No. 08-3866

IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

In re DENNIS L. MIERKOWSKI AND REBECCA J. MIERKOWSKI,
Debtor.

FORD MOTOR CREDIT COMPANY, LLC,
Creditor-Appellant

— v. —

DENNIS L. MIERKOWSKI and REBECCA J. MIERKOWSKI
Debtors-Appellese

ON APPEAL FROM THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF MISSOURI

BRIEF AMICUS CURIAE NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS SEEKING AFFIRMANCE OF THE BANKRUPTCY COURT'S DECISION ON ALTERNATIVE GROUNDS

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CORPORATE DISCLOSURE STATEMENT

FORD MOTOR CREDIT COMPANY, LLC v. DENNIS L. MIERKOWSKI and REBECCA J. MIERKOWSKI, No. 08-3866

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure *Amicus Curiae* the National Association of Consumer Bankruptcy Attorneys makes the following disclosure:

1) For non-governmental corporate parties please list all parent corporations. **NONE.**

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4) In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: 1) the debtor, if not identified in the case caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is an active participant in the bankruptcy proceedings. If the debtor or trustee is not participating in the appeal, this information must be provided by appellant. **NOT APPLICABLE.**

_/s/ Tara Twomey_____
Tara Twomey, Esq.
Attorney for the National Association of Consumer Bankruptcy Attorneys

Dated: March 2, 2009

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STATEMENT OF INTEREST OF NACBA

Incorporated in 1992, the National Association of Consumer Bankruptcy Attorneys ("NACBA") is a non-profit organization of more than 2500 consumer bankruptcy attorneys nationwide. Member attorneys and their law firms represent debtors in an estimated 250,000 bankruptcy cases filed each year.

NACBA's corporate purposes include education of the bankruptcy bar and the community at large on the uses and misuses of the consumer bankruptcy process. Additionally, NACBA advocates nationally on issues that cannot adequately be addressed by individual member attorneys. It is the only national association of attorneys organized for the specific purpose of protecting the rights of consumer bankruptcy debtors. NACBA has filed *amicus curiae* briefs in various courts seeking to protect the rights of consumer bankruptcy debtors. *See*, *e.g.*, *Kawaauhau v. Geiger*, 523 U.S. 57 (1998); *In re Pyatt*, 486 F.3d 423 (8th Cir. 2007); *In re Scarborough*, 461 F.3d 406 (3rd Cir. 2006).

The NACBA membership has a vital interest in the outcome of this case. NACBA members primarily represent individuals, many of whom own motor vehicles. The 2005 amendments to section 1325(a) added an unenumerated, hanging paragraph at the end of the section that deals with certain claims secured by motor vehicles. The effect of this paragraph has been widely debated by creditors, debtors, counsel and commentators. This appeal relates to whether a

creditor's claim is covered by the hanging paragraph where a portion of the financing is used to pay off negative equity from a trade-in vehicle. The answer to that question will determine whether many debtors are able to keep, or will have to surrender, their vehicles.

CONSENT

This brief is being filed with the consent of the parties.

SUMMARY OF ARGUMENT

The 2005 amendments created a narrow exception to the general rule under which debtors are permitted to modify the right of creditors. The exception created by the "hanging paragraph" at the end of section 1325(a) is carefully limited in time, by type and use of the goods, and by the type of claim protected. Specifically, one requirement is that the creditor must have a purchase money security interest securing the debt that is the subject of the claim.

An upside-down car is one in which in which the value of the car is less than the amount owed on it. It is not unusual for owners with longer-term loans, low or no down payments, and/or cars that are depreciating rapidly to be "upside-down." When an owner of an upside-down car wants to trade-in that car and buy a new car, not only must he pay the purchase price of the new car, the negative equity on the old car must also be paid off. While it is common for debtors to finance the payoff of the negative equity, funds advanced to pay off negative equity for a trade-in vehicle do not constitute a purchase money obligation secured by the new car under the Uniform Commercial Code. Such funds are not part of the cash price of the vehicle, nor are they obligations for expenses incurred in connection with acquiring right in the collateral. The financing of negative equity may be convenient but it is not necessary to acquire rights in the new collateral.

The Creditor seeks to expand the very narrow exception created by Congress far beyond its intended scope—by converting the unsecured negative equity from a trade-in vehicle into a purchase money obligation that is protected from bifurcation. A ruling in favor of Creditor on this issue paves the way for them to manipulate transactions in ways that would permit the creditor to transform an otherwise unsecured debt into one that could not be modified in bankruptcy, by simply insisting on the refinancing of any type of unsecured debt as a condition of granting a purchase money loan.

This Court should hold that the financing of negative equity does not constitute a purchase money obligation. This Court should further hold that the hanging paragraph is only applicable where the entire debt is "purchase money." Because Creditor's claims are not entirely purchase money, the bankruptcy court's decision should be affirmed.

ARGUMENT

I. In light of longstanding bankruptcy policies, the provisions of the "hanging paragraph" of section 1325(a) should be construed narrowly.

