No. 09-285

In the Supreme Court of the United States

INDIANA STATE POLICE PENSION TRUST, ET AL.,
PETITIONERS

v.

CHRYSLER LLC, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a completed sale of assets in a bankruptcy proceeding, authorized under 11 U.S.C. 363(b) and made in good faith, can subsequently be reversed or modified in ways that affect the sale's validity, notwithstanding 11 U.S.C. 363(m)'s express prohibition of such reversals and modifications.

2. Whether the court of appeals correctly affirmed the bankruptcy court's approval of the sale of assets in this case.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-45a) is reported at 576 F.3d 108. A prior order of the court of appeals (Pet. App. 46a-47a) affirming the order of the bankruptcy court is unreported. The opinion of the bankruptcy court granting the debtors' motion seeking authority to sell substantially all of their assets (Pet. App. 116a-176a) is reported at 405 B.R. 84. The order of the bankruptcy court authorizing the sale and granting related relief (Pet. App. 48a-115a) is unreported. The opinion and order of the bankruptcy court rejecting petitioners' challenges based on the Emergency Economic Stabilization Act of 2008 and the Troubled Asset Relief

Program (Pet. App. 177a-184a) is reported at 405 B.R. 79.

JURISDICTION

The judgment of the court of appeals was entered on June 5, 2009. On August 5, 2009, the court of appeals issued an opinion setting forth its reasons for the prior order.[1] The petition for a writ of certiorari was filed on September 3, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On April 30, 2009, Chrysler LLC and 24 of its subsidiaries—faced with sharply reduced consumer demand, severe operating losses, and a lack of access to credit—filed for Chapter 11 bankruptcy protection in the United States Bankruptcy Court for the Southern District of New York. Before filing for bankruptcy, Chrysler exhaustively pursued all other options, including a possible sale, possible joint ventures, and possible new financing. Only the United States Department of the Treasury, Export Development Canada, and Fiat S.p.A. proved willing to ally themselves with Chrysler. Both before and after Chrysler filed for bankruptcy, the Department of the Treasury committed billions of dollars in federal financing to Chrysler through the Troubled Asset Relief Program (TARP), thereby staving off an immediate, value-destroying liquidation. Pet. App. 56a, 58a-61a, 117a, 122a-128a.

On May 3, 2009, Chrysler filed a motion (Sale Motion) seeking the bankruptcy court's approval of a tentative agreement to sell substantially all of its assets to

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[1] The court of appeals' June 5, 2009, order had indicated that an opinion would follow. See Pet. App. 47a.

New Chrysler.[2] Under the terms of the proposed exchange, New Chrysler agreed to assume certain liabilities of Chrysler and to pay Chrysler $2 billion in cash. Fiat agreed to contribute access to production platforms, technology, and distribution capabilities to New Chrysler in exchange for a 20% stake in the new company. See Pet. App. 127a-128a. Because the sale was not "in the ordinary course of business," the bankruptcy court's approval was required. 11 U.S.C. 363(b)(1).

Section 363(b) of the Bankruptcy Code provides that, after notice and a hearing, a trustee "may use, sell, or lease, other than in the ordinary course of business, property of the estate." 11 U.S.C. 363(b)(1). Chrysler invoked Section 363(b) in order to expedite the sale of its assets so as to avoid immediate liquidation and save the rapidly-decreasing value of the assets.

2. Petitioners are the Indiana State Police Pension Trust, Indiana State Teachers Retirement Fund, and the Indiana Major Moves Construction Fund. Pet. ii. They are state-employee investment funds that held less than one percent of Chrysler's first-priority secured debt. Pet. App. 129a-130a.[3]

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[2] Because the sale has been completed, Chrysler is now known as Old Carco LLC (f/k/a Chrysler LLC). New Chrysler, previously named New CarCo Acquisition LLC, is now formally known as Chrysler Group LLC. The case caption in the bankruptcy court has been amended to reflect those changes. This brief continues to employ the terminology used in the May 31 and June 1 bankruptcy court opinions and order and in the petition for a writ of certiorari.

