No. 09-285

IN THE

Supreme Court of the United States

In re CHRYSLER LLC, Debtor,

INDIANA STATE POLICE PENSION TRUST, *et al.*,
Petitioners,

v.

CHRYSLER LLC, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY IN SUPPORT OF THE PETITION

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Respondents' briefs ignore the crucial issue presented: whether in connection with a sale of substantially all of its assets under section 363 of the Bankruptcy Code, a debtor and its most powerful stakeholder—in this case, the United States Treasury—may arrange for the treatment of substantially all of its debts and liabilities without complying with the procedural and substantive protections of chapter 11 of the Code.

Section 363 of the Bankruptcy Code, by its terms, provides only for the sale of a debtor's assets. Yet, the Master Transaction Agreement approved by the courts below under section 363 goes well beyond providing for a mere sale of assets. It explicitly sets forth the terms by which substantially all claims against the Debtors were required to be treated.

- $10 billion of unsecured VEBA obligations directly received a $4.6 billion new note from and approximately 68% of the equity in reorganized Chrysler (MTA Exhibit K);

- $5.3 billion of unsecured trade obligations were assumed and paid directly by reorganized Chrysler (MTA § 2.8(b));

- $4 billion of unsecured warranty and dealer obligations were honored by reorganized Chrysler (MTA § 2.08(g),(h)); and

- $3.5 billion of underfunded qualified pension obligations were assumed and directly

satisfied by reorganized Chrysler (MTA §§ 2.06(r), 3.15).

In seeking court approval of the Master Transaction Agreement, Chrysler repeatedly framed it as being necessary to preserve going concern value, Memorandum in Support of the Sale Motion at 9-13 [Bankr. Docket 191]; Statement of the United States Dep't of Treasury in Support of the Commencement of Chrysler LLC's Chapter 11 Case ¶ 3 [Bankr. Docket 69], which was recognized by Chrysler and its advisors as exceeding $25 billion, JA3740-JA3752; May 27, 2009 H'rg Tr. 142:1-144:12, 147:15-148:14. And yet, according to Chrysler, Treasury, the other proponents of the deal, and the courts below, the sale should be viewed as yielding only $2 billion of cash proceeds, all of which was paid to the first lien lenders. According to them, the above-noted $22.8 billion of additional value distributed to creditors should simply be disregarded; it should not be viewed as consideration for the sale because it was to be distributed to creditors by reorganized Chrysler, not "old" Chrysler. This is little more than sophistry; form is not to prevail over substance.

Tellingly, in the notification sent by the UAW informing its members of the proposed modifications to their benefits, the UAW clearly identified the treatment received under the Transaction as a "*restructuring*" of Chrysler's VEBA obligations. *See* Curson Decl. Ex. A at 10 [Bankr. No. 2101].

Further, the auction procedures approved by the Bankruptcy Court did not test the $2.0 billion cash price to be paid to the lenders; instead, they required that all potential auction bidders adopt the *same* specified claims treatment structure specified in the Transaction. *See* Bid Proc. Order, Ex. A at 4-6 [Bankr. No. 492]. The Transaction is thus a reorganization plan clothed as an asset sale.

In an attempt to avoid review of the economic substance of the Transaction, Respondents argue that (i) review is mooted by section 363(m) of the Bankruptcy Code; (ii) Petitioners lack standing because they consented to the Transaction and received more than liquidation value; and (iii) the question presented by Petitioners is not worthy of review because it allegedly fails to raise a circuit conflict. These defenses fail, however, and Respondents cannot escape the Transaction's true nature as a private plan of reorganization.

I. Section 363(m) of the Bankruptcy Code Does Not Moot the Petition

Respondents argue that the Petition is moot under section 363(m) because that provision imposes a "per se rule" that all appeals of unstayed section 363 sale orders are moot. Resp't Chrysler's Br. in Opp'n ("Opp.") 11. Chrysler's misinterpretation of section 363(m) is not only at odds with the plain text of the statute, but provides another basis for granting certiorari. The fundamental defect in

Chrysler's broad mootness argument is revealed by its consequence if adopted: it would shield from review the distributions of billions of dollars of sale consideration to creditors simply because the sale has closed. It is impossible to construe the text of section 363(m) as being intended to have such a result.

