree plan.”<sup>11</sup> As part of that settlement, Chrysler Canada issued a Canadian Health Care Trust Note (the “CHCT Note”) to the Canadian Health Care Trust (the “CHCT”) “in exchange for settling its retiree health care obligations for” Chrysler Canada retirees.<sup>12</sup>

## 2. The Call Option Agreement

On June 10, 2009, Fiat, the VEBA, and the U.S. Treasury executed a Call Option Agreement (the “Call Option Agreement”) that granted Fiat certain rights to purchase (the “Call Option”) from the VEBA 40% of the 676,924 equity interests held by the VEBA (the “Covered Interests”), *i.e.*, 270,770 units or 22% of Chrysler’s membership interest.<sup>13</sup> The Call Option Agreement further provides that, during any six-month period, Fiat cannot exercise the Call Option with respect to more than 20% of the Covered Interests, *i.e.*, 54,154 units.<sup>14</sup>

The Call Option Agreement contains a formula detailing how to calculate the purchase price for any called units. The exact formula depends on whether or not an initial public offering (“IPO”) has occurred.<sup>15</sup> The Call Option Agreement defines the

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<sup>11</sup> Gallagher Aff. Ex. E at 166.

<sup>12</sup> *Id.*

<sup>13</sup> Hirth Aff. Ex. 1 § 2.1, at A-2; Ex. 3 at 4.

<sup>14</sup> Hirth Aff. Ex. 1 § 2.1(d).

<sup>15</sup> *Id.* § 2.1(a).

“Post-IPO Call Option Exercise Price” as being equal to the volume-weighted average price per share of common stock of Chrysler for the twenty consecutive trading days immediately prior to the date of exercise.<sup>16</sup> The “Pre-IPO Call Option Exercise Price” is “equal to one percent (1%) of the Company Equity Value.”<sup>17</sup> Where the Pre-IPO Call Option Price is the operative formula—as is undisputedly the case here—Fiat is required to pay the VEBA, in exchange for the delivery of any called units, the Pre-IPO Call Option Exercise Price less the Contingent Value Rights Settlement Price.<sup>18</sup> The Contingent Value Rights Settlement Price shall be no greater than 20%, and no less than 10%, of the Pre-IPO Call Option Exercise Price.<sup>19</sup> Here, Fiat has agreed to use the minimum 10% figure as the Contingent Value Rights Settlement Price.<sup>20</sup>

The “Company Equity Value” is defined as the product of the “Market Multiple” times the aggregate of Chrysler’s reported “EBITDA” for the most recent four financial quarters for which financial statements have been delivered or were required to be delivered less Chrysler’s “Net Industrial Debt” as of the date of Chrysler’s consolidated financial statements that most recently were delivered or required to be delivered.<sup>21</sup>

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<sup>16</sup> *Id.* at A-5 & § 2.1(a).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at A-2 & §§ 2.1(a), 2.2(f).

<sup>19</sup> *Id.* at A-2.

<sup>20</sup> *See* Countercl. ¶ 28; Answer to Countercl. ¶ 28.

<sup>21</sup> Hirth Aff. Ex. 1 at A-1.



Because Fiat has agreed to use the “Fiat Multiple,” which is basically Fiat Parent’s Enterprise Value over its EBITDA in lieu of the “Market Multiple,”<sup>22</sup> the formula for calculating Company Equity Value can be expressed as follows:

$$\text{Company Equity Value} = \frac{\text{Fiat Parent Enterprise Value}}{\text{Fiat Parent EBITDA}} \times \text{Chrysler EBITDA} - \text{Chrysler Net Industrial Debt}$$

The inputs to Company Equity Value relevant to this dispute are defined as follows:

- “EBITDA” means, for any Person, the consolidated net income (loss) of that Person plus (i) interest charges to the extent deducted from consolidated net income; (ii) consolidated income taxes; (iii) depreciation, amortization, depletion and non-cash charges; and (iv) other extraordinary charges.
- “Market Multiple” means, for any Entity, the average EBITDA trading multiple for the Reference Automotive Manufacturers (determined by each Reference Automotive Manufacturer’s Market Enterprise Value, divided by such Reference Automotive Manufacturer’s EBITDA as reported for the four most recent fiscal quarters for which financial data has been reported); provided that in determining the Market Multiple, any of the Reference Automotive Manufacturers whose EBITDA trading multiple differs from the average of the other Reference Automotive Manufacturers by more than one standard deviation shall be excluded; and provided further that the Market Multiple shall not, in any event, exceed the Fiat Multiple.
- “Net Industrial Debt” means, for any Entity, total indebtedness for borrowed money less cash and cash

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<sup>22</sup> The Market Multiple cannot exceed the Fiat Multiple. *See id.* at A-4. In its Complaint, Fiat agreed, for purposes of the July 3, 2012 Call Option exercise, “to forego any lower purchase price that might have been determined based on the” Market Multiple. Compl. ¶ 19 n.2. Accordingly, I consider the Fiat Multiple for purposes of calculating the Company Equity Value.

equivalents, of the Entity and its subsidiaries each as reported on a consolidated cash basis in accordance with GAAP; provided that the calculation of Net Industrial Debt shall exclude obligations in respect of retirees and indebtedness of finance companies to the extent included in the consolidated results of such Entity.<sup>23</sup>

Other important definitions necessary to calculate inputs to Company Equity Value are:

- “Fiat Multiple” means, at any time, Fiat’s Market Enterprise Value, divided by Fiat’s EBITDA as reported for the four most recent fiscal quarters for which financial data has been reported.<sup>24</sup>
- “Market Enterprise Value” means, for any Entity, the sum of (i) the Net Industrial Debt of such Entity as of such Entity’s most recently reported financial statements and (ii) such Entity’s Market Equity Value.
- “Market Equity Value” means, for any Entity, the product of (i) the number of outstanding shares or units of such Entity’s equity securities as of the most recently reported date times (ii) the volume-weighted average price per share or unit of such Entity’s equity securities as reported on the Entity’s principal securities exchange for each day during the twenty (20) Scheduled Trading Days immediately preceding the date of determination.<sup>25</sup>

### **3. The prohibited transaction exemption**

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<sup>23</sup> Hirth Aff. Ex. 1 at A-3 to A-4.

<sup>24</sup> Although the Fiat Multiple references “Fiat’s Market Enterprise Value” and “Fiat’s EBITDA,” Fiat claims that was a scrivener’s error, and that the Fiat Multiple instead should be based on “Fiat Parent’s” EBITDA and Market Enterprise Value. The VEBA did not dispute this in its Answer and Counterclaims. *See* Answer to Compl. ¶ 15; Countercl. ¶ 35. Accordingly, I have assumed that the Fiat Multiple is based on Fiat Parent’s EBITDA and Market Enterprise Value.

<sup>25</sup> Hirth Aff. Ex. 1 at A-3 to A-5.

On May 18, 2009, before entering into the Call Option Agreement, Chrysler applied to the DOL for an exemption from the purportedly prohibitive sections of ERISA.<sup>26</sup> For example, Chrysler acknowledged that its contribution of shares to the VEBA, on behalf of the Chrysler Plan, “may violate Section 406(a)(1)(A), which prohibits a direct or indirect sale or exchange of any property between a plan and a party in interest.”<sup>27</sup> The request sought an exemption from various provisions of ERISA, including that “Section 406(a) and 406(b) shall not apply to . . . [t]he disposition of Shares in connection with Fiat’s exercise of the Call Options.”<sup>28</sup>

In their request for an exemption, Chrysler represented that:

The exercise price of the Call Options will be determined pursuant to certain formulas, the use of which depends upon whether or not [Chrysler] has completed an initial public offering before Fiat exercises any Call Options, *and which have been designed to approximate the fair market value of the Shares at the time of exercise.*<sup>29</sup>

Notably, Chrysler stated in its request for an exemption that “[t]he exemptions are conditioned upon adherence to the material facts and representations described herein.”<sup>30</sup>

In subsequent correspondence with the DOL regarding the proposed exemption, Chrysler

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<sup>26</sup> Hirth Aff. Ex. 3. All references to the statutory sections of ERISA are as codified in Title 19 of the United States Code.

<sup>27</sup> *Id.* at 9.

<sup>28</sup> *Id.* at 12.

<sup>29</sup> *Id.* at 5 (emphasis added).

<sup>30</sup> *Id.* at 12.

reiterated that “[t]he exercise price is determined pursuant to a formula *designed to arrive at the fair market value of the interests.*”<sup>31</sup>

On October 5, 2009, the DOL issued a Notice of Proposed Exemption Involving Chrysler LLC (the “Notice of Proposed Exemption”).<sup>32</sup> In it, the DOL proposed relief from Section 406(a)(1)(A) for the disposition of shares in Chrysler sold in a transaction involving a party in interest, such as pursuant to the Call Option. The Notice of Proposed Exemption directed that the VEBA “in its sole discretion, will appoint an Independent Fiduciary” to, among other things, act on behalf of the VEBA “in connection with the discretionary management and disposition” of the Chrysler Shares and the “Call Option.”<sup>33</sup> The Notice of Proposed Exemption reiterated that “[t]he exercise price will be determined pursuant to a formula which is designed to arrive at the fair market value of the interests.”<sup>34</sup> Finally, the Notice of Proposed Exemption was conditioned on the truthfulness and accuracy of the application.<sup>35</sup>

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<sup>31</sup> Hirth Aff. Ex. 4 at 2 (emphasis added).

