IN THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

In re CHRYSLER LLC, et al., Debtors.	)	Chapter 11 Case No. 09-50002 (AJG) Jointly Administered
INDIANA STATE POLICE PENSION TRUST, et al., Appellants. v. CHRYSLER, LLC, et al., Appellees.	)	**09-2311-MB**

MEMORANDUM OF LAW IN SUPPORT OF EMERGENCY MOTION OF THE INDIANA PENSIONERS FOR EXPEDITED APPEAL AND A STAY PENDING THE EXPEDITED APPEAL

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Appellants, the Indiana Pensioners,[1] hereby submit this emergency motion (the "Emergency Motion") for entry of an order expediting the appeal (the "Appeal") from the Orders dated May 31 and June 1, 2009 [Bankr. Docket Nos. 3074, 3232] (the "Sale Orders") entered by the Bankruptcy Court for the Southern District of New York, and staying the Sale Orders pending the resolution of this Appeal. The Sale Orders granted Chrysler LLC's ("Chrysler" or the "Debtors") Motion for an Order (A) Authorizing the Sale of Substantially All of the Debtors' Operating Assets, Free and Clear of Liens, Claims, Interests and Encumbrances, (B) Authorizing the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases in Connection Therewith and Related Procedures and (C) Granting Certain Related Relief [Docket No. 190] (the "Sale Motion").

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1(b), each of the Indiana State Teachers Retirement Fund, the Indiana State Police Pension Trust, and the Indiana Major Moves Construction Fund hereby certifies that it (i) has no corporate parent and (ii) no publicly-owned corporation owns 10% or more of its equity stock.

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[1] The Indiana Pensioners are comprised of the Indiana State Teachers Retirement Fund and Indiana State Police Pension Trust, 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 the Senior Secured Debt (as defined below).

STATEMENT OF APPELLATE JURISDICTION

This Court has jurisdiction over this Emergency Motions and Appeal under 28 U.S.C. § 158(d) and Bankruptcy Rule 8001(f), and this Emergency Motion is made pursuant to Fed. R. App. Proc. 21(c). 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]. See Declaration of Glenn M. Kurtz in Support of Emergency Motion, dated June 2, 2009, ¶¶ 4, 6.

PRELIMINARY STATEMENT

This appeal raises issues of first impression that will have far-reaching consequences on how the government addresses the economic problems facing the automotive sector and beyond and the fundamental role of bankruptcy in such efforts. Indeed, discovery revealed that the Government is using Chrysler and this case as a "guinea pig" for the approach attempted here, including as it will relate to the GM bankruptcy.

The Sale Orders being appealed here permit Chrysler to reorganize without complying with any of the statutory requirements of Chapter 11, and diverts the value of Chrysler from the secured first lien lenders to junior and unsecured creditors favored by the Government. The Treasury Department accomplished this by simply characterizing the reorganization as a sale of substantially all of Chrysler's assets. It is obvious, however, that Chrysler has in fact reorganized. Today Chrysler sells Chrysler, Jeep and Dodge cars, trucks and minivans, produced at Chrysler plants, manned by Chrysler's union workers. Following the "Sale," Chrysler will sell Chrysler, Jeep and Dodge cars, trucks and minivans, produced at Chrysler plants, manned by Chrysler's union workers. The only practical difference is the capital structure, which now excludes the first lien lenders.

The appeal raises substantial and novel issues of law never before addressed by this Circuit or any other, including (i) whether the Sale attempted here – indisputably the fastest reorganization on record – constitutes an illegal sub rosa plan and violates the long-standing and fundamental rule of absolute priority, and (ii) the authority of the Treasury to direct the course of, and fund, this bankruptcy through the use of Troubled Asset Relief Program ("TARP") under the Emergency Economic Stabilization Act of 2008 ("EESA"), 12 U.S.C. § 5201, et seq.

Under such circumstances, the 10-day automatic stay of the Sale Orders under Bankruptcy Rule 6004(h) should have stayed in place. As courts have long recognized, that stay exists precisely so an objecting party has sufficient time to protect its appellate rights. Moreover, in opposing a withdrawal of the reference from the bankruptcy court with respect to the Sale Motion, Chrysler and other parties expressly argued that the Indiana Pensioners would have the right to appeal the substantial issues presented. District Court Judge Griesa denied the motion to withdraw on the specific understanding that the Indiana Pensioners' appellate rights would be preserved and unhindered.

