IN THE SUPREME COURT OF THE UNITED STATES

No. 08A1096

INDIANA STATE POLICE PENSION TRUST, ET AL., APPLICANTS

v.

CHRYSLER LLC, ET AL.

ON APPLICATION FOR STAY

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The Solicitor General, on behalf of the United States of America, respectfully submits this memorandum in opposition to the application for a stay submitted by the Indiana Funds.

STATEMENT

1. On April 30, 2009, Chrysler LLC and 24 of its subsidiaries (collectively, Chrysler or Debtors), faced with sharply reduced consumer demand, severe operating losses, and a lack of access to credit, filed for Chapter 11 bankruptcy protection. Before filing for bankruptcy, Chrysler exhaustively pursued all other options, including a possible sale, possible joint ventures, and possible new financing. Only the United States Department of the Treasury, Export Development Canada, and Fiat S.p.A. (Fiat) proved willing to ally themselves with Chrysler.

a. Both before and after Chrysler filed for bankruptcy, the Treasury Department committed billions of dollars in federal financing to Chrysler through the Troubled Assets Relief Program

(TARP), thereby staving off an immediate, value-destroying liquidation. TARP is an economic-stabilization measure authorized by Congress in the Emergency Economic Stabilization Act of 2008 (EESA), Pub. L. No. 110-343, 122 Stat. 3765 (to be codified at 12 U.S.C. 5201 et seq.). Congress enacted EESA to "provide authority and facilities that the Secretary of the Treasury can use to restore liquidity and stability to the financial system of the United States." 12 U.S.C.A. 5201(1) (West Supp. 2009). To accomplish this purpose, EESA authorizes the Secretary to purchase "troubled assets from any financial institution, on such terms and conditions as are determined by the Secretary." 12 U.S.C.A. 5211 (West Supp. 2009).

EESA defines the term "financial institution" to mean "any institution, including, but not limited to, any bank, savings association, credit union, security broker or dealer, or insurance company, established and regulated under the laws of the United States or any State * * * , and having significant operations in the United States, but excluding any central bank of, or institution owned by, a foreign government." 12 U.S.C.A. 5202(5) (West Supp. 2009). The "troubled assets" eligible for purchase under TARP include mortgages, securities related to mortgages, and "any other financial instrument that the Secretary, after consultation with the Chairman of the Board of Governors of the Federal Reserve System, determines the purchase of which is necessary to promote financial market stability." 12 U.S.C.A. 5202(9) (West Supp. 2009). When the Secretary determines that the purchase of particular assets under TARP is appropriate, he must transmit that determination, "in writing, to the appropriate committees of Congress." Ibid. EESA also directs the Secretary to "publish program guidelines" that address, inter alia, the "[c]riteria for identifying troubled assets for purchase" under TARP. 12 U.S.C.A. 5211(d)(4) (West Supp. 2009).

Pursuant to this authority, the Treasury Department has determined that TARP funds may be used to purchase assets from automobile companies when necessary to prevent those companies' failure or major disruption from disrupting the stability of the Nation's economy and financial markets. See U.S. Dep't of the Treasury, Guidelines for Automotive Industry Financing Program <http://www.financialstability.gov/docs/AIFP/AIFP_guidelines.pdf>. Consistent with those guidelines, the Secretary has transmitted to Congress a written determination that the debt obligations and equity of certain automotive companies qualify as "troubled assets" and that such companies qualify as "financial institutions" within the meaning of EESA. Appl. App. 93a-94a.

b. Before it entered bankruptcy, Chrysler sought and received two loans from TARP funds, totaling more than $4 billion, which it used as working capital to meet its obligations to warranty holders, suppliers, and bondholders (including applicants here).

In reviewing Chrysler's request for the second loan, the United States determined that Chrysler was no longer viable as a stand-alone company, and it required as a condition for further loans that Chrysler form a strategic partnership with an appropriate partner by a date certain.