The two main objectives of the Bankruptcy Code are to provide a fresh start for the debtor and the fair and orderly repayment of creditor to the extent possible. To foster a debtor's fresh start, the Bankruptcy Code generally permits debtors to modify the rights of secured and unsecured creditors to reflect what they would receive in a liquidation of the debtor's assets. 11 U.S.C. § 1322(b)(2). To ensure the fair repayment of creditors longstanding bankruptcy policy favors equality of distribution among like creditors. *See* 11 U.S.C. §§ 1322(a)(3); 1322(b)(1).

Debtors frequently modify the rights of secured creditors by splitting or "bifurcating" the creditor's claim into two parts: the secured portion which is equal to the value of the collateral and an unsecured portion represented by any amount owed over the value of the collateral. 11 U.S.C. § 506. The 2005 enactment of the "hanging paragraph" at the end of section 1325(a) created an exception to this common method of dealing with secured creditors. The exception at issue in this case, however, is carefully limited 1) in time, 2) by type and use of the goods, and 3) by the type of claim protected. Specifically, for motor vehicles, the debt must have been incurred within 910 days of the filing of the petition, 2) the collateral must be a motor vehicle acquired for personal use of the debtor, and 3) the creditor

must have a purchase money security interest securing the debt that is the subject of the claim. 11 U.S.C. § 1325(a).

As an exception to the general rules favoring equal treatment of creditors and permitting debtors to modify claims, the elements of the hanging paragraph should be construed narrowly. *See In re Miller,* 454 F.3d 899 (8th Cir. 2006)("Section 549(c) serves as an exception to the automatic stay imposed when a bankruptcy petition is filed, and as such, it should be construed narrowly"); *In re Kaspar*, 125 F.3d 1358, 1361 (10th Cir. 1997)("[e]xceptions to discharge are to be narrowly construed, and because of the fresh start objectives of bankruptcy, doubt is to be resolved in the debtor's favor); *Trustees of Amalgamated Ins. Fund v. McFarlin's Inc.,* 789 F.2d 98 (2d Cir. 1986)("Because presumption in bankruptcy is that the debtor's limited resources will be equally distributed among his creditors, statutory priorities are narrowly construed."). Similarly, the hanging paragraph's preference in favor of a certain class of creditors should be strictly interpreted because granting Creditor protection under the paragraph will reduce funds available to pay unsecured creditors.[1] *See Howard Delivery Serv., Inc. v. Zurich Am. Ins., Co.,* 126 S. Ct. 2105, 2116 (2006).

[1] Distribution of the debtor's assets in bankruptcy is almost always a zero-sum game because the claims against the debtor typically far exceed the value of the estate.

The language of the hanging paragraph, with its clearly defined time frame and specification of covered claims, indicates that Congress was concerned with the rapid initial depreciation of motor vehicles and other personal property securing debts incurred to purchase that property. Congress felt that the purchase money obligations should not be subject to a cramdown shortly after the purchase. Creditor, however, seeks to expand the very narrow exception created by Congress far beyond its intended scope—by converting the unsecured negative equity from a trade-in vehicle into a purchase money obligation that is protected from bifurcation. Despite Creditor's suggestion to the contrary, there is simply no legislative history with respect to the hanging paragraph that supports the position that Creditor should receive a windfall from financing unsecured antecedent debt along with the purchase price of the new vehicle.[2] *See* Section V, *supra.* Indeed, a ruling in favor of the Creditor would "transform knowingly refinanced unsecured negative equity debt into secured debt not supported by collateral value, and then

[2] The legislative history merely mirrors the language of the statute. For example, the House Committee Report concerning the hanging paragraph summarizes the change as follows: Section 306(b) adds a new paragraph to section 1325(a) of the Bankruptcy Code specifying that Bankruptcy Code section 506 does not apply to a debt incurred within the two and one-half year period preceding the filing of the bankruptcy case if the debt is secured by a purchase money security interest in a motor vehicle acquired for the personal use of the debtor within 910 days preceding the filing of the petition. Where the collateral consists of any other type of property having value, section 306(b) provides that section 506 of the Bankruptcy Code does not apply if the debt was incurred during the one-year period preceding the filing of the bankruptcy case. H.R. Rep. 109-31, Pt. 1, at 72, 109th Cong., 1st Sess. (2005).

require it to be paid in full to the detriment of other unsecured creditors."[3] It would allow a creditor to manipulate a transaction in away that would permit the creditor to transform an initially unsecured debt into one that could not be modified in bankruptcy, by simply insisting that refinancing of additional unsecured debt is a condition of granting a purchase money loan.

II. Funds advanced to pay off negative equity for a trade-in vehicle do not constitute a purchase money obligation.

The majority of courts considering whether funds advanced to pay off negative equity on a trade-in vehicle constitute a purchase money obligation have concluded that they do not.[4] In Missouri, as in most other states, the definition of a purchase money security interest is contained in § 9-103 of the Uniform Commercial Code. Mo. Rev. Stat. § 400.9-103. The starting point for defining a

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[3] *In re Peaslee*, 358 B.R. 545, 556 (Bankr. W.D.N.Y. 2006)[Peaslee I], *rev'd by* 373 B.R. 252 (W.D.N.Y. 2007)[Peaslee II]. In *Peaslee III*, the Second Circuit Court of Appeals recently certified the negative equity/purchase money issue to the New York Court of Appeals. *In re Peaslee*, 547 F.3d 177 (2d Cir. 2008).

