UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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IN RE:

MOTORS LIQUIDATION COMPANY, *et al.*,
f/k/a GENERAL MOTORS CORP., *et al.*,

Debtors.

\- x

CALLAN CAMPBELL, *et al.*,

Appellants,

\- against -

09 Civ. 6818 (NRB)

MOTORS LIQUIDATION COMPANY, *et al.*,

Appellees.

\- x

BRIEF FOR APPELLEE THE UNITED STATES OF AMERICA

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TABLE OF EXHIBITS

For the Court's convenience, the following documents are attached as exhibits to this brief:

* All citations to the hearing transcript in this brief are to the testimony of Harry Wilson a Department of Treasury official who was a chief negotiator of the GM sale and the only witness offered by the Government in these cases.

TABLE OF AUTHORITIES

CASES

STATUTES, REGULATIONS, AND RULES

The United States of America, on behalf of the Department of the Treasury ("Treasury" or the "Government"), by its attorney Preet Bharara, United States Attorney for the Southern District of New York, respectfully submits this brief in response to the brief filed by Callan Campbell, Kevin Junso, *et al.*, Edwin Agosto, Kevin Chadwick, *et al.*, and Joseph Berlingieri (collectively, "Appellants").

PRELIMINARY STATEMENT

By order and separate opinion dated July 5, 2009, the United States Bankruptcy Court for the Southern District of New York (Hon. Robert E. Gerber, *B.J.*) approved the sale of substantially all of the assets of General Motors ("GM" or the "Debtors") to NGMCO, Inc. ("New GM"), an entity sponsored by the Treasury Department. Judge Gerber's order became effective on July 9, 2009, and the following day the sale closed; New GM has been doing business since that time.

Appellants here — holders of contingent products liability claims arising from GM's pre-bankruptcy activities — did not and do not object to the sale transaction itself. Rather, they contend that the bankruptcy court should not have permitted New GM to take the automotive assets free and clear of their tort claims. In essence, Appellants seek to have this court re-write the terms of the sale agreement and related transactions so that they can look to New GM to pay their claims, rather than being required — like any other creditor of the old company — to assert claims against the bankruptcy estates, which have already received the full benefit of the sale transaction.

It is simply too late for that sort of relief. Now that the sale has closed (without these Appellants ever so much as asking for a stay), the Bankruptcy Code explicitly prohibits appellate review of the sale on any question other than the purchaser's good faith — something that Appellants do not contest. And even if this Court were not statutorily foreclosed from considering this appeal, the doctrine of equitable mootness bars review of a bankruptcy court order when it has already become effective and cannot be practically or equitably unwound.

Finally, mootness aside, the Second Circuit considered and rejected the very arguments advanced by Appellants here in the Chrysler bankruptcy. In that case, the Court of Appeals expressly held that a bankruptcy court may authorize the sale of an automotive manufacturer's assets to a buyer free and clear of products liability claims. Although Appellants may "strongly disagree" with that holding, App. Br. at 25 n.10,[1] there is no disagreeing that *Chrysler* is the law of this Circuit.

JURISDICTIONAL STATEMENT

The bankruptcy court had jurisdiction over the sale proceedings because they arose under title 11 of the United States Code (the "Bankruptcy Code"). *See* 28 U.S.C. §§ 157, 1334; *see also* Standing Order of Referral of Cases to Bankruptcy Court Judges of the District Court for the Southern District of New York, dated July 10, 1984 (Ward, Acting *C.J.*). Because the Appellants timely appealed from a final order of the bankruptcy court approving the sale, this Court has appellate jurisdiction pursuant to 28 U.S.C. § 158(a)(1).

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[1] Citations to "App. Br." refer to Appellants' Opening Brief.

ISSUES PRESENTED FOR REVIEW

1. Whether, in light of the closing of the sale and the reliance of numerous parties on its terms in entering into extensive and complicated business relationships, this appeal is moot as a statutory or prudential matter.

2. Whether the arguments advanced on this appeal — specifically, that the bankruptcy court was without authority to approve the sale of assets to New GM free and clear of certain tort liabilities — are foreclosed by the Second Circuit's decision in the almost identical *Chrysler* case.

STATEMENT OF THE CASE[2]

A. The Government's Role in these Cases

In response to the troubles plaguing the American automotive industry, the United States of America, through the Treasury Department and the Presidential Task Force on the Auto Industry (the "Auto Task Force"),[3] implemented various

[2] Because Appellants do not challenge any of Judge Gerber's factual findings, the facts described above are drawn from the bankruptcy court's *Decision on Debtors' Motion for Approval of (1) Sale of Assets to Vehicle Acquisition Holdings LLC; (2) Assumption and Assignment of Related Executory Contracts; and (3) Entry into UAW Retiree Settlement Agreement*, which is reported at *In re General Motors Corp.*, 407 B.R. 463 (Bankr. S.D.N.Y. 2009). Consistent with Appellants' practice, this brief cites to the version of the Sale Opinion (cited as "Sale Op.") attached as Appendix A to Appellants' brief, and attached as Exhibit A to this brief as well.

[3] The Auto Task Force is a cabinet-level group led by Treasury Secretary Timothy F. Geithner and National Economic Council Director Laurence H. Summers. It includes the Secretaries of Transportation, Commerce, Labor, and Energy, as well as the Chair of the President's Council of Economic Advisors, the Director of the Office of Management and Budget, the Environmental Protection Agency Administrator, and the Director of the White House Office of Energy and Climate Change.

programs to support and stabilize the domestic automotive industry. Those programs have included, among other things, providing credit support for receivables issued by certain domestic automobile manufacturers and support for consumer warranties. *See* Sale Op. at 8.

