No. ____________

IN THE

Supreme Court of the United States

IN RE CHRYSLER LLC, DEBTOR

INDIANA STATE POLICE PENSION TRUST, INDIANA STATE TEACHERS RETIREMENT FUND, INDIANA MAJOR MOVES CONSTRUCTION FUND,

Petitioners,

v.

CHRYSLER LLC, AKA CHRYSLER ASPEN, AKA CHRYSLER TOWN & COUNTRY, AKA CHRYSLER 300, AKA CHRYSLER SEBRING, AKA CHRYSLER PT CRUISER, AKA DODGE, AKA DODGE AVENGER, AKA DODGE CALIBER, AKA DODGE CHALLENGER, AKA DODGE DAKOTA, AKA DODGE DURANGO, AKA DODGE GRAND CARAVAN, AKA DODGE JOURNEY, AKA DODGE NITRO, AKA DODGE RAM, AKA DODGE SPRINTER, AKA DODGE VIPER, AKA JEEP, AKA JEEP COMMANDER, AKA JEEP COMPASS, AKA JEEP GRAND CHEROKEE, AKA JEEP LIBERTY, AKA JEEP PATRIOT, AKA JEEP WRANGLER, AKA MOPER, AKA PLYMOUTH, AKA DODGE CHARGER; INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE, AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, AFL-CIO ("UAW"), FIAT SPA. AND FIAT S.P.A. AND NEW CARCO ACQUISITION LLC, UNITED STATES OF AMERICA, EXPORT DEVELOPMENT CANADA, CHRYSLER FINANCIAL SERVICES LLC, THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS,

Respondents.

ON APPLICATION FOR IMMEDIATE STAY OF SALE ORDERS ISSUED BY THE BANKRUPTCY COURT

DIRECTED TO HONORABLE RUTH BADER GINSBURG, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONSE OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS TO APPLICATION FOR IMMEDIATE STAY OF SALE ORDERS ISSUED BY THE BANKRUPTCY COURT

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OTHER MATERIALS

The Official Committee of Unsecured Creditors (the "Creditors' Committee") of the above-captioned debtors and debtors-in-possession (the "Debtors") hereby submits this Response to the application (the "Application") of the Indiana State Police Pension Trust, Indiana State Teachers' Retirement Fund, and Indiana Major Moves Construction Fund (the "Indiana Funds") seeking a stay, pending filing of a petition for a writ of certiorari, of the order of the United States Bankruptcy Court for the Southern District of New York (the "Bankruptcy Court") approving the sale of Chrysler's assets (the "Sale Order").

The Creditors' Committee, in its capacity as a fiduciary for a broad cross-section of Chrysler constituencies, including workers, suppliers, dealers, tort creditors, and other unsecured creditors of the Debtors' estates, supports the Chrysler asset sale and opposes any stay that threatens to prevent the sale from closing, as it must, by June 15, 2009. The balance of harms tilts so overwhelmingly against a stay that the Application should be denied on this ground alone. Moreover, the Committee believes that this Court is unlikely to grant a writ of certiorari or, if a writ is granted, to reverse the Sale Order, further arguing against a stay. The Indiana Funds, which represent a tiny fraction of Chrysler's secured debt, have received the appellate review to which they are entitled and should not be permitted to jeopardize the recovery of the overwhelming number of secured and unsecured creditors who understand that this transaction represents the best possible outcome for <u>every</u> Chrysler constituency. The Application for a stay thus should be denied, since it is impossible for the Indiana Funds to post a supersedeas bond large enough to remedy the harm that would result from a collapse of the sale transaction.

Statement

The Committee recognizes that the sale transaction approved by the Bankruptcy Court and challenged on appeal is not perfect. Indeed, it will leave impaired parties within the Committee's constituency. But the challenged transaction is the only alternative to a far worse economic and human disaster.

The absence of any viable competing bids for — or even indications of serious interest in acquiring — Chrysler's businesses presented the Bankruptcy Court with two stark alternatives: approve the proposed sale transaction (by granting the "Sale Motion") to preserve the going-concern value of the Debtors' businesses and maximize substantial value for stakeholders and for the country (despite the unfortunate, but circumscribed, pain and dislocation it will cause to certain constituencies), or reject the transaction and precipitate the immediate liquidation of Chrysler and its assets to the detriment of all involved. The latter course would cause exponentially larger financial and collateral social consequences flowing from the complete disappearance of Chrysler's businesses. The Bankruptcy Court, and the Second Circuit on appeal, both correctly concluded that there was only one choice here: to preserve these businesses as a going concern — the very purpose underlying section 363 of the Bankruptcy Code, which authorizes the sale of a debtor's assets outside of a plan process in chapter 11 cases.

