Case Number 08-60037

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In the Matter of: MARLENE A. PENROD,
Debtor

AMERICREDIT FINANCIAL SERVICES, INC.,

Appellant,

v.

MARLENE A. PENROD,

Appellee.

Appeal from the United States Bankruptcy Appellate Panel
For The Ninth Circuit
BAP Nos. 07-1360, 07-1368
On appeal from United States Bankruptcy Court,
Northern District of California, San Francisco Division
Bankruptcy Case No. 07-30252 TEC 13
Thomas E. Carlson, United States Bankruptcy Judge
235 Pine Street, San Francisco, CA 94104

APPELLANT'S BRIEF

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure Americredit Financial Services, Inc. makes the following disclosure:

AmeriCredit Financial Services, Inc.'s parent corporation is AmeriCredit Corp.; and

AmeriCredit Corp. owns 100% of AmeriCredit Financial Services, Inc.'s stock.

STATEMENT REGARDING ORAL ARGUMENT

Americredit Financial Services, Inc. requests that this Court permit oral argument in this case. Oral argument is proper for several reasons. This is a new and novel area of bankruptcy law that turns on an interpretation of the Bankruptcy Code and its legislative history and other federal and state statutes. Significant policy considerations are implicated. This Court's decision will have huge implications for the motor-vehicle sale and financing industries and consumers given the large number of Chapter 13 cases involving debtors seeking to confirm Chapter 13 plans over the objection of creditors holding claims that qualify for protection under the hanging paragraph, adopted as part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. Allowing oral argument will insure that the parties have an opportunity to fully advise the Court on the broad spectrum of law and policy involved.

Fed.R.App.P. 34(a)(2) provides three exceptions to allowing oral argument. None are relevant in this case. This appeal is not frivolous, the issue has not been authoritatively decided by this Court, and Americredit Financial Services, Inc. believes that the decisional process will be aided by oral argument.

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RELATED APPEALS

Americredit is not aware of any other appeal pending before this Court that involves the same, or similar, issue.

JURISDICTIONAL STATEMENT

On September 17, 2007, the Bankruptcy Court entered an Order finding that the security interest of Americredit Financial Services, Inc. ("Americredit") in the vehicle owned by Marlene A. Penrod ("Penrod") was only partially a purchase-money security interest. Excerpts of Record ("E.R.") at 94-96. Based on that finding, on September 24, 2007, the Bankruptcy Court entered an Order confirming the Penrod's Seconded Amended Chapter 13 Plan. E.R. at 92-93. Americredit filed a Notice of Appeal with respect to the first Order referenced above on September 25, 2007 (E.R. at 87-91), and a Notice of Appeal with respect to the second Order referenced above on September 28, 2007. E.R. at 82-86. The Bankruptcy Court had jurisdiction under 28 U.S.C. § 1334(a), the general order of reference for the Northern District of California, and 28 U.S.C. § 157(b)(2)(A), (B), & (L).

The appeals were referred to the United States Bankruptcy Appellate Panel of the Ninth Circuit ("BAP"). E.R. at 78-81. The BAP had jurisdiction over the appeals under 28 U.S.C. § 158. The BAP entered its Order and Opinion affirming the Orders of the Bankruptcy Court on July 28, 2008. E.R. at 2-51. That Order is a

final Order. On August 12, 2008, Americredit filed its Notice of Appeal of the Order of the BAP. E.R. at 1-2. This Court has jurisdiction under 28 U.S.C. §§ 158(d) and 1291.

STATEMENT OF THE ISSUE

The issue in this appeal is whether a seller has a purchase money security interest in a motor vehicle for purposes of the "hanging paragraph" of 11 U.S.C. § 1325(a)(*)[1] when, as part of the transaction, the purchaser trades in another vehicle and the seller advances sums to discharge existing indebtedness on the trade-in vehicle.

STANDARD OF REVIEW

The facts in this case are not in dispute, and the issue on appeal is a question of law. Questions of law are subject to *de novo* review by this Court. *Einstein/Noah Bagel Corp. v. Smith (In re BCE W., L.P.*), 319 F. 3d 1166, 1170 (9th Cir. 2003).

STATEMENT OF THE FACTS AND PROCEEDINGS BELOW

On September 12, 2005, Penrod purchased from a dealership for her personal use a new 2005 Ford Taurus ("Vehicle"). Penrod agreed to pay $23,516 for the Vehicle, plus tax, title, license fees and other charges described below. The transaction was memorialized by a Retail Installment Sales Contract ("Contract")

1 The asterisk denotes the fact that the hanging paragraph is appended to Section 1325(a) as an unnumbered paragraph.

which complies in all respects with the California Automobile Sales Finance Act. The Contract was subsequently assigned to Americredit. The Contract contains terms which permit Penrod to finance other charges in addition to the cash price of $23,516. E.R. at 108-109; 125-128.

One of the additional charges financed under the Contract arose in connection with Penrod's trade-in vehicle. At the time Penrod purchased the Vehicle, she owned a 1999 Ford Explorer upon which she still owed $13,137. E.R. at 108; 125-126. The parties agreed upon a trade-in allowance of $6,000 for the trade-in vehicle. E.R. at 108; 125-126. Thus, the "negative equity" related to the trade-in vehicle (i.e., the amount by which the indebtedness secured by the vehicle exceeded its value) was $7,137. E.R. at 108; 125-126.

Other charges financed under the Contract include license and title fees, document preparation fees and fees for gap insurance. E.R. at 108; 125-126. These fees are not at issue in this appeal. The "Total Cash Price" disclosed in the Contract was $28,920. E.R. at 108; 125-126. As required by California law, the charge for negative equity is disclosed in the Contract as "Prior Credit or Lease Balance Paid by Seller" and is included as part of the "Total Cash Price" of the Vehicle. E.R. at 108; 125-126.[2] Penrod agreed to pay a "Total Sales Price" of

2 As reflected in the Contract's "Itemization of the Amount Financed", and as disclosed in accordance with California law, the portion of the negative equity that was financed by Penrod was $3,137. California law requires that rebates and

$46,693 in 60 payments of $778. E.R. at 108; 125-126.

On March 2, 2007, 523 days after purchasing the Vehicle, Penrod filed a Petition for Relief under Chapter 13 of the Bankruptcy Code. E.R. at 122-124. At the time the Petition was filed, Penrod owed $25,675 under the Contract, and Americredit filed a secured claim in that amount. E.R. at 114-117. In her Chapter 13 Plan, Penrod proposed to bifurcate Americredit's claim into secured and unsecured components based on the value of the Vehicle. E.R. at 118-121. Thus, Penrod proposed to pay the alleged value of the Vehicle on the petition date as a secured claim, and treat the balance of the claim as an unsecured claim. E.R. at 118-121.

Americredit objected to Penrod's Plan upon the basis that its claim was entitled to protection from bifurcation and cramdown under the hanging paragraph adopted as part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"). 11 U.S.C. § 1325(a)(*) (2005). E.R. at 97-113. The Bankruptcy Court ruled that Americredit was not entitled to the protection of the hanging paragraph as to the amount financed in the Contract related to negative equity. E.R. at 94-96. The Court entered an order overruling Americredit's

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down payments be deducted from the gross negative equity amount. Cal. Civ. Code § 2982(a)(6)(G). In applying the dual status rule, the BAP should have used the lower amount of $3,137. *See e.g., In re Conyers,* No. 07-50855, 2007 Bankr. Lexis, 3773 at *1 (Bankr. M.D.N.C. 2007); *In re Burt,* 378 B.R. 352, 354-55, & n.6 (Bankr. D. Utah 2007).

objection, E.R. at 94-96, and later entered an order confirming Penrod's Second Amended Chapter 13 Plan, which bifurcated Americredit's claim into a secured claim for $18,540 and an unsecured claim for the balance. E.R. at 92-93. Americredit appealed both orders, E.R. at 82-91, and the appeal was referred for decision to the United States Bankruptcy Appellate Panel of the Ninth Circuit ("BAP"). E.R. at 78-81.

On July 28, 2008, the BAP issued its Opinion, affirming the orders of the Bankruptcy Court. E.R. at 3-50. In its Opinion, the BAP concluded that the charge for negative equity was not protected from bifurcation and cramdown by the hanging paragraph based upon the Court's view that this charge did not meet the "purchase-money security interest" requirement of the hanging paragraph. The Court held that all other charges evidenced by the Contract met that requirement. Applying the "dual status" rule, the Court held that the charge for negative equity could be treated as unsecured indebtedness under the Penrod's Plan, while the balance of the charges must be treated as secured indebtedness and paid in accordance with the requirements of Section 1325(a).[3] This appeal is from the order entered on that Opinion.

SUMMARY OF ARGUMENT

The hanging paragraph, 11 U.S.C. § 1325(a)(*), provides that, in a Chapter

3 Penrod conceded at oral argument before the BAP that the dual status rule applies. E.R. at 71-72.

13 case, the debtor cannot strip down the secured indebtedness to the value of the collateral if the creditor has a purchase-money security interest securing its claim, the claim was incurred within 910 days before the bankruptcy filing, and the collateral is a motor vehicle acquired for the debtor's personal use. The issue in this case is whether Americredit has a purchase-money security interest in the Vehicle. Americredit clearly has such a security interest.

Penrod acquired the Vehicle in a single purchase transaction evidenced by a single Contract, creating a single indebtedness, secured by a single asset--the Vehicle. All of the indebtedness evidenced by the Contract was part of the price for the Vehicle and was inextricably related to the purchase transaction. Penrod would have incurred none of the charges absent the Vehicle purchase. Negative equity is not new, novel or unique in any respect, and has been part of vehicle financing for decades. The California legislature has determined that dealer financing of negative equity benefits consumers and is so closely connected with vehicle purchase transactions that it is a permitted charge under the California Automobile Sales Finance Act ("ASFA").

The plain language of the hanging paragraph therefore prohibits the bifurcation and cramdown of Americredit's secured claim since all of the indebtedness evidenced by the Contract is purchase-money indebtedness, i.e., indebtedness incurred by Penrod as part of the purchase price of the Vehicle. The

purpose of the hanging paragraph, as well as its legislative history, supports this plain language interpretation. The BAP Opinion did not analyze the text, purpose or legislative history of the hanging paragraph, and instead chose to rely solely on state law to decide the case.

