No. 16-764

In the Supreme Court of the United States

GENERAL MOTORS LLC,

Petitioner,

v.

CELESTINE ELLIOTT, ET AL.,

Respondents.

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

BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

The Product Liability Advisory Council, Inc. (PLAC) is a non-profit association with 93 corporate members representing a broad cross-section of American and international product manufacturers. These companies seek to contribute to the improvement and reform of law in the United States and elsewhere, with emphasis on the law governing the liability of manufacturers of products. PLAC's perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. In addition, several hundred of the leading defense attorneys in the country are sustaining (non-voting) members of PLAC. Since 1983 PLAC has filed over 1,075 briefs as *amicus curiae* in both state and federal courts, including this Court, presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law. A list of PLAC's corporate members is attached as an appendix to this brief.*

PLAC's members include companies that have participated in the bankruptcy process as debtors, creditors, and purchasers, or are likely to participate in one or more of those capacities in the future. They have a strong interest in preserving the integrity of Section 363 of the Bankruptcy Code, and in particular its "free and clear" provision, which allows

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* Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus*, its members, or its counsel made a monetary contribution to the brief's preparation or submission. Pursuant to Rule 37.2(a), counsel of record for all parties received timely notice of the intent to file this brief. All parties have consented to the filing of this brief.

a good-faith purchaser to take title to a debtor's assets without fear of successor liability, including, as in this case, claims of product liability. More broadly, Section 363 asset sales have become a common and indispensable feature of modern bankruptcy practice. The viability of this tool depends upon the finality of the sales, a benefit that is undermined by the decision below.

INTRODUCTION AND SUMMARY OF ARGUMENT

Chapter 11 of the Bankruptcy Code plays a vital role in the efficient operation of the American economy by allowing distressed businesses to restructure their finances and shed liabilities while continuing to operate as going concerns. Traditionally, companies have freed themselves of liabilities by selling or restructuring assets pursuant to the terms of a Chapter 11 reorganization plan. But the process of proposing a plan to creditors and equity holders, soliciting their consent, and obtaining judicial confirmation is cumbersome and often takes years to complete. When a business is on the verge of collapse, as General Motors Corporation (Old GM) was in 2009, this process is not a viable option, because the business cannot survive long enough to finish the restructuring.

Fortunately, the Bankruptcy Code provides businesses with a faster and more efficient alternative. Section 363 of the Code permits debtors to sell rapidly depreciating assets *before* undergoing reorganization, rather than requiring them to obtain confirmation of a reorganization plan first. In contrast with traditional reorganizations, Section 363 sales can be completed in a matter of weeks, or even days. This high-speed option allows businesses

to maximize the value of their assets, thereby improving recoveries by creditors, and gives them greater access to credit markets.

Section 363 also allows a good-faith purchaser to take title to assets "free and clear" of the debtor's liabilities. The finality conferred by this provision is a vital feature of Section 363. For without protection from successor liability, prospective purchasers would have little incentive to bid in the first place, or at least would have to lower their bids to factor in the costs of due diligence and the risks of litigation. The Code's "free and clear" protection thus benefits debtors and creditors alike.

The Section 363 sale is not a tool reserved for exceptional circumstances but is now an essential feature of modern bankruptcy practice. Indeed, spurred by the globalization of credit markets and related developments, Section 363 sales have largely supplanted traditional reorganizations. Dozens of Chapter 11 reorganizations over the past 15 years have included a Section 363 sale, sparing businesses from liquidation and allowing employees to retain their jobs. Thus, the questions presented in the petition are ones of recurring importance.

The decision below threatens to cripple Section 363 by upsetting the interests the provision is meant to protect. It calls into question the finality of Section 363 sales that have already occurred and makes them less likely to occur in the future.

The court of appeals stripped the good-faith *purchaser* of the benefit of Section 363's "free and clear" provision, on the grounds that the *seller* failed to provide adequate notice to millions of people, only a fraction of whom might have had a claim against

the company at some point in the future, and that the notice did not include *grounds for potential claims* as well as details of the sale. These unprecedented rulings effectively impose on a prospective purchaser the burden of ascertaining whether the seller is or should be aware of some problem that could create liability at some point in the future—and, if so, whether the seller has given potential claimants personal notice not only of the sale but also of their potential claim. The court of appeals' decision will cause purchasers to pass on the costs of additional due diligence and litigation risk to the seller (in the form of a lower price for the assets) and to creditors (in the form of smaller recoveries). To the extent that Section 363 ceases to be a viable option because the debtor cannot attract *any* purchasers, the result will be liquidation, which imposes even greater costs on stakeholders, including employees of the debtor who will lose their jobs, as well as employees of the debtor's suppliers who may lose *their* jobs.

