09-2311-bk

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

IN RE CHRYSLER, LLC,

Debtor.

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"),

Appellees,

INDIANA PENSIONERS, INDIANA STATE TEACHERS RETIREMENT FUND,

Appellants.

ON APPEAL FROM THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANTS
INDIANA STATE POLICE PENSION TRUST, *ET AL.*

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1(b), each of the Indiana State Police Pension Trust, the Indiana State Teachers Retirement Fund, 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.

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PRELIMINARY STATEMENT

This appeal raises novel issues of law with far reaching consequences. Indeed, the United States Department of Treasury ("Treasury" or the "Treasury Department") itself admits that this proceeding is "extraordinary and unprecedented."[1] Through a proposed "sale" transaction, of Chrysler and Treasury seek to:

- temporarily ignore $25 billion of going concern asset value that currently secures $7 billion first lien loans, including those of the Indiana Pensioners,
- lock-in the recovery of the First Lien Lenders at $2 billion based on the assets' purported liquidation value, and
- then have the going concern value realized in the newly-created shell entity, new or reorganized Chrysler, which then distributes at going concern value to Chrysler's junior, but politically favored, stake holders, including the United Auto Workers union (the "UAW") and Treasury itself.

This attack on the most fundamental of creditor rights has been funded, orchestrated and controlled by Treasury, despite its complete lack of statutory and Constitutional authority to do so. The Executive Branch cannot spend funds, take

[1] A-233.

over corporations or control bankruptcy proceedings without Congressional authority. Treasury claims authority under the Emergency Economic Stabilization Act of 2008 ("EESA"),[2] but that Act provides for the purchase of troubled assets from "financial institutions"—not automobile manufacturers—and also does not provide Treasury with the authority to control and restructure any entity, even a bank. Treasury's actions also violate the fundamental rules of priority and circumvent statutory protections attendant to a chapter 11 reorganization.

All of these violations of law and practice were committed, according to the parties, to save Chrysler. Chrysler, however, can be saved without trampling the law and the rights of the first lien lenders. In any case, the issues on appeal call on the Court to maintain the rule of law, even set against cries from others that the economy as a whole will benefit from the sale. The issues raised ask the Court to apply the law notwithstanding the opposition's persistent assertion that the appellants, public pension funds for retired school teachers and policemen and their families, have relatively small holdings. The fact that others did not believe they could take on the Government is no basis for setting aside the rule of law and the rules of priority that are fundamental to the workings of our capital markets. As James Madison wrote long ago in language that is still markedly salient today:

[2] 12 U.S.C. §§ 5201, et. seq. (JSPA ---) References to "JSPA" refer to the Joint Special Appendix on file with the Court. References to "JA" refer to the Joint Appendix assembled by the parties to this appeal and filed with the Court.

"laws impairing the obligation of contract are contrary to the first principles of the social compact, and to every principle of sound legislation." The FEDERALIST No. 44 (James Madison).[3]

JURISDICTIONAL STATEMENT

This Court has jurisdiction over this Appeal under 28 U.S.C. § 158(d) and Bankruptcy Rule 8001(f). On May 31 and June 1, 2009, the bankruptcy court issued the Sale Orders being appealed from here. On June 1, the Debtors-Appellees filed a motion under Bankruptcy Rule 8001(f) for an order certifying the Sale Orders for immediate appeal to this Court [Bankr. Docket No. 3086] (the "Certification Motion"). The Indiana Pensioners consented to the Certification Motion. [Bankr. Docket No. 3203]. On June 2, 2009, the bankruptcy court entered an order certifying the Sale Orders for direct appeal to this Court. [Bankr. Docket No. 3237]. On June 2, 2009, this Court entered an order granting the petition for leave to appeal.

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[3] See also Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555, 602 (1935) (where Justice Brandeis noted that a statute which violated secured creditors' rights, but which was passed for sound public purposes relating to the Great Depression, could not be saved because "the Fifth Amendment commands that, however great the nation's need, private property shall not be thus taken even for a wholly public use without just compensation.").

STATEMENT OF ISSUES PRESENTED

1. Whether the bankruptcy court erred in failing to find that the Treasury Department had violated TARP, by holding that Appellants lacked standing to raise the TARP violations?

2. Whether the Sale is an illegal *sub rosa* plan of reorganization, the consummation of which improperly over-writes the priority scheme of the Bankruptcy Code?

3. Whether the bankruptcy court erred in relying on a purported liquidation valuation where the assets are being sold on a going concern basis and therefore, had to be valued on such basis under Section 506(a)(1) of the Bankruptcy Code?

4. Whether the bankruptcy court erred in relying on the purported liquidation value of the Collateral as a basis for approving the Sale where the liquidation analysis failed to include valuable operating assets of the Debtors that are being sold to new Chrysler, and was prepared and sponsored by an expert who had acted for Debtors in formulating, negotiating and advocating the Sale and who will receive over $10 million if the Sale is closed?

5. Whether the bankruptcy court erred in determining that "New Chrysler" is a good faith purchaser and that the sale is entitled to section 363(m) protection?

6. Whether the bankruptcy court erred in determining that the Indiana Pensioners had consented to the Debtors' sale of substantially all their assets?

7. Whether the Sale Motion schedule ordered by the bankruptcy court denied objecting creditors a full and fair opportunity to develop a record regarding their objections?

STATEMENT OF THE CASE

A. Procedural History of the Bankruptcy Proceeding

Chrysler and certain of its affiliates (the "Debtors") filed for bankruptcy on April 30, 2009. The Debtors 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"). Appellants, the Indiana Pensioners,[4] are among the First Lien Lenders, who are owed $6.9 billion (the "First Lien Debt") secured by a first lien on substantially all of Chrysler's assets (the "Collateral").

On May 3, the Debtors filed a motion in the bankruptcy court for an Order under section 363 of the Bankruptcy Code authorizing, *inter alia*, the sale of substantially all of the Debtors' operating assets, free and clear of liens, claims,

[4] The Indiana Pensioners are comprised of the Indiana State Police Pension Trust and the Indiana State Teachers Retirement Fund, pension funds which are fiduciaries for the investment of billions of dollars of retirement assets for approximately 100,000 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 First Lien Debt.

interests and encumbrances (A-299) (the "Sale Motion"). Under the Sale Motion, the Debtors seek to transfer all or substantially all of Chrysler's assets to a newly-created shell entity that will be owned by the UAW, Treasury and Fiat (the "Sale").

On May 7, the bankruptcy court approved procedures for the Sale, which mandated a schedule for the Sale Motion. Among other things, that schedule left only seven days after a May 19 objection deadline for objecting parties to seek and complete document and deposition discovery before a May 27 evidentiary hearing. (As discussed below, when this schedule proved unworkable Appellants twice moved for continuances, which were denied.)

On May 20, the day after they filed objections to the Sale Motion, Appellants filed a motion to withdraw the reference to the District Court under the mandatory withdrawal of reference statute, 28 U.S.C. §157(d). Among other things, Debtors opposed the motion to withdraw on the ground that Appellants would have the right to an appeal following the determination of the Sales Motion. Argument on the withdrawal motion was heard by Judge Griesa on May 26. Judge Griesa ruled that in light of the expedited schedule set by the bankruptcy court, the Sales Motion issues should be determined by the bankruptcy court in the first instance. The Court made clear, however, that this decision was made in reliance on Debtors' representations that nothing would be done to hinder or impede an appeal from a decision on the Sales Motion. (A-299)

A three-day evidentiary hearing began in the bankruptcy court the next day – May 27. On May 31 the bankruptcy court approved the Sale, issuing an opinion and two orders, one on May 31 and one on June 1 (the "Sale Orders"). On June 1, Appellants sought an emergency hearing before the District Court. Sitting as the Part I judge, Judge McMahon stated that before addressing issues of stay or expedition of an appeal, the parties should wait for the bankruptcy court's entry of the final Sale Orders (at that time only the May 31 order had issued), including specifically with respect to the duration of the mandatory 10-day stay provided under the Bankruptcy Rules.

In considering the issues, Judge McMahon stated: "There is no question that [the Indiana Pensioners] have the right to an appeal. I cannot imagine that there is a court in this chain of courts that is going to deny you your right to an appeal." [(6/1 D. Ct. Hr'g Tr. 18:8-11)] When the June 1 order was issued, it became clear that, notwithstanding Judge Griesa's and Judge McMahon's admonitions, the bankruptcy court had shortened the 10-day stay provided by Bankruptcy Rule 6004(h) to four days. Thus, Chrysler could close the Sale on Friday, June 5 at noon – and Debtors have said that they are prepared to do so. (Debtors' 5/31 Ltr) The bankruptcy court directed that "[a]ny request to further modify the stay should be made to the appellate court." [Sale Order ¶ 57 n. 4.]

The Indiana Pensioners filed notices of appeal on June 1. After the Notices of Appeal were filed, Debtors requested that the bankruptcy court certify this matter to this Court under Bankruptcy Rule 8001(f). Appellants supported certification, and on June 2 the bankruptcy court certified this case to this Court. Upon an emergency motion by Appellants filed on June 2, this Court granted the petition for certification of the appeal and also granted a stay of the Sale Orders.

B. Summary of Decision Below

On May 31, 2009, the bankruptcy court entered its Opinion granting the Sale Motion. [Bankr. Docket No. 3073] (the "Sale Opinion"). On June 1, the bankruptcy court entered its Order approving and authorizing the Sale under section 363 of the Bankruptcy Code. [Bankr. Docket No. 3232] (the "Sale Order").

In approving the Sale, the bankruptcy court found and concluded that (i) the Debtors had exercised sound business judgment in proposing the Sale under section 363(b) of the Bankruptcy Code. [Sale Opinion at 16-18; Sale Order ¶ H; M]; (ii) the Sale did not constitute an illegal *sub rosa* plan of reorganization because the property transferred by New Chrysler to junior creditors was not on account of their prepetition claims [Sale Opinion at 18-24; Sale Order ¶ I]; (iii) the assets of the Debtors could be transferred free and clear of the First Lien Lenders' liens under section 363(f)(2) because the collateral trust agent could and had consented to the Sale on behalf of all of the First Lien Lenders [Sale Opinion at 25-

30; Sale Order ¶ Y], (iv) the Sale was the result of a good faith exercise of the Debtors' management's fiduciary duties [Sale Opinion at 18, 32-34], (v) the U.S. Government had negotiated with the Debtors in good faith and at arms' length and did not exercise improper control of the Debtors [Sale Opinion at 35-37; Sale Order ¶ S]; and (vi) the Debtors afforded all parties with sufficient due process during the course of the proceedings to approve the Sale [Sale Opinion at 39-40; Sale Order ¶ T]. Significantly, at the end of the Sale Order, the bankruptcy court ordered that the automatic 10-day stay imposed by Bankruptcy Rule 6004(h) on the effectiveness of the Sale Order would be reduced to approximately four days—Friday, June 5th at noon. [Sale Order ¶ 57.]

On May 31, the bankruptcy court entered an Opinion and Order Regarding the Emergency Economic Stabilization Act of 2008 ("EESA") and Troubled Asset Relief Program ("TARP") [Bankr. Docket No. 3074] (the "TARP Order"). The bankruptcy court held that the Indiana Pensioners did not have standing under EESA because they were bound by the actions of the Administrative Agent under the Collateral Trust Agreement and they did not experience injury in fact because they were receiving at least their pro rata share of the value of the collateral under the sale transaction. [TARP Order at 5] Further, the bankruptcy court held that, even if the Indiana Pensioners could have shown an injury in fact, they did not show that such injury was fairly traceable to the U.S. Treasury's use of TARP funds. [TARP Order at 5]

STATEMENT OF FACTS

A. Chrysler Has A Going Concern Value Of Over $25 Billion

Chrysler has substantial value. Chrysler itself calculated its value at approximately $25 billion. (A-3740; 5/27 Hr'g Tr., 142:1-143:4-144:12; 147:15-148:14). The financial advisers that Chrysler hired and paid $3 million, Greenhill & Co., LLC, calculated Chrysler's value at $21.5 billion, just days before the bankruptcy filing. (A-3665; 5/27 Hr'g Tr., 194:25-197:2). Remarkably, that going concern valuation was excluded from the fairness opinion presented to the Chrysler board just days later. (A-4181; A-2876). The same values are demonstrated by "New Chrysler".

Fiat's contribution of intellectual property was valued at between $3 billion and $8 billion, which would produce implied value of between $15 billion and $40 billion. (5/27 Hr'g Tr., 304:14-23; 5/28 Hr'g Tr., 324:22-325:20, 325:16-327:22). The Government determined to provide that value to favored constituents, like the unions and itself.