<sup>32</sup> Notice of Proposed Individual Exemption Involving Chrysler LLC, Located in Auburn Hills, MI, 74 Fed. Reg. 51,182 (Oct. 5, 2009).

<sup>33</sup> *Id.* at 51,189.

<sup>34</sup> *Id.* at 51,186.

<sup>35</sup> *Id.* at 51,192 (“The proposed exemption, if granted, will be subject to the express condition that the material facts and representations contained in the application are true and complete, and that the application accurately describes all material terms of the transaction which is the subject of the exemption.”).

On April 26, 2010, the DOL granted to Chrysler an individual exemption from certain prohibited transaction restrictions of ERISA (the “PTE”).<sup>36</sup> Specifically, the PTE stated that the restrictions of certain sections of ERISA would not apply, effective June 10, 2009, to, among other things, “[t]he sale by the [Chrysler Plan] to Fiat . . . of Shares pursuant to the exercise by Fiat of the Call Option Agreement.”<sup>37</sup> The PTE also disclosed that the Chrysler Plan had retained Brock as the Independent Fiduciary.<sup>38</sup> Finally, the PTE contained the following conditions, among others:

(a) The Committee appoints a qualified Independent Fiduciary to act on behalf of the [Chrysler Plan] for all purposes related to the transfer of the Shares and Note to the Plan for the duration of the Plan’s holding of the Shares and Note, except for the voting of the Shares. Such Independent Fiduciary will have sole discretionary responsibility relating to the holding, disposition and ongoing management of the Shares and the Note. The Independent Fiduciary will determine, before taking any of the actions regarding the Shares and the Note, that each such action or transaction is in the interest of the [Chrysler Plan].

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(c) The Independent Fiduciary authorizes the Trustee of the [Chrysler Plan] to dispose of the Shares and the Note only after the Independent Fiduciary determines, at the time of the transaction, that the transaction is feasible, in the interest of the [Chrysler Plan], and protective of the participants and beneficiaries of the Plan.

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<sup>36</sup> Grant of Individual Exemption Involving Chrysler LLC, Located in Auburn Hills, MI, 75 Fed. Reg. 21,668 (Apr. 26, 2010).

<sup>37</sup> *Id.* at 21,675.

<sup>38</sup> *Id.* at 21,670.

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(h) The terms of any transaction exempted herein are no less favorable to the [Chrysler Plan] than the terms negotiated at arms' length under similar circumstances between unrelated parties.<sup>39</sup>

#### 4. Fiat exercises the Call Option

In a June 8, 2012 letter, Fiat notified both the VEBA and the U.S. Treasury of its intent to exercise the Call Option in respect to 54,154 units of Chrysler (the "Called Shares").<sup>40</sup> In accordance with Section 2.2(c) of the Call Option Agreement, on June 27, 2012, Fiat provided the VEBA and the U.S. Treasury with a statement setting forth the details of its calculation.<sup>41</sup> Finally, on July 2, 2012, Fiat furnished the VEBA and U.S. Treasury with a Call Option Exercise Notice notifying them of its exercise as to the Called Shares and specifying a settlement date of July 11, 2012 pursuant to Section 2.2(d).<sup>42</sup> Fiat's exercise price calculation, attached to the Call Option Exercise Notice, showed a Fiat Multiple of 1.17 and a Pre-IPO Call Option Exercise Price of approximately \$155 million. Under Fiat's calculation, it would be required to pay the

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<sup>39</sup> *Id.* at 21,675–76. The reference to "the Committee" is to an independent committee that apparently established and maintains the VEBA trust.

<sup>40</sup> Compl. Ex. C. The 54,154 units were the maximum number of units that Fiat could acquire under the option during a six-month period. Hirth Aff. Ex. 1 § 2.1(a).

<sup>41</sup> Compl. Ex. D.

<sup>42</sup> Hirth Aff. Ex. 2. The settlement date was when Fiat presumably would tender the funds and the VEBA would deliver its shares.

VEBA \$139.7 million after taking into account the 10% Contingent Value Rights Settlement Price.<sup>43</sup>

On July 11, 2012, the VEBA failed to deliver to Fiat any Chrysler membership units, despite the fact that Fiat purportedly “stood ready to tender to the VEBA the cash purchase price.”<sup>44</sup> On July 21, 2011, Fiat had purchased the U.S. Treasury’s 6.031% ownership interest in Chrysler.<sup>45</sup> Therefore, during the time period relevant to this dispute, Fiat Parent has had a 58.54% interest in Chrysler, with the VEBA holding the remaining 41.46% interest.<sup>46</sup>

### C. Procedural History

On September 26, 2012, Fiat commenced this action. Fiat’s complaint (the “Complaint”) sought, among other things, a judgment requiring the VEBA to deliver to Fiat 54,154 Chrysler membership units and a declaration that those units should be delivered at the purchase price as determined by Fiat, *i.e.*, \$139.7 million. On November 12, 2012, the VEBA filed its Answer and Verified Counterclaims (the “Counterclaims”) seeking, among other things, a declaration that the purchase price to be paid by Fiat for

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<sup>43</sup> *Id.*

<sup>44</sup> Compl. ¶ 21.

<sup>45</sup> Hirth Aff. Ex. 9 at 158–59.

<sup>46</sup> *See* Countercl. ¶ 14; Answer to Countercl. ¶ 14.

the Called Shares is an amount to be determined by this Court, but not less than \$342 million.<sup>47</sup>

On December 6, 2012, Fiat moved for judgment on the pleadings. The VEBA then cross-moved for partial judgment on the pleadings. After extensive briefing, I heard argument on both motions on April 25, 2013. This Memorandum Opinion constitutes my ruling on those motions.

#### **D. Parties' Contentions**

Fiat contends that the VEBA's failure to deliver the Called Shares places the VEBA in breach of the Call Option Agreement, and seeks specific performance in the form of delivery of those shares. Fiat asserts that it properly exercised the Call Option with respect to the Called Shares and that it accurately interpreted and applied the formula in the Call Option Agreement in calculating a purchase price of \$139.7 million.

The VEBA challenges Fiat's calculation of the purchase price arguing that certain adjustments are necessary and would result in a purchase price well in excess of \$139.7 million. First, the VEBA argues that "Net Industrial Debt" should not include either the VEBA Note or the CHCT Note. Second, the VEBA disputes the inclusion in Fiat Parent's EBITDA of net income attributable to non-controlling interests in Chrysler. The VEBA also contends that Fiat miscalculated Net Industrial Debt, in other respects besides its handling of the notes. For example, the VEBA alleges that Fiat mistreated interest,

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<sup>47</sup> Brock, as the Independent Fiduciary, verified the allegations on behalf of the VEBA.



non-cash, and extraordinary charges, and that discovery is needed to resolve those issues. Finally, the VEBA avers that federal law bars delivery of the Called Shares to Fiat under the Call Option Agreement because certain conditions in the DOL's PTE have not been satisfied.

## II. ANALYSIS

### A. Standard

Under Court of Chancery Rule 12(c), any party may move for judgment on the pleadings after the pleadings are closed, but within such time as not to delay the trial. A motion for judgment on the pleadings will be granted if no material issue of fact exists and the moving party is entitled to judgment as a matter of law.<sup>48</sup> When considering a Rule 12(c) motion, the court must accept well-pled facts in the complaint as true and view those facts in the light most favorable to the non-moving party.<sup>49</sup> "A court may not grant the motion unless it appears beyond doubt that the claimant can prove no set of facts in support of its claims which would entitle it to relief."<sup>50</sup>

"If a contract's meaning is unambiguous and the underlying facts necessary to its application are not in dispute, judgment on the pleadings is an appropriate procedural

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<sup>48</sup> See *Credit Suisse Secs. (USA) LLC v. W. Coast Opportunity Fund, LLC*, 2009 WL 2356881, at \*3 (Del. Ch. July 30, 2009).

<sup>49</sup> *Rag Am. Coal Co. v. AEI Res., Inc.*, 1999 WL 1261376, at \*1 (Del. Ch. Dec. 7, 1999).

<sup>50</sup> *Petroplast Petrofisa Plasticos S.A. v. Ameron Int'l Corp.*, 2009 WL 3465984, at \*7 (Del. Ch. Oct. 28, 2009).

device for resolving the dispute.”<sup>51</sup> “When ruling on dueling Rule 12(c) motions that turn on an issue of contract construction, the Court must deny both motions if each has advanced reasonable but conflicting readings of the [contract in dispute], or, in other words, if the contract provision in question is ambiguous.”<sup>52</sup> Where the meaning is ambiguous or its “meaning cannot be determined without affording [the non-movant] an opportunity to develop, through discovery, any relevant extrinsic evidence. . . . , a court cannot render judgment on the pleadings.”<sup>53</sup>

The Call Option Agreement unambiguously provides—and both parties agree—that it is governed by the substantive law of New York.<sup>54</sup> Under New York law, “[i]t is well settled that a contract is to be construed in accordance with the parties’ intent, which is generally discerned from the four corners of the document itself.”<sup>55</sup> “A contract also should be interpreted in a manner that ascribes meaning to all of its provisions so as not

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<sup>51</sup> *CorVel Enter. Comp, Inc. v. Schaffer*, 2010 WL 2091212, at \*1 (Del. Ch. May 19, 2010).

<sup>52</sup> *Gibraltar Private Bank & Trust Co. v. Boston Private Fin. Hldgs., Inc.*, 2011 WL 6000792, at \*2 (Del. Ch. Nov. 30, 2011) (internal quotation marks and citation omitted).

<sup>53</sup> *Petroplast Petrofisa Plasticos S.A.*, 2009 WL 3465984, at \*9.