[3] As of the date it filed for bankruptcy, Chrysler owed approximately $6.9 billion to creditors under an Amended and Restated First Lien Credit Agreement. As a group, the creditors had a security interest in, and a first lien on, substantially all of Chrysler's assets. Petitioners held approximately $42 million of this first-priority secured debt. See Pet. App. 129a-130a.

a. In the bankruptcy court, petitioners objected to the Sale Motion on the ground that the proposed sale was an illegal *sub rosa* plan intended to evade the required procedures for confirmation under Chapter 11. Pet. Bankr. Ct. Objection to Sale Mot. 2. Petitioners acknowledged that Section 363 sales are properly used to address quickly diminishing assets but maintained that there was no authority for the Chrysler sale as proposed. *Ibid.* Petitioners also contended that the proposed sale would improperly favor unsecured creditors over secured creditors. *Id.* at 2-3. Finally, petitioners argued that the proposed sale was improper insofar as it would be financed by funds from the TARP. *Id.* at 3.

b. On June 1, 2009, following a three-day evidentiary hearing, the bankruptcy court entered an order approving the sale (Sale Order). Pet. App. 48a-115a. In an accompanying opinion, the court overruled petitioners' objections. *Id.* at 116a-176a; see *id.* at 80a. As relevant here, the court held that the debtors had established "a good business reason for the sale of their assets," *id.* at 137a, and that the sale of assets was "not a *sub rosa* plan of reorganization," *id.* at 139a.

The bankruptcy court explained that, despite "highly publicized and extensive efforts," the proposed transaction represented the only viable option and that "[t]he only other alternative [wa]s the immediate liquidation of the company." Pet. App. 137a. The court concluded that the sale was a superior alternative to liquidation because it would preserve the value of many of Chrysler's assets as a going concern, and the $2 billion on offer would far exceed the liquidation value, which was at most $800 million. *Ibid.*; see *id.* at 139a-140a.

The bankruptcy court acknowledged that a bankruptcy estate's sale of assets cannot be approved if the

sale "would amount to a *sub rosa* plan of reorganization." Pet. App. 136a (quoting *Motorola, Inc.* v. *Official Comm. of Unsecured Creditors* (*In re Iridium Operating LLC*), 478 F.3d 452, 466 (2d Cir. 2007)). The court found no such subversion of the requirements of Chapter 11 here, however, because the significant and ongoing depreciation of Chrysler's assets made it crucial to conduct the sale in time to preserve the going-concern value of many of those assets. See *id.* at 137a-146a. The court observed that under the proposed sale the debtors would receive "fair value for the assets being sold," and that all of that value would go to First-Lien Lenders (a group that includes petitioners, see note 3, *supra*). *Id.* at 139a.

The bankruptcy court further recognized that consent by lienholders (or the satisfaction of other statutory conditions not relevant here, see 11 U.S.C. 363(f)) is required for assets to be sold free and clear of any security interests. Pet. App. 146a (citing 11 U.S.C. 363(f)). The court held that petitioners and their fellow first-tier secured creditors had provided the required consent to relinquish their security interest in Chrysler's assets. *Id.* at 147a-153a (noting that all holders of first-tier debt had agreed to allow their authorized agent to release the collateral based on the majority vote of the creditors, and that the agent did so after 92.5% of the creditors in petitioners' position agreed to the transaction).

The bankruptcy court explicitly rejected petitioners' objections to the good faith of the purchaser. See Pet. App. 160a-165a. As explained in the Sale Order, the court found that "[t]he Purchaser has proceeded in good faith in all respects in connection with this proceeding, is a 'good faith purchaser' within the meaning of section 363(m) of the Bankruptcy Code and, as such, is entitled

to all the protections afforded thereby." *Id.* at 63a; see *id.* at 164a-165a (finding that "no fraud or collusion" was present and that the governmental entities involved had authority to enter the transaction and were "neither controlling the Debtors nor New Chrysler").[4]

3. After being granted leave to appeal directly to the court of appeals pursuant to 28 U.S.C. 158(d)(2), petitioners and several other objectors challenged the bankruptcy court's orders in the court of appeals. Petitioners asked the court of appeals to vacate the Sale Order. Pet. C.A. Br. 28 ("[T]he Sale Orders should be vacated"), 54 (same), 60 (same), 80 (same).

