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.*,	:	
Appellants,	:	
v.	:	**09 Civ. 6818 (NRB)**
MOTORS LIQUIDATION CORP., *et al.*	:	
Appellees.	:	

APPELLANTS' OPENING BRIEF

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Dated: September 23, 2009

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: **Page(s)**

Statutes and Rules: **Page(s)**

Authorities:

JURISDICTIONAL STATEMENT

This is an appeal of the decision (the "**Sale Opinion**" or "**Sale Op.**")[1] (Dkt. No. 2967) and order (the "**Sale Order**") (Dkt. No. 2968) of the United States Bankruptcy Court for the Southern District of New York (the "**Bankruptcy Court**") entered on July 5, 2009 authorizing the sale of certain assets (the "**Purchased Assets**") of General Motors Corporation ("**Old GM**") and its affiliates (collectively, the "**Debtors**") pursuant to that certain Amended and Restated Master Sale and Purchase Agreement and related documents (the "**MPA**") (Sale Order, Dkt. No. 2968, Ex. A) with NGMCO, Inc., a U.S. Treasury-sponsored purchaser ("**New GM**"). Callan Campbell, Kevin Junso, *et al.*, Edwin Agosto, Kevin Chadwick, *et al.*, and Joseph Berlingieri (collectively, the "**Appellants**") objected to the Debtor's motion (the "**363 Motion**"), which sought authority pursuant to 11 U.S.C. §§ 105, 363, and 365 to sell the Purchased Assets to New GM pursuant to the MPA (the "**363 Sale**"). (Dkt. No. 92). For the Court's convenience, a copy of the Sale Opinion is attached hereto as **Appendix A.** A copy of the complete Sale Order is attached hereto as **Appendix B.**

Each of Appellants had standing under 11 U.S.C. § 1109(b) to object to the 363 Motion on account of accidents sustained by each of them involving GM vehicles that occurred prior to commencement of the Debtors' bankruptcy cases under chapter 11 of title 11 of the United States Code (the "**Bankruptcy Code**"). Additionally, each of Appellants had initiated litigation prepetition against GM in state or federal courts in their respective states.[2]

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[1] Capitalized terms used herein and not defined shall have the meanings set forth in the Sale Opinion. References to the "**Docket**" or "**Dkt.**" are to the official docket in the underlying case, *In re Motors Liquidation Company, et al., f/k/a General Motors Corp., et al.*, Case No. 09-50026 (REG), presently pending before the Bankruptcy Court.

[2] The background to each of Appellants' respective products liability claims and pending actions against GM is set forth at Paragraphs 6 – 13 of their filed objection to the 363 Motion. (Dkt. No. 2177). None of the Appellants have filed proofs of claim against the Debtors with the Bankruptcy Court.

Except to the extent that, as argued below, the Bankruptcy Court (A) found that New GM is not a successor to the Debtors in respect of potential *in personam* products liability claims against New GM under applicable state law theories of successor liability and (B) barred and enjoined holders of such claims from pursuing New GM as successor, the Bankruptcy Court had jurisdiction over the 363 Motion pursuant to 28 U.S.C. § 1334(b).

The Bankruptcy Court entered the Sale Order on July 5, 2009. Appellants filed a timely notice of appeal of the Sale Order on July 6, 2009. The closing of the 363 Sale occurred on July 10, 2009 (the "**Closing**"). On July 16, 2009, Appellants filed their designation of items to be included in the record of appeal and statement of issues to be presented on appeal. (Dkt. No. 3185). The Debtors filed their counter-designation and statement of issues on July 27, 2009. (Dkt. No. 3439).

This Court has jurisdiction to hear this appeal pursuant to 28 U.S.C. §158(a)(1) and Federal Rules of Bankruptcy Procedure 8001, *et seq.*

STATEMENT OF THE ISSUES

1. Whether the Closing of the 363 Sale rendered this appeal statutorily or equitably moot?

2. Whether Bankruptcy Code section 363(f) permits the sale of the Purchased Assets to New GM "free and clear" of Appellants' *in personam* products liability claims?

3. Whether the Bankruptcy Court had authority to enjoin Appellants from pursuing *in personam* products liability claims against New GM post-Closing or to conclude that New GM was not a "successor" to Old GM under applicable theories of successor liability?

STATEMENT OF THE CASE

The Debtors' bankruptcy cases commenced on June 1, 2009 (the "**Petition Date**"). (Dkt. No. 1). Contemporaneous with the filing, the Debtors filed the 363 Motion, which sought entry of an order approving the 363 Sale free and clear of liens, claims, encumbrances, and other interests. (Dkt. No. 92). Appellants filed an objection to the 363 Motion and a supporting memorandum of law in which they argued that Section 363(f) of the Bankruptcy Code does not authorize a sale "free and clear" of potential post-Closing *in personam* products liability claims against New GM and that the Bankruptcy Court lacked subject matter jurisdiction to enjoin post-Closing disputes between products liability claimants and New GM. (Dkt. Nos. 2176, 2177). The Bankruptcy Court conducted a three day evidentiary hearing to consider the 363 Motion on June 30 – July 2, 2009 (the "**Sale Hearing**"). (Dkt No. 3087, the "**6/30 Hg. Tr.**"; Dkt. No. 3205, the "**7/1 Hg. Tr.**"; Dkt. No. 3062, the "**7/2 Hg. Tr.**").

On July 5, 2009 the Bankruptcy Court entered the Sale Order and the Sale Opinion. On July 6, 2009, Appellants and the *Ad Hoc* Committee of Asbestos Personal Injury Claimants (the "***Ad Hoc* Asbestos Claimants' Committee**") filed separate motions with the Bankruptcy Court seeking entry of an order certifying the Sale Order for immediate appeal to the Second Circuit Court of Appeals pursuant to 28 U.S.C. § 158(d)(2). (Dkt. Nos. 2990, 2989). The *Ad Hoc* Asbestos Claimants' Committee motion also requested, in the alternative, entry of an order staying the Sale Order pending appeal. The Bankruptcy Court denied these motions in a decision dated July 7, 2009. (Dkt. No. 3046).

On July 8, 2009, the *Ad Hoc* Asbestos Claimants' Committee filed an emergency motion with the United States District Court for the Southern District of New York for an order expediting its appeal and staying the Sale Order pending the appeal. In an order dated July 9, 2009, the District Court denied the motion for a stay pending appeal. (Dkt. No. 3193).