Treasury also provided direct loans to certain automobile manufacturers. *See id.* Specifically, at GM's request in late 2008 and following arm's-length negotiations, Treasury determined to make available to GM billions of dollars in emergency secured financing (the "Prepetition Loan") in order to sustain GM's operations while it developed a new business plan. *See id.* "At the time that the U.S. Treasury first extended credit to GM, there was absolutely no other source of financing available. No party other than Treasury conveyed its willingness to loan funds to GM and thereby enable it to continue operating." *Id.*

The first loan came in December 2008, after GM submitted its proposed viability plan to Congress. *See id.* That plan contemplated GM's shift to smaller, more fuel-efficient cars, a reduction in the number of GM brand names and dealerships, and a renegotiation of GM's agreement with its labor union, among other things. As part of its proposed plan, GM sought emergency funding in the form of an $18 billion federal loan. *See id.*

After negotiations, Treasury and GM entered into a loan agreement on December 31, 2008, that provided GM with up to $13.4 billion in financing on a senior secured basis. *See id.* at 8-9. Under that term loan facility, GM immediately borrowed $4 billion, followed by $5.4 billion less than a month later, and the remaining $4 billion on February 17, 2009. *See id.* at 9. The GM-Treasury loan agreement required GM to submit a proposed business plan to demonstrate its future competitiveness that went significantly farther than the one GM had submitted to Congress. *See id.* at 10. Among other conditions on Treasury's willingness to provide financing, GM was to demonstrate its long-term viability by reducing its outstanding public debt (approximately $27 billion) by at least two-thirds, and converting from cash to common stock at least half of the value of its $20 billion contribution to a union health care trust (the "UAW VEBA"). *See id.*

Treasury and GM subsequently entered into amended credit agreements to provide for an additional $2 billion in financing that GM borrowed on April 24, 2009, and another $4 billion that GM borrowed on May 20, 2009. *See id.* at 12. The funds advanced to GM under the Prepetition Loan — $19.4 billion in total (all on a senior secured basis) — therefore were critical to GM's survival during the months leading up to GM's bankruptcy, and afterwards. *See id.*

Although the Government's decision to provide financing was intended to avoid the drastic and systemic consequences that would result from a GM liquidation, Treasury — as the steward of taxpayer dollars — insisted from the start as a condition of its financial support that GM take the steps necessary to transform itself into a competitive, and successful, player in the global automotive market. *See id.* at 11. Indeed, the threat of liquidation was not the only impetus for the Government's decision to loan substantial additional taxpayer funds to GM in the form of an approximately $33.3 billion debtor-in-possession facility, which provided critical funding to GM pending the approval and consummation of the asset sale (the "DIP Loan").[4] *See id.* at 11, 14. Treasury loaned GM billions of dollars not just to spare the economy the consequences of GM's liquidation, but also because the Government concluded — as a result of an exhaustive analysis conducted by Treasury and the Auto Task Force — that the creation of new, competitive GM was a worthwhile pursuit. *See id.* at 14.

Accordingly, from the moment that it put the very first dollar of emergency financing into GM, Treasury acted as a prudent lender seeking to protect its investment, and thus expressly conditioned its financial commitment upon GM's meaningful progress towards long-term viability. On March 30, 2009, the President announced that GM's efforts to develop a long-term viability plan had fallen short — and that the advancement of any additional federal loans to GM beyond the subsequent sixty-day period would require a more aggressive effort to map out a clear path to long-term viability. *See id.* at 11-12. In connection with the effort that followed, Treasury and the Auto Task Force continued their already-extensive due diligence and analysis of all material aspects of a successful New GM. GM and other stakeholders conducted their own analyses, as well. Ultimately, all agreed that the only viable course was for GM to pursue — with the support of Treasury, Canada, and other constituents — a transaction under section 363(b) of the

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[4] In addition, the governments of Canada and Ontario, through Export Development Canada (collectively, "Canada"), provided more than $9 billion in debtor-in-possession and other financing to support GM's North American operations. *See* Sale Op. at 14 & n.10.

Bankruptcy Code (the "Sale"). *See id.* at 14, 23.[5]

The transaction ultimately agreed upon contemplated the formation of a new Treasury-sponsored entity that, assuming GM received no better offer, would acquire certain substantial assets of GM. As part of the Sale, that newly-formed entity (*i.e.,* New GM), as assignee of Treasury's rights and claims under the Prepetition Loan and the DIP Loan, was to credit bid substantially all of GM's indebtedness against certain assets of GM. Immediately upon closing, New GM was to contribute (a) 10% of its common equity to the bankruptcy estates (plus two tranches of warrants at various strike prices, each for an additional 7.5% equity stake), for distribution to creditors in the bankruptcy court; (b) 17.5% of its common equity on an undiluted basis to a new Voluntary Employee Beneficiary Association formed pursuant to an agreement between New GM and its unionized work force (the "New VEBA"); and (c) 11.7% of its common equity (pre-dilution) to Canada. *See id.* at 13-20 (describing terms of the Sale.) As a result, upon the full consummation of the Sale and subsequent allocations of equity, Treasury was contemplated to hold an undiluted 60.8% stake in New GM. *See id.* at 19.

The Sale and allocations of certain agreed-upon value from New GM to the New VEBA, Canada, and to Old GM for disposition in the bankruptcy court garnered support from a broad spectrum of constituents as GM entered bankruptcy. GM, GM's work force, Treasury, Canada, GM's other secured lenders, and

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[5] Section 363 permits a debtor to "use, sell, or lease, other than in the ordinary course of business, property of the estate." 11 U.S.C. § 363(b)(1).

bondholders holding more than 54% of GM's approximately $27 billion of unsecured debt all supported the Sale and related transactions. *See id.* 1.

Accordingly, on June 1, 2009, GM and certain of its affiliates filed for bankruptcy under chapter 11 of the Bankruptcy Code. On the same day, GM filed a motion seeking approval of the Sale, and, separately, a motion seeking authorization of Treasury's $33.3 billion DIP Loan so that GM could maintain its operations pending the close of the Sale. *See id.* at 12. The availability of such financing was expressly conditioned upon the swift approval and closing of the Sale. Absent such financing, GM faced immediate liquidation. *See id.* at 25.