B. Using TARP Funds As Leverage Treasury Department Diverted Value To Favored Constituents

Chrysler management determined that the best option for maximizing the value of its assets, the nearly $30 billion of value, was simply to reorganize on a stand alone basis. (Chrysler Restructuring Plan for Long-Term Viability (A-3835); 5/27 Hr'g Tr., 123:4-9, 14-21; 5/28 Hr'g Tr., 193:12-13, 292:7-9). The Treasury Department told them they could not do so. (5/27 Hr'g Tr., 124:3-15; 5/28 Hr'g Tr., 292:7-12, 270:58). Chrysler then developed a "re-engineered" stand alone plan as the best option for maximizing value, and was working on that plan within one week of the time that bankruptcy was filed. (Chrysler Re-engineered Stand-Alone Business Plan (A-3788); 5/29 Hr'g Tr., 147:11-12). The Treasury Department refused to allow Chrysler to pursue that plan too. (5/29 Hr'g Tr., 147:22-23). The Treasury Department controlled Chrysler through the use of TARP funds. Treasury persistently stated that it would only bail out Chrysler if Chrysler agreed to accept its terms and structure. (5/27 Hr'g Tr., 124:3-15, 123:22-128:9; 5/28 Hr'g Tr., 338:17-21). Chrysler's lead financial advisor with respect to the 363 sale then determined that an alliance with GM would provide the most value. (5/27 Hearing, 138:20-139:10, 191:25-192:1-4). The Treasury Department refused to permit Chrysler to follow that course as well. (5/28 Hr'g Tr., 295:22-297:6).

Instead, the Treasury Department determined that Chrysler would form an alliance with Fiat. (5/27 Hr'g Tr., 124: 3-15, 123:22-128:9; 5/28 Hr'g Tr., 213:3-5, 63:1-3, 194:13-15, 272:5-10). The Treasury Department negotiated with Fiat to determine their equity stake of 20% - 35% in exchange for access to certain intellectual property. Fiat contributed no money to Chrysler. (5/27 Hr'g Tr., 301:16-24). The Treasury Department then negotiated to provide the unions with 68% of the equity of "New Chrysler." (5/27 Hr'g Tr., 131:20-22; 5/29 Hr'g Tr., 349:10-350:14, 426:10-17). The Treasury Department negotiated with the First Lien Lenders led by the Administrative Agent, JPM, for a recovery of only $2 billion. (5/28 Hr'g Tr., 338:22-340:13). JPM received tens of billions of dollars of TARP funds from the Treasury and, therefore, was in no position to negotiate against the Treasury.

C. Treasury Misuses Section 363 Of TheBankruptcy Code To Divert Value

Treasury then determined the strategy for reorganizing Chrysler without having to actually go through the process of reorganization. Treasury brought on an internal bankruptcy attorney, Matthew Feldman, who conceived the strategy of improperly reorganizing Chrysler by using a 363 sale. (A-4239; A-3660; A-4057; A-4059; A-4619). The transaction, however, is plainly a reorganization, not merely a sale of assets.

The record is clear that, today, Chrysler sells Chrysler, Dodge and Jeep cars, trucks and mini-vans, which are assembled at Chrysler's plants by union workers. Following the proposed sale, New Chrysler will operate under the name Chrysler, it will the sell the same Chrysler, Dodge and Jeep cars, trucks and mini-vans, assembled at the same Chrysler plants by the same union workers. (Master

Transaction Agreement ("MTA") §§ 5.19(b), 6.01; Bidding Procedure Order at 1-2; MTA Recitals, at ¶ 2; 5/27 Hr'g Tr., 129:2-22; 5/28 Hr'g Tr., 68:19-22). The new Chrysler will continue to use the same vendors as the existing Chrysler. (5/27 Hr'g Tr., 343:14-18; 5/28 Hr'g Tr., 301:7-25). Basically, the capital structure is remaining the same, except the First Lien Lenders that have been pushed out. Thus, Chrysler did not sell its assets, it reorganized. Indeed, Chrysler's CEO consistently referred to the sale transaction as a "restructuring" in his testimony. (5/28 Hr'g Tr., 242:24-25, 243:1-5, 271:9-11, 337:10-16). Others likewise slipped, calling it a reorganization at trial. (5/28 Hr'g Tr., 160:11-13).

The Treasury's control included even Chrysler's efforts to provide a fairer deal to the First-Lien Lenders. 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." (Second Gluckman Decl., Exhibit B). The Debtors, notwithstanding a fiduciary duty to control the bankruptcy process, asked Treasury to allow them to structure such a transaction: "I hope you think it's worth giving this one more shot." Id.

Treasury provided 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 Government responded "It's over. The President doesn't negotiate second rounds. We've given and lent billions of dollars so your team could manage this properly. . . ." (Second Gluckman Decl., Exhibit B). Treasury goes on to describe how they had "protected [Chrysler's] management and board," and demonstrate a fundamental misunderstanding of the term terrorist.

D. The 363 Sale Was Then Pushed ThroughWithout Adequate Time For Challenges

The Debtors had the bankruptcy court set bidding procedures that required parties interested in purchasing assets to submit final and binding bids, with no financial or due diligence contingency, in less than two weeks. (5/5 Hr'g Tr., 88:7-12, 169:1-7, 189:14-16, 210:8-14). 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. (5/5 Hr'g Tr., 178:5-9, 179:10-180:13, 183:10-19,; 188:8-15). 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. (5/5 Hr'g Tr., 97:12-22, 171:21-174:4, 189:23-190:1).

Any objectors then had a week to conduct discovery and prepare for trial. (5/27 Hr'g Tr., 40:8-16, 41:5-12) Depositions were conducted without the benefit of document review and the Debtors ignored a Case Management Order that required witness declarations for the Sale Motion hearing to be produced well in advance of the hearing. (A-816). Repeated requests for continuances were denied by the bankruptcy court.

E. Debtors' Flawed Liquidation Valuation

Debtors' Sale Motion relies heavily on a liquidation analysis which values the Indiana Pensioners' Collateral at only $2 billion. The Sale Motion hearing revealed numerous fundamental defects in the liquidation analysis.

First, Debtors sold the Collateral on a going concern basis, where the value is over $25 billion, but then calculated a distribution to the First Lien Lenders on the basis of a $2 billion liquidation analysis. There is no precedent for shifting valuation methodologies, which diverted most of Chrysler's value to unsecured creditors selected by Treasury and violates Section 506(a)(1) of the Bankruptcy Code.

Second, the witness that sponsored the liquidation valuation, Robert Manzo, was conflicted in two ways. Manzo is party to an agreement to pay him personally $10 million if the 363 Sale Motion was approved, and an additional $7 million to his firm. (5/27 Hr'g Tr., 152:5-6). In addition, Manzo was one of Chrysler's principals in formulating, negotiating and advocating a transaction to save

Chrysler. (5/5 Hr'g Tr., 111:16-114:5; 5/27 Hr'g Tr., 108:11-14, 58:18-59:20, 168:1-6, 193:1-13; Manzo Decl., dated April 30, 2009 (A-4416)).

Three, the conflict plainly affected the valuation. Manzo submitted a declaration on April 30, 2009 with a valuation range as high as $2.6 billion, $600 million more than the amount being provided to First Lien Lenders. (Manzo Decl., dated April 30, 2009 at ¶ 80 (A-4416)). That critical fact was brought to light in cross-examination on May 4, 2009, and Manzo confirmed it. (5/4 Hr'g Tr., 114:11-13). The ***very next day*** Manzo came back and reduced his liquidation valuation, with no prior notice or documentation (over objection), by $1 billion. (5/5 Hr'g Tr., 132: 4-14, 134:24-25-135:1-2). Manzo so testified, though he had failed to perform a new valuation. (5/5 Hr'g Tr. 160:22-25, 161:11-12). Manzo revealed his bias, noting that to complete a liquidation valuation he would have to look for "other deterioration" eschewing an objective approach. (5/5 Hr'g Tr., 161:11-12). Two weeks later, Manzo reduced the value even further. (5/27 Hr'g Tr., 54:4-5; 12-15; 23-25; 57:4-9; Manzo Declaration, dated May 20, 2009, at 7 (A-4385)). Manzo concluded that Chrysler had a value of zero in his "low case" scenario. (Manzo Declaration, dated May 20, 2009, at 7 (A-4385)). By contrast, Fiat's counsel represented in open court that the assets not even wanted by new Chrysler were worth as much as $1 billion. (5/26 S.D.N.Y. Hr'g Tr., 7:12-9:17; 5/27 Hr'g Tr., 178:2-179:15).

Four, the valuation is facially incomplete. Chrysler has almost forty current and projected lines of cars, trucks and mini-vans. (Chrysler Restructuring Plan for Long-Term Viability at 135 (A-3835). All of those lines are being transferred to New Chrysler in the 363 Sale. Manzo simply excluded from his valuation all but two lines. (Manzo Declaration, dated May 20, 2009, at 17 (A-4385)) (excluding all Chrysler car lines from liquidation analysis except for Viper and Wrangler). Thus, Manzo ascribed no value to assets that are the subject of the Sale here. The value of those assets is also demonstrated by the fact that the vast majority of those product lines were also part of Chrysler's stand-alone plan and the re-engineered stand-alone plan, developed by Chrysler's senior management. (Chrysler Restructuring Plan for Long-Term Viability (A-3835); Chrysler Re-engineered Stand-Alone Business Plan (A-3778). The Chairman of Chrysler Audit Committee and an independent member of the board of directors, James M. Chapman, testified that most of those lines of cars, trucks and mini-vans were valuable. (5/28 Hr'g Tr., 95:2-4; 110:25-111:1-3). Indeed, Chrysler's counsel had described those assets as "valuable," "durable" and "core." (5/28 Hr'g Tr., 83:13-23; 5/26 S.D.N.Y. Hr'g Tr., 43:10-44:25). Chapman agreed with these characterizations. (5/28 Hr'g Tr., 70:21-72:20).

Manzo also depressed his estimated value based by relying exclusively on Chrysler's performance in 2008. The testimony was unrebutted that 2008 was the worst year ever in the automotive industry and for Chrysler. (5/27 Hr'g Tr., 166:20-24). Once again, Mr. Chapman, one of Chrysler's independent directors, confirmed that a valuation based on 2008 performance would **not be accurate**. (5/28 Hr'g Tr., 85:2-18) ("Chrysler financial performance for 2008 does not provide an accurate basis for determining the value of Chrysler's assets; Chrysler's assets are worth more than the 2008 performance would indicate.").

Manzo also used incredibly low multiples of 1 to 1.5 in determining value. (5/27 Hr'g Tr., 187:10-14). Under oath, he could not identify any precedent for such low multiples. (5/27 Hr'g Tr., 187:17-188:9). In contrast, other advisors retained by Chrysler, Greenhill Partners, had used multiples of 5 to 5.5. (5/27 Hr'g Tr., 187:15-210). Manzo's bias is also reflected in his e-mails. In one exchange, the Debtors' Chief Financial Officer asked its lead financial expert (Manzo) "How do you think banks will react to Stmt that substantially all their debt is gone." (A-3772). Notwithstanding his role as a fiduciary here, Manzo's response was: "Oh baby. What do you think??????? . . . They deserve what they get. . . ."

Manzo was party to other inappropriate communications as well. Chrysler's Board of Directors was advised to preserve enough cash to finance a liquidation. (5/27 Hr'g Tr., 238:33-239:1). Indeed, the Board understood it was their fiduciary duty to do so. (5/27 Hr'g Tr., 233:23-234:1). Nonetheless, Manzo and Kolka (Debtors' CFO) took directions from the Treasury to leave as many liabilities "behind as possible and little cash." (5/27 Hr'g Tr., 237:10-17). Again favoring the unions, Treasury directed "we only had to leave enough behind to pay severance, not the liquidation -- that was bank's problem." (5/27 Hr'g Tr., 238: 21-239:1).

F. Treasury Intended To Frustrate Objectors

Treasury and the Debtors then ran over objectors. The Sale Motion was set on unprecedented schedule for a matter of the size and complexity. Indeed, the Sale Motion schedule was set by the Treasury Department over the objection of the Debtors' lead counsel here, who stated that the schedule was "impossible," a "big mistake," would require people to "stuff a judge" and "risk credibility":

> I think 6/15 is a big mistake – depending on judge – i don't expect to have a hearing until 5/26-28 depending on judge's calendar – expect to settle FOF/COL 5/28-6/1 for counter – earliest order date 6/1-4, if 10 day waiver is not granted we are at 6/15 before a stay battle. Facing a certain appeal – do you really want to stuff a judge? I expect there will be a bid – may not be serious but we will have to act as if it is.
>
> The case that you are handing me – is one to buy time until a sensible deal can be worked out. I expect that there will be a bid – may not be serious but we will have to act as if it is until we can establish it is not serious. The equity is worthless and now you are removing the ability to take time to listen to counterbidders/banks/decent process.
>
> So I guess you would rather make a hard line, irritate the judge, risk credibility and then move it? The impossible is getting to be too hard!

(A-4811-4815). The same attorney with fiduciary duties to the estate also noted the concern with providing First Lien Lenders with only $2.6 billion, which became only $2 billion. Id. ("UST and Fiat will have to figure out how we get to $2.6 B – which is one dollar over liquidation value.")

SUMMARY OF ARGUMENT

Treasury is misusing TARP funds to effect a release of the Collateral securing the First Lien Loans. See infra at p. 23-30. Treasury is also violating EESA by compelling Chrysler's new organization through the guise of a section 363 Sale. Id. at 30-33. The Sale Orders also work on constitutional standing. Id. at 35-37. The Indiana Pensioners have standing to raise these EESA and Constitutional violations as a matter of constitutional standing and under TARP. Id. at 37-43.

The bankruptcy court also erred in determining that the proposed Sale does not constitute an illegal *sub rosa* plan. Chrysler plainly is being reorganized. If the 363 Sale here is not *sub rosa* plan, then there is no such thing as a *sub rosa* plan. Id. at 43-54.