<sup>54</sup> *See* Hirth Aff. Ex. 1 § 5.10 (“THIS AGREEMENT SHALL BE DEEMED TO BE MADE IN AND IN ALL RESPECTS SHALL BE INTERPRETED, CONSTRUED AND GOVERNED BY AND IN ACCORDANCE WITH THE LAW OF THE STATE OF NEW YORK.”).

<sup>55</sup> *MHR Capital P’rs LP v. Presstek, Inc.*, 912 N.E.2d 43, 47 (N.Y. 2009).

to render a provision superfluous.”<sup>56</sup> “[A] written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms.”<sup>57</sup>

“Extrinsic evidence of the parties’ intent may be considered only if the contract is ambiguous, which is an issue of law for the courts to decide.”<sup>58</sup> “Clear contractual language does not become ambiguous, however, simply because the parties to the litigation put forth different interpretations of it.”<sup>59</sup> “Rather, a contract is ambiguous ‘where its terms suggest more than one meaning when viewed objectively by a reasonably knowledgeable person who has examined the context of the entire integrated agreement.’”<sup>60</sup> “Thus, if an agreement is reasonably susceptible on its face of only one meaning, a court is not free to reshape the contract to fit its personal notions of fairness and equity.”<sup>61</sup>

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<sup>56</sup> *Ion Geophysical Corp. v. Fletcher Int’l, Ltd.*, 2010 WL 4378400, at \*6 (Del. Ch. Nov. 5, 2010) (citing *Minerals Tech., Inc. v. Omya AG*, 406 F. Supp. 2d 335, 337 (S.D.N.Y. 2005); *God’s Battalion of Prayer Pentecostal Church, Inc. v. Miele Assocs., LLP*, 845 N.E.2d 1265, 1267 (N.Y. 2006)).

<sup>57</sup> *MHR Capital P’rs LP*, 912 N.E.2d at 47 (quoting *Greenfield v. Philles Records*, 780 N.E.2d 166, 170 (N.Y. 2002)).

<sup>58</sup> *Greenfield*, 780 N.E.2d at 170–71.

<sup>59</sup> *Ion Geophysical Corp.*, 2010 WL 4378400, at \*6 (citing *Riverside S. Planning Corp. v. CRP/Extell Riverside, L.P.*, 869 N.Y.S.2d 511, 517 (N.Y. App. Div. 2008), *aff’d*, 920 N.E.2d 359 (N.Y. 2009)).

<sup>60</sup> *Id.* (quoting, among others, *Minerals Tech.*, 406 F. Supp. 2d at 337).

<sup>61</sup> *Id.*

In interpreting the Call Option Agreement, I also consider contemporaneously executed documents that under New York law should be read together as one.<sup>62</sup> Specifically, I consider the Indenture, the Settlement Agreement, and the Call Option Agreement together because all three were part of the same overarching transaction and

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<sup>62</sup> See *Nau v. Vulcan Rail & Constr. Co.*, 286 N.Y. 188, 197 (N.Y. 1941) (“All three instruments were executed at substantially the same time, related to the same subject-matter, were contemporaneous writings and must be read together as one.”); *BWA Corp. v. Alltrans Exp. U.S.A., Inc.*, 112 A.D.2d 850, 852 (N.Y. App. Div. 1985) (“Where several instruments constitute part of the same transaction, they must be interpreted together. In the absence of anything to indicate a contrary intention, instruments executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction will be read and interpreted together, it being said that they are, in the eye of the law, one instrument.”); see also 17A C.J.S. Contracts § 315, at 337 (1999) (“In the absence of anything to indicate a contrary intention, writings executed at the same time and relating to the same transaction are construed together as a single contract, as though they were as much one in form as they are in substance, in order to determine the intent, rights, and interests of the parties.”); 11 Richard A. Lord, *Williston on Contracts* § 30:26, at 239–42 (4th ed. 1999) (“Apart from the explicit incorporation by reference of one document into another, the principle that all writings which are part of the same transaction are interpreted together also finds application in the situation where incorporation by reference of another document may be inferred from the context in which the documents in question were executed. Thus, in the absence of anything to indicate a contrary intention, instruments executed at the same time, by the same contracting parties, for the same purpose, and in the course of the same transaction will be considered and construed together as one contract or instrument, even though they do not in terms refer to each other.”); *Restatement (Second) of Contracts* § 202(2) (1981) (“A writing is interpreted as a whole, and all writings that are part of the same transaction are interpreted together.”).

were executed on the same day, June 10, 2009.<sup>63</sup> In addition, the Indenture and the Call Option Agreement were integrated by attachment to the Settlement Agreement.<sup>64</sup>

## **B. The Inclusion of the Notes in Net Industrial Debt**

A primary issue in this litigation is whether Fiat correctly included the VEBA Note with a face value of \$4.587 billion and the CHCT Note with a face value of \$976 million (collectively, the “Notes”) in the “Net Industrial Debt” of Fiat Parent and Chrysler.<sup>65</sup> As previously mentioned, the Call Option Agreement defines “Net Industrial Debt” as “total indebtedness for borrowed money . . . ; provided that the calculation of Net Industrial Debt shall exclude obligations in respect of retirees . . . .” In that regard, the parties disagree as to whether: (1) the Notes are “indebtedness for borrowed money”; and (2) the Notes are “obligations in respect of retirees.” If the Notes are not indebtedness for borrowed money *or* the Notes are obligations in respect of retirees, then Fiat should not have included them as Net Industrial Debt.

### **1. “Indebtedness for borrowed money”**

Fiat characterizes the Notes as “indebtedness for borrowed money” for three reasons. First, Fiat contends that under Delaware and New York law, notes evidence indebtedness for borrowed money. Second, Fiat argues that both the Settlement

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<sup>63</sup> See Hirth Aff. Exs. 1, 8; Gallagher Aff. Ex. H.

<sup>64</sup> Hirth Aff. Ex. 8 at 3, 7 & Exs. A, B

<sup>65</sup> Hirth Aff. Ex. 12 at 143.

Agreement and the Indenture refer to the VEBA Note as “debt.” And third, Fiat notes that Chrysler has treated the Notes as debt in public filings.

The VEBA, on the other hand, argues that Chrysler did not borrow any money in procuring the notes, and instead issued the Notes in exchange for terminating certain obligations they purportedly owed to Chrysler retirees. The VEBA points out that in Fiat Parent’s financial statements the Notes are not listed under bonds, borrowings from banks, or asset-based financing; instead, they are listed under “Payables represented by securities.” The VEBA also argues that the Notes cannot be indebtedness for borrowed money because, for tax purposes, Chrysler deducted principal payments to the VEBA under the VEBA Note as contributions to the VEBA. The VEBA also contends that, if this Court were to find the Notes to be indebtedness for borrowed money, that improperly would render the “for borrowed money” language in the Call Option Agreement mere surplusage. Finally, the VEBA relies on a handful of cases as supporting the proposition that where there is no borrowed money or money loaned, there is no indebtedness for borrowed money.

As an initial matter, I note that neither Delaware nor New York case law provides much guidance for interpreting “indebtedness for borrowed money” in the context of this case. *Allied Capital Corp. v. GC-Sun Holdings L.P.*,<sup>66</sup> for example, is one of the few Delaware cases construing that language. The context in which the issue of “indebtedness for borrowed money” arose in *Allied Capital*, however, makes the Court’s

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<sup>66</sup> 910 A.2d 1020 (Del. Ch. 2006).

discussion in that case of limited value here. In particular, the Court considered a provision that prohibited the defendant from incurring “indebtedness for borrowed money.”<sup>67</sup> Ultimately, the Court concluded that indebtedness for borrowed money does “not connote an equity investment,” and that, as a result, a challenged equity investment complied with the terms of the agreement.<sup>68</sup>

In *In re Explorer Pipeline Co.*,<sup>69</sup> the Court considered a provision requiring a supermajority vote of petitioner’s shareholders before it could “incur, create, assume or guarantee any indebtedness for borrowed money” that would result in its aggregate indebtedness exceeding \$15 million.<sup>70</sup> The UAW relies heavily on the Court’s statement in *In re Explorer* that:

Three words—“for borrowed money”—in the end defeat Opposition Respondents’ argument. In construing a supermajority provision in a certificate of incorporation, which, for the reasons set forth above, cannot be “extended by liberal interpretation,” the Court cannot overlook the truism that [petitioner], in the proposed transaction, will not be liable for borrowed money.<sup>71</sup>

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<sup>67</sup> *Id.* at 1020.

<sup>68</sup> *Id.* at 1032.

<sup>69</sup> 781 A.2d 705 (Del. Ch. 2001).

<sup>70</sup> *Id.* at 705.

<sup>71</sup> *Id.* at 718.

That statement was based on the Court’s finding that a trust, and not the petitioner, had borrowed money.<sup>72</sup> Accordingly, the Court concluded that the petitioner had not incurred, created, assumed, or guaranteed indebtedness for borrowed money.<sup>73</sup>

The remaining cases that Fiat relies upon for the proposition that the Notes are “indebtedness for borrowed money” address only the question of whether the Notes are debt.<sup>74</sup> “Indebtedness” is defined as “the condition or state of owing money” or “something owed.”<sup>75</sup> In that regard, it is clear that the Notes represent “indebtedness.” The more important issue is whether the Notes are “indebtedness for borrowed money.”