B. Proceedings in the Bankruptcy Court

The bankruptcy court conducted a three-day evidentiary hearing between June 30 and July 2, 2009, during which it heard undisputed testimony that the Sale of GM to a purchaser sponsored by the Government was the only alternative to GM's freefall liquidation — a result that would have eliminated *any* recovery for unsecured creditors such as the Appellants here, not to mention GM's employees, suppliers, dealers, and the communities that rely upon all of them. *See id.* A key aspect of the undisputed evidence was Treasury's unwillingness to continue to fund GM's operations absent the prompt closing of the sale, throwing good money after bad. *See id.* at 37; *see also* 7/1/09 Hearing Tr. at 184 ("it's better to cut one's losses and . . . while we would certainly have substantial losses [if we did,] if GM entered into a liquidation in July, for sure we'd have extremely significant losses. We believe that that is an economically more rational decision than funding into an open-ended process whereby the losses could be much, much more dramatic.").[6]

Notably, while many parties objected to aspects of the Sale, none sought to block the transaction or proposed a viable alternative. Indeed, the Appellants here objected on a narrow legal issue, concerning whether New GM could acquire substantially all of the Debtors' assets free and clear of state law successor liability. *See* Sale Op. at 50-61 (discussing Appellants' objections). In a comprehensive, 87-page decision, Judge Gerber overruled all objections and approved the transaction, but stayed the effectiveness of his order for four days to allow parties to appeal.

Two parties filed papers before the Sale closed. The Appellants here filed a motion for direct certification of their appeal to the Second Circuit pursuant to 28 U.S.C. § 158(d)(2), seeking to bypass the district court entirely. *See* Bankr. Stay Op. at 1-2.[7] A second set of appellants, certain creditors with asbestos-related personal injury claims against GM, also filed a motion for certification to the Second Circuit and, in the alternative, sought a stay of the Sale order pursuant to Federal Rule of Bankruptcy Procedure 8005; Appellants never joined in seeking that alternative relief. *See id.* at 7 ("The Asbestos Litigants (though not the Individual Tort Litigants) alternatively request . . . I grant a Rule 8005 stay.").

In a Bench Decision dated July 7, 2009, the bankruptcy court denied the

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[6] For the Court's convenience, all pages of the evidentiary hearing transcript cited in this brief are attached as Exhibit E.

[7] Citations to "Bankr. Stay Op." refer to the bankruptcy court's July 7, 2009 *Bench Decision and Order on Motions for § 158(d)(2) Certification, Or in the Alternative, For Stay Pending Appeal*, attached as Exhibit B. The Bench Decision is also reported at *In re General Motors Corp.*, 409 B.R. 24 (Bankr. S.D.N.Y. 2009).

motion for direct certification in light of the Second Circuit's recent affirmance in the nearly identical *Chrysler* case. The bankruptcy court also denied a stay pending appeal. *See id.* at 4-7. The Bench Decision concludes, citing facts previously found by the court in its Sale opinion, that while the movants could demonstrate no irreparable injury in the absence of a stay, a stay would cause grievous injury to GM and its constituents:

> We're here faced with *irreparable* injury to the interests of 225,000 GM employees, an estimated 500,000 GM retirees, 11,500 suppliers, and 6000 dealers whose lives turn on the ability to allow this sale to close. We're here faced with potentially grievous systemic damage to the automobile industry and the states and municipalities where GM workers, retirees and dealers reside. Even as I once more note my sympathy for asbestos victims, granting a stay on this showing (or lack of showing), at the expense of all of those other interests — and especially, without the bond that would be necessary to give them the slightest semblance of compensation — would be unconscionable.

Id. at 17 (emphasis in original).

The asbestos claimants — but, again, not the Appellants — then took their request to the district court. Judge Kaplan also denied a stay, finding both that the movants could not demonstrate irreparable harm — to the contrary, their recovery was *greater* as a result of the Sale than it would have been otherwise (*i.e.*, in a liquidation) — and that, in any event, the movants did not have "any material likelihood of success on appeal" because, among other things, "*Chrysler* is virtually on all fours with this case." Dist. Stay Op. at 3.[8] At that point, the asbestos

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[8] Citations to "Dist. Stay Op." refer to the district court's July 9, 2009 Memorandum and Order, attached as Exhibit C and reported at *In re General* (continued...)

claimants cut their losses, declining to seek a stay in the Court of Appeals or the Supreme Court and ultimately voluntarily dismissing their appeal.

Appellants here, despite not having ever sought a stay of the Sale order, continue to press their appeal.[9]

STANDARD OF REVIEW

To the extent it is reviewable at all, a bankruptcy court's decision approving a sale of assets under section 363 of the Bankruptcy Code is reviewed for abuse of discretion. *See In re Chrysler LLC*, 576 F.3d 108, 119 (2d Cir. 2009). A bankruptcy court abuses its discretion when it arrives at "(i) a decision resting on an error of law (such as application of the wrong legal principle) or a clearly erroneous factual finding, or (ii) a decision that, though not necessarily the product of a legal error or a clearly erroneous factual finding, cannot be located within the range of permissible decisions." *Schwartz v. Aquatic Dev. Group, Inc. (In re Aquatic Dev. Group, Inc.)*, 352 F.3d 671, 678 (2d Cir. 2003) (internal quotation and alteration marks omitted). Thus, this court should accept the bankruptcy court's "factual findings unless clearly erroneous but review[] its conclusions of law *de novo*." *Midland Cogeneration Venture L.P. v. Enron Corp. (In re Enron Corp.)*, 419 F.3d 115, 124 (2d Cir. 2005); *see also* Fed. R. Bankr. P. 8013.

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[8](...continued)
Motors Corp., No. M-47 (LAK), 2009 WL 2009 WL 2033079 (S.D.N.Y. July 9, 2009).

[9] In addition to this appeal, four others are presently pending: one by another group of tort claimants (09 Civ. 7792 (DAB)), two by *pro se* bondholders (09 Civ. 7011 (PGG) and 09 Civ. 7794 (RWS)), and one by certain dissenting labor unions (09 Civ. 6842 (PAC)).

ARGUMENT

POINT I

THIS APPEAL IS TWO KINDS OF MOOT

A. STATUTORY MOOTNESS: ON APPEAL FROM AN UNSTAYED SALE ORDER, THE ONLY ISSUE THAT CAN BE REVIEWED IS THE PURCHASER'S GOOD FAITH

The Bankruptcy Code expressly limits appellate review of a sale order to one issue: whether the purchaser acted in good faith in entering into the transaction. Because Appellants do not contest that the Government and New GM acted in absolute good faith in acquiring GM's assets, their appeal is moot.[10]

Section 363(m) of the Bankruptcy Code provides:

> The reversal or modification on appeal of an authorization under subsection (b) . . . of this section of a sale . . . of property does not affect the validity of a sale . . . under such authorization to an entity that purchased . . . such property in good faith . . . unless such authorization and such sale . . . were stayed pending appeal.