The bankruptcy court erred in using an alleged liquidation value of the Collateral as a basis for approving the Sale. The Collateral was sold on a going concern basis for multiples more than alleged liquidation value. Moreover, the evidence of liquidation value is faulty and conflicted. Id. at 54-61.

The Indiana Pensioners did not consent to the release of the Collateral securing their loans. The loan documents required unanimous consent to a release of all or substantially all of the Collateral. Consequently, the Administrative Agent lacked authority to consent on behalf of the numerous lenders that objected to the transaction, including the Indiana Pensioners. Id. at 61-69.

The bankruptcy court erred in determining that the reorganized Chrysler is a good faith purchaser, and that the sale is entitled to the Section 363(m) protection. Id. at 70-76. Lastly, the schedule ordered by the bankruptcy court denied the Indiana Pensioners a full and fair opportunity to take discovery and develop a record in support of their objections. This pace of this case was unprecedented for its sizing complexity, and the harm was compounded because Debtors failed to comply with applicable deadlines. Id. at 76-82.

STANDARD OF REVIEW

Chrysler had the burden of proving that it satisfied all the requirements of Bankruptcy Code § 363 in order to prevail on the Sale Motion. In re Lionel Corp., 722 F.2d 1063, 1071 (2d Cir. 1983). Because they lack the protections offered by a chapter 11 plan and disclosure statement, section 363 motions involving the sale of substantially all of a debtor's assets are subject to heightened scrutiny as to whether the debtor has met its burden of proof. See In re Exaeris Inc., 380 B.R. 741, 744 (Bankr. D. Del. 2008); Mission Iowa Wind Co. v. Enron Corp., 291 B.R.

39, 43 (S.D.N.Y. 2003); In re Channel One Commcns., Inc., 117 B.R. 493, 496 (Bankr. E.D. Mo. 1990). As in this case, an objecting creditor may oppose (and defeat) a section 363 motion solely on the basis of cross-examination. In re Lionel, 722 F.2d at 1071-72.

In deciding section 363 motions, the bankruptcy court deals in mixed questions of law and fact because the court must assess the legal sufficiency and soundness of the debtor's purported business purpose before granting a section 363 motion. See In re Lionel, 722 F.2d at 1071. As with questions of law, mixed questions of law and fact are reviewed *de novo*. Well-Made Toy MFG. Corp. v. Goffa Int'l Corp., 354 F.3d 112, 115 (2d Cir. 2003); Travellers Int'l A.G. v. Trans World Airlines, Inc., 41 F.3d 1570, 1575 (2d Cir. 1994). Similarly, whether an expert should be permitted to act as a source of evidence is more a question of law that also should be reviewed *de novo*. See In re Air Crash Disaster, 795 F.2d 1230, 1233 (5th Cir. 1986) (Higginbotham, J.). Although factual findings are reviewed for clear error, In re Charles Atwood Flanagan, 503 F.3d 171, 179 (2d Cir. 2007), they will be overturned where there is a "definite and firm conviction that a mistake has been committed," In re Manville Forest Prods. Corp., 896 F.2d 1384, 1388 (2d Cir. 1990) (citations omitted). See United States v. U.S. Gypsum Co., 333 U.S. 364, 395 (1948) (finding clear error where trial court credited testimony that cross-examination showed was in conflict with contemporaneous documents).

ARGUMENT

I.

THE TREASURY DEPARTMENT'S ACTIONS VIOLATE EESA

It is well-settled that the Executive Branch's power are limited to those granted to by Congress and the Constitution. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 585 (1952). Here, Treasury relies on TARP. There is no reasonable dispute here that Treasury, however, is violating TARP by orchestrating and funding the "sale" at issue. The bankruptcy court never reached this issue.

A. Treasury Is Misusing TARP Funds To Effect A Release Of The Collateral Securing First Lien Loans

In October 2008, the Emergency Economic Stabilization Act ("EESA") was enacted for the purpose of restoring liquidity and stability to the American "financial system." 12 U.S.C. § 5201(1). Under EESA, Congress created TARP, which granted the Secretary of the Treasury authority to purchase "troubled assets" from "financial institution[s]." 12 U.S.C. § 5211(a)(1). Specifically, Congress authorized the Secretary of 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) (emphasis added). There is no reasonable dispute that the Treasury is violating TARP in this case.

First, the EESA expressly lists the types of entities that are "financial institutions" as including "any bank, savings association, credit union, security broker or dealer, or insurance company." Chrysler does not fit within any of those categories. Treasury's assertion that the list is not exhaustive misses the point. The list defines the nature of a financial institution, and any additional entities need to fit within such nature. See, e.g., Schreiber v. Burlington Northern, Inc., 472 U.S. 1, 5 (1985) ("words grouped in a list should be given related meaning."). Indeed, there would have been no point in expressly identifying the entities constituting financial institutions, if the statute applied to any type of entity in the world, including car companies.[5] Moreover, courts look at the commonplace meaning of a term, such as financial institution. See, e.g., Smith v. United States, 508 U.S. 223, 228 (1993). Plainly, a financial institution is an entity in the business of extending credit, like a bank. Chrysler sells cars, not credit.

Second, there are other federal statutes that define "financial" matters. The Bank Holding Company Act describes activities that are "financial in nature,"

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[5] That TARP was aimed at financial institutions – the types of institutions listed in the TARP definition of "financial institution," and not auto manufacturers – is also confirmed by the other sections of the EESA, which expand previously authorized statutory mandates for the Federal Reserve, and the FDIC, agencies with certain authority over financial institution. See 12 U.S.C. §§ 5233 (EESA § 126 regarding FDIC authority), 5235 (EESA § 129 regarding the Federal Reserve's loan authority), 5236 (EESA § 131 regarding the Treasury Department's authority as to the Exchange Stabilization Fund), and 5241 (regarding an increase in FDIC deposit and share insurance).

which, like TARP, include "lending . . . money or securities," insuring . . . against loss," "providing financial, investment or economic advisory services," "issuing or selling instruments . . . permissible for a bank to hold directly" and "underwriting . . . securities." 12 U.S.C. § 1843(k)(4). Those categories overlap completely with the TARP definition, and exclude Chrysler.

<u>Third</u>, Treasury admitted that TARP was not available for automakers. Shortly after the EESA was enacted, Treasury Secretary Paulson was specifically asked at a House Financial Services Committee hearing what qualified as a financial institution under the EESA and whether TARP funds could be used to bail out the automotive manufacturers. He testified that automotive manufacturers were <u>not</u> covered by TARP.

> But we certainly are not going to give money to plumbing contractors, and we are not going to give money to a lot of other people and institutions that are applying. We have had a very clear focus here right now. And again, I feel a great responsibility, even though the powers may be very broad, and appropriately so, I feel a great possibility to stick with what the purpose is. The purpose is stabilizing and strengthening our financial system. <u>And I have said to you very clearly that I believe that the auto companies fall outside of that purpose. [of TARP]</u>.

<u>See</u> <u>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.</u>, 110th Cong. 19 (Nov. 18, 2008) (emphasis added).

Fourth, the actions of the House of Representatives, in attempting to authorize the Executive Branch to bail out the automotive manufacturing industry after enacting TARP further demonstrates that TARP is not available for automotive companies. On December 10, 2008, 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). One of the express purposes of the Auto Act was "to immediately provide authority and facilities to restore liquidity and stability to the domestic automobile industry in the United States." Id. at § 2. The day after House passage, however, the Senate rejected the Auto Act and abandoned further efforts to authorize any Executive Branch agency to bail out the automotive industry. If TARP was available to bail out automotive companies, the House would not have needed to propose the Auto Act. In any event, Congress made absolutely clear that it would not authorize Treasury to spend money on an automotive bail out.

Fifth, in response to the refusal by Congress to allow Treasury to spend funds on automotive companies, then Secretary Paulson, within only one week, simply 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."

[Statement of Interest]. Thus, even putting aside this tortured reading of TARP, the Treasury Secretary's prior testimony before Congress and the determination by Congress not to permit an automotive sector bail out, the Treasury specifically recognized that it could provide money to only those that provide credit and financing. None of the Debtors do so.[6]

That created a new problem for Treasury. So, on April 29, in connection with Chrysler's bankruptcy filing, Treasury issued its current determination that because Chrysler is an "institution" it can be treated as a "financial institution" under TARP. [Statement of Interest]. Thus, Treasury has simply read the word "financial" out of the statute.

Treasury's interpretation of convenience is baseless. 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

[6] Chrysler Finance may have provided credit and financing, but it is not a debtor. Moreover, Chrysler Finance is not the recipient of any of the TARP funds here. In fact, Chrysler Finance is not even going to continue on with the New Chrysler.

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.

Sixth, 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 to help states solve budget problems because "we are restricted to giving to financial institutions." 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.

During closing argument before the bankruptcy court the government raised for the first time the notion that Chrysler was a financial institution under TARP because the statutory definition of "financial institution" for purposes of the Bank Secrecy Act includes "a business engaged in vehicle sales, including automobile, airplane and boat sales." 31 U.S.C. § 5312(a)(2). Counsel's new argument is unavailing for three reasons. One, Treasury itself has never before suggested reliance on the Bank Secrecy Act as the basis for its interpretation of TARP, nor did Congress. Two, the Bank Secrecy Act is a separate statute with a very different definition. The statutory definition enacted in the Bank Secrecy Act is an exhaustive and definitive list, including such entities as pawnbrokers, travel agencies and gambling casinos. Thus, the statutory definition only underscores that Congress knows full well how to define a financial institution to include those selling automobiles when it intends to include them within a particular statutory scheme. Three, as the bankruptcy court noted, and Treasury agreed, the Bank Secrecy Act is designed to prevent currency transactions and "because cars, boats and planes may often be a vehicle in which currency transactions may have a violation involved, it may be that the definition in the Bank Secrecy Act is far broader to address those problems." (5/29 Hr'g Tr., May 29 tr at 408-09) TARP has no such purpose.

Finally, Treasury is not entitled to deference with respect to its interpretation of TARP. Where a statute is unambiguous, as here, Treasury is entitled to no deference. Chevron, 467 U.S. at 842-43; NRDC v. Abraham, 355 F.3d 179, 199 (2d Cir. 2004) (Department of Energy's rule replacing energy efficiency standards violated the plain language of the Energy Policy and Conservation Act); Nutritional Health Alliance v. FDA, 318 F.3d 92, 101 (2d. Cir. 2003) (plain language granting the FDA authority to regulate drug "alteration" could not be stretched to regulation of drug packaging). Treasury's reading also is "arbitrary, capricious, an abuse of discretion or not in accordance with law." See, e.g., INS v. Cardoza-Fonseca, 480 U.S. 421, 446 (1987) (deference not granted where Board of

Immigration Affairs inconsistently interpreted, three different ways, the standards governing withholding of deportation; Public Citizen v. Mineta, 340 F.3d 115 (2d Cir. 2005) (finding two rules issued by Secretary of Transportation to be arbitrary and capricious; New York v. Sullivan, 906 F.2d 910, 916 (2d Cir. 1990) (Department of Health and Human Services relied exclusively on treadmill exercise tests when evaluating disability claims, and in doing so, ignored Congress's requirement of particularized treatment). Indeed, Treasury's prior interpretations are far more credible than the one now proferred. Treasury cannot simply overlook the sworn testimony of the Treasury Secretary before Congress, Congress's decision not to authorize an automotive sector bailout, Treasury's prior determinations in this matter, and the recent statements made by the Treasury Secretary before another congressional committee.

The use of TARP funds used to "buy" the Collateral securing the Indiana Pensioners loans violates law, and the Sale Orders should be vacated.

B. Treasury Violated EESA By Compelling Chrysler's Reorganization Through The Guise Of A Section 363 Sale

The Treasury has also violated TARP by orchestrating Chrysler's reorganization. The Executive Branch is not entitled effectively to structure a reorganization for a private company, absent a specific statutory grant of authority to do so.[7] Youngstown, 343 U.S. 585 ("There is no statute that expressly authorizes the President to take possession of property as he did here.") TARP grants no such authority.[8] TARP simply permits the purchase of troubled assets (of a financial institution). Indeed, here the Treasury Department has not yet even purchased any assets from Chrysler. Additionally, EESA 119(b)(2) specifically limits the 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).

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[7] Examples of statutory authority will rehabilitate a private company include FIRREA and the Railroad Reorganization Act. See, e.g., 12 Cf., 12 U.S.C. § 1821(d)(2) (powers of FDIC with respect to failed depositary institutions); 45 U.S.C. 701, *et seq.* ("Railroad Reorganization Act") (establishing detailed procedures for railroad reorganizations under the bankruptcy laws); 11 U.S.C. § 1163 (detailing authority of Transportation Secretary in railroad bankruptcy proceeding).

[8] Absent such express statutory authority, even the federal banking regulators do not have unlimited power in marshaling assets and classifying creditors. See, e.g., Wheeler v. Greene, 280 U.S. 49 (1929) (Federal Farm Loan Bank as receiver had no authority under statute to maintain suit to enforce stockholders' liability); Sharpe v. FDIC, 126 F.3d 1147, 1155 (9th Cir. 1997) (FDIC exceeded statutorily granted powers in attempting to record a reconveyance of the debtor's deed of trust for which it did not pay full consideration); Adagio Inv. Holding Ltd. v. FDIC, 338 F. Supp. 2d 71, 79-81 (D.D.C. 2004) (noting broad FDIC powers under section 1821, but finding that "none of these broad powers encompasses the right to reclassify deposits without authorization…"). TARP contains no reference – or even hint – of Treasury Department authority to direct the course of a chapter 11 proceeding as to a private company like Chrysler.

