No. _____

IN THE

Supreme Court of the United States

_____

PATRICIA PASCALE, *Petitioner,*

v.

CHRYSLER, LLC, *et al.*, *Respondents*.

_____

On Application to Associate Justice Ruth Bader Ginsburg from the United States Court of Appeals for the Second Circuit

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APPLICATION TO STAY SALE ORDERS ISSUED BY BANKRUPTCY COURT PENDING REVIEW ON WRIT OF CERTIORARI

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

Pursuant to Supreme Court Rule 23 and 28 U.S.C. § 2101(f), Patricia Pascale ("Mrs. Pascale") respectfully requests that the Court grant a stay of the mandate of the Second Circuit and the orders of the Bankruptcy Court for the Southern District of New York, dated May 31 and June 1, 2009 (collectively, the "Sale Order") in the underlying bankruptcy case of *In Re: Chrysler, LLC, et al.,* Case No. 09-50002, approving the sale of substantially all of the assets of Chrysler, LLC ("Chrysler" or "Debtor") and granting certain injunctive relief in favor of non-debtor third parties against both current and future claimants. Such a stay is imperative to maintain the status quo while this Court considers Mrs. Pascale's forthcoming petition for writ of certiorari.

Courts are not free to ignore the law in the name of the needs of the big or powerful. Rights of individuals may not be simply disregarded because some believe a quick sale of a car company will strengthen the U.S. economy. But that is exactly what is happening in the bankruptcy case of Chrysler. The due process rights of Mrs. Pascale, and of many others similarly situated, are being trampled in a process that bears little resemblance to a fair or orderly judicial proceeding. Mandatory provisions of the Bankruptcy Code are being completely ignored and the rights of thousands of both current and future claimants are about to be lost permanently unless this Court acts.

As described below, a stay is essential to allow for a meaningful appellate review of the Sale Order. Without a stay, the sale of Chrysler's assets will occur, subject to the terms of the Sale Order, when the current stay issued by the Second Circuit expires on June 8, 2009 at 4:00 p.m. In such case, the closing of the sale may moot the Court's consideration of the critically significant issues present and the erroneous rulings below.

DECISIONS BELOW AND JURISDICTION

On May 31 and June 1, 2009, the bankruptcy court issued the Sale Order granting Chrysler's Motion for an Order (A) Authorizing the Sale of Substantially All of the Debtors' Operating Assets, Free and Clear of Liens, Claims, Interests and Encumbrances, (B) Authorizing the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases in Connection Therewith and Related Procedures and (C) Granting Certain Related Relief. [Bankr. Docket No. 190] (the "Sale Motion"). It also granted Debtor's motion to reduce the automatic statutory stay of enforcement of its orders from 10 days to 4 days. The Sale Order provides for the sale of substantially all of Chrysler's assets to a newly created entity, New CarCo Acquisition Company ("Purchaser" or "New Chrysler").

The Debtor quickly filed a motion under Bankruptcy Rule 8001(f) for an order certifying the Sale Orders for immediate appeal to the court of appeals. [Bankr. Docket No. 3086] (the "Certification Motion"). On June 2,

2009, the bankruptcy court entered an order certifying the Sale Orders for direct appeal to the Second Circuit. (the "Order Certifying Appeal").

Also on June 2, 2009, the court of appeals took jurisdiction under 28 U.S.C. § 158(d)(2) and Bankruptcy Rule 8001(f) and issued an order staying the closing of the sale. The court of appeals heard oral arguments from the parties at 2:00 p.m. on June 5, 2009, announced its affirmance about 10 minutes after the close of argument, and less than three hours later issued its mandate affirming the Sale Order and lifting its stay effective at 4:00 p.m., Monday June 8, 2009, or upon denial of a stay by this Court. (the "Second Circuit Mandate"). The court noted that it would issue an opinion in due course, but said the court was affirming for substantially the reasons set forth by the bankruptcy court.

Recognizing the far-reaching impact of this order, and the serious precedential effect this decision may have on so many, one of the judges on the panel of the court of appeals, Circuit Judge Sack, commented during the hearing that the Supreme Court should "have a swing at this ball." *See,* Neil King Jr., Jeffrey McCracken, *"U.S. Pushed Fiat Deal On Chrysler,"* The Wall Street Journal, June 6-7, 2009, at A1.

The Court has jurisdiction to review this case under 28 U.S.C. § 1254(1) and jurisdiction to stay the Sale Orders under 28 U.S.C. § 2101(f), 28 U.S.C. § 1651 and Supreme Court Rule 23.