The same choice confronts this Court. A stay that prevents the sale transaction from closing on June 15 will inflict disastrous consequences not just on every Chrysler constituency but on the United States as a whole, as the liquidation of this iconic company ripples through community after community causing the failure of suppliers, dealers, and others whose livelihoods depend on the existence of Chrysler as a going concern. The balance of harms thus tilts dramatically against any further stay of the Sale Orders. Indeed, the Indiana Funds will not even suffer any harm because denial of the stay and consummation of the transaction will result in their receiving more on account of their secured claims than they could possibly otherwise recover through liquidation — which is why the overwhelming majority of secured and unsecured creditors supported the sale in the Bankruptcy Court. This factor alone militates decisively against granting a stay.

But the Indiana Funds are also unable to demonstrate either a "reasonable probability" that they will obtain a grant of certiorari or a "fair prospect" of reversal on the merits. See Conkright v. Frommert, 129 S. Ct. 1861, 1861-62 (2009) (Ginsburg, Circuit Justice). Their attacks on the sale transaction center on the assertion that it constitutes a sub rosa attempt to short circuit the requirements and protections of the Chapter 11 plan process to effect inappropriate transfers of value from Chrysler's First Lien lenders to preferred unsecured constituencies. The Indiana Funds argue that this is being accomplished by selling Chrysler's assets at an artificially depressed bargain-basement "liquidation" value of $2 billion, while pre-petition unsecured creditors are being paid out of Chrysler's assets on a "going concern" basis — supposedly diverting value that could have been used to pay a higher percentage of the First Lien debt.

This is, to put it kindly, nonsense. All of the Indiana Funds' bankruptcy law theories for reversal collapse in the face of one fact: Chrysler's assets are being sold at the highest available <u>going concern</u> value, following an exhaustive, world-wide marketing effort and an open, court-supervised auction process. The $2 billion being brought into the estates and earmarked to pay First Lien creditors like the Indiana Funds is the highest and best price that could be obtained for the assets securing that debt. The much larger "going concern" value that the Indiana Funds cite from Chrysler's hopeful projections was based on a key assumption that proved false: that the United States Treasury (the "Treasury"), Chrysler's lender of last resort, would agree to fund a stand-alone reorganization. Once it became clear that the sale to a new company controlled by Fiat was the only alternative to liquidation, previous hypothetical stand-alone valuations became obsolete.

This sale transaction thus falls squarely within the parameters of permissible, indeed necessary, asset sales under section 363 of the Bankruptcy Code. Although the size and scope of the businesses involved are unprecedented, the relief requested — a section 363 sale of a going concern business prior to a plan to maximize and preserve rapidly declining business values — is not unusual. Rather, this is a fairly straightforward going concern sale like those commonly approved in bankruptcy courts around the nation. Significantly, as the Bankruptcy Court found based on uncontroverted evidence, the <u>only</u> alternative to the asset sale transaction is an immediate liquidation of Chrysler, which will result in every single constituency — including the secured lenders — receiving dramatically less than they will as a result of the sale. This is the very paradigm of a section 363 sale necessary to preserve value of the estate. A tiny minority of creditors should not be permitted to jeopardize this result.

Moreover, it is common and expected for a going concern purchaser to seek and obtain agreements with the business's workforce, key suppliers, key contract parties, and other entities that are essential to the ongoing operations of the business being purchased. That such agreements provide for the assumption of liabilities and the satisfaction of certain prepetition claims is not sinister; it is an ordinary and predictable consequence of the purchaser's need to assure that the business operates effectively going forward — and entirely consistent with the Bankruptcy Code. Nor does the distribution of equity interests in the new Chrysler entity to creditors constitute a payment on account of prepetition claims — rather, these parties are being compensated for contributions they will make to the new, separate company. None of this represents a diversion of value from the estates' assets. And the sale in and of itself does not dictate the valuation or treatment of claims; indeed, both assets and liabilities will be left behind in the old Chrysler entity to be further treated in connection with a liquidation plan process.

For all these reasons, the proposed Sale does not constitute a sub rosa plan of reorganization. Nor does it violate the priority scheme of the Bankruptcy Code, or conflict with any of the other Bankruptcy authorities cited in the Application; to the contrary, it meets the familiar, well-established requirements of section 363(b) of the Bankruptcy Code. Moreover, as the Debtors will demonstrate in their response, the Indiana Petitioners lack standing to complain about where the Treasury, functioning as a lender and equity participant in the entity purchasing Chrysler's assets, obtained the money it is lending to finance the new company. In short, there is no reason for this Court to grant certiorari or reverse the Sale Orders, and thus absolutely no basis to grant an additional stay that will place the closing of this transaction in jeopardy.

Background Facts

A. The Proposed Sale Transaction

As explained in the Sale Motion, as of April 30, 2009, certain of the Debtors (collectively, "Old Chrysler") entered into a Master Transaction Agreement (the "MTA"), with Fiat S.p.A, and New Carco Acquisition LLC ("New Chrysler"). Pursuant to the MTA, Old Chrysler seeks to sell substantially all of its assets (the "Sale") to New Chrysler, including more than twenty manufacturing facilities, accounts receivable, inventory, leased property, the rights under assumed contracts, the equity interests of certain wholly owned subsidiaries, intellectual property, and certain avoidance actions under sections 544 through section 553 of the Bankruptcy Code (other than specified excluded assets, the "Purchased Assets"). See JA 3220-23 (MTA §§ 2.06, 2.07).[1] In exchange for the Purchased Assets, New Chrysler has

[1] Citations to Stay App.__ are to the Appendix filed with the Application. Citations to JA ____ are to the Joint Appendix submitted to the Court of Appeals. Citations to SPA ___ are to the Joint Special Appendix also submitted to the Court of Appeals.

agreed to pay Old Chrysler $2 billion in cash and assume more than $20 billion in liabilities, including certain environmental liabilities, warranty obligations, accounts payable, certain benefit plan liabilities, and post-closing products liability. See JA 3223-26 (MTA §§ 2.08, 2.09).