Treasury has made every strategic decision in this reorganization. Chrysler's elected board of directors and senior management had determined to seek a stand alone plan and reorganization. Treasury would not permit them to do so. Chrysler then determined that the best way to maximize value was a "re-engineered" stand alone plan of reorganization. Treasury refused to permit Chrysler to pursue that option. Chrysler's financial expert determined that the most value could be obtained through an alliance with GM. Treasury refused to permit them to pursue that option as well. Instead, Treasury insisted that Chrysler align with Fiat. Treasury then negotiated the deal with Fiat. Treasury also negotiated the terms of the transaction with the UAW. Indeed, Chrysler's CFO learned about the transaction by reading an article in the Wall Street Journal. Treasury also negotiated the payment to the First Lien Lenders, negotiating with the Administrative Agent, JPM, which had received tens of billions of dollars of TARP funds from Treasury, and was in no position to resist Treasury's plan.

Perhaps most importantly, Treasury then conceived the strategy of reorganizing Chrysler through a section 363 sale, rather than pursue 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. If the Debtors complete the Sale, the estate will receive $2 billion, which would be distributed to the First Lien Lenders, representing 29% on their secured debt. Meanwhile, New Chrysler will receive tens of billions of dollars in new loans based on the very same Collateral. Favored unsecured creditors are receiving recoveries substantially higher than secured lenders, perhaps even higher than par. For instance, the UAW is receiving more than $9 billion on its unsecured benefits plan claim, $4.6 million in a note and another estimated $5.5 million in equity. Debtors, however, claim that they never even calculated the value of the New Chrysler's equity.

C. The Sale Orders Work An Unconstitutional Taking

The Supreme Court long ago recognized that a secured creditor's interest in specific property is protected in bankruptcy under the Fifth Amendment. Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555, 589, 594 (1935). That case involved a Depression-era statute that was intended to help bankrupt farmers avoid losing their land in mortgage foreclosure. But rather than mandate some form of moratorium, which had been upheld (see Home Building & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934)), the statute in Radford placed the debtor in a position to hold their property while delaying creditor claims almost indefinitely. Id. at 575-76.

Justice Brandeis noted that the "essence of a mortgage" is the right of the secured party "to insist upon full payment before giving up his security [i.e., the property pledged]." Id. at 580. In invalidating the statute, the Court noted that no bankruptcy law had ever "sought to compel the holder of a mortgage to surrender to the bankrupt either the possession of the mortgaged property or the title, so long as any part of the debt thereby secured remained unpaid." Id. at 581-82. Thus, under the Fifth Amendment Congress could not pass a law that could be used to 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." Id. at 595.[9] That is precisely what Treasury would have Chrysler do here.

Treasury is demanding that the Collateral be stripped away from the First Lien Lenders – thereby impairing the rights of the Indiana Pensioners to realize upon those assets – so that those same assets may be put in New Chrysler and used to the benefit of unsecured creditors in this proceeding, who will then be paid much more than the First Lien Lenders – which Lenders will realize nothing on their unsecured deficiency claims. In Radford, pressing public purposes relating to the Great Depression could not save the statute because "the Fifth Amendment commands that, however great the nation's need, private property shall not be thus taken even for a wholly public use without just compensation." Id. at 602.

D. The Indiana Pensioners Have Standing

[9] Tellingly, in Wright v. Union Central Life Ins. Co., 311 U.S. 273, 278 (1940), the Court upheld the revised version of the statute at issue in Radford based on safeguards "to protect the rights of secured creditors, throughout the proceedings, to the extent of the value of the [pledged] property."

To Raise The EESA Violations

It is clear that Treasury's actions here violate TARP, and the bankruptcy court did not hold otherwise. Rather, the bankruptcy court did not reach the issue based on an alleged lack of standing. Under the court's analysis, however, no one has standing to challenge TARP violations, and Treasury has free reign to violate the law. The bankruptcy court's ruling is wrong as matter of law.

1. The Bankruptcy Court Disregarded the Law of the Case

The Indiana Pensioners filed a motion to withdraw the reference to have the district court resolve the TARP issues raised on this appeal. Appellees opposed the motion, arguing primarily that the Indiana Pensioners lacked standing under TARP. The district court denied the motion to withdraw the reference in order to permit the bankruptcy court to first consider the issue, but expressly held that "TARP and EESA needed to be interpreted," and that the Indiana Pensioners had standing to make the motion to withdraw reference and the related motions. The related motions were the Sale Motion and a motion to appoint a trustee, and the district court's ruling was the law of the case. See In re Fischer, 53 Fed. Appx. 129, 132 (2d Cir. 2002) ("Were we to dismiss the restraining order appeal without reaching its merits, the district court's holding would be the law of the case and binding on future proceedings in the bankruptcy and district courts."); In re Payroll

Express Corp. No. 92-B-43150(CB), 2005 WL 2438444, at *6 (Bankr. S.D.N.Y. 2005); In re Fugazy Express, Inc., 159 B.R. 432, 438 (Bankr. S.D.N.Y. 1993).

The bankruptcy court disregarded the law of the case, holding that the Indiana Pensioners did not have standing to permit the Court to interpret TARP. The bankruptcy court found that the Indiana Pensioners somehow had standing to raise the TARP challenge under that Section 1109(b) of the Bankruptcy Code, but apparently did not have standing to have the TARP violations actually adjudicated. The bankruptcy court found that the district court's holding that "TARP and EESA needed to be interpreted" only referred to the standing to raise the challenge.

The bankruptcy court's decision is plainly incorrect. The district court was clear in stating that EESA and TARP needed to be interpreted and that the Indiana Pensioners had standing. The Court could easily have said that the issue of the Indiana Pensioners' standing needed to be decided, but it did not do so. Moreover, standing is an all or nothing principle. If a party has standing, it can make the challenge. There is simply no rule of standing permitting a party to raise arguments, but not to have them adjudicated. See, e.g., Brooklyn Legal Services Corp. v. Legal Services Corp., 462 F.3d 219, 227 (2d Cir. 2006) (standing is resolved irrespective of the merits, for standing looks at "the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated").

Furthermore, parties in interest under Section 1109(b) "may appear and be heard on any issue in the case under this chapter." The rule plainly does not suggest that the party in interest may be heard on any issue, but a court does not have to adjudicate the issue. Indeed, like constitutional standing, the parties in interest must have a specific interest in the outcome of the issue. See In re Rimsat, Ltd., 193 B.R. 499, 502 (Bankr. N.D. Ind. 1996) (holding that "to qualify as a party in interest requires more than merely being interested in the outcome of the bankruptcy"); In re James Wilson Assocs., 965 F.2d 160, 169 (7th Cir. 1992); Yadkin Valley Bank & Trust Co. v. McGee (In re Hutchinson), 5 F.3d 750, 756 (4th Cir. 1993) (holding that the term "party in interest" includes "all persons whose pecuniary interests are directly affected by the bankruptcy proceedings.") (citations omitted)).

2. The Indiana Pensioners Have Constitutional Standing

The Indiana Pensioners have amply demonstrated that they meet the three part test set forth by the Supreme Court for standing: (1) that the plaintiff have suffered an "injury in fact" which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) that there be a causal connection between the injury and the conduct complained of must be fairly traceable to the challenged action of the defendant, and (3) that it be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992).

First, the Sale Motion seeks to release all of the Collateral securing the First Lien Debt of the Indiana Pensioners and others, in exchange for a cash payment equal to roughly 29% of their outstanding claims against the Debtors. The Sale Motion also provides for no recovery on the Lenders' unsecured deficiency claim, while unsecured creditors receive larger, full or even excess recoveries. Thus, the Indiana Pensioners' injury is concrete and imminent.

Second, there is no question that there is a direct causal connection between Treasury's violation of law and the loss of the Indiana Pensioners' security interest. As addressed above, absent Treasury's use of TARP funds there would be no sale and release of the Collateral securing the Indiana Pensioners' claims. Moreover, Treasury improperly structured the transaction at issue, without any authority under TARP or otherwise to do so. Treasury has controlled all of the material steps in connection with the reorganization, and the release of the Collateral.

Third, there is no question that the imminent injury to the Indiana Pensioners will be redressed by a favorable ruling from this Court. If the Treasury is not permitted to violate TARP, the Indiana Pensioners' Collateral will stay in place. See, e.g., GTE Serv. Corp. v. FCC, 474 F.2d 724, 735 (2d Cir. 1973) (holding FCC anti-trust regulation promulgated outside of Commission's "express or implied" statutory authority was "void as ultra vires"). See also Amalgamated Trans. Union v. Skinner, 894 F.2d 1362, 1372 (D.C. Cir. 1990) (instructing district court to vacate anti-drug program rule promulgated by Urban Mass Transportation Administration without statutory authority); Pueblo of Santa Ana v. Kelly, 104 F.3d 1456 (10th Cir. 1997) (holding gaming compact between Indian tribes and state of New Mexico void ab initio as state governor lacked authority to bind the state by entering such agreements). Accordingly, the injury plainly can be redressed by the relief sought by the Indiana Pensioners in challenging Treasury's conduct. As this Court has recognized, if the party is the object of the government action at issue, "there is ordinarily little question that he has standing."[10] Brooklyn Legal Services, 462 F.2d at 227

[10] In Footnote 23 of its May 31 decision, the bankruptcy court found that the issue of waiver "was not properly presented before the court," but then goes on to address issues that the court claims otherwise would have been "relevant to the waiver issue." The court's discussion that the Indiana Pensioners never objected to the TARP loan made in January 2009 is puzzling. There is no evidence in the record that the Indiana Pensioners were ever made aware of that loan. There was no proceeding authorizing the loan where the Indiana Pensioners could have lodged an objection. The loan was made as junior to the First Lien Lenders, so there was no harm and, therefore, no standing to raise some objection. The court's characterization of the Indiana Pensioners' position is that the "unlawful acts did not benefit them enough" is incorrect. As addressed above, the Treasury has violated TARP. To the extent, however, that the Treasury had satisfied the First Lien Lenders in full, none of the Lenders would have had standing to raise an objection because they would not have been injured. It is the Treasury's violation of TARP in effecting the release of the Collateral, while paying First Lien Lenders only 29 cents and providing much larger recoveries to unsecured creditors, that has harmed the Indiana Pensioners.

Fourth, the court's statement that the Indiana Pensioners are not harmed because the same harm would result if a private party effected a release of the Collateral is incorrect. [TARP Order at 5] The point is that Treasury is nowhere authorized to act as a private party. Moreover, Chrysler's evidence is that there is no other source of funding, so there will be no release of Collateral and diversion of value to favored unsecured creditors absent the misuse of TARP funds and absent Treasury's unauthorized reorganization of Chrysler. Under Treasury's construct, adopted by the bankruptcy court, no one could ever challenge a TARP violation if it was a defense to argue simply that a private party, not subject to TARP, could orchestrate and fund a deal, though they did not do so. The "defense" is particularly puzzling here, where Chrysler admitted, indeed advocated, that Treasury orchestrated and is the only party willing to fund the "Sale."

Fifth, the First Lien Lenders, including the Indiana Pensioners, are the only aggrieved party here. Consequently, if they lack standing, then no one can challenge the serious violations of the Constitution and law. Notwithstanding the often used title "Car Czar," the Treasury Department cannot so insulate itself from judicial review.[11]

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[11] Treasury's prior argument that the Indiana Pensioners are suing as taxpayers for "generalized grievances" is simply wrong. The Indiana Pensioners are suing because the Collateral securing their loans is being released. They do not assert

Sixth, the senior secured loan agreements do not defeat standing here. See infra. As addressed below, the Administrative Agent was not authorized to release the Collateral. Id. Moreover, under Section 2.10 of the senior secured loan agreements, the Administrative Agent has no authority to release the Indiana Pensioners unsecured deficiency claim. Id. So, the diversion of value to unsecured creditors, such as the UAW, also injures the Indiana Pensioners' deficiency claim, further assuring their standing. Indeed, the issue is not one of standing, but rather whether the Indiana Pensioners can succeed on the merits of their objection.

3. The Indiana Pensioners Have Standing Under TARP

The EESA likewise provides standing to the Indiana Pensioners. The EESA contains a savings clause, which provides that "[a]ny exercise of the authority of the Secretary pursuant to this chapter shall impair the claims or defense that would apply with respect to persons other than the Secretary." 12 U.S.C. § 5229(b)(2). The Indiana Pensioners claims and defenses have been impaired the Treasury Secretary's misuse of TARP to release Collateral securing the Indiana Pensioners' loans and divert proceeds to select unsecured creditors, like the unions and Government. Thus, the Indiana Pensioners have standing under the EESA.

any standing on the basis of their status as taxpayers or some other generalized grievance.

Treasury cannot seriously contend that Congress enacted a provision to protect existing creditors, but did not intend they actually be able to enforce that protection. Indeed, the EESA provides that injunctions and even temporary restraining orders may be issued "to remedy a violation of the Constitution." 12 U.S.C. § 5229(a)(2).