Should this Court find the hanging paragraph to be ambiguous, it should consult California state law, specifically Article 9 of California's Uniform Commercial Code and ASFA. The term "purchase-money security interest" is specifically defined in Section 9103 of the California UCC to include secured indebtedness incurred as all or part of the price of collateral or for value given to enable the debtor to acquire rights in or use of the collateral. Comment 3 broadly defines the terms "price" and "value" to include a wide variety of charges. The generous scope of Section 9103 is consistent with long established policies favoring purchase-money liens and the general policy of the UCC supporting the continued expansion of commercial practices through custom, usage and the agreement of the parties. Although the BAP acknowledged that "the concept of a purchase money security interest or lien has had a long and venerable history in commercial law," E.R. at 14, it never reconciled its holding with that history and policy. Under Section 9103, all that is required for a charge to qualify as a "purchase-money obligation" is that it bear a close nexus to the acquisition of the collateral. The charge at issue in this case falls well within the expansive definition

of "purchase-money security interest" in Article 9. The BAP's characterization of Penrod's transaction as two separate transactions and as a refinancing or payment of antecedent indebtedness is legally and factually inaccurate; and its highly restrictive interpretation of the term "purchase-money security interest" in Article 9 is flawed from both a textual and policy perspective.

ASFA supports Americredit's interpretation of Article 9. ASFA sets forth in very specific terms the charges that may be imposed in a vehicle installment sale transaction. The California legislature, taking into account consumer preferences and industry practices, has identified those charges that bear a close nexus to automobile purchases and should therefore be permitted. The charge for negative equity is specifically permitted in ASFA. Reading ASFA *in pari materia* with Article 9 leads to the inescapable conclusion that the charge is a "purchase-money obligation" protected from bifurcation and cramdown by the hanging paragraph. The BAP refused to consider ASFA in interpreting Section 9103 based largely upon its view that ASFA is not *in pari materia* with the hanging paragraph. This analysis is flawed because the issue is whether ASFA and Article 9 should be read *in pari materia*, and not whether ASFA and the hanging paragraph should be read *in pari* material. The BAP also dismissed ASFA as a disclosure statute, which is also incorrect, since ASFA regulates virtually every aspect of automobile sales and finance transactions, and not just disclosures.

Substantial public policies will be advanced by an interpretation of the hanging paragraph that protects negative equity from bifurcation and cramdown. In addition to those noted above related to purchase-money liens and the UCC, the policies expressly stated in the federal statute--preventing bankruptcy abuse, giving secured creditors fair treatment in Chapter 13 and restoring the foundation for secured credit--will be advanced. Vehicle sales and financing will be promoted and facilitated, thus benefiting consumers and the automobile sales and financing industries.

The BAP Opinion will have the exact opposite effect, as automobile dealers and their financiers will be stripped of the benefits provided to them by BAPCPA and will be forced to adjust, leaving consumers with far fewer choices.

Americredit respectfully submits that this Court should reverse the Opinion of the BAP and hold that the hanging paragraph protects the entire secured indebtedness evidenced by the Contract from bifurcation and cramdown.

ARGUMENT

I. THE CHARGE FOR NEGATIVE EQUITY IS PART OF AMERICREDIT'S PURCHASE-MONEY SECURITY INTEREST FOR PURPOSES OF THE HANGING PARAGRAPH.

A. INTRODUCTORY STATEMENT REGARDING AUTOMOBILE FINANCING, NEGATIVE EQUITY, BAPCPA AND THE HANGING PARAGRAPH

1. Automobile Financing and Negative Equity.

Automobile sales and financing are essential and vital parts of our national economy.[4] Americans rely upon the automobile to transport them to and from their homes, schools, businesses, houses of worship, shopping centers and vacation venues. The average price of a new automobile is beyond the means of most consumers to purchase through a single cash payment at the point of purchase, usually a dealership. Dealers and their financing sources have therefore designed a variety of different financing packages to enable consumers to purchase vehicles and pay the purchase price in installments.

Most consumers purchasing a new automobile come to the dealership with a trade-in vehicle which they offer as part of the down payment for the new car. They choose this option, rather than selling the vehicle on their own, because the dealership offers them a ready market to dispose of their vehicle for what they believe will be the best possible price. Often, the trade-in vehicle will be subject to an existing lien arising out of a previous financing. In many, perhaps even most, cases, the indebtedness secured by the existing lien on the trade-in vehicle exceeds the value of the vehicle, resulting in the consumer being considered "upside down"

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4 A recent article, chronicling the plight of automobile dealers throughout the United States, reports that vehicle sales are a key indicator of the health of the economy, as the automobile sales industry supports 1 in 10 jobs in the United States, employs more than 1.1 million workers and accounts for nearly 20 percent of retail sales in most states. Sharon Silke Carty and Chris Woodyard, *For Car Dealers, Tight Credit is Fueling a 'Catastrophe,'* USA Today, Oct. 21, 2008 *available at* http://www.usatoday.com/money/autos/2008-10-20-auto-dealerships-credit-crisis-loans_N.htm.

with respect to the trade-in vehicle. This disparity in value versus indebtedness is referred to as "negative equity."[5]

When the trade-in vehicle is subject to an existing lien, the lien must be discharged in order for the purchase of the new vehicle to take place. This is because a sale of the trade-in vehicle without the approval of the prior lienholder will breach the contract held by the lienholder, resulting in a repossession of the vehicle and possibly lawsuits against both the consumer and the dealer. The dealer would also be unable to resell the trade-in vehicle because the lien of the existing creditor will appear on the vehicle's certificate of title.

When the consumer is upside down with respect to the trade-in vehicle, he or she has two choices: finance the negative equity through the dealership or borrow money from another source (e.g., a finance company or an advance on a credit card) to eliminate the negative equity. Once again, consumers make the choice that is most efficient and economically beneficial to them. This almost

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5 *See, e.g.*, Wilson & DiChiara, *The Changing Landscape of Indirect Automobile Lending*, FDIC Supervisory Insights, Summer 2005, at 29 ("J.D. Power and Associates estimates that approximately 38 percent of new car buyers have negative equity at trade-in, compared to 25 percent two years ago."); *see also,* Kiley, *Car Buyers Burned By Negative Equity*, USA Today, July 6, 2003, available at *http://www.usatoday.com/money/autos/2003-07-06-car-loan_x.htm* ("Mark Eddins of Friendly Chevrolet in Dallas estimates that 90% of his customers are upside-down, often owing $10,000 to $15,000 more than the trade-in is worth"). *See also, Graupner v. Nuvell Credit Corp.* 537 F.3d 1295, 1303 (11th Cir. 2008) and *GMAC v. Peaslee*, 373 B.R. 252, 259 (W.D.N.Y. 2007) discussing the high frequency of automobile sales finance transactions in which negative equity is financed by the dealer.

always involves financing the negative equity through the dealership since this form of financing is usually cheaper than alternative financing sources available to the consumer, assuming alternative financing sources are available at all.

Automobile financing is heavily regulated in the United States. Virtually every state has a retail installment sales act that regulates the terms of financing that can be offered to consumers in vehicle purchase transactions. Because of the widespread prevalence of negative equity financing in vehicle purchase transactions and its importance in facilitating new car sales, 36 states, including California, have enacted statutes as part of their retail installment sales act specifically permitting the dealer to finance negative equity with respect to a trade-in vehicle.[6] These laws take a variety of forms, but they all permit the inclusion of the negative equity as part of the purchase price that the consumer agrees to pay for the new vehicle. The California statute is discussed in detail below.

2. BAPCPA and the Hanging Paragraph.

a. Pre-BAPCPA.

Prior to enactment of BAPCPA, the Bankruptcy Code allowed a Chapter 13 debtor to modify the rights of a secured creditor with a purchase-money security interest in a vehicle by bifurcating the claim into secured and unsecured portions based on the vehicle's value. 11 U.S.C. §§ 506(a)(1), 1325(a)(5) (2004). Thus, the

6 *See* Attachment "A."

creditor would have a secured claim to the extent of the value of the vehicle and an unsecured claim to the extent the creditor's claim exceeded the value of the vehicle. That portion of the creditor's claim allowed as secured would be paid in full with interest, while the unsecured portion would be paid pro-rata with other general unsecured claims. Such a proposal in a Chapter 13 plan is commonly referred to as a "bifurcation and cramdown."

b. Post-BAPCPA.

In 1996, Congress undertook a major revision of the Bankruptcy Code to address abuses in the bankruptcy process as it applies to consumer credit. This revision process culminated in the enactment of BAPCPA, which became effective on October 17, 2005. Pub. L. No. 109-8, 119 Stat. 80 (2005). One of the important features of BAPCPA was the adoption of a "means test" which compels individual debtors with the financial ability to make meaningful payments to their creditors to use Chapter 13 if they file for bankruptcy protection. Credit card companies were the principal proponents of this change since they generally held unsecured claims and were paid little or nothing in a Chapter 7 liquidation case.

Automobile finance companies would have been significantly harmed by this change since they typically fared well in Chapter 7 liquidation cases because their liens followed the vehicle through the case and debtors therefore most often signed reaffirmation agreements with respect to the indebtedness secured by the

vehicle. In addition, the strip down/bifurcation process described above was being abused by debtors who would purchase a new vehicle and then file a Chapter 13 case shortly thereafter in order to strip down the secured claim to the reduced value of the vehicle and cram down a plan of arrangement which would pay the automobile finance company a fraction of the amount owed on its secured indebtedness. [7]

To cure this abuse, Congress amended the Bankruptcy Code to give motor vehicle financiers special protection against cramdown. Under BAPCPA, claims of creditors who finance the purchase of a motor vehicle acquired for the debtor's personal use within 910 days preceding bankruptcy (sometimes referred to as "910 Claims") are treated more favorably than other secured claims: the secured claims of motor vehicle purchase-money financiers are no longer limited to the value of the financed vehicle. This new treatment is required by the hanging paragraph appended at the end of § 1325(a).

B. THE PLAIN LANGUAGE OF THE HANGING PARAGRAPH, AS WELL AS ITS PURPOSE AND LEGISLATIVE HISTORY, SUPPORT THE CONCLUSION THAT AMERICREDIT'S PURCHASE-MONEY SECURITY INTEREST IN THE VEHICLE INCLUDES THE CHARGE FOR NEGATIVE EQUITY

The hanging paragraph provides:

> For purposes of paragraph (5), section 506 shall not apply to a claim described in that paragraph if the creditor has a purchase-money

7 *See GMAC v. Peaslee*, 373 B.R. at 261.

> security interest securing the debt that is the subject of the claim, the debt was incurred within the 910-day [*sic*] preceding the date of the 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; . . . .

