UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re	:	**Chapter 11 Case No.**
MOTORS LIQUIDATION COMPANY, *et al.*,	:	**09-50026 (REG)**
f/k/a General Motors Corp., *et al.*	:	
	:	**(Jointly Administered)**
Debtors.	:	
CALLAN CAMPBELL, *et al.*,	:	**Case No. 09-CV-6818 (NRB)**
Appellants,	:	
v.	:	
MOTORS LIQUIDATION COMPANY, *et al.*,	:	
Appellees.	:	

ANSWERING BRIEF OF MOTORS LIQUIDATION COMPANY, *et al.* IN OPPOSITION TO APPEAL OF CALLAN CAMPBELL, *et al.*

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PRELIMINARY STATEMENT

In the face of severe financial distress and after extended negotiations with the United States Treasury as to financing and the sale of its assets, General Motors Corporation and certain of its affiliates (collectively, "GM" or the "Debtors") each commenced a case under chapter 11 of title 11, United States Code (the "Bankruptcy Code") in the United States Bankruptcy Court for the Southern District of New York (the "Bankruptcy Court") on June 1, 2009 (the "Commencement Date"). GM moved for approval of the sale of substantially all of their assets to a United States Treasury-sponsored purchaser, NGMCO, Inc. n/k/a General Motors, LLC (the "Purchaser" or "New GM"), pursuant to section 363 of the Bankruptcy Code (the "Sale" or the "363 Transaction"). Appellants, product liability contingent claimants (collectively, "Campbell"), objected to the Sale being "free and clear" of such contingent claims.

The Bankruptcy Court, after an evidentiary hearing in which Campbell and other objectors actively participated, entered the order approving the 363 Transaction, dated July 5, 2009 (the "Sale Order"), and issued an 87-page written decision, *In re General Motors Corp.*, 407 B.R. 463 (Bankr. S.D.N.Y. 2009) (the "Sale Opinion" or "Sale Op."). The decision, by Bankruptcy Judge Robert E. Gerber, is fully consistent with and properly applied two decades of Second Circuit precedent, including the Bankruptcy Court decision approving a similar section 363 sale by Chrysler LLC ("Chrysler") of substantially all of its assets to Fiat S.p.A. that the Second Circuit affirmed.[1] The Sale Opinion was based on undisputed trial evidence, which established that the 363 Transaction was the *only* option to:

- preserve and maximize the going concern value of the sale assets, for the benefit of the Debtors' estates;

[1] *In re Chrysler LLC*, 405 B.R. 84 (Bankr. S.D.N.Y. 2009), *aff'd* (by summary order), 2009 U.S. App. LEXIS 12351 (2d Cir. June 5, 2009) and (by supplementary opinion, dated August 5, 2009) 576 F.3d 108 (2d Cir. 2009), *petition for cert. filed*, 78 U.S.L.W. 3107 (U.S. Sept. 4, 2009) (No. 09-285).

- preserve hundreds of thousands of domestic jobs;
- avoid systemic failure throughout the automotive industry of dealers, suppliers and related entities; and
- enable the creation of a new viable automotive manufacturing entity in the national interest.

The Bankruptcy Court also found, based on the undisputed evidence, that:

- prompt consideration and approval of the 363 Transaction was the *only* way to avoid the liquidation of GM's assets and business;
- the liquidation of GM would have yielded only a mere fraction of the going concern value of the assets; and
- liquidation of the GM assets and business would have resulted in *no* distribution of any kind to GM's unsecured creditors, including Campbell, if and to the extent they could prove their claims.

The 363 Transaction was supported by the overwhelming majority of the parties in interest. These included, among others, the Official Committee of Unsecured Creditors; the United States Government represented by the United States Department of the Treasury (the "U.S. Treasury"); the Governments of Canada and the Province of Ontario; the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (the "UAW"); the Indenture Trustees for GM's approximately $27 billion in unsecured bonds and notes; and an ad hoc committee of bondholders representing approximately 20% of such bonds. Sale Op. at 473-74.

No objector, including Campbell, presented any evidence establishing *any* viable alternative to the Sale. Moreover, "[o]pponents of the sale . . . produced no evidence that the sale [was] *not* justified." *Id.* at 491 n.54.

After entry of the Sale Order, an Ad Hoc Committee of Asbestos Tort Claimants (the "Ad Hoc Committee") that had objected to the Sale requested that the Bankruptcy Court,

inter alia, stay the Sale Order pending appeal. After a hearing on notice to Campbell and others, the Bankruptcy Court denied the stay motion (the "July 7 Opinion"). [CD-130][2]

The Ad Hoc Committee then moved in the District Court to stay the Sale Order and for an emergency expedited appeal. On July 9, 2009, after hearing argument, Judge Lewis A. Kaplan denied the Ad Hoc Committee's request for a stay and granted an expedited appeal. [CD-140] Campbell appeared at the hearing before Judge Kaplan, but did not seek a stay or an expedited appeal. The Ad Hoc Committee thereafter moved to withdraw its appeal from the Sale Order.

The 363 Transaction closed on July 10, 2009 and has been fully consummated. [CD-137, at 2 ¶ 4]

The Campbell arguments opposing the Sale "free and clear" of contingent unproven tort claims were squarely rejected in the Sale Opinion, just as the same arguments had been rejected by Bankruptcy Judge Arthur J. Gonzalez in approving *Chrysler's* section 363 sale free and clear of such claims. On June 5, 2009, the Second Circuit affirmed the *Chrysler* sale order "substantially for the reasons" set forth by Bankruptcy Judge Gonzalez. Subsequently, the United States Supreme Court denied certain *Chrysler* objectors' application for a stay of that sale order.[3] On August 5, 2009, the Second Circuit issued its formal opinion, reaffirming the *Chrysler* sale order.

Campbell rejects that the Second Circuit has definitively determined that the Bankruptcy Court has jurisdiction to approve the 363 Transaction. Instead, in footnote 10 of its brief, Campbell acknowledges the governing authority in this Circuit and then attempts to

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[2] All references to GM's Statement of Issues on Appeal and Counterdesignation of Additional Items to be Included in the Record on Appeal in Connection with the Appeal of Campbell shall be referred to herein as "CD-__."

[3] *Ind. State Police Pension Trust v. Chrysler LLC*, 129 S. Ct. 2275 (2009).

reserve the right to challenge the precedent in this Circuit. As a result, Campbell bases its appeal primarily on the proposition that the Purchaser could have assumed the contingent liabilities associated with its claims, despite the lack of any legal requirement therefor and posits its jurisdiction argument on the caselaw of other Circuits.

