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ATTORNEYS FOR THE CHRYSLER
NON-TARP LENDERS

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

In re	)	Chapter 11
CHRYSLER, LLC, et al.,	)	Case No. 09-50002
	)	Jointly Administered
Debtors.	)	

PRELIMINARY OBJECTION OF THE CHRYSLER NON-TARP LENDERS TO MOTION OF DEBTORS AND DEBTORS IN POSSESSION, PURSUANT TO SECTIONS 105, 363 AND 365 OF THE BANKRUPTCY CODE AND BANKRUPTCY RULES 2002, 6004 AND 6006, FOR (I) AN ORDER (A) APPROVING BIDDING PROCEDURES AND BIDDER PROTECTIONS FOR THE SALE OF SUBSTANTIALLY ALL OF THE DEBTORS' OPERATING ASSETS (B) SCHEDULING A FINAL SALE HEARING AND (C) APPROVING THE FORM AND MANNER OF NOTICE THEREOF; AND (II) 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

TO THE HONORABLE ARTHUR J. GONZALEZ,
UNITED STATES BANKRUPTCY JUDGE:

The Chrysler Non-TARP Lenders,[1] by and through their undersigned counsel, hereby file this preliminary objection (the "Preliminary Objection") to the Motion of Debtors and Debtors in Possession, Pursuant to Sections 105, 363 and 365 of the Bankruptcy Code and Bankruptcy Rules 2002, 6004 and 6006, for (I) An Order (A) Approving Bidding Procedures and Bidder Protections for the Sale of Substantially All of the Debtors' Operating Assets (B) Scheduling a Final Sale Hearing and (C) Approving the Form and Manner of Notice Thereof; and (II) 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") filed by Chrysler, LLC ("Chrysler") and the above-captioned debtors and debtors in possession (collectively, the "Debtors"). In support of its Preliminary Objection, the Chrysler Non-TARP Lenders respectfully state and represent as follows:

PRELIMINARY STATEMENT

On Sunday, May 3, 2009, at approximately 7:30 pm EDT, the Debtors filed the Sale Motion. The Sale Motion and the accompanying exhibits and memorandum of law consist of close to 290 pages and seek approval of detailed sales procedures on a little more than 15 hours notice. This does not and cannot comply with the basic requirements of due process. Based on the foregoing, the hearing on the sales procedures should be continued for at least two business days to permit the parties in interest to properly evaluate the bidding procedures and

[1] The Chrysler Non-TARP Lenders are certain holders, or investment advisors to holders, of the Senior Debt (as defined below).

formulate their responses, if any.

Separate and apart from the lack of due process and any infirmities in the bidding procedures themselves, the Sale Motion should be denied because it seeks approval of a sale that cannot be approved under the Bankruptcy Code. In short, the Court should not permit a patently illegal sales process to go forward. Among other things, the sale proposed by the Debtors constitutes an impermissible *sub rosa* plan of reorganization that strips the Chrysler Senior Lenders of the protections of section 1129(a) of title 11 of the United States Code (the "Bankruptcy Code") and improperly attempts to extinguish their property rights without their consent. Further, the sale does not comply with section 363(f) of the Bankruptcy Code and was not proposed in good faith. Indeed, the sale is far from an arm's length transaction, but rather, is the result of a tainted sales process dominated by the United States government. Under these circumstances, the Sale Motion should be denied.

BACKGROUND[2]

1. On April 30, 2009 (the "Petition Date"), each of the Debtors filed petitions for relief under chapter 11 of the Bankruptcy Code, thereby commencing their respective chapter 11 cases (collectively, the "Chapter 11 Cases"). The Debtors are operating their business as debtors and debtors in possession pursuant to sections 1107 and 1108 of the Bankruptcy Code. The Chapter 11 Cases are being jointly administered for procedural purposes.

2. Chrysler and certain of its affiliates are parties to that certain Amended and Restated First Lien Credit Agreement, dated as of August 3, 2007 (as may have been amended or supplemented, the "Senior Credit Agreement") with JPMorgan Chase Bank N.A., as administrative agent, and certain lenders party thereto from time to time (the "Senior Lenders"),

[2] Certain of the facts set forth herein are based upon the representations of the Debtors in the Sale Motion. The Chrysler Non-TARP Lenders reserve the right to challenge such representations, and nothing herein shall constitute a waiver of such right.

under the Senior Lenders are owed a $6.9 billion senior loan (the "Senior Debt") secured by substantially all of the Debtors' assets (the "Collateral").