Following oral argument on June 5, 2009, the court of appeals entered an order affirming the Chrysler sale under the terms described, and "for substantially the reasons stated" in the bankruptcy court's order and opinion. Pet. App. 47a. The court of appeals stated that an opinion would "issue in due course," and it temporarily stayed its order to permit petitioners and other objectors to seek review in this Court. *Ibid.*

4. Petitioners and certain other objectors filed with this Court three separate applications (Nos. 08A1096, 08A1099, and 08A1100) for a stay of the Chrysler sale. After Justice Ginsburg granted a temporary administrative stay of the relevant bankruptcy court orders, this Court denied the applications. 129 S. Ct. 2275 (2009); Pet. App. 187a.

On June 10, 2009, after the stay applications were denied, New Chrysler—with more than $6 billion in exit financing provided by the United States government and

[4] In a separate opinion, the bankruptcy court rejected petitioners' challenge to the use of TARP funds for the transaction on the ground that petitioners lacked standing to bring such a challenge. Pet. App. 177a-183a.

Export Development Canada—completed the purchase of substantially all of Chrysler's assets according to the terms approved by the bankruptcy court and the court of appeals. Pet. App. 10a.

5. On August 5, 2009, the court of appeals issued an opinion that set forth the court's reasons for affirming the order of the bankruptcy court. Pet. App. 1a-45a. With respect to petitioners' contention that the Chrysler sale was an impermissible *sub rosa* plan of reorganization, the court found "adequate rebuttal" in the bankruptcy court's factual findings, *id.* at 24a, and thus no abuse of discretion in the bankruptcy court's approval of the sale as executed under 11 U.S.C. 363(b), Pet. App. 25a. See *id.* at 23a-26a. The court drew its understanding of the relevant legal framework principally from its earlier decision in *Committee of Equity Security Holders* v. *Lionel Corp.* (*In re Lionel Corp.*), 722 F.2d 1063 (2d Cir. 1983), as well as the Fifth Circuit's analysis in *Pension Benefit Guaranty Corp.* v. *Braniff Airways, Inc.* (*In re Braniff Airways, Inc.*), 700 F.2d 935 (1983). See Pet. App. 11a-22a.[5] Looking to the record and the parties' arguments, the court concluded that "Chrysler fit the paradigm of the melting ice cube" appropriate for a Section 363 sale. *Id.* at 25a. The court of appeals held that "[c]onsistent with an underlying purpose of the Bankruptcy Code—maximizing the value of the bankrupt estate—it was no abuse of discretion to determine

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[5] See also Pet. App. 15a n.5 (noting that the *Lionel* standard has been adopted in other circuits, and citing, for example, *Institutional Creditors of Continental Air Lines, Inc.* v. *Continental Air Lines, Inc.* (*In re Continental Air Lines, Inc.*), 780 F.2d 1223 (5th Cir. 1986)); *id.* at 20a (concluding that the "multi-factor analysis" in *Lionel* "remains the proper, most comprehensive framework for judging the validity of § 363(b) transactions").

that the Sale prevented further, unnecessary losses." *Id.* at 26a.

The court of appeals further held that "[t]hrough a series of agreements," petitioners had "effectively ceded" to the collateral trustee the power to consent to a Section 363(b) sale upon the approval of a majority of the lenders, and it concluded that "[a]ccordingly, questions as to the status or preference of Chrysler's secured debt [were] simply not presented." Pet. App. 27a; see *id.* at 11a. The court addressed both the specific terms of the relevant agreements, *id.* at 27a-28a, and petitioners' argument that the "majority lenders were intimidated or bullied into approving the Sale," *id.* at 29a. With regard to the latter, the court of appeals found no support in the record for petitioners' allegations of coercion. *Ibid.* To the contrary, the court observed that "[o]n the whole, the record (and findings) support[ed] the view that [the lenders] acted prudently to preserve substantial value rather than risk a liquidation that might have yielded nothing at all." *Ibid.*[6]

