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

ELLIOTT RESPONDENTS' BRIEF IN OPPOSITION

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INTRODUCTION

The petition should be denied. Contrary to the first question posed by petitioner General Motors LLC (New GM), this case does not present any live question regarding the *content* of notice required to bind absent parties in a Section 363 Sale. As this case comes to the Court, it is uncontroverted that respondents were never provided *any* individual mailed notice as required by the Bankruptcy Code and the terms of the Sale Agreement. For that reason alone, the Second Circuit's opinion does not impose "a novel and unjustifiable constitutional notice requirement." Pet. 20 (capitalization omitted).

Petitioner's second question also does not warrant review. The petition's dire warnings about the future viability of "free and clear" sales under Section 363 are unfounded. It is a staple of due process and the law of preclusion that known parties not properly brought before the court and not notified of the proceedings cannot be bound by them, whether in bankruptcy proceedings or otherwise. *See, e.g.*, *Schroeder v. City of New York*, 371 U.S. 208, 212-13 (1962); *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 800 (1983). The application of these well-established due process principles to the "peculiar" facts here, Pet. App. 53, resolves this case.

Petitioner's repeated accusation that the Second Circuit's ruling unfairly punishes New GM for General Motors Corporation's (Old GM's) failure to notify respondents not only runs headlong into time-honored principles of preclusion, but also misapprehends the realities of a Section 363 sale. As with private sales generally, it is the purchaser's responsibility to perform due diligence to ensure that

the purchased property meets the purchaser's expectations. New GM's oversight of Old GM's inadequate notice cannot be remedied by rewarding New GM with immunity from suit by those who were wrongfully denied their due process rights to notice and an opportunity to be heard.

This case also does not present the grave risks to Section 363 sales conjured by New GM and its amici. The finality of the sale of assets from Old GM to New GM is not implicated by these proceedings. The agreement between Old GM and New GM was a private agreement. Respondents do not "seek[] to undo the sale of Old GM's assets to New GM, as executed through the Sale Order." Pet. App. 23. In their lawsuits, respondents assert no *in rem* claims against the assets of the Sale, but rather solely *in personam* claims against New GM, a non-debtor. The Section 363 Sale remains final, but, as the court of appeals correctly held, respondents are not bound by the injunctions against them that were entered in connection with the conveyance of assets from Old GM to New GM.

STATEMENT OF THE CASE

This brief in opposition is filed on behalf of five of the Elliott respondents—Celestine Elliott, Lawrence Elliott, Sharon Bledsoe, Tina Farmer, and Dierra Thomas—each of whom purchased GM vehicles prior to the Section 363 Sale and allege successor-liability claims against New GM.[1] Ms. Bledsoe suffered two

[1] *See Elliott v. Gen. Motors LLC*, No. 14-CV-8382 and *Bledsoe v. Gen. Motors LLC*, No. 14-CV-7631 (consolidated in *In*

pre-Sale accidents in her 2007 Chevy Cobalt from a faulty ignition switch. Each of these Elliott respondents also seeks to recover for economic loss from the defective switch. Mr. and Mrs. Elliott also purchased a second vehicle prior to the Section 363 Sale that they allege contains non-ignition switch defects.[2]

We first describe the ignition-switch defect in GM vehicles, the principal defect underlying these proceedings. We then turn to Old GM's bankruptcy, New GM's post-Sale recall of the defective vehicles, and the decisions below.

1.a. In February 2014, New GM issued a recall for an ignition-switch defect in Old GM vehicles. Pet. App. 14. The defect created a significant risk that the vehicle would lose electrical power while on the road, resulting in loss of power steering, power brakes, and airbag capabilities. Pet. App. 16-17. This led to scores of injuries as well as economic losses for many owners due to the diminished value of their vehicles.

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re Gen. Motors LLC Ignition Switch Litig., No. 14-MD-2543 (S.D.N.Y.)).