Notwithstanding these important issues and Debtors' assurances to Judge Griesa, the Debtors nevertheless have taken extraordinary steps to attempt to moot the Appeal. The Debtors initially asked the bankruptcy court to eliminate the stay entirely, which would have mooted the appeal. Immediately upon receiving the Sale Orders, the Debtors then pressed the bankruptcy court to permit them to close the transaction Thursday at 9:00 am, before any appeal could be heard. The bankruptcy court granted the request to shorten the 10 day stay period the same day, notwithstanding Judge Griesa's decision and Judge McMahon's June 1 admonition that "no court in this chain of courts" would deny Appellants the right to an appeal. Per the bankruptcy court, the closing of the Sale can take place as of noon on Friday, June 5 – less than three days from now. Remarkably, this closing

date is **a full 10 days before** the June 15 deadline that even Debtors concede is the earliest date by which anyone could claim they are required to close.

Under section 363(m) of the Bankruptcy Code, that closing will moot most of the pending appeal by prohibiting a reversal of the Sale. The courts in this Circuit have repeatedly found that the mooting of an appeal constitutes irreparable harm supporting issuance of a stay. The Sale Orders should be stayed pending this Appeal being heard on as expeditious of a schedule as is practicable for the Court. As set forth in the accompanying Declaration of Glenn Kurtz,[2] Appellants are prepared to file their brief on the merits as early as this Thursday, June 4, so that the appeal can be heard as early as next week. The Indiana Pensioners therefore respectfully request (i) a stay to preserve this Court's jurisdiction to hear the Appeal before the Sale closes and the Appeal is rendered moot, and (ii) an expedited schedule for the Appeal.

BACKGROUND

Chrysler filed for bankruptcy under chapter 11 of title 11 of the United States Code on April 30, 2009. Chrysler and certain of its affiliates are parties to an Amended and Restated First Lien Credit Agreement, dated as of August 3, 2007 with JPMorgan Chase Bank N.A., as administrative agent (the "Administrative

[2] The Indiana Pensioners also have submitted the Declaration of Glenn M. Kurtz in Support of this Emergency Motion dated June 2, 2009 (the "Kurtz Declaration") and accompanying Exhibits A to K.

Agent"), and certain lenders party thereto (the "Senior Secured Lenders"). The Indiana Pensioners are among the Senior Secured Lenders, who are owed $6.9 billion (the "Senior Secured Debt") secured by a first lien on substantially all of Chrysler's assets (the "Collateral").

On May 3, 2009, the Debtors filed the Sale Motion, pursuant to which the Debtors seek to transfer all or substantially all of Chrysler's assets from "Old Chrysler" to "New Chrysler." On May 7, 2009, the Bankruptcy Court approved procedures for the Sale, which mandated a schedule for the Sale Motion dictated by the U.S. Government and advocated by the Debtors. 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 of the Debtors, the U.S. Government, the UAW, and other parties before a May 27 evidentiary hearing. Ultimately, it was not possible to present a complete objection. Indeed, documents still were being reviewed during the trial, and could not even be fully reviewed before the record closed. The bankruptcy court denied a number of motions for a brief continuance.

On May 20, 2009, the day following the filing of their Objection to the Sale Motion, Appellants filed a motion to withdraw the reference to the district court pursuant to 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 issues by the bankruptcy court. Argument on the motion to withdraw reference was heard by Judge Griesa on the morning of Tuesday, May 26. Judge Griesa ruled that in light of the expedited schedule that had been ordered, the issues should be determined by the bankruptcy court in the first instance. The court made clear, however, that the decision was made in reliance on Debtors' representations that nothing would be done to hinder or impede an appeal of the issues raised, including by the request of an exorbitant bond.

A three-day evidentiary hearing was commenced in the bankruptcy court the next day. On May 31 the Bankruptcy Court approved the Sale, issuing the Sale Orders on May 31 and June 1. The Sale Orders are attached hereto as Exhibits A and B to the Kurtz Declaration. Under the Sale Orders the Debtors may close the Sale on Friday at noon – and Debtors have said that they are prepared to do so. Debtors' Letter to the Bankruptcy Court, dated June 1, 2009, attached as Exhibit C to the Kurtz Declaration.