6. While the applications to stay the sale were pending before this Court, a group of objectors including five nonprofit organizations, three individuals with pending tort cases against Chrysler, and an ad hoc committee of individuals with product-liability tort claims against

[6] With respect to petitioners' claim that the Secretary of the Treasury had inappropriately used TARP funds to finance the sale of Chrysler's assets, the court of appeals—like the bankruptcy court—concluded that petitioners lacked standing to challenge the use of the TARP funds, and that the court lacked jurisdiction to entertain such a challenge. Pet. App. 30a. Although petitioners' amici press the merits of that issue here, Washington Legal Found. Br. 6-12, the petition does not present either the standing question or any issue pertaining to the merits of petitioners' prior challenge to the use of TARP funds. See Pet. i.

Chrysler also filed a petition for a writ of certiorari to review the Second Circuit's judgment. *Center for Auto Safety* v. *Chrysler LLC*, No. 08-1513. After the Second Circuit issued its written opinion, they withdrew their petition. The petition in this case is the only pending challenge to the Second Circuit's judgment.

ARGUMENT

In seeking a stay from this Court, petitioners correctly represented that "absent a stay, the Sale will close * * * and, as a matter of statute, the case will be moot." Application for Stay 25 (No. 08A1096). The Court denied the stay; the sale was consummated to a good-faith purchaser; and under the Bankruptcy Code, that sale may no longer be reversed or modified by a reviewing court. 11 U.S.C. 363(m). Accordingly, this case no longer presents a live controversy. Even if this case still involved a live dispute, petitioners' challenge to the sale would not warrant review by this Court. The bankruptcy court applied settled law to the trial record, and the court of appeals' affirmance of the bankruptcy court's decision does not conflict with any decision of this Court or another court of appeals.

1. Section 363(m) of the Bankruptcy Code protects sales completed under 11 U.S.C. 363(b) from reversal or modification when the sale was not stayed pending appeal and when the purchaser acted in good faith. Section 363(m) "creates a rule of 'statutory mootness'" that "codifies Congress's strong preference for finality and efficiency in the bankruptcy context." *Hazelbaker* v. *Hope Gas, Inc.* (*In re Rare Earth Minerals*), 445 F.3d 359, 363 (4th Cir. 2006). As various courts of appeals have noted, to reverse a bankruptcy sale order would be to try to "unscramble an egg," *In re UNR Indus., Inc.*,

20 F.3d 766, 769 (7th Cir.), cert. denied, 513 U.S. 999 (1994), and is prohibited by Section 363(m) out of concern for the "innocent third parties who rely on the finality of bankruptcy judgments," *Anheuser-Busch, Inc.* v. *Miller* (*In re Stadium Mgmt. Corp.*), 895 F.2d 845, 847 (1st Cir. 1990) (citation omitted).[7]

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[7] Accord, *e.g.*, *Made in Detroit, Inc.* v. *Official Comm. of Unsecured Creditors of Made in Detroit, Inc.* (*In re Made in Detroit, Inc.*), 414 F.3d 576, 581 (6th Cir. 2005) (noting that Section 363(m) "safeguards the finality of the bankruptcy sale") (quoting *Official Comm. of Unsecured Creditors* v. *Trism, Inc.* (*In re Trism, Inc.*), 328 F.3d 1003, 1006 (8th Cir. 2003)); *Weingarten Nostat, Inc.* v. *Service Merch. Co.*, 396 F.3d 737, 741 (6th Cir. 2005) ("'Bankruptcy' mootness is predicated on the particular need to encourage participation in bankruptcy asset sales and increase the value of the property of the estate by protecting good faith purchasers from modification by an appeals court of the bargain struck with the debtor."); *Cinicola* v. *Scharffenberger*, 248 F.3d 110, 121-122 (3d Cir. 2001) ("To promote certainty and finality in bankruptcy sales, § 363(m) prohibits the reversal of a sale to a good faith purchaser of bankruptcy estate property if a party failed to obtain a stay of the sale. * * * The provision's blunt finality is harsh but its certainty attracts investors and helps effectuate debtor rehabilitation.") (footnote omitted); *Licensing by Paolo, Inc.* v. *Sinatra* (*In re Gucci*), 105 F.3d 837, 839 (2d Cir.) ("Our appellate jurisdiction over an *unstayed* sale order issued by a bankruptcy court is statutorily limited to the narrow issue of whether the property was sold to a good faith purchaser."), cert. denied, 520 U.S. 1196 (1997); *Gilchrist* v. *Westcott* (*In re Gilchrist*), 891 F.2d 559, 560 (5th Cir. 1990) ("Section 363(m) patently protects, from later modification on appeal, an authorized sale where the purchaser acted in good faith and the sale was not stayed pending appeal."); *In re Sax*, 796 F.2d 994, 998 (7th Cir. 1986) (explaining that Section 363(m) "and the cases interpreting it have clearly held that a stay is necessary to challenge a bankruptcy sale authorized under" Section 363(b)); *Hicks* v. *Pearlstein* (*In re Magwood*), 785 F.2d 1077, 1080 (D.C. Cir. 1986) (agreeing that "[u]nder section 363(m) of the Bankruptcy Code, a sale made to a good faith purchaser pursuant to section 363(b) or (c) of the Code * * * cannot be overturned on appeal unless the sale was stayed pending appeal").