There is likewise no merit to the suggestion that the Indiana Pensioners are somehow outside the "zone of interest" of the EESA. The Supreme Court has made clear that the "zone of interest" test is not especially demanding, nor does there even need to be an express intent or indication of congressional purpose to benefit a party. Clarke v. Securities Industry Ass'n, 479 U.S. 388, 399-403 (1987). Rather, the proper inquiry is simply "whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected by the statute." Nat'l Credit Union v. First Nat'l Bank & Trust Co., 522 U.S. 479, 491-94 (1998).

Here, the express intent is on the face of EESA itself, which provides that the Treasury's exercise of authority "shall not impair the claims or defenses that would otherwise apply with respect to persons other than the Secretary." 12 U.S.C. §119(a)(3). Accordingly, there can be no serious question that the Indiana Pensioners, as parties directly affected by the Treasury's misuse of TARP funds, are within the "zone of interest" of the EESA and any suggestion to the contrary is wrong as a matter of law. Indeed, if the Indiana Pensioners were not within the zone of interest, then no one could be as they are the only aggrieved party in this restructuring.

Treasury's position that the Indiana Pensioners need to pursue a complaint with the Financial Stability Oversight Board is completely unfounded. The Treasury can point to no language TARP or otherwise establishing exclusive jurisdiction over TARP violations. Indeed, the notion that the Indiana Pensioners have to challenge the Treasury Secretary's authority before a four person board on which the Treasury Secretary sits is remarkable.

E. The Judiciary Has Jurisdiction To Consider TARP Violations

Section 119 of the EESA provides for judicial review of the actions by the Secretary of the Treasury subject only to the overlay of title 7 of the Administrative Procedures Act ("APA"). The APA starts from the premise that there is a "strong presumption that Congress intends judicial review of administrative action." Sharkey v. Quarantillo, 541 F.3d 75, 84 (2d Cir 2008). And, contrary to the suggestion of Debtors and Treasury, EESA §119 expressly provides for judicial review. Ass'n of Data Processing Serv. Org. v. Camp, 397 U.S. 150, 154 (1970) (there is no presumption against judicial review and in favor of administrative absolutism unless that purpose is fairly discernable from the statutory scheme).

F. The Treasury Department Cannot Create New Law Or Authority Through Alleged Congressional Inaction

Treasury, for the first time during closing arguments on the Sale Motion, asserted that it was permitted to fund Chrysler because Congress had not taken any action to stop it from doing so. As addressed above, Treasury can act only based on authorization from Congress or the Constitution. Thus, Treasury's powers cannot be expanded based on alleged inaction.

G. The Agent Bank Cannot "Consent" To TARP Violations

The bankruptcy court found that no TARP violation could be asserted because the Administrative Agent allegedly consented to the release of the Collateral. As addressed below, the Administrative Agent had no authority to do so. See infra. In any case, the Administrative Agent also lacks authority to consent to TARP violations. To act here, Treasury needs Congressional authority, and there is no principle of law that permits Treasury to derive authority from the consent of a private party.

II.

THE BANKRUPTCY COURT ERRED IN DETERMINING THAT THE PROPOSED SALE TRANSACTION DOES NOT CONSTITUTE AN ILLEGAL *SUB ROSA* PLAN

The notion that "substance will not give way to form" is a basic precept of bankruptcy. Pepper v. Litton, 308 U.S. 295, 305 (1939). Bankruptcy courts regularly look through form to find the substance of a transaction. In re Energy

Corp., 379 B.R. 425, 435 n. 54 (S.D.N.Y. 2007) ("'a court must look to the economic substance of the transactions and not its form'" (quoting Int'l Trade Admin. v. Rensselaer Polytechnic Insti., 936 F.2d 744, 748 (2d Cir. 1991). Here, looking through the form of the Sale approved by the bankruptcy court to its economic reality reveals that it is a thinly-veiled Treasury-sponsored reorganization of Chrysler. The "Sale" completely reorganizes the financial affairs of the Debtors, dictates the treatment substantially all of the Debtors' creditors, and implements anything and everything that could and should be accomplished under a confirmed chapter 11 plan – without providing any of the procedural and substantive protections mandated for the reorganization of a company in chapter 11 (see 11 U.S.C. §§ 1122 – 1129). As such, it is an illegal sub rosa plan that cannot be approved under section 363.

A debtor may, in the face of a bona fide emergency, sell its assets outside a plan; but exigent circumstances cannot be relied upon as a broad excape-hatch through which a debtor can freely avoid the rigors of (and stakeholder protections) of the chapter 11 plan process. (See Committee of Equity Security Holders v. Liondell (In re Liondell Corp.), 722 F.2d 1063 (2d Cir. 1983) A chapter 11 debtor cannot distribute the proceeds, or effect its reorganization under section 363, or Bankruptcy Rule 9019 or section 105—that can only be done in compliance with sections 1122 through 1129. Bankruptcy law does not permit the "clever" debtor and its financial sponsor (no matter how hard to find or powerful) to circumvent the express provisions of the Bankruptcy Code through the use of complex agreements, fictive structures and shell corporations. Put simply, if the substance of a purported "sale" is a reorganization and a structured distribution of the proceeds among creditors, then the transaction **must** be effectuated through the chapter 11 plan process.

The transaction before the Court is a "Sale" in name only; upon consummation, new Chrysler will be old Chrysler in essentially every respect. It will be called "Chrysler." (Master Transaction Agreement § 5.19(b).) Its headquarters will be the current headquarters of Chrysler. (Master Transaction Agreement § 11.01.) Its employees, including most management, will be retained. (Master Transaction Agreement § 6.01.) It will manufacture and sell Chrysler and Dodge cars and minivans, Jeeps and Dodge Trucks. (Bidding Procedures Order at 1-2 [Docket No. 492]; Master Transaction Agreement, Recitals ¶ 2.) And its vehicles will be sold to consumers through a scaled down version of its existing dealer network. (Dealer Contract Rejection Motion ¶¶ 17, 19 [Docket No. 780].) From the perspective of the public, Chrysler will have successfully emerged from bankruptcy.

The real substance of the transaction is the underlying reorganization it implements. Undesirable assets (and associated contingent liabilities) will be set aside for liquidation. May 28 Hr'g Tr. (A-1965; 323:9-14) (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. Master Transaction Agreement at 1. 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. Kolka Aff. (A-2979-80); 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 plan.

Most importantly, for purposes of sub rosa plan analysis, the rights of all major creditor groups will be dealt with:

- the First Lien Lenders will receive $2 billion in cash in respect of the nearly $7 billion they are owed (Kolka Aff., A-2976-77); Master Transaction Agreement ¶ 7, § 2.13, Debtors' Suppl. Memo. p. 14);

- the Debtors' second and third lien lenders will receive nothing (Kolka Aff. A-2976-77,-2987; Manzo Decl. (A-545); Debtors' Suppl. Memo. p. 14);

- substantially all of the Debtors' $5.3 billion of unsecured trade obligations will be assumed and paid by reorganized Chrysler (Master Transaction

Agreement § 2.8(b); Sale Motion ¶ 16, Kolka Aff. (A-2974-75); Kolka, May 4, 2009 Hr’g Tr. at A-1573; 242:16-25);

- substantially all of the Debtors’ prepetition warranty and dealer obligations—estimated by Chrysler at $4 billion—will be honored by reorganized Chrysler (Kolka, May 4, 2009 Hr’g Tr. at 243:15-19; Master Transaction Agreement § 2.08(g),(h));

- $10 billion in unsecured claims owed to Chrysler’s VEBA will receive a new promissory note from reorganized Chrysler in the amount of $4.6 billion (<u>see</u> Master Transaction Agreement, Exhibit K: UAW Retiree Settlement Agreement at 8; Curson Declaration at 33-35 [Docket No. 2101]) 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 (Kolka, May 4, 2009 Hr’g Tr. at 258:8-24), is worth about $24 billion—approximately five times the amount of the VEBA obligation that is admittedly being satisfied with stock); and

- the $3.5 billion by which Chrysler’s qualified pensions are underfunded will be assumed and paid by reorganized Chrysler over 3 years (Kolka, May 4, 2009 Hr’g Tr. at 236:19-237:15, Master Transaction Agreement §§ 2.06(r), 3.15).

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 (Master Transaction 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.

Not only have the procedural and substantive protections been stripped away, but (perhaps tellingly) the result sought is one that obviously could not be achieved through the plan process:

- In a chapter 11 plan that properly captured going-concern value for the benefit of <u>all</u> creditors (not just those preferred by Treasury), the First Lien Lenders would never agree to accept a plan that didn't provide them with value roughly equivalent to their debt;

- Alternatively, if the First Lien Lenders have a deficiency claim in excess of $5 billion (as the Debtors effectively argue in saying that their collateral only yields them $2 billion), a plan that provides such lenders with no recovery on account of their deficiency claim while providing for the multi-billion dollar payout envisioned here for other unsecured creditors—including what appears to be a recovery for the politically favored VEBA that is multiples of its prepetition claim—could not be confirmed under section 1129 of the Bankruptcy Code without obtaining each lender's affirmative vote.

The Bankruptcy Court avoided the otherwise inevitable conclusion that the Sale could not be approved by looking at form only and ingnoring substance in erroneously determining that "[n]ot one penny of value of the Debtors' assets is going to anyone other than the First Lien Lenders," (Opinion, p. 18), and that "[a]ny prepetition creditor of the Debtors who will hold equity in New Chrysler will receive such interest on account of value that each provides to New Chrysler in its efforts to compete effectively in the auto industry." (Opinion, p. 9, n. 10.; <u>see also</u> Opinion, p. 22 ("In addition, the UAW, VEBA, and the Treasury are not receiving distributions on account of their prepetition claims. Rather, consideration to these entities is being provided under separately-negotiated agreements with New Chrysler.”)) These premises are demonstrably false and at odds with the record.

Payments to the VEBA, both in reorganized Chrysler equity and the note issued by reorganized Chrysler, will be provided on account of the ***existing*** $10 billion unsecured debt owed by the Debtors to the VEBA. The document provided to solicit union approval of the deal specifically states that the note and equity are compensation for the existing prepetition debt, with the note accounting for 50 percent of the debt and the equity accounting for the other 50 percent. (A-3781) Indeed, Robert Nardelli, the Debtors’ Chief Executive Officer, David Curson, the person most knowledgeable from the UAW, and Ronald Kolka, the Debtors’ CFO, testified to these facts. May 28 Hr’g Tr. at A-1923-24: 155:24-159:14 (cross-examination of David Curson); A-1961-62: 308:15-310:3 (cross-examination of Robert Nardelli); A-2141: 167:12-168:12 (cross-examination of Ronald Kolka).

The VEBA is a voluntary employees beneficiary association that “fund[s] **legacy retiree** health care obligations.” Sale Opinion, SPA-9 (emphasis added). It specifically does not include active employees. See Master Transaction Agreement, Ex. K, A-3225). The Debtors’ did not establish, and the bankruptcy court did not explain, how retirees can provide any new value to New Chrysler. Such a finding is thus unsupported (and unsupportable) by the record. The VEBA is nothing more than an unsecured claimant, entirely separate from the UAW or any potential value that may be attributed to the collective bargaining agreement. New Chrysler could have assumed contracts with the UAW without agreeing to pay more than $10 billion to unsecured creditors who will provide no benefit to the company.[12] In sum, the Sale goes far beyond what courts permit for an expedited sale. It is a *sub rosa* plan. It should not be approved.

In approving this Sale, the bankruptcy court ignored these facts and the seminal case that prohibits sales that are *sub rosa* plans, PBGC v. Braniff Airways, Inc. (In re Braniff Airways, Inc.), 700 F.2d 935, 940 (5th Cir. 1983). There, the Fifth Circuit held: "The 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." Id. Braniff, the court recognized a section 363 sale of substantially all of a debtor's assets must be closely scrutinized and held that where a proposed sale:

[12] Similar claims regarding supposed new value have been rejected by the courts. For example, the U.S. Supreme Court in Ahlers rejected a plan which sought to favor certain equity holders over certain creditors based on the purported contribution of future "labor, experience, and expertise." Norwest Bank Worthington v. Ahlers, 485 U.S. 197, 199, 202, 204-05 (1988) (the equitable remedies that may be available in a chapter 11 case to achieve the goal of reorganization are circumscribed by the Bankruptcy Code). The Court held that "whatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code" and that a "fair and equitable" reorganization is one which complies with the Bankruptcy Code. Id. at 206-207.

> attempts to specify the terms whereby a reorganization plan is to be adopted, the parties and the district court must scale the hurdles erected in Chapter 11. . . . Were this transaction approved, and considering the properties proposed to be transferred, little would remain save fixed based equipment and little prospect or occasion for further reorganization.

Id. at 940; see also In re Abbotts Dairies of Pa., 788 F.2d 143, 150 (3d Cir. 1986) (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). That is precisely what the bankruptcy court has approved in this case.

The bankruptcy court also fails to effectively distinguish this case from In re WestPoint Stevens Inc., 333 B.R. 30 (S.D.N.Y. 2005). There, the bankruptcy court approved a sale of substantially all of the debtors' assets in exchange for cash and a transfer of certain unregistered securities and subscription rights to acquire securities of the corporate parent of the purchaser. Id. at 33-34. The sale order went on to set the recovery of the debtor's senior secured creditors and to permit partial distribution of the securities to junior lienholders, free and clear of the senior secured creditors' liens. Id.