11 U.S.C. § 1325(a)(*).

Four requirements must be satisfied for the hanging paragraph to apply: (i) the creditor must have a purchase-money security interest securing the indebtedness that is the subject of its claim, (ii) the debt must have been incurred within the 910-day period preceding the filing of the petition, (iii) the collateral must consist of a motor vehicle and (iv) the motor vehicle must have been acquired for the personal use of the debtor. This dispute concerns only the first requirement, viz., that the creditor must have a purchase-money security interest securing its claim.

The plain language of the hanging paragraph, as well as its purpose and legislative history, support Americredit's position that it has a purchase-money security interest in Penrod's Vehicle so that its claim cannot be bifurcated and crammed down in her Chapter 13 case.

1. The Plain Language of the Hanging Paragraph.

In *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235 (1989), the United States Supreme Court, in interpreting the Bankruptcy Code, stated:

> The plain meaning of legislation should be conclusive, except in the "rare cases [in which] the literal application of a statute will produce a

> result demonstrably at odds with the intention of the drafters." *Griffen v. Oceanic Contractors*, 458 U.S. 564, 571, 102 S. Ct. 3245, 3250, 73 L. Ed. 2d 793 (1982). In such cases, the intention of the drafters, rather than the strict language, controls.

489 U.S. at 242-43.

The text of the hanging paragraph is clear and unambiguous. The statute prohibits bifurcation and cramdown of any claim coming within its scope. Americredit's security interest clearly comes within that scope. Americredit's security interest is a purchase-money security interest since it secures indebtedness that was incurred by Penrod to purchase the Vehicle. Even the BAP concedes that Americredit's security interest is a purchase-money security interest as to all of the indebtedness evidenced by the Contract, with the exception of the charge for negative equity. E.R. at 48. The statutory language is broad, absolute and unqualified. The statute contains no language limiting its conferred benefit "to the extent" of a purchase-money security interest, nor does it require that the entire indebtedness be secured by a purchase-money security interest. Instead, the statute requires only that a purchase-money security interest exist--it applies "*if* the creditor has a purchase-money security interest securing the debt that is the subject of the claim." Americredit's security interest in the Vehicle is clearly a purchase-money security interest, which brings it squarely within the language of the statute.

In the recent case of *In re Dale*, No. 07-32451-H5-13, 2008 U.S. Dist LEXIS 88959 (S.D.Tex. Aug. 14, 2008), the appellate court reached precisely this result on

facts that are identical to those present in this appeal. After reviewing BAPCPA and relevant authorities, the Court concluded that "the statutory language is clear and unambiguous. A plain reading leaves no question that the hanging paragraph eliminates the federal remedy of bifurcation of claims into secured and unsecured." *Dale* at *9. The Court in *Dale* observed that the hanging paragraph made the bifurcation remedy in Section 506 of the Bankruptcy Code unavailable to 910 Claims and stated that "it declines to parse the statutory language and read into the paragraph's reference to a 'purchase-money security interest' a newly enacted federal bifurcation remedy." *Id.* at *10. The Court reached the same result in *In re Hampton*, No. 07-14990 (Bankr. S.D.Ohio Mar. 19, 2008), relying upon the fact that the hanging paragraph lacks language that requires the indebtedness to be secured "only" by a purchase-money security interest, which language is present in other cramdown sections of the Bankruptcy Code.[8] *See also Peaslee*, 373 B.R. at 261 ("By its terms, the hanging paragraph prohibits the bifurcation of *any* claim if the debt is secured by a PMSI") (emphasis in original); *In re Shockley*, No. 07-15884, 2008 Bankr. LEXIS 2550, at *6 (Bankr. S.D.Ohio Apr. 29, 2008) ("The Debtors' interpretation requires the addition of the word 'entire' as a modifier of the word 'debt.'").

2. The Purpose of the Hanging Paragraph.

8 The legislative history section of this brief shows that this omission in the hanging paragraph was intentional. *See* discussion *infra* at 24.

When Congress enacted BAPCPA and the hanging paragraph, it made its purpose unmistakably clear: to "Give Secured Creditors Fair Treatment in Chapter 13" and, in the specific context of the hanging paragraph, "Restoring the Foundation for Secured Credit."

The United States Court of Appeals for the Seventh Circuit is the first federal circuit court to interpret the hanging paragraph. *In re Wright*, 492 F.3d 829 (7th Cir. 2007). The issue in *Wright* was whether a debtor in a Chapter 13 case could surrender a vehicle to the secured creditor in full satisfaction of the secured claim. The Court, in an opinion written by Chief Judge Easterbrook, emphatically rejected this interpretation of the statute:

> Section 306(b) of the 2005 Act, Pub.L. 109-8, 119 Stat. 23, 80 (Apr. 20, 2005), which enacted the hanging paragraph, is captioned "*Restoring the Foundation for Secured Credit.*" This implies replacing a contract-defeating provision such as § 506 (which allows judges rather than the market to value the collateral and set an interest rate, and may prevent creditors from repossessing) with the agreement freely negotiated between debtor and creditor. Debtors do not offer any argument that "the Foundation for Secured Credit" could be "restored" by making all purchase-money secured loans non-recourse; they do not argue that non-recourse lending is common in consumer transactions, and it is hard to imagine that Congress took such an indirect means of making non-recourse lending *compulsory.*

Id. at 832 (first emphasis added; second emphasis in original).

The same policy considerations apply here. Penrod urges this Court to deny Americredit secured treatment for its claim by recharacterizing a major portion of its claim as unsecured despite the clear terms of the Contract freely negotiated

between the parties. The Contract and the hanging paragraph forbid this recharacterization. In protecting automobile finance companies from the abuses attendant to bifurcation and cramdown of their secured claims in a Chapter 13 case, Congress intended to restore the foundation for secured credit by giving the creditor the full benefit of its contract with the debtor. Like the debtors in *Wright*, Penrod has not offered any argument as to how the foundation for automobile secured financing will be restored by re-writing her Contract to strip out a substantial portion of the indebtedness she willingly incurred to purchase the Vehicle.

The decision in *Wright* has been unanimously followed by every other federal circuit court that has considered this issue.[9] In *In re Long*, 519 F.3d 288 (6th Cir. 2008), the United States Court of Appeals for the Sixth Circuit described the purpose of the hanging paragraph in the broadest possible terms: "Based upon the legislative history, there is little doubt that the 'hanging-sentence architects intended only good things for car lenders and other lien holders.'" *Id*. at 294.[10]

The United States Court of Appeals for the Eleventh Circuit is the only federal circuit court to apply the hanging paragraph to a negative equity case. In

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9 *Capital One Auto Fin. v. Osborn*, 515 F.3d 817 (8th Cir. 2008); *In re Ballard*, 526 F.3d 634 (10th Cir. 2008); *Tidewater Fin. Co. v. Kenney*, 531 F.3d 312 (4th Cir. 2008); *In re Long*, 519 F.3d 288 (6th Cir. 2008); *In re Barrett,* 543 F.3d 1239 (11th Cir. 2008).

10 *Quoting* Keith M. Lundin, Chapter 13 Bankruptcy 451.5-1 (3d ed. 2000 & Supp. 2007-1).

Graupner, the Court held that charges for negative equity qualify for protection from bifurcation and cramdown under the hanging paragraph. In reaching its decision, the Court relied heavily on the purpose of the hanging paragraph and its preambles. *Id*. at 1296-98. In *GMAC v. Horne*, 390 B.R. 191, 205 (E.D.Va. 2008), discussed *infra* at 36-38, the appellate court reached the same result, expressing the view that protecting negative equity from bifurcation and cramdown "best effectuates the expressed Congressional intent."[11]

BAPCPA was under consideration by Congress for almost 10 years. During this period, substantial testimony was taken as to the nature of consumer finance, particularly automobile finance, the industry practices attendant thereto, and the abuses that led to the reform effort.[12] As discussed above, one of those well-established industry practices, which is specifically sanctioned in statutes adopted in 36 states, is the financing of negative equity in connection with the purchase of automobiles. Clearly, Congress did not intend to deny automobile dealers and finance companies the benefit of the protections afforded by the hanging paragraph

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11 *See also in re Schwalm*, 380 B.R. 630 (Bankr. M.D.Fla. 2008); *In re Johnson*, 337 B.R. 269 (Bankr. M.D.N.C. 2006). *Cf., Shaw v. Aurgroup Financial Credit Union*, 2009 WL 48214 at *6, *10 (6th Cir. Oct. 9, 2009), relying upon *In re Long* and the preambles to BAPCPA and the hanging paragraph to rule in favor of the secured creditor.

12 Whitford, *A History of the Automobile Lender Provisions of BAPCPA*, 2007 U. Ill. L. Rev. 143 (2007); Carlson, *Cars and Homes in Chapter 13 After the 2005 Amendments to the Bankruptcy Code*, 14 Am. Bankr. Inst. L. Rev. 301 (2006); Jensen, *A Legislative History of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 Am. Bank. L.J. 485 (2005).

to a long-standing and well established industry practice that is of substantial benefit to consumers, facilitates the purchase and financing of automobiles and is specifically permitted by applicable law.[13] Given the prevalence of this type of financing, and its clear benefit to consumers, had Congress intended to exclude these charges from the protection of the hanging paragraph, it would have said so in the statute, or there would be at least some indication of this intent in the legislative history. *See Long*, 519 F.3d at 297.

3. The Legislative History of the Hanging Paragraph.

The earliest response in BAPCPA to secured creditor concerns as to the presence of abuses in the bifurcation and cramdown process was a provision in the 1998 House Bill. That provision amended Section 506, not Section 1325, of the Bankruptcy Code. The provision was not limited to motor vehicles but was

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13 *See Graupner,* 537 F.3d at 1302; *Peaslee*, 373 B.R. at 261-2; *Nuvell Credit Company, LLC v. Muldrew*, 396 B.R. 915, 924-925 (E.D.Mich. 2008); *In re Dunlap*, 383 B.R. 113, 118-19 (Bankr. E.D.Wisc. 2008) (all relying upon industry practices and existing laws at the time of enactment of the hanging paragraph to hold that charges for negative equity are protected from bifurcation and cramdown). S*ee also Schwalm*, 380 B.R. at 634 ("The debtors' argument carries with it the implicit conclusion that Congress intended the 'hanging paragraph' to be inoperative as to a substantial number of auto finance transactions that were industry practice when BAPCPA was adopted. Such an interpretation is not compelled by the text of the 'hanging paragraph' or by its legislative history"); *In re Myers*, 393 B.R. 616, 622 (Bankr. S.D.Ind. 2008) ("This Court doubts that Congress would have gone to the trouble of enacting the hanging paragraph for the benefit of automobile lenders just to render it inapplicable to typical and common automobile financing transactions such as this").

otherwise narrowly drafted as to the types of claims that would enjoy protection from bifurcation:

> "(1) [Section 506] subsection (a) shall not apply to an allowed claim to the extent attributable in whole or in part to the purchase price of personal property acquired by the debtor within 180 days of the filing of the petition…;"
>
> "(2) if such allowed claim attributable to the purchase price is secured only by the personal property so acquired, the value of the personal property and the amount of the allowed secured claim shall be the sum of the unpaid principal balance of the purchase price and accrued and unpaid interest and charges at the contract rate;…."

