No. _____

IN THE SUPREME COURT OF THE UNITED STATES

IN RE Chrysler LLC, AKA Chrysler Aspen, AKA Chrysler Town & Country, AKA Chrysler 300, AKA Chrysler Sebring, AKA Chrysler PT Cruiser, *et al.*,

Debtors-Plaintiffs.

APPLICATION TO STAY SALE OF SUBSTANTIALLY ALL OF CHRYSLER'S ASSETS PENDING REVIEW ON WRIT OF CERTIORARI

To the Honorable Ruth Bader Ginsburg, Associate Justice of the United States and Circuit Justice for the Second Circuit:

Pursuant to Rule 23 of the Rules of this Court and 28 U.S.C. § 2101(f), Movants Center for Auto Safety, Consumer Action, Consumers for Auto Reliability and Safety, National Association of Consumer Advocates, Public Citizen, William Lovitz, Farbod Nourian, Brian Catalono, and the Ad Hoc Committee of Consumer-Victims of Chrysler LLC respectfully move for an order staying the sale of substantially all of Chrysler's assets free and clear of all liens, claims, interests, and encumbrances pending the filing of and final action by this Court on a petition for review of the Second Circuit's order in this case.[1] Movants are planning on filing a petition for certiorari by Tuesday, June 9. The sale agreement approved by the bankruptcy court, whose order the Second Circuit affirmed on Friday afternoon, would release "New Chrysler" from pending and future product liability claims for injury

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[1]A Rule 29.6 disclosure statement is appended to the end of this application.

caused by Chrysler vehicles sold to consumers prior to Chrysler's sale to New Chrysler, regardless of state successor liability laws. The Second Circuit has entered a stay that will continue until 4:00 p.m. on Monday, unless this Court acts beforehand

This case presents issues of exceptional importance about whether the Bankruptcy Code can be used to eliminate successor liability for product liability claims in a quick § 363 sale without the protections afforded by the requirements of a plan of reorganization, and about whether debtors and purchasers constitutionally can extinguish *future* claims—claims that have not yet accrued because the injuries on which they will be based have not yet occurred—given that the people who will one day have such claims cannot have received meaningful notice that the bankruptcy proceeding was resolving their rights or a meaningful opportunity to seek to protect those rights. Movants have no further possibility of securing a stay from the Second Circuit, and, absent a stay from this Court, the sale of substantially all of Chrysler's assets will be authorized, causing irreparable harm to consumers who have and will suffer injury or loss due to defects in Chrysler's vehicles.

STATEMENT OF THE CASE

On April 30, 2009, Chrysler and 24 of its subsidiaries ("Chrysler") filed petitions for bankruptcy under Chapter 11 of the Bankruptcy Code. On May 3, 2009, Chrysler filed a motion for an order authorizing the sale under § 363(f) of the Bankruptcy Code of substantially all of its assets to New CarCo Acquisition LLC ("New Chryler"). The motion asked that the order be "free and clear of all liens, claims (as such term is defined by 101(5) of the Bankruptcy Code), encumbrances, rights, remedies, restrictions, interests, liabilities,

and contractual commitments of any kind or nature whatsoever, whether arising before or after the Petition date . . . including all rights or claims based on any successor or transferee liability" other than certain assumed liabilities. The Master Transaction Agreement that accompanied the motion stated that New Chrysler would not assume liability for "Product Liability Claims arising from the sale of Products or Inventory prior to the closing."

Movants are five organizations that work to protect consumers, three individuals with pending tort cases who have been injured or lost family members because of defects in Chrysler's vehicles, and the Ad Hoc Committee of Consumer-Victims of Chrysler LLC, which has more than 170 members, each of whom has tort claims involving personal injuries (including derivative claims and wrongful death actions) against Chrysler. The Movants filed objections in the bankruptcy court, arguing that the sale should not be approved "free and clear" of product liability claims because such claims do not fall within the statutory language of § 363(f), the provision under which Chrysler and its purchaser seek to proceed, which allows for the sale of property "free and clear of any interest in such property." The consumer organization Movants also asked the bankruptcy court to clarify that future claims—that is, claims that have not arisen because the people who will have them have not yet been injured—were not covered by the sale, both because such claims do not fit within the language of § 363(f) and because due process does not allow the parties to bind people whose injuries have not yet occurred, who therefore could not file claims in the bankruptcy proceeding, and who had no meaningful notice and opportunity to be heard on their not-yet-existent claims.

