No. ___

IN THE

Supreme Court of the United States

In re CHRYSLER LLC, Debtor,

INDIANA STATE POLICE PENSION TRUST, *et al.*,

Petitioners,

v.

CHRYSLER LLC, *et al.*,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

After providing Chrysler interim financing in January 2009, the U.S. Treasury conditioned the additional financing needed for Chrysler's survival on a restructuring that would provide billions to Chrysler's unsecured trade and labor creditors but leave secured creditors with only partial payment. Treasury then directed Chrysler to reorganize in a transaction that would be approved on an emergency basis under section 363 of the Bankruptcy Code rather than through confirmation of a chapter 11 plan. After Chrysler filed for bankruptcy, the court imposed a 15-day deadline for final competing bids, which were required to adopt Treasury's prescribed treatment of Chrysler's unsecured creditors. As expected, no competing bidders came forward, and 31 days after Chrysler commenced its chapter 11 case, the court approved a transaction disposing of nearly all of Chrysler's assets on Treasury's terms. Chrysler's first lien lenders received a liquidation-based recovery while unsecured creditors received over $20 billion of going-concern value in cash, new notes and stock from the reorganized business. Affirming, the Second Circuit declared that "[t]he 'side door' of § 363(b) may well 'replace the main route of chapter 11 reorganization plans.'"

The question presented is whether section 363 may freely be used as a "side door" to reorganize a debtor's financial affairs without adherence to the creditor protections provided by the chapter 11 plan confirmation process.

PARTIES TO THE PROCEEDING

Petitioners include the Indiana State Police Pension Trust, Indiana State Teachers Retirement Fund, and the Indiana Major Moves Construction Fund (collectively, the "Indiana Pensioners").

Parties to the appeal in the Second Circuit included Chrysler LLC ("Chrysler," and collectively with its chapter 11 debtor affiliates, "Debtors"); the United States of America through the Department of the Treasury; International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America, AFL-CIO ("UAW"); Fiat S.p.A.; New Carco Acquisition LLC ("New Chrysler"); Export Development Canada; Chrysler Financial Services Americas LLC; The Official Committee of Unsecured Creditors; Patricia Pascale and The Ad Hoc Committee of Consumer-Victims of Chrysler LLC.

Corporate Disclosure Statement

Pursuant to Supreme Court Rule 29, each of the Indiana Pensioners hereby certifies that it (i) has no corporate parent and (ii) no publicly-owned corporation owns 10% or more of its equity stock.

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PETITION FOR WRIT OF CERTIORARI

The Indiana Pensioners respectfully petition the Court to grant a writ of certiorari to the United States Court of Appeals for the Second Circuit in this matter.

OPINIONS BELOW

The bankruptcy court's Order, issued June 1, 2009, approving the motion for an order (a) Authorizing the Sale of Substantially All of the Debtors' Operating Assets, Free and Clear of Liens, Claims, Interests and Encumbrances, (b) Authorizing the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases in Connection Therewith and Related Procedures and (c) Granting Certain Related Relief (the "363 Motion"), is unpublished but reprinted in the appendix to the Petition at 48a. The Opinion relating to the 363 Motion, issued May 31, 2009, is published at 405 B.R. 84 and reprinted in the appendix to the Petition at 116a. The Opinion and Order discussing the Emergency Economic Stabilization Act of 2008 and Troubled Asset Relief Program (together with the above Order and Opinion, the "Transaction Orders"), is unpublished but reprinted in the appendix to the Petition at 177a.

The bankruptcy court's order certifying the Transaction Orders for direct appeal to the Second Circuit is unpublished but reprinted in the appendix to the Petition at 192a.

The June 2, 2009 order of the Court of Appeals accepting jurisdiction under 28 U.S.C. § 158(d)(2) and Bankruptcy Rule 8001(f) is unpublished but reprinted in the appendix to the Petition at 188a. The final judgment and mandate issued on June 5, 2009, by the Second Circuit affirming the Transaction Orders and lifting its stay effective at 4:00 p.m., Monday, June 8, 2009, or upon denial of a stay by this Court, is unpublished but reprinted in the appendix to the Petition at 46a. The August 5, 2009, opinion of the Court of Appeals further explaining the June 5 judgment is published at -- F.3d --, No. 09-2311-bk, 2009 WL 2382766 (2d Cir. Aug. 5, 2009), and is reprinted in the appendix at 1a.

