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.	:	**Case No. 09-CV-6818 (NRB)**
	:	
MOTORS LIQUIDATION COMPANY, *et al.*,	:	
	:	
Appellees.	:	

APPELLANTS' REPLY BRIEF

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Dated: November 2, 2009

ORAL ARGUMENT REQUESTED

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PRELIMINARY STATEMENT [1]

This appeal is not moot under Section 363(m) because while a Section 363 sale is a "core" proceeding, it's not a jurisdictional "black hole" that subsumes matters not colorably within the bankruptcy court's limited subject matter jurisdiction. If *Chrysler*[2] were wrongly decided or distinguishable on its facts, then the Bankruptcy Court lacked subject matter jurisdiction to bar holders of Existing Products Claims from asserting successor claims against New GM since resolution of those claims could have no conceivable effect on the Debtors' estates. Nor is this appeal equitably moot, since the Court can provide effective relief without having to "unwind the sale" or "knock the props out" from under it. Moreover, by granting the requested relief, New GM will not gain a windfall at the expense of holders of Existing Products Claims.

On the merits, Wilson's self-serving, conclusory, and contradictory statements to the effect that Treasury might "walk away" from the deal if it were exposed to Existing Products Claims do not detract from the fact that, because Existing Products Claims were immaterial to the deal, had New GM tried to walk, it would have been liable for breach of contract. The Court, therefore, should strike the challenged provisions of the Sale Order.

ARGUMENT

I. The mere fact that the 363 Sale was a "core" proceeding doesn't mean that the Bankruptcy Court was vested with authority over matters not colorably within its jurisdiction.

In rejecting the jurisdictional limitation on 363 sales articulated in *Pittsburgh Food & Bev., Inc. v. Ranallo*, 112 F.3d 645, 650 (3d Cir. 1997), as an argument "posit[ed] … on the caselaw of other Circuits," the Debtors advance the untenable argument that because a 363 sale

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[1] Capitalized terms used herein and not otherwise defined have the meaning set forth in the *Campbell* Appellants' Opening Brief. Citations to "**MLC Br.**" refer to the Answering Brief of the Debtors. Citations to "**USA Br.**" refer to the USA's Answering Brief. Citations to "**App. Br.**" refer to the *Campbell* Appellants' Opening Brief.

[2] *In re Chrysler LLC*, 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).

falls within the "core" jurisdiction of the Bankruptcy Court, anything concocted by a purchaser, agreed to by a debtor, and approved in a sale order is necessarily insulated from review under Section 363(m). (MLC Br. at 4, 15). Surely, however, Congress didn't intend for 363 sales to become jurisdictional "black holes" from which unrelated matters having no conceivable effect on the administration of the Debtors' estates cannot escape. Indeed, taken to its logical extreme, if the unstayed Sale Order provided that creditor claims against the Purchaser for traffic accidents involving the Purchaser's employees or agents are also barred and released, then under the Debtors' boundless theory of bankruptcy jurisdiction, even this overreaching term could not be excised because the Sale Order "was within that 'core' jurisdiction" of Section 363. (MLC Br. at 18 n.9; *cf. Travelers v. Bailey,* U.S. Supreme Ct. Case No. 08-295, Transcript of Oral Argument at 15-16 (available at *http://www.supremecourtus.gov/oral_arguments/argument_transcripts/08-295.pdf*) (Chief Justice Roberts and Petitioners' counsel agree that a bankruptcy court's jurisdiction doesn't extend so far as to grant immunity for ordinary traffic accidents)).

The Court, therefore, should follow the Third Circuit's guidance in *Ranallo* and determine in the first instance whether the Bankruptcy Court had colorable jurisdiction to extinguish and enjoin products liability claims against the successor Purchaser. That determination, of course, depends entirely on whether Judge Gerber correctly held as a matter of law that Section 363(f) permits the sale of the Purchased Assets to New GM "free and clear" of *in personam* products liability claims, like those of the *Campbell* Appellants. And whether Judge Gerber got it right depends, in turn, upon (A) whether the Second Circuit was correct in its blanket assertion in *Chrysler* that reference to "interests in property" under § 363(f) includes *in personam* products liability claims arising under state law theories of successor liability, and (B) if so, whether *Chrysler* is distinguishable on the facts. Put another way, if *Chrysler* was wrongly

decided or is distinguishable on its facts,[3] then the Bankruptcy Court necessarily lacked subject matter jurisdiction to bar successor products liability claims because, as explained in the *Campbell* Appellants' Opening Brief, resolution of those claims against the successor New GM "lacked any 'conceivable effect' on the Debtors' estates." (*See generally*, App. Br. at 14-20).

