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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF

The decision below poses a grave threat to the continuing vitality of Section 363 sales. By imposing an unprecedented and unworkable claim-specific notice requirement and stripping good-faith purchasers of the statutory protections on which they rely when purchasing distressed assets, the Second Circuit has destroyed the very qualities that make Section 363 an effective, estate-maximizing tool that benefits debtors and creditors alike.

Respondents' efforts to stave off this Court's review of that profoundly misguided and consequential decision fall flat. Indeed, respondents cannot even agree on what the Second Circuit held. Some suggest that the court faulted Old GM for failing to provide service by mail, but that is wrong and would create a circuit split of its own. Others more candidly acknowledge that the court held that they were constitutionally entitled to notice of their *claims*. But neither the Code nor the Bankruptcy Rules provide for anything more than notice of the sale, so those respondents effectively concede that the decision below holds those notice provisions unconstitutional as applied. That would be reason enough to grant certiorari, but the Second Circuit's decision to hold the good-faith *purchaser* accountable for the purported notice failings of the *seller* is, if anything, more problematic. Respondents have filed four separate briefs but cannot identify a single case vitiating the protections given to a good-faith purchaser based on the failure of the seller to provide adequate notice. Both this Court and the Seventh Circuit have squarely rejected such efforts even when

the notice defect was undeniable and the creditor's claims were extinguished.

Respondents fare no better with their insistence that this case is interlocutory. This petition arises out of a discrete proceeding to enforce the Sale Order, not an interlocutory order in one of respondents' tort suits. That is the precise procedural posture in which this Court reviewed and rejected another Second Circuit bankruptcy ruling, *Travelers Indemnity Co. v. Bailey*, 557 U.S. 137 (2009), and it is not even clear that a final judgment in respondents' separate tort suits—which raise distinct issues and arise in distinct fora—would permit review of the Second Circuit's decision.

As for the contention that this case is *sui generis*, respondents have it exactly backwards; that this case involves one of the biggest bankruptcies in history is all the more reason to grant review. Not only does the sheer volume of claims *directly* impacted by the decision below underscore its broad impact; its high-profile nature ensures that it will have consequences far beyond these parties. If the protections for good-faith purchasers are disregarded when the stakes and profile of the bankruptcy are highest, the message to all would-be purchasers in Section 363 sales large and small will be unmistakable: You are buying not just assets but also some of the liabilities of a seller forced into bankruptcy, including those you expressly disclaimed—at least if, years later, a court finds fault with the sale notice over which you had no control. This buyer-beware policy is the antithesis of the "free and clear" protections embodied in Section 363, and will inevitably reduce the utility of future

sales to the detriment of debtors and creditors. The time to review the decision below, remove the uncertainty over Section 363 sales, and restore the protections for good-faith purchasers is now.

I. The Decision Below Is Unprecedented And Wrong.

A. The Decision Below Erroneously Holds Section 363's Notice Requirements Unconstitutional As Applied.

According to the decision below, the Constitution requires debtors to notify creditors not just of the Section 363 sale (as the Bankruptcy Code and Rules promulgated by this Court require), but also of the basis for any potential claims against them. That novel holding cannot be squared with Section 363 or cases from other circuits. Pet.20-26. Respondents strain mightily to avoid that conclusion, but their conflicting accounts of what the Second Circuit held only underscore the need for this Court's review.

Some respondents insist that the decision below "independently rested on the fact that Old GM did not provide respondents with *any direct* notice of the sale—wholly apart from the notice's content." PCAP11 (some emphasis added); *see* ER13.[1] That reading is impossible to reconcile with the court's conclusion that respondents were prejudiced by the purported notice violation because "the outcome of the §363 sale proceedings [may not] have been the

[1] "PCAP" refers to the Pre-Closing Accident Plaintiffs' brief; "ER" to the Elliott Respondents' brief; "ISP" to the Ignition-Switch Plaintiffs' brief; and "GUC" to Wilmington Trust Company's brief.

same *had Old GM disclosed the ignition switch defect*." Pet.App.47-55 (emphasis added). If the Second Circuit did not hold that due process required notice of *the claims*, then its prejudice analysis is nonsensical.

Implicitly recognizing that problem, respondents make the remarkable claim that "prejudice is not required to sustain a due process violation in these circumstances." ER19. All that matters is that they did not receive their "notice *by mail*." ISP15 (emphasis added). Even the Second Circuit did not accept that extraordinary proposition—and for good reason, as doing so would open a massive circuit split and put the Second Circuit at odds with at least six of its sister Circuits. Pet.App.153-56 & n.162 (collecting cases).