On June 7, 2009, the Petitioners filed a petition for an emergency stay. Justice Ginsberg issued a temporary stay on June 8, 2009, which is reprinted at 187a. On June 9, 2009, this Court issued a per curiam opinion denying the application for an emergency stay, which is reprinted in the appendix at 185a. The stay order and the opinion are published at -- U.S. --, 129 S.Ct. 2275 (2009).

JURISDICTION

The Court of Appeals entered final judgment on June 5, 2009. The Court has jurisdiction to review this case under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions, 11 U.S.C. § 363(f), 11 U.S.C. § 506(a)(1), and 11 U.S.C. §§ 1122-1129, are reprinted in the appendix at 201a-221a.

STATEMENT

The sale of Chrysler's assets has closed and the distribution of value to its creditors has occurred, but the issue of the transaction's legality is not dead. The Indiana Pensioners acknowledge that in the absence of a finding of bad faith, section 363(m) of the Bankruptcy Code proscribes undoing the sale of Chrysler's assets, and do not now seek such relief. Nonetheless, this appeal lives because Chrysler's bankruptcy estate remains unresolved and a determination that the transaction was unlawful would—while leaving undisturbed the assets of the purchaser—require entities that improperly received consideration to return it to the estate for redistribution under a proper chapter 11 plan of reorganization.

The decisions below now stand as precedent that disrupts the balance the Bankruptcy Code strikes between promoting the reorganization of troubled businesses and protecting creditors' rights; this precedent has already been followed in other cases and this trend will continue unless the Court intervenes. Accordingly, given the significance of the issues presented here both for the Indiana

Pensioners and for the future of bankruptcy law (not to mention U.S. capital markets), the Court should take this case now, when the passion of Chrysler's economic crisis has ebbed and there is no call to rush the case through the Court's docket.

The background is as follows:

Chrysler's First Lien Financing

The Debtors are parties to an Amended and Restated First Lien Credit Agreement, dated as of November 29, 2007, with JPMorgan Chase Bank N.A. ("JPM"), as administrative agent, and certain lenders party thereto (the "First Lien Lenders"). Pet.App. 120a.

The First Lien Lenders are owed $6.9 billion ("First Lien Debt"), all of which was secured by a first lien on substantially all of the Debtors' assets (the "Collateral"). Pet.App. 120a, 129a.

The Indiana Pensioners are (a) two pension funds that are fiduciaries for the investment of billions of dollars of retirement assets for approximately 100,000 Indiana civil servants, including police officers, school teachers and their families, and (2) an infrastructure construction fund; together they hold approximately $42.5 million of First Lien Debt. Pet.App. 129a-130a.

Events Leading to Bankruptcy

In January, 2009, with a national recession looming and sales trickling, Chrysler found itself on the brink of insolvency. [Bankr. Docket 52].[1] To fend off the shut-down of an iconic American manufacturer that employed over 55,000 union and non-union workers, the United States Department of the Treasury extended to Chrysler a $4 billion dollar loan using funds from the Troubled Asset Relief Program ("TARP"), enacted by Congress through the Emergency Economic Stabilization Act of 2008, 12 U.S.C. §§ 5201-5241 ("EESA"), ostensibly as a way to keep afloat struggling financial institutions. Pet.App. 119a. While keeping the wolf away from the door with Treasury's bridge financing, Chrysler proposed an out-of-court reorganization plan on February 17, 2009, that contemplated full repayment of the $6.9 billion of First Lien Debt. Pet.App. 124a-125a.

On March 30, 2009, however, Treasury rejected this plan and gave Chrysler 30 days to consummate a transaction that would rid the company of the First Lien Debt entirely, on threatened pain of liquidation. Pet.App. 126a. More particularly, Treasury determined that Chrysler should achieve long-term viability by doing the following: (1) entering into a new collective bargaining agreement

[1] All citations to the "Bankr. Docket" refer to *In re Chrysler LLC*, No. 09-50002 (AJG) (Bankr. S.D.N.Y.).