[4] *See, e.g., In re Penrod,* 392 B.R. 835 (9th Cir. BAP 2008*); In re Callicott*, 396 B.R. 506 (E.D. Mo. 2008); *In re Crawford*, 2008 WL 4833283 (Bankr. E.D. Wis. Oct. 28, 2008); *In re Mancini,* 390 B.R. 796 (Bankr. M.D. Pa. 2008); *In re Munzberg,* 388 B.R. 529 (Bankr. D. Vt. 2008); *In re Look,* 383 B.R. 210 (Bankr. D. Me. 2008); *In re Mitchell*, 379 B.R. 131 (Bankr. M.D. Tenn. 2007); *In re Hayes*, 376 B.R. 655 (Bankr. M.D. Tenn. 2007); *In re Sanders*, 377 B.R. 836 (Bankr. W.D. Tex. 2007); *In re Acaya*, 369 B.R. 564 (Bankr. N.D. Cal. 2007); *In re Bray*, 365 B.R. 850 (Bankr. W.D. Tenn. 2007); *In re Westfall*, 365 B.R. 755 (Bankr. N.D. Ohio 2007); *In re Price*, 363 B.R. 734 (Bankr. E.D.N.C. 2007). Even the *Graupner* bankruptcy court in Georgia noted the "seemingly obvious conclusion" that Creditor "does not hold a purchase money security interest". *In re Graupner*, 356 B.R. 907, 917 (Bankr. M.D. Ga. 2006), *aff'd* 537 F.3d 1295 (11th Cir. 2008).

"purchase money security interest" is a "purchase money obligation" which means "an obligation of an obligor incurred as all or part of the price of the collateral or for given value to enable the debtor to acquire rights in or the use of the collateral if the value is in fact so used." Mo. Rev. Stat. § 400.9-103(a)(2), (b). The terms "price" and "value given" in § 400.9-103(a)(2) are nearly synonymous. The former is used in credit sales transactions in which the seller extends credit to the buyer and the latter is used in loan transactions in which a third-party lender loans funds to the buyer to purchase goods from the seller. *See In re Penrod*, 392 B.R. 835. 844-45 (B.A.P. 9th Cir. 2008). By the plain terms of the § 400.9-103(a)(2), a purchase-money obligation in a credit sale can be part of the price of the collateral, or it can be the whole price of the collateral, but is not an obligation that is greater than the "price" of the collateral.

Because the transaction at issue in this case is a credit sale transaction, the only relevant inquiry is the "price" of the collateral. Creditor erroneously states that negative equity should be considered purchase money if it is part of the "price" of the collateral OR if it was value given to enable the debtor to acquire rights in the collateral. Ford Br. at 29 ("The two prongs are alternatives, and Ford Credit prevails if it satisfies either prong). Similarly, many cases relied on by the Creditor also fail to grasp this fundamental and important difference in purchase money security interests derived from credit sales (i.e., seller financed transactions)

and those derived from enabling loans (i.e., third-party lender transactions). *See GMAC v. Horne*, 390 B.R. 191 (E.D. Va. 2008)(concluding "negative equity may be considered as a component of the 'price' and of the 'value given to enable' even though transaction was credit sale not implicating 'value given to enable'); *General Motors Acceptance Corp. v. Peaslee*, 373 B.R. 252 (W.D.N.Y. 2007)(considering "price" and "value given" as alternatives rather than mutually exclusive and based on the type of transaction).

The "price" of the collateral for purposes of defining a "purchase money obligation" may include obligations for expenses incurred in connection with acquiring right in the collateral, sales taxes, duties, finance charges, freight charges, costs of storage interest, demurrage, administrative charges, expenses of collection and enforcement, and attorney's fees. Mo. Rev. Stat. § 400.9-103 (Comment 3). Price may also include other obligations that are **similar to those items on the enumerated list**. *Id.* The pay off of antecedent debt is not included in this list, nor is it an obligation similar to those provided. *See* cases cited, *supra* note 4. In fact, the U.C.C. excludes the payment of antecedent debt from a purchase money obligation. Comment 2 to U.C.C. § 9-107 (the precursor to U.C.C. § 9-103) explicitly provided that a purchase money security interest could

not secure a pre-existing claim or antecedent debt.[5] *See In re Crawford*, 397 B.R. 461, 466-467 (Bankr. E.D. Wis. 2008), and cases cited. Though this comment is not included in the comments to § 9-103, nothing in the revision of Article 9 suggest that the drafters intended a dramatic departure from the understanding of § 9-107. *Id.*

Creditor claims that the characterization of negative equity as a pre-existing debt is inaccurate. Ford Brief at 44. However, Creditor itself frames the question before this Court as whether sums advanced to "discharge existing indebtedness on a trade-in vehicle" should be considered part of the debtor's purchase money obligation. Ford Brief at 2. Creditor does not explain how the payment of another creditor's unsecured claim is not an antecedent debt. Ford Brief at 39-41; *see In re Penrod*, 392 B.R. 835, 842 (B.A.P. 9th Cir. 2008). Nor does Creditor present any argument that overcomes long-standing bankruptcy policy that disfavors the conversion of unsecured claims into secured claims. *Id., citing Dean v. Davis*, 242 U.S. 438, 37 S.Ct. 130 (1917).