3. On May 3, 2009, at approximately 7:30 pm EDT, the Debtors filed the Sale Motion, seeking approval of bidding procedures and approval of a sale that, without question, constitutes a *sub rosa* plan of reorganization.

OBJECTION

I. The Sale Motion Was Not Timely Filed and the Hearing Should Be Continued

4. A debtor may only use property of the estate outside the ordinary course of business after "notice and a hearing". See 11 U.S.C. § 363(b). The phrase notice and hearing "means such notice as is appropriate in the particular circumstances". 11 U.S.C. § 102(1). In addition, procedural due process requires notice and the opportunity to be heard. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950). Indeed, an "elementary" and "fundamental" requirement of due process in any proceeding is that parties be provided notice "reasonably calculated" under all of the circumstances to afford the objecting party an opportunity to present his objections. See Walthall v. United States, 131 F.3d 1289, 1294 (9th Cir. 1997).

5. That standard is not met in this case. The Debtors seek approval of bidding procedures in connection with the sale of one of the "Big Three" automakers on less than 16 hours notice. The Chrysler Non-TARP Lenders simply cannot be expected to sift through over 290 pages of information and present their objections in such a compressed period of time. Moreover, there is no need for such a short time frame. Even the onerous proposed debtor-in-possession financing provides the Debtors until May 8 to obtain a hearing regarding the bidding procedures. The hearing regarding bidding procedures should be, at a minimum, continued.

II. The Sale Motion Should Be Denied Because the Proposed Sale Is Improper and Cannot Be Approved By the Bankruptcy Court.

6. In addition to the procedural infirmities, the Sale Motion should be denied because the proposed 363 sale is patently improper and cannot be approved under the Bankruptcy Code. Among other things, the proposed sale is an illegal *sub rosa* plan of reorganization, improperly transfers value from senior creditors to junior creditors, cannot be approved over the objection of the Chrysler Non-TARP Lenders and was not proposed in good faith.[3]

A. The Proposed Sale Constitutes an Illegal *Sub Rosa* Plan that Redistributes Value Among Creditor Classes.

7. The terms of the proposed 363 sale (the "363 Sale"), as explained in the Debtors' current papers, clearly constitutes a sub rosa plan of reorganization. Among other things, the sale favors junior creditors over senior creditors and seeks to improperly channel consideration to specific creditor groups. Such a restructuring of creditors' rights and diversion of value is impermissible in the context of a 363 sale. See PBGC v. Braniff Airways, Inc. (In re Braniff Airways, Inc.), 700 F.2d 935, 940 (5th Cir. 1983) ("The debtor and the Bankruptcy Court should not be able to short circuit the requirements of Chapter 11 for confirmation of a reorganization plan by establishing the terms of the plan sub rosa in connection with a sale of assets.").

8. Further, the Debtors impermissibly seek to use the 363 Sale to bind the Chrysler Non-TARP Lenders to a treatment of their claims without having that proposed treatment tested by the standards of the Bankruptcy Code. Such a proposed sale cannot proceed. See, e.g., In re Westpoint Stevens Inc., 333 B.R. 30, 52 (S.D.N.Y. 2005) ("Where it is clear that

[3] The Preliminary Objection was filed on very short notice. The Chrysler Non-TARP Lenders reserve the right, and intend, to submit a more detailed objection as time permits.

the terms of a section 363(b) sale would preempt or dictate the terms of a Chapter 11 plan, the proposed sale is beyond the scope of section 363(b) and should not be approved under that section."); Institutional Creditors of Cont'l Air Lines, Inc. v. Cont'l Air Lines, Inc. (In re Cont'l Air Lines, Inc.), 780 F.2d 1223, 1226-28 (5th Cir. 1986) (same). Simply, a 363 sale is not a substitute for a plan of reorganization. See Westpoint Stevens Inc., 333 B.R. at 52 (noting that when a proposed transaction specifies terms for adopting a reorganization plan, the parties and the court "must scale the hurdles erected in Chapter 11") (citation omitted); see also In re Iridium Operating LLC, 478 F.3d 452, 466 (2d Cir. 2007) (The "trustee is prohibited from such use, sale or lease if it would amount to a sub rosa plan of reorganization."); In re Abbotts Dairies of Pa., Inc., 788 F.2d 143 (3d Cir. 1986) (finding that section 363 does not permit a debtor to abrogate the protections afforded creditors by section 1129 and the plan confirmation process).