11 U.S.C. § 363(m). Accordingly, "appellate jurisdiction over an unstayed sale order issued by a bankruptcy court is statutorily limited to the narrow issue of whether the property was sold to a good faith purchaser." *Licensing by Paolo, Inc. v. Sinatra (In re Gucci)*, 105 F.3d 837, 839 (2d Cir. 1997).

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[10] The bankruptcy court referred to the acquirer of GM's assets as the "Purchaser," defined to be New GM's predecessor, Vehicle Acquisition Holdings LLC. *See* Sale Op. at 1. Prior to and until the time that the Sale closed, Vehicle Acquisition Holdings was essentially a shell company constructed by Treasury to hold and credit bid its secured debt. The principle negotiators of the Sale on behalf of the Purchaser were therefore all Government officials, *see* 7/1/09 Hearing Tr. at 96 (the "principal negotiators" on behalf of New GM were "representatives of the Treasury Department and their advisors"), and it is thus appropriate — as the bankruptcy court did — to evaluate the good faith of both New GM and Treasury.

The bankruptcy court's sale order in this case was never stayed, and the Sale closed in early July. As a result, this court has jurisdiction to review only one thing: whether the purchaser acted in good faith. But the bankruptcy court properly concluded that the Government and New GM were good faith purchasers, and the Appellants here do not even attempt to second-guess that determination. *See* Sale Op. at 25 ("The Purchaser is a purchaser in good faith.");

While the Bankruptcy Code does not define the "good faith" that protects transactions pursuant to section 363(m), the Second Circuit has explained that the "[g]ood faith of a purchaser is shown by the integrity of his conduct during the course of the sale proceedings; where there is a lack of such integrity, a good faith finding may not be made. A purchaser's good faith is lost by 'fraud, collusion between the purchaser and other bidders or the trustee, or an attempt to take grossly unfair advantage of other bidders.'" *Licensing by Paolo, Inc. v. Sinatra (In re Gucci)*, 126 F.3d 380, 390 (2d Cir. 1997) (quoting *In re Rock Indus. Mach. Corp.*, 572 F.2d 1195, 1198 (7th Cir. 1978)).

As representatives of both GM and Treasury testified, the Sale transaction was the product of intense arms'-length negotiations. Throughout the process, GM was represented by numerous independent advisors, including experienced counsel, restructuring experts, and investment bankers all of whom GM selected. Once GM determined that it needed to enter chapter 11 to effect its plan for long-term success, and that a transaction pursuant to section 363 of the Bankruptcy Code was the best way to do so, Treasury and GM engaged in extensive, hard-fought and arms'-length negotiations lasting several months. Over time, the negotiations expanded to involve the United Autoworkers (the "UAW") and the then-existing UAW VEBA, the Debtors' prepetition secured lenders, certain of the Debtors' prepetition unsecured lenders, and Treasury's Canadian co-lenders. After the commencement of these cases, negotiations also included the Official Committee of Unsecured Creditors and other interested parties. The negotiations were conducted without fraud or collusion, and all parties were represented throughout by experienced independent advisors and counsel.

Indeed, as the bankruptcy court specifically found, the Government's conduct in these negotiations epitomized good faith: Treasury provided billions of dollars in financing that no other lender would provide in order to avoid GM's liquidation, preserve Treasury's existing investment in GM, and enable the creation of a new, competitive GM. Based upon the ample evidence of the purchaser's good faith, arms'-length negotiations throughout the entire sale process, and the complete absence of any evidence to the contrary, the bankruptcy court correctly found that it was a good faith purchaser entitled to the protections of section 363(m) of the Bankruptcy Code:

> Here there is no proof that the Purchaser (or its U.S. and Canadian governmental assignors) showed a lack of integrity in any way. To the contrary, the evidence establishes that the 363 Transaction was the product of intense arms'-length negotiations. And there is no evidence of any efforts to take advantage of other bidders, or to get a leg up over them. In fact, the sad fact is that there *were no* other bidders.
>
> Thus, the Court finds that the Purchaser is a good faith purchaser, for sale approval purposes, and also for the purposes of the

> protections section 363(m) provides.

Sale Op. at 40-41 (emphasis in original). *See also id.* at 9 ("[T]here was nothing inequitable about the way the U.S. Treasury behaved in advancing these funds. Nor did the U.S. Treasury act inequitably to GM's creditors, who were assisted, and not injured, by the U.S. Treasury's efforts to keep GM alive and to forestall a liquidation of the company.").

Unable to challenge the Government's good faith, Appellants contend that — notwithstanding the jurisdictional limit on appellate review imposed by section 363(m) and *Gucci* — this Court "is required in the first instance to determine *de novo* whether the Bankruptcy Court had 'colorable' authority under its 'related to' jurisdictional authority to order a sale 'free and clear' of Appellants' *in personam* products liability claims against New GM." App. Br. at 14-15.

Judge Cote recently rejected precisely this argument in the Lehman Brothers case, where certain creditors sought to appeal an unstayed order authorizing the sale of substantially all of Lehman's assets to Barclays Capital, Inc. under section 363. As here, the *Lehman* objectors did not contest the sale transaction itself, but they did object to the sale free and clear of certain interests. After affirming the bankruptcy court's determination that Barclays was a good faith purchaser, Judge Cote considered whether any other attack on the sale order was statutorily moot under section 363(m), including the argument that the bankruptcy court could not have authorized the sale free and clear of certain claims:

> Appellants seek to escape the limitations imposed by Section 363(m) by arguing in their reply brief that they do not challenge

> the sale, but only the terms of the sale, which delivered the LBI assets to Barclays free and clear of liens. *This is a specious distinction*. As the bankruptcy court found, Barclays demanded that the sale be free and clear of liens, and without that term no sale would have occurred. The bankruptcy court's approval of the sale on these terms was unremarkable and utterly consistent with its duty to maximize the value of the Debtors' estate with the benefit of the finality provided by Section 363(m). Consequently, statutory mootness forecloses Appellants' arguments beyond the issue of Barclays's good faith.