PRELIMINARY STATEMENT

Mrs. Pascale brought a wrongful death action against Chrysler arising from the death of her husband, Michael Pascale, who died after contracting mesothelioma caused by his exposure to asbestos as a result of working on the brakes of Chrysler and other automobiles. Mrs. Pascale's action is currently pending against Chrysler in the Superior Court of the State of California for the County of Los Angeles, Case No. BC345910, and is set for trial on June 15, 2009.

The Sale Order impermissibly enjoins asbestos personal injury claims (both current claims, such as those held by Mrs. Pascale and others, as well as all ***future*** claims) against the Purchaser without complying with Section 524(g) of the Bankruptcy Code. 11 U.S.C. § 524(g). Congress enacted a specific statutory regime for the adjustment of a debtor's personal injury liability arising out of exposure to asbestos. Under Section 524(g), a debtor may obtain relief from asbestos liability by following a road map drawn by Congress itself. Attempts by debtors to make an "end run" around the other requirements of the statute through the creative use of other provisions of the Bankruptcy Code have been struck down. *In re Combustion Eng'g, Inc.*, 391 F.3d 190 (3d Cir. 2005). Section 524(g) provides, under carefully regulated circumstances, for an injunction in favor of the debtor and certain others who contribute to a trust fund created for the benefit of asbestos victims, and is a notable exception to the general rule of bankruptcy law, incorporated in

another part of Section 524, namely Section 524(e), which prohibits the use of bankruptcy proceedings to release the liability of non-debtors by enjoining persons who do not hold a right to payment at the time of the filing of the bankruptcy petitions—*i.e.*, future asbestos claimants. Section 524(g) contains important safeguards, such as the appointment of a future claims representative to represent the interests of victims who may not yet know that they may eventually contract an asbestos disease, and the essential right that current claimants, including Mrs. Pascale, must assent to the barring of their claims with the waiver of the claimants' Seventh Amendment rights and their reassignment to a trust created for their benefit.

The bankruptcy court's Sale Order exceeds the subject matter jurisdiction of bankruptcy courts. A bankruptcy court does not possess jurisdiction to enjoin third party, non-debtor claims. Yet the Sale Order does just that and shields New Chrysler from asbestos-related personal injury liability outside of the exclusive procedure Congress proscribed under Section 524(g).

A stay is necessary from this Court to preserve Mrs. Pascale's rights. The stay imposed by the Second Circuit will expire tomorrow (June 8). Mrs. Pascale intends to file a petition for writ of certiorari promptly.[1] Without a stay, the sale of assets to New Chrysler will occur under the terms of the Sale Order and may moot a review by this Court.

[1] Ms. Pascale intends to file her petition for a writ of certiorari as soon as possible or within such time as set by the Court.

REASONS FOR GRANTING THE STAY

A Circuit Justice may grant an application for a stay if 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.)). As the discussion below demonstrates, each of these factors is present in this case.

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

The questions to be presented in Mrs. Pascale's forthcoming petition for writ of *certiorari* amply demonstrate a reasonable probability that the Court will grant the petition. As discussed below, the petition will raise important questions concerning the jurisdiction of a bankruptcy court to grant injunctive relief in favor of non-debtor parties. Moreover, it will show a possible conflict between different courts of appeals as to such jurisdiction and the application of Section 524(g) as the exclusive mechanism Congress prescribed for dealing with asbestos claims in bankruptcy. The petition for certiorari will also demonstrate that the process by which this dispute has come to be before this Court has been such a departure from the accepted and

usual course of judicial proceedings that the Court should exercise its supervisory power and grant certiorari to assure a meaningful review of the Sale Order.

A. This case presents important questions regarding the jurisdiction of a bankruptcy court to grant injunctive relief in favor of non-debtor parties.

The Sale Order's evisceration of Section 524(g), a lawful act of Congress codifying bankruptcy court jurisdiction to address asbestos claims, is a matter of broad national importance. Not only does the Sale Order immunize the transferred assets, it immunizes—through an injunction nowhere provided for in the Bankruptcy Code—the Purchaser of those assets, a non-debtor. This "end run" around the strict prerequisites for asbestos injunctions is buried in the fine print: the Purchaser assumes no liability for any "Product Liability Claims arising from the sale of Products or Inventory prior to the Closing (Master Transaction Agreement at p. 10, § 2.09(i) Excluded Liabilities). And then the Court in its Sale Order issues what is clearly an asbestos injunction, ordering that all persons and entities: are "forever barred, estopped and permanently enjoined from asserting [Product Liability Claims that are "Excluded Liabilities" among other Claims] against the Purchaser, its successors or assigns, its property or the Purchased Assets" (Sale Order at p. 28-29, ¶ 12).

