No. 16-764

IN THE SUPREME COURT OF THE UNITED STATES

GENERAL MOTORS LLC,

Petitioner,

v.

CELESTINE ELLIOTT, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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AMICUS CURIAE BRIEF OF NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The National Association of Manufacturers (NAM) is the nation's largest manufacturing association, representing manufacturers in every industrial sector and all fifty states. Manufacturing employs over 12 million people, contributes roughly $2.17 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for three-quarters of private-sector research and development. The NAM is the powerful voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

The NAM is interested in this case because its membership includes companies that may find themselves as debtors, creditors, or purchasers in bankruptcy. Those parties rely on the finality of § 363 asset sales in bankruptcy. The certainty of that rule is critical to the entire bankruptcy process.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Certiorari should be granted because the Second Circuit's ruling regarding General Motors LLC's ("GM LLC") liability as a good faith purchaser under

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[1] No counsel for a party authored this brief in whole or in part; and no party, party's counsel, or other person or entity—other than the NAM or its counsel—contributed money that was intended to fund preparing or submitting the brief. All parties were timely notified of the NAM's interest in filing this brief and indicated through counsel that they consent to the filing of the NAM's brief.

§ 363 of the Bankruptcy Code is counter to the principles of § 363 asset sales, including the certainty and finality of such sales, and will have widespread negative repercussions. The decision also violates § 363(m) of the Bankruptcy Code regarding appealing or modifying a sale order unless a stay has been obtained because the decision results in a partial revocation of the "free and clear" finding in the order. In addition, the decision contradicts the basic principle of imposing liability on the party at fault, rather than a good faith purchaser, as well as other circuit court opinions on that issue. If a debtor does not provide proper notice to claimants of an asset sale, the proper remedy is against the debtor's estate that received the sale consideration. Liability should not be imposed on the good faith purchaser.

ARGUMENT

I. THE CIRCUIT COURT'S DECISION UNDERMINES THE INTEGRITY OF § 363 SALES AND THEIR "FREE AND CLEAR" NATURE, NEGATIVELY IMPACTING DEBTORS, CREDITORS, AND BUYERS

Bankruptcy Code § 363 permits a debtor or trustee to sell assets "free and clear of any interest in such property." 11 U.S.C. § 363(f). As the Second Circuit recognized, other circuits have held that § 363(f) is sufficiently broad to bar successor liability claims. Indeed, the Second Circuit "agree[s] that successor liability claims can be 'interests' [under the statute] when they flow from a debtor's ownership of

transferred assets." *In re Motors Liquidation Co.*, 829 F.3d 135, 155 (2d Cir. 2016) (the "Order").[2]

Parties turn to § 363 because it produces the best result for debtors and creditors. *See In re Gucci*, 105 F.3d 837, 840 (2d Cir. 1997) (trust in the terms of § 363 sales "assist[s] the bankruptcy court to secure the best price for the debtor's assets."); *In re UNR Indus.*, 20 F.3d 766, 770 (7th Cir. 1994) ("By protecting the interest of persons who acquire assets in reliance on a plan of reorganization, a court increases the price the estate can realize ex ante and thus produces benefits for creditors in the aggregate."); *In re White Motor Credit Corp.*, 75 B.R. 944, 951 (Bankr. N.D. Ohio 1987) ("The successor liability specter would chill and deleteriously affect sales of corporate assets, . . . This result precludes successor liability imposition.").

The "free and clear" protection assures good-faith purchasers that they can acquire a debtor's assets without assuming the risk of successor liability for the debtor's past acts. That assurance helps maximize the price paid for the debtor's assets, which in turn provides creditors with more substantial recoveries after the ensuing claims-resolution process.

By subjecting a good faith asset purchaser to successor liability claims, the Second Circuit's decision means that future § 363 sales may take place at a steep discount, if at all. Debtors' creditors — from lenders and business partners to tort claimants —

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[2] *See also In re Trans World Airlines, Inc.*, 322 F.3d 283, 288 (3d Cir. 2003); *PBBPC, Inc. v. OPK Biotech, LLC*, 484 B.R. 860, 869 (BAP 1st Cir. 2013); *Douglas v. Stamco*, 363 F. App'x 100 (2d Cir. 2010).

will receive less value for their claims. *See Douglas v. Stamco*, 363 F. App'x 100, 102-03 (2d Cir. 2010) ("it is evident that the potential chilling effect of allowing a tort claim subsequent to the sale would run counter to a core aim of the Bankruptcy Code.").