To provide a reasonable but limited opportunity for appellate review before the bar of Section 363(m) applies, an order approving a sale of assets pursuant to Section 363(b) is automatically stayed for a period of time, currently 10 days, unless the bankruptcy court or an appellate court orders otherwise. Fed. R. Bankr. P. 6004(h). In this case, the bankruptcy court found good cause to shorten that time somewhat, see Pet. App. 112a n.4, but both the court of appeals and Justice Ginsburg extended the stay before the sale took effect. See *id.* at 47a, 188a; p. 6, *supra*.

The bankruptcy court expressly found that Section 363(m) would apply to the sale to New Chrysler. Following the evidentiary hearing, the bankruptcy court examined the question whether New Chrysler was a good-faith purchaser, Pet. App. 160a-165a, and concluded that it was, *id.* at 165a. See *id.* at 62a-63a, 107a-108a. The court of appeals did not disturb that finding, either in its order affirming the sale "for substantially the reasons stated in the opinions of [the bankruptcy court]," *id.* at 47a, or in its subsequent opinion, *id.* at 1a-45a. And the bankruptcy court order approving the sale specifically noted that, pursuant to Section 363(m), "the reversal or modification on appeal of the authorization provided herein to consummate the Sale Transaction shall not affect the validity of the Sale Transaction * * * , unless such authorization is duly stayed pending such appeal." *Id.* at 107a-108a.

The petition now before this Court is plainly a challenge to the validity of the sale and therefore is barred by Section 363(m). Petitioners opposed the proposed sale to New Chrysler because they viewed it as an illegal *sub rosa* plan that "extinguish[ed] the property rights of the secured lenders," Pet. Bankr. Ct. Objection to Sale

Mot. 2-3, and because they questioned the legitimacy of the TARP financing provided by the United States, *id.* at 3. Petitioners asked the bankruptcy court to deny the Sale Motion as an illegal redistribution of the debtors' value. *Id.* at 42. And when the bankruptcy court approved the sale over their objections, petitioners asked the court of appeals to vacate the Sale Order entered by the bankruptcy court. *E.g.*, Pet. C.A. Br. 80.

Petitioners now seek to recast their request for relief. Petitioners acknowledge that Section 363(m) bars undoing the sale of Chrysler's assets, yet they ask the court for "a determination that the transaction was unlawful." Pet. 3. In an attempt to reconcile those positions, petitioners claim to seek reversal of the Sale Order "only to the extent that the distribution of proceeds was inequitable." Pet. 41. Contrary to petitioners' contention, however, such a remedy cannot be accomplished "without disturbing the validity of the sale." *Ibid.*