The Sale Order allows the Debtor to jettison its present and future asbestos liability by transferring essentially all of its assets to a "clean" entity that will be protected from the taint of the Debtor's asbestos obligations

without any provision being made for a fund to compensate present and future asbestos claimants. In doing so, the Sale Order effectively—and impermissibly—discharges asbestos related personal injury claims without providing asbestos claimants the protections afforded them under Section 524(g). Regardless of the exigencies that may be present in this case, the due process protections and jurisdictional considerations underpinning Congress' enactment of Section 524(g) cannot be simply ignored.

Lacking subject matter jurisdiction to insulate New Chrysler from asbestos claimants, the Bankruptcy Court improperly relied on Section 105—which allows a bankruptcy court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of the [Bankruptcy Code]"—as its jurisdictional predicate. 11 U.S.C. § 105(a). Section 105, however, is not a jurisdictional trump card. "Any power that a judge enjoys under section 105(a) must derive ultimately from some other provision of the Bankruptcy Code." *In re Metromedia Fiber Network, Inc.*, 416 F.3d 136, 142 (2d Cir. 2005); *United States v. Pepperman*, 976 F.2d 123, 131 (3d Cir. 1992) (stating that section 105(a) does not create substantive rights that would otherwise be unavailable under the Bankruptcy Code). Section 105 is simply not an independent source of federal subject matter jurisdiction. Congress did not intend it as a passkey for bankruptcy courts to employ in opening whatever jurisdictional doors they may wish to open. *In re Johns-Manville Corp.*, 801 F.2d 60, 63 (2d Cir. 1986) (stating "[s]ection 105(a)

does not, however, broaden the bankruptcy court's jurisdiction, which must be established separately"). There is a reasonable probability, therefore, that the Court will consider this exceptionally important issue to be sufficiently meritorious to grant *certiorari.*

B. The decision of the Second Circuit in this case may be in conflict with the decision of the Third Circuit concerning the jurisdiction of bankruptcy courts to grant injunctive relief in favor of non-debtor parties.

The Second Circuit has not yet issued its opinion in this case, but its mandate recites that the Sale Order is being affirmed "for substantially the reasons stated in the opinions of Bankruptcy Judge Gonzalez, entered May 31, 2009." It is very possible therefore, that the opinion of the Second Circuit will be in direct conflict with the decision of the Third Circuit in *In re Combustion Engineering, Inc.*, 391 F.3d 190 (3d Cir. 2005).

In *Combustion Engineering*, the Third Circuit considered an appeal of a bankruptcy court order that sought to use Section 105(a) of the Bankruptcy Code to extend an asbestos channeling injunction to include third-party actions against non-debtors. The Third Circuit ultimately held that "§ 105(a) cannot be used to achieve a result not contemplated by the more specific provisions of § 524(g), which is the means Congress prescribed for channeling the asbestos liability of a non-debtor." *In re Combustion Eng'g, Inc.*, 391 F.3d at 237, n.50. However that is precisely what the Sale Order does here. (*See* further discussion in II.A below.)

Because the stay imposed by the Second Circuit will expire at 4:00 p.m. Monday, no opportunity will be afforded for the parties to consider the opinion of the Second Circuit in this case before it is too late to do anything about it. Given that the mandate of the Second Circuit indicated that the court was upholding the Sale Order for the reasons stated in the opinion of the bankruptcy judge, it is extremely probable that the decision of the Second Circuit will conflict with the Third Circuit's decision in *Combustion Engineering*. This Court should enter a stay to allow the Second Circuit to issue its opinion. If it does in fact adopt substantially the reasoning of the bankruptcy court (which it appears that it will), then a review by *certiorari* in this Court would be appropriate to resolve the conflict.

C. The judgment of the Second Circuit has so far departed from the accepted and usual course of judicial proceedings (and the Second Circuit's sanctioning of such a departure by the bankruptcy court) so as to call for the exercise of this Court's supervisory power.

Under Supreme Court Rule 10, the Court can grant *certiorari* when the decision of the court of appeals "has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power." Supreme Court Rule 10. Mrs. Pascale respectfully submits that this is such a case where the Court's supervisory power is greatly needed.