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[5] Comment 2 to former section 9-107 – Definitions: "Purchase Money Security Interest" provided:
"When a purchase money interest is claimed by a secured party who is not a seller, he must of course have given present consideration. This Section therefore provides that the purchase money party must be one who gives value 'by making advances or incurring an obligation:' the quoted language excludes from the purchase money category any security interest taken as security for or in satisfaction of a pre-existing claim or antecedent debt."

Instead the Creditor, and the Eleventh Circuit Court of Appeal in *Graupner v. Nuvell Credit Corp*., 537 F.3d 1295, 1302 (11th Cir. 2008), find that the payment of this antecedent debt fits squarely within the term "expenses" because it is a "package transaction." "Finance charges, sales taxes and expenses of collection are all rightfully included in the PMSI because they are things that necessarily accompany the purchase of a new car…Paying off the debt on an old car is different." *In re Callicott*, 396 B.R. 506, 509 (E.D. Mo. 2008). Indeed, paying off negative equity is no more closely related to the purchase price than funds advanced to the borrower to pay off, for example, credit card debts to satisfy a creditor's underwriting requirements. Does the payoff of $10,000 in consumer debt become an "expense incurred in connection with acquiring rights in the collateral" if the creditor both requires the debt to be paid off as a condition of extending financing and offers to give the debtor the funds for that purpose? Of course not. *See, e.g., Kahrer v. Ameriquest Mortgage Co*., 418 F. Supp. 2d 748 (W.D. Pa. 2006)(secured lender impermissibly conditioned financing on the payment from the loan proceeds of prior unsecured creditor who had referred borrower to secured lender); *Laubach v. Fidelity Consumer Finance Co.,* 686 F. Supp. 504 (E.D. Pa. 1988)(describing a car finance transaction in which lender required Mr. Copin, a 75-year old borrower, to pay off home mortgage and liens against home and financed the entire transaction), *rev'd* 898 F.2d 907 (3d Cir.

1990)(reversed on preemption grounds). Similarly, a creditor's acceptance of a trade-in vehicle on the condition that the negative equity be paid off and the creditor's willingness to extend the funds to do so does not make it an "expense incurred" to acquire rights in a new vehicle.[6] Clearly, "[o]ne may borrow money to buy something (e.g., a new vehicle), and also borrow additional money for some other purpose (e.g., to pay off the balance of a loan for the trade-in vehicle). The part used to buy something is purchase money obligation. The part used for some other purpose is not." *In re Sanders*, 377 B.R. 836, 853 (Bankr. W.D. Tex. 2007). The creditor's requirement that the debtor retire an existing obligation and providing the debtor the means to do so, does not change the "price" of the new vehicle debtor seeks to purchase. The financing of negative equity may be convenient but it is not necessary to acquire rights in the new collateral. *See Callicott*, 396 B.R. at 509. ('the close nexus required is missing').

This conclusion is bolstered by UCC § 9-103(b)(2), which explicitly extends purchase money security interest to antecedent debts *in the case of inventory*:

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[6] Ford's hypothetical at page 40 is inapposite. In that scenario, the Bank lends money to Borrower to purchase a D9 tractor grader from Seller. In Ford's hypothetical, the proceeds from the Bank loan are given to Seller and in turn are used, in part, by Seller to pay off *Seller's* lien on the equipment. In the case at bar, the question more appropriately is directed, not to the payment of Seller's creditors, but rather Borrower's other creditors. If Bank as part of the tractor transaction requires Borrower to pay off a debt on Borrower's cement mixer which is owed to another creditor, the funds advanced by Bank to pay off the cement mixer are not part of the purchase money obligation with respect to the acquisition of the D9 tractor grader.

> A security interest in goods is a purchase money security interest: ... (2) if the security interest is in inventory that is or was purchase money collateral, also to the extent that the security interest secures a purchase-money obligation incurred *with respect to other inventory* in which the secured party holds or *held* a purchase money security interest.[7]

This UCC provision creates a special rule that a security interest is still a PMSI even if it secures a pre-existing obligation for inventory that used to be purchase-money collateral but has now been sold, leaving a balance still owing. If a purchase money security interest in ordinary goods could also encompass prior debts, this special provision for inventory would be entirely redundant.

[7] In addition, UCC § 9-103(b)(3) creates a similar special rule for security interests in software.

III. Terms used in consumer protection statutes, such as the federal Truth In Lending Act and the Missouri MVTSA, enacted for entirely different purposes than the UCC, should not control the meaning of "purchase money obligation."