STATEMENT OF THE FACTS

Before the Petition Date, GM was primarily engaged in the worldwide production of cars, trucks, and parts. (Sale Op. at 4). At March 31, 2009, the Debtors reported consolidated global assets and liabilities of approximately $82 billion and $172 billion, respectively. (Sale Op. at 5.) The total reported consolidated global liabilities included an estimated $934 million in loss reserves for both existing and future products liability claims, up slightly from the $916 million in reserves contained in the Debtors' audited financial statements at 12/31/08 (the "**Products Liability Loss Reserves**"). (Dkt. No. 3414, PLCA Ex. 2 at p.11; 6/30 Hg. Tr. at 242:3-5; Dkt. No. 3287, the "**Henderson Depo**.," at 187:8-21, 193:9-194:3.)[3] The Debtors set the Products Liability Loss Reserves based on the loss reserve analysis undertaken by Aon Global Risk Consulting ("**Aon**"), which engaged in a rigorous review of the Debtors' historical loss records to determine the estimated projected losses as of 12/31/08 for all products liability claims, regardless of whether based on accidents or losses already sustained ("**Existing Products Claims**") or on accidents or losses not yet sustained but expected, based on historical experience, to arise sometime in the future ("**Future Products Claims**"). (6/30 Hg. Tr. at 157:14-158:10).

Aon's analysis established that the $916 million of Products Liability Loss Reserves at 12/31/08 could be split between Existing Products Claims of approximately $414 million (including an estimated $25 million in "containment expenses" for fees and defense costs) and

[3] Reference to "**PLCA Ex. __**" is to an exhibit introduced by Appellants at the Sale Hearing. Reference to the "**Henderson Depo**." is to the deposition of Fritz Henderson ("**Henderson**"), Old and New GM's chief executive officer, taken on June 28, 2009 and filed under seal (without exhibits thereto) at Dkt. No. 3287. The Henderson Deposition (with exhibits thereto) were filed under seal by the Debtor on 7/27/09 at Dkt. No. 3407 (as Exhibit 10 to "IUE Binder 2"). Henderson was the Debtors' principal negotiator in the 363 Sale. (Wilson Depo. at 16:10-14). Reference to the "**Wilson Depo**." is to the deposition of Harry Wilson ("**Wilson**"), an employee of Treasury and senior member of the working group representing Treasury's interests and day-to-day efforts with respect to Old and New GM. (Dkt. No. 2577 at ¶¶ 1, 6). His deposition was taken on June 29, 2009 and filed under seal at Dkt. No. 3288.

Future Products Claims of approximately $502 million (including an estimated $125 million in "containment expenses"). (6/30/ Hg. Tr. at 164:17-165:16). The Debtors were essentially "self-insured" for all expected losses on Existing and Future Products Claims since they carried insurance coverage only for claims exceeding $35 million per occurrence. (Henderson Depo. at 173:22-174:10).

Through March 31, 2009, the U.S. Treasury ("**Treasury**") lent $13.4 billion on a senior secured basis to the Debtors. (Sale Op. at 8-9). In the early spring of 2009, Treasury provided $6 billion of additional financing and indicated that if the Debtors' were unable to complete an effective out-of-court restructuring through an exchange offer before June 1, 2009, the Debtors should consider a more aggressive viability plan—like a 363 sale—to avoid further erosion of value. (Sale Op. at 11-13). The Debtors acknowledge that had the exchange offer been successful, the Debtors would have been viable and would not have sought bankruptcy relief, even though such an out-of-court restructuring would have meant that the Debtors would not have been able to shed any of their exposure to Existing or Future Products Claims. (Henderson Depo. at 176:10-177:5).

On May 1, 2009, GM and Treasury engaged in a planning meeting to carve up the myriad tasks necessary to plan for a bankruptcy filing—and accompanying 363 sale—in the event the Debtors' out-of-court restructuring efforts failed. (Wilson Depo. at 31:2-13). Among the action items requested by Wilson was a list of so-called "politically sensitive" liabilities that the Debtors and Treasury wanted to carefully consider because of the potential ramifications the treatment of such liabilities in the 363 Sale had on the reputations of both GM and Treasury. (Henderson Depo. at Ex. 4; Henderson Depo. at 162:8-164:3). Two days later, GM sent Treasury a memo that identified approximately $6 billion in such "politically sensitive" liabilities. Included on the list were the $916 million in Existing and Future Products Claims

comprising GM's Products Liability Loss Reserves at 12/31/08. (Wilson Depo. at 28:8-29:9; Henderson Depo. at Ex. 4). No decision was made at the time as to how these liabilities would be treated in the 363 Sale. (Wilson Depo. at 32:2-7). The Debtors and Treasury did agree, however, that once the final decision was made prepetition regarding the "politically sensitive" liabilities to be assumed by New GM and those to be left behind with Old GM, there would be no downward adjustment in the consideration to be received by the Debtors' estate in the event Treasury or New GM later assumed (whether voluntarily or involuntarily) some of the "politically sensitive" liabilities left behind. (Henderson Depo. at 237:12-23, 238:15-239:3). On this point, Henderson acknowledged that "[t]he liability segregation [as regards these "politically sensitive" liabilities] would be established by May 31st, and … it was not contemplated there would be any purchase price adjustments allowed ... once the segregation was finalized." (Henderson Depo. at 238:19-239:3).

At the final Old GM board of directors' meeting on May 29 and 30, 2009, the Old GM board approved the Debtors' bankruptcy filing and Old GM's entry into the proposed 363 Sale with New GM pursuant to the terms of the MPA, as then negotiated. (6/30 Hg. Tr. at 107:11-18; 108:6-8). The Old GM board also fixed at that meeting those "politically sensitive" liabilities that would be assumed post-Closing by New GM and those that would not be assumed. (Henderson Depo. at 240:20-241:3). Henderson advised the Old GM board that once this split was fixed, there would be no purchase price adjustments allowed to the detriment of Old GM in the event New GM subsequently were to assume these liabilities. (Henderson Depo. at 153:16-24; 240:3-241:3; 6/30 Hg. Tr. at 238:24-239:13). The version of the MPA approved prepetition by the Old GM board and attached to the 363 Motion provided that no Existing or Future Product Liability Claims would be assumed by New GM and that the

proposed sale would be "free and clear" of such claims. (Dkt. No. 92 at Ex. A, ¶¶ 2.3(a)(ix), 9.19; 6/30 Hg. Tr. at 167:7-10).