Purchasers may be unwilling to pay a substantial premium for assets in a free and clear sale amidst the uncertainty regarding whether a debtor-in-possession complied with the notice requirements. At a minimum, asset purchasers will likely exhaust considerable resources in order to conduct their own due diligence. In both instances, the ultimate result is a proportional reduction in pro-rata distributions resulting from the asset-purchaser's corresponding expenditures. Thus, the real losers are likely unsecured creditors.

Also under the Order, no § 363 sale is ever truly final. The express terms of a § 363 sale could be rewritten by a court years later if the court concludes that some group of creditors did not receive sufficient notice. The decision is unfair to debtors, creditors, and buyers, as well as other innocent parties, such as investors and lenders, which transact business with good faith purchasers and rely on the integrity of the sale orders to prevent a seller's liabilities from being imposed on a purchaser. The decision also harms innocent shareholders, such as those who purchased GM LLC's stock on the understanding that the company could not be held liable for Old GM's liabilities.

If good-faith purchasers cannot be assured that they are purchasing a debtor's assets free and clear of its liabilities, they will demand steep discounts to offset the risks Congress intended to elimi-

nate. Creditors will have to settle for minimal recoveries.

II. THE CIRCUIT COURT'S DECISION VIOLATES § 363(M) REGARDING APPEALING OR MODIFYING A SALE ORDER UNLESS A STAY HAS BEEN OBTAINED

The policy of finality with respect to § 363 sales is best exemplified by § 363(m), which explicitly prohibits modifications of sales on appeal unless the sale has been stayed. *See In re WestPoint Stevens, Inc.*, 600 F.3d 231, 248 (2d Cir. 2010); *In re Colony Hill Assocs.*, 111 F.3d 269, 272 (2d Cir. 1997); *In re Gucci*, 105 F.3d at 839-40.

The Order regarding GM LLC's liability as a good faith purchaser, years after the sale and without any stay having been secured, is counter to these principles, and eviscerates the finality of § 363 sales.

The Second Circuit attempted to address this issue by explaining that it was simply interpreting the Sale Order, and not modifying it, such that § 363(m) should not apply. The explanation, however, fails for at least two reasons.

First, the application of § 363(m) is not limited to situations where the challenge to a sale order is by an appeal. Rather, and for example, courts have found that § 363(m) is as relevant and as applicable to a motion to set aside a sale as it is to an appeal from an order authorizing a sale. *See In re Tri-Cran, Inc.*, 98 B.R. 609, 618 (Bankr. D. Mass. 1989).[3]

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[3] *See also Polycel Liquidation, Inc.*, 2006 WL 4452982, at *9 (Bankr. D.N.J. Apr. 18, 2006) (Despite the fact the matter at issue was a Rule 60(b) motion relief from a sale order, "This

Second, despite the Second Circuit's purported characterization, the court was modifying the sale order, and not merely interpreting it.

Factually, the sale order contained a provision transferring the assets to GM LLC free and clear of "all" claims and liens, except as delineated in the order.

Legally, eliminating a free and clear provision as to certain claims is considered a modification of a sale order. A court cannot sever one piece of a sale agreement because it might ignore the consideration given by the purchaser.

The circuit court's decision on this issue conflicts with other precedent, including other decisions from the Second Circuit. For example, in *United States v. Salerno*, 932 F.2d 117, 123 (2d Cir. 1991), in addressing an appeal from approval of an asset sale, the court stated that, "[i]t is ... beyond the power of this Court to rewrite the terms of the trustee's sale of the assets" following consummation of the unstayed sale. *See also In re Adelphia Communications Corp.*, 367 B.R. 84, 97 (S.D.N.Y. 2007) (court held in relation to a confirmed chapter 11 plan that, "Appellee's argue, persuasively, that such relief would rewrite the terms of the bargain, which is beyond the power of the Court."); *In re Source Enter.*, 392 B.R. 541, 550 (S.D.N.Y. 2008) ("[C]ourts have found it difficult to sever one piece of a [p]lan, and have noted that such a severance might ignore the tradeoff that allowed the parties to settle in the first instance and would

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court nevertheless considers the Buyer's § 363(m) argument since it pertains to the important policy of finality in bankruptcy cases.").

treat a non-severable provision of [their agreement] as dispensable.") (internal quotation marks omitted).[4]

As the Bankruptcy Court found, the various terms of the Sale Order providing for the free and clear sale of the purchased assets were significant to the § 363 transaction. Also, following the renegotiation of the agreements between Old GM and the purchaser providing that the purchaser would assume certain claims, the newly-expanded assumed liabilities did *not* include those of the appellees in this case.

The Bankruptcy Court could not have modified the Sale Order without the parties' consent or written waiver. *See In re Gen. Motors Corp.*, 407 B.R. 463, 517 (Bankr. S.D.N.Y. 2009) ("The Court cannot create exceptions to [a free and clear order] by reason of this Court's notions of equity.").