A. The federal Truth In Lending Act has no bearing on the definition of "purchase money obligation" under the UCC.

In 1968, Congress enacted the Truth In Lending Act ("TILA") as part of the Consumer Credit Protection Act. Pub. L. No. 90-321 (May 29, 1968). TILA is primarily a disclosure statute that compels creditors extending credit to consumers to disclose the cost of the credit using a standardized format and terminology defined by the Act itself and by the Federal Reserve Board. The primary goal of TILA is to promote the informed use of credit and encourage comparison shopping by prescribing a uniform standard for disclosing the true cost of credit. In order to achieve this goal, TILA adopts an expansive view of the cost of credit, which includes negative equity, insurance products, and any other cost associated with borrowing money.[8]

Additionally, the Truth In Lending Act contains no definition of "purchase money security interest," which is the language of at issue in this case. *See In re Crawford*, 397 B.R. 461, 466 (Bankr. E.D. Wis. 2008). Nor does the TILA define

[8] The cost of credit under TILA is referred to as the finance charge, and it includes "any charge payable directly or indirectly by the consumer and imposed directly or indirectly by the creditor as an incident to or condition of the extension of credit. It does not include any charge of a type payable in a comparable cash transaction." 12 C.F.R., § 226.4(a).

the term "price." Instead, TILA discloses the cost of credit—i.e., the time-price differential—by using the terms "cash price" and "total sale price."

i. "Total sale price" describes the amount a buyer would pay in exchange for the ability to pay an obligation over time, not the actual price of the item purchased.

The "total sale price" of the Truth In Lending Act is not, and has never been, a term that defines a "purchase money security interest" or "purchase money obligation" under the UCC. Rather, it used expansively to advise consumers of the true cost of credit in credit sale transactions. Under the original version of TILA, credit sellers were required to disclose the "deferred payment price" which represented the total amount the borrower would pay in return for the ability to pay the obligation in installments. 12 C.F.R. § 226.8(c)(8)(ii)(1980). *See McGowan v. King, Inc*., 569 F.2d 845 (5th Cir. 1978)(failure to use term "deferred payment price" violated Old. 12 C.F.R. § 226.8(c)(8)(ii)). The term "deferred payment price" was later changed to "total sale price" but the meaning remains the same. The "total sale price" is defined as the sum of 1) the cash price; 2) amounts that are financed by the creditor and are not included in the finance charge (e.g., title fees, credit insurance premiums); and, 3) the finance charge. 12 C.F.R. § 226.18(j). The definition creates a clear distinction between the "cash price" and the "total sale price." Under the Federal Reserve Board's Official Supplemental Staff Commentary the financing of negative equity on a trade-in vehicle is included in

the "total sale price," (i.e., the true cost of credit), but it is not included in the cash price of the new automobile. *See* Official Staff Commentary § 226.2(a)(18)-3 (Supp. 1 to Part 26)(describing how to calculate the "total sale price" for a vehicle with a "cash price" of $20,000, negative equity from a trade-in of $2,000, a down payment of $1500).

ii. Creditor's are permitted to choose the method by which "total sale price" is determined, with one method resulting in a higher "total sale price."

In 1999, the Federal Reserve Board issued Commentary to address situations in which the borrower makes a down payment and trades in a vehicle with negative equity.[9] The Federal Reserve Board's Supplemental Staff Commentary allows the creditor to use either a "netting" or "non-netting" approach when dealing with

[9] Official Staff Commentary § 226.2(a)(18)-3 (Supp. 1 to Part 26) provides: *Effect of existing liens.* When a credit sale transaction involves property that is being used as a trade-in (an automobile, for example) and that has a lien exceeding the value of the trade-in, the total sale price is affected by the amount of any cash provided. (See comment 2(a)(18)--3.) To illustrate, assume a consumer finances the purchase of an automobile with a cash price of $20,000. Another vehicle used as a trade-in has a value of $8,000 but has an existing lien of $10,000, leaving a $2,000 deficit that the consumer must finance. i. If the consumer pays $1,500 in cash, the creditor may apply the cash first to the lien, leaving a $500 deficit, and reflect a downpayment of $0. The total sale price would include the $20,000 cash price, an additional $500 financed under § 226.18(b)(2), and the amount of the finance charge. Alternatively, the creditor may reflect a downpayment of $1,500 and finance the $2,000 deficit. In that case, the total sale price would include the sum of the $20,000 cash price, the $2,000 lien payoff amount as an additional amount financed, and the amount of the finance charge. ii. If the consumer pays $3,000 in cash, the creditor may apply the cash first to extinguish the lien and reflect the remainder as a downpayment of $1,000. The total sale price would reflect the

negative equity and down payments.[10] The "netting" method results in a lower "total sale price" than if the netting was not performed. Based on the example in the Staff Commentary the netting approach would yield a "total sale price" or $23,500 and the non-netting approach would yield a "total sale price" of $25,000.[11]

Creditor attempts to link the treatment of negative equity in the Commentary to "purchase money obligations" by conveniently omitting critical language from the Commentary. Ford Brief at 26-27, n.18. *However when the comment is viewed as a whole, it is clear that purchase money obligations under the UCC cannot depend on the "total sale price" as used in TILA where the creditor can choose whether the "total sale price" should be higher or lower in transactions involving the trade-in of vehicles with negative equity.*

$20,000 cash price and the amount of the finance charge. (The cash payment extinguishes the trade-in deficit and no charges are added under § 226.18(b)(2).) Alternatively, the creditor may elect to reflect a downpayment of $3,000 and finance the $2,000 deficit. In that case, the total sale price would include the sum of the $20,000 cash price, the $2,000 lien payoff amount as an additional amount financed, and the amount of the finance charge.