On April 30, 2009, Chrysler reached a tentative agreement with nearly all of its stakeholders on the terms of a transaction to form such a partnership with Fiat. Chrysler agreed to sell substantially all of its assets to New Carco Acquisition Ltd. (New Chrysler), in exchange for which New Chrysler would assume certain liabilities of Chrysler and pay Chrysler $2 billion in cash. Fiat would contribute access to production platforms, technology, and distribution capabilities to New Chrysler in exchange for a 20% stake. The terms of the agreement set June 15, 2009, as the deadline for the transaction to close; after that date, Fiat has the option to withdraw from the agreement and abandon the transaction.

Meanwhile, Chrysler was unable to satisfy the Treasury Department's conditions for continued funding as a going concern. Accordingly, on April 30, Chrysler and 24 of its subsidiaries decided to file for Chapter 11 bankruptcy in the United States Bankruptcy Court for the Southern District of New York. Debtors continued to operate their businesses as debtors-in-possession.

2. Pursuant to 11 U.S.C. 363, Debtors moved the bankruptcy court for permission to consummate the sale to New Chrysler. See 11 U.S.C. 363(b)(1) (debtor-in-possession, "after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the [bankruptcy] estate"); see also 11 U.S.C. 1107(a). Applicants filed an objection to the sale. Applicants are state-employee investment funds that hold less than 1% of Chrysler's first-priority secured debt.[1]

If the sale is consummated, applicants' security interest will transfer to the cash that Chrysler acquires in the transaction. The entirety of the purchase price will ultimately be used to pay the claims of applicants and their fellow holders of first-priority debt. The $2 billion purchase price represents approximately 29% of Chrysler's first-lien debt. App., infra, 11, 20.

3. Following a three-day evidentiary hearing, the bankruptcy court overruled applicants' objection and approved the sale. The court entered an order approving the sale (Appl. App. 19a-67a) and an accompanying opinion (App., infra, 1-47).

a. The bankruptcy court concluded that the sale was amply justified by the grave situation Chrysler is facing. The court

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[1] As of the date it filed for bankruptcy, Chrysler owed approximately $6.9 billion to creditors under an Amended and Restated First Lien Credit Agreement. The creditors have a security interest in, and a first lien on, substantially all of Chrysler's assets. Applicants hold approximately $42 million of this first-priority secured debt. App., infra, 11.

explained that, "[n]otwithstanding the highly publicized and extensive efforts that have been expended in the last two years to seek various alliances for Chrysler, the Fiat Transaction is the only option that is currently viable. The only other alternative is the immediate liquidation of the company." App., infra, 16-17 (emphasis added). The court further concluded that the transaction is a superior alternative to liquidation because it permits New Chrysler to preserve the value of many of Chrysler's assets as a going concern, and the $2 billion on offer "certainly exceeds the liquidation value," which is at most $800 million. Id. at 17; see id. at 18-19.

The bankruptcy court acknowledged that a bankruptcy estate's sale of assets cannot be approved if the sale "would amount to a sub rosa plan of reorganization." App., infra, 16. The court found no such subversion of the requirements of Chapter 11 here, however, because the significant and ongoing depreciation of Chrysler's assets made it crucial to conduct the sale in time to preserve the going-concern value of many of those assets. Ibid. The court further observed that "[t]he Debtors are receiving fair value for the assets being sold," and that "[n]ot one penny of the Debtors' assets is going to anyone other than the First-Lien Lenders," id. at 18, who include the applicants here, see note 1, supra.

Although consent by lienholders (or the satisfaction of other statutory conditions not relevant here, see 11 U.S.C. 363(f)) is required to sell the assets free and clear of any security interests, the bankruptcy court concluded that applicants and their fellow first-tier secured creditors had provided the required consent. All holders of the first-tier debt had irrevocably agreed to allow their authorized agent to release the collateral based on the majority vote of the creditors. Because 92.5% of the creditors in applicants' position had agreed to the transaction, the authorized agent gave its consent and released the collateral. App., infra, 24-30.

b. In a separate opinion, the bankruptcy court rejected applicants' challenge to the use of TARP funds for the transaction. Appl. App. 8a-13a. Applicants contended that Chrysler is not a "financial institution" within the meaning of EESA and that the use of TARP funds to acquire Chrysler's assets is therefore unlawful. The court did not reach the merits of that argument because it concluded that applicants lacked standing to challenge the use of Treasury funds to purchase the assets in question.