In this regard, the Debtors' criticism of the *Campbell* Appellants' reliance on Judge Baer's decision in *Chateaugay* is misplaced. Appellants do not dispute, as Judge Baer clearly stated, that a bankruptcy court has "inherent [or core] jurisdiction" to determine "whether the 'free and clear' provisions of the sale apply to *in personam* claims as well as *in rem* claims."[4] *Back v. LTV Corp. (In re Chateaugay)*, 213 B.R. 633, 638 (S.D.N.Y. 1997). Rather, the significance of Judge Baer's ruling is found in his conclusions that "[i]nherent jurisdiction does not give the Bankruptcy Court authority to adjudicate all matters relating to appellants' state court claims" (*Id.* at 638) and that "in absence of any articulated legal basis for an indemnity action against the Debtors" or some other "'conceivable effect' on the Debtors," a bankruptcy court's "'related to' jurisdiction [does not] encompass[] the power to enjoin state court successor liability actions against the purchaser of a debtor's assets." (*Id*. at 640).

Judge Baer's decision in *Chateaugay* remains good law in this Circuit and, contrary to the Debtors' attempts to minimize the effect of the ruling, it applies well beyond the mere issue of the "effect of plan confirmation on jurisdiction over these adversary proceedings." *See, e.g., In re WorldCom, Inc. Securities Litig.*, 293 B.R. 308, 318 (S.D.N.Y. 2003) (citing *Chateaugay* for the proposition that no "related to" jurisdiction exists "in [the] absence of any articulated

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[3] While this Court reviews these legal conclusions under the "abuse of discretion" standard, the USA in its response properly defines that standard to mean that "a bankruptcy court abuses its discretion when it arrives at … a decision resting on an error of law (such as application of the wrong legal principle)….; [t]hus this court should … review [the bankruptcy court's] conclusions of law *de novo*." (USA Br. at 11; *compare* MLC Br. at 6).

[4] Of course, as noted above, if *Chrysler* was wrongly decided or is distinguishable on its facts, then the Bankruptcy Court necessarily lacked subject matter jurisdiction to bar successor products liability claims, though that doesn't detract from the Bankruptcy Court's ability to make that determination in the first instance.

legal basis for an indemnity action"); *Compare*, MLC Br. at 17). The *Campbell* Appellants, therefore, are not seeking an "advisory opinion," as the Debtors suggest. Rather, they seek an order striking those very provisions of the Sale Order that bar and enjoin holders of Existing Products Claims from pursuing successor liability claims against New GM. (*Compare,* MLC Br. at 16).

Nor do the authorities relied upon by the appellees refute the argument that the jurisdictional limits of Section 363 can be reviewed *de novo* by an appellate court. *Bay Harbour Mgmt. L.C. v. Lehman Bros. Hldgs., Inc. (In re Lehman Bros. Hldgs., Inc.),* Case Nos. 08-CV-8869 & 8914 (DLC), 2009 WL 667301 (S.D.N.Y. March 13, 2009), has no relevance because the objectors there were not challenging the bankruptcy court's jurisdiction to enter the offending terms of the sale order; they just didn't think like the terms themselves. *Id.* at *5. And while in both *United States v. Salerno*, 932 F.2d 117 (2d Cir. 1991), and *In re Sax*, 796 F.2d 994, 997 (7th Cir. 1986), the Courts refused to entertain jurisdictional challenges premised upon whether the Bankruptcy Court had subject matter jurisdiction to authorize a sale of property that arguably wasn't property of the estate, both Courts specifically noted the absence of real harm to the objecting party, which in both cases retained the ability to assert that it alone was entitled to the cash proceeds from the sale based on its alleged ownership of the property sold. *Salerno,* 932 F.2d at 123 ("We observe further that the sale order … provides that any distribution of cash proceeds of the asset sale is specifically subject to subsequent bankruptcy court approval."); *Sax*, 796 F.2d at 998 ("[Appellant] may have been inconvenienced by having to litigate its lien in a forum not of its own choosing, but it has not been irreparably harmed. The proceeds of the sale … are sufficient to pay the [principal] plus interest that [appellant] claims it is due.").