with the UAW; (2) granting Fiat an equity stake in exchange for access to certain intellectual property (but no cash or tangible assets); (3) exchanging its existing $10 billion unsecured obligation to its Voluntary Employee Benefit Association (the "VEBA") (which provides health and medical benefits to union retirees) for a new $4.6 billion note and a 68% equity stake in the company; and (4) continuing to pay all other operating obligations (*i.e.*, billions of dollars in trade payables, warranty obligations and pension obligations) in full and in the ordinary course of business. Pet.App. 125a-128a; [Bankr. Docket 660, Ex. H]. Critically, Treasury also determined that substantially all of Chrysler's existing $12.9 billion secured debt—the $6.9 billion of First Lien Debt, plus $2 billion second lien debt owed to its parent, Cerberus, plus $4 billion of third lien debt previously advanced by Treasury under TARP—should be eliminated. Pet.App. 120a-125a.

If and only if all these conditions were satisfied, Treasury promised billions of dollars of additional TARP loans to finance Chrysler's ongoing operations. In late March 2009, however, the First Lien Lenders communicated that they would not agree to waive their lien rights without full payment. *See* David Sanger & Bill Vlasic, *U.S. in Standoff With Banks Over Chrysler, N.Y. Times*, April 22, 2009 at B1.

In response, Treasury devised a scheme to strip the First Lien Lenders' rights as secured creditors. Treasury told Chrysler's creditors that, instead of reorganizing under a chapter 11 plan, Chrysler would sell its assets "free and clear" of all interests under section 363 to a newly created shell corporation that would become the revitalized "Chrysler" Treasury originally envisioned. *See* Micheline Maynard & Michael J. de la Merced, *U.S. Said to Seek a Chrysler Plan for Bankruptcy*, *N.Y. Times*, April 23, 2009, at A1; JA-3765-3766.[2] This scheme would yield *going concern* value for select creditors that would become stakeholders in New Chrysler, but only *liquidation* value for the First Lien Lenders—even though the express purpose of the transaction was to avoid an actual liquidation of Chrysler and preserve Chrysler as a going concern. JA-1568; JA-1624. To impel the scheme on Chrysler's creditors, Treasury announced that it would allow Chrysler to bleed liquidity while conditioning additional TARP-funded loans—the only apparent available source of cash—on the creditors' timely approval of the scheme. *See* Maynard & de la Merced, *supra*, at A1.

2. While Chrysler's cash (and options) dwindled, Treasury pursued its strategy to squeeze out the First Lien Lenders using (a) public pressure and (b) a liquidation analysis showing how lenders would supposedly fare if Chrysler was shut down. Pet.App. 139a-140a.

[2] All citations to "JA" refer to the Second Circuit Joint Appendix.

a. Public Pressure: One of the Government's main tools for engineering Treasury's preferred outcome was the bully pulpit. On March 30, 2009, the day Treasury rejected Chrysler's stand-alone reorganization plan that would have paid the First Lien Debt in full, President Obama stated that he would allow Chrysler and Fiat 30 days to come to an agreement and that, "if they and their stakeholders are unable to reach such an agreement . . ., we will not be able to justify investing additional tax dollars to keep Chrysler in business." *See* President Obama, Remarks by the President on the Auto Industry (Mar. 30, 2009).

As the 30-day deadline loomed, Treasury negotiated with the First Lien Lenders, and Chrysler attempted "to secure the support of the necessary stakeholders and reach a successful conclusion that the administration and U.S. Treasury deems appropriate." Maynard & de la Merced, *supra*, at A1 (Statement of Chrysler spokeswoman, Lori McTavish). Indeed, while the United States Government was publicly raising the specter of a Chrysler shut-down, privately Treasury was detailing to holders of First Lien Debt how the Government would use an asset sale under section 363 to achieve its desired result, if necessary. JA-3765; JA-3773.

In response to the mounting public pressure and concern regarding liquidation recoveries, the First Lien Lenders' agent, JPM—itself a recipient of $25 billion in TARP funds, *see* Troubled Assets Relief Program, *Transactions Report*, U.S. Treasury Dept. (Aug. 28, 2009)—communicated its willingness to reduce substantially the amount to be recovered by the First Lien Debt. [Bankr. Docket 2778, Ex. L]. Soon thereafter, all four of Chrysler's lenders who had received TARP funding, JPM, Citibank, Goldman Sachs and Morgan Stanley (who together held over 60% of the First Lien Debt), agreed to support settling the entire $6.9 billion amount of the First Lien Debt for a cash payment of $2 billion. *Id.*