Among the contracts that are being assumed by New Chrysler are agreements with thousands of auto dealers, as well as agreements with numerous suppliers and vendors. The Sale further contemplates that Old Chrysler's collective bargaining agreement ("CBA") with the UAW (as defined below) be modified to reflect substantial union concessions (including an unprecedented six-year no-strike clause) and, as modified, assumed and assigned to New Chrysler. As a condition of entering the modified CBA, the UAW required that New Chrysler agree to support the health benefits of current and future retirees through new funding arrangements for the Voluntary Employee Benefits Association ("VEBA"), the sponsor for the retiree medical benefits plan for UAW-represented retirees. Among these arrangements, the UAW agreed to allow benefits to be funded in part through the contribution of a majority of the equity interests in New Chrysler rather than funding the VEBA only in cash. These types of arrangements are quite common when the businesses to be purchased operate under extensive union agreements with the workforce that constitutes the lifeblood of the business.

Moreover, New Chrysler demonstrated its ability to consummate the transaction and operate the businesses as a going concern through a credit facility separately provided for by the Treasury and Export Development Canada. Under the terms of that loan, the Treasury will also receive a much smaller position in the equity of New Chrysler — all separate arrangements between New Chrysler and its lender that have nothing to do with the prepetition assets of the Debtors.

Given the deteriorating value of the Debtors' businesses, which are currently shut down due to lack of sufficient funding to operate, the MTA will terminate automatically if the Sale does not close on or before June 15, 2009. JA 3277-78 (MTA §§ 10.01(c) and (j)).

B. The Sale Process

On May 3, 2009, the Debtors filed a motion (the "Bid Procedures Motion"), seeking, among other things, the entry of an order establishing bidding procedures ("Bid Procedures Order") in connection with the Sale.

On May 5, 2009, the Office of the United States Trustee appointed the eleven-member committee of unsecured creditors in these chapter 11 cases. The Creditors' Committee's members constitute a broad cross-section of claimants in these cases, including suppliers Continental Automotive Systems, Inc., Cummins, Inc., Ohio Module Manufacturing Co., LLC, and Magna International, Inc.; dealers Zanetti Chrysler Jeep Dodge, DARCARS Imports, Inc., and AutoNation, Inc.; personal injury claimants Desiree Sanchez and Patricia Pascale; the International Union, United Automobile Aerospace and Agricultural Implement Workers of America (the "UAW"); and the Pension Benefit Guaranty Corporation ("PBGC").

On May 7, 2009, the Bankruptcy Court approved the Bid Procedures Order, establishing, inter alia, May 19, 2009, at 4:00 p.m., as the deadline for objecting to the Sale (the "Objection Deadline"); May 20, 2009 as the deadline for submitting a competing bid (the "Bidding Deadline"); and May 27, 2009, at 10:00 a.m., as the date and time for a hearing concerning the approval of the Sale (the "Sale Hearing"). In accordance with the Bid Procedures Order, the Debtors provided extensive publication notice and direct notice to parties affected by the Sale. See [Docket Nos. 1255; 929; 930; 845].[2]

Following the entry of the Bid Procedures Order, the Debtors continued to actively solicit competing bids from various parties. Despite extensive efforts from the Debtors, no parties signed confidentiality agreements. No parties expressed a serious interest in making competing bids. No parties conducted due diligence concerning the Debtors' assets. The Bidding Deadline passed — and no parties submitted competing bids. The Indiana Funds suggest that the bidding deadlines were too tight to fairly test the market (Application at 10-11), but it is undisputed that Chrysler conducted an exhaustive, year long, international search for an alliance partner, which yielded only Fiat (JA 1747-48, 1751 (testimony of Thomas LaSorda)).

C. The Sale Hearing

The Sale Hearing commenced on Wednesday, May 27 and continued over three marathon days — with the Bankruptcy Court hearing live testimony from 12 witnesses, receiving approximately 40 exhibits, and permitting extensive cross-examination and argument that extended the hearing transcript to 1379

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2 Unless otherwise noted, citations to the docket are to the Bankruptcy Court docket.

pages. The Bankruptcy Court received uncontradicted declarations and live testimony from top executives of the Debtors, their chief financial advisor, and others establishing beyond reasonable dispute that the Sale presents the only available alternative to liquidation of Chrysler's business. <u>See</u> JA 913 (Manzo Decl. ¶ 29); JA 3093-94 (Nardelli Decl. ¶ 15); JA 1911 (testimony of James Chapman); JA 2963 (LaSorda Decl. ¶¶ 24, 25). While Chrysler itself had preferred to proceed with a stand-alone plan, that option was ultimately not feasible because the Treasury — Chrysler's sole available funder — was unwilling to finance that option. JA 1932-33, 1957 (testimony of Robert Nardelli).

