

09-2311-bk

**UNITED STATES COURT OF APPEALS  
FOR THE  
SECOND CIRCUIT**

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In Re: Chrysler LLC, aka Chrysler Aspen, aka Chrysler Town and Country, aka Chrysler 300, aka Chrysler Sebring, aka Chrysler PT Cruiser, et al., Debtor

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Patricia Pascale, Objector-Appellant  
v.  
Chrysler LLC, Debtor-Appellee

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

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**BRIEF OF OBJECTOR-APPELLANT PATRICIA PASCALE**

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### III. PRELIMINARY STATEMENT

Patricia Pascale, a member of the Official Committee of Unsecured Creditors of Chrysler LLC, brings this appeal of the Opinion and Order entered in the Bankruptcy Court for the Southern District of New York (the “Bankruptcy Court”), Hon. Arthur J. Gonzalez presiding.

### IV. STATEMENT OF JURISDICTION

On June 1, 2009, the Bankruptcy Court entered its Order (I) Authorizing the Sale of Substantially All of the Debtors’ Assets Free and Clear of All Liens, Claims, Interests and Encumbrances, (II) Authorizing the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases in Connection Therewith and Related Procedures and (III) Granting Related Relief (the “Sale Order”).

The Motion of Debtors and Debtors in Possession for an Order Certifying the Sale Order for Immediate Appeal to United States Court of Appeals Pursuant to 28 U.S.C. § 158(d)(2) (“Motion to Certify the Sale Order for Immediate Appeal to the United States Court of Appeals”) was filed on June 1, 2009. The International Union, United Automobile, Aerospace and Agricultural Implement Workers of American (the “UAW”), Fiat S.p.A. (“Fiat”) and New CarCo Acquisition

Company (“Purchaser” or “New Chrysler”), and the Official Committee of Unsecured Creditors filed joinders in the Motion to Certify the Sale Order for Immediate Appeal to the United States Court of Appeals on June 1. On June 2, 2009, the Bankruptcy Court entered the Order Certifying Sale Order for Immediate Appeal to the United States Court of Appeals, Pursuant to 28 U.S.C. § 158(d)(2). Patricia Pascale (“Mrs. Pascale”) timely filed her Notice of Appeal on June 2, 2009.

This Honorable Court granted leave to appeal pursuant to 28 U.S.C. § 158(d) and announced an expedited briefing and hearing schedule on June 2, 2009.

## V. STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the Bankruptcy Court erred in entering the Sale Order which purports to grant immunity from litigation by asbestos personal injury claimants without complying with the statutory requirements of 11 U.S.C. § 524(g).
2. Whether the Bankruptcy Court erred in finding that it had subject matter jurisdiction to enjoin asbestos personal injury claims.
3. Whether the Bankruptcy Court erred in approving a sale transaction that was in fact an impermissible *sub rosa* plan of reorganization.
4. Whether the Bankruptcy Court erred in authorizing the Debtors’ sale of substantially all of their assets free and clear of claims and interests beyond the permitted scope of 11 U.S.C. 363(f).

5. Whether the Bankruptcy Court erred in entering the Sale Order which allocates proceeds and consideration of the Sale Transaction<sup>1</sup> disproportionately in favor of certain unsecured creditors to the detriment of other, similarly situated unsecured creditors, including Mrs. Pascale.
6. Whether the Bankruptcy Court erred in entering the Sale Order when the Debtors did not meet their burden to demonstrate that the Sale Transactions satisfied all of the requirements of 11 U.S.C. § 363.

## VI. STATEMENT OF THE CASE

This appeal comes to this Court from the Sale Order entered by the Bankruptcy Court on June 1, 2009 in Case No. 09-50002 (AJG).

Mrs. Pascale appeals the Sale Order because (i) it impermissibly enjoins asbestos personal injury claims (both current and future claims) against the Purchaser without complying with Bankruptcy Code, Section 524(g), and (ii) the Sale Transaction it approves constitutes an improper *sub rosa* plan of reorganization by imposing essential features of a plan of reorganization without complying with Section 1129 of the Bankruptcy Code.

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<sup>1</sup> Capitalized terms used but not defined herein shall have the meaning ascribed to them in the Sale Order.

## VII. STATEMENT OF THE FACTS

Mrs. Pascale brought a wrongful death action against Chrysler arising from the death of her husband, Michael Pascale, who died after contracting mesothelioma caused by his exposure to asbestos as a result of working on the brakes of Chrysler and other automobiles.

Mrs. Pascale's action is pending against Chrysler in the Superior Court of the State of California for the County of Los Angeles, Case No. BC345910 and is set for trial on June 15, 2009.

Chrysler LLC and 24 of its affiliated Debtors filed voluntary petitions for relief under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code") on April 30, 2009.

On May 3, 2006, Chrysler filed the Motion of Debtors and Debtors in Possession, Pursuant to Sections 105, 363 and 365 of the Bankruptcy Code and Bankruptcy Rules 2002, 6004 and 6006 for an Order (I) Authorizing the Sale of Substantially All of the Debtors' Assets Free and Clear of All Liens, Claims, Interests and Encumbrances, (II) Authorizing the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases in Connection Therewith and Related Procedures and (III) Granting Related Relief (the "Sale Motion").