Most of the First Lien Lenders (none of whom had received TARP funds), however, balked at the arrangement's obviously unfair treatment of their rights and attempted to engage in separate negotiations, to no avail. *Statement From Non-Tarp Lenders To Chrysler*, BusinessWire, Apr. 30, 2009. Even Chrysler was open to the idea of trying to deliver additional value to its lenders. Its financial advisor, Robert Manzo, mentioned to Matthew Feldman, the President's Auto Administration Taskforce bankruptcy attorney, that he had identified potential ways of providing the First Lien Lenders with more value. JA-3770-71. Feldman responded curtly: "I'm now not talking to you. You went where you shouldn't." *Id.* Manzo hastily apologized. *Id.* Reiterating the Government's control, Feldman responded, "It's over. The President doesn't negotiate second rounds. We've given and lent billions of dollars so your team could manage this properly. . . ." *Id.*

When the parties did not reach an agreement by the deadline, the President vilified the holdout lenders, stating that "[t]hey were hoping that everybody else would make sacrifices, and they would have to make none. I don't stand with them." See Jim Rutenberg & Bill Vlasic, *Chrysler Files to Seek Bankruptcy Protection*, N.Y. Times, Apr. 30, 2009.

b. **Liquidation Analysis:** Robert Manzo, Chrysler's financial expert, fully enabled Treasury's scheme in another way. He prepared a first valuation report purporting to show that the $6.9 billion of first-lien debt could fetch from $654 million to $2.6 billion if Chrysler were liquidated. [Bankr. Docket 52]. Manzo later revised his estimate to suggest that liquidation would bring from $0.00 to no more than $1,378,000,000. [Bankr. Docket 1573].

Manzo, it is worth noting, not only advocated the structure of the Chrysler bankruptcy with Treasury, but also was paid for his liquidation analysis on a contingent fee arrangement providing that he would personally receive $10 million if the 363 Motion succeeded. JA-1765-66. In addition, Manzo testified that his report attributed value to only two of Chrysler's 40 current and projected product lines, relied exclusively on Chrysler's performance in 2008 (the undisputed worst year ever in the auto industry), and utilized low valuation multiples for which he could point to no precedent. For these reasons (and others), the Indiana Pensioners objected to Manzo's testimony, but the bankruptcy court allowed him to testify and credited his valuation. Pet.App. 59a-60a, 140a-141a.

Commencement of Case

When Chrysler's non-TARP First Lien Lenders refused to cave, the Debtors formally filed a chapter 11 bankruptcy petition on April 30, 2009. [Bankr. Docket 1]; Pet.App. 8a. On May 3, 2009, Chrysler began the process of implementing Treasury's scheme to strip the First Lien Debt of its property rights by seeking approval of the Master Transaction Agreement (which incorporated Treasury's requirements regarding creditor recoveries). In the motion the Debtors sought (1) authority to transfer substantially all of their assets to a shell corporation, which would in turn resolve over $20 billion of Chrysler's unsecured debts; (2) emergency approval of highly regulated auction procedures; and (3) a proposed timeline to resolve the entire matter in less than 30 days. [Bankr. Docket 492, Ex. A].

Treasury immediately sought to influence the proceedings by filing a statement telling the bankruptcy court that "its commitment to fund Chrysler's bankruptcy must be contingent on Chrysler achieving the milestones necessary to close a sale in sixty days. Simply put, this time period for a sale is a necessary and critical condition to government funding." [Bankr. Docket 69].

Chrysler's proposed auction rules would give bidders about two weeks to submit final and binding offers (and a non-refundable 10% cash deposit), with no financial or due diligence contingency and on the same terms as the Master Transaction Agreement. JA-1613, 88:7-12, JA-1633, 169:1-7, JA-1638, 189:14-16, JA-1644, 210:8-14. These terms included the substantial burdens of (1) paying over $5 billion in prepetition trade claims, (2) honoring over $4 billion in warranty and dealer incentive obligations, (3) assuming Chrysler's underfunded pension obligation and the new UAW collective bargaining agreement, and (4) providing the agreed treatment of the $10 billion VEBA obligation. [Bankr. Docket 492, Ex. A]. Chrysler also sought to reserve the right to reject the bid after consultation with the UAW, Treasury, and the Creditors Committee. *Id.*