The evidence also established that <u>all</u> of the consideration for the Sale is going to the secured First Lien lenders and that value received by prepetition creditors as a result of the assumption, cure, and assignment of contracts and the distribution of equity interests in New Chrysler does *not* involve the diversion of any value that otherwise would flow to the Debtors' estates or its secured creditors. <u>See</u> SPA 21-24 (Sale Decision at 21-24); JA 1948-49 (testimony of Robert Nardelli). Among other things, New Chrysler is responsible for making all cure payments on assumed contracts. Stay App. 38a, 56a (Sale Order at 20, 38); JA 3226 (MTA § 2.10).

Significantly, the Indiana Funds presented no evidence establishing that any alternative transaction was available; that secured creditors would recover anything approaching $2 billion in a liquidation; or indeed that any secured creditor among the 99+ percent <u>not</u> objecting agreed with the Indiana Funds' attempt to torpedo the sale.

In short, the undisputed evidence established that the only alternative to the Sale would be immediate liquidation and dissolution of world-wide businesses that, once gone, would indisputably prejudice thousands of dealers, suppliers, employees, retirees, customers, lenders and other creditors, and have a devastating impact upon communities, large and small, across the United States. JA 1935 (testimony of Robert Nardelli); JA 2956-57 (LaSorda Decl. ¶¶ 7, 8).

D. <u>The Decisions Below</u>

On May 31, the Bankruptcy Court issued a carefully reasoned 47-page opinion approving the Sale Motion. <u>See</u> Opinion Granting Debtors' Motion Seeking Authority to Sell, Pursuant to 11 U.S.C. § 363, Substantially All Of The Debtors' Assets (the "Sale Decision"). On June 1, the Bankruptcy Court entered a corresponding order. <u>See</u> Order (I) Authorizing the Sale of Substantially All of the Debtors' Assets Free and Clear of All Liens, Claims, Interests and Encumbrances, (II) Authorizing the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases in Connection Therewith and Related Procedures and (III) Granting Related Relief (the "Sale Order").

The Sale Decision and Sale Order summarized the evidence adduced at trial and approved the sale under the standard established by the Second Circuit in <u>Comm. of Equity Sec. Holders v. Lionel Corp. (In re Lionel Corp.)</u>, 722 F.2d 1063 (2d Cir. 1983). The Bankruptcy Court found, consistent with the undisputed evidence, that "the Debtors have established a good business reason for the sale of their assets in the early stages of these cases" and that "the Fiat Transaction is the only option that is currently viable. The only other alternative is the immediate liquidation of the company," which would likely generate no more than $800 million in total value for creditors. SPA 16-17, 19 (Sale Decision at 16-17, 19). The Bankruptcy Court concluded that "the consummation of the Sales Transaction was conducted in good faith and at arms' length and is in the best interest of the Debtors' estate." SPA 18 (Sale Decision at 18). Indeed, the court concluded that "the Debtors' estates will suffer immediate and irreparable harm if the relief requested in the Sale Motion is not granted on an expedited basis." Stay App. 25a (Sale Order at 7).

In addition, the Bankruptcy Court found that "the sale of assets is not a sub rosa plan of reorganization" (SPA 18 (Sale Decision at 18)) and that the treatment received by some creditors as a result of the assumption and assignment of their contracts "is not considered a violation of the priority rules nor does it transform a sale of assets into a sub rosa plan" (SPA 21 (Sale Decision at 21); see also Stay App. 26a (Sale Order at 8)). The Bankruptcy Court further concluded that "the UAW, VEBA, and the Treasury are not receiving distributions on account of their pre-petition claims. Rather, consideration to these entities is being provided under separately-negotiated agreements with New Chrysler." SPA 22 (Sale Decision at 22). The Bankruptcy Court further found that the sale process and related notice were fair and satisfied due process. SPA 39-40 (Sale Decision at 39-40).[3]

The Indiana Funds and other parties appealed from the Sale Order, and the Bankruptcy Court certified the appeals for direct review by the Court of Appeals pursuant to Fed. R. Bankr. P. 8001(f). The United States Court of Appeals for the Second Circuit thereafter ordered expedited briefing and stayed the Sale Order pending its decision. After hearing extensive oral argument on Friday, June 5, the Court of Appeals issued a unanimous panel order affirming the Sale Order "for substantially the reasons stated in the opinions of Bankruptcy Judge Gonzalez." Stay App. 74a (June 5 Order). The Court of Appeals' order extended the stay of the Sale Order until the earlier of 4:00 P.M. on Monday, June 8 or such time as a stay application to this Court is denied.