On May 6, 2009, Mrs. Pascale was appointed to the Official Committee of Unsecured Creditors by Diana G. Adams, the United States Trustee for Region 2.

Mrs. Pascale timely filed her objection to the Sale Motion on May 19, 2009. The Sale Order overruled Mrs. Pascale's objection. Mrs. Pascale timely filed her notice of appeal on June 2, 2009.

### VIII. SUMMARY OF THE ARGUMENT

Courts are not free to disregard the law in the name of “emergency”. Nor are courts free to ignore the rights of individuals entitled to redress in the name of the needs of the big or powerful. Congress enacted a specific statutory regime for the adjustment of a debtor's personal injury liability arising out of exposure to asbestos. Under Bankruptcy Code, Section 524(g), a debtor may obtain relief from asbestos liability by following a road map drawn by Congress itself. Attempts by debtors to make an “end run” around the other requirements of the statute through the creative use of other provisions of the Bankruptcy Code have been struck down. *In re Combustion Eng'g, Inc.*, 391 F.3d 190 (3d Cir. 2005). Section 524(g) provides, under carefully regulated circumstances, for an injunction in favor of the

debtor and certain others who contribute to a trust fund created for the benefit of asbestos victims, and is a notable exception to the general rule of bankruptcy law, incorporated in another part of Section 524, namely Section 524(e), which prohibits the use of bankruptcy proceedings to release the liability of non-debtors by enjoining persons who do not hold a right to payment at the time of the filing of the bankruptcy petitions—*i.e.*, future asbestos claimants. Section 524(g) contains important safeguards, such as the appointment of a future claims representative to represent the interests of victims who may not yet know that they may eventually contract an asbestos disease, and the essential right that current claimants, including Mrs. Pascale, must assent to the barring of their claims with the waiver of the claimants' Seventh Amendment rights and their reassignment to a trust created for their benefit.

The court below simply ignored Section 524(g) with the statement that it did not apply to a Section 363 asset sale, as if one could erase the specific statutory provision by use of a general bankruptcy provision designed for more routine use. Under the guise of a “sale” the court below has approved a reorganization of Chrysler’s automotive business

without making any provision—as Congress clearly intended there to be—for the orderly compensation of victims of asbestos disease. Under the rubric of a transfer of the entire business of Chrysler “free and clear of all Claims” (Sale Order at p. 26, ¶ 9), the Court improperly grants a release to the non-debtor New Chrysler not only of Mrs. Pascale’s state law claim for the mesothelioma death of her husband but also of the eventual demands of unknown future claimants—something that might have been achievable under a proper use of Section 524(g) but which is manifestly impermissible without it.

The Bankruptcy Court’s Sale Order is overreaching in other aspects. Most notably it exceeds the limited subject matter jurisdiction of bankruptcy courts. This Court of Appeals recently had occasion to point out the limits of a bankruptcy court’s subject matter jurisdiction to enjoin claims against non-debtors. *In re Johns-Manville Corp.*, 517 F.3d 52 (2d Cir. 2008), *cert. granted*, 129 S. Ct. 761 (2008) and 129 S. Ct. 762 (2008).

Furthermore, the Bankruptcy Code envisions a democratic process, where negotiations lead to a proposal that is submitted to creditors for approval or disapproval. The use of a nominal “sale”

provision to circumvent the voting requirements of Chapter 11 have justly been prohibited as being an impermissible *sub rosa* plan of reorganization. It is telling that the Bankruptcy Court, while in its Opinion conclusorily stating that that the “[Purchase Agreement] does not dictate terms of a plan of reorganization”(Opinion at p. 21), in its order says precisely the opposite: “Nothing contained in any chapter 11 plan confirmed in these cases shall conflict with or derogate from the provisions of the Purchase Agreement or this Sale Order” (Sale Order at p. 26, ¶7). And lest there be any doubt that the Bankruptcy Court intended to fix, once and for all, completely and irretrievably, the terms of all subsequent plans of reorganization, the court added that “to the extent of any conflict with or derogation between this Sale Order or the Purchase Agreement and such future plan or order, the terms of this Sale Order and the Purchase Agreement shall control....” (Sale Order at p. 26, ¶ 7). Thus it is disingenuous of the Debtors to suggest that the Sale Order does not predetermine the terms of the reorganization. It does so *in haec verba*.

Mrs. Pascale suffers in other ways from the Bankruptcy Court’s haste to approve a “sale” that is much more than a sale. The

Bankruptcy Code contains a careful and time-tested Congressional regime of priorities and antidiscrimination provisions designed to assure a fundamentally fair distribution of limited assets. Under the ordinary processes of approval of a Chapter 11 plan, an unsecured creditor such as Mrs. Pascale would have the right to equality of treatment among similarly situated claimants. It is more than unfair that she should be at risk of no distribution on account of her serious wrongful death claim when other unsecured claimants—namely the Voluntary Employee Benefit Association, or “VEBA”—receive huge recoveries under the so-called Sale Order. As noted in the Bankruptcy Court’s order, nothing that is done by the Sale Order can be undone in a subsequent plan, even though it is clear that the VEBA is receiving its shares in New Chrysler because it is a favored unsecured creditor of the Debtor. The Bankruptcy Code does not permit this sort of discrimination in favor of the large and the influential against the small and the weak. The Sale Order should be vacated.

