No. ___________

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.

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

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29, each of the Indiana State Teachers Retirement Fund, the Indiana State Police Pension Trust, and the Indiana Major Moves Construction Fund hereby certifies that it (i) has no corporate parent and (ii) no publicly-owned corporation owns 10% or more of its equity stock.

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,

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Respondents.

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

To the 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:

The Indiana State Teachers Retirement Fund, Indiana State Police Pension Trust, and the Indiana Major Moves Construction Fund (collectively, the "Indiana Pensioners") respectfully apply for an immediate stay, pending final resolution of a forthcoming petition for writ of certiorari, of orders dated May 31 and June 1, 2009, entered by the Bankruptcy Court for the Southern District of New York in Case Number 09-50002, approving, pursuant to section 363 of the Bankruptcy Code, the sale of substantially all of Chrysler LLC's operating assets. Stay App. 8a-13a, JSPA-48-53; Stay App. 19a-67a, JSPA-54-102 [Bankr. Docket Nos. 3074, 3232] (the "Sale Orders").[1]

As described in greater detail below, a stay of the Sale Orders pending final resolution of the Indiana Pensioners' forthcoming petition for writ of certiorari—on as expedited a schedule as the Court finds necessary—is essential to preserve the Court's jurisdiction. **Without a stay, the section 363 sale will close as soon as Monday, June 8 at 4:00 p.m., which is when the present stay issued by the Second Circuit will be lifted.** Stay App. 74a (Second Circuit Mandate). Under section 363(m) of the Bankruptcy Code (11 U.S.C. § 363(m)), closing the sale will essentially moot the case.

If that happens, a number of consequences will follow:

(1) The United States Department of the Treasury ("Treasury"), purporting to utilize powers conferred upon it by the Troubled Asset Relief Program ("TARP") established under the Emergency Economic Stabilization Act of 2008, 12 U.S.C. 5201 ("EESA"), will have been permitted to structure and finance the reorganization of Chrysler without any judicial review of its authority to do so (the Bankruptcy Court incorrectly disposed of the issues by deciding that Appellants lacked standing);

(2) Chrysler will have been permitted to reorganize under chapter 11 of the United States Bankruptcy Code, 11 U.S.C. 101 et seq. pursuant to a

[1] "Stay App." Refers to the Appendix filed with this Petition. "JSPA" refers to the Joint Special Appendix filed with the Second Circuit in connection with the Indiana Pensioners' appeal. "JA" refers to the Joint Appendix filed with the Second Circuit in connection with the Indiana Pensioners' appeal. The complete bankruptcy docket for *In re Chrysler*, Case No. 09-5002, may be found at www.chryslerrestructuring.com.

transaction that was structured and financed by Treasury, without having been required to comply with the procedural and substantive requirements of the Bankruptcy Code for doing so; and

(3) The secured claims of Chrysler's first lien lenders (including the Indiana Pensioners) and any unsecured deficiency claims they may have if their collateral properly valued is in fact worth less than the amount they are owed, will have received materially less favorable treatment than most of Chrysler's general unsecured creditors.

As such, absent a stay, the Court will be deprived of the opportunity to decide critical, nationally significant legal issues relating to management of the economy by the United States Government. The government-sponsored reorganization of the U.S. auto industry, of which the Chrysler chapter 11 case is a significant (and at this point in time, leading) component, is a matter of incredibly high profile and importance. The public is watching and needs to see that, particularly, when the system is under stress, the rule of law will be honored and an independent judiciary will properly scrutinize the actions of the massively powerful executive branch.

Unless this Court acts to stay the execution of the pending Sale Orders, assets that Chrysler lawfully should use to satisfy its obligations to the Indiana Pensioners will be sold forthwith, resulting in economic harm measured in the millions of dollars to the Indiana Pensioners. Moreover, critical issues concerning the authority of Treasury to expend these funds for these purposes and to act as a party to a proceeding in derogation of important and fundamental tenets of the Bankruptcy Code will go unaddressed and erroneous rulings below will stand as a precedent for similar actions in the future.

DECISIONS BELOW AND JURISDICTION

On May 31 and June 1, 2009, the bankruptcy court issued the Sale Orders granting Chrysler LLC's ("Chrysler" or the "Debtors") 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. Stay App. 66a, JSPA-54-102 (Sale Order).

The Debtors-Appellees 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"). The Indiana Pensioners consented to the Certification Motion. On June 2, 2009, the bankruptcy court entered an order certifying the Sale Orders for direct appeal to the Second Circuit. Stay App. 70a-71a, JSPA-304-05 (Order Certifying Appeal).

Also on June 2, 2009, the Second Circuit Court of Appeals took jurisdiction under 28 U.S.C. § 158(d)(2) and Bankruptcy Rule 8001(f) and, upon Appellant's request, issued an order staying the closing of the section 363 sale. Stay App. 72a-73a. The court 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 Orders and lifting its stay effective at 4:00 p.m., Monday June 8, 2009, or upon denial of a stay by this

Court. Stay App. 74a (Second Circuit Mandate). The court's mandate noted that the court would issue an opinion later (the court stated from the bench that the opinion would be issued by Monday), but said the court was affirming for substantially the reasons set for by the bankruptcy court. *Id.*

Notably, as reported on the front page of today's Wall Street Journal, one of the judges on the panel, Circuit Judge Sack, commented during the hearing that the Supreme Court should "have a swing at this ball." Neil King Jr., Jeffrey McCracken, "U.S. Pushed Fiat Deal On Chrysler," The Wall Street Journal, A1, June 6-7, 2009.