As the petition demonstrates, the decision below is flawed as a matter of law in several respects. This brief will not repeat petitioner's arguments but instead addresses four related issues, to which we have already adverted and which we will develop in greater detail below: the purpose of Section 363; the benefits of the provision; the increasing use of it; and the harms the decision below causes to the interests protected by Section 363.

ARGUMENT

A. The Purpose Of Section 363

The object of a Chapter 11 reorganization is "to restructure a business's finances so that it may

continue to operate, provide its employees with jobs, pay its creditors, and produce a return for its stockholders." H. Rep. No. 95-595, at 220 (1977); accord *Bank of Am. Nat. Trust & Sav. Ass'n* v. *203 N. LaSalle St. P'ship*, 526 U.S. 434, 453 (1999) (purpose of Chapter 11 is to "preserv[e] going concerns" by affording distressed businesses protection from creditors and to "maximiz[e] property available to satisfy creditors"). The premise of reorganization is that "assets that are used for production in the industry for which they are designed are more valuable than those same assets sold for scrap." H. Rep. No. 95-595, at 220.

Such restructuring can be accomplished "by a strategic sale of businesses (and their asset-based, human and financial capital)," as was the case with Old GM, "or by financially restructuring the historic corporate entity." James H.M. Sprayregen et al., *Chapter 11: Not Perfect, but Better Than the Alternatives*, 14 J. BANKR. L. & PRAC. 6 Art. 1, at 61 (2005). In the event that the business has little or no value as a going concern, modern Chapter 11 practice also permits the piecemeal liquidation of assets for the benefit of the creditors. See *Loop Corp.* v. *U.S. Trustee*, 379 F.3d 511, 517 n. 3 (8th Cir. 2004) ("clear weight of authority" permits liquidation through Chapter 11 and does not require refiling under Chapter 7).

Traditionally, corporate restructuring has been carried out pursuant to a Chapter 11 reorganization plan. See 11 U.S.C. § 1123(a)(5) (permitting transfer or sale of "all or any part of the property of the estate" pursuant to terms of Chapter 11 reorganization plan). This process is complicated and time-consuming. As the court below recognized,

> the usual Chapter 11 reorganization follows set procedures: the company entering bankruptcy (the "debtor") files a reorganization plan disclosing to creditors how they will be treated, asks those creditors to vote to accept the plan, and then emerges from bankruptcy with its liabilities restructured along certain parameters. *This jostling can take years*.

Pet. App. 8 (citation and footnotes omitted; emphasis added); see also Jacob A. Kling, *Rethinking 363 Sales*, 17 STAN. J.L. BUS. & FIN. 258, 262 (2012) ("A plan of reorganization must be submitted to a vote of creditors and equity holders after furnishing them with a disclosure statement, a process that can take years."); Hon. Samuel L. Bufford, *Chapter 11 Case Management and Delay Reduction: An Empirical Study*, 4 AM. BANKR. INST. L. REV. 85, 86-89 (1996) (summarizing several studies concluding that median duration of Chapter 11 reorganizations is one to two years). At the end of the process, the reorganization plan is judicially confirmed and the debtor is usually discharged from any previously incurred liabilities. See 11 U.S.C. § 1141(d)(1)(A).

A multi-year reorganization is not a viable option, however, when a distressed business is "grievously bleeding * * * cash at an extraordinary rate," as Old GM was in June 2009. *In re Motors Liquidation Co.*, 529 B.R. 510, 524 (Bankr. S.D.N.Y. 2015), *aff'd in part, vac'd in part, rev'd in part*, 829 F.3d 135 (2d Cir. 2016). In such circumstances, a business cannot survive long enough as a going concern to successfully reorganize.