H.R. 2500, 105th Cong. § 110 (1997); H.R. 3150, 105th Cong. § 128 (1998).

Several observations can be made as to the scope of this anti-bifurcation provision in the House Bill. First, the provision would not have protected from cramdown much of the indebtedness that is covered by a purchase-money security interest in an automobile. For example, it would not have protected amounts attributable to costs and expenses incurred after the acquisition of the automobile, such as collection costs, attorney's fees and expenses incurred to preserve and protect the automobile, even though these costs and expenses are clearly treated as purchase-money indebtedness.[14] Second, the provision would not have protected any secured transaction that was completed more than 6 months prior to the filing of the bankruptcy petition. Third, the "to the extent" and "in whole or in part" wording would have limited the application of the anti-bifurcation rule to the

14 *See* discussion *infra* at 32-33.

portion of the claim that is related to the purchase price applicable to personal property, i.e., principal and interest. And, fourth, the rule would not apply unless the claim was secured solely by the personal property purchased through the incurrence of the indebtedness.

The Grassley/Durbin bill introduced in the Senate was far more expansive. The original version of this bill contained no provision concerning cramdown of secured indebtedness. However, in a markup session in the Judiciary Committee, Senator Abraham from Michigan introduced an amendment that became the basis of the hanging paragraph that appeared in the final bill approved by Congress. Senator Abraham's proposal amended Section 1325 of the Bankruptcy Code to state that Section 506 shall not apply to secured indebtedness no matter when incurred and whether or not purchase-money in nature. S. 1301, 105th Cong. § 302(a) (1998).

The purchase-money language appeared for the first time in 2000, when Section 1325 was amended to cover a claim "if the creditor has a purchase money security interest securing the debt that is the subject of the claim, the debt was incurred in the 5-year period preceding the filing of the petition, and the collateral for that debt consists of a motor vehicle...acquired for the personal use of the debtor." S. 3186, 106th Cong. § 306 (2000). As finally enacted, the Abraham amendment became the unnumbered hanging paragraph attached to section

1325(a) of the Bankruptcy Code.

Two important points can be gleaned from this legislative history. First, the evolution of the anti-bifurcation rule expanded the scope of the rule while limiting its application to motor vehicle collateral. For example, the final version of the hanging paragraph (i) extended its reach beyond principal and interest to cover all charges encompassed within a purchase-money security interest, (ii) extended the reach-back period to a 910-day period, rather than the 180-day period, (iii) removed all limitations inherent in the "to the extent" and "in whole or in part" language and (iv) removed the requirement that the collateral securing the indebtedness could only be the personal property acquired as a result of the incurrence of the indebtedness.

Second, the legislative history demonstrates that, in the final version of the hanging paragraph, Congress abandoned any attempt to define the protection afforded to a secured creditor by reference to the components of the indebtedness that make up its secured claim. Instead, Congress focused on the type of transaction that gave rise to the abuses that it was seeking to prevent, namely, the purchase of an automobile on credit followed shortly by the filing of a Chapter 13 bankruptcy case so that the debtor could strip the secured creditor of a substantial portion of its claim. Thus, the hanging paragraph refers to the nature of the transaction that gave rise to the claim--it must be a purchase-money transaction--

and to the nature of the collateral--it must be a motor vehicle--and not to the nature of the indebtedness that makes up the claim, i.e., it must be principal and interest. As long as the collateral is a motor vehicle acquired by the debtor for personal use, and it is secured by a purchase-money security interest, the entire secured indebtedness is protected from bifurcation and cramdown by the hanging paragraph.

The Penrod transaction fits this paradigm perfectly. Penrod purchased a new 2005 Ford vehicle in September of 2005. All of the charges that she incurred and agreed to pay were directly related to the purchase transaction and were specifically authorized by California law. In March of 2007, less than 910 days after her purchase of the Vehicle, she filed a Chapter 13 case seeking to strip down Americredit's claim from $25,675 to $15,615. This is exactly the type of abuse that Congress sought to prevent in BAPCPA.

In its Opinion, the BAP did not focus on the text, purpose or legislative history of the hanging paragraph, as set forth above, but, instead, turned directly to state law, specifically Article 9 of California's Uniform Commercial Code. E.R. at 15-25. As will be demonstrated later in this brief, California state law strongly supports Americredit's position in this case. However, Americredit respectfully submits, for the reasons set forth above, that the plain language of the hanging paragraph, when considered in light of its purpose and legislative history, supports

its position without the need to resort to state law.

C. OTHER FEDERAL LAWS SUPPORT THE INCLUSION OF NEGATIVE EQUITY AS PART OF THE PURCHASE-MONEY INDEBTEDNESS PROTECTED BY THE HANGING PARAGRAPH.

When Congress enacted BAPCPA in 2005, it was presumed to have known about other pertinent federal laws governing the purchase-money financing of motor vehicles.[15] One important federal law is the Truth in Lending Act ("TILA") (15 U.S.C. §§ 1601 *et seq*.), as implemented by Regulation Z (12 C.F.R. Part 226). The presumption of familiarity with existing law is especially strong with respect to the hanging paragraph and TILA, because, when Congress adopted BAPCPA, it also amended TILA. Pub. L. No. 109-8, 119 Stat. 23, § 1301-09.

In 1999, the Federal Reserve Board, with the aid of FRB Staff Interpretations, amended Regulation Z to include guidance on how purchase-money car financiers should treat negative equity and other recurrent transaction costs for disclosure purposes. 64 F.R. 16614-01, 16617 (1999) (adopting revisions to 12 C.F.R. § 226.18(j)(3), Supp. I to Part 26, Official Staff Interpretations). In particular, negative equity and other transaction costs must be disclosed as part of the "total sale price" of the new vehicle. In this way, as a matter of federal law, the cash price of the vehicle is linked with these costs as part of a single financing

15 *See Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988) ("We generally presume that Congress is knowledgeable about existing law pertinent to the legislation that it enacts").

transaction in which the negative equity is treated as part of the price of the vehicle.[16] It is significant that the California legislature has specifically adopted this view of automobile sales financing in ASFA.[17]

In short, a vehicle financing is considered to be a purchase-money transaction for TILA disclosure purposes even though part of the proceeds is used to satisfy the remaining debt owing on the trade-in vehicle. By treating these charges as part of the "total sale price," TILA links them to the cash price and treats both items as part of a single purchase-money financing.[18]

D. UNDER CALIFORNIA LAW, CHARGES FOR NEGATIVE EQUITY ARE PURCHASE-MONEY OBLIGATIONS ENTITLED TO PROTECTION FROM BIFURCATION UNDER THE HANGING PARAGRAPH.

As a matter of statutory interpretation, the plain language of the hanging

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16 The Official Staff Interpretation of Regulation Z adopted by the FRB contains the following guidance with respect to the treatment of negative equity: "[W]hen 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 cash provided*. . . . 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. . . . *In that case, the total sale price would include the* sum of the $20,000 cash price [and] the *$2,000 lien payoff amount as an additional amount financed* . . . ." 12 C.F.R. Part 226, Supp. I, ¶ 18(j)-3, at 464 (emphasis added).

17 *See* discussion *infra* at 44 *et. seq.*

18 *See Horne*, 390 B.R. at 202-03; *Muldrew*, at 924; *In re Pharis*, No. 07-BK-30527, 2007 Bankr. LEXIS 3863, at *5-6, 12 (Bankr. W.D.La. Oct. 10, 2007) (all relying upon TILA to protect charges for negative equity from bifurcation and cramdown).

paragraph, considered in light of its purpose and legislative history, supports Americredit's position and compels reversal of the Opinion of the BAP. However, should this Court find the statute ambiguous, it should consult state law, especially since, in enacting the hanging paragraph, Congress was dealing with state-created property rights.[19] California has two statutory regimes that are directly relevant here: Article 9 of the UCC, which governs secured transactions in personal property,[20] and ASFA, which governs motor vehicle installment sales.[21] Both Article 9 and ASFA support Americredit's position.

1. Charges for Negative Equity are "Purchase-Money Obligations" under Article 9 of the Uniform Commercial Code.

Article 9 of the UCC, as effective in California and in every other state in the country, comprehensively governs the creation, perfection, priority and enforcement of security interests in personal property.[22] The term "purchase-money security interest" is specifically defined in Section 9103 of Article 9. Section 9103 provides that "a security interest in goods is a purchase-money security interest . . . to the extent that the goods are purchase-money collateral with

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19 *Nobelman v. American Savings Bank,* 508 U.S. 324, 329 (1993) ("[i]n the absence of a controlling federal rule, we generally assume that Congress has 'left the determination of property rights in the assets of a bankrupt's estate to state law' since such '[p]roperty interests are created and defined by state law).'"

20 Cal. Comm. Code § 9101 *et seq*.

21 Cal. Civ. Code § 2981 *et seq.*

22 Cal. Comm. Code § 9109.

respect to that security interest." "Purchase-money collateral" is defined as "goods . . . that secur[e] a purchase-money obligation incurred with respect to that collateral." A "purchase-money obligation" is defined, in turn, as "an obligation … incurred as all or part of the price of the collateral or for value given to enable the debtor to acquire rights in or the use of the collateral if the value is in fact so used."[23]

The UCC definition of "purchase-money obligation" thus contains two prongs: (i) the price of the collateral and (ii) value given to enable the debtor to acquire rights in or use of the collateral. The two prongs are alternatives, and Americredit prevails if it satisfies either prong. In this case, both prongs support the inclusion of charges for negative equity as purchase-money obligations.

a. The Purchase-Money Security Interest is a Favorite of the Law.