The background of the Notes is central to that question. As discussed *supra* Section I.B.1, Chrysler issued the Notes to settle claims by the UAW and the CAW. Specifically, in 2007 and 2009, Old CarCo had agreed to provide retiree medical benefits

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<sup>72</sup> *Id.* at 715 (“Although the overall transaction involves ‘borrowed money,’ no money will be borrowed by [petitioner]. Instead, the borrower of the money will be the Trust.”); *id.* at 717 (“Second, the indebtedness for borrowed money in the proposed transaction is created (i.e., brought into existence) by the acts of the lender and the Trust, as borrower. Although [petitioner] may be a participant in the larger transaction, it is not a party to those very acts that create or establish the indebtedness for borrowed money.”).

<sup>73</sup> *Id.* at 717–18 (“Thus, the indebtedness of the Trust for borrowed money was not ‘created’ by [petitioner] through its actions to initiate and facilitate the operating lease transaction, or otherwise.”).

<sup>74</sup> *See In re Enron Creditors Recovery Corp.*, 380 B.R. 307, 321 (Bankr. S.D.N.Y. 2008) (describing “notes, debentures and bonds” as “the three standard forms of debt securities”); *Drexel Burnham Lambert Prods. Corp. v. MCorp.*, 1991 WL 165941, at \*1 (Del. Super. Aug. 13, 1991) (determining “whether or not the circumstances support Drexel’s conclusion that there was a default under the [Swap Agreement] because MCorp was *unable* to pay” (emphasis in original)).

<sup>75</sup> Black’s Law Dictionary 836 (9th ed. 2009).



in two separate Memoranda of Understanding Post-Retirement Medical Care, dated October 12, 2007 and April 29, 2009, respectively (collectively, the “MOUs”).<sup>76</sup> Chrysler and the UAW had also entered into a settlement (the “Chrysler Retiree Settlement”) in the case of *UAW v. Chrysler, LLC*<sup>77</sup> (the “English Case”) that was approved by the District Court for the Eastern District of Michigan on July 31, 2008 and provided for Chrysler to make certain deposits and remittances to the newly established VEBA for the provision of retiree medical benefits.<sup>78</sup> After Old CarCo filed for bankruptcy in 2009, the UAW asserted that Chrysler (*i.e.*, New CarCo) was bound by the MOUs and responsible for providing retiree medical benefits. To resolve that issue, among others, the parties entered into the Settlement Agreement whereby Chrysler agreed to transfer assets to the VEBA, give membership units in Chrysler to the VEBA, and issue the VEBA Note.<sup>79</sup>

While Chrysler theoretically could have settled the UAW’s and the CAW’s claims by paying cash, Chrysler did not have the cash to do so.<sup>80</sup> Instead, Chrysler elected to

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<sup>76</sup> Hirth Aff. Ex. 8 at 1.

<sup>77</sup> C.A. No. 2:07-cv-14310 (E.D. Mich.).

<sup>78</sup> Hirth Aff. Ex. 8 at 1. *See also In re Chrysler LLC*, 405 B.R. 84, 92 (Bankr. S.D.N.Y. 2009).

<sup>79</sup> *See supra* note 9 and accompanying text.

<sup>80</sup> *See In re Chrysler LLC*, 405 B.R. at 91–92.

pay the VEBA with Chrysler equity and the VEBA Note.<sup>81</sup> Similarly, Chrysler Canada settled the CAW's claims through a combination of paying \$104 million in cash and providing the CHCT Note, which had fair value of \$1.087 billion.<sup>82</sup> In other words, Chrysler *financed* the settlement of the claims and incurred a note as a result of that financing. An order by Judge Arthur Gonzalez of the Bankruptcy Court summarized the settlement of the UAW's claims as follows:

the UAW, as the exclusive collective bargaining representative of employees of the Purchaser and the "authorized representative" of UAW-represented retirees of the Debtors [*i.e.*, Old CarCo] under section 1114(c) of the Bankruptcy Code, and the Purchaser engaged in good faith negotiations in conjunction with the Sale Transaction regarding the funding of retiree health benefits within the meaning of section 1114(a) of the Bankruptcy Code. Conditioned upon the consummation of the Sale Transaction and the assumption and assignment of the UAW [Collective Bargaining Agreement], the UAW and the Purchaser [*i.e.*, Chrysler] have entered into [the Settlement Agreement], which, among other things, provides for the **financing** by the Purchaser of modified retiree health care obligations for the Class and Covered Group (as defined in the UAW Retiree Settlement Agreement) through contributions by the Purchaser to the English Case VEBA. The Debtors, the Purchaser and the UAW specifically intend that their actions in connection with the UAW Retiree Settlement Agreement and related undertakings incorporate the compromise of certain claims and rights and shall be deemed to satisfy the requirements of 29 U.S.C. § 186(c)(2) . . .<sup>83</sup>

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<sup>81</sup> *Id.* at 92 ("VEBA would be funded by a combination of a 55% equity interest in New Chrysler and a new \$4.587 billion note.").

<sup>82</sup> Gallagher Aff. Ex. E at 166.

<sup>83</sup> See Gallagher Aff. Ex. A at 22 (emphasis added).

That summary supports my conclusion that the Notes were financed by Chrysler (*i.e.*, given in lieu of money) and caused Chrysler to be indebted to the VEBA and CHCT. Based on those facts, I conclude that the Notes constitute “indebtedness for borrowed money” within the meaning of the Call Option Agreement.

This interpretation does not render the “for borrowed money” language superfluous, as the VEBA contends. Instead, it recognizes that Chrysler effectively had to borrow money from the VEBA to finance its settlement.

My view of the Notes as “indebtedness for borrowed money” is buttressed by two contemporaneously executed documents, namely, the Settlement Agreement and the Indenture, which equate “notes” with “indebtedness for borrowed money.” Specifically, “Debt” is defined in those agreements as “notes, bonds, debentures or other similar evidences of *indebtedness for money borrowed*.”<sup>84</sup> In that regard, the reference to “*other similar evidences of indebtedness for money borrowed*” suggests that the parties understood notes, bonds, and debentures themselves to be evidences of indebtedness for borrowed money. Thus, the contemporaneously executed documents support my determination that indebtedness for borrowed money includes notes, bonds, and debentures.

The VEBA’s arguments to the contrary do not change my conclusion. The VEBA emphasizes that Chrysler deducts for tax purposes its payments of principal under the

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<sup>84</sup> See Hirth Aff. Ex. 8 at 24 (emphasis added); Gallagher Aff. Ex. H § 1.01 (emphasis added).

VEBA Note as a contribution to the VEBA. Specifically, the VEBA relies on Section 4.2(c)(i) of the Amended and Restated Liability Company Operating Agreement of Chrysler Group LLC, dated as of June 10, 2009 (the “Operating Agreement”), which states in relevant part:

Unless advised in writing by independent counsel that a challenge by a U.S. Taxing Authority to such position is likely to be successful in a final determination, the Company and each member agrees that . . . scheduled payment amounts on the VEBA Note shall be treated as payments to the VEBA, which is being maintained pursuant to a collective bargaining agreement within the meaning of Section 419A(f)(5) of the Code, resulting from an arms’ length negotiation between the Company and the UAW and shall be treated as deductible (for both book and tax purposes) as and when such principal payments are made, and the Capital Accounts of the Members shall reflect each Member’s distributive share (as determined by the other provisions of this Agreement) of such deductions as and when such principal payments are made . . . .<sup>85</sup>

Chrysler’s tax treatment of the Notes, however, does not support a reasonable inference that the Notes are not indebtedness for borrowed money under the Call Option Agreement. As an initial matter, under New York law, an inquiry into the parties’ course of conduct is only appropriate “in the instance of an ambiguity or where the contract is of ‘doubtful meaning.’”<sup>86</sup> But even if I were to consider Chrysler’s tax treatment of the

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<sup>85</sup> Hirth Aff. Ex. 15 at 11.

<sup>86</sup> *Slatt v. Slatt*, 64 N.Y.2d 966, 967 (N.Y. 1985).

Notes, the tax treatment would be outweighed by Chrysler’s public filings, which treat the Notes as “debt.”<sup>87</sup>

In sum, the background of the Notes and the plain language of the Call Option Agreement and contemporaneously executed agreements make clear that “indebtedness for borrowed money” includes the Notes. Therefore, I grant judgment on the pleadings in Fiat’s favor and declare that the Notes are “indebtedness for borrowed money.”

## 2. “Obligations in respect of retirees”

Having concluded that the Notes are “indebtedness for borrowed money,” I next must determine whether the Notes nonetheless should be excluded from Net Industrial Debt as “obligations in respect of retirees.” As previously discussed, the Call Option Agreement states, “that the calculation of Net Industrial Debt shall exclude obligations in respect of retirees.”<sup>88</sup>

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<sup>87</sup> See Gallagher Aff. Ex. E at 135–36. Furthermore, for purposes of the pending motions, it would be inappropriate to take into account VEBA’s allegations regarding the tax treatment of the VEBA Note because considering those allegations would require me to rely on factual allegations not contained in the parties’ pleadings. See *NBC Universal v. Paxson Commc’ns Corp.*, 2005 WL 1038997, at \*4 (Del. Ch. Apr. 29, 2005) (“Generally, matters outside the pleadings should not be considered in ruling on a motion for judgment on the pleadings.”); *Kahn v. Roberts*, 1994 WL 70118, at \*2 (Del. Ch. Feb. 28, 1994) (“In considering a Chancery Rule 12(b)(6) motion to dismiss or a Rule 12(c) motion for judgment on the pleadings, only those matters referred to in the pleadings are to be considered by the Court.”); see also *Allen v. Encore Energy P’rs, L.P.*, — A.3d —, 2013 WL 3803977, at \*1 n.2 (Del. July 22, 2013).