The Sale Order was entered by the bankruptcy court on June 1, 2009 – less than one week ago. The bankruptcy court certified the order for immediate appeal to the court of appeals the next day (skipping the usual

course of appellate review of bankruptcy orders in the district court), and the court of appeals required appellate briefs on one-day notice. Oral argument was heard in the court of appeals the next day and the court of appeals issued its decision within minutes.

The unprecedented speed of this proceeding is exceeded only by the unprecedented wrong that is being inflicted on so many different constituencies. Without intervention by this Court, the stay of the Sale Order will expire tomorrow and the rights of claimants such as Ms. Pascale will be lost forever. If the Sale Order is upheld without review by this Court, the integrity of the whole bankruptcy process will be seen as a sham.

Although this proceeding raises serious issues of great significance on a national level, there is no national security emergency or other reason for depriving individuals of their due process rights. A car company is selling assets. There is no justification for ignoring the rule of law just because either Chrysler or the U.S. government is involved. A stay by this Court, for the short time necessary for the Court to consider the significant jurisdictional and constitutional issues presented, will restore the integrity of the judicial process.

II. There Is A Fair Prospect That This Court Will Conclude The Decision Below Is Erroneous.

A. The Sale Order exceeds the bankruptcy court's jurisdiction under Section 524(g) and violates the due process rights of asbestos claimants.

In entering the Sale Order, the Bankruptcy Court used a provision of the Bankruptcy Code (Section 363(f)) designed for routine sales of assets that are unnecessary to a debtor's reorganization. In this case, however, the assets "sold" encompass the entire continuing business of the debtor and are transferred on terms that are designed to immunize both the transferred assets and the purchaser of those assets from the legitimate state-law claims of current and future asbestos claimants. The assets are transferred "free and clear of all Claims", an innocent looking provision that—along with others—improperly works a release of asbestos liability without the Congressionally-mandated creation of a fund to assure continuing compensation to victims of the insidious fiber. Even though New Chrysler arguably becomes the successor to Chrysler under applicable state law, a person who is not a present creditor of Chrysler, like future asbestos claimants, may be precluded from testing New Chrysler's successor liability.

There is only one means by which a debtor may relieve itself of future asbestos liability: submitting itself to the stringent requirements of Section 524(g). Indeed, the entire concept of the supplemental injunction provided for under Section 524(g) recognizes that future asbestos personal injury demands cannot be discharged as prepetition claims under the general discharge

provisions of the Bankruptcy Code—thus the need for a supplemental injunction.

Furthermore, statements by Congress during the consideration of Section 524(g) clearly indicate that Congress also did not consider future asbestos claims to be "claims" that could be discharged as pre-petition claims under the general discharge provisions of the Bankruptcy Code:

> It is the uncertainty of the number and amount of these future [asbestos] claims, and the need to implement a procedure that recognizes these future claimants as creditors under the U.S. Bankruptcy Code, that necessitates this amendment, as well as the need to provide some assurance that funds will be available to pay future claims. To those companies willing to submit to the stringent requirements in this section designed to ensure that the interests of asbestos claimants are protected, the bankruptcy courts' injunctive power will protect those debtors and certain third parties, such as their insurers, from future asbestos product litigation of the type which forced them into bankruptcy in the first place.

140 Cong. Rec. S222 (daily ed. April 20, 1994) (statement of Sen. Brown).

The inability of debtors to discharge their future asbestos liability was precisely why Congress enacted the supplemental injunction provided for in Section 524(g). If future asbestos claims could simply be cast aside as part of a sale under Section 363—which is effectively what the Debtors have done here—Section 524(g) would become superfluous. A court cannot interpret one section of the Bankruptcy Code in such a manner as to make another section superfluous. *In re Greystone III Joint Venture*, 995 F.2d 1274, 1278 (5th Cir. 1991) ("The broad interpretation of §1122(a) adopted by the lower courts

would render §1122(b) superfluous, a result that is anathema to elementary principles of statutory construction.").

The court below simply ignored Section 524(g) with the statement that it did not apply to a Section 363 asset sale, as if one could erase the specific statutory provision by use of a general bankruptcy provision designed for more routine use. Under the guise of a "sale" the court below has approved a reorganization of Chrysler's automotive business without making any provision—as Congress clearly intended there to be—for the orderly compensation of victims of asbestos disease. Under the rubric of a transfer of the entire business of Chrysler "free and clear of all Claims" (Sale Order at p. 26, ¶ 9), the Court improperly grants a release to the non-debtor New Chrysler not only of Mrs. Pascale's state law claim for the mesothelioma death of her husband but also of the eventual demands of unknown future claimants—something that might have been achievable under a proper use of Section 524(g) but which is manifestly impermissible without it.