[2] The interests of the remaining Elliott respondents who were parties below are not implicated by the petition because they hold either "independent claims" or "Used Car Purchasers' claims." *See* Pet. App. 34-35. The independent claims are based on New GM's own post-Sale tortious conduct. The Used Car Purchasers' claims concern Old GM cars purchased secondhand after the close of the Sale. The Second Circuit held that the bankruptcy court's 2009 Sale Order barred neither type of claim, *id.*, and petitioner does not challenge these holdings in this Court.

b. The ignition-switch problem originated more than a decade before GM entered bankruptcy, when the company designed a uniform ignition switch for use in multiple car models. Pet. App. 15-16. Although no design ever successfully met the company's technical specifications, GM nonetheless began using the new switch in late 2002. Pet. App. 16. The switch was defective. It had such low torque (or rotating resistance) that it could be turned from "on" to "accessory" or "off" mode with very little force—"perhaps even the bump of a stray knee"—and would cause the dangerous malfunctions just noted. *Id.*

GM received customer complaints shortly after the defective cars were sold. Pet. App. 16-17. But the company labeled the defect a "non-safety" issue and only alerted its dealerships that a car with the defect might turn off without explaining that, as a result, cars could stall on the road. *Id.* In 2007, GM's lawyers drafted new bulletins to warn dealerships about the risk of "stalls" while driving, but the bulletins were never sent. Pet. App. 18. Reports to GM of moving stalls and airbag non-deployment continued, but GM still did not acknowledge that the ignition-switch defect was causing airbag non-deployment. The company finally started using a newly developed ignition key in June 2009, "hoping to fix the problem once and for all." *Id.*

2.a. That same month, on June 1, 2009, the company filed for Chapter 11 bankruptcy and simultaneously moved to execute what is known as a Section 363 sale. Pet. App. 7-8.

A Section 363 sale under the Bankruptcy Code differs from an ordinary Chapter 11 reorganization, in which the debtor corporation remains in control of

its business while the bankruptcy court oversees the restructuring of liabilities. In a reorganization, the debtor corporation identifies all creditors, waits for the creditors to vote on the proposed repayment plans, and then "emerges from bankruptcy with its liabilities restructured along certain parameters." Pet. App. 8.

By contrast, Section 363 allows the debtor corporation to obtain cash to repay its creditors by selling its assets "free and clear of any interest" in the property being sold. *See* 11 U.S.C. § 363(f). Once the bankruptcy court authorizes the sale, the purchaser "immediately takes over the business," leaving the old corporation behind to begin the formal liquidation process with most of its liabilities and few remaining assets. Pet. App. 8.

b. Under the proposed Section 363 Sale Agreement between Old GM and (the entity that would eventually become) New GM, the United States Treasury, along with Canada and the United Autoworkers Trust, would form a new corporation, purchase substantially all of Old GM's assets free and clear of all but a limited subset of liabilities, and begin operating as New GM. Pet. App. 8-9, 94-95.

This sale offer was subject to one condition: The Government would purchase the assets "*only* if the sale . . . occurred on an *expedited* basis." 2009 Sale Order, *In re Gen. Motors Corp.*, 407 B.R. 463, 480 (Bankr. S.D.N.Y. 2009) (emphasis in original). If the Sale was not approved by the bankruptcy court by July 10, forty days after the bankruptcy began, the Government would pull its financing, and GM would have to go through traditional Chapter 11 bankruptcy procedures. *Id.*

On June 2, 2009, one day after the bankruptcy was filed, the bankruptcy court ordered GM to notify individually by mail "all parties who are known to have asserted any lien, claim, encumbrance, or interest in" the assets to be sold, and to publish the same notice in various newspapers. Pet. App. 10-11 (quoting bankruptcy court order). The notice included general information about the Sale, such as the date of the Sale Order hearing, the court's location, and objection instructions. Pet. App. 89. "The Sale Notice did not, however, attempt to describe the claims any recipient might have against Old GM, or any bases for objections to the Sale or Proposed Sale Order that any notice recipient might wish to assert." *Id.* Objections were due seventeen days later, on June 19, 2009. Pet. App. 11. It is undisputed that respondents were not sent any mailed notice of the Sale. Pet. App. 39.