Chrysler offered no explanation as to how requiring bidders to assume or pay substantially all of Chrysler's operating and labor obligations would provide a genuine market test of the liquidation value of the First Lien Lenders' Collateral. Indeed, Chrysler expressly admitted that those terms did not benefit the estate. JA-1638-39, 188:8-192:21; *see also* JA-1636, 179:10-180:13. Chrysler also admitted that the bidding procedures were not likely to produce bids for such a large, complicated transaction in such a short period of time. JA-1615, 97:12-22, JA-1634-35, 171:21-174:4, JA-1638-39, 189:23-190:1. Regardless, the bankruptcy court approved the auction procedures on May 8, 2009. [Bankr. Docket 492].

Unsurprisingly, no other bidders came forward. Pet.App. 141a.

<u>Bankruptcy Hearing and Decision</u>

Following the unsuccessful "auction," the pieces were in place for Treasury finally to impose its scheme to reallocate value from the First Lien Lenders to Treasury's preferred trade and labor-related creditors. The bankruptcy court, at the request of Chrysler and Treasury, set May 20 as the deadline for filing objections to the proposed sale. [Bankr. Docket 492]. It also set May 27, 2009, as the date for a hearing on Chrysler's motion to approve the Master Transaction Agreement. *Id.* Hence, the Indiana Pensioners (and other objecting creditors) had only six days to conduct discovery and prepare for trial on the 363 Motion. [Bankr. Docket 2617].

Between May 21 and May 26, the Indiana Pensioners received more than 87,000 documents, totaling over 385,000 pages, from 39 separate productions. *Id.* The Indiana Pensioners took 23 depositions in a four-day period, most of them within 48 hours of the sale hearing. *Id.* While Chrysler's expert had been preparing for the bankruptcy filing since November 2008, [Bankr. Docket 1573, Ex. A]; JA-1639, 192:22-23, the Indiana Pensioners did not receive detailed information about the financial position of the company until a few days before the hearing to approve the transaction and therefore did not have sufficient time to prepare their own expert testimony. [Bankr. Docket 2617].

After conducting a three-day hearing, the bankruptcy court granted the 363 Motion, approving the Master Transaction Agreement and each of the restructuring terms outlined above. Pet.App. 116a. In approving the $2 billion payment to the First Lien Lenders, the bankruptcy court specifically relied on Manzo's testimony regarding the liquidation value of the Collateral, even though the transaction was premised on the continued operation of the business by New Chrysler and evidence had been presented that the going-concern value of the Collateral was $20-30 billion. Pet.App. 126a-128a. This unprecedented use of liquidation value in assessing the propriety of a going-concern transaction—in obvious violation of section 506(a)(1) as previously construed by this Court in *Associates Commercial Corporation v. Rash*, 520 U.S. 953, 960-62 (1997)—effectively diverted most of Chrysler's value away from the First Lien Lenders and toward the favored unsecured creditors selected by Treasury to receive payments from, and debt or equity in, New Chrysler.

<u>Appellate Proceedings</u>

The parties pursued an expedited appeal from the bankruptcy court's order, resulting in an oral argument before the Second Circuit on June 5, 2009.

After deliberating for ten minutes, the Second Circuit affirmed the bankruptcy court's ruling, but stayed its decision pending a possible review by this Court until June 8, 2009. Pet.App. 46a.

The Indiana Pensioners sought an immediate stay in this Court, and Justice Ginsberg granted a temporary stay of the Transaction Orders on June 8, 2009. Pet.App. 187a. That same day, the CEO of Fiat, Sergio Marchionne, disclaimed any notion of abandoning the Chrysler deal after June 15, 2009, saying that "We would never walk away. Never." Serena Saitto, *Fiat Will 'Never' Walk Away From Chrysler, CEO Says*, Bloomberg.com, June 8, 2009.

The next day the Court issued a per curiam opinion denying the Indiana Pensioners' stay application. Pet.App. 185a. The Court emphasized that "[a] denial of a stay is not a decision on the merits of the underlying legal issues[,]" but found that the Pensioners did not carry their burden of showing that the stay, which is a matter of judicial discretion in every case, was justified. Pet.App. 185a, 186a. The transaction closed on June 10, 2009. Pet.App. 10a.