Because Section 524(g) of the Bankruptcy Code provides the ***only*** mechanism by which a debtor's asbestos-related personal injury liabilities are to be managed in a Chapter 11 proceeding, the specific requirements of Section 524(g) cannot be circumvented by the creative use of other provisions of the Bankruptcy Code. Courts have consistently rejected attempts by parties to circumvent Section 524(g). For example, in *In re Combustion Engineering, Inc.*, 391 F.3d 190 (3d Cir. 2005), the Third Circuit considered

whether a court can use Section 105(a) of the Bankruptcy Code to extend an asbestos channeling injunction to include third-party actions against non-debtors. The Third Circuit rejected such argument and held Section 105(a) cannot be used to achieve a result not contemplated by Section 524(g). *In re Combustion Eng'g, Inc.*, 391 F.3d at 237, n.50.

In so holding, the Third Circuit stated as follows:

> Because § 524(g) expressly contemplates the inclusion of third parties' liability within the scope of a channeling injunction—***and sets out the specific requirements that must be met in order to permit inclusion***—the general powers of § 105(a) cannot be used to achieve a result not contemplated by the more specific provisions of § 524(g).[2]

Id. at 236-37 (emphasis added). In other words, third parties cannot be shielded from asbestos-related personal injury liability by any means other than pursuant to the requirements of Section 524(g).

Future asbestos claims against non-debtors such as New Chrysler may indeed be affected in a bankruptcy reorganization, but not without the carefully regulated protections set out by Congress in Section 524(g), such as

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[2] This holding is also consistent with "the well-settled maxim that specific statutory provisions prevail over more general provisions," and the Third Circuit cited to this maxim as support for its conclusion that "the explicit limitations and requirements set forth in § 524(g) preclude the use of § 105(a) to extend application of the trust/injunction mechanism to … [certain] non-debtors." *In re Combustion Eng'g*, 391 F.3d at 237, n.49 (citing *Varity Corp. v. Howe,* 516 U.S. 489, 511 (1996) (interpreting the "the specific governs the general" canon of statutory construction as "a warning against applying a general provision when doing so would undermine limitations created by a more specific provision"); *Sea Harvest Corp. v. Riviera Land Co.,* 868 F.2d 1077, 1080 (9th Cir. 1989) (Section 105(a) "does not empower courts to issue orders that defeat rather than carry out the explicit provisions of the Bankruptcy Code[.]"); 2 COLLIER ON BANKRUPTCY, ¶ 105.04 at 105-15 n.5; *In re Am. Hardwoods, Inc.,* 885 F.2d 621, 625-26 (9th Cir. 1989) ("[S]ection 105 does not authorize relief inconsistent with more specific law.")).

the creation of a compensating trust and approval of the claimants channeled to it. Ms. Pascale's claim and the demands of future asbestos disease victims against a non-debtor cannot otherwise be impaired. The Sale Order appealed from purports impermissibly to shield New Chrysler, a third party, from asbestos-related personal injury liability outside of the exclusive mechanism Congress prescribed for dealing with such claims, namely 11 U.S.C. § 524(g). As a result, there is a fair prospect that the Court will consider the decision below erroneous.

B. The Bankruptcy Court Erred In Authorizing The Debtors' Sale Of Substantially All Of Its Assets Free And Clear Of Claims And Interests Beyond The Scope Of 11 U.S.C. §363(f).

Section 363(f) of the Bankruptcy Code allows the sale, in certain circumstances, of property of a debtor-in-possession "free and clear of any interest in such property." 11 U.S.C. § 363(f). The Bankruptcy Code does not define "interest" and the Second Circuit has not determined what an "interest" in property is within the meaning of Section 363(f). *In re Lawrence United Corp.*, 221 B.R. 661, 668 (Bankr. N.D.N.Y. 1998). Moreover, courts in general "have not yet settled on a precise definition of the phrase 'interest in such property.'" *Id.* (quoting *In re Leckie Smokeless Coal Co.*, 99 F.3d 573, 581 (4th Cir. 1996)). Nonetheless, courts have found that Section 363(f) does not provide the bankruptcy court with the authority to sell a debtor's assets free and clear of general unsecured claims. *Volvo White Truck Corp. v.*

Chambersburg Beverage, Inc. (In re White Motor Credit Corp.), 75 B.R. 944, 948 (Bankr. N.D. Ohio 1987).