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) and 28 U.S.C. § 1651 (the All Writs Act).

STATEMENT

The Indiana Pensioners are comprised of the Indiana State Police Pension Trust and the Indiana State Teachers Retirement Fund, pension funds that are fiduciaries for the investment of billions of dollars of retirement assets for approximately 100,000 Indiana civil servants, including police officers, school teachers and their families, and the Indiana Major Moves Construction Fund, an infrastructure construction fund, all of whom are holders of Chrysler First Lien Debt (as defined below).

Chrysler and certain of its affiliates are parties to an Amended and Restated First Lien Credit Agreement, dated as of August 3, 2007, with JPMorgan Chase Bank N.A. ("JPM"), as administrative agent (the "Administrative Agent"), and certain lenders party thereto (the "First Lien Lenders"). The First Lien Lenders are owed $6.9 billion ("First Lien Debt"), of which the Indiana Pensioners hold $100 million, all of which is secured by a first lien on substantially all of Chrysler's assets (the "Collateral").

Chrysler filed for bankruptcy under chapter 11 of title 11 of the United States Code on April 30, 2009. On May 3, 2009, the Debtors filed a Sale Motion under 11 U.S.C. § 363 that sought to transfer all or substantially all of Chrysler's assets from "Old Chrysler" to a shell corporation—"New Chrysler." [Bankr. Docket No. 190] (Sale Motion). The Sale Motion was the product of a *de facto* corporate reorganization scheme orchestrated by the United States Treasury. In short, Treasury determined that Chrysler would (1) enter into a new collective bargaining agreement with the UAW, (2) enter into an alliance with Fiat by granting it an equity stake in exchange for access to certain intellectual property (but no cash or tangible assets), (3) exchange its existing $10 billion unsecured obligation to the Voluntary Employee Benefit Association (the "VEBA") (which provides retiree health and medical benefits) for a new $4.6 billion note and an equity stake, (4) receive billions of dollars of TARP loans from the Treasury, and (5) continue paying all other operating obligations (i.e., trade payables; warranty obligations; pension obligations) in the ordinary course. Treasury also determined that substantially all of Chrysler's existing secured debt (in addition to the $6.9 billion owed to the First Lien Lenders, Chrysler also owed $2.0 billion under a second lien facility to its parent, Cerberus, and $4.0 billion of third lien debt previously advanced by Treasury under TARP) would need to be eliminated.

In late March, it became apparent to Treasury that the First Lien Lenders would not agree to waive their right to priority payment derived from their lien on substantially all of Chrysler's assets. In response, Treasury devised a nonsubstantive revision to the structure that would create an argument that the First Lien Lenders' rights could be nonconsensually stripped. Instead of just reorganizing Chrysler as planned, Treasury directed that Chrysler would sell its assets "free and clear" of all interests under section 363 of the Bankruptcy Code for liquidation value to a newly-created shell corporation that would for all intents and purposes be reorganized "Chrysler" as described above. To accomplish this, although the transaction would be a going concern reorganization for substantially all other stakeholders, it would have to be treated as a liquidation for the First Lien Lenders—even though the whole purpose of the transaction was to save thousands of jobs and avoid the potentially ruinous effect of a Chrysler collapse on an already deeply troubled economy; in other words, to preserve Chrysler as a going concern. This was purportedly accomplished through three mechanisms: (1) Chrysler had its financial advisor develop a liquidation analysis that showed how poorly the lenders would fair in a liquidation; (2) auction procedures were developed to "market test" the intended liquidation-based recovery; and (3) Treasury announced that if it did not get its way, it would allow Chrysler to collapse regardless of the pain and suffering that would follow (obviously, without this, the liquidation analysis would be irrelevant).

The ploy in large part succeeded. A series of exchanges occurred in April between Treasury and the First Lien Lenders' agent, JPMorgan—itself a recipient of TARP funds from Treasury—where the lenders indicated their willingness to substantially reduce the amount of their debt. This process ultimately lead to an agreement by four lenders, JPMorgan, Citibank, Goldman Sachs and Morgan Stanley (who held over 60% of the first lien debt in the aggregate), to settle the entire $6.9 billion amount of the first lien debt for a cash payment of $2.0 billion. Most of the lenders who held the rest of the first lien debt (none of whom had received any TARP bail-out funds), however, balked at the arrangement's obviously unfair treatment of their rights and attempted to engage in separate negotiations. These efforts, however, were firmly rejected by Treasury.

On its own, Chrysler did not think this was fair, but bowed to Treasury's demands. Before filing the section Sale Motion, Chrysler communicated to Treasury that it was interested in providing additional value to the First Lien Lenders, and had determined ways to finance such payment. The Debtors would "look at more vendor consolidations," and had "other ideas as well."[2] Treasury shut down such ideas with a curt response: "I'm now not talking to you. You went where you shouldn't." *Id.* Debtors hastily apologized, noting again that the estate had room to contribute to a solution: "Sorry. I didn't mean to say the wrong thing and I obviously did. I was trying to make sure that if we had to contribute to the solution you knew we had some room. Sorry I did not realize the mistake!!" *Id.* Again making clear its control, the U.S. Government responded "It's over. The President

[2] Motion papers filed under seal in district court; Second Gluckman Decl., Ex. B.

doesn't negotiate second rounds. We've given and lent billions of dollars so your team could manage this properly. . . ." *Id.*

Moreover, the record shows that Treasury directed Chrysler to reduce the amount of cash it had on hand prior to filing for bankruptcy. JA-3773 (E-mail correspondence between Ronald Kolka and Robert Manzo); JA-4044-45 (E-mail correspondence between Treasury and Chrysler). Although this runs counter to what troubled companies normally do—both because of duties owed to creditors and because such funds could be used to fund an orderly liquidation of a debtor's assets if that would generate the most money for secured creditors—here, it ensured that Chrysler would be wholly dependent on TARP funds from Treasury, which would strengthen the case for the section 363 Sale Motion.