<sup>88</sup> Hirth Aff. Ex. 1 at A-4.

The parties' main disagreement relates to the meaning of "in respect of." The VEBA would construe that phrase broadly to include all obligations that "relate to" or "concern" retirees.<sup>89</sup> Fiat, on the other hand, interprets that phrase more narrowly, effectively construing "in respect of" to mean only those obligations directly owed "to" retirees or their plans. In that regard, Fiat distinguishes between obligations to the retiree plans themselves and obligations to the trusts, *i.e.*, the VEBA and the CHCT, which have the sole obligation to fund the plans.<sup>90</sup>

If I were to adopt Fiat's view—that "in respect of" means directly "to"—then the Notes would not constitute obligations in respect of retirees because payments under the Notes are made to the VEBA and the CHCT. Those trusts, in turn, fund their respective employee health care retirement plans.<sup>91</sup>

But, even if I were to interpret "in respect of retirees" broadly, as the VEBA suggests, I still would conclude, as a matter of law, that the Notes do not constitute "obligations in respect of retirees." Chrysler and Chrysler Canada issued the Notes to settle and *terminate* their health care obligations to the retirees. As recounted in the

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<sup>89</sup> See VEBA's Br. in Opp'n to Fiat's Mot. for J. on the Pleadings and in Supp. of its Cross-Mot. for Partial J. on the Pleadings ("VEBA's Opp'n Br.") 30 (citing Webster's Third Int'l Dictionary of the English Language Unabridged 1934 (2002)).

<sup>90</sup> See Hirth Aff. Ex. 8 at 2 ("... the New VEBA shall have serve as the exclusive funding mechanism for the New Plan.").

<sup>91</sup> *Id.*; Countercl. ¶ 11 ("[A] note issued by Chrysler . . . held by the VEBA on behalf of the Chrysler Plan."); Gallagher Aff. Ex. E at 166 ("The new retiree plan will be funded by the [CHCT].").

Settlement Agreement, “[t]he UAW asserts, and [Chrysler] *denies* that [Chrysler] is bound by the MOUs as a successor to [Old CarCo] and is, therefore, responsible for providing retiree medical benefits as contemplated in the MOUs and the Chrysler Retiree Settlement.”<sup>92</sup> Instead of assuming the retiree obligations, as the VEBA asserts Chrysler did, the Settlement Agreement indicates that “all [Chrysler] obligations regarding Retiree Medical Benefits for the Class and the Covered Group *are terminated* as set forth in this Settlement Agreement.”<sup>93</sup>

While the financial statements for the Chrysler Plan state that “[a]ll Consideration paid or transferred to the Plan must be used for the exclusive purpose of providing retiree medical benefits to the Plan’s participants,”<sup>94</sup> that does not mean that the Notes are “obligations in respect of retirees.” Notably, the Chrysler Plan’s financial statements define “Consideration” to consist of “cash, marketable securities, membership interest, and an installment note.”<sup>95</sup> In that regard, Consideration includes securities, negotiable instruments, and cash that could not possibly be considered an obligation by the maker of that instrument to the retirees. Rather, the obligation is to the holder or bearer of that instrument, currently the VEBA. Because the Notes are transferable,<sup>96</sup> the VEBA

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<sup>92</sup> Hirth Aff. Ex. 8 at 1 (emphasis added).

<sup>93</sup> *Id.* at 15.

<sup>94</sup> Gallagher Aff. Ex. I at 6.

<sup>95</sup> *Id.* at 7.

<sup>96</sup> The VEBA Note is payable to the holder in fixed payments and is marketable and transferable to third parties. *See* Gallagher Aff. Ex. H at §§ 1.01 at 9, 3.01, 3.05.

hypothetically could sell the Notes to a third party, and use the proceeds of that sale to provide for retiree medical benefits. If a third party held the Notes, however, I consider it inconceivable that the Notes would be held to constitute “obligations in respect of retirees.”

In sum, Chrysler provided the Notes and other consideration to settle and terminate certain obligations to retirees that Chrysler disputed that it was bound by. Although the VEBA is obliged to use the proceeds from the Notes and other consideration to provide retiree medical benefits, the Notes themselves are obligations only to the holder, which in this case happens to be the VEBA.

For the foregoing reasons, I conclude that the Notes are not obligations in respect of retirees. Based on that conclusion and my previous conclusion that the Notes are indebtedness for borrowed money, I grant judgment on the pleadings in Fiat’s favor on this aspect of its claim and hold that Fiat’s inclusion of the Notes in Net Industrial Debt was proper.

**C. The Inclusion of Net Income Attributable to Non-Controlling Interests in Fiat Parent’s EBITDA**

The next issue is whether, in calculating the Fiat Multiple, Fiat erred by including net income attributable to the VEBA’s non-controlling interest in Chrysler for purposes of determining Fiat Parent’s EBITDA. As previously noted, the Fiat Multiple is equal to “Fiat’s Market Enterprise Value divided by Fiat’s EBITDA as *reported* for the four most



recent fiscal quarters for which financial data has been reported.”<sup>97</sup> The Call Option Agreement defines EBITDA as follows:

“EBITDA” means, for any Person, *the consolidated net income* (loss) of that Person plus (i) interest charges to the extent deducted from consolidated net income; (ii) consolidated income taxes; (iii) depreciation, amortization, depletion and non-cash charges; and (iv) other extraordinary charges.<sup>98</sup>

In this context, “Person” is an “individual,” or, among other forms of entities, a “corporation.”<sup>99</sup>

Fiat Parent’s financial statements report profits and losses for the entire relevant period and also break out profits and losses attributable to “owners of the parent” and “non-controlling interests.”<sup>100</sup> The following table shows the reported profit and loss figures for these categories during the relevant period:

<b>Year</b>	<b>Profit / (Loss)</b>	<b>Attributable to Owners of Parent</b>	<b>Attributable to Non-Controlling Interests</b>
2011	€1.651 billion	€1.334 billion	€0.317 billion
Q1 2012	€0.379 billion	€0.104 billion	€0.275 billion
Q1 2011	€0.037 billion	€0.029 billion	€0.008 billion

To calculate Fiat Parent’s EBITDA for the four most recent financial quarters (*i.e.*, the last three quarters of 2011 and the first quarter of 2012), Fiat added the €1.651 billion

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<sup>97</sup> Hirth Aff. Ex. 1 at A-3.

<sup>98</sup> *Id.* (emphasis added).

<sup>99</sup> *Id.* at A-5.

<sup>100</sup> Hirth Aff. Ex. 9 at 130, Ex. 10 at 26, Ex. 11 at 26.

attributable to 2011 and the €0.379 attributable to Q1 2012 and subtracted the €0.037 attributable to Q1 2011, to get a consolidated net income of €1.993 billion.

The VEBA argues that the EBITDA of Fiat Parent should not include income attributable to non-controlling interests because the Call Option Agreement defines “Person” as a corporation, and does not include affiliated entities consolidated for accounting purposes. In other words, the VEBA asserts that the Call Option Agreement requires the use of the consolidated net income attributable to the owners of Fiat Parent, not the consolidated net income attributable to Fiat Parent in its financial statements. The VEBA notes that, in contrast to the definition of EBITDA, which refers to the consolidated net income of a Person, “Net Industrial Debt” references the financial information “of the Entity and its subsidiaries each as reported on a consolidated basis.”<sup>101</sup>

The VEBA also argues that, structurally speaking, its interpretation makes more sense. The Fiat Multiple is a fraction in which the numerator is Fiat Parent’s Market Enterprise Value and the denominator is Fiat Parent’s EBITDA. Fiat Parent’s Market Enterprise Value is the sum of its Market Equity Value and Net Industrial Debt. To the extent the Market Equity Value excludes minority interests that Fiat Parent does not

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<sup>101</sup> Hirth Aff. Ex. 1 at A-4. For purposes of the Call Option Agreement, “Entity” has the same meaning as “Person,” except that it excludes individuals. *Id.* at A-3.

own,<sup>102</sup> the VEBA contends that Fiat Parent's EBITDA also should exclude net income attributable to minority interests that Fiat Parent does not own.

Fiat, on the other hand, argues that the "as reported" language in the definition of "Fiat Multiple" makes clear that the relevant EBITDA is the EBITDA derived from the reported information in Fiat Parent's financial statements. Fiat also contends that it would not be feasible to calculate an EBITDA that excludes non-controlling interests from reported data because Fiat Parent's financial statements do not report interest charges, income taxes, and depreciation attributable to non-controlling interests. Finally, Fiat claims that the VEBA's interpretation also would require the excision of results attributable to non-controlling interests as to any entity relevant to the determination of the "Market Multiple," including each of the "Reference Automotive Manufacturers." In that regard, Fiat avers that the parties could not have intended the parties to undertake such complex calculations.