On August 5, 2009, the Second Circuit issued an opinion relating to its June 5 judgment. Pet.App. 1a. The court stressed the "'apparent conflict' between the expedient of a § 363(b) sale and the otherwise applicable features and safeguards of Chapter 11[,]" as explained in *In re Lionel Corp.*, 722 F.2d 1063, 1071 (2d Cir. 1983). Pet.App. 12a-13a. Although section 363 sales are typically used for "wasting assets" such as perishable commodities, the court found that "an automobile manufacturing business can be within the ambit of the 'melting ice cube' theory[.]" Pet.App. 14a. After collecting authority showing that section 363 is being used more and more by large companies that wish to side-step chapter 11 plan confirmation, the court ruled that under the test set forth in *Lionel*, the transaction was not an illegal *sub rosa* debt reorganization plan because Chrysler had "good business reasons" for effectuating the transaction under section 363. Pet.App. 24a.

REASONS FOR GRANTING THE PETITION

This appeal raises novel issues of bankruptcy law with far reaching consequences. The resolution of these issues will impact capital markets, bankruptcy cases and the way the Executive Branch addresses troubled companies, particularly given how Treasury stretched TARP's definition of "financial institution" to include giving bailout funds to automobile manufacturers. *See* Pet.App. 32a-33a. This case presents a test of whether the economic Zeitgeist discerned by the current Administration may supplant the order of economic rights to the assets of a bankrupt company as set by Congress and relied upon by the market.

Certiorari is warranted because the transaction approved in this case goes well beyond what Congress contemplated when permitting asset sales during the pendency of a chapter 11 reorganization case. In upsetting the procedural and substantive balances of chapter 11, the rulings below not only strip the First Lien Lenders of their constitutionally protected property rights, but they also adversely affect investment markets that depend on the reliability of the rights chapter 11 guarantees creditors. The Court should review whether the Administration may lawfully impose such economic reorganization on the stakeholders of a large, multi-national corporation.

I. The Court Needs to Clarify What Limits Exist on Using Section 363 to Avoid Confirming a Chapter 11 Plan

This case raises an important national issue of first impression for the Court: whether, and to what extent, section 363 permits a debtor to deal away substantially all of its assets and provide for the treatment of substantially all of its debts and liabilities without complying with the procedural and substantive protections specified in sections 1122-1129 of the Bankruptcy Code.

As described in detail below, section 363, which authorizes the sale of assets during the administration of a bankruptcy estate, is at tension with chapter 11 of the Bankruptcy Code, which dictates the terms on which a debtor may ultimately reorganize. The circuits have not been successful in resolving this tension with any kind of uniformity or predictability, and even the decision below acknowledged the importance of—and lack of manageable tests to address—the issue. The case is therefore worthy of the Court's attention.

A. The chapter 11 confirmation process is the sole means of restructuring debts, whereas section 363 exists to maximize asset value

In enacting chapter 11 of the Bankruptcy Code, Congress' fundamental goal was to promote the rehabilitation of distressed businesses and thereby maximize value for the benefit of all interested parties. *Toibb v. Radloff*, 501 U.S. 157, 163-64 (1991); *In re Timbers of Inwood Forest Assocs., Ltd.*, 808 F.2d 363, 373 (5th Cir. 1987) (*en banc*), *aff'd* 484 U.S. 365 (1988) ("A principal goal of the reorganization provisions of the Bankruptcy Code is to benefit the creditors of the Chapter 11 debtor by preserving going-concern values and thereby enhancing the amounts recovered by all creditors."). Permitting a debtor to continue to operate and reorganize its business preserves its going concern value, which is presumably superior to the value that would be realized in a liquidation. *See* 7 Collier on Bankruptcy ¶ 1100.01 (Resnick & Sommer eds., 15th ed. rev. 2008). Continued operation also preserves commerce, reduces market instability and saves both jobs and tax base. *See Nat'l Labor Relations Bd. v. Bildisco & Bildisco*, 465 U.S. 513, 528 (1984); *see also* H.R. Rep. No. 95-595, at 220 (1977).

Congress, however, was also cognizant of creditors' constitutionally protected property rights. Thus, the Bankruptcy Code does not permit a debtor to reorganize by unilaterally modifying and discharging the rights of its creditors. Rather, Congress balanced the competing policies of rehabilitating debtors and preserving the property rights of creditors, mainly via the chapter 11 plan confirmation process. *See Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc.*, -- U.S. --, 128 S.Ct. 2326, 2339 (2008).