9. The Debtors bear the burden to prove that the proposed sale is fair, equitable, in the interest of the *estate*, and not unfair to the creditors. The proposed sale fails each of these requirements. Recognizing this failure, the Sale Motion focuses largely on the interests of the United States economy, the automotive industry and other interests. But the focus of the inquiry has to be on the Debtors' creditors. The proposed sale is clearly unfair to them and ignores the absolute priority scheme established by the Bankruptcy Code.

B. The Proposed Sale Fails the Requirement of Section 363(f).

10. The 363 sale cannot be approved over the objection of the Chrysler Non-TARP Lenders. As an initial matter, the lenders do not consent to the sale and, therefore, the sale cannot be approved pursuant to section 363(f)(2) of the Bankruptcy Code. Further, the sales price does not exceed the Senior Debt. Accordingly, the sale cannot be approved pursuant to section 363(f)(3) and no other sections of 363(f) are applicable. Importantly, despite the notable

omission of the such case law from the Sales Motion, the vast majority of courts have concluded that a debtor cannot sell assets free and clear of liens pursuant to section 363(f)(3) over the objection of a secured creditor unless the sales price is greater than the face value of the debt secured by the liens upon such assets. See Clear Channel Outdoor, Inc. v. Knupfer (In re PW, LLC), 391 B.R. 25, 40-1 (9th Cir. B.A.P. 2008) (holding that section 363(f)(3) of the Bankruptcy Code does not authorize the sale free and clear of a lienholder's interest if the price of the estate property is equal to or less than the aggregate amount of all claims held by creditors who hold a lien or security interest in the property being sold); see also In re Riverside Inv. P'ship, 674 F.2d 634, 640-1 (7th Cir. 1982); Richardson v. Pitt County (In re Stroud Wholesale, Inc.), 47 B.R. 999, 1002 (E.D.N.C. 1985), aff'd mem., 983 F.2d 1057 (4th Cir. 1986) (free and clear sale not allowed unless the sale proceeds will fully compensate all secured lienholders); In re General Bearing Corp., 136 B.R. 361 (Bankr. S.D.N.Y. 1992); Scherer v. Fed. Nat'l Mortgage Ass'n (In re Terrace Chalet Apartments, Ltd.), 159 B.R. 821, 828 (N.D. Ill. 1993) (same); In re Perroncello, 170 B.R. 189, 190-92 (Bankr. D. Mass. 1994) (same); In re Feinstein Family P'ship, 247 B.R. 502, 508 (Bankr. M.D. Fla. 2000) (same); In re Canonigo, 276 B.R. 257, 262-3 (Bankr. N.D. Cal. 2002) (same); Criimi Mae Servs. Ltd. P'ship v. WDH Howell, LLC (In re WDH Howell, LLC), 298 B.R. 527, 531 (D. N.J. 2003) (same); see also In re Healthco Int'l, Inc., 174 B.R. 174, 176 (Bankr. D. Mass. 1994) (same). There is no dispute that such condition is not satisfied here.

C. The Sale Is Not Proposed In Good Faith.

11. The facts stated in the Sale Motion (and the supporting declarations) do not support any finding that (i) the New Chrysler is a purchaser in "good faith" under section 363(m) of the Bankruptcy Code, or (ii) would vitiate the relief provided by section 363(n) of the

Bankruptcy Code. The Debtors have the burden to establish the "good faith" of New Chrysler. Indeed, the court is "required to make a finding with respect to the 'good faith' of the purchaser." Ginther v. Ginther Trusts (In re Ginther Trusts), 238 F.3d 686, 689 (5th Cir. 2001), cert. denied, 534 U.S. 814 (2001). Based on the facts adduced, the burden on the Debtors is unsustainable and no finding of good faith is appropriate.