In light of this reality, the Bankruptcy Code offers debtors an alternative way to free themselves

from their liabilities. Rather than delaying the disposition of assets until the judicial confirmation of a reorganization plan, and then disposing of assets pursuant to that plan, a debtor can opt to sell assets pre-confirmation under Section 363 of the Code and undergo reorganization later.

Section 363 permits a debtor in possession, "after notice and a hearing," to "use, sell, or lease, other than in the course of business, property of the estate," subject to a limitation that does not apply here. 11 U.S.C. § 363(b)(1); see *id.* § 1107(a) (authorizing debtor in possession to exercise powers that would otherwise be performed by trustee). Critically, Section 363 allows a sale of assets "*free and clear of any interest* in such property of an entity other than the estate," provided that one of the five conditions listed therein, which are not at issue here, is satisfied. *Id.* § 363(f) (emphasis added). Section 363 also protects the interests of purchasers by prohibiting reviewing courts from "affect[ing] the validity of a [Section 363] sale" to an entity that has purchased "in good faith," whether or not the purchaser knew of the pendency of the appeal, unless the sale has been stayed while the appeal is pending. *Id.* § 363(m).

B. The Benefits Of Section 363

1. Section 363 sales offer a number of unique advantages that are not available in traditional reorganizations. Perhaps the most important is speed. Since Section 363 allows a debtor to proceed with a transaction while delaying the lengthy process of obtaining approval of a reorganization plan, the parties can ordinarily complete a sale in two or three months. See Robert E. Steinberg, *The Seven Deadly Sins in § 363 Sales*, 24 AM. BANKR. INST. J. 22, 22

(2005). If the necessity for speed is especially urgent, a sale can be completed in an even shorter period. The sale of BearingPoint's assets to Deloitte, for example, was completed less than a month after the filing of the Chapter 11 petition. See Nadia Khattak, *Section 363 Sales: New Stalking Horse Strategies*, PRACTICAL LAW, Apr. 28, 2009, at 2, available at http://us.practicallaw.com/6-385-9854?source=related content. And the sale of Lehman Brothers' assets was finalized a mere five days after Lehman filed its petition. See *In re Gulf Coast Oil Corp.*, 404 B.R. 407, 421 (Bankr. S.D. Tex. 2009).

A speedy Section 363 sale can allow the debtor to survive as a going concern for the rest of the restructuring process. The ability of a distressed debtor to continue operating is frequently threatened by its inability to obtain long-term financing. The existence of massive liabilities makes it all but impossible for debtors to obtain credit, which in turn makes the use of traditional reorganization impracticable. This point has been made by a pair of leading bankruptcy practitioners:

> As a business entity incurs losses in operations and experiences high debt to equity leverage ratios, its ability to access capital markets becomes more and more restricted. As credit tightens, the whirlpool of illiquidity develops. Without access to capital and credit, the debtor is unable to continue or pursue operations.

Harvey R. Miller & Shai Y. Waisman, *Does Chapter 11 Reorganization Remain a Viable Option for Distressed Businesses for the Twenty-First Century?*, 78 AM. BANKR. L.J. 153, 182 (2004). A successful Section 363 sale can improve access to credit by

providing lenders with assurance that the debtor will be able to successfully restructure. See Douglas E. Deutsch & Michael G. Distefano, *The Mechanics of a § 363 Sale*, 30 AM. BANKR. INST. J. 48, 48 (2011).

Likewise, suppliers may be unwilling to do business with an insolvent debtor, or may insist upon advance payments, thus exacerbating the credit squeeze experienced by the debtor. See Kling, 17 STAN. J.L. BUS. & FIN. 258, at 263. This was an important consideration in the sale of Old GM's assets. See *In re Gen. Motors Corp.*, 407 B.R. 463, 474 (Bankr. S.D.N.Y. 2009). Similarly, customers may be reluctant to purchase the product of an insolvent business because of the risk that the debtor will fail and be unable to service the product or honor warranties. See Bufford, 4 AM. BANKR. INST. L. REV. at 89-90.

Finally, a swift sale of a rapidly depreciating asset can benefit creditors by maximizing the sale value. It can also aid creditors by reducing the administrative costs associated with lawyers and bankers. See Kling, 17 STAN. J.L. BUS. & FIN. at 262-263.