The bankruptcy court found for two reasons that applicants had not established injury in fact. The court first explained that applicants were bound by their authorized agent's decision to release the collateral (see p. 7, supra) and could not claim injury from that decision. See Appl. App. 12a. The court also relied on its factual finding, made in the separate opinion authorizing the sale, that the collateral at issue is worth no more than the $2 billion sale price. See ibid. For that reason, the court concluded, applicants will receive at least as much under the sale as they would under a liquidation and therefore have not suffered injury in fact. See ibid.

The court further held that, even if applicants could establish injury in fact, they could not show that their injury was "fairly traceable to the U.S. Treasury's use of TARP funds." Appl. App. 12a. The court explained that, "[i]f a non-governmental entity were providing the funding in this case, the [applicants] would be alleging the same injury, i.e., interference with their collateral. In this light, it is not the actions of the lender that the [applicants] are challenging but rather the transaction itself." Ibid.

c. Although the Bankruptcy Rules generally provide for a stay of ten days before an order authorizing a sale or assignment takes effect, Fed. R. Bankr. P. 6004(h), 6006(d), the bankruptcy court concluded that a ten-day stay was not justified given the time-sensitive nature of the Chrysler sale and the $100 million per day being lost each day that Chrysler remains in bankruptcy. Accordingly, the bankruptcy court declined to stay its order beyond noon on June 5. Appl. App. 66a-67a & n.4.

Pursuant to 28 U.S.C. 158(d) and with the agreement of the parties, the bankruptcy court certified its order to permit appeal directly to the court of appeals. Appl. App. 70a-71a. On June 2, the court of appeals accepted the appeal, id. at 73a, and issued a highly expedited schedule for briefing and argument, id. at 72a. In issuing that schedule, the court of appeals granted applicants' motion for a continued stay pending the court's consideration of the case. Ibid.

4. On Friday, June 5, the court of appeals affirmed the judgment of the bankruptcy court "for substantially the reasons stated in the opinions of Bankruptcy Judge Gonzalez." Appl. App. 74a. The court indicated that an opinion or opinions will follow. Ibid. The court of appeals has continued its temporary stay of the bankruptcy court's order until 4:00 p.m. on Monday, June 8, or this Court's denial of a further stay, whichever is earlier. Ibid.

ARGUMENT

"Denial of [an] in-chambers stay application[] is the norm; relief is granted only in 'extraordinary cases.'" Conkright v. Frommert, 129 S. Ct. 1861, 1861 (2009) (Ginsburg, J., in chambers) (quoting Rostker v. Goldberg, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers)). To justify such relief, applicants must show, at a minimum, "(1) 'a "reasonable probability" that four Justices will consider the issue sufficiently meritorious to grant certiorari * * * ; (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.'" Id. at 1861-1862 (quoting Rostker, 448 U.S. at 1308) (brackets in original); accord, e.g., Stroup v. Willcox, 549 U.S. 1501, 1501 (2006) (Roberts, C.J., in chambers); Barnes v. E-Systems, Inc. Group Hosp. Med. & Surgical Ins. Plan, 501 U.S. 1301, 1302 (1991) (Scalia, J., in chambers). Even if applicants could satisfy those prerequisites, they would not necessarily be entitled to the relief they seek. Rather, "in a close case it may be appropriate to 'balance the equities' -- to explore the relative harms to applicant[s] and respondent[s], as well as the interests of the public at large." Conkright, 129 S. Ct. at 1862 (quoting Rostker, 448 U.S. at 1308).

In this case, applicants can satisfy none of the Court's requirements for an in-chambers stay, and the balance of the equities weighs heavily against the entry of such relief. Applicants oppose the sale because, if the sale is consummated, they will likely receive approximately 29% of the value of their secured liens. On the merits, applicants contend that the Treasury Department's use of TARP funds to finance the sale is unlawful because Chrysler is not a "financial institution" within the meaning of EESA, and that the sale itself is invalid as a sub rosa reorganization plan.