Public interest organizations and other parties submitted objections. Pet. App. 11. In response, New GM voluntarily agreed to assume liabilities, if any, for state Lemon Law claims and product liability claims arising after the Sale. Pet. App. 94-95. On July 5, 2009, the bankruptcy court rejected the remaining objections and approved the proposed Sale. Pet. App. 11. It set a bar date of November 30, 2009, for the filing of claims against Old GM. Pet. App. 12.

c. Over the next several years, the bankruptcy court managed the former corporation's remaining liabilities, and a final plan was confirmed in March 2011. Pet. App. 12-13. Under that plan, secured claims, priority claims, and environmental claims would be paid in full, but unsecured claims would be paid on a pro rata basis out of the GUC Trust, a new

entity created by the plan to liquidate Old GM's assets and pay out valid claims. *Id.* On February 8, 2012, the bankruptcy court ordered that any new claims against Old GM would be "deemed disallowed." Dkt. 11394; *see* Pet. App. 14. During the bankruptcy proceedings, Old GM never disclosed its potential liability for the ignition-switch defect or any of the non-ignition-switch defects alleged by respondents.

3. A full two years later, in February 2014, petitioner issued its first recall for the ignition-switch defect. By October 2014, New GM had issued more than sixty additional recalls affecting many other cars. Pet. App. 14-15. Respondents and others promptly filed the suits against New GM at issue here. As noted, none of the parties asserting claims against New GM had been provided individual notice before the 2009 Sale Order.

4.a. New GM moved to enforce the Sale Order in the bankruptcy court. It contended that respondents are bound by the injunctive provisions of the Sale Order and therefore should be enjoined from pursuing their claims against New GM. Respondents contended that they did not receive the notice and opportunity to be heard that the Due Process Clause requires before they can be bound by proceedings in which they did not participate and were therefore not subject to the 2009 injunction. *See* Pet. App. 70-71.

The bankruptcy court agreed that respondents were entitled to mailed notice. It found that, at the time of the Section 363 Sale, "GM had enough knowledge of the Ignition Switch Defect to be required, under the National Traffic and Motor Vehicle Safety Act, to send out mailed recall notices

to owners of affected Old GM vehicles." Pet. App. 75 (internal parenthetical omitted). Therefore, they were known creditors entitled to notice of the Section 363 Sale. *See* Pet. App. 77.

The bankruptcy court held, however, that the denial of notice was insufficient to make out a due process violation unless it was coupled with proof that respondents had been prejudiced. Pet. App. 77. Because respondents' arguments regarding successor-liability claims were, the court said, similar to the objections that it had considered and rejected at the Section 363 hearing in 2009, the bankruptcy court held that respondents' participation would not have affected its rulings. Pet. App. 78-79. The bankruptcy court therefore enjoined them from pursuing successor-liability claims against New GM. Pet. App. 79.

b. The Second Circuit reversed in part and vacated in part.[3] It agreed with the bankruptcy court's finding of fact that Old GM knew or reasonably should have known about the ignition-switch defect prior to its bankruptcy and the bankruptcy court's conclusion that due process required direct, mailed notice to respondents and other owners of vehicles containing the ignition-switch defect. Pet. App. 39. The court of appeals disagreed with the bankruptcy court's ruling that respondents were nevertheless barred from asserting

[3] The Second Circuit also affirmed the bankruptcy court's decision not to enforce the Sale Order as to the independent claims and reversed the bankruptcy court's decision to enforce the Sale Order as to the Used Car Purchasers' claims. Pet. App. 62; *see supra* note 2.

successor-liability claims against New GM because they had not been prejudiced by the lack of notice. Pet. App. 47.

The panel did not decide whether prejudice is relevant to the due process analysis, instead ruling that in the "peculiar" circumstances of the case, prejudice was apparent because the lack of notice prevented respondents from participating in negotiations that might have affected the terms of the Section 363 Sale. Pet. App. 53. Because those negotiations were motivated in significant part by business and public-interest concerns (for example, to preserve consumer confidence in the brand, and to stem the national adverse effects from the potential failure of Old GM), the court of appeals concluded that the bankruptcy court had erred in its exclusive focus on legal factors in its consideration of prejudice. Respondents' participation in the negotiations, the court of appeals explained, may well have affected the terms of the Sale Agreement. *Id.* Accordingly, the Second Circuit held, having been denied the constitutionally required notice, and having demonstrated prejudice, the ignition-switch plaintiffs are not bound by the terms of the Sale Order. Pet. App. 55.[4]

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[4] The Second Circuit vacated and remanded to the bankruptcy court with respect to plaintiffs holding claims about defects other than ignition-switch defects, seeking further factual findings as to whether these non-ignition-switch plaintiffs were known creditors and thus entitled to the same due process protections as ignition-switch plaintiffs. Pet. App. 54.