2. The "free and clear" provision is a vital feature of the Section 363 procedure. The "unique ability to cleanse the assets of a distressed company" via the free-and-clear mechanism "attracts potential purchasers[,] as it removes the cloud of uncertainty associated with purchasing assets." Miller & Waisman, 78 AM. BANKR. L.J. at 195-196. Without the finality afforded by this provision, debtors would struggle to find willing buyers and would be forced to drastically lower their asking price to account for the additional litigation risk. In the case of large businesses like Old GM, or other businesses with

large contingent liabilities, that risk could amount to billions of dollars.

The finality provided by Section 363(f) also benefits creditors. Without the ability to buy assets free and clear of successor liability, purchasers would have no choice but to greatly reduce their bids, if they were even willing to bid in the first place. The "free and clear" provision allows distressed companies to sell assets quickly before they lose too much value, enlarging the pool of money set aside for creditors during reorganization.

Purchasers of assets would be harmed as well if there were no finality to the sale. They would lose good opportunities to invest their capital or be subject to unpredictable contingent liabilities.

Employees benefit from Section 363(f) too, in that the sale of assets and improved access to credit greatly enhance the ability of the debtor to survive as a going concern and to restructure. Without the "free and clear" provision, the risk of job losses would be far greater.

3. The benefits discussed above are all evident in the Old GM bankruptcy at issue here. The speed and finality of the Section 363 sale allowed Old GM to avoid outright liquidation, which would have been "disastrous" for its creditors, equity holders, suppliers, customers, and employees. *In re Gen. Motors Corp.*, 407 B.R. at 474. Instead, General Motors was able to restructure and survive as a going concern, under new ownership and with a new corporate identity. The government also benefited from the "free and clear" provision. Assuming it would even have purchased Old GM's assets without the provision, the government would probably have

had to absorb Old GM's liabilities itself, and it would have been hard pressed to find anyone to buy the government's shares.

As explained in more detail in Point D, the decision below severely undermines the benefits that flow from the alacrity and finality afforded by Section 363. Indeed, had the legal principles adopted by the court of appeals been in effect at the time of Old GM's bankruptcy, the Section 363 sale would likely never have occurred.

C. The Increasing Use Of Section 363

1. As bankruptcy judges and commentators have observed, changes in the economy have spurred an increase in the use of Section 363 sales:

> Unprecedented liquidity in the capital markets, investment strategies that include significant claims trading in large cases, alleged "loan to own" strategies, active participation in bankruptcy cases by hedge funds and other non-bank lending entities, and venue selection based on a court's perceived propensity to approve § 363(b) sales without requiring satisfaction of chapter 11 confirmation requirements have altered the landscape of chapter 11 in large cases. While these factors have initially appeared in the very large cases, the practice in smaller cases has followed the lead of the larger cases.

In re Gulf Coast Oil Corp., 404 B.R. at 418-419. The result has been "a huge increase in motions to sell substantial parts (or all) of the [bankruptcy] estate under § 363(b) prior to plan confirmation." *Id.* at 419.

In contrast to the detailed legal prescriptions for traditional reorganizations, the broad language of Section 363 has permitted practitioners to adapt bankruptcy practices to address evolving needs:

> There is nothing in the Bankruptcy Code requiring bidding (there is no mention of higher and better offers), stalking horses, or sale procedures orders; nor does section 363 specifically deal with such issues as environmental liabilities, toxic torts or successor liability in a sale context. The whole body of law and the bankruptcy sale processes were developed by judges and lawyers within the last [few decades], creating a practical and often times more efficient restructuring tool than a reorganization plan.

Robert G. Sable *et al.*, *When the 363 Sale Is the Best Route*, 15 J. BANKR. L. & PRAC. 2 Art. 2, at 121-122 (2006). This flexibility has enabled Chapter 11 practice to make "quantum leaps" since the leading Section 363 cases of the early 1980s were decided. *In re Gulf Coast Oil Corp.*, 404 B.R. at 418 (discussing *In re Lionel Corp.*, 722 F.2d 1063 (2d Cir. 1983), and *In re Braniff Airways, Inc.*, 700 F.2d 935 (5th Cir. 1983)).