## **IX. STANDARD OF REVIEW**

On appeal, the findings of fact of a bankruptcy court are reviewed under a “clearly erroneous” standard. FED. R. BANKR. P. 8013. In

applying the clearly erroneous standard of review, a district court must reverse the bankruptcy court where it is “left with the definite and firm conviction that a mistake has been committed.” *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948). Legal conclusions are reviewed *de novo*. *In re U.S. Lines, Inc.*, 318 F.3d 432, 435-36 (2d Cir. 2003). Similarly, mixed questions of law and fact are reviewed *de novo*. *In re Vebeliunas*, 332 F.3d 85, 90 (2d Cir. 2003). The court may “affirm, modify or reverse a bankruptcy judge’s judgment, order or decree or remand with instruction for further proceedings.” FED. R. BANKR. P. 8013. In matters committed to the discretion of the bankruptcy judge, the legal and factual findings are reviewed for abuse of discretion. *In re Blaise*, 219 B.R. 946, 949-50 (B.A.P. 2d Cir. 1998). “A bankruptcy court abuses its discretion if it bases its decision on an erroneous view of the law or upon clearly erroneous factual findings.” *Id.*

## X. ARGUMENT

### A. THE BANKRUPTCY COURT ERRED IN ENTERING THE SALE ORDER WHICH PURPORTS TO GRANT SUCCESSOR LIABILITY PROTECTIONS TO NEW CHRYSLER FROM ASBESTOS PERSONAL INJURY AND WRONGFUL DEATH CLAIMS WITHOUT COMPLYING WITH THE STATUTORY REQUIREMENTS OF 11 U.S.C. § 524(g).

1. *The only way for a debtor to be relieved of its asbestos liability is by satisfying the requirements of Section 524(g).*

In entering the Sale Order, the Bankruptcy Court used a provision of the Bankruptcy Code designed for routine sales of surplus assets that are unnecessary to a debtor's reorganization. In this case, however, the assets "sold" encompass the entire continuing business of the debtor and are transferred on terms that are designed to immunize both the transferred assets and the purchaser of those assets from the legitimate state-law claims of current and future asbestos claimants. The assets are transferred "free and clear of all Claims", an innocent looking provision that—along with others—improperly works a release of asbestos liability without the Congressionally-mandated creation of a fund to assure continuing compensation to victims of the insidious fiber.

Not only does the Sale Order immunize the transferred assets, it immunizes—through an injunction nowhere provided for in the Bankruptcy Code—the Purchaser of those assets, a non-debtor. This

“end run” around the strict prerequisites for asbestos injunctions is buried in the fine print: the Purchaser assumes no liability for any “Product Liability Claims arising from the sale of Products or Inventory prior to the Closing (Master Transaction Agreement at p. 10, § 2.09(i) Excluded Liabilities). And then the Court in its Sale Order issues what is clearly an asbestos injunction, ordering that all persons and entities: are “forever barred, estopped and permanently enjoined from asserting [Product Liability Claims that are “Excluded Liabilities” among other Claims] against the Purchaser, its successors or assigns, its property or the Purchased Assets” (Sale Order at p. 28-29, ¶ 12).

The Sale Order allows the Debtor to jettison its present and future asbestos liability by transferring essentially all of its assets to a “clean” entity that will be protected from the taint of the Debtor’s asbestos obligations without any provision being made for a fund to compensate present and future asbestos claimants. In doing so, the Sale Order effectively—and impermissibly—discharges asbestos related personal injury claims without providing asbestos claimants the protections afforded them under Section 524(g). Regardless of the exigencies that may be present in this case, the due process protections and

jurisdictional considerations underpinning Congress' enactment of Section 524(g) cannot be simply ignored.

There is only one means by which a debtor may relieve itself of future asbestos liability: submitting itself to the stringent requirements of Section 524(g). Indeed, the entire concept of the supplemental injunction provided for under Section 524(g) recognizes that future asbestos personal injury demands cannot be discharged as prepetition claims under the general discharge provisions of the Bankruptcy Code—thus the need for a supplemental injunction.

This much was clearly recognized by the *Johns-Manville* court that developed the supplemental injunction/trust construct that would later be codified in Section 524(g). As the *Johns-Manville* court recognized:

Any plan emerging from this case which ignores [future] claimants would serve the interests of neither the debtor nor any of its other creditor constituencies in that the central short and long-term economic drain on the debtor would not have been eliminated. Manville might indeed be forced to file again and again if this eventuated. Each filing would leave attenuated assets available to deal with interests of emerging future claimants.

*In re Johns-Manville Corp.*, 36 B.R. 743, 746 (Bankr. S.D.N.Y. 1984).