Critically, the Sale Motion is premised on a $2 billion cash payment, which arose from a *liquidation* valuation rather than a going-concern valuation, of the Collateral to be sold to New Chrysler.[3] That is, while Chrysler is operating these assets now and will continue operating them as part of New Chrysler (where they were valued on a going concern basis at $20-30 billion), they valued those same assets on a liquidation basis at less than $2 billion for purposes of justifying only a partial payment to the First Lien Lenders. This unprecedented shift in valuation

[3] The record shows that this analysis, upon which the Sale Motion was premised, was prepared by the financial advisor to the Debtors who (i) actively negotiated and advocated the structure of the Chrysler bankruptcy with Treasury, and (ii) prepared the crucial liquidation analysis on a contingent fee basis, such that the advisor (Mr. Manzo) would personally receive $10 million if the Sale Motion succeeded. JA-4451-53 (Capstone Engagement Letter); JA-A-837-843 (Amended Capstone Engagement Letter). Although these facts were brought out on the record—along with a list of valuable Chrysler assets that Manzo omitted from his liquidation analyses—the bankruptcy court overruled objections by the Indiana Pensioners, allowed Manzo to testify as a source of

methodologies (which is not permitted by section 506(a) of the Bankruptcy Code) effectively diverted most of Chrysler's value away from the secured *and* unsecured claims of the First Lien Lenders to the unsecured creditors selected by Treasury who will be receiving substantial value on their unsecured claims from New Chrysler. Among other things, this liquidation analysis became the foundation for the bankruptcy court's ruling that the Indiana Pensioners have no standing to object to the sale because they were receiving more than the value of their Collateral. Stay App. 12a-13a, JSPA-52-53 (TARP Order).

The Debtors had the bankruptcy court set bidding procedures that required parties interested in purchasing the assets of Chrysler to submit final and binding bids, with no financial or due diligence contingency, in less than two weeks. JA-1613, 88:7-12, JA-1633, 169:1-7, JA-1638, 189:14-16, JA-1644, 210:8-14 (Hearing Testimony). Not only that, but bids had to include the same terms imposed by Treasury on Fiat and Chrysler, though Debtors admitted that those terms did not benefit the estate. JA-1636, 178:5-9, JA-1636, 179:10-180:13, JA-1637, 183:10-19, JA-1638, 188:8-15 (Hearing Testimony). Debtors also admitted that the bidding procedures were not likely to produce bids for such a large complicated transaction in such a short period of time. JA-1615, 97:12-22, JA-1634-35, 171:21-174:4, JA-1638-39, 189:23-190:1 (Hearing Testimony). The Indiana Pensioners (and other objecting creditors) then had only seven days to conduct discovery and go to trial on

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evidence on liquidation values and unquestioningly credited the liquidation valuation. Stay App. 28a, JSPA-63 (Sale Order).

the section Sale Motion. JA-753-816 (Order Approving Bidding Procedures and Setting Final Hearing on Sale Motion).

The bankruptcy court granted Debtor's motion on the terms requested by the Debtors, as outlined above.

REASONS FOR GRANTING THE APPLICATION FOR STAY

Without a stay, Chrysler's section 363 sale will be able to close Monday afternoon, and this case will be moot. Mootness would not only deprive the Indiana Pensioners of an opportunity for full recovery, but it would deprive the Court and the Nation of the opportunity for final determination of substantial and novel issues of law never before addressed by this Court or any other (save the decisions below). These issues include (i) whether the Sale attempted here—indisputably the fastest reorganization on record—constitutes an illegal *sub rosa* chapter 11 reorganization plan and violates the longstanding and fundamental rule that first-lien creditors have absolute priority in bankruptcy, and (ii) whether Treasury has the authority to direct the course of, and fund, this bankruptcy through the use of TARP funds under the EESA. The Court should stay the Sale Orders so that the Indiana Pensioners may, in good order, ask the Court to review whether the law permits such wholesale alteration of bankruptcy law, not to mention the American capital markets, by the Executive Branch of the U.S. Government acting beyond the color of Congressional authority.

I. There is a Reasonable Probability that Certiorari will be Granted

The issues presented by this case are of immediate—and enduring—national significance, as courts below have recognized by accelerating the litigation and commenting on the stakes. *See In re Chrysler, LLC*, No. 09-50002, 2009 WL 1490990, at *1 (S.D.N.Y. May 26, 2009) (noting the "rather short bankruptcy process" for a deal affecting over $7 billion in secured loans and involving the U.S. Government, an Italian automaker, and the third largest U.S. automaker); *In re Chrysler LLC*, 2009 WL 1507547, at *2 (Bankr. S.D.N.Y. 2009) (noting the billions of dollars and thousands of workers involved). Even the Treasury has expressly recognized in its initial filing with the bankruptcy court that this is an "extraordinary and unprecedented case." JA-233 (Treasury Statement in Support of Chrysler Bankruptcy). Furthermore, the decision below presents important issues relating to Treasury's use of TARP funds to finance the section 363 sale, concerning the valuation of the first-lien creditors' collateral, and respecting conflicts with decisions from other circuits and with this Court's own precedents on matters relating to the Bankruptcy Code. Accordingly, a grant of certiorari is reasonably likely.