Unlike the appellants in *Salerno, Sax,* and *Ranallo,* who at least retained a claim to a first priority in the sale proceeds if it subsequently were determined that the assets sold were not

property of the estate, the *Campbell* Appellants and other products liability claimants will have been irreparably harmed if the offending provisions of the Sale Order are not stricken because these provisions strip them of their state law claims against New GM without providing them a corresponding first priority claim against the sale proceeds.[5] Further, the supposed "benefit" to these victims of the sale provides no solace to them here since creditor recoveries are projected at pennies on the dollar[6] and they may well have been able to pursue successor claims against a purchaser of the Debtors' assets in liquidation. (*Compare,* MLC Br. at 5; USA Br. at 21).

II. This appeal is not equitably moot because Existing Products Claims are inconsequential relative to the aggregate transaction value and their allowance against New GM won't unravel the entire sale.

No court is a rubber stamp, so the mere fact that the terms of the 363 Sale were "heavily negotiated" and that New GM "purposely and expressly decided not to assume any liability" for prepetition products liability claims doesn't mean that this appeal is equitably moot. Nor does the Court have to "unscramble the eggs," "unwind or rewrite the Sale," or "knock the props out" from under the Sale to provide fair and effective relief. As explained at length in the *Campbell* Appellants' Opening Brief, while Treasury took the position that it would not assume any of the estimated $916 million in "politically sensitive" products liability claims, the parties agreed there

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[5] The Debtors obviously misapprehend the import of *Ranallo*. (*Compare* MLC Br. at 18 n.9). Like the Courts in *Salerno* and *Sax, Ranallo* held that an appeal of a 363 sale, premised on the argument "that the bankruptcy court did not have jurisdiction over [the] assets," would fail because "the bankruptcy court, at least arguably, had jurisdiction over … assets which [the debtor] indirectly owned…." *Ranallo*, 112 F.3d at 650. In so deciding, however, *Ranallo* posits the situation facing the Court here, where "*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.*" *Id.* (emphasis added). "Such a case in theory could arise," the *Ranallo* Court concluded, "*if the bankruptcy court approved the sale of assets not even colorably within its jurisdiction.*" *Id.* (emphasis added). The appellees also mistakenly quote *Salerno*'s Section 363(m) policy analysis favoring finality in bankruptcy sales in support of their arguments on equitable mootness. (MLC Br. at 20; USA Br. at 19-20). *Salerno*, however, was decided under Section 363(m) only and therefore its policy considerations of finality have no application to the doctrine of equitable mootness and so should be disregarded in that connection.

[6] The Debtors' valuation expert, Steven Worth, testified at the hearing that the projected equity of New GM had a value between $38 billion and $48 billion. (6/30 Hg. Tr. at 270:4-7). With unsecured creditor claims, estimated at about $35 billion, scheduled to share *pro rata* in 10% of the equity of New GM allocated under the Sale to unsecured creditors, the projected recovery to this class will be about 10¢ on the dollar. (Dkt. No. 3413, PLCA Ex. 2 at p.2).

would be no downward adjustment in the consideration paid to the Debtors' estate in the event New GM later were to assume some or all of those "politically sensitive" liabilities. (App. Br. at 6-7). Further, these weren't mere "discussions," as the Debtors have characterized them, but—as demonstrated by the fact that the consideration paid did not change when New GM agreed postpetition to assume responsibility for approximately $682.8 million in Existing and Future Products Claims—a binding agreement between the parties. (*Compare,* App. Br. at 7-8 with MLC Br. at 10). Equally significant, the MPA approved by the Court contained no provision requiring the Debtors to indemnify New GM for any Existing Products Claims for which New GM might become liable post-Closing. (App. Br. at 8).