As Section 363 practice has evolved to address contemporary needs, sales under the provision have largely supplanted traditional reorganizations:

> In recent years, it has become more commonplace for debtors to hold § 363 sales with the purpose of selling *substantially all* of their assets. In this regard, many debtors are essentially "opting out" of the chapter 11

> plan process in favor of what they perceive to be a quicker, more efficient process.

Deutsch & Distefano, 30 AM. BANKR. INST. J. at 48.

The speed and scope of these changes have spurred much commentary among scholars, who have published articles with colorful titles like "Chapter 11 at Twilight," "The End of Bankruptcy," and "Does Chapter 11 Reorganization Remain A Viable Option for Distressed Businesses for the Twenty-First Century?" See Douglas G. Baird & Robert K. Rasmussen, *Chapter 11 at Twilight*, 56 STAN. L. REV. 673 (2003); Douglas G. Baird & Robert K. Rasmussen, *The End of Bankruptcy*, 55 STAN. L. REV. 751 (2002); Miller & Waisman, 78 AM. BANKR. L.J. 153.

2. Consistent with the judicial and academic commentary discussed above, many of the most highly publicized and economically significant reorganizations of the last decade, across a variety of industries, were accomplished with a pre-confirmation sale of all or substantially all of the debtor's assets pursuant to Section 363. For example:

- In September 2016, a bankruptcy court approved a $243.3 million sale of the assets of Aéropostale, a clothing retailer, to a group of investors. Under the terms of the sale contract, the purchaser agreed to keep at least 229 stores open and retain more than 7,000 of the retailer's 10,000 employees. See Lillian Rizzo, *Aéropostale Sale Wins Court Approval*, WALL ST. J., Sept. 12, 2016, available at http://www.wsj.com/articles/aeropostale-sale-wins-court-approval-1473702424.

- In August 2016, a bankruptcy court approved the sale of Gawker Media's assets to Univision for $135 million. See Lukas I. Alpert, *Univision Wins Bankruptcy Auction for Gawker Media for $135 Million*, WALL ST. J., Aug. 16, 2016, available at http://www.wsj.com/articles/univision-wins-bankruptcy-auction-for-gawker-media-for-135-million-1471386502. Gawker had been crippled by a $140 million jury verdict in a defamation lawsuit filed by Hulk Hogan. Under the terms of the sale contract, Univision "agreed to keep 95% of New York-based Gawker's employees on current terms." Tiffany Kary, *Gawker Media's Sale to Univision Approved as Flagship Closes*, BLOOMBERG, Aug. 18, 2016, available at https://www.bloomberg.com/news/articles/2016-08-18/gawker-s-135-million-sale-to-univision-gets-court-s-approval.

- In 2014, a bankruptcy court approved the sale of Brookstone, a retail store, for about $147 million. See Sara Randazzo, *Judge Approves Brookstone Sale, Bankruptcy-Exit Plan*, WALL ST. J., June 23, 2014, available at http://www.wsj.com/articles/judge-approves-brookstone-sale-bankruptcy-exit-plan-1403543853. The purchaser, a consortium of Chinese investors, "plan[ned] to continue operating the majority of the specialty retailer's 240 stores after the company exit[ed] bankruptcy." *Id*. In an article about the participation of Chinese investors in American bankruptcies, the ChinaDaily noted that "[f]unds are willing to commit billions of investment dollars because the US Bankruptcy Code is a stable set of laws that allows participants to understand the risks

and rewards." Ted Osborn and Geoffrey Raicht, *Strategies vital for success of global acquisition deals*, CHINADAILY USA, Sept. 8, 2014, available at http://usa.chinadaily.com.cn/epaper/2014-09/08/content_18562479.htm.