Furthermore, statements by Congress during the consideration of Section 524(g) clearly indicate that Congress also did not consider future asbestos claims to be “claims” that could be discharged as pre-petition claims under the general discharge provisions of the Bankruptcy Code:

It is the uncertainty of the number and amount of these future [asbestos] claims, and the need to implement a procedure that recognizes these future claimants as creditors under the U.S. Bankruptcy Code, that necessitates this amendment, as well as the need to provide some assurance that funds will be available to pay future claims. To those companies willing to submit to the stringent requirements in this section designed to ensure that the interests of asbestos claimants are protected, the bankruptcy courts’ injunctive power will protect those debtors and certain third parties, such as their insurers, from future asbestos product litigation of the type which forced them into bankruptcy in the first place.

140 Cong. Rec. S222 (daily ed. April 20, 1994) (statement of Sen. Brown).

The inability of debtors to discharge their future asbestos liability was precisely why Congress enacted the supplemental injunction provided for in Section 524(g). If future asbestos claims could simply be cast aside as part of a sale under Section 363—which is effectively what the Debtors have done here—Section 524(g) would become superfluous.

A court cannot interpret one section of the Bankruptcy Code in such a manner as to make another section superfluous. *In re Greystone III Joint Venture*, 995 F.2d 1274, 1278 (5th Cir. 1991) (“The broad interpretation of §1122(a) adopted by the lower courts would render §1122(b) superfluous, a result that is anathema to elementary principles of statutory construction.”).

2. *Courts have consistently rejected attempts by parties to circumvent Section 524(g).*

Because Section 524(g) of the Bankruptcy Code provides the *only* mechanism by which a debtor’s asbestos-related personal injury liabilities are to be managed in a Chapter 11 proceeding, the specific requirements of Section 524(g) cannot be circumvented by the creative use of other provisions of the Bankruptcy Code.

For example, in *In re Combustion Engineering, Inc.*, 391 F.3d 190 (3d Cir. 2005), the Third Circuit considered an appeal of a bankruptcy court order that sought to use Section 105(a) of the Bankruptcy Code to extend an asbestos channeling injunction to include third-party actions against non-debtors. The Third Circuit ultimately held that “§ 105(a) cannot be used to achieve a result not contemplated by the more specific provisions of § 524(g), which is the means Congress prescribed for

channeling the asbestos liability of a non-debtor.” *In re Combustion Eng’g, Inc.*, 391 F.3d at 237, n.50.

In so holding, the Third Circuit stated as follows:

Because § 524(g) expressly contemplates the inclusion of third parties' liability within the scope of a channeling injunction—***and sets out the specific requirements that must be met in order to permit inclusion***—the general powers of § 105(a) cannot be used to achieve a result not contemplated by the more specific provisions of § 524(g).<sup>2</sup>

*Id.* at 236-37 (emphasis added).

In other words, third parties cannot be shielded from asbestos-related personal injury liability by any means other than pursuant to the requirements of Section 524(g).

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<sup>2</sup> This holding is also consistent with “the well-settled maxim that specific statutory provisions prevail over more general provisions,” and the Third Circuit cited to this maxim as support for its conclusion that “the explicit limitations and requirements set forth in § 524(g) preclude the use of § 105(a) to extend application of the trust/injunction mechanism to ... [certain] non-debtors.” *In re Combustion Eng’g*, 391 F.3d at 237, n.49 (citing *Varsity Corp. v. Howe*, 516 U.S. 489, 511 (1996) (interpreting the “the specific governs the general” canon of statutory construction as “a warning against applying a general provision when doing so would undermine limitations created by a more specific provision”); *Sea Harvest Corp. v. Riviera Land Co.*, 868 F.2d 1077, 1080 (9th Cir. 1989) (Section 105(a) “does not empower courts to issue orders that defeat rather than carry out the explicit provisions of the Bankruptcy Code[.]”); 2 COLLIER ON BANKRUPTCY, ¶ 105.04 at 105-15 n.5; *In re Am. Hardwoods, Inc.*, 885 F.2d 621, 625-26 (9th Cir. 1989) (“[S]ection 105 does not authorize relief inconsistent with more specific law.”)).

Future asbestos claims against non-debtors such as New Chrysler may indeed be affected in a bankruptcy reorganization, but not without the carefully regulated protections set out by Congress in Section 524(g), such as the creation of a compensating trust and approval of the claimants channeled to it. Her claim and the demands of future asbestos disease victims against a non-debtor cannot otherwise be impaired. The Sale Order appealed from purports impermissibly to shield New Chrysler, a third party, from asbestos-related personal injury liability outside of the exclusive mechanism Congress prescribed for dealing with such claims, namely 11 U.S.C. § 524(g). Accordingly, the Sale Order should be vacated.

**B. THE BANKRUPTCY COURT ERRED IN FINDING IT HAD SUBJECT MATTER JURISDICTION TO ENJOIN ASBESTOS PERSONAL INJURY CLAIMS AGAINST NEW CHRYSLER.**

This Court has recently held that “a bankruptcy court only has jurisdiction to enjoin third-party, non-debtor claims that directly affect the *res* of the bankruptcy estate.” *In re Johns-Manville Corp.*, 517 F.3d 52, 66 (2d Cir. 2008). The Court’s statements in doing so are especially meaningful under the unprecedented and troubling circumstances surrounding the releases at issue here:

A court's ability to provide finality to a third-party is defined by its jurisdiction, not its good intentions. We have previously recognized that "a nondebtor release is a device that lends itself to abuse. By it, a nondebtor can shield itself from liability to third parties. In form, it is a release; in effect, it may operate as a bankruptcy discharge arranged without a filing and without the safeguards of the Code."