Campbell's jurisdictional argument is ill-founded. The governing statute states that an order approving the sale of property is a *core* bankruptcy proceeding. 28 U.S.C. § 157(b)(2)(N) ("Core proceedings include, but are not limited to . . . orders approving the sale of property other than property resulting from claims brought by the estate against persons who have not filed claims against the estate"). Likewise, the governing case law is unequivocal in confirming that bankruptcy court "'orders approving the sale of property' constitute core proceedings." *Jamaica Shipping Co. v. Orient Shipping Rotterdam, B.V. (In re Millenium Seacarriers, Inc.)*, 458 F.3d 92, 95 (2d Cir. 2006) (quoting 28 U.S.C. § 157(b)(2)(N)). Bankruptcy courts unquestionably have the authority to "hear and determine" such proceedings and, in connection therewith, to "enter appropriate orders and judgments." *U.S. Lines, Inc. v. Am. S.S. Owners Mut. Prot. & Indem. Ass'n (In re U.S. Lines, Inc.)*, 197 F.3d 631, 636 (2d Cir. 1999) (quoting 28 U.S.C. § 157(b)(1)). Jurisdiction over, and the administration and disposition of, a debtor's property is the daily grist of the Bankruptcy Court's business. Point I.A, *infra*.

Further, Campbell's failure to obtain, or even seek, a stay of the 363 Transaction requires denial of the appeal. Absent a stay, section 363(m) of the Bankruptcy Code expressly limits appellate review of a consummated section 363 sale to the purchaser's good faith. *Licensing by Paolo, Inc. v. Sinatra (In re Gucci)*, 105 F.3d 837, 839 (2d Cir. 1997). Campbell did not challenge New GM's good faith; and the Bankruptcy Court specifically found that New GM was a good faith purchaser. Point I.B, *infra*. The Sale was fully consummated over three

months ago. Since then, thousands of transactions have occurred, including incurring new and substantial obligations by New GM. It is too late to "unscramble the eggs" and reopen this heavily negotiated transaction in which the Purchaser purposely and expressly decided not to assume any liability for the Campbell contingent claims. Point I.C, *infra*.

Campbell offers no cognizable basis on the merits to reverse the Sale Order. GM's Board of Directors unquestionably articulated sound business reasons for the 363 Transaction -- the preeminent consideration under section 363(b) of the Bankruptcy Code -- and exercised prudent business judgment in approving the 363 Transaction. The 363 Transaction maximized and preserved the going concern value of GM's assets and business for its stakeholders. It represented the only available transaction for GM to avoid the draconian consequences of a liquidation and forced sale of its assets and business -- a scenario in which, according to the uncontroverted trial evidence, unsecured claimants (such as Campbell) would have received *nothing*. The 363 Transaction also resulted in substantial benefits in fostering consumer and market confidence in GM products and in serving the national interest to preserve the U.S. automotive industry. As the Bankruptcy Court found: it is "hard to imagine circumstances that could more strongly justify an immediate 363 sale." Sale Op. at 491. In sum, "[i]f the 363 Transaction [was] disapproved, GM [would have lost] its funding and its liquidity . . . and its only alternative [would have been] liquidation." *Id.* at 491-92. Point II.A, *infra*.

Approval of the Sale "free and clear" of successor liability and other claims was entirely proper and consistent with well-settled authority. Point II.B, *infra*.

COUNTER-STATEMENT OF THE ISSUES ON APPEAL

1. Is the appeal from the Sale Order moot by reason of (a) Appellants' failure to obtain a stay of that Sale Order; (b) the consummation of the Sale to the Purchaser; and (c) the

finding of the Bankruptcy Court that the Purchaser was a good faith purchaser under 11 U.S.C. § 363(m)?

2. Did Appellants meet their burden of establishing that the Bankruptcy Court abused its discretion in authorizing and approving the 363 Transaction in light of (a) the uncontroverted evidence of the GM Board of Directors' due care and good faith business judgment in entering into such transaction, adduced at a contested hearing; and (b) the Bankruptcy Court's proper application of controlling precedent, as most recently reaffirmed in *Chrysler*?

3. In the face of the uncontroverted evidence of the background of and reasons for the Sale and the intensive, arm's-length negotiations that resulted in the 363 Transaction, did Appellants meet their burden of establishing that the Bankruptcy Court abused its discretion or made clearly erroneous findings of fact in determining that the Sale was made in good faith by the Purchaser and the Debtors?

STANDARD OF APPELLATE REVIEW

While the Bankruptcy Court's legal conclusions are reviewed *de novo*, its findings of fact are reviewed only for clear error. *Gulf States Exploration Co. v. Manville Forest Prods. Corp. (In re Manville Forest Prods. Corp.)*, 896 F.2d 1384, 1388 (2d Cir. 1990); *Chrysler*, 576 F.3d at 112. A reviewing court must "'accept the ultimate factual determination of the fact-finder unless that determination either is completely devoid of minimum evidentiary support displaying some hue of credibility or bears no rational relationship to the supportive evidentiary data.'" *Fellheimer, Eichen & Braverman, P.C. v. Charter Techs., Inc.*, 57 F.3d 1215, 1223 (3d Cir. 1995) (citation omitted). The decision to approve a section 363 sale is committed to the

discretion of the Bankruptcy Judge. Any challenge to the Sale Order must establish an abuse of that discretion.[4]

STATEMENT OF THE CASE

The pertinent facts are set forth in the Sale Opinion and the July 7 Opinion and are incorporated in this brief as if fully and at length set forth.[5] Some of the more salient facts found by the Bankruptcy Court are set forth below.

PROCEEDINGS BELOW

A. GM's Bankruptcy and Related 363 Motion

GM's financial distress, and its failure to maintain financial viability despite billions of dollars of Government loans, were well known by the Commencement Date. [CD-140, at 1]

On June 1, 2009, GM and certain of its subsidiaries each filed petitions for relief under chapter 11 of the Bankruptcy Code. [CD-1]. To preserve the going concern value of its assets and business, and consistent with the financing provided by the U.S. Treasury totaling $19.4 billion, GM also filed a motion with the Bankruptcy Court, pursuant to sections 105(a), 363 and 365 of the Bankruptcy Code, to approve the sale of substantially all of its assets, and the assumption of certain contracts and leases and their assignment, to NGMCO, Inc., a U.S. Treasury-sponsored purchaser (the "363 Motion") in consideration of a purchase price of over

[4] *See Chrysler*, 576 F.3d at 117 (noting that "the size of the transaction, and the residuum of corporate assets, is, under our precedent, just one consideration for the exercise of discretion by the bankruptcy judge(s)"); *id.* at 118 (referring to the "discretionary, multifarious *Lionel* test" for section 363 transactions); *id.* at 119 ("On this record, and in light of the arguments made by the parties, the bankruptcy court's approval of the [s]ale was no abuse of discretion. . . . Consistent with the underlying purpose of the Bankruptcy Code . . . it was no abuse of discretion to determine that the [s]ale prevented further, unnecessary losses.").