REASONS FOR DENYING THE WRIT

The petition should be denied. No question regarding the *content* of notice of a free-and-clear sale is actually posed by this case. The Second Circuit never reached the issue because it agreed with the bankruptcy court that, at the least, due process required individual, mailed notice to a debtor's known creditors. The Second Circuit's due process analysis is plainly correct and implicates no new law nor conflict in the lower courts, and so does not warrant this Court's review. In addition, contrary to the petition, the Second Circuit's ruling does not threaten legitimate policy goals underlying Section 363 or bankruptcy policy more generally. It also does not unfairly impose burdens on New GM for Old GM's failure to notify respondents of the sale-order proceedings. Purchasers like New GM have to conduct their own due diligence to ensure that the sale meets all legal requirements, including the notice and opportunity to be heard that the Bankruptcy Code and due process demand.

I. As this case comes to this Court, it presents no live controversy regarding the content of the notice as posed by the first question presented.

Petitioner's first question presented asks whether, as a matter of due process, a Section 363 sale notice must contain certain information to put creditors on notice of their potential interests in the proposed sale, such as whether the creditor may have a particular claim against the debtor. Pet. i. But, in the current posture of this case, addressing that question would be purely hypothetical. The *content* of the notice is not at issue here because respondents in

this case received no mailed notice at all. *See* Pet. App. 39.

1. The petition does not dispute that (a) known Chapter 11 creditors must be notified by mail; (b) respondents were known creditors of Old GM, the Chapter 11 debtor; and (c) respondents were not, in fact, notified by mail.

a. The petition does not dispute that known creditors must receive individual notice under both the Bankruptcy Code and due process.

A Section 363 proceeding, like all Chapter 11 proceedings, must comply with the notice requirements of that chapter and the rules issued under it. The Code requires that "all creditors" receive "notice by mail" in a Section 363 sale of property. Fed. R. Bankr. P. 2002(a); *see* 11 U.S.C. § 363(b); Fed. R. Bankr. P. 2002(c), 6004(c); *see also* Pet. 20. This statutory requirement for individual notice—not just notice by publication—applies to all "known" creditors. *See* 3 Collier on Bankruptcy, ¶ 342.02 (Alan N. Resnick & Henry J. Sommer eds., 16th ed.). Thus, known creditors have "a right to assume that the statutory 'reasonable notice' will be given [to] them before their claims are forever barred." *City of New York v. N.Y., New Haven & Hartford R.R. Co.*, 344 U.S. 293, 297 (1953) (finding that creditors' liens were enforceable because, even though creditors knew the debtor was in bankruptcy, the debtor only provided notice by publication and did not provide notice by mail as required by statute).

For these reasons, the Sale Agreement itself required that notice be sent to all known creditors under the Bankruptcy Code and Rules.[5] And cognizant of these foundational notice requirements, the bankruptcy court ordered Old GM to inform all "known creditors" by mail. Dkt. 274 (June 2, 2009); *see* Pet. App. 10-11.

Importantly, due process demands these same minimal notice protections. *Tulsa Prof'l Collection Servs., Inc. v. Pope*, 485 U.S. 478, 489-91 (1988) (distinguishing between the individual mailed notice required for known potential claimants and the publication notice allowed for unknown potential claimants who cannot be found with reasonable diligence); *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 318-20 (1950) (same); *City of New York*, 344 U.S. at 296 (same).[6] Indeed, the failure to provide the procedures demanded by the Bankruptcy Code was itself a due process violation. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428-29 (1982).

b. The petition also does not dispute that respondents holding ignition-switch claims are, in fact, *known* creditors. The Second Circuit affirmed the bankruptcy court's factual determination that "Old GM knew or reasonably should have known about the ignition switch defect prior to bankruptcy,"

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[5] Amended and Restated Master Sale and Purchase Agreement, Dkt. 2968-2 §§ 6.4(f)-(g), 9.2 (July 5, 2009).