In light of these facts, which the response briefs do not challenge, there is no inequity in excluding Existing Products Claims from the "free and clear" and injunctive provisions of the Sale Order. Treasury points to cases suggesting that such modifications would "rewrite the terms of the bargain" and "ignore the tradeoff that allowed the parties to … treat a non-severable provision … as indispensible" (USA Br. at 20), but given the facts recited above, this greatly overstates the supposed harm to New GM were the Court to perform such elective surgery on the Sale Order's offending provisions. By agreeing that the consideration paid to the Debtors would not change even if New GM were to assume all products liability claims, Treasury acknowledged that this supposed lynchpin to the deal was really immaterial. Consequently, had the Bankruptcy Court ordered New GM to assume these liabilities, and had Treasury refused to close the deal, Treasury would have been in breach of the MPA and liable for contract damages. *See, Jordan v. Can You Imagine, Inc.*, 485 F. Supp. 2d 493, 498 (S.D.N.Y. 2007) ("For a breach to be material, it must 'go to the root of the agreement between the parties.'" … "[I]f a breach is relatively minor and not of the essence, the plaintiff is still bound by the contract and may not abandon performance and obtain damages for a total breach by the defendant.") (*citing New Windsor Vol.*

Ambul. Corps, Inc. v. Meyers, 442 F.3d 101 (2d Cir. 2006) *and* 23 WILLISTON ON CONTRACTS § 63:3 (4th ed. 2006)).

Clearly, the exclusion of "politically sensitive" Existing Products Claims from the deal did not "go to the root of the agreement between the parties." Rather, by having excluded such liabilities from the final approved MPA, New GM obtained a windfall. In light of the *de minimus* amount that the remaining Existing Products Claims represent relative to the $92 billion paid by New GM in the deal (approximately .25%), granting the requested relief would not be inequitable. (App. Br. at 22-23). This appeal, therefore, should not be dismissed as equitably moot. *Compare, In re Chateaugay Corp.*, 988 F.2d 322, 325 (2d Cir. 1993) ("[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"); *see also,* App. Br. at 23 (citing to cases where courts granted effective relief based on the *de minimus* relative amounts of claims at issue relative to the entire transaction value).

Wilson's conclusory, self-serving, statements that Treasury would "walk away unless the Court finds that you are not a successor" carry little weight. (*Compare,* USA Br. at 29). His first reaction to the question of whether Treasury was prepared to "walk away" if New GM was deemed a successor was not so absolute; he responded: "It is hard to answer a hypothetical question without knowing the terms of the outcome of that." (7/1/09 Hg. Tr. at 147:19-148:5). Further, Wilson was not asked whether Treasury would "walk away" if the Court were to find New GM is a successor with respect to Existing Products Claims only. Regardless, as explained above, Treasury could not credibly claim it would "walk away" if forced to surrender a windfall, and if it did walk for that reason, it would have breached the MPA.

Finally, as discussed in their Opening Brief, the *Campbell* Appellants failure to seek a stay is of no moment under the *Chateaugay* five-factor test where, as here, the appeal "would not

necessitate an unraveling" of the Sale. *Frito-Lay, Inc. v. LTV Steel Co. (In re Chateaugay Corp.)*, 10 F.3d 944, 949-50 (2d Cir. 1993). Yet, the appellees' response briefs treat this fifth *Chateaugay* factor like a talisman that mandates dismissal notwithstanding the compelling holdings to the contrary of *United States Trustee v. Official Comm. of Equity Sec. Holders (In re Zenith Electronics Corp.)*, 329 F.3d 338, 344 n.4 (3d Cir. 2003), and *In re Adelphia Comm. Corp.*, 367 B.R. 84, 93 (S.D.N.Y. 2007). (*See,* App. Br. at 24-25). As noted in the *Campbell* Appellants' Opening Brief, had they first argued that a stay was justified because their appeal would be rendered equitably moot, but later argued that the appeal in fact wasn't equitably moot, their appeal could well have been dismissed on judicial estoppel grounds alone. (*Id.*)