The bankruptcy court specifically found, however, that (a) as a practical matter, the sale that it approved is the only feasible alternative to liquidation of Chrysler's assets, and (b) applicants and other first-lien creditors would receive no more under a liquidation than the $2 billion that the sale will produce. Those findings were central both to the court's determination that applicants lack standing to challenge the use of TARP funds and to the court's ultimate decision to approve the sale. Applicants make no meaningful effort to show that either of those findings is wrong, much less to demonstrate that review of those findings is an appropriate use of this Court's resources. The application for a stay should therefore be denied.

1. Neither of applicants' challenges to the court of appeals' ruling satisfies this Court's criteria for certiorari review. First, applicants' challenge to the use of TARP funds is not properly before the Court because (as both courts below appear to have concluded) applicants lack standing to raise it.[2] Applicants offer only passing references to the bankruptcy court's resolution of the standing issue, and they do not contend that the question of standing itself warrants this Court's review. Second, applicants' challenge to the bankruptcy court's approval of the

[2] Given that the court of appeals affirmed the bankruptcy court "for substantially the reasons stated in the opinions of Bankruptcy Judge Gonzalez," Appl. App. 74a, the Second Circuit appears to have agreed with the bankruptcy court that applicants lack standing to raise their EESA challenge.

sale rests on the premise that the facts of this case are not as the bankruptcy court found them. The bankruptcy court applied settled law to the trial record, and the court of appeals' affirmance of that decision does not conflict with any decision of this Court or another court of appeals. There is accordingly no basis for further review or for an interim stay.

a. Applicants cannot show a reasonable likelihood that four Members of this Court will vote to review their claim regarding the automobile industry's eligibility for TARP funds. Applicants do not even address the settled standing principles on which the courts below relied to dismiss their EESA challenge. Instead, applicants simply assert that the bankruptcy court resolved the standing issue "incorrectly," Appl. 2, and then proceed to discuss the merits of the EESA question. Applicants contend that the question whether Chrysler is an EESA "financial institution" warrants this Court's review, see Appl. 14-16, 22-23, even though that issue has not yet been addressed by any court in this or any other litigation.

This Court has often cautioned that it is a tribunal "of final review, 'not of first view.'" FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800, 1819 (2009) (quoting Cutter v. Wilkinson, 544 U.S. 709, 718 n.7 (2005)). Accordingly, its "usual procedures" counsel against a "rush to judgment without a lower court opinion." Ibid. There is no reasonable likelihood that four Justices would vote to grant review of a question of statutory construction that was not passed on by either court below. That is particularly so here, where the courts below did not decide the interpretive question because they concluded that applicants lack standing. If that holding is correct, then no federal court has jurisdiction to decide the merits of applicants' EESA challenge, even if the proper interpretation of 12 U.S.C.A. 5202(5) (West Supp. 2009) (EESA's definition of "financial institution") otherwise would warrant this Court's review.

Applicants do not challenge the bankruptcy court's legal analysis of the standing question. They briefly suggest in their statement of facts (Appl. 10) that one of the bankruptcy court's three alternative rationales for concluding that applicants lack standing rested on an incorrect factual finding. But this Court generally does not disturb "concurrent findings of fact by two courts below"; it departs from that practice only when presented with a "very obvious and exceptional showing of error," which applicants have not shown. Exxon Co., U.S.A. v. Sofec, Inc., 517 U.S. 830, 841 (1996) (quoting Graver Tank & Mfg. Co. v. Linde Air Products Co., 336 U.S. 271, 275 (1949)). And applicants do not question the bankruptcy court's other rationales for finding no injury in fact -- including the highly fact-specific conclusion that applicants gave their agent the irrevocable authority to consent to the release of their collateral. See Appl. App. 11a-12a; see also App., infra, 24-30 (explaining applicants' consent).