The senior secured creditors appealed, arguing that the sale order converted more than $240 million of secured monetary claims against the debtors into an illiquid minority equity interest in the parent of successor entities of the debtor. Id. at 34. The district court reversed, holding that the rights of the senior secured creditors could not be abrogated and that the bankruptcy court lacked authority to approve such a transaction under section 363 of the Bankruptcy Code:

> The Bankruptcy Court pointed to no authority, nor has this court despite the extensive research efforts of counsel and the undersigned's own chambers found any, standing for the proposition that an action in permanent derogation of a senior creditor's contractual rights can be forced upon that creditor for the purpose of providing 'adequate protection' to a junior creditor . . . . Taken to its logical extreme, the Bankruptcy Court's notion of adequate protection would allow a powerful creditor and a debtor anxious to achieve some value for its favored constituencies to run roughshod over disfavored creditors' rights, so long as a section 363(b) asset sale transaction could be defended as an exercise of reasonable business judgment in the context of dire economic circumstances.

Id. at 49-50.

The court went on to observe that "section 363(b) is not to be utilized as a means of avoiding Chapter 11's plan confirmation procedures." Id. at 52. "Where it is clear that the terms of a section 363(b) sale would preempt or dictate the terms of a Chapter 11 plan, the proposed sale is beyond the scope of section 363(b) and should not be approved under that section." 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."); Institutional

Creditors of Cont'l Air Lines, Inc. v. Cont'l Air Lines, Inc. (In re Cont'l Air Lines, Inc.), 780 F.2d 1223, 1226-28 (5th Cir. 1986).

Here, the bankruptcy court acknowledges WestPoint and that usurping the role of the confirmation process is improper, but then seeks to distinguish WestPoint on the purported basis that the proposed Sale does not allocate proceeds from the First Lien Lenders. This, however, requires disregard of the fact that value is plainly being provided to unsecured creditors, including the VEBA (and not to the First Lien Lenders) as discussed above.

Moreover, the bankruptcy court's finding that the only other option to the Sale was "the immediate liquidation of the company" (Sale Opinion at 17) does not justify the approval of a *sub rosa* plan. There was no need for the Debtors to sell their assets to new Chrysler in order to separate the good assets from the bad, to assume certain contracts and not others, to restructure the UAW collective bargaining agreement or to equitize certain obligations; each of these goals could be accomplished within the existing corporate structure under a proper chapter 11 plan (including the restructuring of union contracts under section 1113). As such, the only business justification offered with respect to the Sale is the argument that the business did not have sufficient financing to give it the time to implement its reorganization through a plan. This argument, however, does not pass muster. The apparent emergency was knowingly manufactured by the Treasury and adhered to by the Debtors.

From the time Chrysler received its initial $4 billion TARP advance, both Chrysler and Treasury knew that this amount was insufficient to fund a reorganization and that such funds would be fully expended in approximately 4 months (i.e., by the end of April 2009). As such, the fact that Chrysler waited until it had completely consumed all of its liquidity to commence these Chapter 11 Cases (and did not do so months ago when its finances were not nearly as dire) is an emergency of its own making that cannot properly serve as a basis for driving a process that results in the disproportionate impairment of the First Lien Lenders' rights.

To permit such a result would not only reward misbehavior, it would open the door to unacceptable mischief—

- a debtor and its lender would be free (if not incented) to drive the business to the brink of being unable to continue as a going concern from a liquidity perspective, and then

- to file with the debtor's chapter 11 petition, a motion for approval of the required addition financing, the availability of which would be conditioned on selling the assets to a shell company that would implement a custom-made priority scheme in lieu of the one contemplated by law by assuming the obligation to pay only certain specified liabilities of the debtor.

There is no existing precedent for the approval of such transactions, which would effectively undermine or eliminate the chapter 11 plan process. This case should not open that door, and the Sale Orders should be vacated.

III.

THE BANKRUPTCY COURT ERRED IN USING THE ALLEGED LIQUIDATION VALUE OF THE COLLATERAL AS A BASIS FOR APPROVING THE SALE

Throughout the proceedings, the Debtors' foremost response to objections to the Indiana Pensioners' objections to the Sale has been that they have no reason to complain because First Lien Lenders will receive as much (or more) value as they would if the Collateral were liquidated. On multiple occasions, in their papers, witness testimony, and counsels' argument to the court below, the Debtors asserted that the First Lien Lenders' recoveries as a result of the Sale would be higher than what they would receive in a forced liquidation. See May 20 Manzo Decl., A-902-27.

In approving the Sale Motion, the bankruptcy court specifically relied on the alleged liquidation value of the Collateral in its Sale Order and Sale Opinion as support for approval of the Sale. Sale Opinion, at 17, 19; Sale Order, at ¶ M. In the Sale Order, the bankruptcy court made specific findings that the consideration to be paid by the purchaser exceeds the liquidation value. Sale Order, at ¶ M. Noting its reliance on the Debtors' financial advisor, the bankruptcy court stated that, on the high end, an immediate liquidation would generate $800 million, and therefore, "the First-Lien Lenders will receive a greater return under the proposed sale, which reflects the going concern value, than under a piecemeal liquidation." Sale Opinion, at 19.

As a preliminary matter, the Debtors' proffered liquidation value is completely faulty and should not have been relied upon as a basis for the court's decision. It excludes most of the assets that are in fact the subject of the Sale Motion, locks in the financial performance from the worst historical year ever and uses unprecedentedly low multiples. <u>See</u> <u>supra</u>.

Compounding the flaws inherent in the liquidation analysis is the fact that Manzo could not be credited as a source of evidence by the bankruptcy court. <u>First</u>, Manzo was not an objective expert. He had become a party in interest, advocating, negotiating and formulating Chrysler's plans with the Treasury. <u>Second</u>, in formulating the liquidation analysis to support his work for Chrysler, Manzo also was acting to help himself under a contingent fee agreement that guarantees him $10 million personally – and millions more for his firm – if the Sale closes. Under such circumstances, courts have held as a matter of law. <u>See</u> <u>Lippe</u> v. <u>Bairnco Corp.</u>, 288 B.R. 678, 688 (S.D.N.Y. 2003) (expert who had acted as plaintiffs' counsel and had helped develop trial strategy not allowed to testify, having become completely partisan), *aff'd* , 99 Fed. Appx. 274 (2d Cir. 2004); <u>In</u>

re Oneida Ltd., 351 B.R. 79, 92 (Bankr. S.D.N.Y. 2006) (court was "entitled to discredit anything" said by valuation expert because expert retained on contingency fee basis), *citing*, Milfam II LP & Trust A-4 v. Am. Comm. Lines, LLC, 2006 U.S. Dist. LEXIS 65494, at *3-*7 (in discounting expert opinion entirely court notes contingency fee agreement and that opinion openly ignored factors obviously relevant to valuation); Gediman v. Sears, Roebuck & Co., 484 F. Supp. 1244, 1248 (D. Mass. 1980) (expert testimony entitled to virtually no weight where expert negotiated potential settlement of claim for contingent fee and also attempted to proffer valuation testimony).

The bankruptcy court's reliance on liquidation value was also improper as a matter of bankruptcy law. Remarkably, the Debtors purport to sell their operating assets with a going concern value of over $25 billion, by somehow rely on a liquidation valuation for purposes of paying the First Lien Lenders. As a matter of law, and logic, the Debtors are not permitted to sell assets on a going concern basis, but distribute value on a liquidation basis.

It is undisputed that the Indiana Pensioners, as First Lien Lenders, are secured creditors under section 506 of the Bankruptcy Code—up to the value of the Collateral. 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). Notably, 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); In re Chateaugay Corp., 154 B.R. 29, 33 (Bankr. S.D.N.Y. 1993) (recognizing that the phrase, "[s]uch value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property" in section 506(a) is a clear and unambiguous instruction as to how a court should select a valuation methodology").

Where a debtor proposes to use or dispose of a secured creditor's collateral as or in conjunction with an ongoing business, courts ***must*** value such collateral on a going concern basis—as opposed to a liquidation or hypothetical foreclosure basis. See Chateaugay, 154 B.R. at 33 (holding that the text of 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); see also Assoc. Commercial Corp. v. Rash, 520 U.S. 953, 961-62, 117 S. Ct. 1879, 1885 (1997) (finding that the circuit court "rendered inconsequential the sentence 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). "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).

Here, the sale transaction is a fiction and nothing more than a reorganization of Chrysler, in which the same assets will, effectively be retained and operated by reorganized Chrysler. The Debtors have premised the Sale and, indeed, their entire restructuring effort (including the truncated timeline for objecting, conducting discovery and obtaining a resolution of the Sale Motion) on the need to preserve the "going concern" value of Chrysler and the Collateral. See Kolka Affidavit, A-2977 ("Chrysler has commenced these cases to implement a prompt sale to preserve the going concern value of its business and return its business to viability under new ownership."); May 4 Hr'g Tr. A-1538; 103:2-18 (Manzo testifying that payments contemplated under the DIP budget are in furtherance of preserving going concern value for New Chrysler), A-1568; 225:2-21 (Garberding testifying that relief sought is part of an effort to preserve Chrysler's going concern value), A-1570; 233:1-20 (Kolka testifying that "sale transaction as proposed has the company [continuing] on a going concern basis").[13]

[13] Kolka Affidavit, A-3012-13 (stating that the first-day pleadings have been designed to meet certain goals including "preserving and protecting Chrysler's assets pending a sale, including by paying claims of suppliers, dealers and employees to preserve the going concern value of Chrysler's business."); Manzo Apr. 30 Decl. A-4426-30; May 4 Hr'g Tr. A-1533: 82:13-83:7 (Manzo testifying regarding effect on going concern value of paying for unpaid vacation), A-1535; 92:6-19 (Manzo testifying regarding effect on going concern value of

Indeed, the Debtors obtained authority from the bankruptcy court to satisfy billions of dollars in unsecured obligations all for the purpose of preserving Chrysler (and the Collateral) as a going concern. Kolka Affidavit, A-2974-75 (noting that, absent a sale, approximately $20 billion of unsecured obligation will go unpaid); May 4, 2009 Hr'g Tr. A-1573; 242:16-244:20) (same); May 29, 2009 Hr'g Tr. A-2139-40; 161:22-162:1-21 (Kolka testifying that "New Chrysler" would assume substantially all of Chrysler's warranty claims, trade claims, and liability for its pensioner, which is underfunded by approximately $3.6 billion as of last year).

It also has been openly admitted by the Debtors (and all other proponents of the Sale, including the Treasury), and cannot now be denied, that the Sale contemplates a continuation of the Debtors' automobile manufacturing business. The only difference will be that substantially all Debtors' going concern value—and the Collateral—will have been transferred to a newly formed, shell entity; with the only substantive effect that billions of dollars of First Lien Debt will be left

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making payments under voluntary termination employment program), A-1580; 273:12-25 (Edelman, counsel for Export Development Counsel, noting that its "motives are to preserve the going concern value of the Chrysler entities and to preserve Chrysler's jobs and its businesses."). At least 12 times the Debtors' CFO says in his affidavit concern, not liquidation, value for the benefit of its stakeholders (Kolka Aff. A-2974-75, A-2977, A-2980-81, A-3010-13, A-3020-21, A-3023-24, A-3029-30).

behind at the Debtors, who will no longer even have the right to use the "Chrysler" name. Master Transaction Agreement § 5.19(a), A-3263.

Put simply, these Chapter 11 Cases and the proposed Sale transaction are premised solely on the goal of preserving the ***existing going concern value*** of the Collateral. Yet, the Debtors (and the bankruptcy court) at every turn have attempted to dismiss the objections of the First Lien Lenders by arguing that the offered $2 billion payment is higher than what the Debtors' allege would be available in an immediate liquidation. As the cases cited above make clear, in light of the Debtors' use and the proposed post-disposition use of the Collateral, the bankruptcy court had no basis at law for applying a liquidation value to the Collateral under section 506(a) of the Bankruptcy Code. Accordingly, the bankruptcy court's reliance on the alleged liquation value of the Collateral as a basis for approving the Sale was wrong as a matter of law and the Sale Orders should be vacated.

IV.

THE INDIANA PENSIONERS DID NOT CONSENT TO THE DEBTORS' SALE OF SUBSTANTIALLY ALL OF THEIR ASSETS

The Indiana Pensioners did not consent to the sale of substantially all of the Debtors' assets. And under the terms of the applicable documents, the Collateral Trustee cannot consent on their behalf.

It is undisputed that the proposed sale contemplates the transfer of substantially all of the First Lien Lenders' Collateral and that such transfer will require all liens thereon to be released. In that regard, the credit documents specifically address such a scenario. Section 9.1(a)(iii) of the First Lien Credit Agreement provides that no waiver, amendment, supplement or modification shall "release all or substantially all of the Collateral . . . (except as otherwise provided in the Loan Documents) . . . . without the written consent of *all* Lenders." (Emphasis added). First Lien Credit Agreement, § 9.1(a)(iii), A-2588. In other words, the Administrative Agent cannot release all or substantially all of the Collateral without obtaining a written consent from each and every one of the First Lien Lenders.

The bankruptcy court summarily dismissed section 9.1(a)(iii)'s requirement of unanimous consent to the release of the liens on the Collateral (which necessarily must occur as part of the Debtors' section 363 Sale) stating that such sale "is not a 'release' of collateral because the lien attaches to the proceeds of the sale, which remain as collateral to secure the loan made by the Lenders." Sale Opinion, SPA-28. This characterization is incorrect as a matter of law.