The purchase-money security interest has long been a favorite of the law.[24] This is because purchase-money financing allows a debtor to acquire new assets which might otherwise be subject to an after-acquired property clause in an existing security agreement. Thus, Article 9 creates special "super-priority" rules that allow the holder of a purchase-money security interest in inventory, equipment

23 Cal. Comm. Code § 9103.

24 *See* Gilmore, *The Purchase Money Priority*, 76 Harv. L. Rev. 1333 (1963); McLaughlin, *"Add On" Clauses in Equipment Purchase Money Financing: Too Much of a Good Thing*, 49 Fordham L. Rev. 661, 670-71, 675 (1981).

and software to enjoy priority over the holder of a pre-existing blanket lien on all of the debtor's assets.[25] This favored status is not limited to commercial transactions. For example, under Article 9, the holder of a purchase-money security interest in consumer goods is not required, in most instances, to file a financing statement to perfect its security interest in the goods.[26]

This favored status applicable to purchase money financing also extends to federal laws. In addition to the favored treatment given to purchase-money financiers in the hanging paragraph, section 522(f) of the Bankruptcy Code provides that the debtor may not avoid a purchase-money security interest in exempt household goods,[27] Section 1110 of the Bankruptcy Code gives special rights to purchase-money financiers of aircraft equipment in a Chapter 11 case[28] and Section 547(c)(3) of the Bankruptcy Code gives special protection from preference avoidance to "enabling loans," which are defined like a purchase-money security interest.[29] Under the Federal Tax Lien Act, a purchase-money creditor enjoys priority over a prior-filed federal tax lien.[30] Finally, the Federal Trade Commission's ban on household good liens does not apply to purchase-

25 Cal. Comm. Code § 9324.
26 Cal. Comm. Code §§ 9309(1), 9310(b)(2).
27 11 U.S.C. § 522(f)(1)(B) (2005).
28 11 U.S.C. § 1110 (2005).
29 11 U.S.C. § 547(c)(3) (2005).
30 Clark, *The Law of Secured Transactions Under the Uniform Commercial Code*, vol. 1, Para. 5.04 (rev. ed. 2007).

money security interests in the household goods.[31]

This favored treatment under federal and state law is an acknowledgment of the importance of purchase-money financing to our national economy, as this type of financing facilitates the acquisition of assets by debtors, either to grow their business or to acquire goods for their personal use and enjoyment. It is for this reason also that the statutes affording this favored status, most especially Article 9 of the Uniform Commercial Code, are broadly drafted and construed as to the type of obligations that will qualify for purchase-money treatment.[32] California law grants the same favored status to purchase-money real estate mortgages.[33]

b. Under the First Prong of the Article 9 Definition of "Purchase-Money Security Interest," the "Price" of the Vehicle Purchased by Penrod Includes the Charge for Negative Equity.

The first prong in the Article 9 definition of "purchase-money security interest" states that a security interest is a purchase-money security interest if the obligation it secures was incurred "as all or part of the price of the collateral." Cal.

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31 16 C.F.R. § 444.2 (a)(4) (1984); *see also* 12 C.F.R. § 227.13 (1985).

32 *See Pristas v. Landaus of Plymouth, Inc.*, 742 F.2d 797, 801 (3rd Cir. 1984); *In re Billings*, 838 F.2d 405, 408 (10th Cir. 1988) (both urging a broad interpretation of the term "purchase-money security interest"). *See also Brodie Hotel Supply, Inc. v. United States*, 431 F.2d 1316, 1319 (9th Cir. 1970) (describing the purchase-money security interest as a "specially favored" lien).

33 *See* Cal. Civ. Code §§2898, 3046. *T*he priority granted by these statutes extends to both purchase-money sellers and purchase-money lenders, *Van Loben Sels v. Bunnell*, 120 Cal. 680, 684 (1898), and is rooted in long-standing common law and equitable principles. *See Brock v. First South Sav. Ass'n.*, 8 Cal. App. 4th 661, 672 *et. seq.* (1992).

Comm. Code §9103(a)(2). Official Comment 3 to § 9103 defines the term "price:"

> [t]he "price" of collateral…includes "[o]bligations for expenses incurred in connection with acquiring rights in the collateral, sales taxes, duties, finance charges, interest freight charges, costs of storage in transit, demurrage, administrative charges, expenses of collection and enforcement, attorney's fees, and other similar obligations."

Cal. Comm. Code § 9103, Comment 3.

Several important conclusions can be drawn from the textual definition of "purchase-money security interest," as supplemented by Comment 3. First, the term "price" has a broad and expansive meaning, consistent with the favored status of the purchase-money lien and the desire to encourage and facilitate purchase-money financing.[34] Second, the term "price" is not limited to the cash price of the goods. This is clear from the fact that the term "price" includes finance charges which are added to the cash price to determine the "time sale price" or "credit price" applicable to the goods.[35] Third, the definition of "price" is not limited to the common understanding of this term as used in everyday parlance. For example, the price of collateral includes expenses of enforcement and attorney

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34 *See* McLaughlin, 49 Fordham L. Rev. at 661. The negative equity cases consistently emphasize this broad construction theme. *See, e.g., Graupner*, 537 F.3d at 1302-03; *Myers*, 393 B.R. at 620-21; *Dunlap*, 383 B.R. at 117; *In re Burt*, 378 B.R. 352, 362 (Bankr. D.Utah 2007).

35 *See* McLaughlin, 49 Fordham L. Rev. at 665. The use of the word "cash price" in other sections of Article 9 reinforces the conclusion that the term "price" as used in Section 9103 has a broader meaning than the term "cash price". *See* UCC § 9-620(e)(1) (employing the term "cash price") and § 9-625(c)(2) (employing both the terms "time-price" and "cash price").

fees, even though these expenses and fees would not normally be considered part of the purchase price of goods. Fourth, the fees, expenses and charges encompassed within the broad definition of "price" are not limited to those legally required in order for the debtor to take title to the goods.[36] In fact, most of the charges listed in Comment 3 are not expenses that are incurred in order for the debtor to acquire title to the goods; and many of them are incurred well after the transaction has taken place and the debtor has already acquired the goods. Fifth, even though the list contains 11 separate and distinct items in addition to the cash price of the goods, it is not exhaustive. The inclusion of "obligations for expenses incurred in connection with acquiring rights in the collateral" at the beginning of the list[37] and "other similar obligations" at the end of the list telegraphs this clear

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36 Use of the words "in connection with" in Comment 3 reinforces this position. The Comment states that "obligations for expenses incurred in connection with acquiring rights in the collateral" qualify as purchase-money obligations. Had the drafters intended to limit these expenses to those legally required to acquire rights in the collateral, they would have used the words "in order to" rather than the broader standard of "in connection with."

37 The phrase "obligations for expenses incurred in connection with acquiring rights in the collateral" begins the list in Comment 3 and is set apart from the rest of the listed items by commas. This is significant because it shows that these expenses need not be of the same type or magnitude as the rest of the items in the list. *See Ron Pair Enterprises*, 489 U.S. at 241-2. Further support for this broad interpretation of the first item in the list--"obligations for expenses incurred in connection with"--is found in the last item in the list--"other similar obligations." This drafting convention demonstrates that the first item in the list--obligations for expenses incurred--is not limited to obligations that are similar to the listed items that follow. Otherwise, the first and last items in the list would be redundant, a result not permitted by well settled rules of

message.[38]

The second paragraph of Comment 3 is of special significance since it sets forth the overriding test that must be satisfied for fees, expenses and charges to qualify for treatment as "purchase-money obligations." That paragraph states:

> The concept of "purchase-money security interest" requires *a close nexus between the acquisition of collateral and the secured obligation*.

Cal. Comm. Code § 9103, Comment 3 (emphasis added). Again, the Comment sets forth a broad and liberal standard--all that it requires is a close connection between the acquisition of the goods and the secured obligation.

In this case, the portion of the secured indebtedness evidenced by the Contract attributable to negative equity falls well within the broad definition of "price" in Section 9103. The charge for negative equity was directly related and closely connected to Penrod's purchase of the Vehicle, and would not have been

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statutory interpretation. *See TRW, Inc. v. Andrews*, 543 U.S. 19, 31 (2001) ("It is a 'cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence or word shall be superfluous, void or insignificant.'"); *University Medical Center v. Thompson*, 380 F.3d 1197, 1200 (9th Cir. 2004) (relying upon the *TRW* case); *DuBois v. Workers' Comp. Appeals Bd.,* 5 Cal. 4th 382, 388 (1993). Indeed, tethering "obligations for expenses incurred" to the other items in the list makes no sense since the other listed items are not even similar to each other (compare "sales taxes" to "enforcement costs and attorney's fees").

38 Other expenses that would be treated as "purchase-money obligations" under § 9103(a)(2), even though they are not listed in Comment 3, would include expenses incurred by the secured creditor to preserve, protect and defend the collateral should the debtor breach this covenant in the security agreement. *See* McLaughlin, 49 Fordham L. Rev. at 673-74.

incurred absent her purchase of the Vehicle. Penrod's counsel virtually conceded at oral argument in the BAP that the transaction would not have been completed unless the dealer accepted Penrod's trade-in vehicle and discharged the lien on that vehicle. E.R. at 68.

In respect of her purchase of the Vehicle, Penrod negotiated a package transaction that folded all of the charges into one Contract on terms that were acceptable to the dealership and to her. All of these charges clearly qualify as "expenses incurred in connection with acquiring rights in the collateral" since they are all closely connected to the purchase of the Vehicle and therefore satisfy the "close nexus" requirement of the statute.

In *Graupner*, 537 F.3d 1295, the Eleventh Circuit reviewed the relevant statutes and decisional law and concluded that charges for negative equity were purchase-money obligations since they satisfy the "close nexus" test of Article 9:

> We believe there is such a "close nexus" between the negative equity in Debtor's trade-in vehicle and the purchase of his new vehicle. The financing was part of the same transaction and may be properly regarded as a "package deal." Payment of the trade-in debt was tantamount to a prerequisite to consummating the sales transaction, and utilizing the negative equity financing was a necessary means to accomplish the purchase of the new vehicle. As the district court held in affirming the bankruptcy court, the negative equity was an "integral part of," and "inextricably intertwined with," the sales transaction. To hold otherwise would not be a fair reading of the UCC.

537 F.3d at 1302.

In *Muldrew*, 396 B.R. 915 at 925, the District Court for the Eastern District

of Michigan reached the same conclusion as that set forth in *Graupner*, based upon the package nature of vehicle installment sale transactions and the close interrelationship that exists between the purchase price of a new vehicle and the purchaser's trade-in vehicle. The Court correctly concluded that "[a] closer nexus to the collateral can hardly be imagined." *Id*. at 926.[39]

In *Peaslee*, the trustee made the same *ejusdem generis* argument as the BAP: that negative equity is not a "purchase-money obligation" within the meaning of UCC Section 9103 since it is not similar to the other expense listed in Comment 3. The appellate court rejected this argument:

> [I]n addition to the specific items listed in Comment 3, the comment also includes "obligations for expenses incurred in connection with acquiring rights in the collateral." Since the items following that term-sales taxes, duties, etc.-are not set off by the words "such as," "including," or a similar phrase, they are apparently not listed as *examples* of such expenses, but as *additional* components of the "price" of the collateral, or of "value given" by the debtor. It is not apparent why a refinancing of rolled-in negative equity on a trade-in as part of a motor vehicle sale could not constitute an "expense[ ] incurred in connection with acquiring rights in" the new vehicle . . . it is in fact difficult to see how that could *not* be viewed as such an expense.