- In 2012, a bankruptcy court approved the $525 million sale of Eastman Kodak's digital-imaging patents to Intellectual Ventures and RPX Corp, which are jointly owned by a number of technology companies, including Apple, Google, Facebook, Amazon, Microsoft, Samsung, and Adobe. See Nick Brown, *Kodak patent sale plan gets court approval*, REUTERS, Jan. 11, 2013, available at http://www.reuters.com/article/us-kodak-patent-sale-idUSBRE90A0YN20130111. The Section 363 sale allowed Eastman Kodak to obtain the financing it needed to get through the 20-month reorganization process. *Id.*; see also Matthew Daneman, *Kodak bankruptcy officially ends*, USA TODAY, Sept. 3, 2013, available at http://www.usatoday.com/story/money/business/2013/09/03/kodak-bankruptcy-ends/2759965/.
- In 2009, Chrysler sold its assets to a group of purchasers led by Fiat, approximately 30 days after Chrysler and its affiliated debtors filed for Chapter 11 bankruptcy. At the time, Chrysler had approximately 55,000 employees worldwide, including approximately 27,600 in the United States, whose jobs were threatened by the possibility of imminent liquidation. See *In re Chrysler LLC*, 405 B.R. 84, 88–89, 96 (Bankr. S.D.N.Y. 2009).

- Another prominent Section 363 sale was the one at issue here, which also closed in 2009. This sale allowed Old GM to slim down and restructure its liabilities. See Christie Smythe, *GM, Chrysler Highlight Growing 363 Sale Trend*, LAW360, July 10, 2009, available at https://www.law360.com/articles/110638/gm-chrysler-highlight-growing-363-sale-trend. As the bankruptcy court noted, the alternative to a Section 363 sale was liquidation, which would have been "a disastrous result for GM's creditors, its employees, the suppliers who depend on GM for their own existence, and the communities in which GM operates." 407 B.R. at 474. At the time, GM employed 235,000 employees worldwide, including approximately 91,000 in the United States. *Id.* at 475.
- In 2009, a bankruptcy court approved the sale of computer-services firm Bearingpoint's public-sector unit to Deloitte for $350 million. Bearingpoint spun off the rest of its units in separate Section 363 sales. See Jonathan Starkey, *BearingPoint Nears End of Difficult Run*, WASH. POST, July 25, 2009, available at http://www.washingtonpost.com/wp-dyn/content/article/2009/07/24/AR2009072403783.html.
- In 2008, the sale of Lehman Brothers' assets to Barclay's Capital was approved just five days after Lehman filed its Chapter 11 petition. About 10,000 of Lehman's 24,000 employees kept their jobs. See Heidi N. Moore, Sept. 26, 2008, *Barclays to Buy Lehman Investment Bank, Save At Least 9,000 Jobs*, Sept. 16, WALL ST. J., available at

http://blogs.wsj.com/deals/2008/09/16/barclays-to-buy-lehman-investment-bank-save-9000-jobs; *Judge OKs Lehman Brothers sale to Barclays*, CBS NEWS, Sept. 20, 2008, available at http://www.cbsnews.com/news/judge-oks-lehman-brothers-sale-to-barclays.

Other significant Section 363 sales since 2000 include:

- sale of the assets of InPhonic, an online seller of wireless services and phones, to Versa Capital Management, see *New Day at InPhonic—Court Approves InPhonic Sale to Versa*, BUSINESS WIRE, Dec. 18, 2007, available at http://www.businesswire.com/news/home/20071218005632/en/Day-InPhonic-Court-Approves-In Phonic-Sale;
- sale of substantially all of the assets of Polaroid Corp. to One Equity Partners for $255 million, see *How Jacques Nasser and his fellow buyout artists at J.P. Morgan made a killing on Polaroi*d, FORBES, Mar. 3, 2005, available at http://www.forbes.com/forbes/2005/0328/ 058.html;
- sale of the assets of Top-Flite, Inc. and its affiliates to Callaway Golf, a transaction with a total value of approximately $125 million, see James Hartford, *Callaway to Acquire Top-Flite Out of Bankruptcy*, SGBMEDIA, June 30, 2003, available at https://sgbonline.com/callaway-to-acquire-top-flite-out-of-bankruptcy;
- sale of the bulk of the assets of Exodus Communications, Inc. to Cable & Wireless for

$800 million, see David Pringle, *Cable & Wireless Placed Bad Bet on Risky Business*, WALL ST. J., Dec. 26, 2002, available at http://www.wsj.com/articles/SB1040856200783392073;