From New GM's perspective, the approximately $91 billion to $93 billion aggregate purchase price was "the least amount that had to be paid to get the deal done."[4] (Wilson Depo. at 361:7-24; 7/1 Hg. Tr. at 111:16-19). As the Bankruptcy Court found, New GM's purchase of Old GM was motivated "not so much by reason of the economic merit of the purchase, but rather to address the underlying societal interests in preserving jobs and the North American auto industry, the thousands of suppliers to that industry, and the health of the communities, in the U.S. and Canada, in which GM operates." (Sale Op. at 15). According to Wilson, New GM's decision on whether to assume specific liabilities or leave them behind with the Old GM depended entirely on what New GM considered "necessary for the commercial success of New GM." (7/1 Hg. Tr. at 111:20-23). Further, Wilson acknowledged, because New GM's $48.7 billion in senior secured debt was completely underwater, treatment of the various creditor classes in Old GM according to their relative priorities was irrelevant to New GM. (7/1 Hg. Tr. at 110:23-111:7). As such, claims of equal priority were treated differently in the sale despite the fact that, in liquidation, these liabilities would have shared on an equal or *pari passu* basis in the assets of Old GM.[5]

Between the Filing Date and the Sale Hearing, the Debtors and New GM agreed to two significant changes to the original MPA that improved potential recoveries for certain products

[4] The purchase price hereinafter is assumed to be approximately $92 billion and is comprised of (i) the $48.7 billion credit bid of the U.S. Treasury and the Canadian Government, (ii) approximately $48.4 billion of assumed liabilities, (iii) approximately $7.4 to $9.8 billion in value being given to Old GM, and (iv) less approximately $13.4 billion in cash expected to be held by New GM at Closing. (6/30 Hg. Tr. at 283:6-24; Dkt. No. 425, J. Stephen Worth Affidavit, at Ex. F).

[5] For example, approximately $18 billion in trade payables and $44 billion in various pension and employee obligations were substantially assumed by New GM whereas holders of unsecured bonds and prepetition products' liability claims will only recover whatever paltry share they're assigned on a *pari passu* basis in the remaining assets of Old GM. (Dkt. No. 3414, PLCA Ex. 2 at pp. 11-12; 7/1 Hg. Tr. at 114:1-115:2).

liability claimants. The first change, reached a few days after the Petition Date, resulted from postpetition agreements reached with GM's dealer network whereby New GM agreed to indemnify these dealers for any Existing or Future Products Claims successfully asserted against them. (Sale Op. at 61 n.10; 6/30 Hg. Tr. at 170:8-18). Debtors' management estimated that this single change would cause approximately $400 million of the $916 million in estimated Products Liability Loss Reserves at 12/31/08 to be assumed by New GM at Closing. (Dkt. 3414, PLCA Ex. 2 at p. 13; Henderson Depo. at 227:6-229:11; 6/30/08 Hg. Tr. at 242:6-20). The second change, reached on the eve of the Sale Hearing, provided that New GM would assume liability for all Future Products Claims that arose post-Closing, even if the vehicle involved in the accident was manufactured pre-Closing. (Sale Op. at 51). As a result of this change, New GM assumed the entire $502 million in estimated Future Products Claims (including "containment expenses"). (6/30 Hg. Tr. at 168:17-169:9; Sale Order at Ex. A, ¶¶ 2.3(a)(ix)). Henderson acknowledged that assumption of these products liability claims by New GM would not impair its viability post-Closing. (6/30 Hg. Tr. at 172:11-15).

Consistent with the prepetition agreement reached between the Debtors and Treasury in advance of the bankruptcy filing, none of the consideration to be paid in the 363 Sale for the Purchased Assets changed as a result of New GM's agreement to assume well over $500 million (and perhaps as high as about $682.8 million) in Existing and Future Products Claims.[6]

[6] In trying to estimate the total products liability claims assumed by New GM, if one assumes that (A) 414/916, or 45.2%, of the $400 million in claims assumed by New GM as a result of the dealer indemnity agreements represented the Existing Products Claims that otherwise would have been left behind with Old GM and (B) 502/916, or 54.8%, of that $400 million represented Future Products Claims that New GM later agreed to assume anyway, then the portion of the $916 million in reserves at 12/31/08 that were assumed by New GM at Closing was approximately $682.8 million (representing about 75% of the total $916 million in projected Existing and Future Products Claims at 12/31/08). This amount represented the sum of (A) $502 million in Future Products Claims (including "containment expenses") and (B) approximately $180.8 million (or 45.2% of $400 million) in Existing Products Claims (including "containment expenses"). Based on the foregoing assumption, one can additionally estimate the total Existing Products Claims left with Old GM (based on Products Liability Reserves at 12/31/08) to be about $233.2 million, or 0.25% of the approximately $92 billion purchase price paid for the Purchased Assets. *See, supra* at 4-5 for the source of the "414" and "502" figures used herein.

(6/30 Hg. Tr. at 169:10-18; 234:29-239:13). Additionally, no provision was included in the MPA that would require the Debtors to indemnify or in any way reimburse New GM for any Existing Products Claims for which New GM might be liable post-Closing. *See*, Sale Order, Ex. A.

On July 5, 2009, the Bankruptcy Court entered the Sale Order, which provided in relevant part that as a consequence of the 363 Sale:

- the Purchased Assets would "vest New GM with all right, title, and interest of the [Debtors]… free and clear of liens, claims, encumbrances, and other interests…, including rights or claims … based on any successor or transferee liability"; (Sale Order, ¶ AA; ¶ 10)

- the "Purchaser shall not be deemed … to: (i) be a legal successor … to the Debtors …, (ii) have, de facto or otherwise, merged with or into the Debtors; or (iii) be a mere continuation or substantial continuation of the Debtors or the enterprise of the Debtors; (Sale Order, ¶ 46)

- "all persons and entities are forever prohibited and enjoined from commencing or continuing in any manner any action or other proceeding … against New GM … with respect to any … successor or transferee liability of New GM for any of the Debtors; (Sale Order, ¶ 47).

Paragraphs BB, DD, 6-8, and 48 of the Sale Order provided relief similar to the provisions cited above. Significantly, as regards the "politically sensitive" liabilities from which New GM sought to be insulated from successor liability, the Bankruptcy Court did find it "doubtful" that "the U.S. and Canadian Governments would have lent and ultimately bid a lesser amount" had New GM been required to assume these claims. (Sale Op. at p. 51 n.91). While the Bankruptcy Court did find in the Sale Order that "[t]he Purchaser would not have entered into 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 successor or transferee liability" (Sale Order, ¶ DD), this finding does not contradict the narrower finding in the Sale Opinion. The finding in the Sale Order encompasses *all* potential

claims for successor liability, whereas the narrower finding in the Sale Opinion focuses only those successor claims asserted in respect of "politically sensitive" liabilities (which, as explained above, could have been assumed by New GM without any downward adjustment of the ultimate consideration to be paid to the Debtors in the deal). *See*, *supra* at 5-6, 7-8.