1. Chapter 11 provides a detailed framework under which a debtor may reorganize while protecting the rights of all stakeholders

The chapter 11 plan confirmation process is the detailed statutory regimen for governing how a troubled company reorganizes its assets and liabilities under chapter 11. It requires that carefully balanced procedural and substantive elements be satisfied before the bankruptcy court may approve a plan. Congress enacted this rigorous process precisely because the reorganization of a debtor's estate, in most cases, will materially transform the rights and remedies that stakeholders held prior to the commencement of the chapter 11 case.

Sections 1122-1129 of the Bankruptcy Code impose a number of substantive requirements that a proponent must satisfy before its plan can be confirmed. First, the Bankruptcy Code explicitly governs the contents of every plan. *See* 11 U.S.C. §§ 1122-23, 1129(a)(1); *see also* S. Rep. No. 95-989, at 126 (1978); H.R. Rep. No. 95-595, at 412 (1977). Section 1123 sets forth what *must* be included in a plan (*e.g.*, setting forth the designation and treatment of classes, that each claim or interest within a particular class is treated the same, and that the debtor has provided for adequate means of implementation), 11 U.S.C. § 1123(a), and what *may* be included (*e.g.*, rejection, assumption and assignment of executory contracts, settlements of claims, sale of substantially all of the estate's assets or modification of certain rights of secured creditors), 11 U.S.C. § 1123(b).

Moreover, stakeholders are entitled to vote on a plan on the basis of "adequate information" regarding the debtor and the contents of the proposed plan. *See* 11 U.S.C. §§ 1125, 1129(a)(2); *see also* S. Rep. No. 95-989, at 126 (1978). Indeed, votes on a proposed plan may not even be solicited unless stakeholders receive "a written disclosure statement approved, after notice and a hearing, by the court as containing adequate information." 11 U.S.C. § 1125(b).

Further, before the plan may be confirmed, the proponent must demonstrate that the plan satisfies specific requirements—each designed by Congress to protect stakeholders—and the bankruptcy court must hold an evidentiary hearing in respect of each. 11 U.S.C. §§ 1128-29. For example, the proponent must generally show that: (a) each impaired class of claims or interests has either accepted the plan or will receive not less than it would in a liquidation; (b) each class of claims or interests has accepted the plan or is not impaired by the plan; (c) at least one class of impaired claims affirmatively accepted the plan; and (d) the proposed plan is feasible and not likely to result in another bankruptcy filing. 11 U.S.C. § 1129(a)(7)-(8), (10)-(11).

Finally, if any class of claims or interests does not accept the plan, the court may confirm the plan only if the proponent can satisfy further "cramdown" requirements. The proponent must demonstrate that the plan is "fair and equitable" with respect to, and does not "discriminate unfairly" against, each non-accepting class of claims. 11 U.S.C. § 1129(b)(1). This condition, often referred to as the "absolute priority" rule, requires a proponent to demonstrate that the plan does not violate the relative priority rights of non-consenting classes of secured creditors, unsecured creditors and equity interests. *See, e.g., Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 441-45 (1999);

Norwest Bank Worthington v. Ahlers, 485 U.S. 197, 202 (1988).

Taken together, these requirements provide creditors with a significant level of due process before their property rights may be permanently altered by a debtor's reorganization. In that regard, they provide an important statutory counterweight to the legitimate objective of rehabilitating bankrupt companies.

2. Section 363 is not an alternative to the plan confirmation process

Consistent with the goal of preserving going concern value, the Bankruptcy Code also provides a number of tools that a debtor may use to administer its chapter 11 estate and continue operating its business—pending confirmation of a plan. To fund the costs of its chapter 11 case, a debtor may seek to obtain additional financing after commencing bankruptcy. *See* 11 U.S.C. § 364. A debtor may elect to preserve valuable executory contracts and unexpired leases by curing any defaults and assuming or assigning those agreements for the benefit of its estate. *See* 11 U.S.C. § 365. A debtor may also elect to breach those agreements and thereby provide its counterparties with claims to be treated as part of its chapter 11 plan. *Id.*

Similarly, section 363 authorizes debtors to petition the bankruptcy court to sell assets other than in the ordinary course of business before plan confirmation. *See* 11 U.S.C. § 363 (providing that a debtor, "after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate[.]").