[10] Netting" means that the cash down payment would be applied, or "netted" against the negative equity.

[11] The "total sale price" is the sum of the "cash price" [$20,000] plus other charges [$500 prior lien pay-off in the "netted" approach] or [$2,000 lien payoff in the non-netted approach] plus the finance charge. *See* 12 C.F.R. § 226.18(j).

B. Similarly, Motor Vehicle Sales Financing Acts are a wholly inappropriate standard for defining "purchase money obligations" and "purchase money security interests."

Like the Truth In Lending Act, the Missouri Motor Vehicle Time Sales Act (MVTSA) is a consumer protection statute. Across the country during the late 1950s and 1960s, states enacted laws regulating the use of retail sales contracts out of concern for protection of consumers from unconscionable business practices.[12] Historically, general usury statutes applied only to loans, not to sales of goods on credit.[13] As a result, lenders were avoiding usury restrictions by buying consumer paper at a discount from retailers rather than issuing loans for the purchase of goods. Retail installment statutes, such as the Missouri MVTSA, addressed this loophole that allowed lenders to exploit unwary consumers.[14] These special usury laws set limits on the charges assessed in credit sale transactions typically required disclosure of the cost of credit. Specifically, the Missouri MVTSA when

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[12] *See* Retail Instalment Sales Legislation, 58 Colum. L. Rev. 854, 855 (1958)("there have recently been expressions of concern over the rising quantity of consumer credit, deterioration in the qualify of consumer credit, and the oppressive business practices form which consumers need protection").

[13] *See, e.g.*, *Thomas v. Knickerbocker Operating Co*., 108 N.Y.S. 2d 234 (N.Y. Sup. Nov. 19, 1951)("mere fact of variation between cash price and time selling price which was greater than 6 per cent did not render transaction usurious"; usury must be founded on loan or forbearance of money; installment agreement did not constitute forbearance of money); *Bryant v. Securities Inv. Co*., 102 So. 2d 701 (Miss. 1958)(fact that time price shown in conditional sales contract for sale of automobile and cash price exceeded percentage of interest permitted by usury laws did not render contract usurious).

[14] *See* Stephen Taylor, *Missouri and Federal Credit Disclosures*, 35 Mo. L. Rev. 382, 386-87 (1970).

originally enacted required certain disclosures, regulated the charges imposed for the extension of credit and contained licensing requirements for those engaged in the business of purchasing retail installment contracts for motor vehicles.[15] From the enactment of the Missouri MVTSA until today, no Missouri court has ever suggested that provisions of the UCC should be interpreted based on the definition of terms used in this consumer protection statute which was enacted to promote disclosure of the true cost of credit and limit finance charges.

Like the Missouri MVTSA, many of these state laws provide a definition of "cash sale price" and "time sale price," the former being the price which would be paid if the buyer used cash or its equivalent, and the latter being the invariably higher price which the buyer would pay in return for the ability to pay in installments. Traditionally, the difference between the time price and the cash price was not legally recognized as interest, but was instead considered a "time-price differential." Many state statutes define the difference between the cash sale price and the time sale price as the "finance charge."[16]

In 1999, Missouri amended its MVTSA to expand the definition of "principal balance"—not "cash sale price"—to include amounts used to pay off negative

[15] *Id*. at 388.
[16] *See, e.g.*, Ga. Code Ann. § 10-1-33 (Georgia's Motor Vehicle Sale Finance Act limits the finance charge in certain transactions)

equity on a trade-in vehicle.[17] This amendment parallels changes in the 1999 Supplemental Staff Commentary to TILA. It permits credit sellers to finance such negative equity and like TILA, instructs that such negative equity should be included in determining the cost of the credit.

The Missouri MVTSA was enacted to protect motor vehicle purchasers from abusive selling practices and excessive charges. There is no indication in the statute, in its original legislative history, or the legislative history accompanying the 1999 amendment that the inclusion of negative equity in the term "principal balance" was intended to modify the traditional understanding of a purchase money obligation under the UCC. *Cf. In re Acaya*, 369 B.R. 564, 570 (Bankr. N.D. Cal. 2007)(analyzing similar amendments to California's Automobile Sales Finance Act).

IV. By its plain language the hanging paragraph at the end of section 1325(a)(9) only applies when the creditor holds a purchase money security interest with respect to the entire debt.

A plain reading of the statutory language makes clear that the hanging paragraph only applies when the creditor holds a purchase money security interest in the entire debt. *See In re Look,* 383 B.R. 210, 220 (Bankr. D. Me. 2008); *In re Mitchell*, 379 B.R. at 137-40; *In re Sanders*, 377 B.R. at 858-64.

[17] Mo. Legis. S.B. 386 (1999).