Similarly, there was no need to expedite this appeal when the key issue on equitable mootness is whether New GM should be entitled to a windfall on the backs of those claimants least able to defend themselves. Notably, even Judge Gerber saw no benefit in an expedited appeal. In denying the *Campbell* Appellants' motion to certify their appeal directly to the Second Circuit, he rhetorically asked:

> [H]ow could a decision presented and decided to the Second Circuit in two days (or on any other expedited basis) be helpful to the bankruptcy community, or the public, or the Supreme Court? If the Supreme Court is to decide an issue that's the subject of a Circuit split, doesn't it deserve the best decision the Second Circuit can provide?

In re General Motors Corp., 409 B.R. 24, 29 (Bankr. S.D.N.Y. 2009).

With holders of an estimated $233.2 million in Existing Products Claims left to stew in their rotten luck, with 363 sales not the exception but the rule in bankruptcy cases,[7] and with a clear split in the circuits, it's hard to imagine a bankruptcy rule that is more important to get right than this one. And if the cost to New GM of getting it right is that they lose a windfall profit and

[7] *See,* Douglas G. Baird & Robert K. Rasmussen, *The End of Bankruptcy*, 55 Stan. L. Rev. 751, 751-52 (2002) ("Corporate reorganizations have all but disappeared. Giant corporations … are no longer using it to rescue a firm from imminent failure. Many use Chapter 11 merely to sell their assets and divide up the proceeds.").

have to advance another one-quarter percent of the consideration they paid in the deal, then that's a cost well worth requiring New GM to pay.

III. Appellants should not be penalized for failing to advance a detailed argument that everyone acknowledges this Court cannot decide based on principles of *stare decisis*.

The Debtors (but not the USA, the real party at risk here) argue that the *Campbell* Appellants waived their right to appeal whether Section 363(f)'s reference to "interests in property" includes *in personam* products liability claims against a successor purchaser. But unlike the cases cited by the Debtors, nothing of substance could have been credibly argued to the Court on this issue since the *Campbell* Appellants readily acknowledge that the Court is bound by the Second Circuit's decision in *Chrysler*. (*See,* App. Br. at 25 (*citing United States ex. Schnitzler v. Follette*, 406 F.2d 319, 322 (2d Cir. 1969)).

Frank v. United States, 78 F.3d 815 (2d Cir. 1996), cited by the Debtors, is instructive and points this Court to the right result. *Frank* recognizes that a reviewing court "may overlook a litigant's failure properly to present an issue on appeal in unusual circumstances, one being where manifest injustice would otherwise result; … [another being] in other cases involving, for example, 'important … question[s] of first impression.'" *Id.* at 833. If the Court is inclined to consider whether the *Campbell* Appellants' argument on this issue has been waived because the *Campbell* Appellants only referred to it marginally in their Opening Brief, the *Campbell* Appellants respectfully suggest that this case presents "unusual circumstances" justifying the preservation of this issue on appeal. First, as noted above, substantive argument on whether Section 363(f) authorizes a sale free and clear of products liability claims against the successor purchaser is futile given the holding of *Chrysler* (a point acknowledged by Treasury in its response). (USA Br. at 28). Second, manifest injustice would result if the *Campbell* Appellants are denied the right to pursue this issue on appeal. Appellant Callan Campbell faces about $4.5

million in future medical and related costs after her *GMC Jimmy* flipped and, because the roof's strength to weight ratio is among the lowest of all GM vehicles, she became paralyzed when the car's roof crushed down on her. (Dkt. No. 2176 at ¶¶ 6-7). Appellant Kevin Junso and his 17 year-old son were involved in a similar roof-crushing accident. Kevin's *GMC Envoy* flipped in the accident, his son died, and Kevin lost his right leg and sustained other serious injuries from which he will never fully recover. (Dkt. No. 2176 at ¶ 8).