Even if applicants had established standing to challenge the Treasury Department's use of TARP funds to acquire Chrysler's assets, there is no reasonable likelihood that this Court would grant review to decide applicants' EESA claim. The relevant EESA provision was enacted only eight months ago and has not yet been construed by any federal court, including the courts below.

b. The bankruptcy court's approval of the sale, affirmed by the Second Circuit, does not conflict with any decision of this Court or another court of appeals. Nor have applicants identified any other basis for concluding that this Court will grant certiorari to review the highly fact-specific holdings below.

Applicants principally contend (Appl. 17-18) that the bankruptcy court employed "shifting valuation methodologies" and that the choice of valuation method conflicts with this Court's decision in Associates Commercial Corp. v. Rash, 520 U.S. 953 (1997). Applicants' premise is flawed, and their reliance on Rash is misplaced. The bankruptcy court correctly explained that a purchaser that will operate Chrysler's assets places a greater value on them than those same assets would fetch at liquidation. App., infra, 18-19. The liquidation value, by the time of the hearing, had decreased to at most $800 million. Id. at 19. By contrast, the value of the assets in the context of this sale has been measured by the market, through bidding procedures already determined to be fair and adequate to attract the highest and best offer available. See id. at 38-39. That value is the $2 billion that New Chrysler is paying. Id. at 18-19.

The Court in Rash addressed a question not presented here -- how to value collateral that the debtor does not plan to sell, but rather intends to keep and continue to use. Precisely because the collateral in the Rash scenario is not being sold on the market (or surrendered to a creditor who will sell it), the Bankruptcy Code requires use of a valuation method that measures the economic benefit of leaving the collateral in the debtor’s hands. See 520 U.S. at 962-963. Here, by contrast, the value of the assets has been measured by the price a purchaser will pay to acquire and operate the assets.

Applicants’ attempts to establish a circuit conflict concerning the concept of a “sub rosa” reorganization plan (Appl. 18-20) are similarly unavailing. The bankruptcy court extensively discussed that issue in its opinion, see App., infra, 16, 18-24, and concluded that on these facts applicants had not shown an impermissible attempt to implement a sub rosa plan.[3] As the court recognized, the Second Circuit has held that a bankruptcy court may

[3] Applicants address (Appl. 19) only the bankruptcy court’s discussion of sub rosa plans in its order. Applicants disregard the court’s more extensive analysis of that issue in its opinion, App., infra, 16, 18-24, which is expressly incorporated into the order, see Appl. App. 42a.

deny permission to conduct a transaction if it “would amount to a sub rosa plan of reorganization.” Id. at 16 (quoting Motorola, Inc. v. Official Comm. of Unsecured Creditors (In re Iridium Operating LLC), 478 F.3d 452, 466 (2d Cir. 2007)). Indeed, the Second Circuit has expressly agreed with applicants’ leading case on the point. Motorola, 478 F.3d at 466 (citing PBGC v. Braniff Airways, Inc. (In re Braniff Airways, Inc.), 700 F.2d 935, 940 (5th Cir. 1983)). But the facts of the sale here do not amount to a sub rosa reorganization plan. Unlike in Braniff, for example, there is no attempt to dictate how the sale proceeds will be used in a contemplated reorganization or how the creditors will vote on a future reorganization plan. See Braniff, 700 F.2d at 940.

Applicants’ reliance (Appl. 19) on In re Abbotts Dairies of Pa., Inc., 788 F.2d 143 (3d Cir. 1986), is similarly misplaced. The Third Circuit held in that case that “when a bankruptcy court authorizes a sale of assets pursuant to [11 U.S.C.] 363(b)(1), it is required to make a finding with respect to the ‘good faith’ of the purchaser.” Id. at 149-150. Here, the bankruptcy court made an express finding of good faith by New Chrysler. See Appl. App. 63a; App., infra, 34-37. Applicants disputed that finding extensively on appeal, Appl. C.A. Br. 69-75, and the court of appeals affirmed. As the court in Abbotts Dairies noted, such a finding helps to “ensure[] that section 363(b)(1) will not be employed to circumvent the creditor protections of Chapter 11,” which has its own good-faith requirement. 788 F.2d at 150. The making and affirmance of a good-faith finding here further refutes applicants' challenge to the sale.