On June 1, 2009, the Bankruptcy Court for the Southern District of New York, Judge Arthur J. Gonzalez presiding, issued an opinion granting the relief sought in the sale motion. The opinion stated that tort claims and any potential successor liability claims are "interests in such property" that can be extinguished by § 363(f). Bankr. Op. at 42-43. The Court also held that the sale did not violate future claimants' due process rights because "notice of the proposed sale was published in newspapers with very wide circulation," *id.* at 43., citing *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 317 (1950), for the proposition that "publication of notice in such newspapers provides sufficient notice to claimants 'whose interests or whereabouts could not with due diligence be ascertained.'" In addition, the court stated that the interests of future tort claimants had been presented to the Court. Bankr. Op. at 43. The order signed by Judge Gonzalez authorized the sale of substantially all of Chrysler's assets free and clear of all liens, claims, interests, and encumbrances, "whether arising before or after the Petition date," "including all claims or rights based on any successor or transferee liability." Sale Order at 2-3; *see also id.* at 40, ¶ 35 (stating that New Chrysler "shall not have any successor, derivative or vicarious liabilities of any kind or character for any Claims, including, but not limited to, on any theory of successor or transferee liability, . . . whether known or unknown as of the Closing, now existing or hereafter arising . . . .").

On June 1, 2009, Chrysler filed a motion for an order certifying the sale order for immediate appeal to the court of appeals pursuant to 28 U.S.C. § 158(d)(2). The Movants filed notices of appeal the next day. Also on June 2, 2009, the Second Circuit granted

Chrysler's motion, issued a stay, and set forth an expedited briefing and hearing schedule. The Second Circuit heard argument on June 5, 2009. That same afternoon, the Second Circuit entered an order authorizing the sale of substantially all of Chrysler's assets, on the terms stated in the bankruptcy court's order, for substantially the reasons stated in Judge Gonzalez's opinion. The order stated that opinions would issue in due course and the mandate would issue forthwith. As of this filing, the opinions have not yet issued. The order announced that the stay entered by the Court on June 2 will continue until the earlier of 4:00 p.m. on Monday, June 8, 2009, or the time a stay is denied by the U.S. Supreme Court.

ARGUMENT

This Court will grant a stay when there is "(1) 'a 'reasonable probability' that four Justices will consider the issue sufficiently meritorious to grant certiorari or to note probable jurisdiction'; (2) 'a fair prospect that a majority of the Court will conclude that the decision below was erroneous'; and (3) a likelihood that 'irreparable harm [will] result from the denial of a stay.'" *Conkright v. Frommert*, 129 S.Ct. 1861 (April 30, 2009) (Ginsburg, J.) (quoting *Rostker v. Goldberg*, 448 U.S. 1306 (1980) (Brennan, J.)). Each of these factors is satisfied here.

I. There Is A Reasonable Probability That The Court Will Grant Certiorari.

This case presents important questions of federal law that should be resolved by this Court, and there is a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari. Chrysler and New Chrysler, through the sale order, are attempting to immunize New Chrysler from all successor liability for Chrysler

vehicles that have already been sold, even where New Chrysler would have successor liability under state law. And they are doing so without providing for product liability claimants in the bankruptcy proceeding. Indeed, at the bankruptcy hearing, Chrysler's and New Chrysler's witnesses agreed there would be nothing left in the bankruptcy estate for these claimants. Chrysler, one of the "Big Three" U.S. automakers, is responsible for millions of vehicles on the road; in 2008 alone, it sold approximately 1.5 million vehicles. Allowing Chrysler and New Chrysler to eliminate successor liability for current and future claims for pre-existing vehicles will not only affect the thousands of people injured and to-be-injured by Chrysler vehicles, but will establish a precedent that will allow and encourage debtors to use § 363(f) quick sales (without the protections afforded in a plan of reorganization) as a means of immunizing going concerns from claims—including claims that do not yet even exist—of people who have been injured by defects in the debtors' products. The recent bankruptcy filing of General Motors, another of the big three automakers, demonstrates that while the issues presented here have been percolating in the courts for some time, they are growing in importance, and the time to decide them is now.