[5] The relevant facts also appear in the Affidavit of Frederick A. Henderson Pursuant to Local Bankruptcy Rule 1007-2 [CD-2]; the Supplemental Affidavit of Frederick A. Henderson Pursuant to Local Bankruptcy Rule 1007-2 [CD-43]; the declaration of Harry Wilson [CD-50], submitted by the U.S. Government; and the transcripts of the evidentiary hearing and related proceedings before the Bankruptcy Court on June 30, 2009 [CD-134], July 1, 2009 [CD-141], and July 2, 2009 [CD-133].

$90 billion. [CD-5] The Purchaser would, in return, acquire the subject assets, assume certain specified liabilities, and create a "New GM" free of any entanglement with bankruptcy. [*Id.*] The Sale would result in: (i) preservation of the going concern value of those assets; (ii) avoidance of systemic failure related to the United States automobile industry; (iii) continued employment for hundreds of thousands of persons; (iv) protection of the many communities dependent upon the continuation of the business; (v) restoration of consumer confidence; and (vi) establishment of an automotive manufacturing business that would be viable, competitive, reliable and a standard bearer for a basic United States industry. Sale Op. at 480. The 363 Motion requested expedited approval of the 363 Transaction, subject to any higher or better offers. [CD-5, at 8 ¶ 15] On June 2, 2009, the Bankruptcy Court, after notice and a hearing, approved notice and other procedures as to the proposed sale and set an objection deadline of June 19, 2009, a bid deadline of June 22, 2009, and a sale hearing on June 30, 2009. [CD-15]. Numerous objections to the Sale were served and considered at the sale hearing. No other offers of any kind were received by GM. No alternative to the Sale was proffered, nor was it argued that the Sale was not in GM's best interests. Sale Op. at 494.

The *undisputed* evidentiary record before the Bankruptcy Court demonstrated that the 363 Transaction was the *only* viable means of preserving and maximizing GM's value. [CD-2, at 3, 7, 8-10; CD-141, at 72] There was no other option, as "the only alternative to an immediate sale [was] liquidation." Sale Op. at 493.

Only the U.S. Treasury was prepared to finance the chapter 11 administration. [CD-141, at 57; CD-4, at 12-14] The DIP financing was expressly conditioned on GM's seeking and obtaining approval of the 363 Transaction and, even then, *only* if that sale occurred on an *expedited* basis. [CD-2, at 41; CD-140, at 4; CD-2 at 31-32, 34-35; CD-143, at 75-76, 183]; *see*

also Sale Op. at 480 (finding that "the DIP financing will come to an end if the 363 Transaction is not approved by July 10").

The 363 Transaction, as contemplated by the Amended and Restated Master Sale and Purchase Agreement (the "MPA"), was, and continues to be, a material element of the U.S. Government's program to revitalize the domestic automotive industry. [CD-2, at 32] As the Bankruptcy Court found, the MPA was the product of intense, good-faith negotiations between the Debtors and their key stakeholders, including the U.S. Treasury and the UAW. Sale Op. at 494-95.

The 363 Transaction contemplated that substantially all of GM's core assets -- i.e., those that the U.S. Treasury and the Purchaser considered essential for New GM to be a competitive, economically viable operating entity -- would be sold and transferred to the Purchaser. [CD-141, at 135; CD-50, at 6 ¶ 13]. The consideration to GM had a total value in excess of $90 billion [CD-19, Ex. F at 15], equal to the sum of:

- a section 363(k) credit bid in an amount (estimated to be $48.7 billion at July 31, 2009) equal to the amount of indebtedness owed to the Purchaser as of the closing pursuant to the UST Credit Facilities and the DIP Facility (each as defined in the MPA), less approximately $7.7 billion of indebtedness under the DIP Facility;
- the cancellation of warrants previously issued by GM to the U.S. Treasury;
- the issuance by the Purchaser to the Debtors of 10% of the common stock of the Purchaser as of the closing (worth an estimated $3.8 to $4.8 billion [CD-19, Ex. F at 14]);
- the issuance by the Purchaser to the Debtors of warrants to purchase up to an additional 15% of the shares of common stock of the Purchaser; and
- the assumption by the Purchaser of the Assumed Liabilities, thus removing tens of billions of dollars of claims against the Debtors from the chapter 11 cases.

Sale Op. at 482.

Moreover, notwithstanding earlier discussions regarding so-called "politically sensitive" liabilities that the Purchaser may or may not have been willing to assume (App. Br. at

5-7), the Purchaser exercised care in determining what liabilities it would assume as "necessary for the commercial success of New GM." [CD-141, at 111; *see also id.* at 104, 107-08, 135] Such considerations necessarily extended to liabilities that had the offsetting, but, nevertheless, critical benefit of fostering consumer confidence in New GM, such as honoring warranties and customer incentives and maintaining vital supplier contracts. [CD-2, at 35 ¶ 83]. The Purchaser was clear that it would not pursue the 363 Transaction if it had to take on liabilities it did not want, such as the contingent Campbell liabilities. [CD-115, at 15 ¶ DD] Indeed, certain assets were excluded from the Sale and are retained by Motors Liquidation Company to be administered in the Debtors' chapter 11 cases. [CD-50, at 10 ¶ 23].

B. Bankruptcy Court Approval of the 363 Transaction

Campbell objected to the 363 Motion on the grounds that (i) section 363 "does not extend to successor liability choses in action" and, thus, "the court in *Chrysler misapplied* the case law and adopted inconsistent policies;" (ii) the Bankruptcy Court lacked jurisdiction "to enjoin post-closing disputes between personal injury claimants and the Purchaser;" and (iii) future claimants, "who have not yet suffered an injury or a loss cannot have an interest in GM's property because the injuries that would lead them to have such an interest have not yet occurred" (and, because "they do not know that they will be injured in the future," and, thus, a "free and clear" sale violates due process). [D-12, at 10 ¶ 18].[6]

Relative to the objections, the parties in interest engaged in 10 days of expedited discovery. GM produced several hundred thousand pages of documents and responded to dozens of interrogatories. Objectors deposed three witnesses. An evidentiary hearing on the 363 Motion was held on June 30, July 1, and July 2, 2009, during which five witnesses testified and

[6] All references to Appellants' Designation of the Record and Statement of Issues on Presented on Appeal shall be referred to herein as "D-__."

affidavits and declarations were considered. [CD-2; CD-4; CD-18; CD-19; CD-20; CD-43; CD-50; CD-110; CD-141, at 205-11].