As an initial matter, I am not persuaded that the purported inconsistency identified by the VEBA between the figures used for Fiat Parent's EBITDA and Market Enterprise Value warrants adopting the VEBA's method of calculating Fiat Parent's EBITDA. Under the VEBA's theory, the calculation of Market Enterprise Value itself would be

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<sup>102</sup> As previously noted, Market Equity Value is equal to the outstanding shares of an entity times the average share price of that entity. *See supra* note 25 and accompanying text. Although not specified in its briefs, the VEBA's contention that Market Equity Value would exclude the value of non-controlling interests is likely based on an efficient market theory. That is, in an efficient market investors would internalize the fact that Fiat does not own 100% of its Chrysler subsidiary, for example.

internally inconsistent. As previously discussed, Market Enterprise Value is equal to Net Industrial Debt plus Market Equity Value.<sup>103</sup> While Market Equity Value conceivably might exclude non-controlling interests, as the VEBA asserts, Net Industrial Debt does not. Net Industrial Debt is determined based on the financial information “of the Entity and its subsidiaries each as reported on a consolidated basis”; therefore, it would include debt attributable to non-controlling interests.<sup>104</sup>

Based on the structure and plain language of the Call Option Agreement, I conclude that EBITDA, as used in that agreement, includes income attributable to non-controlling interests. Under both GAAP and IFRS, consolidated net income would include Fiat Parent’s non-controlling interests. For example, in 2007, the Financial Accounting Standards Board released Statement of Financial Accounting Standards No. 160 which “change[d] the way the consolidated income statement is presented. It requires consolidated net income to be reported at amounts that include the amounts attributable to both the parent and the noncontrolling interest.”<sup>105</sup> Under International

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<sup>103</sup> Hirth Aff. Ex. 1 at A-4.

<sup>104</sup> *Id.*

<sup>105</sup> FASB, Statement of Financial Accounting Standards No. 160, Noncontrolling Interests in Consolidated Financial Statements (2007), *available at* <http://www.fasb.org/cs/BlobServer?blobcol=urldata&blobtable=MungoBlobs&blobkey=id&blobwhere=1175820919516&blobheader=application%2Fpdf>. *See also* Technical Amendments to Rules, Forms, Schedules, and Codification of Financial Reporting Policies, 74 Fed. Reg. 18,612-01 (Apr. 23, 2009) (“[Statement No.] 160 changes the way the consolidated income statement is presented. It requires consolidated net income to be reported at amounts that include the amounts attributable to both the parent and the noncontrolling interest.”). I take judicial

Accounting Standard (“IAS”) 27, under which Fiat Parent reports,<sup>106</sup> “an entity combines the financial statements of the parent and its subsidiaries line by line by adding together like items of assets, liabilities, equity, income and expenses.”<sup>107</sup> IAS 27, however, also separately identifies “the non-controlling interest in the profit or loss of consolidated subsidiaries for the reporting period.”<sup>108</sup>

The consolidated income statement of Fiat Parent reports three figures: (1) profit/(loss) for the period; (2) profit/(loss) for the period attributable to “[o]wners of the parent”; (3) and profit/(loss) for the period attributable to “[n]on-controlling interests.” Of those three figures, I find that only the first reasonably could be understood to represent the consolidated net income of the “Person,” Fiat Parent. That interpretation is the only one that gives a reasonable meaning to the *consolidated* in “consolidated net

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notice of both GAAP and IFRS rules under Delaware Rule of Evidence 201(b), which includes “facts capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” *See* D.R.E. 201(b); *see also SEC v. Goldstone*, 2013 WL 3456875, at \*143 (D.N.M. July 8, 2013) (taking judicial notice of financial accounting standards under Federal Rules of Evidence Rule 201).

<sup>106</sup> *See* Hirth Aff. Ex. 9 at 157 (“[O]n 24 May 2011 . . . Fiat acquired an additional 16% (on a fully-diluted basis) of the ownership interest of Chrysler, increasing its interest to 46% (on a fully-diluted basis). As a result of the potential voting rights associated with options that became exercisable on that date, Fiat was deemed to have acquired control of Chrysler under IAS 27 – *Consolidated and Separate Financial Statements*. Accordingly, Chrysler has been consolidated on a line-by-line basis by Fiat with effect from that date (for practical purposes, 1 June 2011).”).

<sup>107</sup> *See* IAS 27, Consolidated and Separate Financial Statements ¶ 18 (2009), available at [http://ec.europa.eu/internal\\_market/accounting/docs/consolidated/ias27\\_en.pdf](http://ec.europa.eu/internal_market/accounting/docs/consolidated/ias27_en.pdf).

<sup>108</sup> *Id.* ¶ 18(b).

income.” The latter two figures, on the other hand, constitute breakouts of the consolidated net income figure that may be of interest to investors, but do not reflect a reported EBITDA or even an input to a reliable and objective basis for computing EBITDA from reported information on Fiat Parent. In that regard, I reject the VEBA’s creative argument—that EBITDA is defined as “the consolidated net income (loss) of that Person” and therefore should include only the net income attributable to the owners of Fiat Parent—as being inconsistent with a common understanding of consolidation.

Moreover, the VEBA’s interpretation would render the “as reported” language superfluous. Specifically, the VEBA’s construction of the Call Option Agreement would require me to ignore the net income of Fiat Parent “as reported” and adjust that number to exclude profits attributable to non-controlling interests. The VEBA’s interpretation also would require the parties to stray further away from Fiat Parent’s financials “as reported,” and attempt to ascertain, among other things, what Fiat Parent’s interest charges, income taxes, depreciation, and amortization, excluding non-controlling interests, would be.<sup>109</sup> But, Fiat Parent does not report the extent to which its interest charges, income taxes, depreciation, and amortization are attributable to non-controlling interests.<sup>110</sup>

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<sup>109</sup> Alternatively, the parties would have to concoct a theoretical EBITDA figure using an assemblage of mismatched parts that combines a net income figure that excludes income attributable to non-controlling interests with interest charge, income tax, depreciation, and amortization figures that do not. Indeed, the VEBA seems to suggest that this would be the appropriate approach. *See* VEBA’s Reply Br. in Supp. of its Cross-Mot. for Partial J. on the Pleadings 17.

<sup>110</sup> *See* Hirth Aff. Exs. 9–11.

Similarly, the VEBA's interpretation would require the parties, in calculating the Market Multiple, to excise from the relevant metrics of the Reference Automotive Makers the net income, interest charges, income taxes, depreciation, and amortization attributable to non-controlling interests. While Chrysler's peers, such as Ford Motor Company and General Motors Company, report income attributable to non-controlling interests, they, like Chrysler, do not break out interest charges, income taxes, depreciation, or amortization attributable to non-controlling interests.<sup>111</sup>

I am convinced that the parties did not intend EBITDA "as reported" to include such complex and difficult adjustments. Accordingly, I conclude that Fiat's interpretation of EBITDA, which includes net income attributable to non-controlling interests, is the only reasonable interpretation of the relevant provisions of the Call Option Agreement. Therefore, I will grant judgment in favor of Fiat on this question.

**D. The Exclusion of Indebtedness of Finance Company Subsidiaries from Fiat Parent's Net Industrial Debt**

The parties' next disagreement relates to Fiat's treatment of Fiat Parent's finance company subsidiaries' debt. The Call Option Agreement defines Net Industrial Debt as:

for any Entity, total indebtedness for borrowed money less cash and cash equivalents, of the Entity and its subsidiaries each as reported on a consolidated cash basis in accordance with GAAP; provided that the calculation of Net Industrial

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<sup>111</sup> See, e.g., Ford Motor Co., 2011 Annual Report (2011), available at [http://corporate.ford.com/doc/2011\\_annual\\_report.pdf](http://corporate.ford.com/doc/2011_annual_report.pdf); Gen. Motors Co., 2011 Annual Report (2011), available at [http://www.gm.com/content/dam/gmcom/COMPANY/Investors/Stockholder\\_Information/PDFs/2011\\_GM\\_Annual\\_Report.pdf](http://www.gm.com/content/dam/gmcom/COMPANY/Investors/Stockholder_Information/PDFs/2011_GM_Annual_Report.pdf).

*Debt shall exclude obligations in respect of retirees and indebtedness of finance companies to the extent included in the consolidated results of such Entity.*<sup>112</sup>

In calculating total indebtedness for borrowed money, Fiat subtracted Fiat Parent's financial services debt from Fiat Parent's consolidated debt. Specifically, Fiat used the following data taken from Fiat Parent's first quarter 2012 interim financial statements<sup>113</sup>:

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<sup>112</sup> Hirth Aff. Ex. 1 at A-4 (emphasis added).

<sup>113</sup> Gallagher Aff. Ex. B at 19.



*Net Debt by Activity (at 31 March 2012 and 31 December 2011)*

(€ million)	31.03.2012			31.12.2011		
	Consolidated	Industrial Activities	Financial Services	Consolidated	Industrial Activities	Financial Services
<b>Debt:</b>	(27,808)	(25,720)	(3,508)	(26,772)	(24,796)	(3,595)
Asset-backed financing	(439)	(89)	(373)	(710)	(213)	(497)
Other debt	(27,349)	(25,631)	(3,135)	(26,062)	(24,583)	(3,098)
Current financial receivables from jointly-controlled financial services companies (a)	23	23	-	21	21	-
Intersegment financial receivables	-	1,332	88	-	1,339	80
<b>Debt, net of intersegment and current financial receivables from jointly-controlled financial services companies</b>	<b>(27,785)</b>	<b>(24,365)</b>	<b>(3,420)</b>	<b>(26,751)</b>	<b>(23,236)</b>	<b>(3,515)</b>
Other financial assets (b)	573	574	-	557	559	-
Other financial liabilities (b)	(262)	(261)	(2)	(429)	(428)	(3)
Current securities	212	159	53	199	147	52
Cash and cash equivalents	18,293	18,121	172	17,526	17,429	97
<b>Net debt</b>	<b>(8,969)</b>	<b>(5,772)</b>	<b>(3,197)</b>	<b>(8,898)</b>	<b>(5,529)</b>	<b>(3,369)</b>