12. The sale of assets by the Debtors to New Chrysler is not a sale that was negotiated by independent parties at arm's length. Rather, it is a sale that was orchestrated entirely by the Treasury and foisted upon the Debtors without regard to corporate formalities, the fiduciary duties of the Debtors' officers and directors or the other important checks and balances typically found in good faith sales. Indeed, well before the filing, the Debtors had ceased to function as an independent company and had become an instrumentality of the government. President Obama, in his public statements, made it clear that the Debtors would be required to pursue the sale transaction with Fiat and ordered the Debtors to cease all efforts to pursue any other transaction. Both actions are clearly inconsistent with the requirements of a good faith sale. And, the government exerted extreme pressure to coerce all of the Debtors' constituencies into accepting a deal which is being done largely for the benefit of unsecured creditors at the expense of senior creditors. Under the circumstances, the sale transaction does not pass muster under section 363(n), let alone section 363(m), and New Chrysler simply cannot establish that it is a good faith purchaser in connection with the proposed sale.

III. The Taking of Collateral through a Direct or Indirect Use of TARP Authority is Unconstitutional.

13. The Treasury Department relies on TARP as the purported authority to justify the disparate treatment under the 363 Sale, even though TARP was enacted after the Senior Lenders' liens on the Debtors' property were already in place. The Supreme Court long

ago recognized, however, that a secured creditor's interest in specific property is protected in bankruptcy under the Fifth Amendment. Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555, 594 (1935). That case involved a Depression-era statute that was intended to help bankrupt farmers avoid losing their land in mortgage foreclosure. The statute in Radford provided that the bankrupt debtor could achieve a release of the security interests either (i) with the lender's consent, purchasing the property at its then appraised value by making deferred payments for two to six years at statutorily-set interest rates; or (ii) by seeking from the bankruptcy court a stay of the proceedings for up to five years during which time the debtor could use the property by paying a rent set by the court, which payments would be for the benefit of all creditors, with a purchase option at the end of that period. Id. at 856-57.

14. Justice Brandeis noted that the "essence of a mortgage" is the right of the secured party "to insist upon full payment before giving up his security [i.e., the property pledged]." Radford, 295 U.S. at 580. In invalidating the statute, the Court stated that "[t]he bankruptcy power . . . is subject to the Fifth Amendment," and that the pernicious aspect of this law was its "taking of substantive rights in specific property acquired by the bank prior to the act." Id. at 589-90 (emphasis added). Thus, Congress could not pass a law that could be used to deny to secured creditors their rights to realize upon the specific property pledged to them or "the right to control meanwhile the property during the period of default." Id. at 594. That is precisely what the Treasury Department would have Chrysler do here, with respect to the Chrysler Non-TARP Lenders' property rights that were acquired prior to the enactment of TARP.

15. Relying on purported authority provided by TARP, the Treasury Department is demanding that Chrysler's assets be stripped away from the coverage of the

Senior Lenders' liens – thereby impairing the rights of the Senior Lenders to realize upon those assets – so that those assets may be put in New Chrysler and used to the benefit of unsecured creditors in this proceeding, who will then be paid much more than the Senior Lenders. But, even assuming that TARP provides the Treasury Department with authority to provide funding to the Debtors and impose the transfer of collateral away from the Senior Lenders, TARP was enacted long after the Senior Lenders contracted with the Debtors and received senior liens on the Debtors' property. Radford specifically disallowed the use of a law to retroactively alter existing liens on property.

16. Here, the proposed sale of the Debtors' assets will leave the Senior Lenders with a diluted pool of assets and no further interests in the operating assets covered by their specific liens. The Constitution forbids this application of a law retroactively to undercut the Senior Lenders' pre-existing property rights in favor or inferior creditors.

17. Finally, that the Treasury Department would take these unconstitutional actions to help the United States address difficult economic times is not an answer. Indeed, the same justification was expressly rejected in Radford, where Justice Brandeis noted that a statute which violated secured creditors' rights, but which was passed for sound public purposes relating to the Great Depression, could not be saved because "the Fifth Amendment commands that, however great the nation's need, private property shall not be thus taken even for a wholly public use without just compensation." Id. at 602.

18. What is really striking here is that what is being proposed by the Sale Motion would strip the Collateral away and allow it to be put to use as new capital in New Chrysler for the benefit of existing and other creditors – even though the Chrysler Non-TARP Lenders have been given no opportunity to realize upon that Collateral to the point of full

repayment ahead of at least $14 billion of selectively identified unsecured creditors.

CONCLUSION

19. For the foregoing reasons, the Chrysler Non-TARP Lenders respectfully request that the Court deny the Sale Motion in its entirety.

Dated: May 4, 2009
New York, New York

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