*Id.* (quoting in part *In re Metromedia Fiber Network, Inc.*, 416 F.3d 136, 142 (2d Cir. 2005)).

In the case at bar, the present and future asbestos claims against New Chrysler stemming from the transfer of the Debtors' entire business to New Chrysler will not have any affect on the *res* of the Debtors' estate. The Debtors' attempt to effectuate the injunctive absolution of New Chrysler—a non-debtor purchaser—from the claims of present and future asbestos claimants—also non-debtors—arises in the context of the disposition of essentially all of the Debtors' assets pursuant to Section 363. Once the sale is consummated, the assets no longer constitute any part of the *res* of the Debtors' bankruptcy estate and any nexus between the purchaser and the Debtor that could conceivably be grounds for such an unprecedented third-party, non-debtor injunction is snapped.

Nor does the fact that the contemplated sale depends on a release of New Chrysler create a sufficient nexus to the *res* of the Debtors' estate. In fact it is "precisely this conditioning of financial participation by non-debtors on releases that is subject to the sort of abuse foreseen' in *Metromedia.*" *In re Johns-Manville Corp.*, 517 F.3d at 66 (quoting in part *In re Karta Corp.*, 342 B.R. 45, 55 (S.D.N.Y. 2006)). This Court has articulated its concerns about parties' attempts to fabricate subject matter jurisdiction in order to fund a bankruptcy case:

a debtor could create subject matter jurisdiction over any non-debtor third-party by structuring a plan in such a way that it depended upon third-party contributions. As we have made clear, subject matter jurisdiction cannot be conferred by consent of the parties. Where a court lacks subject matter jurisdiction over a dispute, the parties cannot create it by agreement even in a plan of reorganization.

*Id.* at 66. The Debtors' attempt to contrive subject matter jurisdiction by predicating a sale of its assets on a release of its asbestos liability is exactly the type of behavior this Court was concerned about in *Johns-Manville*.

Lacking subject matter jurisdiction to insulate New Chrysler from asbestos claimants, the Bankruptcy Court improperly relied on Section 105—which allows a bankruptcy court to "issue any order, process, or

judgment that is necessary or appropriate to carry out the provisions of the [Bankruptcy Code]”—as its jurisdictional predicate. 11 U.S.C. § 105(a). Section 105, however, is not a jurisdictional trump card. “Any power that a judge enjoys under section 105(a) must derive ultimately from some other provision of the Bankruptcy Code.” *Metromedia*, 416 F.3d at 142; *United States v. Pepperman*, 976 F.2d 123, 131 (3d Cir. 1992) (stating that section 105(a) does not create substantive rights that would otherwise be unavailable under the Bankruptcy Code). Section 105 is simply not an independent source of federal subject matter jurisdiction. Congress did not intend it as a passkey for bankruptcy courts to employ in opening whatever jurisdictional doors they may wish to open. *In re Johns-Manville Corp.*, 801 F.2d 60, 63 (2d Cir. 1986) (stating “[s]ection 105(a) does not, however, broaden the bankruptcy court’s jurisdiction, which must be established separately”).

**C. THE BANKRUPTCY COURT ERRED IN APPROVING A SALE TRANSACTION THAT WAS IN FACT A *SUB ROSA* PLAN OF REORGANIZATION.**

A sale of a debtor’s assets under 11 U.S.C. § 363 should not be approved if the terms of that sale constitute a *sub rosa* plan of reorganization.

Under section 363(b) of the Code, “[t]he trustee, after notice and a hearing may use, sell, or lease, other than in the ordinary course of business, property of the estate.” The trustee is prohibited from such use, sale or lease if it would amount to a *sub rosa* plan of reorganization. The reason *sub rosa* plans are prohibited is based on a fear that a debtor-in-possession will enter into transactions that will, in effect, “short circuit the requirements of [C]hapter 11 for confirmation of a reorganization plan.”

*In re Iridium Operating LLC*, 478 F.3d 452, 466 (2d Cir. 2007) (citations omitted).

Restructuring of the rights of a debtor’s creditors is outside the scope of Section 363. A transaction characterized as a sale of estate property pursuant to Section 363 should not be approved if the transaction has “the practical effect of dictating some of the terms of any future reorganization plan.” *In re Braniff Airways, Inc.*, 700 F.2d 935, 940 (5th Cir. 1983). As the Fifth Circuit noted in *Braniff*, reorganization of the debtor requires that the parties and court comply with the requirements of Chapter 11, including those of disclosure, voting, meeting the best interests of creditors test and complying with the absolute priority rule. *Id.*

The District Court of the Southern District of New York agrees:

Indeed, it is well established that section 363(b) is not to be utilized as a means of avoiding Chapter 11’s plan

confirmation procedures. Where it is clear from 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.

*In re Westpoint Stevens, Inc.*, 333 B.R. 30, 52 (S.D.N.Y. 2005). The district court in *Westpoint Stevens* found that the Section 363 sale at issue there impaired the claim satisfaction rights of objecting creditors and was an effort to overcome anticipated objections to an attempt to cram down an equity based plan. The court rejected such an attempted use of Sections 363(b) and 105. *Id.* at 54.