Finally, the provisions of 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. Indeed, given the following unrebutted facts, if New GM isn't a successor to Old GM, it's hard to imagine a scenario where a purchaser ever would be deemed a "successor" to a seller:

- four of Old GM's eight brands were assumed by New GM;
- most of existing management continued in their same roles with New GM;
- New GM retained the Old GM brand name;
- management hoped that brand loyalty and goodwill would continue and improve;
- management anticipated expensive marketing campaigns would be commenced post-Closing to convince people that GM and its products have improved post-bankruptcy;
- management wanted the customer to view the transfer to New GM as a seamless transition from a warranty, service, parts, and customer experience perspective;
- service relationships with dealers would continue post-Closing;
- Treasury, on a fully diluted basis, would be the majority shareholder and in effective control of New GM, just as it was the effective owner of the Debtors based on its priority secured position that, in liquidation, would leave nothing for unsecured creditors;
- New GM would own substantially all of Old GM's intellectual property, machinery, real property, personal property, receivables, equipment, inventories, contracts, books and records, customer lists, computer files, legal records, supplier records, assumed executory contracts, insurance, refunds, and goodwill;

- New GM would assume liabilities arising in the ordinary course of Old GM's business, claims under assumed executory contracts, most salaries and wages, warranty claims, and collective bargaining agreements (as modified);
- offices would not change; and
- the operating business will still be known as "GM."

(*See,* Sale Order, Ex. A at ¶¶ 2.2(a), 2.3(a); Wilson Depo. at 259:8-261:4, 359:3-7, 359:8-361:16, 6/30 Hg. Tr. at 98:7-19, 246:9-20; 7/1 Hg. Tr. at 109:4-110:22; Dkt. No. 3413, PLCA Ex. 1).

Appellants challenge only those provisions in the Sale Order (*i.e.*, ¶¶ AA, BB, DD, 6-8, 10, and 46-48) that (i) authorized the transfer of the Purchased Assets "free and clear" of their potential *in personam* products liability claims and (ii) barred and enjoined the Appellants from pursuing their products liability claims against New GM post-Closing as the successor to the Old GM.

SUMMARY OF THE ARGUMENT

Case law in this Circuit establishes three necessary conditions to a Court's authorizing a 363 sale "free and clear" of potential products liability claims against a successor purchaser. The first condition, a legal one, is set forth in *Back v. LTV Corp. (In re Chateaugay)*, 213 B.R. 633, 638 (S.D.N.Y. 1997), and *Pittsburgh Food & Bev., Inc. v. Ranallo*, 112 F.3d 645 (3d. Cir. 1997), and requires that a reviewing court determine whether the bankruptcy court could colorably assert that it had "related to" subject-matter jurisdiction based on a finding that the outcome of the dispute could have a "conceivable effect" on the debtor's bankruptcy estate.

The second and third conditions, factual ones, are explained in *In re Chrysler LLC,* 576 F.3d 108 (2d Cir. 2009). One requires a finding that the "free and clear" aspects of the sale order be a "critical inducement" to the purchaser's willingness to consummate the sale. The

second requires a finding that the 363 sale process not be structured in a manner "inconsistent with the Bankruptcy Code's priority scheme." *Chrysler*, 576 F.3d at 126.

Though failure to satisfy any one of these conditions should be sufficient to deny a purchaser the right to a "free and clear" order cleansing it of potential successor liability, none of these conditions were satisfied in this case. First, the Bankruptcy Court lacked authority to render the findings and conclusions being challenged in this appeal because resolution of Appellants' products liability claims against New GM, as successor, lacked any "conceivable effect" on the Debtors' estates. In this regard, most significant is the fact that Old GM has no obligation to indemnify New GM for liabilities that were not expressly assumed under the MPA yet might be charged to New GM post-Closing. Second, the record clearly establishes that entry of a "free and clear" order barring successor claims against New GM in respect of Existing Products Claims was not a "critical inducement" to New GM's willingness to consummate the 363 Sale. In fact, the Bankruptcy Court found it "doubtful" that New GM "would have lent and ultimately bid a lesser amount" had it been required to assume these "politically sensitive" claims. (Sale Op. at 51 n.91). Third, the principle that creditors of equal priority should be treated similarly was cast aside in favor of Treasury's single-minded focus on assuming any liability it deemed "necessary for the commercial success of New GM." *See*, *supra* at 7. For this reason, over $60 billion in unsecured claims were assumed by New GM in whole or substantial part while, in marked contrast, Appellants and other similarly situated unsecured creditors will recover, at best, a paltry *pari passu* share of the few remaining assets left in Old GM.

Arguments that this appeal is moot on statutory and equitable grounds also fail. This appeal is not moot on statutory grounds because Bankruptcy Code section 363(m) does not prevent a reviewing court from reversing provisions of a sale order that were "not even

colorably within its jurisdiction." *Ranallo*, 112 F.3d at 650. Nor, applying the five factors outlined in *Frito-Lay, Inc. v. LTV Steel Co. (In re Chateaugay Corp.)*, 10 F.3d 944, 949-50 (2d Cir. 1993), is this appeal equitably moot. Most significantly, the remaining Existing Products Claims left behind with the Old GM are *de minimus* relative to the approximately $92 billion purchase price paid by New GM. Thus, striking the provisions of the Sale Order barring these claims will not "unravel intricate transactions" or impair New GM's viability. Appellants' failure to seek a stay pending appeal is also not fatal to their cause. Appellants sought, but were denied, expedited review. Moreover, the "stay" factor carries little weight where–as here–granting the requested relief would in no way unravel or "knock the props out" from the consummated transactions.

STANDARD OF REVIEW

This Court, vested with appellate jurisdiction over the rulings of the Bankruptcy Court pursuant to 28 U.S.C. § 158(a), reviews the legal conclusions of the Bankruptcy Court *de novo*, and may reverse the findings of fact of the Bankruptcy Court when they are clearly erroneous. *Bay Harbour Management, L.C. v. Lehman Bros. Holdings, Inc. (In re Lehman Bros. Holdings, Inc.)*, 2009 WL 667301 (S.D.N.Y. March 13, 2009) (*citing AppliedTheory Corp. v. Halifax Fund., L.P. (In re AppliedTheory Corp.)*, 493 F.3d 82, 85 (2d Cir. 2007)). Mixed questions of law and fact are reviewed "either *de novo* or under the clearly erroneous standard depending on whether the question is predominantly legal or factual." *Id. (citing Italian Colors Rest. v. Am. Express Travel Related Servs. Co. (In re Am. Express Merchants' Litig.)*, 554 F.3d 300, 316 n.11 (2d Cir. 2009)).

ARGUMENT

I. This appeal was not rendered statutorily or equitably moot by the Closing.

The Debtors are sure to argue that this appeal should be summarily dismissed on grounds of mootness, both statutory (under Bankruptcy Code section 363(m)) and equitable. As discussed below, neither ground has merit.

A. The appeal is not moot under Section 363(m) because the Bankruptcy Court lacked "related to" jurisdiction that would enable it to enjoin Appellants' claims against New GM or to conclude that New GM was not a successor to Old GM.