[6] Notably, the two cases cited in the petition for the proposition that publication notice was sufficient to bind respondents involved *unknown* creditors. *See In re Placid Oil Co.*, 753 F.3d 151, 154-57 (5th Cir. 2014); *Chemetron Corp. v. Jones*, 72 F.3d 341, 347-48 (3d Cir. 1995).

so the ignition-switch plaintiffs were known creditors under the Code. Pet. App. 39; *see* Pet. App. 76 ("[T]he facts that gave rise to its recall obligation resulted in 'known' claims."); 11 U.S.C. § 101(5) (defining claim to include "right to payment, whether or not such right is . . . contingent").[7]

c. And the petition does not dispute that respondents were never provided individual mailed notice. *See* Pet. App. 69 (ignition-switch claimants "were given neither individual mailed notice of the 363, nor mailed notice of the opportunity to file claims for any losses they allegedly suffered.").

2. The undisputed requirements of the Bankruptcy Code and due process thus resolve the notice question: Because respondents did not receive any individual notice at all, the minimum notice requirements were not met. Whether due process demands that a Section 363 sale notice include certain *content*—the principal question presented by the petition—is not presented by this case.

II. This case does not pose either question presented, or threaten Section 363 policies, because it is resolved by unassailable, well-established preclusion law principles.

The petition tries hard to frame this case as imposing new constitutional burdens on Section 363 sales or as punishing petitioner as a good-faith

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[7] As noted (*supra* note 4), the factual question whether non-ignition-switch claimants were known creditors is pending in the bankruptcy court.

purchaser of a debtor's assets. Neither characterization is correct.

At the heart of this case is a much simpler and settled question of preclusion under the Due Process Clause: whether an injunction binds a party who was not accorded the constitutionally required notice or an opportunity to be heard before its entry. Bankruptcy or not, the answer is no.

1.a. As a general matter, a person is not bound by a judgment to which he was not a party. *Taylor v. Sturgell*, 553 U.S. 880, 892-93 (2008); *Richards v. Jefferson Cty.*, 517 U.S. 793, 798 (1996); *Hansberry v. Lee*, 311 U.S. 32, 40-41 (1940). Whether a litigant is a party, and therefore bound, is "subject to due process limitations," *Taylor*, 553 U.S. at 891, one of which is notice and an opportunity to be heard, *see Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). As explained above, no one disputes that respondents lacked notice and opportunity to be heard at the June 2009 hearing on the Sale Order. Pet. App. 39. Thus, under the general rule, respondents are not bound by the Sale Order.

b. Special statutory schemes like probate and bankruptcy law can "expressly forclos[e] successive litigation by nonlitigants" but only when they are "otherwise consistent with due process." *Taylor*, 553 U.S. at 895 (quoting *Martin v. Wilks*, 490 U.S. 755, 762 n.2. (1989)).

Because of the need to establish final dispositions of *in rem* interests in a debtor's property, some rules of bankruptcy notice provide broader preclusion of absent parties than would apply outside bankruptcy. Bankruptcy court orders disposing of *in rem* interests, like those establishing clear title to

property generally, are good "against the world." *Tenn. Student Assistance Corp. v. Hood*, 541 U.S. 440, 448 (2004).

This specialized statutory scheme is not implicated here, however, because respondents seek to assert *in personam* claims against New GM, a non-debtor. Respondents' lawsuits can have no effect on the debtor's property. For that reason, their claims are outside the specialized *in rem* concerns of bankruptcy law, and the general and familiar requirements for disposing of individuated *in personam* claims must be followed before absent third parties may be precluded. *See Mullane*, 339 U.S. at 314-15; Restatement (Second) of Judgments § 1 (1982); *see also Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985).

In any case, the Bankruptcy Rules themselves set the minimum due process requirements. As known creditors, respondents were entitled to the individual mailed notice that bankruptcy law requires to protect the rights of known creditors. And as explained earlier, that respondents were not afforded these minimum bankruptcy law notice protections itself violated due process. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428-29 (1982).

c. Petitioner suggests that individual notice was not required to bind respondents to the 2009 Sale Order because they, "like nearly every other 'sentient American,' . . . were aware of the sale," and so could not have been harmed by the lack of mailed notice. *See* Pet. 21 (quoting *In re Gen. Motors*, No. M 47(LAK), 2009 WL 2033079, at *1 (Bankr. S.D.N.Y. July 9, 2009)). That is incorrect as a matter of fact and law.