Reasons for Denying the Application

An application to a single Justice for a stay pending filing of a petition for certiorari is made pursuant to Supreme Court Rules 22 and 23 and 28 U.S.C. § 2101(f), and is governed by a variation on the classic standard for the granting of a stay pending appeal. The party seeking a stay must establish the equivalent of "likelihood of success" — that there is both a "reasonable probability" that four

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[3] The Bankruptcy Court made several other findings in support of the Sale Motion with respect to issues that the Creditors' Committee does not specifically address in this Response — including, inter alia, that the assets may be sold free and clear of liens and interests, that New Chrysler is a good faith purchaser, and that the Debtor properly discharged its fiduciary duties in proposing the sale. See SPA 24-37 (Sale Decision at 24-37); see also Stay App. 30a-31a, 35a-38a (Sale Order at 12-13, 17-20).

Justices will vote to grant certiorari and a "fair prospect" that the party will thereafter prevail on the merits — as well as irreparable harm and, where relevant, that the balance of harms weighs in favor of a stay. See Conkright v. Frommert, 129 S. Ct. 1861, 1861-62 (2009) (Ginsburg, Circuit Justice). We address the latter factor first because it is independently dispositive here.

I. THE BALANCE OF HARMS WEIGHS OVERWHELMINGLY AGAINST A STAY

As demonstrated above, the undisputed facts show that the Indiana Funds will not be harmed but in fact will benefit as a result of the Sale — they will receive their proportional share of $2 billion, rather than a share of the $800 million or less that would constitute the entire recovery for Chrysler's creditors in the event of a liquidation. And a liquidation is exactly what will happen if the Sale is not permitted to close. The result will be not just a loss of value for the First Lien lenders but a complete wiping out of all other creditors and the disappearance of a going concern that directly or indirectly is responsible for the existence of hundreds of thousands of U.S. jobs. The Indiana Funds speculate that the United States and Fiat will not let that happen, but there is no reason for this Court to permit holders of less than one percent of Chrysler's secured debt to force all other constituents of Chrysler to make that gamble with so much hanging in the balance. Any stay that extends to or past June 15 threatens nothing less than a national disaster, and on this ground alone the Application should be denied.

II. THE INDIANA FUNDS HAVE NOT DEMONSTRATED EITHER A "REASONABLE PROBABILITY" OF OBTAINING CERTIORARI OR A "FAIR PROSPECT" OF REVERSAL

The Indiana Funds' bankruptcy-based arguments for certiorari (and reversal) all proceed from the groundless premise that Chrysler's going concern value is being diverted to pay unsecured creditors rather than the First Lien lenders. This is simply false, and thus the Indiana Funds have no serious prospect of obtaining further relief in this Court.[4]

A. The Proposed Transaction Fits The Paradigm Of A Necessary And Appropriate Going Concern Sale

The Bankruptcy Court correctly determined that the Sale is a classic going concern asset sale consistent with the core values of the Bankruptcy Code. Under Chapter 11 of the Code, "the purpose of a business reorganization case, unlike a liquidation case, is to restructure the business's finances so that it may continue to operate, provide its employees with jobs, pay its creditors, and produce a return for its stockholders." H.R. Rep. No. 95-595, at 220 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6179. Underlying this objective is the legislative conclusion that "[i]t is more economically efficient to reorganize than to liquidate, because it preserves jobs and assets" and because "assets that are used for production in the industry for which they were designed are more valuable than those same assets sold for scrap." Id.; see 7 William M. Collier, Collier on Bankruptcy ¶ 1100.01

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4 The Debtors address in their Response the Indiana Funds' additional, equally groundless, arguments regarding the Emergency Economic Stabilization Act and Troubled Asset Relief Program.

(Resnick & Sommer eds., 15th ed. rev. 2008) (Chapter 11 intended to "enable the debtor to preserve any positive difference between the going concern value of the business and the liquidation value. Moreover, continued operation can save the jobs of employees, the tax base of communities, and generally reduce the upheaval that can result from termination of a business").

Based on this legislative judgment, the "paramount policy and goal of Chapter 11, to which all other bankruptcy policies are subordinated, is the rehabilitation of the debtor" as a going concern. In re Chateaugay Corp., 118 B.R. 19, 22 (Bankr. S.D.N.Y. 1990); accord N.L.R.B. v. Bildisco & Bildisco, 465 U.S. 513, 528 (1984) ("fundamental purpose of reorganization is to prevent the debtor from going into liquidation, with an attendant loss of jobs and possible misuse of economic resources"); In re Ionosphere Clubs, Inc., 98 B.R. 174, 176-77 (Bankr. S.D.N.Y. 1989) (same); In re Doyle Manufacturing Corp., 77 F. Supp. 116, 119 (N.D.N.Y. 1948) ("It is the Court's obligation to preserve the going concern value of this debtor for the benefit of those having a financial interest therein"); see also NMSBPCSLDHB, L.P. v. Integrated Telecom Express, Inc. (In re Integrated Telecom Express, Inc.), 384 F.3d 108, 119 (3d Cir. 2004) (the "Supreme Court has identified two of the basic purposes of Chapter 11 as (1) 'preserving going concerns' and (2) 'maximizing property available to satisfy creditors'") (citing Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship, 526 U.S. 434, 453 (1999), and Toibb v. Radloff, 501 U.S. 157, 163-64 (1991)).