Under section 363(f)(2), the provision relied upon by the bankruptcy court in approving the Sale Motion, the Debtors can only sell all or substantially all of the Collateral upon the voluntary release of the First Lien Lenders' lien. The fact that a new lien attaches to the proceeds of the sale does not alter the fact that the original liens must be released in order to consummate the sale. The $6.9 billion lien on the physical assets of the Debtors is a property right that is fundamentally different from a lien on cash proceeds of $2 billion. Thus, the bankruptcy court's finding that the First Lien Lenders' lien will not be released and will remain in effect even after the sale is incorrect.[14] Since a release of the lien on the Collateral is necessary for consummation of the section 363 sale of the Collateral, pursuant to section 9.1(a)(iii) consent ahs not be obtained from all of the First Lien Lenders to the Debtors' section 363 sale, the Debtors cannot satisfy the requirements of section 363(f)(2).

In an attempt to bypass the unanimity requirement under section 9.1(a)(iii) of the First Lien Credit Agreement, the bankruptcy court relies on the parenthetical exception ("except as otherwise provided in the Loan Documents") provided therein. The bankruptcy court holds that the First Lien Lenders' lien can be released without the First Lien Lenders' unanimous consent on the premise that the

[14] The fact that a lien will attach to the sale proceeds is irrelevant for purposes of analyzing consent under section 363(f)(2). The attachment of a lien on the sale proceeds would only be relevant for purposes of analyzing section 363(f)(3), which allows a trustee to sell property free and clear of any interest in such property if the interest is a lien, and the property is sold for a price greater than the aggregate value of all the liens on the property. 11 U.S.C. § 363(f)(3), SPA-306. The $6.9 billion lien on the Debtors' assets is indisputably greater than the $2 billion sale, and therefore, section 363(f)(3) is inapplicable. The bankruptcy court recognizes this but entirely foregoes addressing section 363(f)(3).

"loan documents expressly provide for the Administrative Agent to direct the Collateral Trustee to take Enforcement Actions, including the sale of all or any of the Collateral." Sale Opinion, SPA 28-29. The Debtors' filing of a section 363 sale motion, however, is not a Collateral Enforcement Action; among other things, the Debtors are conducting the sale, not the Collateral Trustee. Accordingly, the fact that the Administrative Agent is authorized to direct the Collateral Trustee to take Enforcement Actions is not relevant to the analysis of section 9.1(a)(iii).

1. The Bankruptcy Court's Interpretation of Section 9(a)(iii) Is Inconsistent with Well-Established Principles Under New York Law

The bankruptcy court's interpretation also is inconsistent with the principle of contract interpretation in New York (which governs pursuant to section 9.11 of the First Lien Credit Agreement) that a contractual exception may not be construed to consume a contractual rule. See Bear, Stearns Funding, Inc. v. Interface Group-Nevada, Inc., No. 03 Civ. 8259, 2007 WL 1988150 (S.D.N.Y. July 10, 2007) (finding that an exception to a loan restriction could not be interpreted so broadly that restriction would effectively be eliminated).

Under New York law, a contract "should be construed so as to give full meaning and effect to all of its provisions." LaSalle Bank Nat'l Ass'n v. Nomura Asset Capital Corp., 424 F.3d 195, 206 (2d Cir. 2005) (citations and quotations omitted). "An interpretation of a contract that has the effect of rendering at least one clause superfluous or meaningless is not preferred and will be avoided if possible. Rather, an interpretation that gives a reasonable and effective meaning to all terms of a contract is generally preferred to one that leaves a part unreasonable or of no effect." Galli v. Metz, 973 F.2d 145, 149 (2d Cir. 1992); see also Columbus Park Corp. v. Dep't of Hous. Pres. & Dev., 80 N.Y. 2d 19, 31 (1992) ("a construction which makes a contract provision meaningless is contrary to basic principles of contract interpretation.").

Bear, Stearns Funding, involved a New York law breach of contract action arising from a loan agreement between Bear Stearns and Interface Group-Nevada. In relevant part, Interface argued that Bear Stearns' sale of a portion of the loan to a competitor of Interface constituted a material breach of the contract. The agreement permitted Bear Stearns to sell, issue participations in, or securitize all or part of the loan. Section 10.24 of the loan agreement, however, restricted Bear Stearns' assignment rights by prohibiting Bear Stearns from assigning the loan to a competitor of Interface. Section 10.24 also provided that the restriction *did not apply* to a "Securitization" of the loan. Section 9.1 of the loan agreement defined "Securitization" broadly to encompass virtually all sales, issuances of participations, and securitizations. Id. at *1-2. In reliance on this broad language, Bear Stearns argued that its sale of the loan to Interface's competitor was a "Securitization," and therefore was not subject to Section 10.24.

The district court examined the interplay of Section 10.24 and Section 9.1 to resolve whether Bear Stearns' sale constituted a material breach of the contract. The court noted that the agreement defined "Securitization" so broadly that at least on first glance, the sale appeared to fall within the definition provided in Section 9.1. Id. at *12. The court, however, concluded:

> But the definition of Securitization . . . is so broad that applying it to Section 10.24 would render the Competitor Restriction meaningless, an interpretation disfavored under New York law. Section 10.24 states that the Competitor Restriction 'shall not apply to a Securitization of the Loan.' If this use of 'Securitization' includes any sale, participation, or securitization of all or part of the Loan, it is difficult to see how the Competitor Restriction could ever apply. In other words, if the broad definition of Securitization in Section 9.1 is applied to Section 10.24, the exception (the Securitization Exemption) would completely swallow the rule (the Competitor Restriction). Such an interpretation must be rejected.

Id. (internal citations omitted).

Similarly, if the bankruptcy court's broad definition of "Collateral Enforcement Action" is applied, section 9.1(a)(iii)'s rule of unanimous consent would be rendered superfluous and meaningless. By holding that the Collateral Trustee's consent to the Debtors' sale is a Collateral Enforcement Action excepted from unanimous consent, the bankruptcy court suggests that the definition of Collateral Enforcement Action is so broad as to encompass virtually any affirmative action ***and*** passive inaction taken by the Collateral Trustee as well as any action taken by the Debtors under the direction of the Administrative Agent.

The bankruptcy court's interpretation of section 9.1(a)(iii), however, leaves no scenario where a unanimous amendment, consent or waiver to release of all or substantially all of the Collateral would ***ever*** be required, and completely overrides section 9.1(a)(iii)'s rule of unanimity. Such construction must be rejected as unreasonable because it fails to give full meaning and effect to ***all*** of provisions in the First Lien Credit Agreement.

2. The Bankruptcy Court's Interpretation of Section 9(a)(iii) Is Inconsistent with the Debtors' and Treasury's Prior Interpretation of Section 9(a)(iii)

Moreover, the Debtors and the U.S. government have also from time to time conceded that section 9.1(a)(iii) requires unanimity of consent in order to implement the Debtors' Sale. Both the Debtors and the Government have made multiple statements on the record regarding their efforts to secure the consent of dissenting First Lien Lenders like the Indiana Pensioners prior to the commencement of the Debtors' Chapter 11 cases. Despite obtaining consent from the majority of the First Lien Lenders, the Debtors filed for chapter 11 due to a minority group of dissenting First Lien Lenders. For example, Chrysler's official press release on April 30, 2009 stated that:

> Chrysler initiated discussions with Fiat more than a year ago to develop plans for a global product alliance. Over the past several months, these discussions have evolved and expanded. Chrysler and many of its stakeholders worked tirelessly to agree upon concessions that will result in a significantly lower cost base and enable fulfillment of a broader strategic alliance. . . .

> Despite substantial progress on many fronts, Chrysler was not able to obtain the necessary concessions from ***all*** of its lenders, which would have avoided the need for a bankruptcy proceeding. As a result, under the direction of the U.S. Treasury, Chrysler LLC and 24 of its wholly owned U.S. subsidiaries today filed voluntary petitions under Chapter 11 of the U.S. Bankruptcy Code in U.S. Bankruptcy Court for the Southern District of New York."

Press Release, <u>Chrysler LLC and Fiat Group Announce Global Strategic Alliance to Form a Vibrant New Company</u>, Apr. 30, 2009 <u>available at</u> http://www.chryslerllc.com/en/news/article/?lid=the_new_chrysler&year=2009&month=4 (emphasis added).

Similarly, on April 30, , President Obama stated that the Debtors would file for bankruptcy protection because a small group of First Lien Lenders refused to consent to the sale of substantially all of the Debtors' assets: "Because of the fact that the UAW and many of the banks, the biggest stakeholders in this whole process have already aligned, have already agreed [to the Debtors' sale], this process will be quick. [Chrysler's bankruptcy proceedings] will be efficient. It's designed to deal with those last few holdouts, and it will be controlled. . . . It's a process that has the full support of Chrysler's key stakeholders and the full backing of the United States government." President Barack Obama, <u>Remarks by the President on the Auto Industry</u>, Apr. 30, 2009 <u>available at</u> http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-on-the-Auto-Industry/. The President further noted that "[w]hile many stakeholders made sacrifices and worked constructively," the Debtors were forced into bankruptcy because "a group of investment firms and hedge funds decided to hold out for the prospect of an unjustified taxpayer-funded bailout." Id. The Debtors as well as the U.S. government recognized that without the unanimous consent of all its First Lien Lenders, the Debtors' planned sale could not be implemented outside of bankruptcy proceedings.

If the Debtors and the U.S. government did not interpret section 9.1(a)(iii) to require unanimous consent, they would have never worked "tirelessly" in their effort to obtain consent from all of the first-lien creditors or commenced chapter 11 proceedings to implement an in-court restructuring once such efforts failed. Having obtained the consent of the required Lenders, the Debtors would have forced the sale on the dissenting minority First Lien Lenders without the protections of the Bankruptcy Code if Section 9(a) worked as held by the court below. The commencement of the Debtors' chapter 11 cases after failure to obtain unanimous consent demonstrates that the Debtors and the U.S. government, like the Indiana Pensioners, interpreted section 9.1(a)(iii) of the First Lien Credit Agreement to require written consent from each of the First Lien Lenders.

3. The Bankruptcy Court's Interpretation of Section 9(a)(iii) Raises Serious Public Policy Concerns.

Failing to give effect to the plain language of the First Lien Credit Agreement and the CTA also compromises the integrity of the credit market and gives rise to serious public policy concerns. In today's deteriorating credit market, it is standard practice to include in a credit document provisions prohibiting the administrative agent and the collateral trustee from releasing collateral without the consent of each first lien lender party to that agreement. Indeed, First Lien Lenders rely on the enforceability of such provisions when trading in the credit market. The bankruptcy court's disregard for the plain meaning of section 9.1(a)(iii) will adversely impact the credit market by chilling lending activity as First Lien Lenders will no longer be able to rely on the enforceability of their credit documents. Accordingly, in order to preserve First Lien Lenders' confidence in the credit market, the bankruptcy court's unreasonable interpretation of section 9.1(a)(iii) must be rejected.

V.

THE COURT ERRED IN DETERMINING THAT NEW CHRYSLER IS A GOOD FAITH PURCHASER AND THAT THE SALE IS ENTITLED TO SECTION 363(M) PROTECTION

The bankruptcy court concluded that "New Chrysler" (an entity undisputedly controlled by the Treasury, the UAW, and Fiat) was a "good faith purchaser" for purposes of section 363(m) of the Bankruptcy Code. [Sale Opinion, SPA-37]. The evidence in the record, however, strongly contradicts that determination. In fact, the record establishes that the purchaser is a shell corporation that currently has no assets, income, employees, officers or directors.

It is also uncontroverted that two of the purchaser's three shareholders are substantial creditors of Chrysler, whose claims are receiving preferential treatment as compared to the secured and deficiency claims of the First Lien Lenders.

In that regard, the record includes direct and circumstantial evidence that the Treasury formulated and directed (a) Chrysler's reorganization strategy (including the formation and use of new Chrysler), (b) which creditors Chrysler or new Chrysler would pay, and (c) how much they would receive and in what currency. The Treasury also dictated the timing and manner of the company's chapter 11 filing. The result, if this Court focuses only on form and eschews economic reality (as did the court below), is that Chrysler has agreed to sell to New Chrysler for $2 billion assets that will have a going concern value of not less than $20 billion! This control was obtained and maintained largely by the Treasury's use of the increasingly imminent complete dissipation of the company's cash resources as an effective sword of Damocles to compel compliance. Accordingly, the bankruptcy court erred in finding that the Sale is entitled to protection under section 363(m).

A "good-faith purchaser" determination is a mixed question of law and fact. Licensing by Paolo, Inc. v. Sinatra (In re Gucci), 126 F.3d 380, 390 (2d Cir. 1997) ("Gucci II"). Although the Bankruptcy Code does not define "good faith purchaser," the Second Circuit has defined it as "one who purchases the assets for value, in good faith and without notice of adverse claims." Id. Specifically,

> [t]o determine a purchaser's good faith, courts look to the integrity of his conduct during the course of the sale proceedings; where there is a lack of such integrity, a good faith finding may not be made. . . . Good faith is absent where a purchaser engaged in fraud, collusion between the purchaser and other bidders or the trustee, or an attempt to take grossly unfair advantage of other bidders.