Whether every American knew of GM's economic troubles or not, Americans holding potential claims against GM would have had no way of knowing that their claims were being negotiated away in an expedited bankruptcy proceeding in New York unless they were told of it (which is exactly why notice was, in fact, sent to some creditors of Old GM). *See supra* at 5-6 (quoting bankruptcy court's notice requirements).[8]

In any event, this Court has held repeatedly that mere "knowledge of a lawsuit and an opportunity to intervene" is insufficient to give that suit preclusive effect. *Martin v. Wilks*, 490 U.S. at 765. Awareness of earlier (purportedly preclusive) litigation is insufficient, as a matter of due process, to preclude a separate suit on the same subject matter. *S. Cent. Bell Tel. Co. v. Alabama*, 526 U.S. 160, 168 (1999).

2. Petitioner's second question presented—whether a Section 363 purchaser (New GM) should be punished for the "supposed sins" of the Section 363 seller (Old GM), Pet. 19—mischaracterizes the effect of the Second Circuit's ruling. Petitioner views the case as if respondents were suing it for a constitutional tort (its alleged violation of due

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[8] In this regard, petitioner seriously distorts the bankruptcy court's views. Petitioner seeks to attribute to the bankruptcy court the understanding that every "sentient American" was "aware of the sale." Pet. 21. But what the bankruptcy court actually said is that "[n]o sentient American is unaware of the travails of the automobile industry in general and of General Motors Corporation ('GM') in particular." *In re Gen. Motors*, No. M 47(LAK), 2009 WL 2033079, at *1 (Bankr. S.D.N.Y. July 9, 2009).

process). But respondents do not seek relief from New GM for Old GM's violation of their due process rights. Instead, they contend that the Sale Order does not preclude their lawsuits against New GM. The proper due process analysis has nothing to do with ascribing fault for the failure to provide notice and thus does not concern the "sins" of either New GM or Old GM. As explained above, a court may not preclude individuals' *in personam* claims if those individuals lacked notice and an opportunity to be heard. That result follows from the failure to satisfy the prerequisites for preclusion, regardless of who may have been responsible.

a. The petition relies on *Factors' & Traders' Insurance Co. v. Murphy*, 111 U.S. 738 (1884), and *Matter of Edwards*, 962 F.2d 641 (7th Cir. 1992), for the proposition that parties lacking notice are nevertheless invariably precluded from ever seeking a remedy against a Section 363 purchaser. Pet. 28-30.[9]

These cases each involved creditors asserting common, undivided *in rem* claims (liens) on particular property subject to a bankruptcy proceeding. *See Factors'*, 111 U.S. at 742-43; *Edwards*, 962 F.2d at 642. By contrast, respondents here are pursuing individuated, *in personam*

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[9] GM's repeated suggestion (Pet. 17, 19, 22) that the Sale Order did not deprive respondents of an effective remedy because they were free to seek recovery from Old GM's bankruptcy estate is more than a little ironic. New GM did not come clean about the ignition-switch defect until 2014, two years after the final date for filing new claims against Old GM. *See supra* at 7.

successor-liability claims against a non-bankrupt entity—not against common property within a bankruptcy estate. In fact, this case does not involve any dispute over ownership of the property sold in bankruptcy. No party seeks to undermine the validity of the Section 363 Sale, nor of the Chapter 11 priority plan. And the success of one claim cannot undermine the success of any other.[10]

In sum, the legitimate interest in the finality of the disposition of *in rem* interests in property are not implicated in this case, which concerns the preclusion of *in personam* claims against New GM, a non-debtor. Such claims, if they are successful, will be paid by New GM and will have no effect on the debtor's property.

b. New GM's claim that it is being unfairly punished for Old GM's wrongs lacks merit. "Section 363 sales are, in essence, private transactions." Pet. App. 45. It is the purchaser's responsibility to perform due diligence to determine whether the debtor is hiding liabilities.