373 B.R. at 258-9 (emphasis in original).

Until recently, the seminal and leading authority supporting the position adopted by the BAP in its Opinion was *In re Pajot*, 371 B.R. 139 (Bankr. E.D.Va.

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39 *See also Schwalm*, 380 B.R. at 633-34; *In re Weiser*, 381 B.R. 263, 268 (Bankr. W.D.Mo. 2007); *In re Ford*, 387 B.R. 827, 831 (Bankr. D.Kan. 2008).

2007). This decision has been reversed on appeal. *See Horne*, 390 B.R. 191. In *Horne*, the District Court for the Eastern District of Virginia issued a 33-page opinion in which it exhaustively reviewed the relevant statutes and decisional law, and concluded that charges for negative equity satisfied both the "price" and "value" prongs of Article 9 of the UCC. As to the price prong, the Court held:

> Applying the accepted meaning of the term, the price that the debtors paid for the vehicles at issue includes negative equity because each debtor, as buyers, gave to each seller a trade-in vehicle which would not have, indeed could not have, been accepted for that purpose unless the balance owed on it by the buyers to the third party had been paid off. Thus the discharge of the buyer's remaining obligation on the trade-in vehicle was part and parcel of the buyer's ability to use the trade-in vehicle to buy the new vehicles.

390 B.R. at 199.

c. Under the Second Prong of the Article 9 Definition of Purchase-Money Security Interest, the Charge for Negative Equity Constitutes Value Given that Enabled Penrod to Acquire Rights in or Use of the Vehicle.

Americredit also has a purchase-money security interest under the second prong of the Article 9 definition, which defines "purchase-money obligation" as an obligation incurred "for value given to enable the debtor to acquire rights in or the use of the collateral if the value is in fact so used." Cal. Comm. Code § 9103(a)(2). Comment 3 to Section 9103 states that the term "value given to enable," like the term "price," includes "obligations for expenses incurred in connection with acquiring rights in the collateral" as well as the other items listed

in the Comment. *Id.* at Comment 3.

The transaction in this case fits this second prong perfectly. Just as the dealer advanced the funds to satisfy the obligation to pay the cash price of the Vehicle, the dealer also gave "value" by advancing funds to satisfy the indebtedness on the trade-in vehicle, thus "enabling" Penrod to acquire the Vehicle. As stated above, it was a package transaction. As contemplated by Comment 3, the costs of satisfying these obligations were "expenses incurred" in connection with Penrod's acquiring rights in the collateral, i.e. the Vehicle.

In *Horne*, the appellate court explained why charges for negative equity satisfy the value prong of Section 9103:

> However, the buyers could not have contributed the trade-in vehicle unless the seller acted to enable the debtor to do so, and the financing of the negative equity was just part of the way that the debtor was enabled to use the trade-in vehicle to acquire a possessory right in, and the use of, the new vehicle.

390 B.R. at 199.[40]

d. The BAP Erred in its Application of Article 9.

(1) The Contract Did Not Involve Two Separate Transactions; nor can it be Characterized as a Refinancing or a Payment of Antecedent Indebtedness.

The BAP characterized Penrod's transaction with the dealer as two separate transactions--a purchase of the Vehicle and a loan to pay off existing indebtedness

40 *Accord, Ford*, 387 B.R. at 831; *In re Cohrs*, 373 B.R. 107 (Bankr. E.D.Cal. 2007) (applying California law).

on the trade-in vehicle. E.R. at 26-27. In the same vein, the BAP characterized the transaction as a refinancing and an assumption by the dealer of Penrod's antecedent indebtedness. E.R. at 26-27; 35. These characterizations are plainly inaccurate. The dealer made a single advance pursuant to single Contract which created a single indebtedness incurred in the purchase of a single asset--the Vehicle. Although the advance by the dealer discharged existing indebtedness, there is nothing in Section 9103 or Comment 3 that disqualifies an advance as a purchase-money obligation because it is used to discharge existing indebtedness. In this respect, the transaction is no different than if the dealer had advanced funds to discharge existing indebtedness related to storage or transportation charges, which are expenses specifically listed in Comment 3 as "purchase-money obligations." The dealer advanced new value to Penrod to purchase the Vehicle and discharge her obligation on the used vehicle. Recharacterizing the advance to pay the negative equity as a separate and unrelated loan transaction, or as an assumption or refinancing of antecedent indebtedness, is functionally and legally inaccurate.[41]

An example will illustrate this point. Suppose Penrod Construction Company ("PCC") approaches its bank, Friendly Finance Bank ("Friendly

41 *See Muldrew* at 926: "The amount Muldrew financed to pay off the negative equity on his trade-in vehicle involved a new, smaller amount, a new lender, a new piece of collateral, and a new contract. In short, it was not 'antecedent debt.'"

Finance"), to secure financing for the purchase of a D-9 Tractor Grader owned by Ace Construction Company ("Ace"). The purchase price for the equipment is $100,000. The equipment is subject to a $40,000 lien granted by Ace to its bank, Local Bank of San Francisco ("Local Bank"). Friendly Finance agrees to make a $100,000 loan to PCC to purchase the equipment. The loan will be secured by the equipment. Of the $100,000 purchase price paid to Ace, $40,000 will be used to discharge the existing indebtedness owed to Local Bank so Ace can deliver title to the equipment free and clear of liens. In this quintessencial bank financing transaction, it is beyond dispute that the security interest granted to Friendly Finance is a purchase-money security interest as to the entire $100,000 loan even though $40,000 of the loan will be used to satisfy existing indebtedness. Friendly Finance will have advanced value (the $100,000 loan) that enabled PCC to acquire title to and use of the collateral (the equipment). In the negative equity cases, the argument for inclusion of the charge for negative equity as a purchase-money obligation is even stronger because, unlike the payment to discharge the existing indebtedness in the above example, the charge for negative equity is always a brand new number, arising out of a new secured transaction, and dependent on the trade-in allowance which is hammered out in the negotiations between the two parties.

(2) The *Ejusdem Generis* Doctrine Does Not Apply to Comment 3.

The BAP invokes the *ejusdem generis* doctrine to hold that charges for negative equity do not qualify for treatment as purchase-money obligations because they are not of the same type or magnitude as the expenses specifically listed in Comment 3. E.R. at 26. As discussed above, the *ejusdem generis* doctrine has no application to Comment 3[42] and has been consistently rejected in negative equity decisions.[43]

(3) The Absence of Negative Equity from the List of Expenses in Comment 3 is Irrelevant.

In its Opinion, the BAP notes the absence of negative equity in the list of expenses in Comment 3, stating that this was not likely an oversight of the Article 9 Reporters. E.R. at 26. Americredit agrees with the BAP that the absence of negative equity in the list of qualified expenses in Comment 3 was not an oversight on the part of the Reporters. In 1993, The National Conference of Commissioners on Uniform State Laws and the American Law Institute appointed an Article 9 Drafting Committee to recommend changes to Article 9 to resolve disputes and ambiguities that have arisen in the interpretation and application of the Code. *See* Cal. Comm. Code § 9101, Official Comment 2. The Drafting Committee completed its work in 1993, and NCCUSL and the ALI approved revised Article 9 that same year. *Id.* Revised Article 9 became effective in every state in 2001. *See*

42 *See* discussion *supra* at 33-34 and n. 37.
43 *See, e.g., Horne*, 390 B.R. at 203-04; *Peaslee*, 373 B.R. at 258.

William M. Burke, *Some Thoughts on the Success of the Revised Article 9 Enactment Effort*, The ALI Reporter, Vol. 23, No. 4 (Summer 2001) (reproduced in Attachment "B). Significantly, as of 1998, when the Drafting Committee completed its work on the text and Official Comments to Article 9, there was not a single reported case on negative equity under Section 9-107 of Article 9, the predecessor to Section 9-103. This is because disputes related to consumer automobile financing, in which negative equity is present, are not resolved under Article 9. Instead, security interests in automobiles in consumer finance transactions are perfected under state certificate of title laws, and not Article 9. *See* Cal. Comm. Code § 9311(a)(2). Disputes under Article 9 related to negative equity did not begin to appear until BAPCPA was enacted in 2005, seven years after the Article 9 Drafting Committee completed its work. Thus, it is not surprising, nor is it in any way significant, that Comment 3 to Section 9-103 does not address negative equity.

Viewing Section 9103 from an even larger perspective, there was no motivation or reason for the drafters to prepare an exhaustive list of permitted expenses in Comment 3 since the Comment explicitly states that the list is not exhaustive. Further, the fundamental premise of the BAP Opinion--that charges for the financing of negative equity are absent from Comment 3--is flawed since the list starts with "obligations for expenses incurred in connection with acquiring

rights in the collateral," which clearly encompasses these charges.

(4) Article 9 Does not Impose a Requirement that Charges be Absolutely Required in Order to Qualify as Purchase-Money Obligations.

The BAP described the advance made by the dealer to pay the negative equity on Penrod's trade-in vehicle as a "convenience or accommodation" to the transaction, but not a requirement for Penrod to purchase the Vehicle. E.R. at 33-35. This is both a misstatement of the law and a mischaracterization of the transaction. First, Article 9 does not require that an expense be legally required in order for the debtor to take title to the collateral in order for the expense to qualify as a purchase-money obligation.[44] Comment 3 to Section 9103 lists several examples of expenses that qualify for treatment as purchase-money obligations even though they are not legally required, or in any way associated with, the debtor's acquiring title to the collateral. For example, Comment 3 lists freight charges, costs of storage, demurrage, administrative charges, expenses of collection, and attorneys fees as purchase-money obligations even though they are not legally required in order for the debtor to acquire title to the collateral and, in most cases, are incurred well after the debtor has acquired the collateral. The BAP's "absolute requirement" holding has no support in Article 9 and has been

44 *See* discussion *supra* at 33 and n. 36.

repeatedly rejected in negative equity decisions.[45]

Even assuming Article 9 imposes an absolute requirement test, the charges for negative equity plainly meet this test. When Penrod chose to trade in her used Ford Explorer, the lien on that vehicle was required to be discharged or the transaction could not have been completed since the dealer would not have been able to resell the used vehicle with the outstanding lien noted on its certificate of title. From both a legal and practical standpoint, the advance by the dealer to discharge the negative equity was an absolute requirement for the transaction to take place.[46] The negative equity cases consistently emphasize this point.[47]

2. The California Automobile Sales Finance Act Treats Charges for Negative Equity as Closely Connected to the Purchase of an Automobile and Therefore Part of the Price of the Vehicle.