If *Chrysler* was wrongly decided, then these poor souls deserve their day in court. It would be a manifest injustice to them if, after all the work and expense undertaken to get to just this point, they could not advance the substance of their appeal because they failed to discuss at length in their opening brief an argument that all parties agree is "entirely foreclose[d]" in this appeal. (USA Br. at 28).

Still, to complete the record, and as more fully explained in the *Campbell* Appellants' *Amended Memorandum of Law* filed with the Bankruptcy Court in support of their objection to 363 Sale (Docket No. 2177),[8] the *Chrysler* court wrongly held that Section 363(f)'s reference to "interests in property" includes *in personam* products liability claims against a successor purchaser because:

- Section 363(f)'s plain meaning does not extend to successor liability choses in action. The phrase "interest(s) in property" appears 40 times in the Code. Yet not once can the phrase "interest in property" be substituted with the word "claim" and make any sense.

- The Seventh Circuit's opinion in *Precision Indus., Inc. v. Qualitech Steel SBQ, LLC (In re Qualitech Steel Corp.)*, 327 F.3d 537 (7th Cir. 2003), is instructive as it disagrees with the holding in *In re TWA*, 322 F.3d 283 (3d Cir. 2003), that an "interest in property" is **"**simply a right that is connected to or arising from the property." Rather, according to the 7th Circuit, that right must be a "right to the property itself.**"** *Qualitech*, 327 F.3d at 545-46.

[8] In footnote 10 of its Opening Brief, Appellants' mistakenly cited to its *Amended Memorandum of Law* at Docket No. 3155. In fact, the reference should have been to Docket No. 2177. Counsel apologizes to the Court and the appellees for any confusion resulting from this error.

- Nothing in pre-Code practice or legislative history establishes the notion that bankruptcy sales can be effectuated free and clear of claims against the purchaser based on theories of successor liability.

- *Barnhill v. Johnson*, 503 U.S. 393 (1992), held that the "transfer" of an "interest in property" occurred at the time the debtor's check was honored, not at the time the check was delivered. *Barnhill* establishes that a "nebulous right to bring suit" is not an "interest in property." *Id.* at 400-401 (emphasis added). *United Savings Assn. of Texas v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365 (1988), held that "the 'interest in property' protected by § 362(d)(1) does not include a secured party's right to immediate foreclosure." *Id.* at 371. Reading "interest in property" as broadly as the *Chrysler* court did contravenes the holdings of *Barnhill* and *Timbers*, each of which involved the same kind of "nebulous right" or "chose in action" that the *Chrysler* court held is an "interest in property" that can be extinguished in a "free and clear" sale.

- A narrower reading that would exclude *in personam* choses in action from the coverage of "interests in property" under § 363(f) is amply supported by a long line of cases, including *In re White Motor Credit Corp.*, 75 B.R. 944 (Bankr. N.D. Ohio 1987), and *Rubinstein v. Alaska Pacific Consortium (In re New England Fish Co.)*, 19 B.R. 323 (Bankr. W.D. Wash. 1982), cases cited by the Debtors. *See, White Motor*, 75 B.R. 948 ("General unsecured claimants, including tort claimants, have no specific interest in a debtor's property); *New England Fish*, 19 B.R. at 326 (Title VII claimants are general unsecured creditors who lack "an interest in the specific property of the estate being sold" under § 363(f)).

- *American Living Sys. v. Bonapfel (In re All Am. Of Ashburn, Inc.)*, 56 B.R. 186 (Bankr. N.D. Ga. 1986), upon which the *Chrysler* court also relied, did not conclude that *in personam* claims are "interests in property" for purposes of § 363(f). Rather, like *White Motor* and *New England Fish*, that case was decided without a single reference to the section's "interest in property" language. *Id.* at 190.

- *Chrysler's* reliance on *TWA* is misplaced because it tortures the text to transform "claims" into an "interest in property" that can be extinguished in a "free and clear" sale under § 363(f). The U.S. Supreme Court warned in *BFP v. Resolution Trust Corp.*, 511 U.S. 531 (1994), that a court should not "torture [the text] into meaning" for "such word-gaming would deprive the criterion of all meaning." *Id.* at 538 n.4. *TWA* (and now *Chrysler*) do just that.