A. The plain text of section 363(m) does not render appeals of unstayed sale orders moot where a court can fashion relief that does not affect the validity of the sale

Section 363(m) provides that "reversal or modification on appeal of an authorization under . . . section [363] of a sale . . . of property does not affect the validity of a sale" to a good faith purchaser where such sale order is not stayed. 11 U.S.C. § 363(m). Section 363(m) thus does not state that all appeals of unstayed section 363 sale orders are moot, only that appellate relief may not disturb the finality of the underlying sale.

As the Second Circuit has acknowledged (even as it found an appeal to be moot) section 363(m) "in terms 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 the validity of the sale." *In re Gucci*, 105 F.3d 837, 839 (2d Cir. 1997) (emphasis added). The "simple, straightforward,

and absolute" "per se rule" touted by Chrysler cannot be reconciled with the text of the statute itself.

It is entirely consistent with that text for the Indiana Pensioners to "seek[] review in this Court of the propriety of the Sale Order." Opp. 14. Section 363(m) necessarily *presupposes* valid appeals of orders permitting sales that have closed, but then merely limits the remedies available, providing that, *if* a sale order to a good-faith purchaser is reversed or modified, the reversal or modification cannot affect the validity of the sale. The statute would not make sense otherwise. As the Second Circuit acknowledged, "[i]t is not entirely clear why an appellate court, considering an appeal from an unstayed but *unwarranted* order of sale to a good faith purchaser, could not order some form of relief other than invalidation of the sale." *Gucci*, 105 F.3d at 840 n.1 (emphasis added).

Here, Petitioners' injuries stem directly from the Transaction's improper distribution of sale consideration, which is clearly beyond the parameters of what may be authorized under section 363, *not* from the sale itself. As such, a proper remedy would be to order the creditors who received the consideration to return it to Chrysler's estate so that it can be distributed under a chapter 11 plan. This remedy would in no way implicate the validity of the sale and thus would not be proscribed by section 363(m).

B. The circuit split over the construction of section 363(m), ignored by Respondents, raises an additional basis for granting certiorari

In its attempt to avoid review of the merits, Chrysler has raised another basis for granting the petition: to resolve a circuit conflict over the "per se" mootness issue. By granting the Petition, the Court will have the opportunity to clarify that the express terms of section 363(m) do not otherwise moot appeals that remain viable under Article III.[1]

Review of the section 363(m) mootness issue is independently warranted because, as Chrysler's own cases show, the "per se rule" has not been adopted in every circuit. In *In re Parker*, 499 F.3d 616, 621 (6th Cir. 2007), the Sixth Circuit expressly acknowledged that the circuits are divided on the construction of section 363(m).

Some circuits have adopted a "per se rule," under which "appellate jurisdiction over an *unstayed* sale order issued by a bankruptcy court is statutorily limited to the narrow issue of whether the property was sold to a good faith purchaser." *Gucci*, 105 F.3d at 839-40 (emphasis in original). Every case cited by

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[1] Chrysler also cites *California v. San Pablo & T. R. Co.*, 149 U.S. 308, 314 (1893), but that case, which stands only for the general proposition that the Court does not decide moot questions, is inapposite because Constitutional mootness is not at issue here.

Chrysler essentially recites or applies this "per se rule" without further examination of section 363(m). *See* Opp. 10-16.

Yet, although ignored by Chrysler, other circuits actually do heed the plain text of section 363(m). The Third Circuit has held that section 363(m) does not bar appeal—even of an unstayed sale order—where "a remedy can be fashioned that will not affect the validity of the sale." *Krebs Chrysler-Plymouth, Inc. v. Valley Motors, Inc.*, 141 F.3d 490, 499 (3d Cir. 1998). The Tenth Circuit similarly has held that, "where state law or the Bankruptcy Code provides remedies that do not affect the validity of the sale, § 363(m) does not moot the appeal." *In re Osborn*, 24 F.3d 1199, 1203-04 (10th Cir. 1994). Both the *Krebs* and *Osborn* courts reviewed the propriety of a sale order—even though the sale order itself would stand—to determine whether a "remedy can be fashioned that does not affect the validity of a sale." *Krebs*, 141 F.3d at 499; *see also Osborn*, 24 F.3d at 1204 (imposing a constructive trust on sale proceeds would not "affect the validity" of the sale).[2]