The Bankruptcy Court here approved what the Debtors characterize as a “sale transaction” with Fiat and New Chrysler. However, as with the transactions found to be impermissible *sub rosa* plans in *Braniff* and *Westpoint Stevens*, the Sale Transaction is much more than a “sale”: it not only restructures the rights of creditors, it is an integral part of a larger plan that includes granting releases to such obvious non-debtors as Daimler and Chrysler Holding LLC.

For example, as previously noted, asbestos personal injury claimants and other tort claimants would purportedly be enjoined from asserting state-created successor liability claims against New Chrysler.

Although Chapter 11 provides a means for altering objecting creditors' rights, that alteration must occur through the plan confirmation process, not pursuant to a Section 363 sale. *See Westpoint Stevens*, 333 B.R. at 34. Creditors' rights are not marginal issues in bankruptcy cases: they are the very essence of the equitable system of reorganizing one's obligations. To ride roughshod over statutory creditor rights of participation in voting on a plan of reorganization is to be unfaithful to equity in the name of expediency. In entering the Sale Order, the Bankruptcy Court not only altered objecting creditors' rights outside of the plan confirmation process, it short-circuited those creditors' rights, and ultimately rendered them entirely illusory.

A condition of the purported "sale" are two releases given in favor of various non-Debtors, including Chrysler Holding LLC and Daimler among others. These releases, relating to prepetition claims of mismanagement among other things, give the lie to the suggestion that the Sale Transaction is the mere disposition of estate assets. It is rather a comprehensive restructuring of the Debtors' businesses and a resolution of its causes of actions against potential non-debtor defendants. One searches in vain for authority for this sort of third

party release under the “sale” provisions of the Bankruptcy Code. If any such global restructuring and resolution is to be attempted, Congress intended that it be done pursuant to a plan of reorganization properly disclosed to creditors and approved by them.

A clearer case of a *sub rosa* reorganization is hard to imagine, for in this case, the Bankruptcy Court has specifically stated that its Sale Order will govern, and that any subsequent plan of reorganization will be wholly restrained by its terms. The Sale Order expressly provides:

Nothing contained in any chapter 11 plan confirmed in these bankruptcy cases or the order confirming any such chapter 11 plan shall conflict or derogate from the provisions Purchase Agreement or this Sale Order, and to the extent of any conflict or derogation between this Sale Order or the Purchase Agreement and such future plan or order, the terms of this Sale Order and the Purchase Agreement shall control to the extent of such conflict or derogation.

(Sale Order at p. 26, ¶ 7).

The Purchase Agreement and Sale Order plainly preempt and dictate the terms of any plan of reorganization in these bankruptcy cases. The Bankruptcy Court erred in approving a *sub rosa* plan of reorganization by entering the Sale Order.

**D. THE BANKRUPTCY COURT ERRED IN AUTHORIZING THE DEBTORS' SALE OF SUBSTANTIALLY ALL OF ITS ASSETS FREE AND CLEAR OF CLAIMS AND INTERESTS BEYOND THE SCOPE OF 11 U.S.C. §363(f).**

Section 363(f) of the Bankruptcy Code allows the sale, in certain circumstances, of property of a debtor-in-possession “free and clear of any interest in such property.” 11 U.S.C. § 363(f). The Bankruptcy Code does not define “interest” and the Second Circuit has not determined what an “interest” in property is within the meaning of Section 363(f). *In re Lawrence United Corp.*, 221 B.R. 661, 668 (Bankr. N.D.N.Y. 1998). Moreover, courts in general “have not yet settled on a precise definition of the phrase ‘interest in such property.’” *Id.* (quoting *In re Leckie Smokeless Coal Co.*, 99 F.3d 573, 581 (4th Cir. 1996)). Nonetheless, courts have found that Section 363(f) does not provide the bankruptcy court with the authority to sell a debtor’s assets free and clear of general unsecured claims. *Volvo White Truck Corp. v. Chambersburg Beverage, Inc. (In re White Motor Credit Corp.)*, 75 B.R. 944, 948 (Bankr. N.D. Ohio 1987).

Courts have found that *in personam* claims are not included in the phrase “any interest in such property” as that phrase is used in Section 363(f):

Section 363(f) does not authorize sales free and clear of *any interest*, but rather of *any interests in such property*. These three additional words define the real breadth of *any interests*. The sorts of interests impacted by a sale “free and clear” are *in rem* interests which have attached to the property. Section 363(f) is not intended to extinguish *in personam* claims. Were we to allow “any interests” to sweep up *in personam* claims as well, we would render the words “in such property” a nullity. No one can seriously argue that *in personam* claims have, of themselves, an *interest in such property*.

*Fairchild Aircraft, Inc. v. Campbell (In re Fairchild Aircraft Corp.)*, 184 B.R. 910, 917-18 (Bankr. W.D. Tex. 1995), *vacated on other grounds*, 220 B.R. 909 (Bankr. W.D. Tex. 1998). Accordingly, a Section 363(f) sale can only be used to extinguish *in rem* interests such as liens, mortgages and other encumbrances held by secured creditors and cannot be used to cleanse the assets and absolve the purchaser of liability for current or future products liability claims. *Schwinn Cycling & Fitness, Inc. v. Benonis (In re Schwinn Bicycle Co.)*, 210 B.R. 747, 761 (Bankr. N.D. Ill. 1997) (holding that Section 363(f) “only protects the purchased assets from lien claims against those assets” and does not protect a buyer from current and future products liability claims).