IV. *Chrysler* is not "on all fours" with this case and so the Sale Order should not have extinguished rights to assert Existing Products Claims against New GM under theories of successor liability.

While this Court may be bound by *stare decisis* on the issue of whether "interests in property" includes *in personam* products liability claims against a successor purchaser, this Court is free to consider, *de novo*, whether *Chrysler* is distinguishable. When Judge Gerber delivered

the Sale Opinion on July 5, 2009, the only guidance he had from the Second Circuit was a one-liner stating that it was affirming "for substantially the reasons stated in the opinions below." Sale Op. at 59 (*quoting In re Chrysler LLC*, 2009 U.S. App. LEXIS 12351 (2d Cir. June 5, 2009)). While it is true that Judge Gerber ruled that *Chrysler* is not distinguishable because the purchaser in *Chrysler* was a private entity whereas the purchaser in *GM* was a public entity, the *Campbell* Appellants never argued that this was a basis for distinguishing *Chrysler* from *GM*.

Rather, as explained in the *Campbell* Appellants' Opening Brief, the Second Circuit's written opinion provides two factual grounds to distinguish the treatment of products liability claimants in this case: first, that a sale "free and clear" of Existing Products Claims was not a "critical inducement" to the 363 Sale; second, that respecting the relative priorities of creditor classes was wholly irrelevant to this transaction. (App. Br. at 25-26). Since Judge Gerber had no inkling when he issued his opinion that these two factors would provide a basis for distinguishing *GM* from *Chrysler*, the fact that he believed on the basis of the Second Circuit's one-liner that *Chrysler* was "not distinguishable in any legally cognizable respect" cannot be afforded much deference. (Sale Op. at 60; *Compare*, MLC Br. at 27; USA Br. at 28).

The Debtors and Treasury dispute the *Campbell* Appellants' argument that, in point of fact, a sale "free and clear" of the "politically sensitive" Existing Products Claims was not a "critical inducement" to Treasury's willingness to consummate the sale. However, as explained above, Wilson's self-serving, conclusory statement that Treasury would "walk away unless the Court finds that you are not a successor" is contradicted by his far more equivocal first reaction to the question of whether Treasury would "walk away" if New GM was deemed a successor. Further, to the extent that Paragraph DD of the Sale Order suggests otherwise, the Court is again directed to footnote 51 of the Sale Opinion, in which the Bankruptcy Court found that if New GM could not have obtained protection against the "politically sensitive" successor liability

claims (described in Section 2 of the Sale Opinion's "Discussion" section), then "whether the U.S. or Canadian Governments would have lent and ultimately bid a lesser amount here is doubtful." (Sale Op. at 51). Finally, as noted above, regardless of what Paragraph DD of the Sale Order says New GM would do had the Sale Order not covered Existing Products Claims, nothing in Paragraph DD detracts from the fact that—because Existing Products Claims were immaterial to the deal—had New GM tried to walk from the deal on the basis that the Court required New GM to assume Existing Products Claims, New GM would have been liable for breach of contract.

Nor do the appellees' responses refute the *Campbell* Appellants' argument that *GM* is distinguishable because respecting the relative priorities among creditors was wholly irrelevant to this transaction. Treasury misses the point by focusing on the *sub rosa* issue. (USA Br. at 30). The *Campbell* Appellants are not suggesting that the Sale circumvented the bankruptcy priorities. Rather, the point is that relative priorities among creditors were irrelevant here and so there need be no concern that permitting holders of Existing Products Claims to pursue their claims against New GM would somehow subvert the Bankruptcy Code's priority scheme. *Compare, Chrysler*, 576 F.3d at 126 ("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.") (*citing In re TWA*, 322 F.3d at 290)).