1. Certiorari is likely to be granted because this is an incredibly important bankruptcy case, the details of which have been splashed across the front pages of major national newspapers for weeks, including today's Wall Street Journal. Regardless of its outcome, the Chrysler bankruptcy carries profound implications for the Nation's economy. Nearly everyone will feel the impact, from auto workers and suppliers to pensioners and bondholders to unrelated companies who hope to raise money through the sale of secured debt in the future.

In fact, notable economic scholars have cautioned that allowing the government to disrupt the absolute priority rule in bankruptcy proceedings will destabilize the investment market. *See* Richard A. Epstein, *The Deadly Sins of Chrysler Bankruptcy*, http://www.forbes.com/2009/05/11/chrysler-bankruptcy-mortgage-opinions-columnists-epstein.html ("It is absolutely critical to follow these priority rules inside bankruptcy in order to allow creditors to price risk outside of bankruptcy."); *see also* Todd J. Zywicki, *Chrysler and the Rule of Law*, http://online.wsj.com/article/SB124217356836613091.html, (suggesting that government intervention with struggling companies will only become more commonplace if the rule of law is disrupted); Mark J. Roe, *Stress-Testing Washington's Chrysler Bankruptcy Plan*, http://www.forbes.com/2009/05/12/buffett-treasury-bankruptcy-opinions-contributors-chrysler.html ("This is not a good economic time to disrupt lending to troubled companies."). In addition, the players in the Chrysler bankruptcy understood that Treasury was using this case as a test for what would be attempted—on a much magnified scale—in the bankruptcy of General Motors. Indeed, in an email with Chrysler's CEO, Manzo made clear that Treasury was doing what it was doing because Chrysler was the "guinea pig." JA-4067 (E-mail correspondence between Robert Manzo and Thomas LaSorda).

The Chrysler and General Motors bankruptcies involve almost $100 billion in assets, and the Government, without any specific approval from Congress, is using the bankruptcy system to re-order private property rights on a scale and in a way that America has never before seen. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952) ("There is no statute that expressly authorizes the President to take possession of property as he did here."). Certiorari is warranted because the dangers of upsetting the procedural and substantive balances created by the bankruptcy plan process (and resulting shift this may cause in the investment markets) should be examined thoroughly rather than rushed through the courts for the benefit of only one company. The Court should give itself and the Nation a chance to be sure that the Administration may lawfully impose such economic reorganization on the country and may do so in the manner and by the means employed in this case.

2. Certiorari is also likely because of the important precise legal issues, not least of which is whether Treasury is violating EESA by orchestrating and funding the sale with TARP funds. In particular, Treasury is using TARP funds to finance the following:

- substantially all of the Debtors' $5.3 billion of unsecured trade obligations, assumed and paid by reorganized Chrysler (JA-3223, § 2.08(b) (Fiat-Chrysler Agreement); JA-2972-75 (Kolka Aff.); JA-1573, 242:16-25 (Hearing Testimony);

- substantially all of the Debtors' prepetition warranty and dealer obligations—estimated by Chrysler at $4 billion—will be honored by reorganized Chrysler (JA-1573 , 243:15-19 (Hearing Testimony); JA-3224, §§ 2.08(g), (h) (Fiat-Chrysler Agreement);

- approximately $10 billion in unsecured claims owed to Chrysler's VEBA will be satisfied with a new promissory note from reorganized Chrysler in the amount of $4.6 billion to cover $10 billion in unsecured claims owed to Chrysler's VEBA (*see* JA-3207, Ex. K (Fiat-Chrysler Agreement); JA-3774-85 (UAW Modifications to 2007 Agreement and Addendum to VEBA Agreement) and (subject to dilution) 68% of the stock in reorganized Chrysler (which, if Fiat's 20% stake is worth the $6.9 billion the Debtor's CFO testified to (JA-1574 , 258:8-24 (Hearing Testimony)), is worth about $24 billion—approximately five times the amount of the VEBA obligation that is admittedly being satisfied with stock);

- $3.5 billion over three years to fund Chrysler's qualified pensions (JA-1571, 236:19-237:15 (Hearing Testimony); JA-3221, JA-3238-40, §§ 2.06(r), 3.15 (Fiat-Chrysler Agreement)); and

- Only $2 billion in cash (or roughly 28 cents on the dollar) will be paid in respect of nearly $7 billion owed to Chrysler's First Lien Lenders (JA-2976-77 (Kolka Aff.); JA-3227, § 2.13 (Fiat-Chrysler Agreement)).

Under EESA, however, Congress created TARP and granted the Secretary of the Treasury authority only to purchase "troubled assets" from "financial institution[s]." 12 U.S.C. § 5211(a)(1), JSPA-327. Specifically, Congress authorized the Treasury "to purchase, and to make and fund commitments to purchase, troubled assets from any financial institution, on such terms and conditions as are determined by the Secretary, and in accordance with this Act and the polices and procedures developed and published by the Secretary." 12 U.S.C. § 5211(a)(1), JSPA-327.