On June 1, 2009, Appellants sought an emergency hearing before the district court. Sitting as the Part I judge, Judge Coleen McMahon stated that before addressing issues of stay or expedition of an appeal, the parties should wait for the bankruptcy court's entry of Sale Order, including specifically with respect to the duration of the mandatory 10-day stay. 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." D. Ct. Hr'g Tr. 18:8-11 (June 1, 2009) (attached to Kurtz Declaration as Exhibit D).

Notwithstanding Judge Griesa's and Judge McMahon's admonitions, the bankruptcy court shortened the 10-day automatic stay and stated 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 their notices of appeal of the Sale Orders on June 1, 2009 (the "Notices of Appeal"). Copies of the Notices of Appeal are attached as Exhibits E and F to the Kurtz Declaration. After the Notices of Appeal were filed, Debtors requested that the bankruptcy court certify appeal of all issues relating to the Sale Orders directly to this Circuit Court pursuant to Bankruptcy Rule 8001(f). Appellants supported certification directly to this Court, and on the morning of June 2, 2009, the bankruptcy court issued a further order certifying for appeal directly to this Court all issues relating to the Sale Orders. A copy of the certification order is attached as Exhibit G to the Kurtz Declaration.

ARGUMENT

Under FRAP 2, the Court may direct an expedited appeal. In this Circuit a stay pending expedited appeal should be granted based on a balancing of four

factors: (i) appellant's likelihood of success on the merits; (ii) whether appellant will be irreparably injured absent a stay; (iii) whether issuance of the stay will substantially injure other interested parties; and (iv) where the public interest lies. See In re World Trade Center Disaster Site Litig., 503 F.3d 167, 170 (2d Cir. 2007). The failure of one factor is not dispositive. Rather, "the degree to which a factor must be present varies with the strength of other factors." Id. Here, all factors strongly favor a stay pending an expedited appeal.

A. Appellants Will Suffer Irreparable Harm

The Indiana Pensioners will suffer irreparable harm absent a stay of the Sale Orders pending an expedited Appeal because the closing of the Sale will as a matter of statute moot the issues for appeal. Courts have long recognized that the elimination of a movant's rights by mootness is the "quintessential" form of prejudice to a party. See ACC Bondholder Group v. Adelphia Communics. Corp. (In re Adelphia Communics. Corp.), 361 B.R. 337, 347-48 (S.D.N.Y. 2007) ("where the denial of a stay pending appeal risks mooting *any* appeal of *significant* claims of error, the irreparable harm requirement is satisfied") (emphasis in original), appeal dismissed by, 367 B.R. 84 (S.D.N.Y. 2007); Country Squire Assocs. v. Rochester Cmty. Sav. Bank (In re County Squire Assocs.), 203 B.R. 182, 183-84 (B.A.P. 2d Cir. 1996) (granting stay and finding that irreparable harm was established where it was clear that without a stay pending appeal the

foreclosure sale would proceed and moot the appeal); In re St. Johnsbury Trucking Co., 185 B.R. 687, 688, 690 (S.D.N.Y. 1995) (granting stay of confirmation order pending appeal and concluding that movant established the threat of irreparable injury based on risk that appeal would be mooted if no stay were granted).

Absent a stay and expedited Appeal, the closing of the Sale on Friday will immediately moot substantially all of the Indiana Pensioners' appellate rights under section 363(m) of the Bankruptcy Code.[3] Put simply, once the Collateral is "sold" to New Chrysler, section 363(m) will essentially prevent it from being reversed, thereby eviscerating the Indiana Pensioners' appellate rights. Recognizing the substantial issues presented by the Indiana Pensioners, the Debtors and their supporters have leveraged section 363(m) by requesting and obtaining from the bankruptcy court in the Sale Order a waiver of the ten-day stay normally imposed by Bankruptcy Rule 6004(h). Thus, absent a stay and an expedited Appeal, the Sale will be closed and the Appeal effectively mooted before this Court ever has a chance to consider the issues.