c. Applicants are left with the contention (Appl. 12-14, 20-21) that this Court should grant review because the Chrysler bankruptcy is of national importance. As an economic matter, that is true, and blocking the transaction would undoubtedly have grave consequences. See pp. 23-25, infra. But even in the largest bankruptcy proceedings, this Court applies its traditional criteria to determine whether a particular legal issue is appropriate for plenary review. Here, the bankruptcy court carefully considered the trial record, entered detailed factual findings, and applied settled law to those facts. Applicants' fact-specific challenges do not satisfy the Court's established certiorari criteria. See Sup. Ct. R. 10.

2. Applicants have similarly failed to establish the requisite "fair prospect" that this Court would reverse the judgment of the court of appeals.

a. As noted above, applicants make no effort to rebut the lower courts' conclusion that they lack standing to bring their EESA challenge. Applicants can hardly claim a likelihood of success on the merits of that claim without showing that the Court has jurisdiction to reach the merits. In any event, although applicants contend that the government has "read out the word 'financial'" from the term "financial institution," Appl. 22-23, they do not discuss EESA's definition of the term "financial institution" (or even acknowledge that "financial institution" is a defined term under the statute). The applicable definition encompasses "any institution, including, but not limited to, any bank, savings association, credit union, security broker or dealer, or insurance company," that is "established and regulated under the laws of the United States or any State" and that "ha[s] significant operations in the United States." 12 U.S.C.A. 5202(5) (West Supp. 2009) (emphases added). Where Congress expressly defines a term, courts do not parse the individual words that make up the term; they look to the statutory definition. See, e.g., Burgess v. United States, 128 S. Ct. 1572, 1577 (2008). And, to the extent that the statutory definition is ambiguous, the interpretation of that provision adopted by the Treasury Department -- the federal agency entrusted by Congress with administration of EESA -- is entitled to judicial deference.

b. Applicants have also failed to demonstrate any reason to believe that this Court would reverse the determination of the courts below that the challenged sale is not a sub rosa reorganization plan. Applicants' contentions are in substance an attack on the bankruptcy court's findings of fact, and as discussed above, this Court will not set aside the considered and reasonable factual findings of a trial court once they have been affirmed by the court of appeals. See p. 13, <u>supra</u>.

3. Further, applicants cannot show that a stay is warranted to prevent irreparable injury to themselves. To be sure, consummation of the sale would likely result in applicants receiving considerably less (approximately 29%) than the full amount of their secured claims. As explained above, however, the bankruptcy court found that the challenged sale is the only feasible alternative to liquidation, and that applicants would receive no more under a liquidation than they will receive if the sale goes forward. Absent a persuasive reason to believe that one or both of those findings is erroneous -- and applicants offer none -- a stay would not alleviate the injury that applicants have identified.

Applicants principally challenge Chrysler's sale of the collateral, in which applicants currently have a security interest, for $2 billion in cash, which will be used to satisfy the same debt that the collateral secured. App., <u>infra</u>, 20 ("[T]he security interest of the First-Lien Lenders [including applicants] will attach to the sale proceeds and there will be an immediate and indefeasible distribution of all of the $2 billion dollar sale price to the First-Lien Lenders, who are owed $6.9 billion."). If the sale does not occur, the bankruptcy court found, "[t]he only other alternative is the immediate liquidation of the company." <u>Id.</u> at 17; see also <u>id.</u> at 18 n.15 (finding that a purported third option hypothesized by applicants was “simply not a viable option”). That liquidation, the court further found, will result in at most $800 million. Id. at 19.

Accordingly, there is no need to speculate about what applicants’ security interest in Chrysler’s assets would be worth in the future. If the sale to New Chrysler does not take place, Chrysler will be liquidated. Applicants will receive a pro rata share of the liquidation value, which is substantially less than the $2 billion purchase price. See App., infra, 19.[4] Although applicants’ anticipated receipt of 29% of the full value of their secured claims may constitute an injury, that injury results from the severe diminution in value of Chrysler’s assets serving as collateral; it is not attributable to the impending sale, and a stay would not prevent it from occurring.