It has long been recognized that, where necessary to preserve going concern value, sale of a debtors' business need not await the confirmation of a chapter 11 plan. As a result, bankruptcy courts frequently authorize the sale of the debtor's assets pursuant to section 363 of the Bankruptcy Code prior to the plan process, where the transaction represents the sound exercise of the debtor's business judgment and is necessary to preserve the business as a going concern and to maximize value for stakeholders. See Florida Dep't of Revenue v. Piccadilly Cafeterias, Inc., 128 S. Ct. 2326, 2331 n.2 (2008) (chapter 11 "expressly contemplates" a debtor "selling substantially all its assets as a going concern" and then later submitting "a plan of liquidation (rather than a traditional plan of reorganization) providing for the distribution of the proceeds resulting from the sale").

For example, In re Decora Indus., Inc., No. 00-4459 JJF, 2002 WL 32332749 (D. Del. May 20, 2002), the court approved the sale of substantially all of a debtor's assets because its "net revenues [were] insufficient to support the ongoing operations and the necessary capital and other improvements" and the debtor had no other sources of financing. As such, the estates' only options were to "proceed with the [p]roposed [sale] [t]ransaction . . . or terminate business operations, employees and commence a liquidation of assets." Id. at *3. Concluding that the proposed sale "preserves the going-concern value of [d]ebtors' business and the jobs of [d]ebtors' employees," the court permitted the debtor to proceed and overruled the objectors' claims. Id.; accord In re Summit Global Logistics, Inc., No. 08-11566, 2008 Bankr. LEXIS 896, at *30 (D.N.J. Mar. 26, 2008) (approving sale of business pursuant to Section 363 because "the failure to consummate a sale at this juncture will result in a complete shut down of the Debtor's operations" and "a going concern sale proves more lucrative than a sale of a non-operational entity"); In re Lady H Coal Company, 193 B.R. 233, 243-44 (Bankr. S.D.W. Va. 1996) (approving sale of business where only other "viable options" would be infusion of working capital from third party; given absence of such capital, court held that "debtors' business judgment is justified in seeking a sale of the major portion of assets as any hope of eliminating losses and rehabilitating operations appear unrealistic").

Nor are these cases unique. In the past few months, several pre-plan going concern sales have been approved by bankruptcy judges in the Southern District of New York. See, e.g., In re Silicon Graphics, Inc., Case No. 09-11701 (MG), Dkt. No. 292; In re BearingPoint, Inc., Case No. 09-10691 (REG), Dkt. No. 468; In re Lehman Brothers Holdings, Inc., Case No. 08-13555 (JMP), Dkt. No. 258.

The Second Circuit set forth a widely recognized test to determine when going concern sale transactions are authorized by section 363(b) of the Bankruptcy Code, requiring that the debtor demonstrate and the court find that there is a "good business reason" to enter the proposed transaction. See Comm. Of Equity Sec. Holders v. Lionel Corp. (In re Lionel Corp.), 722 F.2d 1063, 1071 (2d Cir. 1983); accord Motorola, Inc. v. Official Comm. of Unsecured Creditors (In re Iridium Operating LLC), 478 F.3d 452, 466 (2d Cir. 2007).

Here, the Bankruptcy Court's conclusion that the Debtors met this standard cannot seriously be challenged. As the Debtors' witnesses testified without contradiction, the Debtors' current operations are not sufficient to support their cash needs and their sole remaining source of funds — financing provided by the federal governments of the United States and Canada — is set to expire in the near term. No parties other than New Chrysler have bid for, or even investigated, a potential purchase of the business of Old Chrysler. SPA 16-17 (Sale Decision at 16-17).

If the Sale is not permitted to close, the estates' only remaining alternative would be an immediate liquidation of the Debtors' business, which would likely yield a net amount of no more than $800 million. SPA 17-19 (Sale Decision at 17-19); JA 1742 (testimony of Robert Manzo). Not only would such a result vastly diminish the value available to satisfy the claims of all stakeholders in Chrysler, it would also impose wrenching consequences on society at large flowing from the collapse of not only Chrysler's businesses, but the businesses of thousands of dealers and suppliers that are dependent upon Chrysler and, potentially, of other major auto manufacturers as well. Consistent with the long line of cases approving going concern sales under section 363(b) and the goals of Chapter 11, the Bankruptcy Court correctly granted the Debtors' Sale Motion.

No substantial Chrysler constituency disagrees. On appeal, objections are being spearheaded by secured lenders representing less than one percent of the First Lien debt. This fringe group should not be permitted to thwart the overwhelming majority of creditors in every constituency that have reasonably concluded that the Sale is the *only* way to salvage a viable company and maximize value for all creditors.