While *Licensing by Paolo, Inc. v. Sinatra (In re Gucci)*, 105 F.3d 837, 839 (2d Cir. 1997), establishes the general rule in this Circuit that Bankruptcy Code section 363(m) limits appellate court jurisdiction over an unstayed sale order to the "narrow issue of whether the property was sold to a good faith purchaser," that rule applies only to the extent the Bankruptcy Court has acted within the scope of its limited subject-matter jurisdiction. That boundary, at least in the 363 sale context, is best articulated by the Third Circuit in *Pittsburgh Food & Bev., Inc. v. Ranallo*, 112 F.3d 645 (3d Cir. 1997), in which the Court stated:

> We recognize that it might be claimed that a bankruptcy court usurped power so that even absent a stay, notwithstanding section 363(m), an order reversing an order approving a sale permissibly could affect the validity of the sale of assets. Such a case in theory could arise if the bankruptcy court approved the sale of assets not even colorably within its jurisdiction.

Id. at 650. The Sixth Circuit in *Parker v. Goodman*, 499 F.3d 616 (6th Cir. 2007), cites *Ranallo* as good precedential authority, but notes that neither that case nor *Ranallo* involved facts that justified invoking this exception to Section 363(m)'s general rule. *Id.* at 623-24.

The Court, therefore, 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. *Cf., Travelers v. Bailey*, — U.S. —, 129 S. Ct. 2195, 2203 (2009) (on direct review of an order enjoining actions between non-debtors, "the Court of Appeals would indeed have been duty bound to consider whether the Bankruptcy Court had acted beyond its subject-matter jurisdiction"); *Huddleston v. Nelson Bunker Hunt Trust Estate*, 109 B.R. 197, 201 (N.D. Tex. 1989) (in refusing to dismiss appeal of confirmation order that enjoined future litigation by nondebtors against the banks on mootness grounds, court states "[a]n appellate court is under a duty … to ensure that the lower court has not exceeded its jurisdiction"). Further, because the bankruptcy court's jurisdictional authority to order such a "free and clear" sale was not considered by the Second Circuit in *Chrysler*, this Court is free to independently consider its "related to" jurisdictional authority. *Pereira v. Aetna Cas. & Surety Co. (In re Payroll Exp. Corp.)*, 921 F Supp 1121, 1123 (S.D.N.Y. 1996) ("[w]hen an issue was not raised in the circuit court, a district court is not bound by the resulting decision") (*citing* 1B James W. Moore, et al., MOORE'S FEDERAL PRACTICE ¶ 0.402[2] at I-27 (2d ed. 1995)).

The U.S. Supreme Court stated in *Celotex Corp. v. Edwards*, 514 U.S. 300, 308, 115 S. Ct. 1493 (1995), that a bankruptcy court's "related to" jurisdiction is broad, but "cannot be limitless." *Id.* at 1499. Since then, this Circuit has held that whether "related to" jurisdiction exists depends on "whether [the] litigation has a significant connection with a pending bankruptcy proceeding," and that this connection–in turn–depends upon "whether its outcome might have any 'conceivable effect' on the bankrupt estate." *California Public Employees' Retirement Sys. v. Worldcom, Inc.*, 368 F.3d 86, 95 (2d Cir. 2004) (*citing In re Cuyahoga Equip. Corp.*, 980 F.2d 110, 114 (2d Cir. 1992)). "But whatever test is used," the Supreme Court noted in *Celotex*, they all "make clear that bankruptcy courts have no jurisdiction over proceedings that have no effect on the debtor." *Celotex*, 514 U.S. at 308 n.6, 115 S. Ct. 1499 n.6.

Back v. LTV Corp. (In re Chateaugay), 213 B.R. 633 (S.D.N.Y. 1997), provides a very instructive analysis on the scope of its "related to" jurisdiction over post-closing successor products liability claims in the 363 sale context. There, the purchaser of the debtor's assets in a 363 sale commenced adversary proceedings in the bankruptcy court four years after the sale closed in hopes of enjoining three state court products liability actions that were commenced post-closing based on injuries sustained in accidents involving vehicles manufactured by the debtor prepetition.[7] *LTV Op. Findings* ¶¶ 6-11, 50-63. The vehicles involved were so-called "DJ-5 Postal Dispatcher Vehicles" ("**DJ-5's**") that were sold primarily to the US Postal Service and manufactured by AM General or its predecessor, American Motors Corp (**"AMC**"). *LTV Op. Findings* ¶¶ 1, 13. LTV purchased AM General from AMC in 1983. *LTV Op. Findings* ¶ 13. Less than 1% of all DJ-5's manufactured were produced by AM General after the acquisition. *Id.* LTV and its AM General subsidiary ("**Old AM General**") filed for bankruptcy on July 17, 1986. *LTV Op. Findings* ¶ 3. On January 7, 1992, the bankruptcy court authorized the sale of certain of Old AM General's assets to an unrelated third party ("**New AM General**") in a 363 sale. *LTV Op. Findings* ¶ 5. The sale agreement expressly excluded from the acquisition all assets and liabilities arising out of or related to the DJ-5's, including products liability claims. *LTV Op. Findings* ¶¶ 19, 22, 23. The order approving the 363 sale overruled objections of certain DJ-5 products liability claimants who argued that New AM General, as successor, should be required to assume possible tort liability owing to the products liability claimants. *LTV Op. Findings* ¶ 20. The bankruptcy court's order approving the sale to New AM General provided that "the sale of the Assets shall be free and clear of any and all

[7] The facts recited here are drawn from the reported decision of the bankruptcy court, *LTV Corp. v. Back (In re Chateaugay Corp.*), 201 B.R. 48 (Bankr. S.D.N.Y. 1996) (hereinafter "***LTV Op.***"). Reference herein to "***LTV Op. Findings*** **¶ __**" is to the particular paragraph in the bankruptcy court's "Findings of Fact" (*Id.* at 51-61). Reference herein to "***LTV Op. Conclusions*** **¶ __**" is to the particular paragraph in the bankruptcy court's "Conclusions of Law" (*Id.* at 61-72).

lien, interests, … [or] claims, [all of which] shall attach to the proceeds of such sale … in the order of their priority." *LTV Op. Findings* ¶ 24. The bankruptcy court further found that New AM General, "[r]elying upon the terms of the Sale Agreement," paid in excess of $135 million for the purchased assets. *LTV Op. Findings* ¶ 26. The bankruptcy court also cited as significant New AM General's contention it would not have purchased the assets "unless the sale agreement included a provision eliminating any liability originating from DJ-5's." *LTV Op. Findings* ¶ 26.