Applicants contend that the bankruptcy court’s valuation findings are wrong or biased. Appl. 9 & n.3. But at the hearing, applicants put on no expert evidence of valuation. Their unsupported assertion that the assets to be sold are actually worth $20 to $30 billion as a going concern (Appl. 9) is amply refuted not

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[4] Applicants suggest (Appl. 27) that the treatment of the unsecured portion of their claims against Chrysler will somehow constitute injury. But because the collateral is not worth enough to satisfy all first-priority secured claims, some portion will necessarily be unsecured, regardless whether the sale proceeds or Chrysler is liquidated.

only by the expert evidence on which the bankruptcy court relied,[5] App., infra, 19, but by the purchase price set in a bidding process that the court specifically found was fair, open, and calculated to bring the highest and best offer, id. at 38-39.

Applicants also contend (Appl. 25-27) that, because consummation of the sale will preclude continued challenges to it and thereby moot the case, they will necessarily suffer irreparable injury if a stay is denied. But because applicants have no meaningful prospect of reaping a tangible benefit if the sale is disapproved, they will suffer no practical harm if their objections are rendered moot. Moreover, unless this Court is prepared to grant certiorari and to decide the case on the merits by June 15, entry of the stay could itself have the effect of preventing the sale from going forward, since after June 15 Fiat will be legally entitled to withdraw from the agreement. See pp. 22-24, infra. The stay might therefore have the practical effect of granting applicants all the relief they seek in this case -- a particularly inequitable result where both the bankruptcy court and the court of appeals have rejected applicants' challenges.

4. Even if applicants could show a reasonable likelihood that this Court will both review and reverse the Second Circuit's decision, and if they could demonstrate an actual, irreparable

[5] The bankruptcy court considered and rejected applicants' challenge (Appl. 9 n.3) to the credibility of Debtors' valuation expert. App., infra, 19 n.17.

injury that would be mitigated by interim relief, a stay would not be warranted. See Conkright, 129 S. Ct. at 1862 ("[I]n a close case it may be appropriate * * * to explore the relative harms to applicant[s] and respondent[s], as well as the interests of the public at large.") (quoting Rostker, 448 U.S. at 1308). Applicants cannot show that the benefit to them would outweigh the very serious harms to the other parties to this litigation and to the public interest generally that a stay would entail.

Applicant are correct (Appl. 12) that "the Chrysler bankruptcy carries profound implications for the Nation's economy." They are wrong, however, in asserting (ibid.) that the economy will feel these implications "[r]egardless of its outcome." Here, only two outcomes are possible. Either the sale will go forward, in which case New Chrysler will be able to restart the production lines -- or Chrysler will be liquidated. As the bankruptcy court specifically found, no other options are available. App., infra, 16-18 & n.15. Applicants' bid to block the sale would force the liquidation of Chrysler, a step whose economic consequences would be so severe that two national governments have committed unprecedented resources to prevent it. Id. at 30-31. Granting applicants that form of relief would be manifestly contrary to the public interest.

a. Granting a stay beyond Monday, June 15, jeopardizes the sale -- the only remaining alternative to the outright liquidation of Chrysler. The Master Transaction Agreement sets June 15 as the deadline for the proposed sale to close. After that date, Fiat has the right to walk away.

Applicants concede these facts but assert that Fiat is “unlikely to back out of a deal with such favorable terms.” Appl. 28. Applicants ignore the bankruptcy court’s specific finding that Chrysler’s assets are “deteriorating rapidly in value” while the company is in bankruptcy and production is idled. Appl. App. 25a. Indeed, Chrysler is losing more than $100 million per day. Id. at 23a. Continued delay in restarting production jeopardizes the physical condition of Chrysler’s assembly plants and the viability of its parts suppliers and dealer distribution network -- all essential parts of the assets being purchased by the new company. App., infra, 17.