Nor can the Bankruptcy Court be faulted for approving the Sale despite the unavoidable reality that it will harm some constituents of Chrysler. In particular, a number of long-time Chrysler dealers face the destruction or dramatic diminution of their businesses (and the loss of jobs for their employees) because of the hard decisions that Chrysler had to make in rationalizing its dealer roster to strengthen the overall going concern. JA 1995-96 (testimony of Peter Grady); JA 220 (Grady Decl. ¶ 17). As the Second Circuit has observed, "[s]ympathy for the non-debtor that may, through no fault of its own, bear some significant burden from the debtor's rejection of an executory contract due to the happenstance of an unforeseen bankruptcy proceeding is understandable." COR Route 5 Co., LLC v. Penn Traffic Co., (In re Penn Traffic Co.), 524 F.3d 373, 382 (2d Cir. 2008). However, the court cautioned that the Bankruptcy Code "does not condition the right to assume or reject on a lack of prejudice to the non-debtor party," id., and stressed that "[t]he interests of the creditors collectively and the bankrupt estate as a whole will not yield easily to the convenience or advantage of one creditor out of many," id. (quoting Pub. Serv. Co. of N.H. v. N.H. Elect. Coop. (In re Pub. Serv. Co. of N.H.), 884 F.2d 11, 14-15 (1st Cir. 1989)). If the interests of the minority of discontinued dealers must yield to the greater good of the far larger number of businesses and jobs that will be saved through the Sale, a fortiori creditors representing a miniscule portion of the secured debt should not be permitted to hold the Sale hostage based on their unproven assertion that some other hypothetical transaction might result in a greater payout to them.

B. The Proposed Sale Is Not A Sub Rosa Plan Or Otherwise Inconsistent With The Bankruptcy Code

Notwithstanding the clear line of authority sanctioning a section 363(b) sale of substantially all the assets of a debtor's business in advance of a plan of reorganization, the Indiana Funds have asserted that the Sale Motion is an impermissible sub rosa plan that dictates the terms of any future plan of reorganization and generally "short circuits" plan confirmation requirements. Relying heavily on the decision in In re Braniff Airways, Inc., 700 F.2d 935 (5th Cir. 1983), the Indiana Funds claim that the Sale impermissibly purports to dictate certain results — including the amount and nature of the distributions various classes of creditors will receive — that they assert can be effected only pursuant to a plan of reorganization. In particular, they claim the MTA provides for certain creditors, such as the UAW, the VEBA, and the Treasury to receive substantial consideration in the form of notes or equity in New Chrysler while leaving creditors of equal or greater priority likely to receive a materially smaller distribution on their claims against Old Chrysler.

The Objectors are simply mistaken. Braniff concerned an asset sale that didn't merely sell assets as a going concern, but tried to dictate material terms of a future plan (including that the scrip that Braniff received as part of the purchase price could be used only in a future Braniff reorganization and could be issued only to certain creditors, and that secured creditors would be bound to vote a portion of their deficiency claims in favor of any future plan backed by a majority of the unsecured creditors' committee). See 700 F.2d at 939-40. Here, in contrast, New Chrysler will simply pay a cash purchase price to and assume certain liabilities of Old Chrysler — the same as in any other section 363 sale of a business. Secured creditors of Old Chrysler, like the Indiana Pensioners, will have the remainder of their claims (net of their share of the $2 billion sale proceeds) determined and treated in connection with future proceedings in the case. The Bankruptcy Court correctly concluded that "the Debtors are not attempting to evade the plan confirmation procedures." SPA 20 (Sale Decision at 20).

The Indiana Funds make several related arguments based on their inexplicable (but relentless) assertion that the $2 billion purchase price constitutes a "liquidation" valuation (see Application at 7, 9, 17) rather than what it indisputably is: the most the assets could fetch on a going concern basis after a world-wide marketing process and court-supervised auction. The Indiana Funds' supposed certiorari-worthy issue based on Assocs. Commercial Corp. v. Rash, 520 U.S. 953 (1997), is thus a complete non sequitur, because the Sale does not represent "a shift in valuation methodologies." Application at 17. Rash concerned the methodology to be used to determine the value of collateral that a debtor chooses to retain rather than surrender or sell, and mandates the use of replacement rather than foreclosure value. See 520 U.S. at 960, 962-63. Where, as here, the assets have actually been sold on the open market, Rash is irrelevant — the value is determined by the actual sale.

Similarly, the Indiana Funds' invocation of In re Armstrong World Industries, Inc., 432 F.3d 507 (3d Cir. 2005), is way off the mark. Armstrong concerned a reorganization plan that violated the absolute priority rule by transferring value belonging to the estate to junior creditors when more senior creditors were not being paid in full. See 432 F.3d at 513. The Indiana Funds try to shoehorn the Chrysler Sale into this rubric by asserting that the UAW, the VEBA, and the Treasury are somehow receiving distributions of value from Old Chrysler in respect of prepetition claims. But all consideration provided to these entities as part of the Sale flows from separately negotiated agreements with New Chrysler, not as distributions on prepetition unsecured claims. To take over and run Old Chrysler's business, New Chrysler must assume (or otherwise enter into new) contractual obligations that are essential to operate the business profitably. These contracts include not only agreements with the majority of Old Chrysler's dealers, suppliers, and others, but, critically, the agreements covering Old Chrysler's unionized workforce. JA 3010 (Kolka Aff. ¶ 90); Garberding Decl. ¶¶ 24, 30 [Docket No. 49]; JA 1948, 1996 (testimony of Robert Nardelli and Peter Grady); JA 3092 (Nardelli Decl. ¶ 11). As the Bankruptcy Court confirmed, "[n]ot one penny of value of the Debtors' assets is going to anyone but the First-Lien Lenders." SPA 18 (Sale Decision at 18).