This case presents the issue of whether an automobile manufacturer is a "financial institution" under EESA. Indeed, shortly after the EESA was enacted, Treasury Secretary Paulson was specifically asked at a House Financial Services Committee hearing whether TARP funds could be used to bail out automotive manufacturers. He testified that "the auto companies fall outside of [the] purpose" of TARP." Oversight of Implementation of the Emergency Economic Stabilization Act of 2008 and of Government Lending and Insurance Facilities; Impact on Economy and Credit Availability: Hearing Before the H. Comm. on Fin. Servs., 110th Cong. 19 (Nov. 18, 2008).

In response to this lack of coverage, the House passed the so-called "Auto Act," which provided for $14 billion in loans to the automotive industry (and a mere fraction of the $700 billion authorized under TARP). Auto Industry Financing and Restructuring Act, H.R. 7321, 110th Cong. § 10 (2008). A day later, however, the Senate rejected the Auto Act and abandoned further efforts to authorize any Executive Branch agency to bail out the automotive industry. Within a week, Secretary Paulson reversed his position that automakers were not eligible for TARP funds. Even then, however, Treasury again admitted that TARP is not available to car companies, unless they were engaged in "the provision of credit and financing." The Debtors here are not engaged in credit and financing, and Treasury has now taken the position that it may stretch TARP to provide implausibly broad authority to bail out any "institution," financial or not.

Furthermore, even if EESA permits Treasury to purchase the assets of an automobile manufacturer such as Chrysler, it expressly forbids altering the First Lien Lenders' claims. Section 119(b)(2) of EESA specifically precludes Treasury from rearranging lenders claims: "[a]ny exercise of the authority of the Secretary pursuant to this chapter shall not impair the claims or defenses that would otherwise apply with respect to persons other than the Secretary." 12 U.S.C. § 5229(b)(2), JSPA-347-48.

Whether Treasury is exceeding the limits of its statutory authority in a way that injures the Indiana Pensioners by financing a deal that harms their first-priority liens in the Chrysler Collateral is an important, nationally significant question that warrants the Court's review.

3. The bankruptcy court ruled that, because the Administrative Agent consented to this sale, and because under the court's valuation methodology the Indiana Pensioners did not suffer any collateral deficiency, the Pensioners had no grounds for objecting to the sale. As noted above, the $2 billion valuation employed by the bankruptcy court arose from a *liquidation* valuation rather than the *going-concern* valuation used to sell the assets. Under the bankruptcy code, however, a claim that is "secured by a lien on property in which the estate has an interest . . . is secured to *the extent of the value* of such creditor's interest in [such property]." 11 U.S.C. § 506(a)(1) (emphasis added). Further, under section 506(a), "value shall be determined *in light of the purpose of the valuation and of the proposed disposition or use* or on a plan affecting such creditor's interest." *Id.* (emphasis added).

The decision below permitting a shift in valuation methodologies, from going-concern value to liquidation value, violates section 506(a)(1) and conflicts with the Court's decision in *Assocs. Commercial Corp. v. Rash*, 520 U.S. 953, 961-62 (1997). There, the Court ruled that the lower court had "rendered inconsequential the sentence [of section 506(a)(1)] that expressly addresses how 'value shall be determined'" by applying a foreclosure-value standard when the collateral was actually going to be used by the chapter 13 debtor to generate an income stream. Said the Court: "The *actual use*, rather than a foreclosure sale that will not take place, is the proper guide under a prescription hinged to the property's 'disposition or use.'" *Rash*, 520 U.S. at 963 (emphasis added). *See also In re Chateaugay Corp.,* 154 B.R. 29, 33 (Bankr. S.D.N.Y. 1993) (holding that section 506(a) requires a secured claim to be valued on a going-concern basis rather than liquidation basis when the property will be used in a post-confirmation going concern).

Under the proper going-concern standard (which is the basis for the bankruptcy court's approval of the transaction), the First Lien Lenders' claims are properly valued at $6.9 billion. JA-1573 245:18-20 (Hearing Testimony). Hence, in light of the mere $2 billion allocated the First Lien Lenders under the sale, secured creditors such as the Indiana Pensioners plainly have suffered a security deficiency that they have retained the right to pursue. *See Assocs. Commercial Corp.*, 520 U.S. at 961-62; *In re Chateaugay Corp.,* 154 B.R. at 33.

Whether section 506(a)(1) permits shifting valuation methodologies is an important issue in many Chapter 11 bankruptcies, and if permitted as proposed here to justify section 363 sales, will effectively gut not only section 506(a)(1) but also all of the carefully considered protective structures and priorities of Chapter 11. This is yet another reason certiorari is likely to be granted.

4. Another glaring circuit conflict generated by the decision below is with the seminal *sub rosa* plan case *PBGC v. Braniff Airways, Inc. (In re Braniff Airways, Inc.)*, 700 F.2d 935, 940 (5th Cir. 1983), where the court held that "[t]he debtor and the bankruptcy court should not be able to short circuit the requirements of Chapter 11 for confirmation of a reorganization plan by establishing the terms of the plan *sub rosa* in connection with a sale of assets."

With that in mind, the court deemed a purported section 363 sale of substantially all of a debtor's assets to be a de facto reorganization where it "attempts to specify the terms whereby a reorganization plan is to be adopted" such that "little would remain save fixed based equipment and little prospect or occasion for further reorganization." *Id.* at 940. In such a case, "the parties and the district court must scale the hurdles erected in Chapter 11 . . . ." *Id.* *See also Clyde Bergemann, Inc. v. The Babcock & Wilcox Co. (In re The Babcock & Wilcox Co.)*, 250 F.3d 955, 960 (5th Cir. 2001) ("[T]he provisions of § 363 . . . do not allow a debtor to gut the bankruptcy estate before reorganization or to change the fundamental nature of the estate's assets in such a way that limits a future reorganization plan."). Other circuits have come to similar conclusions. *See In re Abbotts Dairies of Pa.*, 788 F.2d 143, 150 (3d Cir. 1986) (holding that a section 363 sale cannot be used to abrogate the protections afforded to creditors by section 1129 of the Bankruptcy Code and the plan confirmation process).