Courts have found that *in personam* claims are not included in the phrase "any interest in such property" as that phrase is used in Section 363(f):

> Section 363(f) does not authorize sales free and clear of *any interest*, but rather of *any interests in such property*. These three additional words define the real breadth of *any interests*. The sorts of interests impacted by a sale "free and clear" are *in rem* interests which have attached to the property. Section 363(f) is not intended to extinguish *in personam* claims. Were we to allow "any interests" to sweep up *in personam* claims as well, we would render the words "in such property" a nullity. No one can seriously argue that *in personam* claims have, of themselves, an *interest in such property.*

Fairchild Aircraft, Inc. v. Campbell (In re Fairchild Aircraft Corp.), 184 B.R. 910, 917-18 (Bankr. W.D. Tex. 1995), *vacated on other grounds,* 220 B.R. 909 (Bankr. W.D. Tex. 1998). Accordingly, a Section 363(f) sale can only be used to extinguish *in rem* interests such as liens, mortgages and other encumbrances held by secured creditors and cannot be used to cleanse the assets and absolve the purchaser of liability for current or future products liability claims. *Schwinn Cycling & Fitness, Inc. v. Benonis (In re Schwinn Bicycle Co.)*, 210 B.R. 747, 761 (Bankr. N.D. Ill. 1997) (holding that Section 363(f) "only protects the purchased assets from lien claims against those assets" and does not protect a buyer from current and future products liability claims).

Because holders of asbestos-related personal injury claims (and other tort claims) have *in personam* claims, the property cannot be sold free and clear of their claims, including successor liability claims. The Second Circuit has recently held that "a bankruptcy court only has jurisdiction to enjoin third-party, non-debtor claims that directly affect the *res* of the bankruptcy estate." *In re Johns-Manville Corp.*, 517 F.3d 52, 66 (2d Cir. 2008). The Court's statements in doing so are especially meaningful under the unprecedented and troubling circumstances surrounding the releases at issue here:

> A court's ability to provide finality to a third-party is defined by its jurisdiction, not its good intentions. We have previously recognized that "a nondebtor release is a device that lends itself to abuse. By it, a nondebtor can shield itself from liability to third parties. In form, it is a release; in effect, it may operate as a bankruptcy discharge arranged without a filing and without the safeguards of the Code."

Id. (quoting in part *In re Metromedia Fiber Network, Inc.*, 416 F.3d 136, 142 (2d Cir. 2005)).

In the case at bar, the present and future asbestos claims against New Chrysler stemming from the transfer of the Debtors' entire business to New Chrysler will not have any affect on the *res* of the Debtors' estate. The Debtors' attempt to effectuate the injunctive absolution of New Chrysler—a non-debtor purchaser—from the claims of present and future asbestos claimants—also non-debtors—arises in the context of the disposition of essentially all of the Debtors' assets pursuant to Section 363. Once the sale is

consummated, the assets no longer constitute any part of the *res* of the Debtors' bankruptcy estate and any nexus between the purchaser and the Debtor that could conceivably be grounds for such an unprecedented third-party, non-debtor injunction, is broken.

Nor does the fact that the contemplated sale depends on a release of New Chrysler create a sufficient nexus to the *res* of the Debtors' estate. In fact it is "'precisely this conditioning of financial participation by non-debtors on releases that is subject to the sort of abuse foreseen' in *Metromedia*." *In re Johns-Manville Corp.*, 517 F.3d at 66 (quoting in part *In re Karta Corp.*, 342 B.R. 45, 55 (S.D.N.Y. 2006)). The Second Circuit has articulated its concerns about parties' attempts to fabricate subject matter jurisdiction in order to fund a bankruptcy case:

> a debtor could create subject matter jurisdiction over any non-debtor third-party by structuring a plan in such a way that it depended upon third-party contributions. As we have made clear, subject matter jurisdiction cannot be conferred by consent of the parties. Where a court lacks subject matter jurisdiction over a dispute, the parties cannot create it by agreement even in a plan of reorganization.

Id. at 66. The Debtors' attempt to contrive subject matter jurisdiction by predicating a sale of its assets on a release of its asbestos liability is exactly the type of behavior the Second Circuit was concerned about in *Johns-Manville*.

The Bankruptcy Court's reliance on *In re White Motor Credit Corp.* and *Rubinstein v. Alaska Pacific Consortium (In re New England Fish Co.)*,

19 B.R. 323 (Bankr. W.D. Wash. 1982) for the proposition that Section 363(f) authorizes the sale of the Debtors' assets free and clear of asbestos-related personal injury claims (and other tort claims) is misplaced (*See* Opinion at p. 42-43). While both of the cases cited allowed the sales to proceed free and clear of the liabilities at issue in those cases, the courts in *In re White Motor Credit Corp.* and *In re New England Fish Co.* did not rely on Section 363(f) to support the sales.