In re Lehman Bros. Holdings, Inc., Nos. 08 Civ. 8869 (DLC), 08 Civ. 8914 (DLC), 2009 WL 667301, at *7 (S.D.N.Y. Mar. 13, 2009) (emphasis supplied).

As did the buyer in *Lehman*, the Government here demanded that the sale of GM's assets be free and clear of Appellants' claims, and without that term no sale would have occurred. *See* Sale Op. at 16-17 (listing as one of the "deal points" of the Sale agreement the exclusion of "product liability claims arising out of products delivered prior to the Closing"); *id.* at 51 ("New GM would not assume any Old GM liabilities for injuries or illnesses that arose before the 363 Transaction").[11] "The

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[11] Appellants place considerable weight on the bankruptcy court's parenthetical observation that "[w]hether the U.S. and Canadian Governments would have lent and ultimately bid a lesser amount here is doubtful." App. Br. at 9, 12, 26 (quoting Sale Op. at 51 n.91)). Appellants' suggestion that this was a "finding" of the bankruptcy court, *id.*, however, is entirely misleading. *First*, the bankruptcy court did not have occasion to have to "find" whether Treasury would have bid a different amount had New GM been saddled with Appellants' claims, because the bankruptcy court recognized that it was not free to re-write the terms of the Sale agreement. *See* Sale Op. at 81 ("This Court has found that the Purchaser is entitled to a free and clear order. The Court cannot create exceptions to that by reason of this Court's notions of equity."). *Second*, the bankruptcy court explicitly found that the Sale agreement *was* contingent on the free and clear order, concluding that "[t]he Purchaser *would not have entered* in the MPA and *would not consummate* the 363 sale if the sale . . . was not free and clear of all liens, claims, encumbrances, and other interests . . . , including rights or claims based on any
(continued...)

bankruptcy court's approval of the sale on these terms was [therefore] . . . utterly consistent with its duty to maximize the value of the Debtors' estate with the benefit of the finality provided by Section 363(m)," *Lehman Bros.*, 2009 WL 667301, at *7, and this appeal is moot.

B. EQUITABLE MOOTNESS: THE BEHAVIOR OF NUMEROUS PARTIES IN RELIANCE ON THE SALE, AMONG OTHER THINGS, WOULD RENDER ANY REVIEW OF THE SALE ORDER UNFAIR

This appeal is moot for a second, entirely independent reason. Under prudential doctrines of mootness, because the Appellants failed to seek a stay of the sale order, because the sale was subsequently consummated, and because numerous parties have engaged in business with New GM in reliance on the finality of the Sale, it would be grossly inequitable to unwind or rew-rite the Sale.

This doctrine of "equitable mootness" holds that "[a]n appeal should . . . be dismissed as moot when, even though effective relief could conceivably be fashioned, implementation of that relief would be inequitable." *Deutsche Bank AG v. Metromedia Fiber Network (In re Metromedia Fiber Network, Inc.)*, 416 F.3d 136, 143 (2d Cir. 2005); *see also Frito-Lay, Inc. v. LTV Steel Co. (In re Chateaugay Corp.)*, 10 F.3d 944 (2d Cir. 1993). The doctrine comes into play in two situations: "when an unstayed order has resulted in a comprehensive change in circumstances, and when a reorganization is substantially consummated." *Kenton County Bondholders Comm. v. Delta Air Lines, Inc. (In re Delta Air Lines, Inc.)*, 374 B.R. 516, 522

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[11](...continued)
successor or transferee liability." App. Br. at 9 (quoting Sale Order) (emphasis supplied).

(S.D.N.Y. 2007) (internal quotation marks omitted). In either situation, "there is a strong presumption that an appeal of any unstayed order is moot." *Id.*

"This presumption can only be overcome if five circumstances are present." *In re Source Enterprises, Inc.*, 392 B.R. 541, 548 (S.D.N.Y. 2008).

> (a) the court can still order some effective relief; (b) such relief will not affect the re-emergence of the debtor as a revitalized corporate entity; (c) such relief will not unravel intricate transactions so as to knock the props out from under the authorization for every transaction that has taken place and create an unmanageable, uncontrollable situation for the Bankruptcy Court; (d) the parties who would be adversely affected by the modification have notice of the appeal and an opportunity to participate in the proceedings; and (e) the appellant pursued with diligence all available remedies to obtain a stay of execution of the objectionable order if the failure to do so creates a situation rendering it inequitable to reverse the orders appealed from.

Chateaugay, 10 F.3d at 952-53 (internal quotation marks, citations, and alterations omitted).[12]

Appellants do not attempt to dispute that the Sale of automotive assets to New GM is both a "comprehensive change in circumstances" as well as the "substantial[] consummat[ion]" of an asset sale that undisputedly maximized all creditors' recoveries in GM's bankruptcy. *Delta*, 374 B.R. at 522; *see* App. Br. at 21 (skipping straight to five-factor *Chateaugay* test without attempting to argue

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[12] *Chateaugay* involved an appeal from an order approving a plan of reorganization, and so the threshold test includes asking whether "a reorganization [has been] substantially consummated," and one of the factors refers to a debtors' "re-emergence" from bankruptcy. The doctrine of equitable mootness and the *Chateaugay* test, however, applies analogously in appeals from orders approving asset sales under section 363 of the Bankruptcy Code. *See, e.g., Lehman Bros.*, 2009 WL 667301, at *8 n.7.

presumption of mootness does not apply). Accordingly, the only question is whether Appellants can overcome the "strong presumption" of prudential mootness, *Delta*, 374 B.R. at 522, by demonstrating each and every one of the *Chateaugay* factors.

1. No Relief Can Be Fashioned Other Than Undoing The Sale In Its Entirety

Appellants suggest that this "Court can fashion effective relief by simply carving out from all the challenged provisions of the Sale Order any language that would impair the ability of holders of *in personam* products liability claims to assert claims against New GM." App. Br. at 21. Appellants in essence suggest that this Court re-write the terms of a carefully negotiated commercial transaction, re-allocating to New GM liabilities that it explicitly bargained to have left with the bankruptcy estates. Notably, Appellants give no authority for this Court's authority to do so.