Here, however, the Second Circuit and the bankruptcy court approved (without discussion) a section 363 sale that plainly would have been rejected in the Fifth and Third Circuits. The bankruptcy court relied heavily on the supposedly well-grounded business judgment supporting the sale without subjecting it to the chapter 11 testing that the Fifth Circuit quite plainly would have required. And although the issue was thoroughly briefed, the bankruptcy court's Sale Order, affirmed without elaboration (thus far) by the Second Circuit, said only, "[t]he consummation of the Sale Transaction outside of a plan of reorganization pursuant to the Purchase Agreement neither impermissibly restructures the rights of the Debtors' creditors nor impermissibly dictates the terms of a liquidating plan of reorganization for the Debtors. The Sale Transaction does not constitute a *sub rosa* plan of reorganization." Stay App. 26a, JSPA-61 (Sale Order). Under the analysis set forth in *Braniff*, Chrysler's attempts to ignore the protections provided to secured creditors under the Bankruptcy Code would have been invalidated.

5. The decisions below conflict with the Third Circuit's decision in *In re Armstrong World Industries*, *Inc.*, 432 F.3d 507, 513 (3d Cir. 2005), that the absolute priority scheme of the Bankruptcy Code applies where some senior creditors use their distributions to pay junior creditors at the expense of other senior creditors, who are not being paid in full. Here, the Second Circuit and the bankruptcy court permitted a section 363 sale that has the effect of granting preferential treatment to general creditors, namely the UAW, over first-lien secured creditors, including the Indiana Pensioners. The bankruptcy court, in clear contravention of *Armstrong World's* no-payoff rule, held that absolute priority did not apply because the property transferred by New Chrysler to junior creditors—such as the UAW's 55% stake in New Chrysler—was not "on account of" prepetition claims. This deal, however, represents exactly the kind of insiders' squeeze play that the absolute priority rule is designed to prevent. *See id.*

The decisions below thus conflict with *Armstrong World*, and they also conflict with the Court's own longstanding rule in bankruptcy cases "that preferential treatment of a class of creditors is in order only when clearly authorized by Congress." *Howard Delivery Serv. Inc. v. Zurich Am. Ins. Co.,* 547 U.S. 651, 655 (2006) (citing *Nathanson v. NLRB,* 344 U.S. 25, 29 (1952); *United States v. Embassy Restaurant, Inc.*, 359 U.S. 29, 31 (1959)).

6. This matter also raises an important issue of first impression: whether, and to what extent, section 363 of the Bankruptcy Code may be construed

to permit a debtor, even under exigent circumstances, to deal with substantially all of its assets and liabilities without complying with the Congressionally-mandated procedural and substantive protections specified in sections 1122-1129 of the Bankruptcy Code for such transactions. This Court has previously directed that Title 11 is a comprehensive, integrated statutory scheme that must be strictly construed as a whole. *United States v. Ron Pair Enterprises, Inc.,* 489 U.S. 235 (1989); *Lamie v. U.S. Trustee (02-693)*, 540 U.S. 526 (2004). Accordingly, a general provision such as section 363 of the Bankruptcy Code, which generally authorizes the sale of assets, may not be applied so as to overwrite the very detailed and specific provisions of the Bankruptcy Code that enumerate exactly the steps by which a debtor may restructure its assets and liabilities (sections 1122 through 1129 of the Bankruptcy Code). In the present case, not only has Chrysler used section 363 to convert its assets to currency to prevent further diminution in value, but if the Court looks at the economic reality of the transaction as this Court has instructed in bankruptcy matters (*Pepper v. Litton*, 308 U.S. 295 (1939)), Chrysler went a step further and established the terms on which substantially all of its liabilities would addressed and treated. If this is permitted to occur, section 363 will become a "fast-track mini-reorganization statute" under which debtors can reorganize quickly and distribute value in satisfaction of claims not pursuant to the Bankruptcy Code's long-standing priority scheme, but rather under whatever payment scheme may be imposed or directed by the party with the most negotiating leverage - - here, the Treasury using TARP funds. Moreover, the Sale Orders, by valuing Chrysler's operating assets one way (at liquidation value) for the First Lien

Lenders and another way (going concern value) with regard to the VEBA, the pension and other preferred creditors, establish a way around this Court's decision in *Assocs. Commercial Corp.,* 520 U.S. 953 (1997), which held that a secured lender's collateral must be valued on the basis of the contemplated use of the collateral. To prevent such abuse, this Court should clarify that a secured creditor's collateral must be valued based on the contemplated use, regardless of whether the transaction is accomplished pursuant to a sale under section 363 or a plan under sections 1122 through 1129.

For these reasons as well, there is a reasonable probability that at least four Justices will vote to grant review in this case.