Thus, far from demonstrating that this case is a poor vehicle for resolving the merits of the question presented, the section 363(m) mootness issue further

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[2] Treasury incorrectly asserts that "[t]he petition now before this Court is plainly a challenge to the validity of the sale[.]" (Resp't U.S. Br. in Opp'n 11). Again, Petitioners do not seek to reverse the transfer of the Collateral; but rather, to reverse the improper distributions made to non-purchaser, junior creditors.

justifies review of this nationally important case. *See United States v. Mendenhall*, 446 U.S. 544, 551-52 n.5 (1980) (stating that if a "determination of the question is essential to the correct disposition of the other issues in the case, [the Court] shall treat it as 'fairly comprised' by the questions presented in the petition for certiorari.").

II. Petitioners Were Harmed By the Transaction

A. The issue of consent is irrelevant to the question presented by the Petition

Respondents argue that Petitioners neither "dispute" nor "challenge" the finding below that JPM, as Collateral Trustee, consented to the release of the Collateral on behalf of the First Lien Lenders, and thus, Petitioners lack standing to contest the Transaction. *See* Opp. 2, 17, 18, 28. To be clear, Petitioners maintain that JPM could consent to a release of the Collateral only with unanimous lender consent, which did not exist. But the issue of JPM's purported consent is not relevant to the injury to, and continued standing of, the Indiana Pensioners with respect to the question presented—a question fully addressed by the Second Circuit without reference to any supposed consent or waiver by the Indiana Pensioners. Pet.App. 11a-26a.

Regardless whether JPM could consent to a transfer of the Collateral, JPM certainly could not consent on behalf of Petitioners to an improper

section 363 reorganization of Chrysler's obligations. JPM's "consent" rights (if any) extended only to the disposition of the Collateral and not to the First Lien Lenders' right to enforce their claims as unsecured creditors. Indeed, none of the courts below ever found that Petitioners' alleged "consent" deprived them of standing to object to the Transaction as creditors of Chrysler. Pet.App. 11a, 131a. Moreover, the loan documents themselves make clear that JPM could not impair by consent Petitioners' rights as unsecured creditors. Section 2.10 of the Collateral Trust Agreement explicitly states that, "[n]otwithstanding any other provision of this Collateral Trust Agreement," each First Lien Lender's right to enforce its claims as a creditor "shall not be impaired or affected without the consent of such [First Lien Lender]." JA2801. No court has held to the contrary.

Even more troubling is Respondents' apparent belief that a showing of majority consent by the First Lien Lenders could somehow shield the Transaction from all of its legal deficiencies. As explained above and in the Petition, the Transaction was a *de facto* reorganization plan improperly approved under section 363 as a "sale" instead of through the plan confirmation process under sections 1122-1129. The Transaction is illegal. A showing of majority consent can neither legalize it nor bind Petitioners. Thus, the issue of "consent" is irrelevant to Petitioners' ability to seek review from this Court, just as it was

irrelevant to the Second Circuit's resolution of the issue on its merits below. Pet.App. 26a.

B. First Lien Lenders were entitled to the Collateral's going concern value

Respondents also argue that Petitioners lack standing to seek review for lack of redressable injury. They contend that the Petition's failure to dispute the lower courts' findings that Chrysler's only alternative to the Transaction was a liquidation indicates that Petitioners were not injured. Opp. 16, 19.

Any reliance on the supposed liquidation value of the Collateral as a basis to contest Petitioners' standing directly contradicts this Court's interpretation of section 506 of the Bankruptcy Code under *Associates Commercial Corp. v. Rash*, 520 U.S. 953, 961-62 (1997). In *Rash*, this Court held that a secured creditor's collateral must be valued based on the proposed use of such property. *Id.*; *see also* 11 U.S.C. § 506(a)(1) (the value of such Collateral "shall be determined *in light of the purpose of the valuation and of the proposed disposition or use* of such property[.]" (emphasis added)); *In re Chateaugay Corp.*, 154 B.R. 29, 33 (Bankr. S.D.N.Y. 1993) (recognizing that section 506 provides unambiguous instruction on how collateral should be valued).