III. THE CIRCUIT COURT'S DECISION IMPOSES LIABILITY ON A GOOD FAITH PURCHASER FOR A DEBTOR'S NOTICE VIOLATIONS, CONTRADICTING THE PRINCIPLE OF IMPOSING LIABILITY ON THE PARTY AT FAULT

In reliance on the Sale Order, GM LLC closed the sale, paying significant value for the assets, and

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[4] The rationale behind this principle is straightforward, as stated in *Salerno*, 932 F.2d at 123 ("Otherwise, potential buyers would discount their offers to the detriment to the bankruptcy's estate by taking into account the risk of further litigation and the likelihood that the buyer will ultimately lose the asset, together with any further investments or improvements made in the asset.").

began manufacturing vehicles. Since July 2009, GM LLC no doubt has entered into countless transactions in reliance on the Sale Order and its free and clear provisions.

If the debtor seller did not provide proper notice to claimants of the asset sale, the proper remedy is against the debtor's estate, not the good faith purchaser. There is no basis to transfer Old GM's liabilities to GM LLC.

Old GM and GM LLC are not the same. GM LLC did not even exist until the government created it in 2009, and the company did not take possession of Old GM's assets or hire any employees until after the sale. Nor is it relevant, as the Second Circuit seemed to think, that GM LLC now operates a business similar to the one operated by Old GM. Such overlap is commonplace following a sale of assets.

The Second Circuit's holding simply cannot be reconciled with the text and purpose of § 363. The holding is also in conflict with decisions from this Court and other circuits. *Factors' & Traders' Ins. Co. v. Murphy*, 111 U.S. 738 (1884), and *In re Edwards*, 962 F.2d 641 (7th Cir. 1992), both confirm that the remedy for a notice violation by the seller is *not* to impose liability on the good-faith purchaser.

Many other courts have confirmed that rather than imposing liability on the good faith purchaser, the *proper* remedy for a sale notice violation is to allow claimants to seek a recovery against the seller's estate. *See In re Conway*, 885 F.2d 90, 96 (3d Cir. 1989) (Conway's position that he did not receive adequate notice of an asset sale "provides a justification for permitting Conway to file a late proof of claim

with the bankruptcy court . . ., rather than a justification for imposing successor liability on Volvo."); *Molla v. Adamar of New Jersey, Inc.*, 2014 WL 2114848, at *5 (D.N.J. May 21, 2014) (if plaintiff did not receive adequate notice of the bankruptcy proceeding, that is relevant to whether its claims will be discharged in bankruptcy, but not a basis to impose liability on a purchaser who acquired assets "free and clear of all claims and interests . . .").

Here, the analysis is same. No matter how respondents attempt to cast it, the thrust of their argument is that successor liability is appropriate because they did not have an effective remedy against the predecessor, Old GM. That argument is unavailing as against GM LLC for the reasons discussed in the cases cited above.

Furthermore, the *only* remedy against a § 363 purchaser of assets in the event of a notice violation, if appropriate, is to set aside the sale, not a partial revocation of the order or the free and clear finding as to certain creditors. *See Austin v. BFW Liquidation, LLC (In re BFW Liquidation, LLC)*, 471 B.R. 652, 670-71 (Bankr. N.D. Ala. 2012) (citing cases where courts found that the remedy for a lack of notice to certain creditors and a due process violation is to set aside or void the entire sale with the sale proceeds returned to the buyer);[5] *see also In re Fern-*

[5] In *Austin*, the court found that the prejudice that would have resulted to the estate from setting aside the sale, as well as to creditors and the purchaser at the sale, was "enormous" and "it would simply be impossible to undo the sale, reassemble all of the things sold and since resold, and reimburse the buyer's purchase money and other outlays at this late date." *Id.* at 673. Setting aside a sale is an extraordinary remedy to be done, if at all, only close in time to the sale.

wood Markets, 73 B.R. 616, 617 (Bankr. E.D. Pa. 1987).

The Second Circuit, however, claimed a power that § 363 does not provide - partial revocation of a sale order. While the statute allows a bankruptcy court to refuse to approve a § 363 sale, it *does not* allow courts to force purchasers to take on liabilities they did not agree to assume, especially after the sale transaction has closed. The Second Circuit exercised just that power here, and it did so well after GM LLC had lost the opportunity to walk away from the sale or renegotiate other terms.

CONCLUSION

For the foregoing reasons, this Court should grant GM LLC's Petition for Writ of Certiorari.

Respectfully submitted,

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