That's because there is none. The Second Circuit has squarely held — confronted with an appellant's argument that it should modify a small provision in a sale order rather than reverse the sale entirely — that an appellate court has no ability to re-write the terms of a section 363 sale:

> The government is correct in arguing that the appeal of the sale order is moot. . . . The consummation of the sale was not stayed. The instant appeal was briefed and argued months after the sale closed. *It is thus beyond the power of this Court to rewrite the terms of the trustee's sale of the assets* of [debtor] Certified and Transit Mix to the Quad companies.
>
> Our conclusion that *we must leave the terms of sale undisturbed* furthers the policy of finality in bankruptcy sales. Moreover, it assists bankruptcy courts in maximizing the price for assets sold in such proceedings. Otherwise, potential buyers would discount

> their offers to the detriment of the bankrupt's estate by taking into account the risk of further litigation and the likelihood that the buyer will ultimately lose the asset, together with any further investments or improvements made in the asset.

United States v. Salerno, 932 F.2d 117, 122-23 (2d Cir. 1991) (emphasis supplied; internal citations omitted). *See also In re Adelphia Commc'ns. Corp.*, 367 B.R. 84, 97 (S.D.N.Y. 2008) (holding, in analysis of equitable mootness, that suggested remedy of ordering "selective disgorgement from cherry-picked creditors . . . would rewrite the terms of the bargain, which is beyond the power of the Court"); *Source Enterprises*, 392 B.R. at 550 ("courts have found it difficult to sever one piece of a Plan, and have noted that such a severance might 'ignore the tradeoff that allowed the parties to settle in the first instance and would treat a non-severable provision of the Settlement Agreement as dispensable.'" (quoting *Delta*, 374 B.R. at 523)); *TWA, Inc. v. Texaco, Inc. (In re Texaco, Inc.))*, 92 B.R. 38, 46 (Bankr. S.D.N.Y. 1988) (calling it a "common-sense notion" that the "piece meal dismantling of the Reorganization Plan in subsequent appeals of individual transactions is, in practical terms if nothing else, a virtually impossible task" (internal quotation marks omitted)). *See also* Sale Op. at 81 ("This Court has found that the Purchaser is entitled to a free and clear order. The Court cannot create exceptions to that by reason of this Court's notions of equity.").

Thus, the only relief available to Appellants here is unwinding the sale of assets to New GM in its entirety. But that is not "effective relief," for as the bankruptcy court found, the recovery to unsecured creditors (such as Appellants) under what has become the *status quo* is far better than the only alternative, a liquidation of GM's assets. *See* Sale Op. at 3 ("As nobody can seriously dispute, the only alternative to an immediate sale is liquidation."); *id.* at 16 ("The Court finds that in the event of a liquidation, unsecured creditors would recover nothing."); *see also* Dist. Stay Op. at 3 ("Judge Gerber found, on the basis of a hearing record, that the only alternative to consummation of this sale is liquidation of GM and that the unsecured creditors would receive nothing in that event. . . . Thus, this case evokes the old adage that one ought to be careful of what one wishes.").

2. The Relief Suggested By Appellants Would Affect New GM's Vitality and Knock the Props Out From a Series of Intricate Transactions

The second and third *Chateaugay* factors — whether the requested relief will "affect the re-emergence of the debtor as a revitalized corporate entity" or "unravel intricate transactions so as to knock the props out from under the authorization for every transaction that has taken place" — likewise demonstrates why any relief would be inequitable here. *Chateaugay*, 10 F.3d at 952-53 (internal quotation marks omitted).

Appellants skirt these factors entirely, arguing that because the Debtors are in liquidation, the relevant question on the second factor is whether the "appellant's requested relief would affect the debtor's ability to liquidate." App. Br. at 22 (quoting *Schroeder v. New Century Liquidating Trust (In re New Century TRS Holdings, Inc.*), 407 B.R. 576, 590 (Bankr. D. Del. 2009). But *New Century* involved an appeal from an order confirming a plan of liquidation, so of course the question was whether the requested relief would affect the debtor's ability to liquidate. *See id.* at 587-88. Here, Appellants seek review of an order approving a sale of substantially all of GM's assets to a new company, so the analogous question is whether the relief requested will affect the emergence of New GM as a vital corporate entity. Even assuming that the Court could re-write the Sale transaction to apportion Appellants' claims from the Debtors to New GM, there is no denying that foisting those liabilities onto New GM would "affect" New GM's vitality, which is precisely why Treasury specifically negotiated for those liability to be excluded.

Appellants likewise misstate the third *Chateaugay* factor, analyzing whether their requested relief would "affect New GM's viability" rather than whether it would "knock the props out from under the transactions that have occurred since the sale was consummated." App. Br. at 22. *See also* 7/1/09 Hearing Tr. at 104 ("we did not see it as our obligation to take on claims to the point at which New GM was no longer viable. It wasn't a determination, or frankly, a consideration in our thinking."). New GM has entered into numerous transactions since the Sale closed on July 10, 2009, all of them dependent on the Sale terms not being disturbed.[13]

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[13] Even taking Appellants' argument at face value and assuming the relevant question is whether their tort liabilities will undermine New GM's viability, Appellants ignore the fact that their products liability claims are no different than any other unsecured claim, and there is no different justification for reapportioning Appellants' claims to New GM than there would be to shift any other GM liabilities. While any one liability might not doom New GM, GM filed for bankruptcy precisely because it was *not* viable when saddled with all of them. *See* 7/1/09 Hearing Tr. at 104-05 ("the test cannot be any one liability, if it were assumed would be the difference between viability and lack of viability. Of course, on that basis, there are a number of things that could easily fall within the bucket of not tipping the balance between viability and not viable. Our job is to create the most attractive NewCo we possibly can. And any one liability, whether it's one of dollar — 100 million dollars, even a billion dollars, may or may not tip the balance, but that's not the exercise we ever engaged in.").

Among them, New GM has assumed approximately 4,100 dealer franchise agreements, *see* Sale Op. at 5, as well as substantially all of Old GM's executory contracts with direct suppliers, *see id.* at 20, it has offered employment to all of Old GM's non-unionized employees and unionized employees represented by the UAW, *see id.*, and it has assumed modified collective bargaining agreements with the UAW, which were ratified by the UAW membership, *see id.* at 22.[14]

3. Appellants Failed to Diligently Pursue A Stay

"'[W]hen bankruptcy appellants have failed and neglected to pursue the available remedies to obtain a stay of [an] Order,' they have 'thereby . . . permitted . . . a comprehensive change of circumstances to occur,' and 'it [would be] inequitable to hear the merits of their case.'" *Source Enterprises*, 392 B.R. at 548 n.2 (quoting *Texaco*, 92 B.R. at 45 (alteration in original)).