In earlier stay proceedings brought in the district court, Fiat explained that it was already concerned about the depreciating value of Chrysler’s assets and that further delay would create a direct risk that the transaction would unravel. Fiat Opp. to Applicants’ Mot. for Stay, 09-CV-4943 Docket entry No. 9, at 3 (S.D.N.Y. filed May 22, 2009); accord C.A. App. 1809 (5/27/2009 Trial Tr. 332-333). Against the bankruptcy court’s findings and Fiat’s own explanation, applicants offer no basis for optimism that Fiat will remain at the table, while Chrysler’s assets depreciate and further rounds of litigation continue, if a stay is granted and the sale is not consummated by the current deadline.

The liquidation of Chrysler would have very severe effects on the American and Canadian economies. More than 38,000 Chrysler employees would lose their jobs; 23 manufacturing facilities and 20 parts depots will be shuttered; more than 3000 Chrysler dealers would suffer significant and possibly fatal harm to their businesses; and billions of dollars in health and pension benefits for current and former Chrysler workers would be wiped out. C.A. App. 2974-2975.

b. Even if the stay were continued for a short time and Fiat did not withdraw from the transaction, the consequences of delay for both Chrysler and the United States government would far outweigh any benefit to applicants. Chrysler is losing $100 million per day, Appl. App. 25a, the impact of which directly falls on the United States as provider of debtor-in-possession financing. These losses will continue while Chrysler remains in bankruptcy. As applicants note (Appl. 28), New Chrysler will not re-commence production of automobiles until mid-August even if the sale is consummated immediately. But every day that Chrysler remains in bankruptcy without consummating the sale threatens to postpone the resumption of production even further and to prolong the period of $100-million-per-day losses.

Applicants contend that the $100-million-per-day figure is unproven ("the only source being the statement of a Treasury official at his deposition") and that "a stay here will not cause

Chrysler any harm." Appl. 28. Those contentions lack merit. The bankruptcy court's factual finding that Chrysler is losing $100 million per day, Appl. App. 25a, is based on deposition testimony that was admitted at trial with applicants' express acquiescence and not contradicted at trial or elsewhere. C.A. App. 2109 (5/29/2009 Trial Tr. 41); see also C.A. App. 1447 (Feldman deposition 66:2-4).

c. Even if applicants had shown some actual harm to their security interest in the depreciating Chrysler collateral, such harm could not outweigh these grave and very real consequences.

First, applicants hold only a tiny fraction -- less than 1% -- of Chrysler's first-tier secured debt. App., infra, 11; see note 1, supra. The vast majority of debt holders in the same tier -- 92.5% -- have given their consent to the sale. Id. at 27. As the bankruptcy court correctly concluded, applicants agreed to be bound by that decision when it, along with all of the other first-tier secured creditors, gave the authorized agent the irrevocable authority to consent to the release of the collateral on behalf of all such creditors. App., infra, 24-30. As noted above, the consent by applicants' authorized agent was one of the bases on which the bankruptcy court concluded that applicants had no injury in fact for standing purposes. Appl. App. 11a-12a. That fully effective waiver, which applicants do not dispute in this Court, precludes them from asking this Court to give them relief that they contracted away. As the bankruptcy court concluded, "[i]f [applicants] did not want to waive such rights, they should not have invested in an investment with such restrictions." App., infra, 30.

Second, and more importantly, even on applicants' view any potential harm to applicants pales by comparison to the harms to Debtors and the public interest. Applicants are owed approximately $42 million and contend that they will receive 29% of that sum from the sale. App., infra, 11. Even if all of the bankruptcy court's factual findings were in error, and even if applicants might recover the full $42 million owed them upon disapproval of the sale, that speculative possibility cannot outweigh the much graver prospect of losses many times that sum that Chrysler, its stakeholders, and the American and Canadian economies would suffer if the last remaining alternative to Chrysler's liquidation is foreclosed.

CONCLUSION

The application for a stay should be denied.

Respectfully submitted.

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JUNE 2009