The bankruptcy court concluded that it had "related to" jurisdiction over the adversary proceedings (*LTV Op. Conclusions* ¶¶ 11-28) and so enjoined the products liability claimants "from proceeding against non-debtor third parties such as New AM General where, as here, the actions against such third parties have at least a conceivable effect upon the Debtors or implicate the interpretation or enforcement of this Court's orders." *LTV Op. Conclusions* ¶ 33. The Bankruptcy Court held that the actions would have a "conceivable effect" on the debtors' estate in the following five ways:

> (1) the possibility that New AM General would file claims against the Debtors for contribution or indemnity; (2) the possibility that the Debtors would be collaterally estopped from asserting bankruptcy discharge defenses should one of the state courts find fraud, collusion or insufficient notice in the bankruptcy process; (3) the risk of inconsistent judgments; (4) hampering [the] Debtor's "fresh start"; and (5) the possible drop in value of LTV's stock, which many creditors received as payment for their claims.

Chateaugay, 213 B.R. at 639.

On appeal, the district court framed the issue to be "whether successor liability claims against non-debtor New AM General have such a 'conceivable effect' [on the debtors' estates]." *Chateaugay*, 213 B.R. at 639. Relying on *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994

(3d Cir. 1984),[8] and *Zerand-Bernal Group, Inc. v. Cox*, 23 F.3d 159 (7th Cir. 1994),[9] the *Chateaugay* court held that the bankruptcy court "lacked statutory jurisdiction to hear challenges to state court successor liability actions brought against purchasers of debtors' assets." *Chateaugay*, 213 B.R. at 639. In so doing, the district court analyzed and rejected each of the five purported grounds for "related to" jurisdiction cited by the bankruptcy court and concluded as to the first such ground that "in the absence of any articulated legal basis for an indemnity action against [the] Debtors, the Bankruptcy Court lacks statutory jurisdiction to hear appellees' claims." *Chateaugay*, 213 B.R. at 640. The court held that the remaining grounds "are also insufficient to sustain jurisdiction." *Id.*

The findings of fact and conclusions of law in the Sale Order being challenged through this appeal suffer from the same jurisdictional defects that were found to exist in *Chateaugay*. For example, as in *Chateaugay*, 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." (Sale Order at ¶¶ 8, 47). Additionally, despite overwhelming evidence cited above that New GM will look and operate like a true successor or mere continuation of the Old GM, the Sale Order contains the finding that "New GM shall not be deemed ... a legal successor … to the Debtors … [or] a mere continuation or substantial continuation of the Debtors or the enterprise of the Debtors … under any theory of successor or transferee liability, de facto merger or continuity, … and products … liability." (Sale Order at ¶ 46).

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[8] *Pacor* held that an indemnity action against the debtor did not create a "conceivable effect" on the estate because, absent an indemnity agreement among the parties, "there would be no automatic liability against [the debtor] on account of a judgment against [the debtor's supplier of asbestos,] Pacor." *Pacor*, 743 F.2d at 994.

[9] *Zerand* held that a bankruptcy court lacks jurisdiction to enjoin a state court products liability suit against a successor purchaser of the debtor's assets. *Zerand*, 23 F.3d at 162.

The Bankruptcy Court, however, lacked authority to render such findings of fact and conclusions of law because resolution of Appellants' *in personam* products liability claims against New GM, as successor, lacked any "conceivable effect" on the Debtors' estates. As explained in *Masterwear Corp. v. Rubin Baum Levin Constant & Friedman (In re Masterwear Corp.)*, 241 B.R. 511, 516 (Bankr. S.D.N.Y. 1999), "[i]n litigation involving non-debtors, 'relatedness' often turns on the estate's obligation to indemnify the losing party." Yet, no such finding can be made here because New GM lacks any right of indemnity against the Debtors if New GM were somehow found liable, as successor, for products liability claims not expressly assumed in the MPA. *See, supra* at 9. Moreover, as the record cited above establishes, New GM would remain viable post-Closing even if it were potentially liable for the remaining Existing Products Claims left behind with the Old GM. *See, supra* at 8. As such, any *in personam* products liability claims asserted by Appellants against New GM on successor grounds could have no conceivable effect on the Debtors' estates. The Bankruptcy Court, therefore, lacked the requisite "related to" jurisdiction to enter the challenged findings of fact and conclusions of law.

Additionally, because a bankruptcy court lacks stand-alone powers to make final determinations on state or common law questions, the Bankruptcy Court lacked jurisdiction to enter the challenged provisions of the Sale Order on alternative independent grounds. As the Bankruptcy Court noted, state law governs whether New GM would be deemed a "successor" to the Old GM on Existing Products Claims under theories of "mere continuation," "continuity of enterprise," or "product line exception." (Sale Op. at 51; *see also* Michael H. Reed, *Successor Liability and Bankruptcy Sales Revisited—A New Paradigm*, 61 BUS. LAW. 179, 184 (2005) ("The rights of common law successor liability claimants … usually are 'created and defined' by state law and clearly appear to be substantive rights")). Under any measure, such

traditional state law questions qualify as "non-core" matters as to which the Bankruptcy Court could–at best–only submit proposed findings of fact and conclusions of law to the district court. *See*, 28 U.S.C. § 157(c)(1); *Marshall v. Marshall*, 547 U.S. 293, 303 (2006) ("A bankruptcy court may exercise plenary power only over core proceedings. In noncore matters, a bankruptcy court may not enter final judgment; it has authority to issue only proposed findings of fact and conclusions of law, which are reviewed *de novo* by the district court"). However, tort-based products liability claims for personal injuries sustained—like those of the Appellants—cannot even be considered by the Bankruptcy Court. *See*, 28 U.S.C. § 157(b)(5) ("personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claims arose"). Finally, the Bankruptcy Court's consideration of successorship issues was premature and not ripe for adjudication since the actions necessary to establish New GM's conduct post-Closing had not yet even occurred. *See e.g., Bes Enterprises, Inc. v. Natanzon*, No. 06-870, 2006 WL 3498419, at *5 (D. Md. Dec. 4, 2006) (motion to dismiss successor liability claims against purchaser in a 363 sale denied because more facts were needed to establish New GM's post-sale order conduct). This Court, therefore, should reject the Debtors' statutory mootness arguments and instead strike the challenged provisions from the Sale Order.

B. The appeal is not equitably moot under the "*Chateaugay* Factors" test because fair and effective relief can be fashioned that will not impair New GM's viability or create an unmanageable situation for the Bankruptcy Court.

The Second Circuit has ruled that "[w]ithin the bankruptcy context, '[a]n appeal should also be dismissed as moot when, even though effective relief could conceivably be fashioned, implementation of that relief would be inequitable.'" *Frito-Lay, Inc. v. LTV Steel Co. (In re Chateaugay Corp.),* 10 F.3d 944, 949-50 (2d Cir. 1993) (*citing In re Chateaugay Corp.*, 988

F.2d 322, 325 (2d Cir. 1993)). The presumption of equitable mootness may be overcome, however, if all of the following five factors (the "*Chateaugay* Factors") are met:

> (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 "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."