The evidentiary record established that the 363 Transaction was a sound exercise of GM's business judgment and was the *only* viable alternative to a liquidation that would also avoid cataclysmic ramifications for the national economy. The Bankruptcy Court made findings of fact that were central to its approval of the 363 Transaction and its conclusion that the Sale was a proper, prudent exercise of business judgment by GM:

- "There is a good business reason for proceeding with the 363 Transaction now, as contrasted to awaiting the formulation and confirmation of a chapter 11 plan";
- "There is an articulated justification for proceeding with the 363 Transaction now";
- "The 363 Transaction is an appropriate exercise of business judgment";
- "The 363 Transaction is the only available means to preserve the continuation of GM's business";
- "The 363 Transaction is the only available means to maximize the value of GM's business";
- "There is no viable alternative to the 363 Transaction";
- "The only alternative to the 363 Transaction is liquidation";
- "No unsecured creditor will here get less than it would receive in a liquidation";
- "The UAW Settlement is fair and equitable, and is in the best interests of both the estate and UAW members";
- "The secured debt owing to the U.S. Government and EDC (both post-petition and, to the extent applicable, prepetition) is not subject to recharacterization as equity or equitable subordination, and could be used for a credit bid"; and
- "The Purchaser is a purchaser in good faith."

Sale Op. at 485-86.

As to the challenges raised by Campbell and other tort claimants to the "free and clear" aspects of the Sale, the Bankruptcy Court, after analyzing the statutory provisions and the

relevant jurisprudence, held that, although "textual analysis is inconclusive" and, "[v]iewed nationally, the caselaw is split in this area," it "is *not* split in this Circuit and District." *Id.* at 503-04. Judge Gerber stated:

> This Court has previously noted how *Chrysler* is so closely on point, and this issue is no exception. Judge Gonzalez expressly considered it. In material reliance on the Third Circuit's decision in *TWA*, the "leading case on this issue," Judge Gonzalez held that *TWA*:
>
> > "makes clear that such tort claims are interests in property such that they are extinguished by a free and clear sale under section 363(f)(5) and are therefore extinguished by the Sale Transaction. The Court follows *TWA* and overrules the objections premised on this argument. . . . [I]n personam claims, including any potential state successor or transferee liability claims against New Chrysler, as well as in rem interests, are encompassed by section 363(f) and are therefore extinguished by the Sale Transaction."

Id. at 504 (quoting *Chrysler*, 405 B.R. at 111). Judge Gerber emphasized:

> Thus the Court has, at the least, a judgment by the Second Circuit that 363(f) may appropriately be invoked to sell free and clear of successor liability claims. The claims sought to be preserved here are identical to those in *Chrysler*. And *Chrysler* is not distinguishable in any legally cognizable respect. On this issue, it is not just that the Court feels that it *should* follow *Chrysler*. It *must* follow *Chrysler*. The Second Circuit's *Chrysler* affirmance . . . is controlling authority.

Id. at 505.

Bankruptcy Judge Gerber denied GM's request to waive the ten-day stay period under Fed. R. Bankr. P. 6004(h) and 6006(d). He provided for a four-day stay of the Sale Order, until 12:00 noon on July 9, 2009, so as to permit any objectors to seek and obtain appellate review or a stay. *Id.* at 520 n.143.

C. Bankruptcy Court Denial of Application for Certification or a Stay

On July 6, 2009, Campbell requested that the Bankruptcy Court certify its appeal directly to the Second Circuit -- but *not* a stay of the 363 Transaction. [CD-130, at 2, 6-7]. The Ad Hoc Committee also requested a direct appeal and a stay. [*Id.* at 2, 6-17].

After oral argument, the Bankruptcy Court declined to certify the appeals, holding that Campbell and the Ad Hoc Committee failed to satisfy *any* of the factors required by 28 U.S.C. § 158(d)(2). [*Id.* at 2-7] The Bankruptcy Court held that "the most important consideration in advancing the case is enabling GM to complete the sale of its assets that is essential to its survival, and which is stayed until Thursday at noon, but not beyond that." [*Id.* at 6]

The Bankruptcy Court also denied the Ad Hoc Committee's application for a stay. [*Id.* at 7-17] The Bankruptcy Court stated:

> Under the circumstances here, [the] requirement [of a possibility of success on the merits] is not satisfied for an appeal to the district court, as the district court will be bound by the judgment of the Second Circuit [in *Chrysler*] just as much as I am. And I would also think that it would be as sensitive as I am to the importance of *stare decisis* in bankruptcy cases, and thus similarly follow Judge Gonzalez's *Chrysler* decision, when it is so closely on point.

[*Id.* at 11] The Bankruptcy Court noted that the "only alternative to an immediate sale is liquidation -- which would be a disastrous result for GM's creditors, its employees, the suppliers who depend on GM for their own existence, and the communities in which GM operates," and that "[c]ausing all of those interests to be sacrificed for these litigants' ability to avoid mootness arguments is an intolerable result." [*Id.* at 12-14].

D. Judge Kaplan's Denial of the Ad Hoc Committee's Emergency Stay Motion

On July 8, 2009, the Ad Hoc Committee filed an emergency motion in the District Court for an expedited appeal and a stay. The motion was briefed and heard by Judge Kaplan

the next morning. [CD-140, at 2] After argument, Judge Kaplan orally denied the motion and issued his written opinion later that day. [*Id.*]

Judge Kaplan held that the Ad Hoc Committee's "likelihood of success on appeal" -- on the very "free and clear" issues raised here -- was "minimal at best." [CD-140, at 3][7] Judge Kaplan found it "quite doubtful whether the [Ad Hoc Committee] established the requisite threat of irreparable injury" -- given the Bankruptcy Court's unchallenged finding that "the only alternative to consummation of this sale is liquidation of GM and that the unsecured creditors would receive nothing in that event." [CD-140, at 2-3]. Judge Kaplan found that, in balancing the hardships, under the operative documents, "the entry of a stay -- any stay at all -- would be an event that would permit the United States to terminate DIP financing immediately." [*Id.* at 4].

ARGUMENT

I.

THE APPEAL SHOULD BE DENIED

A. The Bankruptcy Court's Approval of the 363 Transaction Was a Proper Exercise of Its "Core" Jurisdiction

The bulk of Campbell's brief does not address the merits of this appeal. Rather, it focuses on the alleged lack of authority by the Bankruptcy Court to approve the Sale free and clear because assumption of the contingent liabilities would not affect the Debtors, but only New GM. App. Br. at 12. Such argument is devoid of merit.

[7] Judge Kaplan, like the Bankruptcy Court before him, issued his decision prior to the Second Circuit's issuance, on August 5, 2009, of its detailed opinion affirming Judge Gonzalez's decision in *Chrysler*. The Second Circuit decision to which Judge Kaplan refers was the earlier summary affirmance "for substantially the reasons stated in the opinions of Bankruptcy Judge Gonzalez." 2009 U.S. App. LEXIS 12351, at *2 (2d Cir. June 5, 2009).