Because holders of asbestos-related personal injury claims (and other tort claims) have *in personam* claims, the property cannot be sold free and clear of their claims, including successor liability claims.

The Bankruptcy Court's reliance on *In re White Motor Credit Corp.* and *Rubinstein v. Alaska Pacific Consortium (In re New England Fish Co.)*, 19 B.R. 323 (Bankr. W.D. Wash. 1982) for the proposition that Section 363(f) authorizes the sale of the Debtors' assets free and clear of asbestos-related personal injury claims (and other tort claims) is misplaced (*See* Opinion at p. 42-43). While both of the cases cited allowed the sales to proceed free and clear of the liabilities at issue in those cases, the courts in *In re White Motor Credit Corp.* and *In re New England Fish Co.* did not rely on Section 363(f) to support the sales.

In fact, the bankruptcy court in *In re White Motor Credit Corp.* specifically stated that Section 363(f) was "inapplicable to sales free and clear of" general unsecured tort claims because such claims "have no specific interest in a debtor's property." *In re White Motor Credit Corp.*, 75 B.R. at 948; *accord In re New England Fish Co.*, 19 B.R. at 326 (General unsecured creditors of the estate "do not have an interest in the specific property being sold ... which is contemplated by [Section]

363(f)"). The bankruptcy court in *In re White Motor Credit Corp.* specifically relied on the discharge provisions of the Bankruptcy Code, to determine that the creditor's rights against the debtor's assets did not survive. *In re White Motor Credit Corp.*, 75 B.R. at 948-49. It was a plan that affected the creditor, not a Section 363 sale.

Therefore, *In re White Motor Credit Corp.* does not support the erroneous assertion that the sale of the Debtors' assets could be conducted free and clear of asbestos-related personal injury claims. Such claims are not "interests in such property" that can be extinguished by way of a Section 363(f) sale because such claims are general unsecured claims to which no specific property interest attaches. *In re White Motor Credit Corp.*, 75 B.R. at 948; *In re New England Fish Co.*, 19 B.R. at 326; *In re Hutchinson*, 5 F.3d 750, 756 n. 4 (4th Cir. 1993); *In re Wolverine Radio Co.*, 930 F.2d 1132, 1147 n. 23 (6th Cir. 1991) (citing *In re White Motor Credit Corp.* with approval).

Consequently, Section 363(f) does not provide a bankruptcy court with authority to find that the Sale Transaction "shall not impose or result in the imposition of any liability or responsibility on Purchaser for any Claims, including, without limitation for any successor liability

or any products liability for the sale of any vehicles by the Debtors for their predecessors or affiliates” (Sale Order at p. 18, ¶ Z). Accordingly, the Sale Order should be vacated.

**E. THE BANKRUPTCY COURT ERRED IN ENTERING THE SALE ORDER AS IT ALLOCATES PROCEEDS AND CONSIDERATION OF THE SALE DISPROPORTIONATELY IN FAVOR OF CERTAIN UNSECURED CREDITORS TO THE DETRIMENT OF OTHER, SIMILARLY SITUATED UNSECURED CREDITORS, INCLUDING MRS. PASCALE.**

The *sub rosa* plan approved by the Sale Order provides that certain prepetition creditors of the Debtors will fare extremely well. If approved, the Sale Transaction will result in New Chrysler issuing 55%, 8% and 2% of the Membership Interests in New Chrysler to the VEBA, the United States Treasury and the Canadian government, respectively (Sale Motion at p. 17, ¶ 41). Additionally, if the Sale Transaction is consummated, the Debtors will assume and assign to the Purchaser all but three of their collective bargaining agreements with the UAW (Sale Motion at 17-18, ¶ 43). Moreover, if the Sale Transaction is approved, the Purchaser has agreed to enter into a settlement agreement with the UAW which will result in the Purchaser making contributions to a VEBA to provide non-pension retiree benefits for the Debtors’ retirees and surviving spouses represented by the UAW (Sale Motion at p. 18, ¶

44). It is hardly surprising that these beneficiaries of the Sale Transaction's generosity strongly supported the Sale Motion.

However, the Court is charged with acting in the best interest of *all* parties. As the Second Circuit has aptly observed:

In fashioning its findings, a bankruptcy judge must not blindly follow the hue and cry of the most vocal special interest groups; rather, he should consider all salient factors pertaining to the proceeding and, accordingly, act to further the diverse interests of the debtor, creditors and equity holders.

*In re Lionel, Corp.*, 722 F.2d 1063, 1071 (2d Cir. 1983) (holding that Section 363(b) sale was not justified and reversing order approving sale).