Far from constituting a disguised attempt to elevate the priority of the unsecured claims of preferred constituents, New Chrysler's renegotiation of key business terms, and the consequent assumption of the amended collective bargaining agreement with the UAW as part of the transaction, is a rational and customary effort to secure a motivated and effective workforce post-transaction. Similarly, while the UAW conditioned its willingness to enter the new CBA on New Chrysler's establishment of modified funding arrangements for the VEBA to fund retiree health benefits (JA 3598-3600 (Curson Decl. ¶¶ 5-8)), nothing in the Bankruptcy Code prevents a purchaser from negotiating terms of employment with a workforce representative. A consensually modified new agreement with the UAW was essential if Chrysler was to move forward as a going concern. JA 3600 (Curson Decl. ¶¶ 10); JA 1948 (testimony of Robert Nardelli).

The Bankruptcy Code recognizes that the assumption of an executory contract (such as a dealer, supplier, or collective bargaining agreement) may result in "the creditor who is party to the lease or executory contract receiving more favorable treatment than other creditors." <u>See</u> <u>In re Café Partners/Washington 1983</u>, 90 B.R. 1, 7 n.5 (Bankr. D.D.C. 1988). However, that does not render the treatment of that creditor unfairly preferential. <u>See</u> <u>id</u>. (rejecting argument that assumption of lease would put landlord in favored position over other creditors). The Bankruptcy Court correctly found that these agreements were necessary for the viability of New Chrysler and did not divert "value which would otherwise inure to the benefit of the Debtors' estates." SPA 23 (Sale Decision at 23). The Indiana

Funds' allegation that the Sale Order diverts to unsecured creditors "assets that Chrysler lawfully should use to satisfy its obligations" to the First Lien lenders (Application at 3) is simply false.

Similarly, the Treasury is not receiving its equity in New Chrysler on account of its prepetition claims against Old Chrysler. Rather, it is receiving a minority stake in New Chrysler as additional consideration for making a *new* $6.2 billion loan to New Chrysler that will be used to purchase Old Chrysler's assets and to fund New Chrysler's ongoing operations. This is an unrelated transaction between New Chrysler and its funding source, not a disposition of property of the estates. SPA 23 (Sale Decision at 23). In short, that the UAW, the VEBA, and the Treasury are also creditors of Old Chrysler does not render their agreements with New Chrysler to permit the businesses to be acquired and operate as a going concern inappropriate or represent a disguised effort to fix or make distributions on the prepetition claims of these parties.

Unlike in cases like Braniff, neither the express terms of the MTA nor the transactions it contemplates will dictate any terms of a proposed chapter 11 plan or predetermine the future course of these cases. The consummation of the Sale, if it is approved, will not strip the estate of all assets or fix the final amounts of distributions. Rather, the estates will retain certain assets as well as various categories of claims, including the rejection damage claims of hundreds of dealers and suppliers and tort claimants and others, that will remain to be resolved. There is material work that remains in these estates post-sale. For these reasons, as well as those expressed previously, the Sale constitutes a straightforward — albeit an extraordinarily large — going concern transaction and not a sub rosa plan.

In short, none of the Indiana Funds' supposedly certiorari-worthy issues has any grounding in the actual facts and reality of this transaction — and they provide no basis to project any likelihood either that certiorari will be granted or that the Court ultimately will reverse the Sale Order and doom Chrysler to liquidation.

* * *

The Chrysler Sale transaction is not perfect — and indeed, it will leave compromised constituents of the Creditors' Committee — but in these dire times, the parties and the courts cannot allow the perfect to be the enemy of the good. In view of the challenges that Chrysler faces, the proposed transaction is remarkable in preserving the core of this ongoing enterprise, saving many thousands of jobs, and preserving the livelihoods of a majority of Chrysler dealers and suppliers in the face of the worst economic adversity in the last 75 years. There is no alternative available to this transaction. No responsible fiduciary for the company or any appreciable group of creditors could do other than support it and work for its consummation.

Conclusion

For the foregoing reasons, the Application should be denied.

Dated: New York, New York
June 7, 2009

Respectfully submitted,

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Certificate of Service

I, Jeffrey S. Trachtman, hereby certify that on June 7, 2009, true and complete copies of the attached Response of the Official Committee of Unsecured Creditors, dated June 7, 2009, were served by electronic mail upon the counsel listed on the attached service list.

Dated: New York, New York
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