- sale of the assets of Genuity Inc. to Level 3 Communications for $242 million, see *Level3 to Acquire Genuity Assets and Operations*, PRNEWSWIRE, Nov. 27, 2002, available at http://www.prnewswire.com/news-releases/level-3-to-acquire-genuity-assets-and-operations-76984797.html;
- sale of the assets of Asia Global Crossing Ltd., a Chinese telecommunications company, to Asia Netcome for $120 million, see James S. Granelli and Elizabeth Douglass, *Asia Global Crossing Files for Bankruptcy*, L.A. TIMES, Nov. 18, 2002, available at http://articles.latimes.com/2002/nov/18/business/fi-asia18;
- sale of the assets of Velocita Corp., a telecommunications company, to AT&T for $37 million, see *AT&T to Buy Velocita Assets*, WALL ST. J., Nov. 8, 2002, available at http://www.wsj.com/articles/SB1036727287266501068;
- sale of the assets of LTV Steel to members of the International Steel Group for $375 million, see Press Release, *International Steel Group*, Apr. 12, 2002, available at http://www.prnewswire.com/news-releases/international-steel-group-completes-acquisition-of-ltv-steel-assets-announces-board-of-directors-letter-of-understanding-with-uswa-76941832.html;

- acquisition by Reuters of substantially all of the assets and liabilities of Bridge Information Systems for $373 million, see *Reuters Completes Acquisition of Bridge Assets, Begins Integration*, WALL ST. & TECH., Oct. 4, 2001, available at http://www.wallstreetandtech.com/careers/reuters-completes-acquisition-of-bridge-assets-begins-integration/d/d-id/1254816; and
- sale of the assets of TWA to a parent of American Airlines for $500 million, see *American completes TWA buy*, see ASSOCIATED PRESS, Apr. 10, 2001, available at http://www.tulsaworld.com/archives/american-completes-twa-buy/article_897d9291-0db1-509f-9636-466a 566a3777.html.

3. The increasing use of Section 363 transactions and corresponding decline in traditional reorganizations underscore how consequential this type of sale is in modern bankruptcy practice. The prevalence of Section 363 sales also demonstrates the exceptional importance of the questions presented in the petition for certiorari. As explained in more detail in Point D, the decision of which the petition seeks review calls into question the finality of the sale of assets not only in this case but in many others (including those described above); diminishes the likelihood that Section 363 will be used in future cases; and undermines the benefits of this mechanism to virtually every stakeholder in the bankruptcy process.

D. The Harms Caused By The Decision Below To The Interests Protected By Section 363

The ability to sell assets before confirmation of a Chapter 11 plan, via the speedy and flexible mechanism of a Section 363 sale, has saved dozens of businesses from liquidation and tens if not hundreds of thousands of people from losing their jobs. Through each of the two rulings at issue here, the decision below jeopardizes the benefits that Section 363 provides to debtors, creditors, purchasers, employees, and others.

First, the court of appeals concluded that Old GM was aware or should have been aware of the ignition defect; that all 27 million people who owned a model with this defect were "known" creditors, on the theory that some fraction of them might have a product-liability claim against GM at some point in the future; that, because they were "known" creditors, the Due Process Clause entitled all 27 million owners to personal notice of the sale; and that adequate notice included notification, not only of the details of the sale, but also of any potential future claim against GM and the grounds therefore (*i.e.*, the ignition defect). Second, the court of appeals determined that the remedy for this Due Process violation lies, not against the seller, the entity that committed the violation, but against the good-faith purchaser of the assets, such that the purchaser is deprived of Section 363's "free and clear" protections.

These holdings fundamentally alter the dynamics of a Section 363 sale and drastically reduce its utility. If the court of appeals' decision is permitted to stand, an entity that is considering the purchase of assets in a Section 363 sale will have to

ascertain (1) whether the debtor was aware of any problem that might give rise to a product-liability (or other) claim in the future; (2) whether the debtor provided individualized notice of the sale to every person who might some day have a legal claim on the basis of that problem; and (3) whether each person was apprised in the notice of the existence of the potential claim. A prospective purchaser will have to ascertain those things because, under the court of appeals' decision, a good-faith purchaser can in effect be liable for the seller's failure to comply with the obligations created by the court, despite Section 363's "free and clear" provision.