Appellants here never sought a stay of the Sale order; that fact alone dooms their appeal. *See Metromedia*, 416 F.3d at 144 ("We insist that a party seek a stay even if it may seem highly unlikely that the bankruptcy court will issue one."). Appellants contend that their request for an expedited appeal was sufficient, relying on *Metromedia*. But *Metromedia* doesn't say quite that: the court there found an appeal equitably moot because the appellants had sought neither a stay

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[14] Each of these transactions was obviously prospective at the time the bankruptcy court wrote its opinion, but each has now come to pass. In addition, New GM has taken numerous other steps in reliance on the Sale, including assembling a new Board of Directors, launching a new advertising campaign revolving around its emergence from bankruptcy, and entering into strategic acquisitions (*e.g.*, Delphi Corp.) and sales (*e.g.*, HUMMER). *See generally* http://www.gm.com/corporate/about/news/index.jsp?deep=press.

nor an expedited appeal. *See id.* at 145. It does not necessarily follow as a matter of logic that seeking an expedited appeal alone is sufficient.

In any event, although Appellants initially sought an expedited appeal, they ultimately chose not to pursue one. Specifically, Judge Kaplan, after denying the asbestos claimants' stay motion, scheduled an expedited appeal that would have resulted in oral argument the week of July 20, 2009. *See* Dist. Stay Op. at 5. Appellants could have availed themselves of that schedule — as they observe, they were present throughout the stay proceedings, *see* App. Br. at 23 — but instead, by letter to Judge Kaplan dated July 14, 2009 (the same day their brief was due under the expedited schedule), Appellants informed the Court that they would not be submitting their brief, but would instead file one in the ordinary course.[15]

Although the Sale had already closed by then — since Appellants had not sought a stay — Appellants needed to pursue an expedited appeal to make the argument that they have satisfied the fifth *Chateaugay* factor. After all, the *Chateaugay* factors collectively ask, in essence, "Given everything that's gone on since and in reliance upon the order appealed from, is it fair to review that order now?" Thus, in *Metromedia*, the court noted not only that the order appealed from had gone effective, but that "over a year" had passed since it had, during which time other transactions had been consummated in reliance on that order. 416 F.3d at 144-45. Likewise, here, the difference between an appeal heard ten days after the Sale closed and one heard approximately four months later is meaningful. During

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[15] A copy of Appellants' July 14, 2009 letter is attached as Exhibit D.

that time period, as noted (*see supra* at 23 & n.14), New GM assumed numerous dealer agreements, executory contracts, retained a workforce, and entered into a new collective bargaining agreement — all rooted in New GM's knowledge that the Sale has been consummated on the terms approved in the bankruptcy court. Appellants' contention that they fulfilled their obligation to seek a stay of the Sale by instead seeking an expedited appeal — but not actually availing themselves of one when offered the opportunity — turns the *Chateaugay* analysis on its head. *Compare Adelphia*, 367 B.R. at 98-99 ("Refusal to post a bond that a court requires as a condition to obtaining a stay pending appeal constitutes a failure to seek a stay diligently. . . . To permit a party to avoid mootness merely by pursuing a stay that they never intended to bond would be grossly inequitable and would swallow the fifth *Chateaugay* factor." (internal quotation marks omitted)).

* * *

This appeal is moot, pure and simple. Section 363(m) of the Bankruptcy Code forecloses the appeal. Even if it did not, it would be grossly inequitable to undo the entire Sale transaction and force GM into liquidation — the only relief that this Court can grant Appellants, albeit "relief" that would guarantee zero recovery for Appellants and all other unsecured creditors. And even giving Appellants the benefit of every argument and assuming that this Court were permitted to revise the terms of an extensively-negotiated commercial transaction to foist on New GM liabilities that it specifically bargained to avoid, the appeal would still be equitably moot because, among other things, Appellants failed to seek a stay or otherwise prosecute this appeal in a manner designed to minimize the disruption of any adverse judgment against New GM. Accordingly, the appeal should be dismissed.

POINT II

THE SECOND CIRCUIT CONSIDERED AND REJECTED EACH OF APPELLANTS' SUBSTANTIVE ARGUMENTS IN *CHRYSLER*

The overwhelming majority of Appellants' brief is dedicated to anticipating and attempting to rebut any suggestion that this appeal is moot. For the reasons just given, those arguments are misplaced, and this appeal should indeed be dismissed as moot. Even were that not so, the appeal is devoid of merit. Indeed, the Second Circuit considered and rejected each of Appellants' arguments in a virtually identical factual scenario just two months ago in *Chrysler*.

Appellants raise two issues on this appeal: (1) whether section 363(f) of the Bankruptcy Code permits a sale free and clear of *any* interest in property, including *in personam* products liability claims; and (2) whether the bankruptcy court had authority to bar claims against New GM under state-law successor liability theories.[16] *See* App. Br. at 2. Those issues were both expressly considered by the Second Circuit in *Chrysler* and decided adversely to Appellants. The Circuit's extensive discussion is fully on-point and is dispositive:

> We agree with *TWA* [*In re Trans World Airlines, Inc.*, 322 F.3d 283

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[16] Section 363(f) allows a bankruptcy trustee or debtor-in-possession to "sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate," if certain conditions are met. 11 U.S.C. § 363(f).