Other respondents more candidly and correctly acknowledge that the Second Circuit did hold that due process required Old GM to give creditors "notice *of their claims*." PCAP27 (emphasis added). Echoing the Second Circuit's prejudice finding, they argue that, without claim-specific notice, they "would have [had] no reason to … object to a sale that severely diminished their interests." PCAP18. Setting aside the problem that the bankruptcy court considered and rejected the same basic objections before it approved the sale, that argument repeats the Second Circuit's mistake. Section 363 sales *do not extinguish creditors' claims*; those claims survive the sale and are channeled to the proceeds it generates. Pet.6-7. Creditors then can assert their claims against those proceeds during the ensuing claims-resolution process, which has separate and more rigorous notice

requirements. Pet.22. Imposing novel claims-notice requirements on Section 363 sales will slow those sales down dramatically (even though time is often of the essence) and reduce their proceeds, all to the disadvantage of debtors and creditors alike.

In fact, courts have repeatedly rejected claim-specific notice requirements even where creditors' claims *may* be extinguished if not timely filed. *See In re Placid Oil Co.*, 753 F.3d 151 (5th Cir. 2014); *Chemetron Corp. v. Jones*, 72 F.3d 341 (3d Cir. 1995). Respondents fail to respond meaningfully to those cases, instead addressing only the separate question of how they distinguished between "known" and "unknown" creditors. PCAP20; ISP13. But regardless of whether creditors are known or unknown[2] (which affects the means, not the content, of the notice), those cases and others squarely hold that notice need not include "information about specific potential claims." *Placid Oil*, 753 F.3d at 158; *accord In re Penn Cent. Transp. Co.*, 771 F.2d 762, 768 (3d Cir. 1985).[3] It would make no sense at all for the Constitution to demand *more* notice in the Section 363 context, where creditors have *less* at stake. Tellingly, respondents' four briefs identify no case that holds otherwise.

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[2] NGMCO certainly does not concede that respondents—contingent tort claimants who had not asserted *any* claims against Old GM—were "known" creditors. *See* Pet.25 n.4.

[3] *See also In re Amdura Corp.*, 170 B.R. 445, 453 (D. Colo. 1994); *In re Circuit City Stores, Inc.,* 2010 WL 2208014, at *8 (Bankr. E.D. Va. May 28, 2010).

B. The Decision Below Erroneously Punishes A Good-Faith Purchaser For The Seller's Purported Notice Failings.

Even if Old GM failed to comply with its notice obligations, respondents cannot explain why that should give rise to a remedy against *NGMCO*, the innocent good-faith purchaser. Here again, respondents filed four briefs without citing a single case stripping a good-faith purchaser of a sale order's "free and clear" protection. Instead, they cite cases standing only for the unremarkable proposition that a "free and clear" provision cannot bar claims that did not exist when the sale order was entered[4]; cases that do not involve good-faith purchasers[5]; and cases holding only that courts may use Federal Rule of Civil Procedure 60(b)(4) to void a Section 363 sale order.[6] All of those cases are inapposite: Respondents' claims pre-date the sale; the bankruptcy court expressly found that NGMCO was a good-faith purchaser; and respondents have never invoked Rule 60(b). Thus, respondents fail to identify a single precedent that supports the decision below.

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[4] *Zerand-Bernal Grp., Inc. v. Cox*, 23 F.3d 159 (7th Cir. 1994); *In re Grumman Olson Indus., Inc.*, 467 B.R. 694 (S.D.N.Y. 2012).

[5] *In re Savage Arms*, 43 F.3d 714 (1st Cir. 1994); *In re Metzger*, 346 B.R. 806 (Bankr. N.D. Cal. 2006); *In re Rounds*, 229 B.R. 758 (Bankr. W.D. Ark. 1999).

[6] *In re Ex-Cel Concrete Co.*, 178 B.R. 198 (B.A.P. 9th Cir. 1995); *Compak Cos. v. Johnson*, 415 B.R. 334 (N.D. Ill. 2009); *In re Polycel Liquidation, Inc.*, 2006 WL 4452982 (Bankr. D.N.J. 2006); *see also In re Fernwood Mkts.*, 73 B.R. 616 (Bankr. E.D. Pa. 1987).