(a) Includes debt payable by FGA Capital to other Fiat Group companies

(b) Includes fair value of derivative financial instruments

*Net Debt by Activity for Fiat excluding Chrysler (at 31 March 2012 and 31 December 2011)*

(€ million)	31.03.2012			31.12.2011		
	Fiat excluding Chrysler	Industrial Activities excluding Chrysler	Financial Services	Fiat excluding Chrysler	Industrial Activities excluding Chrysler	Financial Services
<b>Debt:</b>	(17,444)	(15,356)	(3,508)	(16,245)	(14,269)	(3,595)
Asset-backed financing	(443)	(73)	(373)	(679)	(182)	(497)
Other debt	(17,001)	(15,283)	(3,135)	(15,566)	(14,087)	(3,098)
Current financial receivables from jointly-controlled financial services companies (a)	23	23	-	21	21	-
Intersegment financial receivables	-	1,332	88	-	1,339	80
<b>Debt, net of intersegment and current financial receivables from jointly-controlled financial services companies</b>	<b>(17,421)</b>	<b>(14,001)</b>	<b>(3,420)</b>	<b>(16,224)</b>	<b>(12,709)</b>	<b>(3,515)</b>
Other financial assets (b)	482	483	-	430	432	-
Other financial liabilities (b)	(181)	(180)	(2)	(329)	(328)	(3)
Current securities	212	159	53	199	147	52
Cash and cash equivalents	9,865	9,693	172	10,106	10,009	97
<b>Net debt</b>	<b>(7,043)</b>	<b>(3,846)</b>	<b>(3,197)</b>	<b>(5,818)</b>	<b>(2,449)</b>	<b>(3,369)</b>

(a) Includes debt payable by FGA Capital to other Fiat Group companies

(b) Includes fair value of derivative financial instruments

Due to the role of the centralized treasury services companies, debt for Industrial Activities (Fiat excluding Chrysler) also includes funding raised by the central treasury on behalf of consolidated Financial Services companies (included under intersegment financial receivables).

Intersegment financial receivables for Financial Services companies, on the other hand, represent loans or advances to industrial companies – for receivables sold to Financial Services companies that do not meet the derecognition requirements of IAS 39 – as well as liquidity deposited temporarily with the central treasury.

By excluding the €3.420 billion in “financial services” debt as reported in Fiat Parent’s financial statements, Fiat calculated Fiat Parent’s total indebtedness for borrowed money to be €24.365 billion.<sup>114</sup>

The VEBA protests that Fiat Parent’s “financial statements make clear that a portion of the debt of Fiat Parent’s financial services subsidiaries represents inter-company loans (which are eliminated in consolidation) and thus not indebtedness of finance companies to the extent included in the consolidated results of Fiat Parent.”<sup>115</sup>

That argument is based on Fiat Parent’s 2011 Annual Report, which states:

Financial services companies, though, obtain funds only partially from the market: the remaining are obtained from Fiat S.p.A. through the Group’s treasury companies (included in industrial companies), which lend funds both to industrial Group companies and to financial services companies as the need arises.<sup>116</sup>

In response, Fiat emphasizes that intercompany loans would be reflected under “intersegment financial receivables” and not “finance services” debt. Notably, Fiat’s interim financial statements disclose that:

Due to the role of the centralized treasury services companies, debt for Industrial Activities (Fiat excluding Chrysler) also includes funding raised by the central treasury on behalf of consolidated Financial Services companies (included under intersegment financial receivables).<sup>117</sup>

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<sup>114</sup> ~~€27.785 billion~~ – ~~€3.420 billion~~ = €24.365 billion.

<sup>115</sup> VEBA’s Opp’n Br. 34.

<sup>116</sup> Hirth Aff. Ex. 9 at 140.

<sup>117</sup> Gallagher Aff. Ex. B at 19.

Fiat argues that because “intersegment financial receivables” are subtracted from the net debt for industrial activities, the resultant €24.365 billion figure is the proper figure to use for total indebtedness for borrowed money.

In that regard, it is not clear from the pleadings and Fiat Parent’s financial statements whether inter-company loans are entirely included in “intersegment financial receivables” or whether a portion of the debt of Fiat Parent’s financial services subsidiaries represents inter-company loans. Under Rule 12(c), I must deny a motion for judgment on the pleadings unless a claimant can prove no set of facts in support of its claims which would entitle it to relief or where the meaning cannot be determined without affording the non-movant an opportunity to develop, through discovery, any relevant extrinsic evidence. Because that standard has not been met, I deny judgment on the pleadings on the extent of Fiat’s exclusion of indebtedness of Fiat Parent’s finance company subsidiaries in its calculation of Net Industrial Debt.<sup>118</sup>

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<sup>118</sup> An additional reason why I refuse to grant judgment on the pleadings on the exclusion of indebtedness of Fiat Parent’s finance company subsidiaries is that the financial statements that Fiat relies upon—Fiat Parent’s first quarter 2012 interim financial statements—were prepared in accordance with IFRS. The Call Option Agreement, however, indicates that Net Industrial Debt is to be calculated “as reported on a consolidated cash basis *in accordance with GAAP*.” Hirth Aff. Ex. 1 at A-4. Fiat dismisses the difference as a “scrivener’s error” noting that Fiat Parent is an Italian corporation that reports following IFRS “as all Italian corporations do.” See Tr. 58–60. But, that argument was not raised in Fiat’s briefs. At this early stage of the proceedings, Fiat has “failed to meet the ‘heavy presumption that a deliberately prepared and executed written instrument manifest[s] the true intention of the parties.’” *Stonebridge Capital, LLC v. Nomura Int’l PLC*, 68 A.D.3d 546, 548 (N.Y. App. Div. 2009) (quoting *George Backer Mgmt. Corp. v. Acme Quilting Co.*, 413 N.Y.S.2d 135, 139 (N.Y. App. Div. 1978)). Indeed, if Fiat is wrong, and the parties did intend GAAP to apply, it

## E. The Treatment of Interest, Non-Cash, and Extraordinary Charges

As previously discussed, EBITDA is defined as:

the consolidated net income (loss) of [a] Person *plus* (i) *interest charges to the extent deducted from consolidated net income*; (ii) consolidated income taxes; (iii) depreciation, amortization, depletion and *non-cash charges*; and (iv) *other extraordinary charges*.<sup>119</sup>

The VEBA takes issue with Fiat's calculation of EBITDA.<sup>120</sup> Most importantly, the VEBA challenges whether "charges" in the sense of "non-cash charges" or "extraordinary charges," should be calculated on a net basis.

The VEBA contends that Fiat should have netted out "charges" "so as to provide an accurate approximation of a company's on-going ability to generate cash flow from operations."<sup>121</sup> That is, the VEBA would offset charges that would reduce EBITDA against gains or charges that would increase EBITDA. Fiat, on the other hand, added back only those charges that were losses or expenses. Fiat bases its view on the

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would be useful for the Court to receive evidence on the differences between GAAP and IFRS, if any, as they relate to this aspect of the calculation of Net Industrial Debt.

<sup>119</sup> Hirth Aff. Ex. 1 at A-3 (emphasis added).

<sup>120</sup> In its opposition brief, the VEBA objected to Fiat's calculation of EBITDA because it "uses numbers that, upon inspection, do not appear in the financial statements upon which it relies." VEBA's Opp'n Br. 36. In its responsive brief, Fiat explained its calculation and provided the sources for those numbers. The VEBA did not question those numbers again either in its final brief or at oral argument. Moreover, Fiat's calculation appears well-substantiated by Fiat Parent's financial statements. Because the only apparent dispute remaining involves the interpretation of "charges," I focus on that disagreement.

<sup>121</sup> *Id.* at 38.

definition of “charges” as an expense or cost. Fiat also notes that the parties *could* have provided, but did not provide, that “charges” would be determined on a net basis, as they did in the definition of EBITDA which refers to “consolidated *net* income.”

“Charges” is not a defined term in the Call Option Agreement. To give that term meaning, Fiat urges this Court to rely on certain dictionary definitions of “charge” that define it as an expense or cost.<sup>122</sup> The *Handbook of International Financial Terms*, on the other hand, defines an extraordinary charge or extraordinary item as follows:

A one-off income or expense in a financial statement that is outside the normal business activity of the reporting entity and is unlikely to be repeated. Although Generally Accepted Accounting Principles defines what constitutes an extraordinary item, in practice firms have some discretion over reporting such one-offs. The exact treatment of the item may significantly affect the reported profit (or loss) for the financial year. Most analysts would exclude any gains (losses) when evaluating a business. Under the UK's Financial Reporting Standard 3, extraordinary items are now subject to severe restrictions.<sup>123</sup>

Notably, the latter definition recognizes that extraordinary charges could include a *one-off income* or *gain*. Moreover, based on the limited record currently available, it appears reasonable that the parties may have intended that netting both extraordinary gains and losses would lead to a better approximation of a company's ability to generate earnings.

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<sup>122</sup> See Random House Webster's Unabridged Dictionary 347 (2d. ed. 2009); Black's Law Dictionary (9th ed. 2009).

<sup>123</sup> Peter Moles & Nicholas Terry, *The Handbook of International Financial Terms* 204 (1997).

Because the term “charges” in the Call Option Agreement is susceptible to at least two reasonable interpretations, I conclude that the term is ambiguous. Accordingly, the parties should be allowed to develop evidence regarding the intended meaning of that term through discovery and expert witnesses, if appropriate. Therefore, I deny Fiat’s motion for judgment on the pleadings on this issue.