The Debtors also miss the mark by arguing that granting the requested relief would be unfair to holders of other liquidated, noncontingent Existing Products Claims. (MLC Br. at 28). In fact, were the Court to grant the requested relief and strike the challenged provisions of the Sale Order, there is no reason to limit that relief to just the *Campbell* Appellants since their arguments apply equally well to all holders of Existing Products Claims. Were the Court inclined to limit the requested relief to the *Campbell* Appellants, however, the Debtors cite no

authority for why relief should be denied an appellant simply because others who failed to appeal wouldn't get the same relief. *Cf. Anderson v. J.A. Interior Applications, Inc.*, No. 97-4552, 1998 WL 708851 (N.D. Ill. 1998) (rejecting concerns that successor claimants will elevate their priority rights by noting that "[c]reditors ahead of plaintiffs in the bankruptcy proceedings are thus entitled to the same distribution of assets regardless of whether plaintiffs recover anything from [the debtor's] successor").

V. Denying the requested relief will more encourage debtors to engage in moral hazard behavior to the detriment of products liability claimants than it will discourage prospective purchasers from bidding on a debtor's assets.

Finally, the Court should reject the argument that policy considerations dictate against granting the requested relief because "[p]rospective purchasers would not be able to rely on sale orders and sales that were unstayed and consummated." (MLC Br. at 27-28). For starters, where the relief requested hasn't been mooted on a statutory or equitable basis, then a purchaser shouldn't be relying on the finality of that order anyway. But, the *Chrysler* court took an additional step, saying sales "free and clear" of *in personam* successor claims are appropriate because such a sale "can often yield the highest price for the assets." *Chrysler*, 576 F.3d at 116. Such a blanket policy statement, however, should be rejected since it creates significant moral hazards—at least in respect of products liability claimants—by rewarding a debtor who fails to obtain adequate insurance to cover these claims. Further, not all circuits agree. *See, e.g., Western Auto Supply Co. v. Savage Arms, Inc. (In re Savage Indus., Inc.)*, 43 F.3d 714, 722-23 (1st Cir. 1994); *Zerand-Bernal Group, Inc. v. Cox*, 23 F.3d 159, 163 (7th Cir. 1992).

Additionally, in neither *Chrysler* nor *GM* was any evidence submitted to the Bankruptcy Court from which one could conclude that if successor products liability claims are extinguished through "free and clear" sales, then purchasers will be more encouraged to bid on a debtor's assets and pay a higher price for them. (MLC Br. at 20). Rather, all that was proven in *Chrysler*

and *GM* is that the "Golden Rule" (*i.e.*, "he who has the gold rules") applies in bankruptcy cases too. In light of state laws and policies expressly designed to spread risk and prevent the kind of moral hazard behavior that, in the absence of such laws, would encourage debtors (and their senior lenders) to preserve cash flow and underinsure products liability risks, it is unclear why the recoveries from a 363 sale should be "maximized" at the expense of product liability claimants. *Cf.*, George S. Kuney, *Jerry Phillips' Product Line Continuity and Successor Corporation Liability: Where Are We Twenty Years Later?*, 72 Tenn. L. Rev. 777, 779 (2005) ("the decisions that support continuity of enterprise or product line liability appear to do so on the basis of spreading risk to afford plaintiffs a remedy that they otherwise would not have").

Accordingly, rather than discouraging bidding on assets, a decision overturning *Chrysler* will more likely only discourage the kind of moral hazard behavior that products liability laws were designed to discourage in the first place. *Cf. Chicago Truck Drivers, Helpers and Warehouse Workers Union Pension Fund v. Tasemkin*, 59 F.3d 48, 50-51 (7th Cir. 1995) ("[T]he potential for chilling does not vary as a function of a company's precise degree of distress, and there is no reason to accord the purchasers of formally bankrupt entities some special measure of insulation from liability that is unavailable to ailing but not yet defunct entities."); *Zerand-Bernal* (extinguishing state law rights in order to increase the value of the debtors' property "would not only [] harm [] third parties…, but [would provide an] incentive to enter bankruptcy for reasons that have nothing to do with bankruptcy"). Policy concerns raised by the appellees, therefore, should play no role in this Court's final decision.

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RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I, Steve Jakubowski, hereby certify that I served a copy of the **APPELLANTS' REPLY BRIEF** via email to the email addresses listed below on this 2nd day of November, 2009.

/s/ Steve Jakubowski

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