The installment sale of motor vehicles is thoroughly regulated in California. This regulation is found in ASFA. ASFA is not just a disclosure statute or consumer protection law. Rather, ASFA thoroughly regulates virtually every aspect

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45 *See, e.g., Graupner*, 537 F.3d at 1295 ("[T]he fact that 'attorneys fees' are listed in Comment 3 'belies the notion that "price" or "value" is narrowly construed as only those [traditional] expenses that *must* be paid to drive the car off the lot.'") (citation omitted; emphasis in original); *Horne*, 390 B.R. at 201, n. 8 & 203-04; *Peaslee*, 373 B.R. 252, 258-59; *In re Smith*, No. 07-3054, slip op. at 22 (Bankr. S.D. Ill. June 25, 2008) (unpublished) (observing that the "absolute requirement" test would even exclude charges for accessories to the vehicle such as air conditioning or a sun roof); *Myers*, 2008 WL 2445214 at *3-*4.

46 *See* discussion *supra* at 35-38.

47 *Id.*

of the installment sale and financing of motor vehicles in California. Thus, ASFA governs the terms that can be included in a motor vehicle installment sale contract, regulates the charges that can be imposed, imposes disclosure requirements related to sale and financing terms, regulates the manner in which the contract can be administered, amended and enforced, limits liens on collateral and restricts the rights of holders of the contract. See Cal. Civ. Code 2981 e*t seq*. The penalties for a violation of ASFA are severe, including, in some circumstances, rendering the contract unenforceable, allowing recovery of all past payments made by the purchaser and treble damages. See Cal. Civ. Code § 2983, 2983.1. The Act has been uniformly described as a thorough and comprehensive regulation of the field of automobile sales and financing.[48]

a. Article 9 and ASFA Should be Read in Pari Materia.

Under California law, statutes are *in pari materia* if they relate to the same person, or class of persons, have the same purpose or cover the same subject matter.[49] The doctrine of *in pari materia* applies even if one statute deals with a subject generally, while the other statute deals with the subject with more specificity.[50] Under this doctrine of statutory interpretation, courts are required to

48 *E.g., Hernandez v. Atlantic Fin. Co.,* 105. Cal. App. 3d 65, 69 (1980); *The Rees-Levering Motor Vehicle Sales and Finance Act,* 10 U.C.L.A. L. Rev. 125, 126-27 (1962).

49 *Isobe v. Unemployment Ins. Appeals Bd.,* 12 Cal. 3d 584, 590 (1974).

50 *Medical Board v. Superior Court*, 88 Cal. App. 4th 1001, 1016 (2001).

construe the statutes together as constituting one law[51] and to reach a result that harmonizes the statutes so as to achieve a uniform and consistent legislative purpose.[52]

The *in pari materia* rule applies here because both Article 9 and ASFA apply to the same class of persons--dealers and automobile sale finance companies--relate to the same subject matter--the installment sale and financing of automobiles--and have the same general purpose--regulating the terms and conditions and methods of administration and enforcement of security interests in automobiles.[53] In fact, the California legislature has instructed the courts to read Article 9 and ASFA *in pari materia* because Article 9 specifically refers to ASFA for supplementary rules and principles. Cal. Comm. Code § 9201(b).

b. ASFA Dictates that Charges for Negative Equity Bear a Close Nexus to the Purchase of Automobiles and Are Therefore Purchase-Money Obligations.

ASFA does not define the term "purchase-money security interest." This definition is found in Article 9. Under the Article 9 definition, charges will qualify as "purchase-money obligations" if they bear a "close nexus" to the acquisition of the collateral. Comment 3 to Section 9103 offers several examples of charges that

51 *Isobe,* 12 Cal. 3d at 590.

52 *Id*. at 591.

53 *See Peaslee*, 373 B. R. at 252; *Horne*, 390 B.R. at 205; *Smith*, No. 07-30540 at *14-15 (applying the *in pari materia* rule of statutory interpretation to Article 9 and state motor vehicle installment sale statutes).

bear such a close nexus, but makes no attempt to develop an exhaustive list, leaving this instead to the state legislature and the courts, based on the unique needs and requirements of each type of secured transaction.

Through ASFA, the California legislature has filled this gap by specifying in great detail charges that bear a close nexus to automobile financing and may therefore be included in an automobile installment contract. It is significant that charges for negative equity, like charges for tax, title and license fees, made the list of permitted charges in ASFA. Thirty-five other states have reached the same conclusion.[54] At the very least, this demonstrates that charges for negative equity bear a close nexus to the purchase of automobiles and should therefore qualify as purchase-money obligations under Article 9.

This legislative determination in ASFA should be followed in applying the close nexus test in Article 9, since the California legislature, in making the determination, had the opportunity to take into consideration all of the relevant policy issues, including consumer preferences, industry practices, the potential for abuse and the desire to encourage and facilitate automobile sales and financing. All of the charges imposed in the Contract signed by Penrod are expressly permitted in ASFA, including the charge for negative equity. The charges are therefore "purchase-money obligations" since they satisfy the close nexus

54 *See* Attachment "A."

requirement of Comment 3.

ASFA specifically includes charges for negative equity as part of the "cash price" of the motor vehicle, Cal. Civ. Code § 2981(e), which dovetails perfectly with the term "price" in Comment 3 to Section 9103 of the UCC. Even if the California legislature had not concluded that the term "cash price" includes charges for negative equity, the legislative authorization for these charges to be imposed would make them part of the "total sales price" or "credit price" of the vehicle which also fits the definition of "price" in comment 3.[55] Since the "cash price," "total sales price" and "time price" in ASFA all include charges for negative equity, these charges are, by definition, purchase-money obligations under Section 9103.

ASFA should also be read *in pari materia* with the Truth-In-Lending Act and Regulation Z, discussed above,[56] because both laws serve the identical purpose, and ASFA repeatedly refers to Regulation Z for disclosure rules and requirements.[57] In fact, when the California legislature amended ASFA in 1999 to set forth the disclosure rules applicable to charges for negative equity, it specifically adopted the disclosure rule approved in Regulation Z. *See* Cal. Civ. Code § 2982(g). The Committee Reports related to Senate Bill 1092, adopting this

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55 *See* discussion *supra* at 32 & n.35.

56 *See* discussion *supra* at 26-27.

57 *See e.g.,* Cal. Civ. Code §§ 2981, 2982. Section 2982(m) provides that any information required to be disclosed in ASFA "may be disclosed in- any manner, method, or terminology required or permitted under Regulation Z…."

disclosure rule, stated that the purpose of the change in ASFA was to bring ASFA into compliance with the disclosure requirements of Regulation Z. *See* Reports of the Senate Judiciary Committee at p. 2 and the Assembly Committee on Judiciary at p. 3.[58] Since ASFA and Regulation Z treat charges for negative equity as part of the "price" of the automobile, Americredit respectfully submits that these charges also fall within the definition of "price" in Section 9103 and Comment 3.

In its Opinion, the BAP stated that Regulation Z "negate[s] somewhat" the argument that negative equity is part of the price of the vehicle since Regulation Z treats negative equity as part of the "total sales price" of the vehicle, rather than the "cash price" of the vehicle as required by ASFA. E.R. at 30, fn. 18. This difference in treatment of negative equity in ASFA and Regulation Z is without significance since the term "price," as used in Section 9103 and Comment 3, refers to the "total sales price," "credit price" or "time price" of the vehicle, and not just the "cash price."[59] Both Regulation Z and ASFA thus treat negative equity in exactly the same manner. This uniform treatment of negative equity in both Regulation Z and ASFA, which is relied upon by creditors in making disclosures to consumers in automobile financing transactions, establishes beyond doubt that the credit industry and consumers view charges for negative equity as part of the

58 For the convenience of the Court, these Reports are included in Attachment "B."

59 *See* discussion *supra* at 32 and n. 35.

purchase price of the new vehicle.

Applying the *in pari materia* rule of statutory interpretation, charges for negative equity clearly qualify as purchase-money obligations under Article 9. Even if the *in pari materia* doctrine does not apply, ASFA's treatment of these charges is powerful evidence that they satisfy the "close nexus" test of Article 9 and are therefore "purchase-money obligations" entitled to protection under the hanging paragraph.[60]

The BAP dismissed ASFA as irrelevant to the definition of "purchase-money security interest" in the hanging paragraph and Article 9. E.R. at 27-31. First, the Court concluded that the *in pari materia* doctrine does not apply because it would be inappropriate to apply a state law rule of statutory interpretation to construe a federal statute. Americredit, however, has never argued that the hanging paragraph and ASFA should be viewed *in pari materia.* To the contrary, Americredit argues that Article 9 and ASFA should be viewed *in pari materia* for purposes of construing the term "price" in Article 9, which the BAP views as the controlling issue in this case. Since the use of the term "cash price" in ASFA is highly

60 *See Graupner,* 537 F. 3d at 1302*; Peaslee*, 373 B.R. at 260-61; *Schwalm*, 380 B.R. at 634; *Horne*, 390 B.R. at 202-03; *Muldrew*, 396 B.R. at 923-25; *Smith*, 7-30540 at *17-18; *In re Cohrs,* 373 B.R. 107 at 110 (all relying upon state retail installment sales acts to conclude that charges for negative equity are purchase-money obligations under Article 9). *Cohrs* interpreted the California ASFA; and the retail installment sales acts in *Graupner* and *Peaslee* are nearly identical to ASFA and include charges for negative equity as part of the "cash price" of the automobile.

informative as to the meaning of the term "price" in Article 9, application of the *in pari materia* doctrine is clearly appropriate. Second, the BAP declined to apply the *in pari materia* doctrine because the hanging paragraph and ASFA do not address the same subject. This argument is flawed for the same reasons as the preceeding argument: the comparison is not between the hanging paragraph and ASFA, but rather between ASFA and Article 9. Third, the BAP declined to review the definition of "price" in ASFA because ASFA does not apply to California lenders who make purchase-money loans to automobile purchasers, which could create different results under Article 9 based upon the status of the financier. This concern on the part of the BAP is unfounded since ASFA is instructive as to the meaning of the term "price" in Section 9103 even in cases in which ASFA does not directly apply. Fourth, the BAP dismisses ASFA as a disclosure statute, which, as pointed out above, is inaccurate.[61] Finally, the BAP viewed Article 9 and ASFA as operating independently of each other based upon Section 9201(b) of Article 9 which makes a secured transaction subject to Article 9 also subject to ASFA.[62] This interpretation of Section 9201(b) is plainly in error. It is beyond dispute that, in a transaction subject to both Article 9 and ASFA, the dealer and financing

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61 *See Peaslee*, 373 B.R. at 260 discussing New York's Motor Vehicle Retail Installment Sales Act, which, like ASFA, includes negative equity as part of the "cash price" of the automobile.