In fact, the bankruptcy court in *In re White Motor Credit Corp.* specifically stated that Section 363(f) was "inapplicable to sales free and clear of" general unsecured tort claims because such claims "have no specific interest in a debtor's property." *In re White Motor Credit Corp.*, 75 B.R at 948; *accord In re New England Fish Co.*, 19 B.R. at 326 (General unsecured creditors of the estate "do not have an interest in the specific property being sold … which is contemplated by [Section] 363(f)"). The bankruptcy court in *In re White Motor Credit Corp.* specifically relied on the discharge provisions of the Bankruptcy Code, to determine that the creditor's rights against the debtor's assets did not survive. *In re White Motor Credit Corp.*, 75 B.R. at 948-49. It was a plan that affected the creditor, not a Section 363 sale.

Therefore, *In re White Motor Credit Corp.* does not support the erroneous assertion that the sale of the Debtors' assets could be conducted free and clear of asbestos-related personal injury claims. Such claims are not "interests in such property" that can be extinguished by way of a Section

363(f) sale because such claims are general unsecured claims to which no specific property interest attaches. *In re White Motor Credit Corp.*, 75 B.R. at 948; *In re New England Fish Co.*, 19 B.R. at 326; *In re Hutchinson*, 5 F.3d 750, 756 n. 4 (4th Cir. 1993); *In re Wolverine Radio Co.*, 930 F.2d 1132, 1147 n. 23 (6th Cir. 1991) (citing *In re White Motor Credit Corp.* with approval).

Consequently, Section 363(f) does not provide a bankruptcy court with authority to find that the Sale Transaction "shall not impose or result in the imposition of any liability or responsibility on Purchaser for any Claims, including, without limitation for any successor liability or any products liability for the sale of any vehicles by the Debtors for their predecessors or affiliates" (Sale Order at p. 18, ¶ Z). Accordingly, the entry of the Sale Order by the bankruptcy court was erroneous, and it is more than likely that this Court will so conclude.

C. The Bankruptcy Court Erred in Approving a Sale Transaction that was in Fact a *Sub Rosa* Plan of Reorganization.

A sale of a debtor's assets under 11 U.S.C. § 363 should not be approved if the terms of that sale constitute a *sub rosa* plan of reorganization.

> Under section 363(b) of the Code, "[t]he trustee, after notice and a hearing may use, sell, or lease, other than in the ordinary course of business, property of the estate." The trustee is prohibited from such use, sale or lease if it would amount to a *sub rosa* plan of reorganization. The reason *sub rosa* plans are prohibited is based on a fear that a debtor-in-possession will enter into transactions that will, in effect, "short circuit the requirements of [C]hapter 11 for confirmation of a reorganization plan."

In re Iridium Operating LLC, 478 F.3d 452, 466 (2d Cir. 2007) (citations omitted).

Restructuring of the rights of a debtor's creditors is outside the scope of Section 363. A transaction characterized as a sale of estate property pursuant to Section 363 should not be approved if the transaction has "the practical effect of dictating some of the terms of any future reorganization plan." *In re Braniff Airways, Inc.*, 700 F.2d 935, 940 (5th Cir. 1983). As the Fifth Circuit noted in *Braniff*, reorganization of the debtor requires that the parties and court comply with the requirements of Chapter 11, including those of disclosure, voting, meeting the best interests of creditors test and complying with the absolute priority rule. *Id.*

The District Court of the Southern District of New York agrees:

> Indeed, it is well established that section 363(b) is not to be utilized as a means of avoiding Chapter 11's plan confirmation procedures. Where it is clear from the terms of a section 363(b) sale would preempt or dictate the terms of a Chapter 11 plan, the proposed sale is beyond the scope of section 363(b) and should not be approved under that section.

In re Westpoint Stevens, Inc., 333 B.R. 30, 52 (S.D.N.Y. 2005). The district court in *Westpoint Stevens* found that the Section 363 sale at issue there impaired the claim satisfaction rights of objecting creditors and was an effort to overcome anticipated objections to an attempt to cram down an equity based plan. The court rejected such an attempted use of Sections 363(b) and 105. *Id.* at 54.