Petitioners' argument on the merits (which the courts below correctly rejected) is that the Section 363 sale not only transferred Chrysler's assets to New Chrysler "but also dictated what creditors would receive for their claims." Pet. 32. To grant petitioners their requested relief therefore would, on petitioners' own theory, alter what creditors would receive for their claims and thus impermissibly change the terms of the sale, precisely what Section 363(m) bars. Cf. *Official Comm. of Unsecured Creditors* v. *Trism, Inc.* (*In re Trism, Inc.*), 328 F.3d 1003, 1007 (8th Cir. 2003) (holding that the validity of a sale is affected by changes to any provision that would "alter the parties' bargained-for exchange") (citing *Cinicola* v. *Scharffenberger*, 248 F.3d 110, 125-126 (3d Cir. 2001), and *Stadium Mgmt.*, 895 F.2d at 849); *Cargill, Inc.* v. *Charter Int'l Oil Co.* (*In re*

Charter Co.), 829 F.2d 1054, 1056 (11th Cir. 1987) ("One cannot challenge the validity of a central element of a purchase * * * without challenging the validity of the sale itself."), cert. denied, 485 U.S. 1014 (1988).

Because petitioners can no longer obtain any relief on their objection to the sale, further review is not warranted.

2. Petitioners' challenge to the Section 363 sale lacks merit and would not warrant review by this Court even if the case still involved a live dispute.

a. Petitioners contend (Pet. 24-28) that a circuit conflict exists concerning the circumstances under which a Section 363 sale should be regarded as an invalid "*sub rosa*" reorganization plan. That claim is unavailing. As discussed below, the courts of appeals that have addressed this question have identified complementary rather than conflicting criteria for determining whether specific circumstances justify a Section 363 sale. Moreover, any differences in the guidance provided by the different circuits do not affect the outcome of this case. As the courts below recognized, the Chrysler sale satisfied all articulated standards, including the standards urged by petitioners.

Petitioners argue that there are three "competing standards" for determining whether a Section 363 sale is appropriate: the "'good business reason'" test established by the Second Circuit in *Lionel*, 722 F.2d at 1071; the "'good faith'" requirement set out by the Third Circuit in *In re Abbotts Dairies of Pa., Inc.*, 788 F.2d 143, 149-150 (1986); and the "'*sub rosa*' plan test" established by the Fifth Circuit in *Pension Benefit Guaranty Corp.* v. *Braniff Airways, Inc.* (*In re Braniff Airways, Inc.*),

700 F.2d 935, 940 (5th Cir. 1983). Pet. 25, 27.[8] Contrary to petitioners' contention (Pet. 25), these cases do not establish "diverging, imprecise tests." All three decisions provide useful guidance to bankruptcy courts in making factual determinations. Rather than articulating inconsistent standards, they offer complementary analyses or considerations that may be used in conjunction with one another. See, *e.g.*, *240 N. Brand Partners* v. *Colony GFP Partners* (*In re 240 N. Brand Partners*), 200 B.R. 653, 659 (B.A.P. 9th Cir. 1996) (requiring a show of good faith in addition to a valid business justification).

Notably, the Second Circuit has expressly agreed with the Fifth Circuit that a Section 363 sale is not proper if it "would amount to a *sub rosa* plan of reorganization." *Motorola, Inc.* v. *Official Comm. of Unsecured Creditors* (*In re Iridium Operating LLC*), 478 F.3d 452, 466 (2d Cir. 2007) (citing *Braniff*, 700 F.2d at 940); see Pet. App. 21a-22a (discussing *Iridium*, 478 F.3d at 466, and *Braniff*, 700 F.2d at 940). Conversely, the Fifth Circuit has adopted the Second Circuit's standard. See *Institutional Creditors of Cont'l Air Lines, Inc.* v. *Continental Air Lines, Inc.* (*In re Continental Air Lines, Inc.*), 780 F.2d 1223, 1226 (1986) (agreeing with the Second Circuit's decision in *Lionel* that a Section 363(b) sale requires justification, and reconfirming that a Section 363 sale may not be approved if it amounts to a *sub rosa* plan). Accordingly, there is no direct circuit conflict on the legal standard for approving a Section 363 sale.