Apart from the serious consequences this case will have for people who have or will suffer harm from defects in Chrysler vehicles, this case presents an important constitutional issue: whether unknown and unknowable people, who have not yet been injured by a product, can have their future claims eliminated in a bankruptcy proceeding. Numerous courts of appeals have recognized the constitutional issue caused by attempting to discharge or foreclose future claims in a bankruptcy proceeding. *See In Re Chateaugay*, 944 F.2d 997,

1003 (2d Cir. 1991) (recognizing the "enormous practical and perhaps constitutional problems" that would arise from considering future claims to be "claims" under the Bankruptcy Code); *Schweitzer v. Consolidated Rail Corp.*, 758 F.2d 936, 944 (3d Cir. 1985) ("[A]n interpretation of "interests" that included plaintiffs' future tort actions would raise constitutional questions."); *Mooney Aircraft Corp. v. Foster*, 730 F.2d 367, 375 (5th Cir.1984) ("[L]ack of notice might well require us to find that the bankruptcy court's prior judgment was ineffective as to the [future claimants'] claims."); *Matter of UNR Indus., Inc.*, 725 F.2d 1111, 1119 (7th Cir. 1984) (stating that the difficulties of giving constitutionally adequate notice to the thousands of people exposed to asbestos sold by UNR but who had not yet developed asbestosis were "possibly insurmountable").

In *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 627 (1997), this Court recognized "the gravity of the question whether class action notice sufficient under the Constitution . . . could ever be given to legions so unselfconscious and amorphous" as asbestos-exposed individuals with no perceptible asbestos-related disease. Here, the category of people who will be injured by defects in Chrysler vehicles in the future is also unselfconscious and amorphous. The Court is likely to agree that, before a sale is approved that purports to eliminate the rights of, likely, thousands of people who will be injured because of defects in Chrysler vehicles sold prior to the bankruptcy sale, the Court should grant a writ of certiorari to consider this important constitutional question.

II. The Decision Below Is Erroneous.

1. Current Product Liability Claims

The sale of Chrysler was approved pursuant to § 363(f) of the Bankruptcy Code. However, the Court will likely conclude that § 363(f) does not allow a sale of property "free and clear" of product liability claims. Section 363(f) narrowly permits the sale of property free and clear of any "interest in such property," if one of five conditions are met. Product liability claims are not "interests in such property."

That tort claims are distinguishable from "interests" is shown by another Bankruptcy Code provision, § 1141(c). That section provides that property "dealt with" by a reorganization plan is "free and clear of all *claims and interests*" (emphasis added). "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 24 (1983) (internal quotation marks and alteration omitted); *see also id.* ("We refrain from concluding here that the differing language in the two subsections has the same meaning in each."). This established canon of statutory construction shows that Congress's omission of "claim" in § 363(f) was intentional and that § 363(f) applies only to "interests"—not claims. And § 363(f) provides far fewer procedural safeguards for creditors than § 1141(c), which likely explains why it provides narrower benefits to the debtor than does § 1141(c).

In any event, the phrase "claims and interests" in section § 1141(c) shows that Congress knows how to affect "claims" when it wants to do so, and it did not do so in § 363(f).

2. Future Claims

The bankruptcy court order approving the sale and the Second Circuit's affirmance of that order are also erroneous in that they approve the sale "free and clear" of product liability claims that have not yet arisen. In this regard, the orders below err in two regards. First, as a statutory matter, future claims are not "interests" within the meaning of § 363(f) or the Bankruptcy Code. Second, as a constitutional matter, due process does not allow the elimination of successor liability for the unaccrued product liability claims of people who are not yet injured and have no way to know that they will be injured.

a. As discussed above, product liability claims are not "interests in such property" under the opening sentence of § 363(f). As explained, § 363(f) allows the sale of property free and clear only of any "interest in such property." But even if current claims could be considered "interests in such property" under that section, claims that do not yet exist cannot be. People who have not yet suffered any injury or loss attributable to Chrysler cannot have an "interest in [its] property" because the injuries that would arguably constitute such an interest have yet to occur.