The Bankruptcy Court here approved what the Debtors characterize as a "sale transaction" with Fiat and New Chrysler. However, as with the transactions found to be impermissible *sub rosa* plans in *Braniff* and *Westpoint Stevens*, the Sale Transaction is much more than a "sale": it not only restructures the rights of creditors, it is an integral part of a larger plan that includes granting releases to such obvious non-debtors as Daimler and Chrysler Holding LLC.

For example, as previously noted, asbestos personal injury claimants and other tort claimants would purportedly be enjoined from asserting state-created successor liability claims against New Chrysler. Although Chapter 11 provides a means for altering objecting creditors' rights, that alteration must occur through the plan confirmation process, not pursuant to a Section 363 sale. *See Westpoint Stevens*, 333 B.R. at 34. Creditors' rights are not marginal issues in bankruptcy cases: they are the very essence of the equitable system of reorganizing one's obligations. To ride roughshod over statutory creditor rights of participation in voting on a plan of reorganization is to be unfaithful to equity in the name of expediency. In entering the Sale Order, the Bankruptcy Court not only altered objecting creditors' rights outside of the plan confirmation process, it short-circuited those creditors' rights, and ultimately rendered them entirely illusory.

A condition of the purported "sale" is two releases given in favor of various non-Debtors, including Chrysler Holding LLC and Daimler among

others. These releases, relating to prepetition claims of mismanagement among other things, give the lie to the suggestion that the Sale Transaction is the mere disposition of estate assets. It is rather a comprehensive restructuring of the Debtors' businesses and a resolution of its causes of actions against potential non-debtor defendants. One searches in vain for authority for this sort of third party release under the "sale" provisions of the Bankruptcy Code. If any such global restructuring and resolution is to be attempted, Congress intended that it be done pursuant to a plan of reorganization properly disclosed to creditors and approved by them.

A clearer case of a *sub rosa* reorganization is hard to imagine, for in this case, the Bankruptcy Court has specifically stated that its Sale Order will govern, and that any subsequent plan of reorganization will be wholly restrained by its terms. The Sale Order expressly provides:

> Nothing contained in any chapter 11 plan confirmed in these bankruptcy cases or the order confirming any such chapter 11 plan shall conflict or derogate from the provisions Purchase Agreement or this Sale Order, and to the extent of any conflict or derogation between this Sale Order or the Purchase Agreement and such future plan or order, the terms of this Sale Order and the Purchase Agreement shall control to the extent of such conflict or derogation.

(Sale Order at p. 26, ¶ 7).

The Purchase Agreement and Sale Order plainly preempt and dictate the terms of any plan of reorganization in these bankruptcy cases. The Bankruptcy Court erred in approving a *sub rosa* plan of reorganization by entering the Sale Order.

III. There Is Likelihood That Irreparable Harm Will Result From A Denial Of A Stay.

On appeal, a sale order of a bankruptcy court is limited by 11 U.S.C. § 363(m) to the issue of whether the property was sold to a good faith purchaser. Although Section 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)).

Absent a stay from this Court, the sale of Chrysler will go through Monday at 4 p.m. Moreover, the impermissible injunctive relief in the Sale Order will become effective. Even if this Court should grant certiorari to review the Sale Order, without a stay the Purchaser will close the transaction and argue that the sale, including the impermissible injunctive relief granted as part of the sale consideration, can not be affected by any subsequent decision of this Court. 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.

Moreover, in weighing the harm that will ensue from this erroneous ruling, the Court must be mindful of the rights of future asbestos claimants, whose rights are specifically protected by the provisions of Section 524(g), but whose claims are being extinguished by the unlawful provisions of the Sale Order. No representative of the future claimants has been appointed as required by Section 524(g), so their voice is silent – as Chrysler and the Purchaser designed their transaction. But their voice will be forever silent under the terms of the Sale Order. Although it has been suggested persons incurring asbestos related injuries in the future can collaterally attack the injunctive relief granted under the Sale Order, such an attack would be significantly impeded by the Sale Order, perhaps to the point that the difficulty in mounting such a collateral attack would effectively eliminate the ability to do so.

CONCLUSION

In order to preserve the status quo and allow for a meaningful appellate review the Court should grant the stay. The Court can grant such relief without harming Chrysler's reorganization effort by implementing a reasonable schedule for filing of petitions for *certiorari* and review of such petitions, which will also enable Chrysler to attempt to negotiate a possible resolution while the review is pending.

For the reasons stated herein, the Court should grant a stay pending the filing of a petition for *certiorari* for review of the Second Circuit's decision in this case and the Court's final consideration of such petition.

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