Chateaugay, 10 F.3d at 952-53 (citations omitted).

This appeal is not equitably moot under the *Chateaugay* Factors test. First, the 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 under applicable state law theories of successor liability. Such relief would not condemn New GM to absolute liability for such claims, nor even mandate their assumption. All it would do is afford products liability claimants the ability to assert claims against New GM to the extent permitted by the applicable law of successor liability in a particular claimant's state. *Cf., Chicago Truck Drivers, Helpers and Warehouse Workers Union (Indep.) Pension Fund v. Tasemkin*, 59 F.3d 48, 50 (7th Cir. 1995) ("there is no reason to accord purchasers of formally bankrupt entities some special measure of insulation from liability that is unavailable to ailing but not yet defunct entities"); *Chateaugay*, 10 F.3d at 954 (remand unnecessary even though plan has been substantially consummated because "at least some effective relief could be granted [since] Frito-Lay would readily accept some fractional recovery that does not impair feasibility or affect parties not before this Court, rather than suffer the mootness of its appeal as a whole").

Additionally, as noted in *Deutsche Bank AG v. Metromedia Fiber Network, Inc. (In re Metromedia Fiber Network, Inc.),* 416 F.3d 136 (2d Cir. 2005), this Court may consider the merits of Appellants' appeal before considering whether the appeal is equitably moot. *Id.* at 144 ("Because equitable mootness bears only upon the proper remedy, and does not raise a threshold question of our power to rule, a court is not inhibited from considering the merits before considering equitable mootness.") As in *Metromedia*, a review of the merits will assist this Court in fashioning an appropriate equitable remedy, particularly since the unique facts of this case distinguish it from *Chrysler* in material ways. *Id.* ("Often, an appraisal of the merits is essential to the framing of an equitable remedy.").

Second, given that the Debtors are in liquidation (as their new assumed name, "Motors Liquidation Company," bespeaks), granting the requested relief will not affect "the re-emergence of the debtor as a revitalized corporate entity." *Schroeder v. New Century Liquidating Trust (In re New Century TRS Holdings, Inc.)*, 407 B.R. 576, 590 (Bankr. D. Del. 2009), held that "the analogous concern in the liquidation context would be whether the appellant's requested relief would affect the debtor's ability to liquidate." For the same reasons explained above as to why the Bankruptcy Court lacked "related to" jurisdiction (*i.e.*, the absence of any "conceivable effect" on the Debtors' estates), granting the requested relief will have no impact on the Debtors' ability to liquidate.

Third, such relief will not unravel intricate transactions, "knock the props" out from under the transactions that have occurred since the sale was consummated, or create an unmanageable situation for the Bankruptcy Court. As noted above, New GM's chief executive officer, Fritz Henderson, testified that allowing products liability claimants to pursue their Existing Products Claims against New GM will not affect New GM's viability. Moreover, the above estimate of approximately $233.2 million in remaining Existing Products Claims left

behind with Old GM is a *de minimus* sum, representing only about .25% of the approximately $92 billion total consideration paid by New GM in the deal. *See, supra* at n.6; *LTV Corp. v. Aetna Casualty and Surety Co. (In re Chateaugay Corp.)*, 167 B.R. 776, 779 (S.D.N.Y. 1994) ("It is difficult to conceive how a potential liability of, at most, several million dollars could unravel the Debtors' reorganization., which involved the transfer of billions of dollars, and which has resulted in the revival of Debtors into a multi-billion dollar operation with $200 million in working capital."); *In re Aurora Foods, Inc.*, No. 04-166 (GMS), 2006 WL 3747306 at *4 (D. Del. 2006) ("it is unlikely that a $6.85 million claim will unravel a $930 million reorganization plan"). Exposing New GM to possible liability for these *de minimus* relative amounts surely will not "knock the props" out of the acquisition or adversely impact New GM's viability.

Fourth, the only party that would be affected by the proposed modifications to the Sale Order is New GM, which—through its counsel at the U.S. Attorney's Office for the Southern District of New York—has been served with all pleadings related to this appeal.

Fifth, Appellants request for an expedited appeal of the Sale Order, though denied by the Bankruptcy Court, was sufficient under *Metromedia* to satisfy this last of the *Chateaugay* Factors. *Metromedia*, 416 F.3d at 145 (*citing Retired Pilots Assoc. of U.S. Airways, Inc. v. U.S. Airways Group, Inc. (In re U.S. Airways Group, Inc.)*, 369 F.3d 806, 810 (4th Cir. 2004) ("failure to seek a stay ***or*** expedited appeal 'weighs strongly in favor of a finding of equitable mootness'") (emphasis added)). Also, when Appellants' moved for an expedited review of the Sale Order, the *Ad Hoc* Asbestos Claimants' Committee joined in that request and moved, in the alternative, for a stay pending appeal. Appellants' counsel also appeared at the hearing before the district court (though Appellants did not formally join in the motion). The *Ad Hoc* Asbestos Claimants' Committee's appeal raised the same substantive issues as those raised by

the Appellant (*i.e.*, whether the assets could be sold "free and clear" of successor liability claims against New GM), and both the Bankruptcy Court and the district court denied the *Ad Hoc* Asbestos Claimants' Committee's stay request. *In re General Motors Corp.*, 409 B.R. 24 (Bankr. S.D.N.Y. 2009) (denying requests for expedited review and stay pending appeal); *In re General Motors Corp.*, Case No. M-47 (LAK), 2009 WL 2033079 (S.D.N.Y. July 9, 2009) (denying *Ad Hoc* Asbestos Claimants' Committee's motion for stay pending appeal). As such, a stay closely related to this appeal in fact was sought, and denied.

Finally, as explained in *United States Trustee v. Official Comm. of Equity Security Holders (In re Zenith Electronics Corp.)*, 329 F.3d 338 (3d Cir. 2003), the "stay" factor should not be given much weight where granting the requested relief would not unravel the sale transaction. Using the same logic that applies here, the *Zenith* court stated:

> The "stay" factor cannot be given much weight in our consideration of this case because, as the Trustee's appeal would not necessitate an unraveling of the plan, there was little reason for the Trustee to have requested a stay…. [T]he "stay" factor is "largely duplicative of the 'substantial confirmation' factor...." in the sense that a plan cannot be substantially consummated if the appellant has successfully sought a stay. Therefore, the "stay" factor is designed to safeguard the same interests as the "substantial consummation" factor and should only weigh heavily against the appellant if, by a failure to secure a stay, a reorganization plan was confirmed, the existence of which is later threatened by the appellant's appeal. That is not the situation here.