Respondents' failure is unsurprising, as Section 363(m) squarely forecloses the argument that a notice defect can "affect the validity of a sale" to a good-faith purchaser once it has been consummated. 11 U.S.C. §363(m). Respondents make no attempt to reconcile the Second Circuit's contrary holding, which impermissibly modified the terms of the sale in contravention of that unambiguous text; instead, they just insist (citing no authority) that the Constitution demands a remedy—even against a good-faith purchaser—regardless of whether Congress mandated otherwise. PCAP25. In other words, their only answer is that Section 363(m) must be unconstitutional as applied here.

That is reason enough to grant certiorari, but respondents are not even correct that they were deprived of a remedy. As respondents concede, they could have filed claims against GUC Trust as soon as they learned about the ignition-switch defect, but they made a "tactical choice" to sue NGMCO instead, hoping to circumvent the Bankruptcy Code's priority scheme and recover more than the *pro rata* recovery available through the trust. Pet.App.220-22.[7] Thus,

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[7] Respondents filed claims against GUC Trust only after NGMCO filed this petition. *See, e.g.*, Omnibus Motion To File Late Proofs Of Claim, No. 09-50026 (Bankr. S.D.N.Y. Dec. 22, 2016), ECF 13807. While GUC Trust is quick to emphasize the "profound prejudice" that would result from allowing respondents to recover from the trust at this late date, GUC6, it tellingly declines to explain how allowing recovery against *the good-faith purchaser* would be any less prejudicial. To the extent GUC Trust suggests that the Sale Order's "accordion feature" supports that result, it is mistaken. That is a mechanism through which NGMCO agreed, under certain circumstances, to provide additional funding for *GUC Trust* to

if respondents are no longer able to *invoke* the remedy the Sale Order left intact for claims against Old GM, that is a problem of their own making. As this Court observed more than a century ago, it is "impossible to shut one's eyes to the injustice" that would result from allowing that gambit to succeed. *Factors' & Traders' Ins. Co. v. Murphy*, 111 U.S. 738, 741-42 (1884).

Respondents insist *Factors'* is inapposite because the creditor (Murphy) "was represented by an agent" at the bankruptcy sale. ER18 n.10; ISP23-24; PCAP27-28. In fact, this Court explained that the agent "acted for Marshall J. Smith & Co.," not Murphy. 111 U.S. at 741. Respondents fare no better in attempting to distinguish *In re Edwards*, 962 F.2d 641 (7th Cir. 1992). While *Edwards* involved a lien, not a tort claim, ISP24; ER17-18, Section 363 does not distinguish among types of "interests" from which property may be sold "free and clear." 11 U.S.C. §363(f); *see In re Trans World Airlines, Inc.*, 322 F.3d 283, 288-89 (3d Cir. 2003). Nor, *contra* ISP24, did the *Edwards* creditor waive any due process argument. While the court found that the creditor's objection to the sale came too late, it reached and *rejected* the argument that that result violated due process. *See* 962 F.2d at 645 ("[T]he doctrine of bona fide purchasers does not violate the due process clause."). Respondents thus fail to reconcile the decision below with either *Factors'* or *Edwards*.

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settle creditor claims *against Old GM*, not through which NGMCO agreed to assume liability for those claims itself.

Respondents' other arguments are equally unavailing. Respondents emphasize that NGMCO operates a business similar to Old GM's and hired many of Old GM's former employees. ISP1, 4, 18; PCAP30. But that is both commonplace in Section 363 sales, *see* Pet.5, and entirely beside the point. The knowledge of later-hired, former Old GM employees might be relevant to claims based on *post-sale* conduct, but that knowledge is not imputed to the good-faith purchaser before the sale, whether or not it hires employees from the seller or pursues the same line of business. Respondents' contrary contention is just a backdoor effort to question the good faith of the government-owned purchaser—even though they have never advanced that argument and it was rejected years ago. *In re Motors Liquidation Co.*, 430 B.R. 65, 79 (S.D.N.Y. 2010).

Some respondents argue that NGMCO does not have "free and clear" title because the "notice requirements" of Section 363(b) were not satisfied. PCAP25. But Section 363(m) does not confine its protections for good-faith *purchasers* to sales in which the *seller* provided adequate notice; indeed, Congress' promise of finality would be hollow if it contained such a gaping exception. Nor are respondents correct that the Sale Order cannot bar their claims because they were not parties to the sale proceeding. ER14-15. A Section 363 sale "transfers property rights, and property rights are rights good against the world, not just against … persons with notice of the proceeding." *In re Met-L-Wood Corp.*, 861 F.2d 1012, 1017 (7th Cir. 1988); *accord Regions Bank v. J.R. Oil Co.*, 387 F.3d 721, 732 (8th Cir. 2004).