Title 28 of the United States Code (the "Judicial Code") divides bankruptcy proceedings into two principal categories: core and non-core. 28 U.S.C. § 157. The law is clear that "'[b]ankruptcy judges have the authority to "hear and determine all . . . core proceedings arising under title 11 . . . and may enter appropriate orders and judgments, subject to review under section 158 of [title 28].'" *U.S. Lines, Inc. v. Am. S.S. Owners Mut. Prot. & Indem. Ass'n (In re U.S. Lines, Inc.)*, 197 F.3d 631, 636 (2d Cir. 1999) (quoting *In re S.G. Phillips Constrs., Inc.*, 45 F.3d 702, 704 (2d Cir. 1995) (quoting 28 U.S.C. § 157(b))). "'[I]n making the core/non-core distinction, Congress realized that the bankruptcy court's jurisdictional reach was essential to the efficient administration of bankruptcy proceedings and intended that the 'core' jurisdiction would be construed as broadly as possible subject to the constitutional limits established in [*Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982)].'" *Luan Inv. S.E. v. Franklin 145 Corp. (In re Petrie Retail, Inc.)*, 304 F.3d 223, 229 (2d Cir. 2002) (quoting *S.G. Phillips*, 45 F.3d at 705).

"[C]ore proceedings include . . . orders approving the sale of property other than property . . . ." 28 U.S.C. § 157(b)(2)(N); *see also Jamaica Shipping Co. v. Orient Shipping Rotterdam, B.V. (In re Millenium Seacarriers, Inc.)*, 458 F.3d 92, 95 (2d Cir. 2006) ("'orders approving the sale of property' constitute core proceedings") (quoting 28 U.S.C. § 157(b)(2)(N)); *Petrie*, 304 F.3d at 229 (same). The Sale Order approved the sale of GM's property, as Campbell acknowledges. App. Br. at 1 ("This is an appeal of the decision . . . authorizing the sale of certain assets . . . of General Motors Corporation"). *A fortiori*, the Bankruptcy Court had to have core jurisdiction over the 363 Motion and authority to approve the sale "free and clear" of claims. *Mich. Employment Sec. Comm'n v. Wolverine Radio Co. (In re Wolverine Radio Co.)*, 930 F.2d 1132, 1145 (6th Cir. 1991) ("because this action involves issues

which arose because of a bankruptcy proceeding . . . and because [the debtor] asserts a right based on bankruptcy law, 11 U.S.C. § 363(f), this action is a core proceeding and the bankruptcy court had jurisdiction to enter judgment on the motion").

Recognizing that it cannot overcome such authority, Campbell presents a hypothetical situation and, in effect, seeks an impermissible advisory opinion that possible *future* product liability claims against New GM, *if* any are asserted *in* the Bankruptcy Court, would fall outside of that Court's subject matter jurisdiction because they "could have no conceivable effect on the Debtors' estates." App. Br. at 19.[8] Campbell misconceives the issue on appeal. The 363 Transaction set the terms of the Sale.

The pertinent issue presented is whether the Bankruptcy Court had jurisdiction to approve a "free and clear" sale. Based on the applicable statutory and caselaw, all of which Campbell conveniently ignores, the answer is a resounding "yes."

In *Chrysler*, the Second Circuit made it clear -- specifically as to product liability claims of objectors to that 363 sale -- that, "[b]ecause appellants' claims arose from Old Chrysler's property, § 363(f) permitted the bankruptcy court to authorize the [s]ale free and clear of appellants' interest in the property." 576 F.3d at 126; *see* App. Br. at 25 n.10. The Second Circuit does not hesitate to examine subject matter jurisdiction, and has "an independent obligation" to do so, *sua sponte*. *Joseph v. Leavitt*, 465 F.3d 87, 89 (2d Cir. 2006) (citing *Travelers Ins. Co. v. Carpenter*, 411 F.3d 323, 328 (2d Cir. 2005)); *see also Durant, Nichols, Houston, Hodgson & Cortese-Costa, P.C. v. Dupont*, 565 F.3d 56, 62 (2d Cir. 2009) ("If subject matter jurisdiction is lacking and no party has called the matter to the court's attention, the court

[8] Campbell is concerned that "the Sale Order 'forever barred, estopped, and permanently enjoined' products liability claimants from 'asserting [rights or claims] against New GM' or from 'commencing or continuing . . . any action or other proceeding against New GM . . . under any theory of successor or transferee liability, de facto merger or continuity, . . . and products liability.'" App. Br. at 18 (quoting Sale Order ¶¶ 8, 47).

has the duty to dismiss the action sua sponte."). Campbell's implicit suggestion that the Circuit did not consider the Bankruptcy Court's jurisdiction in *Chrysler* is untenable.

Appellants do not cite any authority that a free and clear sale under 363(f) is not a core proceeding. Their heavy reliance on *Back v. LTV Corp. (In re Chateaugay Corp.)*, 213 B.R. 633 (S.D.N.Y. 1997) (*see* App. Br. at 16-19), underscores the infirmity of and lack of caselaw support for their argument. *Chateaugay* did not involve an objection to a section 363 sale. It involved adversary proceedings for declaratory and injunctive relief to enjoin state court actions against a purchaser of assets four years after a chapter 11 plan had been consummated. *Chateaugay* dealt with the effect of plan confirmation on jurisdiction over these adversary proceedings. Campbell conspicuously ignores *Chateaugay's* holding -- which flatly contradicts its argument and presaged the Circuit's *Chrysler* holding -- that the Bankruptcy Court's "inherent jurisdiction" *does* allow it to adjudicate "those matters that relate directly to the proceedings before the Bankruptcy Court [including] whether the 'free and clear' provisions of the sale order apply to *in personam* as well as *in rem* claims." 213 B.R. at 638.

Finally, Campbell's argument that the Bankruptcy Court lacked jurisdiction to enter the Sale Order because state law governs whether New GM is a successor (App. Br. at 19-20) must be rejected. Substantially all creditor claims are based on state law, and bankruptcy courts always deal with state law issues in determining the allowance of claims. That does not affect the jurisdiction of the Bankruptcy Court to otherwise stay the enforcement of state law claims or approve the sale of a debtor's property free and clear of such claims in accordance with section 363(f).

B. The Appeal Should Be Denied Under the Doctrine of Statutory Mootness

Section 363(m) of the Bankruptcy Code limits appealability of a section 363 sale order that has been consummated to the issue of good faith of the purchaser:

> 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 or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, *unless such authorization and such sale . . . were stayed pending appeal.*

11 U.S.C. § 363(m) (emphasis added); *see also* H.R. Rep. No. 95-595, at 346 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6302 (section 363(m) "protects good faith purchasers of property . . . from a reversal on appeal of the sale authorization, *unless the authorization for the sale and the sale itself were stayed pending appeal*") (emphasis added).