**F. The PTE’s Purported Requirements and Conditions**

Finally, the VEBA contends that applicable federal law bars the VEBA’s sale of Chrysler shares at the price calculated by Fiat. According to the VEBA, Section 406(a) of ERISA prohibits the VEBA’s sale of Chrysler shares to Fiat unless certain conditions of the PTE are met. Those purported conditions include, among others, that: (1) the formula in the Call Option Agreement as applied by Fiat, was designed to approximate the fair market value of Chrysler’s shares at the time of exercise; (2) the terms of any transaction be no less favorable to the Chrysler Plan than the terms negotiated at arms’ length under similar circumstances between unrelated parties; and (3) the independent fiduciary, *i.e.*, Brock, determine that the transaction is in the interest of the Chrysler Plan and protective of the participants and beneficiaries of that plan. For example, the VEBA states in its third affirmative defense:

In its application to the Department of Labor, Chrysler represented that the exercise price of the call options will be determined pursuant to formulas designed to approximate the fair market value of the Shares at the time of exercise. With respect to Fiat’s July 2012 exercise of a call option, the express condition of the exemption is not satisfied because the formula for determining the Pre-IPO Call Option Exercise Price set out in the Call Option Agreement, as applied by Fiat, is not designed to approximate the fair market value of the

Called Shares. Accordingly, the relief requested by Fiat cannot be granted because the sale of the Called Shares at the purchase price determined by Fiat would constitute a transaction which is prohibited by applicable Federal law.<sup>124</sup>

In effect, the VEBA asks this Court to determine that Fiat's redemption of the Called Shares would invalidate the currently effective PTE, thus rendering Section 406(a) of ERISA applicable to this transaction. The VEBA further contends that, absent the PTE, Section 406(a) would prohibit the redemption of the Called Shares.

Although neither party raised this issue in their briefs, I seriously question whether this Court has subject matter jurisdiction to hear and decide questions regarding whether the conditions allegedly imposed by the DOL in the PTE are satisfied here or whether the PTE is valid. In that regard, I note that this Court may raise the issue of subject matter jurisdiction *sua sponte*,<sup>125</sup> and that the parties to an agreement cannot confer subject matter jurisdiction by consent or agreement.<sup>126</sup>

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<sup>124</sup> Countercl. at 17. *See also id.* at 38 ¶ 65 (“Absent compliance with the terms and conditions of the [PTE], the VEBA’s sale of Chrysler Shares pursuant to the Call Option Agreement to Fiat, . . . would constitute a prohibited transaction under ERISA.”).

<sup>125</sup> *See Christiana Town Ctr., LLC v. New Castle Cty.*, 2003 WL 21314499, at \*3 (Del. Ch. June 6, 2003) (“Rather, it is clear that, unlike many jurisdictions, judges in the Delaware Court of Chancery are obligated to decide whether a matter comes within the equitable jurisdiction of this Court regardless of whether the issue has been raised by the parties.” (internal quotation marks and citations omitted)), *aff’d*, 841 A.2d 307, 2004 WL 77868 (Del. 2004) (ORDER).

<sup>126</sup> *El Paso Natural Gas Co. v. TransAm. Natural Gas Corp.*, 669 A.2d 36, 39 (Del. 1995).

In a case similar to this case, *Unaka Co. v. Newman*,<sup>127</sup> the United States District Court for the Eastern District of Tennessee was tasked with determining whether an exemption from the prohibition against transactions between an ERISA plan and a related party applied because certain conditions in the exemption purportedly had not been met.<sup>128</sup> The District Court concluded that its jurisdiction to decide that issue was “exclusive” under 29 U.S.C. § 1132(c)(1) (now 29 U.S.C. § 1132(e)(1)) and 28 U.S.C. § 1331.<sup>129</sup> Section 1132(e)(1) of Title 29 states:

Except for actions under subsection (a)(1)(B) of this section, *the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter* brought by the Secretary or by a participant, beneficiary, fiduciary, or any person referred to in section 1021(f)(1) of this title. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under paragraphs (1)(B) and (7) of subsection (a) of this section.<sup>130</sup>

It appears unlikely, therefore, that this Court would have jurisdiction to determine whether conditions prescribed in an exemption granted by the DOL have been met.

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<sup>127</sup> 2005 WL 1118065 (E.D. Tenn. Apr. 26, 2005).

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at \*1.

<sup>130</sup> 29 U.S.C. § 1132(e)(1) (emphasis added). This action does not come within the categories of concurrent jurisdiction delineated in either Section 1132(a)(1)(B) or Section 1132(a)(7), which deal respectively with civil actions brought by: (1) a participant or beneficiary to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan; and (2) a state to enforce compliance with a qualified medical child support order.



Indeed, a pertinent Federal Regulation provides that “[t]he determination as to whether, under the totality of the facts and circumstances, a particular statement contained in (or omitted from) an exemption application constitutes a material fact or representation is made by the [DOL].”<sup>131</sup> The DOL also may take steps to revoke or modify an exemption, “[i]f, after an exemption takes effect, changes in circumstances, including changes in law or policy, occur which call into question the continuing validity of the [DOL]’s original findings concerning the exemption.”<sup>132</sup>

Based on the *Unaka* case and the cited statutes and regulations, I conclude for purposes of the pending motions for judgment on the pleadings that serious questions exist as to whether this Court has subject matter jurisdiction to decide the issues raised in the VEBA’s third, fourth, and fifth affirmative defenses and fourth and fifth counterclaims. Because the parties did not address these jurisdictional issues in any detail in their briefing, I deny the pending motions for judgment on the pleadings to the extent they relate to those PTE-based defenses and counterclaims without prejudice to the VEBA’s ability to pursue them at a later time.

### **G. Specific Performance**

Fiat contends it is entitled to delivery of the Called Shares in exchange for the payment of \$139.7 million. Under New York law, to obtain a decree specific performance Fiat must show that: (1) the Call Option Agreement is a valid contract; (2)

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<sup>131</sup> 29 C.F.R. § 2570.49(e).

<sup>132</sup> *Id.* § 2570.50(a).

Fiat has *substantially performed* under the contract; (3) the VEBA is able to perform its obligations; and (4) Fiat has no adequate remedy at law.<sup>133</sup> These elements must be proven by a preponderance of the evidence under New York law.<sup>134</sup> “Once that showing is made, ‘[a] party seeking [specific performance] must show equitable factors in its favor . . . and must also demonstrate that its risk of injury, if the injunction is denied, is one that after balancing the equities entitles it to relief.’”<sup>135</sup>

In addition, I note that the parties agreed in Section 5.9(a) of the Call Option Agreement that

Monetary damages would not be an adequate remedy in the event that any of the covenants or agreements in this Agreement is not performed in accordance with its terms, and it is therefore agreed that, in addition to and without limiting any other remedy or right it may have, the non-breaching party will have the right to an injunction, temporary restraining order or other equitable relief in any state court sitting in the State of Delaware enjoining any such breach or threatened breach and enforcing specifically the terms and provisions hereof.

At this point, Fiat has succeeded in proving some, but not all of its claims. Consequently, Fiat has not yet demonstrated that the VEBA is required to deliver the 54,154 shares in return for Fiat’s payment of \$139.7 million. Thus, it would be

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<sup>133</sup> *In re IBP, Inc. S’holders Litig.*, 789 A.2d 14, 52 (Del. Ch. 2001) (applying New York law).

<sup>134</sup> *Id.*

<sup>135</sup> *Laurus Master Fund, Ltd. v. Versacom Int’l, Inc.*, 2003 WL 21219791, at \*3 (S.D.N.Y. May 21, 2003) (quoting *Nemer Jeep-Eagle, Inc. v. Jeep-Eagle Sales Corp.*, 992 F.2d 430, 433 (2d Cir. 1993)) (alterations in original).

premature for me to enter an order requiring the VEBA to deliver the Called Shares to Fiat at that price.

#### **H. Attorneys' Fees**

The Call Option Agreement provides for the award of attorneys' fees to the prevailing party.<sup>136</sup> Fiat has prevailed as to the inclusion of the Notes in Net Industrial Debt and the inclusion of net income attributable to non-controlling interests in Fiat Parent's EBITDA, but this proceeding will continue as to, at least, the amount of indebtedness of finance companies to be included in Net Industrial Debt and the treatment of interest, non-cash, and extraordinary charges in the computation of EBITDA. Because this litigation is only partially resolved and must continue, I will defer addressing the question of attorneys' fees pursuant to Section 5.4 of the Call Option Agreement until the conclusion of this matter.

#### **III. CONCLUSION**

For the foregoing reasons, the Court grants Fiat's Motion for Judgment on the Pleadings and denies the VEBA's opposing Motion for Partial Judgment on the Pleadings on the question of:

1. whether the Notes should be included in the calculation of Net Industrial Debt (*i.e.*, the Court rejects the allegations set forth in paragraph 36(a) of the VEBA's Counterclaims); and

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<sup>136</sup> Hirth Aff. Ex. 1 § 5.4 ("In any action or proceeding brought to enforce any provision of this Agreement or where any provision hereof is validly asserted as a defense, the successful party shall, to the extent permitted by applicable law, be entitled to recover reasonable attorneys' fees in addition to any other available remedy.").

2. whether net income attributable to non-controlling interests should be included in Fiat Parent's EBITDA (*i.e.*, the Court rejects the allegations in paragraphs 36(c) and 38(a) of the VEBA's Counterclaims).

In all other respects, Fiat's Motion for Judgment on the Pleadings and the VEBA's opposing Motion for Partial Judgment on the Pleadings are denied.

**IT IS SO ORDERED.**