II. There is a Fair Prospect that the Court will Reverse

1. With respect to the use of TARP funds to finance the section 363 sale here, the Court is likely to reverse the decision below because Treasury's interpretation of the EESA is implausible. It ignores the unambiguous terms of the statute, the history of its enactment and the Treasury's own prior interpretations. The Treasury Department's "interpretation" eviscerates the clear Congressional intent of TARP and violates the well-settled principle of statutory construction that every word in a statute has meaning, and no word may be rendered superfluous. *Leocal v. Ashcroft*, 543 U.S. 1, 12 (2004) ("we must give effect to every word of a statute wherever possible"); *Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (we follow "the cardinal rule that statutory language must be read in context [since] a phrase gathers meaning from the words around it."). Treasury simply cannot read out the

word "financial," rendering the word, and the very purpose and history of TARP, meaningless.

Treasury's effort to read out the word "financial" also conflicts with Treasury Secretary Geithner's remarks to a House Appropriation sub-committee on May 21, 2009. Secretary Geithner said that he could not help states solve budget problems because "we are restricted to giving to financial institutions." *See* www.reuters.com/article/companynewsandpr/idvsn2052531520090521. For that same reason, the TARP funds also cannot be used help an automobile maker. The statute has to have the same meaning irrespective of the Treasury Department's interest at a particular point in time.

Additionally, EESA § 119(b)(2) specifically prohibits Treasury from rearranging lenders rights: "[a]ny exercise of the authority of the Secretary pursuant to this chapter shall not impair the claims or defenses that would otherwise apply with respect to persons other than the Secretary." 12 U.S.C. § 5229(b)(2), JSPA-347. The Court's Takings Clause doctrine essentially required this limitation. *See Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 589, 594 (1935) (invalidating a statute that placed the debtor in a position to hold secured property while delaying creditor claims almost indefinitely because Congress may not deny secured creditors their rights to realize upon the specific property pledged to them or "the right to control meanwhile the property during the period of default").

Here, however, Treasury conceived the strategy of reorganizing Chrysler through a section 363 sale, rather than pursuing a plan of reorganization, subject to normal chapter 11 protections. As addressed above, the structure is a sham; Chrysler is plainly reorganizing. The company is effectively the same, only the secured creditors have been eliminated from the capital structure, and the unsecured creditors have been elevated. This plainly violates the EESA's statutory injunction against impairing existing claims and appropriates the Indiana Pensioners' property rights without providing just compensation.

2. With respect to the Bankruptcy Code, the Indiana Pensioners are likely to succeed because the valuation of its collateral plainly transgresses section 506 of the Code and because the transaction is a section 363 "sale" in name only. Upon consummation, New Chrysler will be Old Chrysler in essentially every respect.

The real substance of the transaction is the underlying reorganization it implements. Undesirable assets (and associated contingent liabilities) will be set aside for liquidation. JA-1965, 323:9-14 (Hearing Testimony, cross-examination of Nardelli) ("we're not putting in some of the factories, but I would say the majority of the valuable assets, to assure that the new business is an ongoing enterprise, would be the kind of the sales transaction going in for cash out."). A new investor will contribute certain technology and other intangibles in exchange for a minority stake in the business. New arrangements will be put in place for the financing of the business, including dealer and fleet purchases. Keegan Decl. ¶¶ 10-14; [Bankr. Docket No. 312]. Old equity will retain no interest, and a new board will be seated. JA-2979-80 (Kolka Aff.); Operating LLC Agreement § 5.3, Exhibit H to Notice of Filing of Master Transaction Agreement [Bankr. Docket No. 660].

None of these actions, however, requires an asset sale for implementation; all of it can be done through a chapter 11 plan. Most importantly, for purposes of *sub rosa* plan analysis, the rights of all major creditor groups will be dealt with. This *de facto* reorganization of the Debtors and the satisfaction of their claims, unless reversed by this Court, will be substantially accomplished in roughly 45 days (JA-3277 (Chrysler-Fiat Agreement § 10.01(c))), without a disclosure statement, without a plan, without stakeholder voting, without any assessment of the value of reorganized Chrysler or the relative recoveries of old Chrysler's creditors, without the vetting of objections to confirmation and without determining if the requirements of section 1129 have been satisfied—in short, without providing stakeholders any of the due process and substantive protections required by Congress under the Bankruptcy Code. Under these circumstances, the Indiana Pensioners have a fair prospect of prevailing on the merits.

III. Petitioners will Suffer Irreparable Harm Absent a Stay

The Indiana Pensioners will suffer irreparable harm absent a stay of the Sale Orders pending review by the Court because, absent a stay, the Sale will close on Monday, June 8, 2009, and, as a matter of statute, the case will be moot. That is, once the Collateral is "sold" to New Chrysler, section 363(m) of the Bankruptcy Code, which provides that reversal or modification of sale authorization on appeal "does not affect the validity of the sale or lease under such authorization to an entity that purchased or leased such property in good faith[,]" 11 U.S.C. § 363(m), JSPA-309, will essentially prevent it from being reversed.

Many courts have held that, once a plan is recognized and opportunity to stay the matter has passed, it is neither feasible nor equitable to go back and disrupt the process. *See Mac Panel Co. v. Va. Panel Corp.*, 283 F.3d 622, 625 (4th Cir. 2002) ("granting the relief requested by [the petitioner] on appeal would require the bankruptcy court to traverse a totally impractical, perhaps impossible, course—one that might be as daunting as the reconstruction of Humpty Dumpty."); *In re UNR Indus., Inc.*, 20 F.3d 766, 769 (7th Cir. 1994) ("Unless the [§ 363] sale is stayed pending appeal, the transaction survives even if it should not have been authorized in the first place."); *In re Stadium Mgmt. Corp.*, 895 F.2d 845, 847 (1st Cir. 1990) ("Absent a stay, the court must dismiss a pending appeal [of a § 363 sale] as moot because the court has no remedy that it can fashion even if it would have determined the issues differently.").