Campbell did not seek a stay of the Sale Order: The Campbell appeal from the Sale Order is moot. *Licensing by Paolo, Inc. v. Sinatra (In re Gucci)*, 105 F.3d 837, 839 (2d Cir. 1997); *In re Andy Frain Servs., Inc.*, 798 F.2d 1113, 1125 (7th Cir. 1986). The Second Circuit has strictly enforced section 363(m). *Gucci*, 105 F.3d at 839 ("Our 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."); *Kabro Assocs. of W. Islip, LLC v. Colony Hill Assocs. (In re Colony Hill Assocs.)*, 111 F.3d 269, 273 (2d Cir. 1997). Thus, "regardless of the merit of an appellant's challenge," an appellate court "may neither reverse nor modify the judicially-authorized sale if the entity that purchased or leased the property did so in good faith and if no stay was granted." *Gucci*, 105 F.3d at 840; *see In re Sax*, 796 F.2d 994, 997 (7th Cir. 1986) ("Section 363(m) does not say that the sale must be proper under § 363(b); it says the sale must be *authorized* under § 363(b).").[9] Section 363(m) is dispositive of the Campbell appeal.[10]

[9] Appellants concede that the rule articulated in *Gucci* applies "to the extent the Bankruptcy Court has acted within the scope of its limited subject matter jurisdiction." App. Br. at 14. Here, the Sale Order was within that "core" jurisdiction. *See* Point I.A, *supra*. Appellants' reliance on cases from the Third Circuit and Sixth Circuit thus is misplaced. App. Br. at 14. In any event, those cases are easily distinguishable from the facts of this case. For

C. The Appeal Should Be Denied Under the Doctrine of Equitable Mootness

The 363 Transaction has been consummated, with all of the attendant consequences of transferring and transforming a multibillion dollar business, including its relationship to third parties, governmental entities, suppliers, customers, and the communities in which it does business. The doctrine of equitable mootness applies. *Kenton Cty. Bondholders Comm. v. Delta Air Lines, Inc. (In re Delta Air Lines, Inc.)*, 374 B.R. 516, 522 (S.D.N.Y. 2007), *aff'd*, 309 F.App'x 455 (2d Cir. 2009), *petition for cert. filed*, 78 U.S.L.W. 3065 (U.S. July 22, 2009) (No. 09-104); *Deutsche Bank AG v. Metromedia Fiber Network, Inc. (In re Metromedia Fiber Network, Inc.)*, 416 F.3d 136 (2d Cir. 2005); *Official Comm. of Unsecured Creditors of LTV Aerospace & Def Co. v. Official Comm. of Unsecured Creditors of LTV Steel Co. (In re Chateaugay Corp.)*, 988 F.2d 322, 325 (2d Cir. 1993).

The doctrine generally applies in two situations, both of which are implicated here: "when an unstayed order has resulted in a 'comprehensive change in circumstances,' and when a reorganization is 'substantially consummated.'" *Delta*, 374 B.R. at 522 (quoting *Allstate Ins. Co. v. Hughes*, 174 B.R. 884, 888 (S.D.N.Y. 1994)). The doctrine may be overcome only by an appellant satisfying *all* of the following factors (the "*Chateaugay* Factors"):

> (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

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example, *Pittsburgh Food & Beverage, Inc. v. Ranallo*, 112 F.3d 645 (3d Cir. 1997), involves a determination of whether the assets that were sold were property of the estate – an issue that is not the subject of this appeal.

[10] *See* Sale Op. at 494 ("Here there is no proof that the Purchaser . . . 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 get a leg up over them. In fact, the sad fact is that there *were no* other bidders.").

> affected by the modification have notice of the appeal and an opportunity to participate in the proceedings"; and (e) the appellant "pursue[d] 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."

Frito-Lay, Inc. v. LTV Steel Co. (In re Chateaugay Corp.), 10 F.3d 944, 952-53 (2d Cir. 1993) ("*Chateaugay II*") (citations omitted). Appellants have not sustained their burden.

Campbell is simply wrong that this Court can fashion effective relief by "carving out from the challenged provisions of the Sale Order" any language that would impair its ability to assert claims against New GM. App. Br. at 21. If Campbell were correct, this Court would be rewriting, post-closing, a heavily negotiated business transaction -- and one in which the Purchaser purposefully chose *not* to assume the very liabilities in question. *See Chrysler*, 576 F.3d at 126 ("The possibility of transferring assets free and clear of existing tort liability was a critical inducement to the [s]ale."). Such a result would undermine the ability of parties to rely on an order approving a 363 sale and would have the effect of discouraging such sales. The equitable mootness doctrine, in contrast, promotes finality of bankruptcy sales and assists the Bankruptcy Court in obtaining the best price for a debtor's assets. *See United States v. Salerno*, 932 F.2d 117, 123 (2d Cir. 1991) ("Our conclusion that we must leave the terms of sale undisturbed furthers the policy of finality in bankruptcy sales [and] assists bankruptcy courts in maximizing the price for assets sold . . . . Otherwise, potential buyers would discount their offers . . . .").

Campbell admittedly failed to "pursue with diligence all available remedies to obtain a *stay of execution*" of the Sale Order; and that failure "create[d] a situation rendering it inequitable to reverse the order[ ] appealed from." *Chateaugay II* at 952-53 (emphasis added); *see also Kassover v. Gibson*, No. 02 Civ. 7978, 2003 WL 21222341, at *2 (S.D.N.Y. May 27,

2003) (appeal from order approving settlement and stock purchase agreement creating new entity was equitably moot where appellant had opportunity to, but did not, apply for stay prior to consummation of merger, resulting in a comprehensive change of circumstances), *aff'd*, 98 F.App'x 30 (2d Cir. 2004). As the Second Circuit explained in *Metromedia Fiber Network*:

> A chief consideration under *Chateaugay II* is whether the appellant sought a stay of confirmation. If a stay was sought, we will provide relief if it is at all feasible, that is, unless relief would "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." But if the appellant failed to seek a stay, we consider additionally whether that failure . . . renders relief inequitable. *We insist that a party seek a stay even if it may seem highly unlikely that the bankruptcy court will issue one. . . .*
>
> . . . In the absence of any request for a stay, the question is not solely whether we *can* provide relief without unraveling the Plan, but also whether we *should* provide such relief in light of fairness concerns.