In hastily arranged transactions like this one, a purchaser such as New GM takes the risk that its contracting partner, the debtor, failed to disclose all the liabilities relating to the property. If, as New GM

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[10] It also bears mention that the notice failure in *Factors'* has no resemblance to the notice failure here. In *Factors'*, the relevant party was not personally served with process in the bankruptcy proceeding, but she was represented by an agent at that proceeding who kept her apprised as it was unfolding. *Factors'*, 111 U.S. at 740-41. Here, as explained above, respondents received no notice of any kind and had no agents at the Sale Order proceedings.

contends, Old GM has exposed it to more liabilities than New GM calculated, New GM may have a remedy against the remnants of the Old GM estate for misrepresenting the property it purported to sell.

But whatever the rights of New and Old GM between themselves, one thing is clear: Respondents had no notice or opportunity to be heard in the proceedings authorizing New GM to buy Old GM assets and purporting to bar respondents from ever asserting successor-liability claims against New GM. New GM's remedy for Old GM's wrongdoing cannot be an award of immunity from suit by Old GM's customers, complete strangers both to the purchase agreement between Old GM and New GM, and, because of the lack of notice, to the Section 363 proceedings that gave effect to the agreement.

* * *

In sum, petitioner fails to appreciate that the Second Circuit's judgment can be sustained on traditional and uncontested preclusion grounds: that a person's individuated, *in personam* claim may not be barred by a judgment in a proceeding of which she lacked notice and an opportunity to be heard.

III. The Second Circuit's reasoning is correct.

Review is also unwarranted because the Second Circuit's reasoning is plainly right. That court assumed without deciding that prejudice is relevant to the due process analysis and concluded that respondents were, in fact, prejudiced by the lack of notice. But prejudice is not required to sustain a due process violation in these circumstances, and even if it were, the court of appeals correctly held that respondents suffered prejudice.

1. This Court's precedent demonstrates that once a person's right to notice and opportunity to be heard has been abridged, prejudice is presumed, so no showing of prejudice is required. As this Court has put it, "it is no answer to say that in [a] particular case due process of law would have led to the same result because [the party] had no adequate defense upon the merits." *Peralta v. Heights Med. Ctr., Inc.*, 485 U.S. 80, 86-87 (1988) (quoting *Coe v. Armour Fertilizer Works*, 237 U.S. 413, 424 (1915)); *accord Carey v. Piphus*, 435 U.S. 247, 266 (1978) ("[T]he right to procedural due process is 'absolute' in the sense that it does not depend upon the merits of a claimant's substantive assertions."); *Fuentes v. Shevin*, 407 U.S. 67, 87 (1972) ("The right to be heard does not depend upon an advance showing that one will surely prevail at the hearing.").

2. Even if a showing of prejudice were required, the Second Circuit's fact-bound determination that respondents were prejudiced by the due process violation is clearly correct.

Had respondents known about their claims, they would have had an opportunity to participate in the Section 363 proceedings. Pet. App. 47-48 (explaining how notice would have brought various new and potentially powerful interests to the negotiating table). They could have objected to the Sale Order, adding their own interests to those of other objectors. *See* Pet. App. 11. They could have participated in the negotiations on the terms of the Sale Order, appealing to either GM's desire to increase consumer confidence or to the Government's desire to promote the national economy. Pet. App. 48-52. What is more, the particular interests at issue here could not have been represented in the Section 363 proceedings in

June 2009, as those interests would not have been apparent until five years later when the ignition-switch defect was made public. All told, the Sale Order might well have been affected had respondents been aware of their claims, and therefore they were prejudiced by the lack of notice.

3. Petitioner asserts that even if respondents had been provided individual notice, that notice did not need to inform respondents of the ignition-switch defect because the Bankruptcy Code and Rules do not require a Section 363 notice to include the creditor's interest in the Sale. Pet. 20-26. Thus, the argument goes, respondents still would not have learned about the car defects, and the Section 363 negotiations would not have been affected. Pet. 25-26. This reasoning reflects a fundamental misunderstanding of due process.

As noted earlier (*supra* at 15), bankruptcy proceedings must comport with due process. *See Martin v. Wilks*, 490 U.S. 755, 762 n.2 (1989); *Tulsa Prof'l Collection Servs., Inc. v. Pope*, 485 U.S. 478, 490-91 (1988); *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 312-14 (1950). And to do so, notice must be more than a "mere gesture," *Mullane*, 399 U.S. at 314-15, and enable a person to understand her interests in the proceeding. Thus, "notice should describe the action and *the plaintiffs' rights in it*." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985) (emphasis added).