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[3] Section 363(m) states:

> The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

11 U.S.C. 363(m).

B. Debtors Will Not Be Substantially Harmed By The Relief Sought

In contrast to the substantial irreparable harm that the Indiana Pensioners will suffer absent a stay and expedited Appeal, the Debtors will suffer no harm. In advocating the draconian schedule approved by the bankruptcy court, the Debtors represented that the date for closing the Sale need not take place until June 15, 2009, which is confirmed by the Sale documents. Moreover, Chrysler's agreement relating to the Sale also allows Chrysler the unilateral right to extend the closing ahead to July 15—over six weeks from now—if they have not yet received regulatory approval. As of the close of evidence, no such approval was in place. Indeed, as revealed in an email produced in discovery, Chrysler's own requested schedule built in the 10-day stay period. That same email also revealed Chrysler's view that the extraordinary schedule requested from the bankruptcy by Chrysler and Treasury was "impossible," a "big mistake" and would "risk credibility." The email further noted: "**Facing a certain appeal** – do you really want to stuff a judge?" (Emphasis added)[4] Treasury chose to do so over the advice of the Debtors' lead bankruptcy counsel.

Moreover, the Debtors cannot be heard to claim prejudice after they represented to Judge Griesa that the Indiana Pensioners' motion to withdraw the reference should be denied based on a right ***to appeal*** any adverse ruling on the

[4] This email and the relevant Sale documents were admitted into evidence by the bankruptcy court and will be part of the Record on this Appeal.

Sale Motion. This argument was vitally important to the Debtors given the District Court's findings that the Indiana Pensioners' motion to withdraw the reference was timely, that the Indiana Pensioners have standing to raise the issues presented, and that the issues presented are novel and substantial issues of non-bankruptcy federal law – findings that normally would have supported mandatory withdrawal of the reference as to the Sales Motion from the Bankruptcy Court under 11 U.S.C. § 157(d).[5] Rather than withdraw, however, Judge Griesa allowed the Sale Motion to go forward on the ***express understanding*** that the Indiana Pensioners' appellate rights would be preserved.

Specifically, District Judge Griesa made clear that "there certainly is a need to interpret" the EESA and TARP issues presented by the Indiana Pensioners' objection, and that the Indiana Pensioners should have a fair opportunity to appeal the Sale Motion without hindrance (including by means of an exorbitant bond):

> Now, I don't know whether there is anything to be said about this but I want to say to all parties ***there should be a fair opportunity to appeal.*** I am not keeping the case now but I am fully aware of the need for a right of appeal after the bankruptcy judge does his work, and ***the various parties who have opposed***

[5] See, e.g., City of New York v. Exxon Corp., 932 F.2d 1020, 1026 (2d Cir. 1991) ("cases or issues that would otherwise require a bankruptcy court judge to engage in significant interpretation, as opposed to simple application, of federal laws apart from the bankruptcy statutes."); Enron Power Mktg., Inc. v. California Power Exch. Corp., No. 04 Civ. 8177(RCC), 2004 WL 2711101, *2 (S.D.N.Y. Nov. 23, 2004) (quoting Shugrue v. Air Line Pilots Ass'n Int'l (In re Ionosphere Clubs, Inc.), 922 F.2d 984, 995 (2d Cir. 1990)).

> ***the motion to withdraw the reference have relied to some extent on the fact that there is a right of appeal.***
>
> Now, I hope I do not hear of any attempts to obstruct that right of appeal or make it unduly difficult because of some inappropriate request for some exorbitant bond. ***The people opposing the withdrawal of the reference have relied on that right of appeal and that right of appeal should exist and it should be able to be exercised without any hindrance.***

D. Ct. Hr'g Tr. 89:5-89:17 (May 26, 2009) (emphasis added);[6] see also D. Ct. Op. at 6 (May 26, 2009) (bankruptcy court's decisions regarding the Sale Motion should be "subject to the right of appeal").[7]

Further, during an emergency hearing held on June 1, District Judge McMahon stated that, given the importance of these issues, "[t]here 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." D. Ct. Hr'g Tr. 18: 8-11 (June 1, 2009).

Having used the reality of an appeal as a sword to prevent withdrawal of the reference, the Debtors cannot now attempt to use alleged harms to the estate as a shield against the appellate rights of the Indiana Pensioners – especially when the

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[6] A copy of the May 26, 2009 District Court transcript is attached as Exhibit H to the Kurtz Declaration.