Bay Harbour Mgmt., L.C. v. Lehman Bros. Holdings, Inc. (In re Lehman Bros. Holdings, Inc.), Nos. 08-Civ.-8869 (DLC), 08-Civ.-8914 (DLC), 2009 WL 667301 at *6 (S.D.N.Y. March 13, 2009) (internal quotations omitted) (citing Gucci II 126 F.3d at 390).

In considering the issue of good faith, the bankruptcy court determined that the Treasury acted no differently than any other lender of "last resort" in conditioning the provision of its financing on a transaction with Fiat. Sale Opinion, SPA-36-37. Moreover, the bankruptcy court found that the non-economic motivations of the U.S. Government were irrelevant to the approval of the Sale or findings of good faith. Sale Opinion, SPA-30-31. The evidence, however, indicates that the bankruptcy court erred in finding good faith and granting section 363(m) protection to the transaction.

As the prepetition third lien lender to the Chrysler (Kolka Aff., A-3000), the Task Force on the Auto Industry (the "Auto Task Force") and the Treasury began exerting pressure on Chrysler to restructure itself in such a way that favored certain stakeholders, which the Treasury deemed important. Chrysler's responsive conduct has made this abundantly clear:

- it ceased all serious efforts to explore alternative ways to raise cash or sell assets (A-3002-12);
- it made no attempt to sell off any of its brands as going concerns to parties other than Fiat (i.e., the party required by the Treasury) (Fiat Term Sheet at 14);
- it ceded complete control of the process of formulating the critical elements for the company's reorganization to the Auto Task Force (A-1624; 36:5-37:3)
- it never seriously considered commencing bankruptcy proceedings prior to April 30, 2009, even though it was clear that Chrysler would run out of cash on or about that date, imperiling the recoveries of First Lien Lenders and maximizing the Treasury's leverage over the process (Kolka Deposition 71:3-20; May 5 Hr'g Tr. 130:11-132:5);
- before deciding to sell substantially all of its assets under section 363 of the Bankruptcy Code to a newly created shell company, new Chrysler, Chrysler did not develop a view of its liquidation or going concern values, its debt capacity, the value of the equity in the new company, what interest Fiat should receive for its purported contributions to the new company, what recovery its creditors should receive, or what equity stakes, if any, its creditors should receive; May 4 Hr'g Tr. A-1571; 235: 14-24; A-1573-74; 245: 15-246:19, A-1575; 250:12-252:18.
- in ceding control of its reorganization efforts to its third lien lender (the U.S. Government), never once did Chrysler consider such lender's obvious conflicts of interest [May 5 Hr'g Tr. A-1571; 235: 14-24; A-1574; 246: 4-6, Gluckman Declr. (Bankr. Docket No. 1268), Ex. D)].

Chrysler failed even to participate in any of the negotiations with its two most important stakeholders, the First Lien Lenders and the United Auto Workers union. (May 4 Hr'g Tr. 235: 14-24; 246: 4-6, Gluckman Decl., Ex. D) According to Mr. Kolka, the Debtors' CFO, "The two billion dollar offer I first heard about it when we read it in, I believe it's the Wall Street Journal." (May 4 Hr'g Tr. A-1574; 246: 8-9); Gluckman Declr., Ex. D (Bankr. Docket No. 1268). The Treasury all but assumed all of the Debtors' major business decisions and responsibilities. (May 4 Hr'g Tr. A-1574; 246: 8-9); Gluckman Declr. Ex. D (Bankr. Docket No. 1268) (Kolka testifying that the Debtors were not involved in the allocation of equity in New Chrysler or such negotiations between the UAW, Treasury or Fiat, nor were they involved in the negotiations with the First Lien Lenders). Using its control over the Debtors, the Treasury even decided the time of the filing and the venue for the Chapter 11 Cases, (See Press Background Briefing on Auto Industry (April 30, 2009), A-2920-22), and decided to effectuate the Debtors' restructuring through the Sale to a shell corporation owned by the Treasury, the UAW and Fiat.

In addition, the evidence does not support the bankruptcy court's finding that the Sale was the result of an arms' length negotiation. Sale Opinion, SPA-18 The record indicates that there are numerous conflicts of interest:

- The Treasury is (i) the Debtors' prepetition third-lien lender, (ii) the Debtors' DIP lender, (iii) the exit finance lender, (iv) an equity holder in the purchaser, (v) a TARP lender to the Administrative Agent, and three other First-Lien Lenders, who held in the aggregate with the Administrative Agent nearly 70 percent of the amounts outstanding under the First-Lien Credit Agreement, and (vi) a TARP lender to both Chrysler FinCo and GMAC; in addition, the Treasury has exercised extraordinary control over the Debtors in connection with the development and formulation of their reorganization strategy;

- The Debtors' majority owner, Cerberus, is the holder of the second-lien loans that are being released and has significant ownership interests in Chrysler FinCo (the Debtors' former auto financier) and GMAC (Fiat's prospective auto financer), both of which have entered into material transactions with the Debtors and the purchaser that may be providing a substantial, undisclosed benefit to Cerberus;

- The UAW is not only the union representing the employees for both Chrysler and the Fiat, but also is a significant creditor of Chrysler and a significant equity holder in the purchaser (Kolka Aff. A-3004-05);

- The Debtors' CEO was previously employed by Chrysler's parent (Cerberus) and, immediately following consummation of the proposed sale, will be returning to employment there (May 28 Hr'g Tr. A-1942; 230:9-232:17; A-1944; 238:1-25); and

- Various parties supposedly engaged in "arms' length" negotiations are nonetheless sharing counsel—e.g., Schulte Roth & Zabel LLP is acting as counsel to both the Debtors and their parent, Cerberus (May 28 Hr'g Tr. A-1946; 246:9-248:3), and Simpson Thacher & Bartlett LLP is counsel to both the Treasury and the Administrative Agent.

Another obvious example of a lack of arms' length negotiation, is the bidding procedure proposed by the Debtors in connection with the Sale. These procedures required not only that prospective bidders submit unconditional bids within only a week or so, but that such bids ***mirror*** the deal with Fiat in every aspect, including the assumption of the Debtors' VEBA, employee and union obligations, regardless of the price offered. See Bid Proc. Order, Exhibit A at 4-6 [Bankr. Docket. No. 190]. When asked about these procedures, the Debtors' own witnesses testified that they had not seen them and that they had not been prepared by Chrysler. (5/5 Hr'g Tr. A-1616-99:2-4). Such a response begs the question of which of the other interested non-Debtor parties (Treasury, Fiat, the UAW, or all three) drafted the very bid procedures which were supposed to maximize value for the Debtors' stakeholders (i.e., the Indiana Pensioners) by encouraging parties other than the purchaser to offer more money for the company. Such bid tampering alone constitutes "bad faith" for purposes of section 363(m) of the Bankruptcy Code. See Gucci II, 126 F.3d. at 390 (the good-faith requirement prohibits fraudulent, collusive actions specifically intended to affect the sale price or control the outcome of the sale."); In re Abbots Dairies of Pa., Inc., 788 F.2d 143, 149 (3d Cir. 1986) (manipulation of timing to create an emergency that would preclude truly competitive bidding and justify an immediate sale is evidence of bad faith).

As a consequence of the control exerted by Treasury and the lack of any arms' length negotiations, the Debtors proposed the Sale, a *sub rosa* plan, under which billions of dollars would be shifted to favored unsecured claimants at the expense of the First Lien Lenders and substantially all of the Debtors' assets would be transferred to a "shell corporation." Under these circumstances, the bankruptcy court erred in finding that "New Chrysler" was a good faith purchaser entitled to the protections of section 363(m)

VI.

THE INDIANA PENSIONERS WERE DENIED A FULL AND FAIR OPPORTUNITY TO DEVELOP THE RECORD

Another extraordinary aspect of this case was the schedule advocated by the Treasury and the Debtors and adopted by the bankruptcy court. That schedule, relating to the sale of over $25 billion in assets, compelled objecting parties like the Indiana Pensioners to formulate, prepare for and conduct a trial on the merits in less than one week. Anyone would be hard-pressed to point to any other civil litigation involving billions of dollars in which a court mandated that the matter be prepared and tried in a week. And the bankruptcy court's schedule was not crafted to the size and complexity of the case. Rather, the schedule was a product of result-oriented jurisprudence: Treasury and the Debtors wanted a result, and openly used the litigation process to pursue that result by denying objecting parties a full and fair opportunity to take discovery and develop a record in support of their objections.

As discussed above, the Debtors and Treasury prepared for the bankruptcy for months. A-3765-66; A-3772. Part of the planning involved setting an unrealistic schedule for the Sale Motion, and Chrysler and Treasury openly debated the merits of how tight the schedule should be. A-3662-63. In connection with Chrysler's debtor-in-possession financing, Treasury established "case milestones."[15] Among the milestones listed in papers filed with the bankruptcy court, was that the Sale Motion hearing be held on or before June 1, with the Sale closing by June 27.[16] Ultimately, an even tougher schedule was set – requiring objections to the Sale Motion by May 19 and a hearing by May 27[17] – even though Debtors' counsel viewed that schedule as risking Chrysler's credibility and as "stuffing" a judge. (A-3662-63)

The Indiana Pensioners filed their objections on May 19 (R Bankr. Docket No. 1259 and immediately (i) demanded from Debtors information on who would testify at the Sale Motion hearing,[18] and (ii) served discovery requests on Chrysler, Treasury, Fiat and the UAW. Under the Case Management Order entered by the bankruptcy court, Debtors, as the moving party, had to "identify its proposed evidence and witnesses within two business days of a written request therefor made by the objecting party."[19] That would have been May 22.

Debtors produced about 350,000 pages of documents in a rolling production over several days,[20] while other parties added another 100,000 pages. Given the time pressures, there was no time to review the documents thoroughly to determine

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[15] See Second Lien Secured Priming Superpriority Debtor-in-Possession Credit Agreement § 7(i) [Bankr. Docket No. 2433].
[16] See id. at Schedule 1.1G.
[17] See Order Approving Sale Motion Procedures [Bankr. Docket no. 492]
[18] See May 23, 2009 W&C Letter (A-4795)
[19] Case Management Order (A-825).
[20] Debtors' brief on Sale Motion at 49. [Bankr. No. 2130]

what had been received and not received, and then engage in any meaningful meet and confer process to press for additional discovery. Thus, the Sale Motion proponents generally were able to unilaterally decide what to produce or withhold.[21]

The same pattern emerged as to depositions. Beginning on May 22, the Debtors designated 13 witnesses.[22] Debtors still had not designated the specific witnesses who would testify on the Motion, as required under the Case Management Order, making it impossible effectively to allocate resources. As of May 23, Debtors continued to say that their witness list was not finalized – nor were additional witness declarations available.[23] In response, the Indiana Pensioners moved for a continuance, highlighting, *inter alia*, Debtors' violation of the Case Management Order and the continuing problem of rolling document productions during ongoing depositions.[24] The bankruptcy court refused a continuance. A-4797.

The Indiana Pensioners were further prejudiced because they were never able to litigate the Debtors' (and the Treasury's) apparent waivers of privilege. For example, on May 25, in seeking additional discovery from the Treasury, the Indiana Pensioners offered documents showing Debtors' counsel sharing

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[21] A-4775-80, A-4781-83, A-4784-85, A-4798-800.
[22] A-4786-90.
[23] A-4801.
[24] A-4791.

privileged material and case strategy with the Treasury, and Treasury disclosing intra-governmental information that had been described as privileged. In any normal litigation, such documents would have resulted in follow-on discovery that would have enhanced the Indiana Pensioners' case on Debtors' lack of independence, breach of duty, and lack of a sound (and well-informed) business purpose under section 363. Here, however, the march toward trial made any rational litigation strategy impossible to pursue.

Finally, on the eve of trial (literally late the night before), the Debtors produced *three* new witness declarations for testifying witnesses. Each witness had been deposed, but without the benefit of these new declarations, which were provided well outside the bounds of the Case Management Order. Faced with an obvious breach of the litigation protocol, the Indiana Pensioners made a new motion for a continuance, which was again denied. (Motion and 5/27 Tr. at 30-38)

This Court has cautioned that "a court must not let its zeal for a tidy calendar overcome its duty to do justice." Breary v. City of Rye, 601 F.2d 62, 63 (2d Cir. 1979). In particular, justice should not be "impaired by such a 'close inflexible attention to the docket.'" See id. at 65, citing Peterson v. Term Taxi, Inc., 429 F.2d 888, 891 (2d Cir. 1970); General Signal Corp. v. MCI Telecommunics. Corp., 66 F.3d 1500, 1508 (9th Cir. 1995). Here, the Indiana Pensioners who were "stuffed" (in the words of Debtors' counsel) as they were denied the protections of the Federal Rules with respect to aggressively develop properly their case. This prejudice was then magnified by the stakes – as over $20 billion in assets is in play – representing substantially all of Appellants' Collateral. Under these circumstances, the decision of the bankruptcy court on the Sale Motion should be vacated as having denied the Indiana Pensioners a full and fair opportunity to develop a record in support of their objections.

CONCLUSION

For the foregoing reasons, Appellants the Indiana Pensioners respectfully submit that the Sale Orders entered by the bankruptcy court should be vacated.

Dated: New York, New York
June 4, 2009

Respectfully submitted,

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