62 *See* discussion *supra* at 46.

institution must comply with *both* Article 9 and ASFA unless the statutes are in conflict. Americredit submits that, as to the definition of "price," Article 9 and ASFA are in perfect harmony. *See In re Cohrs,* 373 B.R. at 110-111 relying upon Section 9201(b) of California's Article 9 to conclude that Article 9 and ASFA should be read consistently to include charges for negative equity as purchase-money obligations.

E. STRONG PUBLIC POLICY CONSIDERATIONS SUPPORT THE TREATMENT OF CHARGES FOR NEGATIVE EQUITY AS PURCHASE-MONEY INDEBTEDNESS PROTECTED FROM BIFURCATION AND CRAMDOWN UNDER THE HANGING PARAGRAPH.

In both Article 9 and ASFA, the California legislature has declared its support for the inclusion of charges for negative equity as purchase-money obligations. This advances both general and specific legislative policies. The general policies advanced by these statutes are the long-standing policies that favor the purchase-money security interest and the overriding policies of the UCC to "permit the continued expansion of commercial practices through custom, usage and the agreement of the parties" and to give effect to the contract of the parties and established trade practices. Cal. Comm. Code §1103(2)(b). The specific policy advanced by the statutes is the desire of the legislature to facilitate the sale and financing of automobiles upon terms that recognize consumer preferences, support common industry practices and benefit and protect both consumers and

creditors.

Similar federal policies are implicated and advanced by treating these charges as purchase-money obligations protected from bifurcation and cramdown by the hanging paragraph. In enacting the changes to Section 1325(a), Congress sought to remedy abuses that had developed in the use of Chapter 13 by individual debtors. In the specific context of the hanging paragraph, Congress also sought to restore the foundation for secured credit by denying bifurcation and cramdown of indebtedness incurred in purchase-money automobile financing transactions. Congress was well aware of the importance of this financing to our national economy and the industry practices and state regulatory framework that had developed to promote this financing and protect consumers.

The Opinion of the BAP thwarts these important federal and state policies. Dealers, financial institutions and consumers will all suffer from the Court's cribbed reading of the hanging paragraph. Dealers and financial institutions will be required to alter long-standing industry practices in order to adjust to the denial of the benefits they fought so hard to achieve in BAPCPA. *See Long*, 519 F.3d at 295 ("Car dealers and finance companies would have to figure these new uncertainties into the price or financing costs of each car sold."). Consumers, in turn, will be denied valuable choices. In effect, the BAP has adopted a rule of decision that will force all purchasers of automobiles to incur higher financing

costs in order to subsidize the very small percentage of individuals who purchase a vehicle, file a Chapter 13 case shortly thereafter, and then seek to retain the vehicle and strip down the secured indebtedness of the financing entity.

Americredit respectfully submits that it is important to focus upon what is at stake in this appeal. The implications of this case to dealers and financial institutions that provide much needed financing to consumers are enormous. Penrod, by way of contrast, has very little at stake in the outcome of this appeal. BAPCPA requires debtors to commit all of their disposable income to plan payments to secured and unsecured creditors. The hanging paragraph simply determines how much of that committed disposable income goes to the secured creditor that enabled the debtor to purchase the new vehicle shortly before bankruptcy, and how much goes to unsecured creditors, such as credit card companies.[63] Accordingly, if the hanging paragraph is interpreted so as to permit Penrod to bifurcate and cram down the secured indebtedness related to the negative equity financed by Americredit, Penrod does not "win" by keeping those funds. Those funds instead go to unsecured creditors, primarily credit card issuers, who played no role in providing this value to Penrod when she purchased the Vehicle

[63] *See* Elizabeth Warren, *Bankruptcy Reform Then and Now*, 12 Am. Bankr. Inst. L. Rev. 299, 318-19 (2004) ("$1.00 that goes to the car industry in a Chapter 13 because the bill would prevent a strip-down on car loans is $1.00 that does not go to the credit card companies…But you are just moving it around…out of one [creditor's] pocket into another.") *See also Penrod Opinion*, E.R. at 14.

shortly before she filed bankruptcy.

Penrod negotiated a package transaction with the dealership, which included charges to satisfy her indebtedness on her trade-in vehicle. The BAP has now told her that she need not pay for these charges as secured indebtedness under her Chapter 13 Plan. It is hard to see how the BAP's Opinion is faithful to the goals and purposes of the statute or how it will restore the foundation for secured credit, thus facilitating and encouraging the sale and financing of automobiles in the United States. It is clear that the BAP Opinion will have the opposite effect.

CONCLUSION

For all of the reasons set forth above, Americredit respectfully requests that this Court reverse the Opinion and order of the BAP and hold that charges for negative equity are protected from bifurcation and cramdown by the hanging paragraph of Section 1325(a) of the Bankruptcy Code.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)

1. This brief complies with the type-volume limitation of Fed.R.App.P. 32(a)(7)(B) because this brief contains 1,295 lines, excluding the parts exempted by Fed.R.App.P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed.R.App.P. 32(a)(5) and the type style requirements of Fed.R.App.P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word 3.0 in 14-point Times New Roman.

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Americredit Financial Services, Inc.

ATTACHMENT "A"

STATES THAT EXPRESSLY ALLOW NEGATIVE EQUITY TO BE FINANCED AS PART OF A SECURED RETAIL INSTALLMENT SALES CONTRACT

1.	Alaska:	Alaska Stat. §45.10.220 (2005)
2.	Arkansas:	Ark. Code Ann. § 23-112-318 (2007)
3.	California:	Cal. Civil Code § 2981(e) (2006)
4.	Colorado:	Colo. Rev. Stat. § 5-1-301(5) (2007)
5.	Delaware:	Del. Code Ann. tit. 5 § 2907 (e) (2007)
6.	Florida:	Fla. Stat. Ann. ch. 520.07 (2007)
7.	Georgia:	Ga. Code Ann. § 10-1-31 (2007)
8.	Hawaii:	Haw. Rev. Stat. § 476-1 (2007)
9.	Idaho:	Idaho Code §2 8-41-301 (2007)
10.	Illinois:	815 Ill. Comp. Stat. § 375/2.8 (2007)
11.	Indiana:	Ind. Code § 24-4.5-2.111 (2007)
12.	Iowa:	Iowa Code § 537.1301.5 (2007)
13.	Louisiana:	La. Rev. Stat. Ann. § 6:969.6(2) (West 2005)
14.	Maryland:	Md. Code Ann. Commercial Law §§ 12-601(m), 12-606(b) (2007)
15.	Michigan:	Mich. Compiled Laws ch. § 492.102 (12) (2007)
16.	Minnesota:	Minn. Stat. § 53C.08 (2007)
17.	Mississippi:	Miss. Code Ann. § 63-19-31 (2007)
18.	Missouri:	Mo. Rev. Stat. § 365.020(8) (2007)
19.	New Hampshire:	N.H. Rev. Stat. Ann. § 361-A:7 (2007)

20.	New Mexico:	N.M. Stat. Ann. § 58-19-7.B (Michie 2005)
21.	New York:	N. Y. Personal Property Law § 301(6) (Consol. 2007)
22.	North Carolina:	N.C. Gen. Stat.§ 25A-9 (2007)
23.	Ohio:	*Johns v. Ford Motor Credit Co.*, 551 N.E.2d 179 (Ohio Ct.App. 1990)
24.	Oklahoma:	Okla. Stat. tit.14 A, § 2-111 (2007)
25.	Oregon:	Or. Rev. Stat. § 83.520 (2005)
26.	Pennsylvania:	69 Pa. Cons. Stat., Ch. 6, § 603 13 (2007)
27.	South Carolina:	S.C. Code Ann. § 37-2-111 (Law Co-op. 2006)
28.	South Dakota:	S. D. Codified Laws § 54-3A-2 (Michie 2005)
29.	Tennessee:	Tenn. Code Ann. § 47-14-120 (2007)
30.	Texas:	Tex. Fin. Code Ann.§ 348.006 (Vernon 2002)
31.	Vermont:	Vt. Stat. Ann. tit.9, § 2355(f)(1)(D) and (J) (2007)
32.	Virginia:	Va. Code Ann. § 6.1-330.77 (Michie 2005)
33.	Washington:	Wash. Rev. Code § 63.14.040 (2007)
34.	West Virginia:	W. Va. Code § 46A-1-102 (4) (2007)
35.	Wisconsin:	Wis. Stat. § 421.301(5) (2007)
36.	Wyoming:	Wyo. Stat. Ann. § 40-14-211(a) (Michie 2005)

ATTACHMENT "B"

Decisions and Reports Not Available
Through a Publicly-Accessible Electronic Database

In re Smith, No. 07-30540, slip opinion, (Bankr.S.D.Ill. Jun. 25, 2008)

California Assem. Com. on Judiciary,
Analysis of Sen. Bill 1092 (1999-2000 Reg. Sess.)

California Senate Judiciary Com.,
Analysis of Sen. Bill 1092 (1999-2000 Reg. Sess.)

Burke, *Some Thoughts on the Success of the Revised Article 9 Enactment Effort*, The ALI Reporter, Vol. 23, No. 4 (Summer 2001)

ATTACHMENT "C"

Reproduced Statutes, Rules and Regulations Required For Court's Determination of Issues on Appeal

11 U.S.C. § 506

11 U.S.C. § 1325

Cal. Civ. Code § 2981

Cal. Civ. Code § 2982

Cal. Comm. Code § 9103

Official Comment 3 to Cal. Comm. Code § 9103

12 C.F.R. Part 226, Supp. I ¶ 18(j)(3)

CERTIFICATE OF SERVICE
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I hereby certify that on _____, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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630 N. San Mateo Dr.
San Mateo, CA 94401

Signature /s/ Angie Contreras_____
Angie Contreras