[7] A copy of the May 26, 2009 District Court opinion of Judge Griesa is attached as Exhibit I to the Kurtz Declaration.

Debtors and the U.S. Government previously represented that they have well beyond June 4 to close the Sale.[8]

C. Appellants Can Show Substantial Likelihood of Success On The Merits

As extensive briefing before Judge Griesa and the bankruptcy court demonstrate (and will be demonstrated shortly to this Court if an expedited schedule is granted), Appellants have shown that the Sale attempted here is unprecedented in both scope and timing and will, Appellants submit, irrevocably alter the landscape for the appropriate use of 363 sales in bankruptcy. Attached to the Kurtz Declaration as Exhibit J is a more complete recitation of the bankruptcy law violations.

In addition, as Judge Griesa has already recognized, there are substantial and novel issues regarding the Government's use of its TARP authority under EESA to direct and orchestrate the bankruptcy proceeding and Sale. In addressing the motion to withdraw reference, Judge Griesa held that the Appellants had standing and that "[t]here is certainly a need to interpret EESA and TARP." D. Ct. Op. at 6 (May 26, 2009). This is consistent with another recent district court decision that

[8] Debtors have asserted to the bankruptcy court that they are losing $100 million per day by not closing. See Debtors' Letter to the Bankruptcy Court, dated June 1, 2009 (attached as Kurtz Declaration Exhibit C). This fact, however, was never proven by the Debtors at trial (the only source being the statement of a Treasury official at his deposition). There is no proof that the alleged loss would be mitigated by a closing of the Sale to the contrary, Chrysler will not restart car production until mid-August. Thus an Appeal here will not cause Chrysler any harm.

addressed the use of TARP funds to bail out the automotive manufacturers. Although the court denied the challenge by a taxpayer group for lack of standing, it observed:

> On its face, this definition [of "financial institution" under TARP] would not appear to include automobile manufacturers. And the terms of the Act do seem to limit the use of TARP funds to assisting financial institutions. See 12 U.S.C. § 5211(a)(1) (authorizing the Secretary of the Treasury to purchase troubled assets, as defined by the act, from "financial institutions"). Plaintiffs' arguments have even more persuasive force given that a bill, HR 7321, specifically designed to authorize the distribution of TARP funds to auto manufactures passed the United States House of Representatives. See GovTrack.us. H.R. 7321-110th Congress (2008): Auto Industry Financing and Restructuring Act, GovTrack.us (database of federal legislation) <http://www.govtrack.us/congress/bill.xpd?bill=h110-7321> (accessed Apr 28, 2009). Passage of that bill by the House, even though not ultimately enacted, raises the question of why was such a bill necessary if the Act already authorized the distribution of TARP funds to the auto industry?

Texans Against Gov'tal Waste & Unconstitutional Gov'tal Conduct v. U.S. Dep't of the Treasury, 2009 WL 1469752 (N.D. Tex. May 26, 2009). Attached to the Kurtz Declaration as Exhibit K is a more complete recitation of the TARP violations. Contrary to the bankruptcy court's finding, and as recognized by Judge Griesa, the Indiana Pensioners have suffered real harm here and do have standing to assert the issues presented here. Kurtz Declaration, Ex. L at 6.

Accordingly, Appellants have also shown a sufficient likelihood of success on the merits for purposes of a stay pending an expedited briefing schedule.

D. <u>The Appeal Presents Substantial Issues of Significant Public Interest</u>

All courts who have weighed in to date recognize that the issues here are of great public significance and are substantial. As noted above, both Judge Griesa and Judge McMahon have recognized the importance of the issues presented here and the need for an appeal. Similarly, the bankruptcy court also recognized the significant public interest at play in this unprecedented case. Thus, the dispute is not over whether the issues presented affect the public interest but rather whether the Debtors should be allowed to avoid any meaningful appellate review of the unprecedented approach they and the Government have taken in the Chrysler bankruptcy.

CONCLUSION

For the foregoing reasons, the Court should enter an order expediting the Appeal as described herein, should stay the Debtors' consummation of the Sale under the Sale Order pending resolution of the Appeal, and grant such further relief as the Court deems appropriate.

Dated: New York, New York
June 2, 2009

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