4. Even assuming that petitioner is correct that notice need not have described the intended recipient's interest in the proceedings, a mailed notice simply apprising respondents of the pendency of the Section 363 proceeding would have been better

than no notice at all (which is what occurred here). Petitioner does not dispute that the Bankruptcy Rules (and due process) at the very least demanded individual notice of the Section 363 proceeding to known creditors, such as respondents. *See* Pet. 20; *see also supra* at 11 (describing relevant bankruptcy law). That type of notice, although constitutionally inadequate, could have alerted respondents to the proceedings, brought them to the table, and thus potentially influenced the terms of the Section 363 Sale Order.

IV. The limited impact of the Second Circuit's ruling and its non-finality underscore the petition's lack of cert-worthiness.

The earlier sections of this opposition demonstrate both that the petition's questions presented are not genuinely posed by this case and that the Second Circuit's reasoning is correct. The Court should deny the petition for these reasons alone. Three other considerations underscore that conclusion.

1. The Second Circuit held that respondents' independent claims against New GM—claims based not on successor liability but on New GM's own *post-Sale* tortious conduct—are not barred by the Sale Order because they are not "claims" against the bankrupt entity (Old GM) within the meaning of the Bankruptcy Code. Pet. App. 34-35. Petitioner does not challenge that ruling in this Court. Only some claims have been pled solely as successor-liability claims premised on Old GM's misconduct. Many of respondents' claims are economic-damages claims that can be, and have been, pled as independent claims based on New GM's post-Sale misconduct—its

cover-up of the defects resulting in loss of value in respondents' vehicles. Indeed, each of the Elliott respondents have pled these kinds of independent claims against New GM. *See supra* note 2. None of these claims could possibly be affected by a ruling of this Court.

The Second Circuit also held that the Sale Order does not cover the Used Car Purchasers' claims—that is, claims by "individuals who purchased Old GM cars *after* the closing." Pet. App. 35. Petitioner does not contest that holding in this Court either. It is likely that a large number of current owners of Old GM vehicles acquired them after the Section 363 Sale. *See* Manheim 2012 Used Car Market Report, https://www.manheim.com/content_pdfs/products/UCMR-2012.pdf (38.8 million used cars sold in the retail market in 2011). Five of the twelve Elliott respondents—Ishmael Sesay, Paul Fordham, Momoh Kanu, Tynesia Mitchell, and James Tibbs—are Used Car Purchasers whose claims are not barred by the Sale Order. No Used Car Purchasers' claim could possibly be affected by a ruling of this Court.

At bottom, the number of potential claims affected by the Second Circuit's ruling is far fewer than the petition's hyperbolic assertions would suggest. *See* Pet. 33-34.

2. This case comes to the Court, in significant part, in an interlocutory posture. "Ordinarily, this court should not issue a writ of certiorari to review a decree of the circuit court of appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." Robert L. Stern et al., Supreme Court Practice § 4.18 at 282

(10th ed. 2013) (internal quotation marks omitted); *see also Va. Military Inst. v. United States*, 508 U.S. 946, 946 (1993) (opinion of Scalia, J.) (respecting the denial of certiorari) ("We generally await final judgment in the lower courts before exercising our certiorari jurisdiction.").

To be sure, pre-Sale ignition-switch claims are not barred under the Second Circuit's ruling. But the number of potential ignition-switch claims is far fewer than *non*-ignition-switch successor-liability claims—the latter involve more than sixty post-Sale GM recalls—and no court has determined whether these claims are barred by the Sale Order. As noted (*supra* note 4), the Second Circuit remanded to the bankruptcy court to make factual findings as to whether non-ignition-switch plaintiffs were known creditors and thus entitled to individual mailed notice. Pet. App. 54-55.

3. Finally, even with respect to respondents' successor-liability claims, answering the petition's abstract questions presented would make little sense at this time. No court has yet determined whether respondents hold valid successor-liability claims under state law. And, for its part, petitioner still denies that it is Old GM's successor. Pet. 32 n.6. At least until these questions are sorted out, there is no reason for this Court to enter the fray.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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