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[8] As petitioners acknowledge, the standard articulated by the Second Circuit in *Lionel* is the most prevalent standard used among the circuits. See Pet. 26 (citing Fourth, Sixth, and Seventh Circuit precedents).

b. In any event, the Chrysler sale was analyzed and justified under each of the available standards. The bankruptcy court found—and the Second Circuit affirmed—not only that there was a sufficient business justification for the sale, but also that the sale was undertaken in good faith and did not amount to a *sub rosa* plan of reorganization.

The bankruptcy court found that the debtors had established a "good business reason" for the Section 363 sale of assets: the need to maximize the value of the assets in the face of impending liquidation. Pet. App. 137a-138a. In affirming the order approving the sale, the court of appeals emphasized that Chrysler was facing "its revenues sinking, its factories dark, and its massive debts growing." *Id.* at 25a; see *id.* at 24a-26a.

The bankruptcy court also addressed the "good faith" of the purchaser. The Third Circuit held in *Abbotts Dairies* that "when a bankruptcy court authorizes a sale of assets pursuant to [11 U.S.C.] 363(b)(1), it is required to make a finding with respect to the 'good faith' of the purchaser." 788 F.2d at 149-150. Here, the bankruptcy court made an express finding that New Chrysler was acting in good faith. Pet. App. 63a, 99a, 160a-165a. Petitioners disputed that finding extensively on appeal, see Pet. C.A. Br. 69-75, and the court of appeals affirmed. As the court in *Abbotts Dairies* noted, such a finding helps to "ensure[] that section 363(b)(1) will not be employed to circumvent the creditor protections of Chapter 11," which has its own good-faith requirement. 788 F.2d at 150.

Finally, the bankruptcy court extensively discussed—and the court of appeals reviewed—whether the Chrysler sale constituted an impermissible *sub rosa* or *de facto* plan of reorganization. Pet. App. 21a-26a,

56a-57a, 136a-146a. The courts concluded, on the particular facts of this case, that it did not. *E.g.*, *id.* at 22a-23a. For example, unlike in *Braniff*, here there was no attempt to dictate how the sale proceeds would be used or how the creditors would vote on a future reorganization plan. See *Braniff*, 700 F.2d at 940. Moreover, as the Second Circuit observed, the fact that the sale addressed substantially all of Chrysler's assets did not render it an improper subversion of Chapter 11. Pet. App. 19a n.8 (citing *Florida Dep't of Revenue* v. *Piccadilly Cafeterias, Inc.*, 128 S. Ct. 2326, 2330 n.2 (2008)); *id.* at 22a.

Accordingly, this case presents no occasion to consider any marginal differences between the ways in which the courts of appeals have phrased their respective standards. Under any of the formulations that the circuits have thus far identified, the court of appeals correctly affirmed the Sale Order.

c. Petitioners' contentions are in substance an attack on the bankruptcy court's considered and reasonable factual findings. For example, petitioners disagree (Pet. 14, 33) with the court's determination—affirmed by the court of appeals—that the sale would maximize value to Chrysler's secured creditors, and that New Chrysler would emerge from the Sale as an entity distinct from Old Chrysler in light of its various assets and technologies, including those contributed by Fiat. But those findings were examined and affirmed by the court of appeals, *e.g.*, Pet. App. 26a, and present no issue appropriate for a grant of certiorari. This Court generally does not disturb "concurrent findings of fact by two courts below," and it departs from that practice only when presented with a "very obvious and exceptional showing of error." *Exxon Co., U.S.A.* v. *Sofec, Inc.*, 517

U.S. 830, 841 (1996) (quoting *Graver Tank & Mfg. Co.* v. *Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949)). Petitioners have made no such "exceptional showing."

d. Petitioners contend that this Court should grant review because of the "high profile of this case." Pet. 39; see also Washington Legal Found. Br. 20-21. Even in the largest bankruptcy proceedings, however, this Court applies its traditional criteria to determine whether a particular issue is appropriate for plenary review. Here, the bankruptcy court carefully considered the trial record, entered detailed factual findings, and applied settled law to those facts; the Second Circuit affirmed the bankruptcy court's decision; and this Court agreed to allow the sale to go forward. Notwithstanding the dollar values involved in this particular sale, petitioners' challenge to its validity does not satisfy the Court's established certiorari criteria. See Sup. Ct. R. 10.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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