Moreover, even if § 363(f) applied to "claims" (as opposed to "interests"), the future causes of actions of people who have not yet suffered a loss or injury due to the defect in their vehicles would not be covered. "The term 'claim' means . . . right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." 11 U.S.C. § 101. A person who has not yet suffered a loss or injury has no right to payment of any kind from

the debtor. *Cf. Schweitzer v. Consolidated Rail Corp.*, 758 F.2d at 944 (claims for personal injuries that developed after a bankruptcy not dischargeable "claims" under prior version of Bankruptcy Act); *see also In re Chateaugay Corp.*, 944 F.2d at 1003-04 ("Accepting as claimants those future tort victims whose injuries are caused by pre-petition conduct but do not become manifest until after confirmation, arguably puts considerable strain not only on the Code's definition of 'claim,' but also on the definition of 'creditor.'"). Indeed, that people with future claims cannot be considered claimants under the Bankruptcy Code in this proceeding is demonstrated by the lack of any attempt to provide for them. *See Zerand-Bernal Group, Inc. v. Cox*, 23 F.3d 159, 163 (7th Cir. 1994) ("[I]f, as in some asbestosis cases, unknown future product-liability tort creditors of the debtor, . . . had been treated as claimants (or at least as parties in interest) in the . . . bankruptcy proceeding, provision would have been made for them there.").

Furthermore, even if future claims did meet the threshold requirement of "interests in property" under § 363(f), Chrysler's property cannot be sold free and clear of them unless one of the five conditions set forth in § 363(f) is met. Here, the bankruptcy court held that tort claims could be released under § 363(f)(5), which allows sale free and clear of claims that can be "compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest." Bankr. Op. 24, 42. Future claims—causes of action that have not yet even accrued—cannot be made to fit within this paragraph. People with no current claim do not have an interest that can be reduced to a monetary value; they have not yet been injured, much less can they know the nature or extent of an injury yet to occur. It would be

impossible for Chrysler to bring a proceeding against any future claimant to compel him or her to accept money in exchange for a claim that has not yet arisen.

b. The sale of Chrysler "free and clear" of product liability claims that have yet to arise also raises serious due process problems. Because people who will, but have not yet, suffered injury from defects in Chrysler vehicles do not know that they will be injured in the future, they cannot receive either meaningful notice that their rights are being adjudicated or a meaningful opportunity to be heard. As the Third Circuit stated in *Schweitzer*, 758 F.2d at 943, it would be "absurd" to expect a "person who had no inkling" that he would be injured by the debtor's product years in the future to file a claim in the debtor's bankruptcy proceedings to preserve his rights; *see also In re Pettibone Corp.*, 151 B.R. 166, 172 (Bkrtcy. N.D. Ill. 1993) ("[T]he argument implies that *uninjured* persons who wish to protect themselves in event of future injuries have the burden of monitoring national financial papers . . . to read notices about businesses they have no claims against because they are on notice of claim bar dates affecting any future injuries caused by such companies. Franz Kafka would have been able to accept such a legal principle in one of his stories; the Bankruptcy Code and the Fifth Amendment to the United States Constitution cannot.") (emphasis in original).

In holding that due process was satisfied, the bankruptcy court cited *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 317 (1950), for the proposition that publication notice is sufficient for claimants "whose interests or whereabouts could not with due diligence be ascertained." Bankr. Op. at 43. But the problem here is not just that

Chrysler has been unable to provide individualized notice to people with future claims; the problem is that people with future claims do not themselves know that they will be injured by defects in Chrysler's products, and, therefore, any purported notice to them is a sham. Moreover, even if they saw notice in a newspaper, people who have not yet been injured—some of whom may not even own a Chrysler vehicle—would not know that the sale would affect them. These individuals have neither claims against nor knowledge that they will ever have a cause of action against Chrysler. *Cf. Amchem Prods.*, 521 U.S. at 627 (discussing the impediments to providing adequate class notice to people who have been exposed to asbestos but have no perceptible injury at the time of settlement).

The bankruptcy court's reliance on *Mullane* was wrong for another reason: The elimination of future claims against New Chrysler is not only a violation of procedural due process in the sense that the future claimants have no inkling of how the sale is treating them; the sale is eliminating all potential product liability claims against New Chrysler even though state law protects those claimants' rights. Such "choses in action" are property protected by the due process clause, *see Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 807 (1985), which could not be eliminated consistent with due process, even if the future claimants had been provided notice. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429-30 (1982).

In short, the sale order eliminates the claims of people who have not yet been injured and who neither had nor could have had meaningful notice or opportunity to be heard before their rights were extinguished. Such a result is not permitted by either § 363(f) or the

Constitution. For these reasons, a majority of the Court is likely to hold that the decision to approve the sale order was erroneous.