416 F.3d at 144-45 (internal citations omitted) (emphasis added).[11]

The inequity to the Debtors, the U.S. Treasury, New GM, and other parties in interest if this Court were to grant Campbell's requested relief is manifest. The Purchaser consummated the 363 Transaction only after defeating Campbell's efforts to require such assumption. No stay was obtained. The Sale closed. New GM is fully operational. Countless new transactions have occurred. Billions of dollars in DIP and exit financing have already been funded and expended. Supplier and dealer networks have been completely overhauled, including the rejection of thousands of executory and dealership contracts. Having opted *not* to take action

[11] Appellants cite *Metromedia* for the proposition that a "request for expedited appeal of the Sale Order, though denied by the Bankruptcy Court, was sufficient . . . to satisfy this last of the *Chateaugay* Factors." App. Br. at 23 (citation omitted). But the Second Circuit's focus was on "whether the appellant sought a stay." 416 F.3d at 144. Appellants sought only certification of the appeal directly to the Second Circuit under 28 U.S.C. § 158(d)(2) [CD-130, at 2] As Judge Gerber noted, Appellants "aren't asking me to block the sale." [*Id.* at 6.] Appellants did not ask Judge Kaplan for a stay; and they did not seek a stay in the Second Circuit thereafter.

to delay the closing, "presumably understanding the serious consequences that would have" resulted [CD-130, at 6], Campbell should not be allowed to turn back the clock to compel the Purchaser to assume liabilities that it specifically refused. It would be particularly inequitable to do so here because it would elevate Appellants' unproven claims to a priority above other unsecured creditors, including tort claimants who had obtained judgments against GM, prior to the chapter 11 filing. Campbell decided not to seek a stay. It violated the Second Circuit's admonition on insistence that a party seek a stay or lose the right to appeal. *Metromedia Fiber Network*, 416 F.3d at 144-45. Thus, the appeal should be denied.

II

THE BANKRUPTCY COURT PROPERLY EXERCISED ITS DISCRETION IN APPROVING THE 363 TRANSACTION

The Bankruptcy Court, on the facts and the law, did not abuse its discretion by approving the 363 Transaction.

A. The Bankruptcy Court Properly Found that the 363 Transaction Was Entirely Appropriate in These Exigent Circumstances

The overriding consideration for approval of a section 363 sale is whether a "good business reason" has been articulated. *In re Chrysler LLC*, 576 F.3d 108, 114 (2d Cir. 2009), *petition for cert. filed*, 78 U.S.L.W. 3107 (U.S. Sept. 4, 2009) (No. 09-285); *Motorola, Inc. v. Official Comm. of Unsecured Creditors (In re Iridium Operating LLC)*, 478 F.3d 452, 466 (2d Cir. 2007); *Comm. of Equity Sec. Holders v. Lionel Corp. (In re Lionel Corp.)*, 722 F.3d 1063, 1069, 1071 (2d Cir. 1983).

The 363 Transaction was a sound exercise of articulated business judgment. GM had run out of money; it owed billions of dollars that could not be repaid; it had no alternative but to terminate its business operations. The record established, and the Bankruptcy Court found, that the 363 Transaction was not merely reasonable, but the *only* viable means of

preserving the value of GM's business enterprise, maximizing its going concern value and yielding the greatest value for GM and its creditors. Sale Op. at 474, 491-92; *id.* at 495 ("[t]he GM Board's decision would withstand *ab initio* review, *far more than the business judgment test requires*"; "it was the only responsible alternative available") (emphasis added).

Faced with a choice between (i) implementing the 363 Transaction within the parameters negotiated with and insisted on by the Purchaser and thereby achieving the results and objectives set forth above; or (ii) liquidating GM's assets, with *no* distribution at all to any unsecured creditors, including Campbell if it is able to prove its contingent claims (*see* Sale Op. at 474, 481, 484, 491-92), the Bankruptcy Court found that the GM Board exercised sound business judgment in proceeding with the 363 Transaction. Indeed, all objectors conceded that the sale was in the best interests of GM and its economic stakeholders [CD-133 at 59-60, 71-72] *Accord Chrysler*, 405 B.R. at 96 (debtors "established a good business reason for the sale" in opting for the "only option . . . currently available," especially where "only other alternative" was "immediate liquidation").

In connection with section 363 sales, courts consider the broader public interest. For example, in *Trans World Airlines, Inc.*, the court concluded:

> [T]here is a substantial public interest in preserving the value of TWA as a going concern and facilitating a smooth sale of substantially all of TWA's assets to American. *This includes the preservation of jobs for TWA's 20,000 employees, the economic benefits the continued presence of a major air carrier brings to the St. Louis region, and preserving consumer confidence in purchased TWA tickets American will assume under the sale.*
>
> I also believe the Sale Order implements the public interest that favors an organized rehabilitation . . . of a financially distressed corporation which lies at the core of chapter 11. *I conclude that the alternative to the Sale Order in this case is a free-fall chapter 11 leading to a liquidation with the subsequent substantial disruption of diverse economic relationships and*

> *likelihood of material adverse harm to a very broad spectrum of creditor constituencies.*

No. 01-00056, 2001 WL 1820326, at *14 (Bankr. D. Del. Apr. 2, 2001) (emphasis added). Such factors were expressly considered both by the Bankruptcy Court (Sale Op. at 493, 499), and by Judge Kaplan in denying a stay. July 9 Op. at 4.

B. The Bankruptcy Court Properly Approved the "Free And Clear" Sale

Despite the failure of Campbell to expressly argue the merits, it is Campbell's position that the Second Circuit got it wrong in affirming the *Chrysler* sale "free and clear" of successor liability. In footnote 10 of its brief, Campbell concedes that this "governing authority is flatly against" them, but disagrees with this Circuit's governing rule. However, Campbell's brief is devoid of any credible substantive argument establishing error by the Second Circuit.[12] Campbell argues that "interests in property" under section 363(f) of the Bankruptcy Code do not include *in personam* choses in action arising under state law theories of successor liability. Appellants reject that section 363(f) clearly does enable a debtor in possession or trustee to sell property of the estate "free and clear of any interest in such property," including contingent tort claims, in precisely the present circumstances. *Chrysler*, 576 F.3d at 126 (affirming denial of tort claimant objections and holding that "§ 363(f) permitted the bankruptcy court to authorize the [s]ale free and clear of appellants' interest in the property"); *see also Smart World Techs., LLC v. Juno Online Servs., Inc. (In re Smart World Techs., LLC)*, 423 F.3d 166, 169 n.3 (2d Cir.

[12] "Issues not sufficiently argued are in general deemed waived and will not be considered on appeal." *Frank v. United States*, 78 F.3d 815, 833 (2d Cir. 1996), *vacated on other grounds*, 521 U.S. 1114 (1997). In other words, "an appellant . . . must state the issue *and* advance an argument." *Id.* Thus, adopting by reference memoranda filed in the district court is a practice that has been consistently and roundly condemned by the Courts of Appeal. *See Gilday v. Callahan*, 59 F.3d 257, 273 n.23 (1st Cir. 1995); *see also Frank*, 78 F.3d at 833 (rejecting appellant's reference to a claim "in the 'issues' section and attempt[ ] to present it to us by referring to his arguments to the district court"); *accord Northland Ins. Co. v. Stewart Title Guar. Co.*, 327 F.3d 448, 452-53 (6th Cir. 2003).