Courts have also recognized that in bankruptcy the elimination of a movant's rights by mootness is the "quintessential" form of prejudice to a party. *See also ACC Bondholder Group v. Adelphia Commc'ns. Corp.* (*In re Adelphia Commc'ns. Corp.*), 361 B.R. 337, 347-48 (S.D.N.Y. 2007) ("where the denial of a stay pending appeal risks mooting any appeal of significant claims of error, the irreparable harm requirement is satisfied") (emphasis in original), *appeal dismissed*, 367 B.R. 84 (S.D.N.Y. 2007); *Country Squire Assocs. v. Rochester Cmty. Sav. Bank (In re County Squire Assocs.)*, 203 B.R. 182, 183-84 (B.A.P. 2d Cir. 1996) (granting stay and finding that irreparable harm where without a stay the foreclosure sale would proceed and moot the appeal); *In re St. Johnsbury Trucking Co.*, 185 B.R. 687, 688, 690 (S.D.N.Y. 1995) (concluding that movant established the threat of irreparable injury based on risk that appeal would be mooted if no stay were granted).

Finally, the possibility of mootness has traditionally satisfied the irreparable harm requirement for a stay from this Court. *See McDaniel v. Sanchez*, 448 U.S. 1318, 1322 (1980) (Powell, J., in chambers); *In re Roche*, 448 U.S. 1312, 1316 (1980) (Brennan, J., in chambers); *Wise v. Lipscomb*, 434 U.S. 1329, 1334 (1977) (Powell, J., in chambers); *In re Bart*, 82 S.Ct. 675, 675-76 (1962) (Warren, C.J., in chambers).

If the deal is allowed to go through, Old Chrysler will be left with all the worthless assets. The Indiana Pensioners' remaining investment will become unsecured and, as Chrysler's CEO Robert Nardelli testified, Old Chrysler will have no assets to satisfy the unsecured deficiency claims of the First Lien Lenders:

> Q. I'm talking about all the creditors of OldCo. How much money do you think will be left in OldCo after it is liquidated?
> A. I'm not sure how to answer the question, is that OldCo. will pay two billion dollars out to the first lien, and as I understand it, the liquidation of the assets would then go to the government to offset the DIP funding, except for what remains of some liabilities. But I-
> Q. So essentially there would be no value left?
> A. I think that's fairly correct.

JA-1985, 403:9-18 (Hearing Transcript).

Old Chrysler will be a valueless entity leaving unfavored creditors with no remedy, and unable to approach the debt repayment numbers achieved by the favored unsecured creditors.

IV. The Equities Favor Granting a Stay

The Debtors asserted to the bankruptcy court that it is losing $100 million per day by not closing. Stay App. 14a-15a (Debtors' Letter to Gonzalez J. re Waiver of Automatic Stay of Enforcement). This fact, however, was never proven by the Debtors at trial (the only source being the statement of a Treasury official at his deposition). Accordingly, there is no proof that the alleged loss would be mitigated by a closing of the Sale. To the contrary, Chrysler will not restart car production until mid-August. *See* JA-1700, 34:21-25 (Hearing Transcript). Thus, assuming expedited consideration of this case, a stay here will not cause Chrysler any harm.

Furthermore, any such alleged losses must be considered in context. In order to circumvent longstanding bankruptcy and commercial law, the U.S. Government, Chrysler and Fiat have created an artificial deadline designed to force the courts to quickly dispose of issues that deserve more careful judicial consideration. While it is true that Fiat *could* back out of the deal if it is not consummated by June 15, it has the express right to extend its purchase rights for another 30 days, and if is truly the only bidder, then there is no worry that the company will be sold to another in the interim. *See* Stay App. 27a, JSPA-62 (Sale Order). Additionally, the benefits for Fiat, expansion of their operations into the United States, and a potential of majority ownership of "New CarCo Acquisitions, LLC," as well as guaranteed government-backing of billions of dollars, make it unlikely to back out of a deal with such favorable terms. In addition, the U.S. Government, which has already given over $5 billion to Chrysler, has indicated its willingness to give billions more to complete the sale. All of this shows, combined with the acknowledged public interest concerns, that the deal will not fall through if it is not completed by June 15. On the other hand, if the sale is completed, the Indiana Pensioners have no further recourse in bankruptcy court.

Moreover, the need for the Court to review the profound issues presented by Chrysler's novel bankruptcy sale far outweighs the cost of delaying a section 363 sale. As noted above, scholars have cautioned that allowing the U.S. Government to disrupt the absolute priority rule in bankruptcy proceedings will destabilize the investment market—and it is logical to think that it should, as no secured creditor can trust their liens again if the Treasury can define any "institution" as worthy of TARP funds and use an accelerated section 363 sale process to cram down transactions that wipe out secured claims. If they are correct, the negative economic consequences of permitting an unlawful sale to proceed may well over time dramatically outweigh Chrysler's short-term harm.

CONCLUSION

The Court should grant the application for stay.

Respectfully submitted,

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Dated: June 6, 2009

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 S.P.A. AND NEW CARCO AQUISITION LLC,

Respondents.

CERTIFICATE OF SERVICE

I hereby certify that on June 6, 2009, true and complete copies of the Application for Stay were served upon counsel for all parties by mailing same by overnight UPS delivery, facsimile, and electronic mail, to the following:

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