III. Absent A Stay, Movants Will Suffer Irreparable Harm.

Unless the Court issues a stay pending review of this matter on a writ of certiorari, Movants' petitions will become moot. A long line of court of appeals decisions holds that appellate jurisdiction over an unstayed sale order issued by a bankruptcy court is limited by 11 U.S.C. § 363(m) to the narrow issue of whether the property was sold to a good faith purchaser. Although § 363(m) "states only that an appellate court may not 'affect the validity' of a sale of property to a good faith purchaser pursuant to an unstayed authorization, and can even be read to imply that an appeal from an unstayed order may proceed for purposes other than affecting validity of the sale, courts have regularly ruled that the appeal is moot." *In re Gucci*, 105 F.3d 837, 839 (2d Cir. 1997) (citing *Ewell v. Diebert*, 958 F.2d 276, 280 (9th Cir.1992); *AnheuserBusch, Inc. v. Miller*, 895 F.2d 845, 847 (1st Cir.1990); *Cargill, Inc. v. Charter Int'l Oil Co.*, 829 F.2d 1054, 1056 (11th Cir.1987)).

Here, absent a stay, the sale will go through Monday at 4 pm. After that, the ruling below would, in light of § 363(m), be effectively unreviewable by this Court, even if the Court would have determined the issues differently on their merits (that is, if it had the opportunity to review the issues before the sale became final and § 363(m) became operative). *Anheuser Busch*, 895 F.2d at 847. Accordingly, this Court should issue a stay to review the important issues presented here.

In addition, completion of the sale will irreparably harm Movants. Individual Movants Lovitz, Nourian, and Catalano, for example, have product liability claims pending against Chrysler, based on very serious injuries caused by defects in their vehicles. Mr. Lovitz and Mr. Catalano are suing for damages in connection with the deaths of their mothers caused by defects in Chrylser vehicles—a Dodge Neon and a 1997 Chrysler Town and Country Mini Van. *See Lovitz v. Daimler North America Corp., et al.*, Case No. 1:08cv0629 (N.D. Ohio, O'Malley, J.); *Catalano v. Chrysler, LLC, et al.*, Case No. 08-32664-NP (Sanilac County, Mich. Cir. Ct.). And Mr. Nourian, the plaintiff in *Nourian v. Chrysler, LLC; Chrysler Motors, LLC; Daimler A.G.; and Walker Motor Co. d/b/a Buerge Chrysler-Jeep*, Case No. SC098902 (Los Angeles Sup. Ct.), suffered serious injuries, requiring surgeries, lost work time, and hundreds of thousands of dollars in medical bills, as the result of a defect in a 1998 Jeep Cherokee. Given that no funds remain in Chrysler to pay any claims and that the Sale Order would act as a bar to any successor liability claims they had, without a stay and an opportunity to have the Court consider their petition for certiorari, the claims of each of these individuals will disappear, with no consideration of the merits of their individual cases or of the merit of the issues they seek to present to this Court.

The organizational Movants further seek this Court's intervention to address the interests of individuals who will be injured in the future but have yet to be injured, and accordingly, have yet to have any claim against Chrysler. The sale agreement purports to preclude these people from bringing suit against Chrysler when they do have claims. Movants believe that the provision of the sales agreement that eliminates these "future"

claims and state laws of successor liability with respect to such claims is impermissible as a matter of both statutory and constitutional law. Thus, people injured in the future may be able to attack the validity of that provision in future suits. However, their very ability to bring those future suits is threatened because, even if the attempt to immunize the new company from liability for claims that have yet to accrue is invalid, injured people's ability to bring suit will be hampered by the agreement and the bankruptcy court decision, which state that these claims are, essentially, eliminated, and accordingly create a significant impediment to the ability of these individuals to find lawyers to bring their cases.

CONCLUSION

For the foregoing reason, the Court should grant a stay pending the filing of and final action by this Court on a petition for review of the Second Circuit's order in this case.

Respectfully Submitted,

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RULE 29.6 STATEMENT

Movants the Center for Auto Safety, Consumer Action, Consumers for Auto Reliability and Safety, the National Association of Consumer Advocates, and Public Citizen are non-profit corporations that have no parents and have issued no stock.