The new paragraph added to the end of section 1325(a)(9) (hereinafter the "hanging paragraph") states in relevant part:

> For purposes of paragraph (5), section 506 shall not apply to a claim described in that paragraph if the creditor has a purchase money security interest securing the debt that is the subject of the claim, the debt was incurred within the 910-day preceding the date of filing of the petition, and the collateral for that debt consists of a motor vehicle (as defined in section 30102 of title 49) acquired for the personal use of the debtor…

The word "debt" appears five times in the hanging paragraph. On none of those occasions is the word modified by language such as "to the extent" or "portion of." *See Sanders*, 377 B.R. at 860. Congress could easily have provided that the hanging paragraph applied to the extent that debt was secured by a purchase money obligation, but it did not do so. In other sections of the Code, Congress specifically used the words "to the extent" or "any portion" to indicate applicability to all or part of a debt, claim, payment, property or lien at issue. *See, e.g.,* 11 U.S.C. § 329 ("return of any such payment, **to the extent** excessive,…"); 11 U.S.C. § 365(j)("recovery of **any portion** of the purchase price…"); 11 U.S.C. § 506(b)("**To the extent** that an allowed secured claim is secured by property…"); 11 U.S.C. § 506(d)("**To the extent** that a lien secures a claim…"); 11 U.S.C. § 522(o)(3)("**to the extent** such value is attributable to **any portion** of any property…"). "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is presumed that Congress

acted intentionally and purposely in the disparate inclusion or exclusion." *Rusello v. United States*, 464 U.S. 16, 23 104 S. Ct. 296, 300 (1983)(citation and quotation omitted). Also, "[w]here Congress knows how to say something but chooses not to, its silence is controlling." *In re Griffith*, 206 F.3d 1389, 1394 (11th Cir. 2000)(citation and quotations omitted). Because Congress refers to the "whole" unless otherwise indicated, the Creditor incorrectly presumes that the word "entire" or "only" must be inserted as a modifier before "the debt" can refer to the entirety of the debt. Ford Brief at 16. To the contrary, it is the Creditor's interpretation that requires a modifier to be judicially inserted into the statute.

Indeed, the legislative history of the bankruptcy amendments demonstrates that Congress specifically rejected language that would have limited bifurcation if creditor's claims were attributable, in whole or in part, to a purchase money obligation. For example, section 122 of the Bankruptcy Reform Act of 1999 provided that "subsection (a) [of § 506] shall not apply to an allowed secured claim to the extent ***attributable in whole or in part to the purchase price*** of personal property acquired by the debtor within 5 years of filing of the petition."(emphasis supplied). *See also* Bankruptcy Reform Act of 1998, H.R. 3150, 105th Cong. § 128 (1998). Similarly, the 1997 version of the bill provided that "Subsection (a) [of § 506] shall not apply to an allowed secured claim to the extent ***attributable in whole or in part to the purchase price*** of personal property acquired by the debtor during

the 90-day period preceding the date of filing of the petition."(emphasis supplied). Consumer Bankruptcy Reform Act of 1997, S. 1301, 105th Cong. § 302(c) (1997). Surely, had Congress intended to prevent the bifurcation of claims for which creditors held a partial purchase money security interest, it could have easily done so. The change from the prior version shows that Congress did not intend for the hanging paragraph to apply to debts that consist of non-purchase money obligations. *Transcontinental & W. Air, Inc. v. Civil Aeronautics Bd.,* 336 U.S. 601, 696 (1949)(relying on legislative history to prior unenacted bill for clarification of language used in bill that was ultimately enacted). In this case, the result of applying the plain language does not produce a result that is absurd, bizarre, or demonstrably at odds with Congressional intent. If, however, Congress "enacted into law something different from what it intended, then it should amend the statute to conform to its intent." *Lamie v. U.S. Trustee*, 540 U.S. 526, 534, 124 S.Ct. 1023, 1034 (2004).

If this court effectively rewrites the statute so that the word "debt" in the phrase "purchase money security interest securing the debt" applies to "any portion of the debt" or "the debt, in whole or in part" then each other occurrence of the word "debt" in the section must be similarly construed. *See Ratzlaf v. U.S.,* 510 U.S. 135, 143 S. Ct. 655 (1994)("a term appearing in several places in a statutory text is generally read the same way each time it appears"). Such judicial

revisionism would potentially expand the applicability of the hanging paragraph far beyond the plain language of the statute. A broad construction of the hanging paragraph would also violate principles of statutory construction and longstanding bankruptcy policy which dictate that exceptions to general rules be construed narrowly.