Respondents have declared throughout the record that implementation of the Transaction was necessary to preserve Chrysler's "going concern"

value. *See, e.g.,* Opp. 4, 33; Mem. in Supp. of the Sale Mot. at 9-13 [Bankr. No. 191]; Statement of the United States Dep't of Treasury in Support of the Commencement of Chrysler LLC's Chapter 11 Case ¶ 3 [Bankr. Docket 69]. Chrysler's counsel has been outspoken regarding the "going concern" preserved in the cases. *See* Corinne Ball, *Looking at the Crisis and Chrysler's Rebound*, New York Times (DealBook), October 9, 2009, *available at* http://dealbook.blogs.nytimes.com/2009/10/09/looking-at-the-crisis-and-chryslers-rebound/#more-126481 ("Each [of General Motors and Chrysler] sustained a bankruptcy, selling their businesses as a going concern to a government-funded enterprise.").

Accordingly, that Petitioners may have received more than liquidation value is irrelevant. Under *Rash*, the courts below improperly failed to accord the Collateral value as a "going concern" operation. This issue is fully encompassed by the question presented, and the parties' dispute over it is a reason to *grant* the Petition, not a reason to deny it.

III. The Court Needs to Address the Inherent Tension Between Section 363 and Chapter 11 of the Bankruptcy Code

The Petition raises a nationally important bankruptcy issue of first impression: whether section 363 may be used as a side-door reorganization statute separate and apart from the plan process under sections 1122-1129 of the Bankruptcy Code. *See* Pet.App. 17a-18a.

Sections 1122-1129 and section 363 of the Bankruptcy Code are inherently in tension. *See* Pet.App. 20a. With chapter 11, Congress balanced the competing policies of rehabilitating debtors and preserving the property rights of creditors by providing creditors with a significant level of due process before their property rights may be permanently altered by a debtor's reorganization. But with section 363, Congress authorized debtors to petition the bankruptcy court to sell assets other than in the ordinary course of business before plan confirmation—sales that do not afford creditors with nearly the same protections as chapter 11. The existence of these two provisions precipitates the question as to when a section 363 sale becomes an improper *de facto* reorganization.

Respondents do not deny this inherent statutory tension. In fact, they only underscore the national importance of resolving it when they, like the Second Circuit, enumerate case after case where entire bankruptcy estates have been distributed under section 363 despite the requirements of chapter 11. Opp. 32.

Respondents assert that certiorari should be denied because the Petition does not raise a clear circuit split. They are simply wrong. Under the Second Circuit's test, a section 363 sale of substantially all of a debtor's assets is permissible if the sale is supported by a "good business reason." *In re Lionel Corp.*, 722 F.2d 1063, 1071 (2d Cir. 1983).

Indeed, *Chrysler* teaches that good business reasons justify such sales even where they provide reorganization distributions to stakeholders.

Conversely, under the Fifth Circuit's *sub rosa* test, any such sale that "attempts to specify the terms whereby a reorganization plan is to be adopted" is prohibited, even if there is the *best* business reason. *In re Braniff Airways, Inc.*, 700 F.2d 935, 940 (5th Cir. 1983); *see also In re Abbotts Dairies of Pa., Inc.*, 788 F.2d 143, 150 n.5 (3d Cir. 1986) (providing that a "good faith" finding cannot be made if a "debtor-in-possession . . . effectively abrogate[s] the creditor protections of Chapter 11"). Under that standard, the Chrysler sale would have been rejected.

Review is necessary to resolve this inconsistency among the lower courts. The Court needs to provide guidance by establishing a concrete, objective set of criteria for determining when a substantial asset sale is permissible under section 363 and when it becomes a private reorganization plan that must go through the chapter 11 plan process. This case presents the Court with an excellent opportunity to delineate that test and to provide the certainty that debtors and investors require.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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