2005) ("Section 363 permits sales of assets free and clear of claims and interests. It thus allows purchasers . . . to acquire assets without any accompanying liabilities.").[13]

Section 363(f)'s reference to sales free and clear of "any interest" permits the sale of a debtor's assets free and clear of claims, including successor liability claims in contract and in tort. The Third Circuit held that the bankruptcy court properly extinguished the successor liability of a purchaser, "free and clear," of a debtors' business operations under section 363(f), as it related to, inter alia, employment discrimination claims. *In re Trans World Airlines, Inc.*, 322 F.3d 283, 288-90 (3d Cir. 2003) ("*TWA*"). It expressly rejected the very argument advanced by Campbell here: that "interests" in property should be narrowly interpreted to mean only *in rem* interests, like liens, and to exclude "claims." *Id.; accord Am. Living Sys. v. Bonapfel (In re All Am. of Ashburn, Inc.)*, 56 B.R. 186, 189-90 (Bankr. N.D. Ga. 1986) (successor liability for product defects claim barred), *aff'd*, 805 F.2d 1515 (11th Cir. 1986); *In re New England Fish Co.*, 19 B.R. 323, 328 (Bankr. W.D. Wash. 1982) (sale was free and clear of successor liability claims for employment discrimination and civil rights violations).

In *Chrysler*, the Bankruptcy Court unequivocally concurred with the above principles in rejecting the same contentions now espoused by Appellants:

> Some of these objectors argue that their claims are not "interests in property" such that the purchased assets can be sold free and clear of them. However, the leading case on this issue, . . . *TWA* . . . , makes clear that such tort claims are interests in property such that

[13] In addition, section 105(a) of the Bankruptcy Code authorizes bankruptcy courts to "issue any order . . . that is necessary or appropriate to carry out the provisions of this title," 11 U.S.C. § 105(a); that authority, separate from section 363(f), extends to approval of asset sales free and clear of claims and liabilities. *See Volvo White Truck Corp. v. Chambersburg Beverage, Inc. (In re White Motor Credit Corp.)*, 75 B.R. 944, 948-49 (Bankr. N.D. Ohio 1987) (power to approve sale free and clear of tort claims originated from section 105(a), rather than section 363(f), subject only to limits on power to discharge claims under section 1114). Relying on the Supreme Court's decision, *Perez v. Campbell*, 402 U.S. 637 (1971), the *White Motor* court also held that, in the context of asset sales in bankruptcy, state successor liability statutes and rules are subject to federal preemption pursuant to the Supremacy Clause of the U.S. Constitution and, thus, must defer to achievement of Bankruptcy Code objectives and policies. 75 B.R. at 950.

> they are extinguished by a free and clear sale under section 363(f)(5) and are therefore extinguished by the Sale Transaction. The Court follows *TWA* and overrules the objections premised on this argument. Even so, *in personam* claims, including any potential state successor or transferee liability claims against New Chrysler, as well as *in rem* interests, are encompassed by section 363(f) and are therefore extinguished by the Sale Transaction. The Court also overrules the objections premised on this argument.

405 B.R. at 111 (internal citations omitted).

The Second Circuit, in its extensive *Chrysler* decision, agreed with *TWA* and stated:

> We agree with *TWA* and *Leckie*[14] that the term "any interest in property" encompasses those claims that "arise from the property being sold." By analogy to *Leckie* . . . "[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 [automobile] industry, and had taken up business in an altogether different area, [appellants] would have no right to seek [damages]."
>
> "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." Appellants ignore this overarching principle and assume that tort claimants faced a choice between the [s]ale 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 [s]ale. As in *TWA*, "a sale of the assets of [Old Chrysler] at the expense of

[14] *United Mine Workers of Am. 1992 Benefit Plan v. Leckie Smokeless Coal Co. (In re Leckie Smokeless Coal Co.)*, 99 F.3d 573, 582 (4th Cir. 1996) ("while the plain meaning of the phrase 'interest in such property' suggests that not all general rights to payment are encompassed by the statute, Congress did not expressly indicate that, by employing such language, it intended to limit the scope of section 363(f) to *in rem* interests, strictly defined, and we decline to adopt such a restricted reading of the statute").

> 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]."
>
> 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 [s]ale free and clear of appellants' interest in the property.

576 F.3d at 126 (citations omitted).

Campbell's arguments that *stare decisis* does not dictate the result here (App. Br. at 25-26) must fail. Bankruptcy Judge Gerber stated that

> at the least, a judgment by the Second Circuit that 363(f) may appropriately be invoked to sell free and clear of successor liability claims. The claims sought to be preserved here are identical to those in *Chrysler*. And *Chrysler* is not distinguishable in any legally cognizable respect. On this issue, it is not just that the Court feels that it *should* follow *Chrysler*. It *must* follow *Chrysler*. The Second Circuit's *Chrysler* affirmance . . . is controlling authority.

407 B.R. at 504-05.

Indeed, beyond the jurisdictional issue dealt with above, there can be no serious dispute -- and certainly no "clear error" in the Bankruptcy Court's determination -- that *Chrysler's ratio decidendi* is on "all fours" with this case. New GM, the U.S. Treasury-sponsored Purchaser in the GM case, like the purchaser in *Chrysler*, agreed to assume "only the liabilities that promote[d] its commercial interests." *Chrysler*, 405 B.R. at 111 (citations omitted). The 363 Transaction consummated that agreement.

To reverse the Sale Order at this time, as requested by Campbell, would be contrary to the applicable legal principles and would have a detrimental effect on bankruptcy sales. Prospective purchasers would not be able to rely on sale orders and sales that were

unstayed and consummated. As the Second Circuit noted, reversal would turn the priority scheme under the Bankruptcy Code upside down. It would have the effect of elevating Campbell's contingent claims to a status higher than that of general unsecured creditors who hold liquidated noncontingent claims against GM.

CONCLUSION

The Sale Order should be affirmed in all respects.

Dated: New York, New York
October 23, 2009

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AFFIDAVIT OF SERVICE

I, Ilusion Rodriguez, certify under penalty of perjury that I am over the age of eighteen and am not a party to the above-captioned proceeding. On October 23, 2009, I caused a true and correct copy of the foregoing ANSWERING BRIEF OF MOTORS LIQUIDATION COMPANY, *et al.* IN OPPOSITION TO APPEAL OF CALLAN CAMPBELL, *et al.* to be served by e-mail and FedEx, unless otherwise indicated, upon the parties that are listed below.

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/s/ Ilusion Rodriguez
Ilusion Rodriguez

Sworn to before me this
23rd day of October 2009
/s/ Nicole Aliseo
Notary Public
NICOLE ALISEO
Notary Public, State of New York
No. 01AL6186782
Qualified in Richmond County
Commission Expires May 12, 2012