The Debtors apparently contemplate a "liquidating plan of reorganization" (*See* Sale Order at p. 6, ¶ D). It is impossible for Mrs. Pascale to ascertain what funds, if any, will remain for payment of her claim by the Sellers pursuant to a liquidating plan of reorganization that is wholly cabined by the terms of the Order approving the Sale Transaction. It takes no crystal ball to see that Mrs. Pascale may receive little or nothing on account of her wrongful death claim; in fact, testimony at the Sale Hearing indicates that there will be little if anything left for the creditors left behind, like asbestos and other tort

claimants. The Bankruptcy Court itself stated: “Not one penny of value of the Debtors’ assets is going to anyone other than the First-Lien Lenders” (Opinion at p. 18)<sup>3</sup>. The Bankruptcy Court’s own findings thus shows that the Sale Transaction will provide handsome returns to favored unsecured creditors and yet deny Mrs. Pascale any meaningful payment for her asbestos-related personal injury claim, a result assuredly not contemplated by Congress in enacting 11 U.S.C. § 524(g).

This Court should not countenance the discrimination in treatment that is inherent in the Sale Order, which by its own terms sets plan distributions in concrete. It is not for a court of equity to sell out the interests of the small claimant in order to gain the support of large and powerful constituencies such as the UAW and its VEBA, the United States Treasury and the Canadian government.

**F. THE BANKRUPTCY COURT ERRED IN ENTERING THE SALE ORDER WHEN THE DEBTORS DID NOT MEET THEIR BURDEN TO DEMONSTRATE THAT THE SALE TRANSACTION SATISFIES ALL OF THE REQUIREMENTS OF 11 U.S.C. § 363.**

Courts commonly make an explicit finding that a purchaser “acted in good faith” in the course of the sale proceedings. *See, e.g., In re*

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<sup>3</sup> There is a possibility that perhaps \$30 million might be made available for unsecured creditors, whose claims, however, aggregate to more than \$50 billion.

*Abbotts Dairies of Pa., Inc.*, 788 F.2d 143, 147-48 (3d Cir. 1986). Such a finding was not possible in the context of the Sale Transaction.

Indeed, while the Sale Order includes a statement that the “Purchaser has proceeded in good faith,” the Sale Order further provides:

The Purchaser would not have entered in the Purchase Agreement and would not consummate the Sale Transaction . . . if the sale of the Purchased Assets was not free and clear of all Claims other than the Assumed Liabilities, or if the Purchaser would, or in the future could, be liable for any such Claims, including . . . the “Excluded Liabilities”.

(Sale Order at p. 14, ¶ Y).

In other words, the Purchaser will not consummate the Sale Transaction unless the Bankruptcy Court enters an order purporting to protect it from whatever state-created successor liability claims that Mrs. Pascale and other known or unknown asbestos claimants may have. Because such a provision is contrary to law and is outside of the authority of the Bankruptcy Court, the Purchaser, by definition, has not acted in good faith. Because the Purchaser did not act in good faith, the Bankruptcy Court erred in entering the Sale Order.

## XI. CONCLUSION

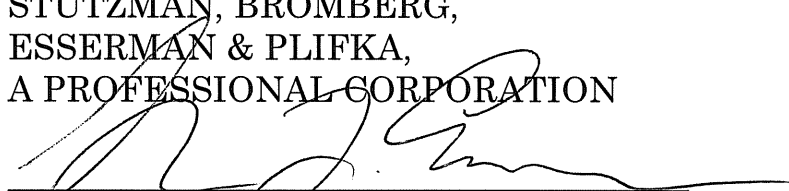
The Bankruptcy Court committed reversible error in entering the Sale Order which (1) purports to enjoin current asbestos personal injury and wrongful death claims as well as future asbestos demands against the non-debtor New Chrysler without satisfying the statutory requirements of 11 U.S.C. § 524(g), (2) purports to enjoin claims that the Bankruptcy Court lacked subject matter jurisdiction to enjoin, (3) approves an impermissible *sub rosa* plan of organization characterized as a sale transaction, (4) authorizes the sale of substantially all of the Debtors' assets free of claims and interests well beyond the scope of 11 U.S.C. 363(f), (5) allocates proceeds and consideration of the Sale Transaction disproportionately to the detriment of some unsecured creditors, including Mrs. Pascale and in a manner not in the best interests of unsecured creditors as a whole, and (6) did not require the Debtors to meet their burden to demonstrate that the Sale Transaction satisfies all of the requirements of 11 U.S.C. § 363.

For the foregoing reasons, Mrs. Pascale respectfully prays that the Sale Agreement be VACATED and that the Court grant any and all other relief to which she may be entitled.

Dated: Dallas, Texas  
June 4, 2009

Respectfully submitted,

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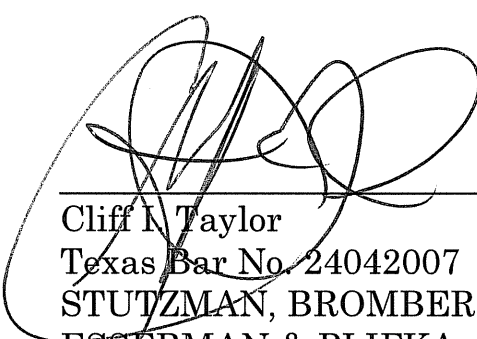
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**CERTIFICATE OF COMPLIANCE WITH  
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1. This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because this brief contains 6,878 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii).
  
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