Finally, some respondents make the remarkable argument (supported by absolutely no authority) that NGMCO deserves its fate because "[i]t is the *purchaser*'s responsibility to perform due diligence to determine whether the debtor is hiding liabilities." ER18 (emphasis added); *see* PCAP27. But making would-be purchasers conduct due diligence of the adequacy of the seller's notice (especially if claims-based notice is required) would be wholly unworkable. And, more to the point, that argument is utterly irreconcilable with Section 363(f), the whole point of which is to provide a mechanism for purchasing a debtor's assets "*free and clear*" of its liabilities, hidden or otherwise. Pet.23-24.

II. These Exceptionally Important Questions Should Be Resolved Now.

The decision below unquestionably removes the linchpin of one of the biggest and most important bankruptcies in history. Respondents nevertheless insist that this case is too factbound to be certworthy or to have much broader impact. ISP1-2; GUC8-9; PCAP22. That argument confuses the extraordinary importance of Old GM's bankruptcy with the recurring legal questions the Second Circuit resolved. Whatever role the facts may have played in leading the court astray, the conclusions it ultimately reached—that due process requires claim-specific notice, and that failure to provide such notice is ground for stripping a good-faith purchaser of its "free and clear" protections—impact *every* Section 363 sale, large or small.

Section 363 sales have become "the preferred method of monetizing the assets of a debtor

company," Robert E. Steinberg, *The Seven Deadly Sins in §363 Sales*, 24 Am. Bankr. Inst. J., June 2005, at 22; *see* PLAC11-19,[8] and "the practice in smaller cases has followed the lead of the larger cases." *In re Gulf Coast Oil Corp.*, 404 B.R. 407, 418-19 (Bankr. S.D. Tex. 2009). The lesson from the decision below will be unmistakable. If the Second Circuit was willing to vitiate the core terms of one of the biggest Section 363 sales in history, then no Section 363 sale is safe and no purchase really free and clear. The extraordinarily high stakes and high profile of this bankruptcy will ensure that this deeply flawed message is delivered far and wide, undermining Section 363 sales large and small. *See* COC7-9.

Respondents are wrong to suggest that the posture of this case is an obstacle to review. ISP7-9; GUC13-14. This petition does not arise from an interlocutory order in one of respondents' tort lawsuits; it arises out of a motion NGMCO filed *in bankruptcy court* to enforce the Sale Order. Pet.App.65. This case is thus in the same posture as *Travelers Indemnity*, where the Second Circuit refused to enforce a bankruptcy court's prior injunction against state-court tort lawsuits. This Court granted certiorari and reversed, despite respondent's objection that "[t]he Second Circuit's decision was interlocutory." Brief in Opposition for Chubb Indemnity Insurance Co. 1, *Travelers Indem. Co. v. Bailey*, Nos. 08-295 & 08-307 (filed Nov. 3,

[8] "PLAC" refers to the Product Liability Advisory Council's amicus brief; "COC" to the Chamber of Commerce's brief; and "NAM" to the National Association of Manufacturers' brief.

2008). Moreover, it is not even clear that this Court *could* review the Second Circuit's decision at the conclusion of respondents' tort suits, which present distinct issues and are being litigated elsewhere.

In all events, even assuming this Court could forestall review, there is no reason it should. If the Sale Order does bar respondents' claims against the good-faith purchaser, then forcing the parties to litigate those claims to final judgment before resolving that question will have achieved nothing but an enormous waste of litigant and judicial resources. *See* COC9-12. And in the interim, it would leave in place a profoundly misguided decision that vitiates the very protections that make Section 363 such an effective tool for debtors and creditors alike. *See* NAM2-5. The result will be more debtors forced into liquidation, which will harm not just shareholders and creditors, but employees, suppliers, customers, and communities—*i.e.*, precisely what Congress intended Section 363 to help avoid. *See* PLAC22. Accordingly, the Court should grant certiorari now, before it is too late to undo the harms the decision below inflicts.

CONCLUSION

This Court should grant the petition.

Respectfully submitted,

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