V. The court's best guess as to legislative intent is insufficient to overcome the plain language of the statute.

Despite the dearth of legislative history on the hanging paragraph, creditors have routinely argued in hanging paragraph cases that Congressional intent in enacting the provision was solely to benefit creditors. *See* Ford Brief at 17-24; *In re Kenney*, 2007 WL 1412921 (Bankr. E.D. Va. May 10, 2007)("Creditors argue that the hanging paragraph should always be read to provide heightened protection to 910 secured creditors, as that was the intent of Congress"), *rev'd in part by Tidewater Finance Co. v. Kenney*, 531 F.3d 312 (4th Cir. 2008); *In re Brown*, 346 B.R. 868 (Bankr. N.D. Fla. 2006)("Wells Fargo contends that the absurdity of the result originates from the fact that the changes in the Code wrought by BAPCPA were enacted to enhance the rights of secured creditors in bankruptcy"). One court summarized the creditor's argument on the hanging paragraph as follows:

> The crux of Ford Motor Credit's argument is that § 1325 was amended to protect the interests of the 910 creditor and thus the statute should be interpreted to give the interests of the secured 910 creditor increased protection. Ford Motor Credit is in

> essence requesting this Court to find that the statute on its face is contrary to the intent of the drafters.

In re Williams, 2007 WL 2122131 (Bankr. E.D. Va. Jul. 19, 2007). Several courts have adopted the Creditor's argument despite the absence of supporting legislative history. Even the Sixth Circuit Court of Appeals, in *dicta*, has erroneously given weight to what it ***perceived*** as Congress' intent. *See In re Long*, 519 F.3d 288, 294 (6th Cir. 2008). Similarly, the District Court, in *Peaslee II*, without any citation, stated that "the so-called 'hanging paragraph' of § 1325, was obviously intended to protect the interests of automobile dealers who provide financing for customers." *Peaslee II*, 373 B.R. at 261; *see also In re Zehrung*, 351 B.R. 675, 678 (W.D. Wis. 2006)(basing its decision on what it found to be the "likely" and "extremely unlikely" intent of Congress). But what makes this intent "obvious"? Certainly, the legislative history reflects no such intent. *See In re Quick*, 371 B.R. 459, 463 n.10 (B.A.P. 10th Cir. 2007)(" Specifically, we do not agree that BAPCPA amendments that appear to benefit creditors must be interpreted in such a way as to benefit only creditors. In fact, many of the supposedly "pro-creditor" amendments appear reflective of the normal give and take of the legislative process."), *rev'd by In re Ballard*, 526 F.3d 634 (10th Cir. 2008). Rather the House Report as it pertains to the hanging paragraph merely contains a synopsis of the final statutory language. *See* H.R. Rep. 109-31, Pt. 1, at 71-72, 109th Cong., 1st

Sess. (2005). This Court should reject arguments by Creditor and its *amici* that are based on what Creditor has "gleaned" from the legislative history, Ford Brief at 23, based on what its amici believe secured creditors "must have feared," NADA Brief at 9, and based on reasons that Congress "may have chosen" the particular language enacted, NADA Brief at 13. Creditor's regarding Congressional intent and overreaching generalities are notably uncited and are unsupported by empirical proof or other evidence in the statute or the legislative history. NACBA urges the Court to look beyond the Creditor's rhetoric and instead focus on the language of the statute.

To the extent Creditors and amicis' beliefs are based on the role of private groups advocating for the legislation, the Supreme Court has specifically counseled against inferring any such intent. Courts should not attribute to Congress an official purpose based on the motives of particular groups that lobbied for or against certain provisions. *See Circuit City Stores v. Adams*, 532 U.S. 105, 120, 121 S. Ct. 1302, 149 L.Ed 234 (2001)(private interest groups' roles in lobbying for or against legislation provide a dubious basis from which to infer intent); *see also Garcia v. United States*, 469 U.S. 70, 76, 105 S. Ct. 479, 83 L.Ed.2d 474 (1984)(courts should look only to Committee Reports that "represent[] the considered and collective understanding of those [legislators] involved in drafting and studying the proposed legislation."). This Court should reject the dicta in *In re Long* and *In re*

Graupner, which would lead to the unsupportable conclusion that creditors should always win in cases related to the 2005 amendments simply because creditors lobbied for the passage of the bill.

The language of the hanging paragraph should not be "interpreted" to match a court's determination of what Congress "meant" to say. Rather the plain language of the statute should be conclusive, except in rare cases in which the literal application will produce a result *demonstrably* at odds with the intentions of the drafters.

CONCLUSION

For the reasons stated above, this Court should hold that the financing of negative equity does not constitute a purchase money obligation. Further, this Court should hold that the hanging paragraph is only applicable where the entire debt is "purchase money." Because Creditor's claim is not entirely purchase money, the bankruptcy court's decision should be affirmed.

Respectfully submitted,

_/s/ Tara Twomey_____
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CERTIFICATION OF BAR MEMBERSHIP

Counsel for amicus curiae, Tara Twomey, is a member of the bar of this Court of Appeals for the Eighth Circuit.

CERTIFICATE OF COMPLIANCE

This brief, exclusive of the certifications, tables of contents and authorities and the identity of counsel at the end of the brief, is 6988 words in text and footnotes as counted by Microsoft Word, the word processing system used to prepare this brief. This brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14-point font.

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I certify under penalty of perjury that the foregoing is true and correct.

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CERTIFICATE OF SERVICE

I hereby certify that on this3rd day of March 2009 the original and 9 copies of the Brief of *Amicus Curiae,* was sent to the Clerk for the Eighth Circuit Court of Appeals via Federal Express and two copies mailed, first-class, postage paid, to counsel listed below:

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