This state of affairs will inevitably reduce the number of purchasers willing to buy a debtor's assets and inevitably reduce the price that any buyer is willing to pay. That is true for two related reasons. First, the requirements imposed by the court of appeals will force a purchaser to expend additional time, money, and other resources in conducting its due diligence, to ensure that it can enjoy the benefits of the "free and clear" provision. Second, any additional due diligence can only reduce, not eliminate, the risk that the purchaser will be saddled with successor liability, since a purchaser can never know for certain what potential claims a court in hindsight might conclude the seller was or should have been aware of.

These new burdens imposed on purchasers will inevitably fall on other parties as well. To the extent that a purchaser reduces the price it is willing to pay to account for the additional costs of due diligence and litigation risk, the debtor will receive less money for its assets and there will be less money to divide among creditors. To the extent that the debtor is

unable to find anyone willing to buy at any price, and is unable to survive a lengthy traditional bankruptcy, the debtor will have no choice but to liquidate. Liquidation harms, not only the debtor and its shareholders and creditors, but also those who depend upon the debtor's survival as a going concern, including its employees, suppliers, customers, and other members of the affected community.

It would be one thing if the rules created by the court below, and the dire consequences that follow from them, were somehow compelled by the law. In that event, the consequences would be unfortunate but unavoidable. As the petition explains, however, these unprecedented rules in fact have no basis in the law, or for that matter in logic or common sense, and thus the consequences of the rules are eminently avoidable. All that is necessary is for this Court to grant certiorari and reverse the manifestly erroneous decision of the court of appeals.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX

Corporate Members Of The
Product Liability Advisory Council, Inc.

3M
Altec, Inc.
Altria Client Services LLC
Astec Industries
Bayer Corporation
BIC Corporation
Biro Manufacturing Company, Inc.
BMW of North America, LLC
The Boeing Company
Bombardier Recreational Products, Inc.
Boston Scientific Corporation
Bridgestone Americas, Inc.
Bristol-Myers Squibb Company
C. R. Bard, Inc.
Caterpillar Inc.
CC Industries, Inc.
Celgene Corporation
Chevron Corporation
Cirrus Design Corporation
Continental Tire the Americas LLC
Cooper Tire & Rubber Company
Cordis Corporation
Crane Co.
Crown Equipment Corporation
Daimler Trucks North America LLC
Deere & Company
Delphi Automotive Systems
The Dow Chemical Company
E.I. DuPont de Nemours and Company
Emerson Electric Co.
Exxon Mobil Corporation
FCA US LLC

Ford Motor Company
Fresenius Kabi USA, LLC
General Motors LLC
Georgia-Pacific LLC
GlaxoSmithKline
The Goodyear Tire & Rubber Company
Great Dane Limited Partnership
Hankook Tire America Corp.
Harley-Davidson Motor Company
The Home Depot
Honda North America, Inc.
Hyundai Motor America
Illinois Tool Works Inc.
Intuitive Surgical, Inc.
Isuzu North America Corporation
Jaguar Land Rover North America, LLC
Jarden Corporation
Johnson & Johnson
Kawasaki Motors Corp., U.S.A.
Kia Motors America, Inc.
Kolcraft Enterprises, Inc.
Lincoln Electric Company
Magna International Inc.
Mazak Corporation
Mazda Motor of America, Inc.
Medtronic, Inc.
Merck & Co., Inc.
Meritor WABCO
Michelin North America, Inc.
Microsoft Corporation
Mitsubishi Motors North America, Inc.
Mueller Water Products
Novartis Pharmaceuticals Corporation
Novo Nordisk, Inc.
Pella Corporation

Pfizer Inc.
Polaris Industries, Inc.
Porsche Cars North America, Inc.
RJ Reynolds Tobacco Company
Robert Bosch LLC
SABMiller Plc
The Sherwin-Williams Company
St. Jude Medical, Inc.
Stryker Corporation
Subaru of America, Inc.
Takeda Pharmaceuticals U.S.A., Inc.
TAMKO Building Products, Inc.
Teleflex Incorporated
Toyota Motor Sales, USA, Inc.
Trinity Industries, Inc.
U-Haul International
The Viking Corporation
Volkswagen Group of America, Inc.
Volvo Cars of North America, Inc.
Wal-Mart Stores, Inc.
Western Digital Corporation
Whirlpool Corporation
Yamaha Motor Corporation, U.S.A.
Yokohama Tire Corporation
ZF TRW
Zimmer Biomet