Id. at 344 n.4 (*quoting In re Zenith Electronics Corp.*, 250 B.R. 207, 214 (D. Del. 2000)). Moreover, had Appellants sought a stay pending appeal based on concerns that it risked irreparable harm absent a stay, they could well have been judicially estopped from now arguing that effective relief can be granted without "knocking the props" out from under the 363 Sale. *See*, *In re Adelphia Comm. Corp.*, 367 B.R. 84, 93 (S.D.N.Y. 2007) (appeal dismissed on grounds of judicial estoppel where appellants advanced the position during the stay proceedings, inconsistent with their position in their subsequent appeal, that their appeal would

be equitably moot if the reorganization plan were to be consummated). This fifth factor, therefore, has either been satisfied or lacks relevance to this appeal.

II. Principles of *stare decisis* do not require blind adherence to *Chrysler*, which is distinguishable on legal and factual grounds.

It is well established that a federal district court in this Circuit is required under the doctrine of *stare decisis* to follow a binding precedent of the Court of Appeals. *United States ex. Schnitzler v. Follette*, 406 F.2d 319, 322 (2d Cir. 1969). This doctrine, however, "is limited to actual determinations in respect of litigated and necessarily decided questions." *Warner Bros., Inc. v. Dae Rim Trading, Inc.*, 877 F.2d 1120, 1128 (2d Cir. 1989) (citations omitted). It is also limited by the requirement that the appellate decision be "on all fours" with the matter being considered by the lower court. *In re Shea & Gould*, 214 B.R. 739, 744 (Bankr. S.D.N.Y. 1997) (*citing* 18 MOORE'S FEDERAL PRACTICE § 134.02[2] (3d ed.1997)); *United States v. Nolan*, 136 F.3d 265, 270 (2d Cir. 1998) (principle of *stare decisis* is applicable only where facts in the two actions are the same) (citation omitted).

While the Second Circuit's decision in *In re Chrysler LLC*, 576 F.3d 108 (2d Cir. 2009), issued one month after the Bankruptcy Court entered the Sale Opinion and Sale Order, does implicate the doctrine of *stare decisis* in certain respects,[10] *Chrysler* did not address the

[10] It must be noted at this point that, for the reasons stated in its Amended Memorandum of Law filed with the Bankruptcy Court ("**Appellants' Memorandum of Law**") (Dkt. No. 3155 at 3-9), Appellants strongly disagree with the *Chrysler* Court's blanket assertion that "interests in property" under § 363(f) includes *in personam* choses in action arising under state law theories of successor liability. Appellants also strongly disagree, for the reasons stated in Appellants' Memorandum of Law (Dkt. No. 3155 at 9-15), with the *Chrysler* Court's reliance on *TWA* and *Leckie* to support its blanket assertion that "[b]ecause 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. To preserve these issues for appeal, Appellants incorporate the foregoing objections by reference. But given the principles of *stare decisis* cited above, Appellants will not repeat these legal objections here and instead follow the admonition of Justice Scalia and Bryan Garner, who advise:

> Even when the governing authority is flatly against you, if you think it is wrong you should say so, lest on appeal you be held to have waived the point. If, for example, you are appearing before a district court bound by a prior court-of-appeals precedent, it is of little use to argue at

question of whether the bankruptcy court had "related to" jurisdictional authority to enter the requested findings and conclusions. Additionally *Chrysler* is not "on all fours" with this case, and is therefore distinguishable, because the record here demonstrates that, unlike *Chrysler,* (A) a sale "free and clear" of the remaining Existing Products Claims was not a "critical inducement" to the 363 Sale and (B) the "overarching principle" of the "Bankruptcy Code's priority scheme" was irrelevant to New GM, who couldn't have cared less about the relative priorities of similarly situated creditors. *Compare Chrysler,* 576 F.3d at 126.

Regarding the "critical inducement" factor, as discussed above, leaving Existing Products Claims with Old GM was not a factor that was critically necessary to induce New GM to close the 363 Sale. As the Bankruptcy Court found, Treasury consummated the sale because it was economically necessary to do so for the sake of the country and not because of the economic merits of the deal. *See, supra* at 7. The Bankruptcy Court also found it "doubtful" that New GM "would have lent and ultimately bid a lesser amount" had it been required to assume these claims. (Sale Op. at 51 n.91). This finding was sound, particularly in light of the two postpetition changes to the structure of the deal described above in which New GM agreed to assume approximately $682.8 million (or about 75%) of the estimated $916 million in projected Existing and Future Products Claims at 12/31/08, yet—consistent with the prepetition assurances Henderson and the Old GM board received from Treasury that "no downward adjustment in the consideration to be received by the Debtors' estate" would occur if New GM agreed postpetition to assume some of the "politically sensitive" liabilities originally left

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> length that this precedent mistakes the law. Still, you should place in the record your view that it does so … so that there will be no doubt of your entitlement to raise that issue in the highest court of that jurisdiction.

Justice Antonin Scalia & Bryan A. Garner, MAKING YOUR CASE: THE ART OF PERSUADING JUDGES 52-53 (Thompson/West 2008).

behind—neither Treasury nor New GM demanded a reduction in the consideration to be paid to the Debtors' estates under the MPA. *See, supra* at 7-9.

As regards the second factor, *Chrysler* is distinguishable for the additional reason that the Second Circuit emphasized there the importance of adhering in the 363 sale process to the "overarching principle" that "[t]o 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." *Chrysler*, 576 F.3d at 126. Such reasoning may have been appropriate in *Chrysler* where the senior secured claims received less than 1/3 of the principal amount of their debt, but it has no bearing here where, as discussed above, the relative priorities of the various creditor classes were wholly subservient to Treasury's dominant concern of doing whatever was "necessary for the commercial success of New GM." *See, supra* at 7. For this reason, as noted above, different categories of unsecured claimants having the same priority in liquidation received markedly disparate treatment in the 363 Sale. *See, supra* at n.5.

The Court, therefore, should not blindly follow *Chrysler* on *stare decisis* grounds. Because the two critical factors relied upon by *Chrysler* in affirming the sale "free and clear" of successor liability claims are absent in this case, the Court should not approve the provisions of the Sale Order being challenged through this appeal.

CONCLUSION

For the foregoing reasons, Appellants respectfully request that the Court (i) reject the Debtors' mootness arguments, (ii) consider this appeal on the merits, (iii) strike the challenged provisions of the Sale Order that, among other things, (A) hold that New GM is not a successor to the Debtors in respect of Existing Products Claims and (B) bar and enjoin holders of Existing Products Claims from pursuing potential successor liability claims against New GM, and (iv) remand for further proceedings consistent with such order.

Dated: September 23, 2009

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I, Steve Jakubowski, hereby certify that I served a copy of the **APPELLANTS' OPENING BRIEF** via email to the email addresses listed below on this 23rd day of September, 2009.

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