> (3d Cir. 2003)] and *Leckie* [*United Mine Workers of Am. 1992 Benefit Plan v. Leckie Smokeless Coal Co. (In re Leckie Smokeless Coal Co.)*, 99 F.3d 573 (4th Cir. 1996)] that the term "any interest in property" [in section 363(f)] encompasses those claims that "arise from the property being sold." By analogy to *Leckie* (in which the relevant business was coal mining), "[appellants'] rights are grounded, at least in part, in the fact that [Old Chrysler's] very assets have been employed for [automobile production] purposes: if Appellees had never elected to put their assets to use in the [automotive] industry, and had taken up business in an altogether different area, [appellants] would have no right to seek [damages]." *Leckie*, 99 F.3d at 582.
>
> "To allow the claimants to assert successor liability claims against [the purchaser] while limiting other creditors' recourse to the proceeds of the asset sale would be inconsistent with the Bankruptcy Code's priority scheme." *TWA*, 322 F.3d at 292. Appellants ignore this overarching principle and assume that tort claimants faced a choice between the Sale and an alternative arrangement that would have assured funding for their claims. But had appellants successfully blocked the Sale, they would have been unsecured creditors fighting for a share of extremely limited liquidation proceeds. Given the billions of dollars of outstanding secured claims against old Chrysler, appellants would have fared no better had they prevailed.
>
> The possibility of transferring assets free and clear of existing tort liability was a critical inducement to the Sale. As in *TWA*, "a sale of the assets of [Old Chrysler] at the expense of preserving successor liability claims was necessary in order to preserve some [55],000 jobs, . . . and to provide funding for employee-related liabilities, including retirement benefits [for more than 106,000 retirees]." *TWA*, 322 F.3d at 293. . . .
>
> It is the transfer of Old Chrysler's tangible and intellectual property to New Chrysler that could lead to successor liability (where applicable under state law) in the absence of the Sale Order's liability provisions. Because appellants' claims arose from Old Chrysler's property, § 363(f) permitted the bankruptcy court to authorize the Sale free and clear of appellants' interest in the property.

Chrysler, 576 F.3d at 126 (alterations in first sentence supplied; others in original).

Indeed, Appellants expressly recognize that *Chrysler* decided the precise issues raised by this appeal, and note that they "strongly disagree." *See* App. Br. at 25 & n.10. Whatever the merit of Appellants' arguments — which they do not actually set out in their brief, choosing instead to incorporate by reference their brief in the bankruptcy court — this Court is bound by *Chrysler*. Accordingly, the *Chrysler* court's conclusions — that a bankruptcy court may, using section 363, both (a) authorize the sale of assets free and clear of products liability claims, and (b) bar products liability claims against a section 363 purchaser that rely on theories of successor liability — are controlling here, and entirely foreclose this appeal.

The Court can readily dismiss Appellants' attempt to distinguish *Chrysler*. In fact, one can hardly imagine two cases more similar than *GM* and *Chrysler*, *see* Sale Order at 58 ("This Court has previously noted how *Chrysler* is so closely on point, and this issue [*i.e.*, successor liability] is no exception."); *id.* at 60 ("The claims sought to be preserved here are identical to those in *Chrysler*. And *Chrysler* is not distinguishable in any legally cognizable respect."), and, in any event, the Second Circuit's holding was the result of an almost pure exercise of statutory construction, and had almost nothing to do with the particulars of Chrysler's bankruptcy, *see id.* at 60 n.108 ("The Court cannot agree with the suggestion that *Chrysler* is distinguishable. . . . We are talking about an issue of statutory construction here, and the Code makes no distinction in that regard."); *see also* App. Br. at 10 ("the provisions in the Sale Order finding that New GM was not a successor to Old GM were surely based on the Bankruptcy Court's interpretation of the Bankruptcy Code section 363(f), and not on the realities before the Court.").

Moreover, even if they were pertinent to the *Chrysler* court's reasoning (which they were not), the two supposed differences between *GM* and *Chrysler* are nonexistent. *First*, Appellants contend that leaving products liability claims with Old GM was "was not a factor critically necessary to" the Government in crafting the Sale transaction. App. Br. at 26. But this assertion is flatly contrary to the undisputed testimony of Harry Wilson, Treasury's chief negotiator of the GM transaction, who stated explicitly: "We do not have any intention to move forward [with the Sale] if the sale order, with regards to successor liability, is not entered as [proposed]." 7/1/09 Hearing Tr. at 150; *see also id.* at 185-86. Mr. Wilson clarified this point under questioning:

> Q. You would walk away [from the Sale] unless the Court finds that you are not a successor . . . ?
>
> A. That's our position.

Id. at 151.[17] *See also supra* at 16-17 & n.11. *See generally* 7/1/09 Hearing Tr. at 135 (the "primary test" Treasury employed to decide whether New GM should take on a liability was "that the assets assumed should be commercially necessary for the viability or help for the New GM").

Second, Appellants aver that because "the relative priorities of the various creditors" assertedly "were wholly subservient to Treasury's dominant concern of

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[17] The bankruptcy court expressly "found all witnesses credible, and takes their testimony as true." Sale Op. at 4. *See also id.* at 37 ("The Court fully takes Harry Wilson at his word.").

doing whatever was 'necessary for the commercial success of New GM,'" *Chrysler* is somehow distinguishable. App. Br. at 27. That makes absolutely no sense. If Appellants mean to insinuate that the bankruptcy court somehow circumvented the usual priorities of creditors in bankruptcy to advance the Government's agenda, that argument was rejected by the bankruptcy court here and by the Second Circuit in *Chrysler*. *See* Sale Op. at 42-43 (rejecting argument that Sale was a "*sub rosa* plan" of reorganization that violated the Bankruptcy Code's absolute priority rule); *See Chrysler*, 576 F.3d at 118 (same). If, on the other hand, Appellants are asserting that the Government was more concerned with the commercial success of New GM than about the recovery of creditors in the bankruptcy — which is true of every asset purchaser — the Government's motives here were no different than in *Chrysler*. Indeed, in both *GM* and *Chrysler* the purchaser — the Governments and Canada in *GM*; the Government and Fiat in *Chrysler* — sought to acquire automotive assets at the lowest price possible, with the smallest portfolio of liabilities commercially practicable, in order to ensure that New GM and New Chrysler, respectively, had the best chance to thrive. *See* Sale Op. at 46 (quoting the bankruptcy court's finding in *Chrysler* that New Chrysler negotiated to ensure its own viability, with "the estates' economic interests" being "irrelevant").

No two cases are exactly alike, of course, but *GM* and *Chrysler* are about as close as it gets. *Chrysler* considered and rejected each of the arguments advanced by Appellants here; this Court is therefore obliged to do the same.

CONCLUSION

For the reasons just given, the judgment of the bankruptcy court should be affirmed.

Dated: New York, New York
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Respectfully submitted,

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