Section 363 provides creditors with a number of protections when a debtor seeks to dispose of assets. A section 363 sale requires notice to creditors and the opportunity for a hearing. 11 U.S.C. § 363(b)(1). Typically, security interests survive such a sale, and creditors with interests in the property may prohibit or condition the sale as necessary to ensure they receive adequate protection of their interests. 11 U.S.C. § 363(e). Sales may proceed free and clear of a creditor's interest only in cases where some other law permits the sale, the creditor consents or the creditor's claim is fully paid. 11 U.S.C. § 363(f). Secured creditors also have a right to bid on the property offered for sale and offset the value of their interest against their bid if they are successful in doing so. 11 U.S.C. § 363(k).

These protections, however, are not as comprehensive or substantial as those provided to creditors under the chapter 11 confirmation process described above. Section 363 contains no framework delineating the information that must be provided to creditors, the proper treatment of claims against the estate, or any specific requirements for restructuring debt obligations designed to protect the property rights of creditors, including the principle of creditor democracy so deeply entrenched in the plan process. Unlike sections 1125(g) and 1126(b) of the Bankruptcy Code, and contrary to the observation of the Second Circuit in this case, section 363 has no mechanism for effectuating a "pre-packaged" reorganization of a debtor's estate. Pet.App. 8a.

There is a good reason for this dearth of creditor protections: Congress never intended for section 363 to replace the confirmation process or be used as an alternative reorganization tool. Section 363 may be used to maximize the value of estate assets or otherwise benefit the interests of creditors, but a debtor cannot use this provision to short-circuit the chapter 11 confirmation process or upset the balances otherwise struck between the rehabilitation policy and creditors rights. *See, e.g.*, *In re Braniff Airways, Inc.*, 700 F.2d 935, 940 (5th Cir. 1983); *In re WestPoint Stevens, Inc.*, 333 B.R. 30, 52 (S.D.N.Y. 2005). Permitting *ad hoc* reorganizations under section 363 (often referred to as "*sub rosa*" plans) would effectively render this careful balance—a policy both intended by Congress and relied upon by financiers—nugatory.

B. Lacking guidance from the Court, the circuits disagree on the point at which a section 363 sale becomes an impermissible reorganization

The Court has never addressed the point at which a section 363 sale of a substantial portion of a debtor's assets constitutes an improper circumvention of the carefully constructed chapter 11 plan confirmation process. The circuits have provided only vague statements and diverging, imprecise tests for deciding whether to approve a section 363 sale—disharmony that reflects the inherent tensions between chapter 11 and section 363. The existence of competing standards on such a fundamental issue under the Bankruptcy Code requires the Court's attention.

The Second Circuit, in *In re Lionel Corp.*, 722 F.2d 1063 (2d Cir. 1983), was the first circuit to address the tension between a debtor's ability to sell substantially all of its assets under section 363 and the due process protections provided by the chapter 11 confirmation process. The *Lionel* court acknowledged that, although section 363(b) does not necessarily require an "emergency," "perishability" or a showing of "cause" as a predicate for an asset sale, it does "require[] notice and a hearing"—and, most importantly, "Chapter 11's safeguards" must not be "swallow[ed] up[.]" *Id.* at 1069. Accordingly, the test adopted by the Second Circuit (and applied in this case) is that section 363 sales of all or substantially all of a debtor's assets must be supported by a "good business reason." *Id.* at 1071; *see also In re Iridium Operating LLC*, 478 F.3d 452, 466 & n.21 (2d Cir. 2007).

The potential frailty of the Second Circuit's "good business reason" test was observed by the district court in *In re WestPoint Stevens, Inc.*, 333 B.R. at 30, when it reversed the portion of a section 363 transaction purporting to allocate value between first and second lien debt. There, criticizing the bankruptcy court's application of the test, the court predicted a case like this one:

> Taken to its logical extreme, . . . [the bankruptcy court's analysis] would allow a powerful creditor and a debtor anxious to achieve some value for its favored constituencies to run roughshod over disfavored creditors' rights, so long as a section 363(b) asset sale transaction could be defended as an exercise of reasonable business judgment in the context of dire economic circumstances.

Id. at 49-50.

Nevertheless, the Fourth, Sixth, and Seventh Circuits have all largely adopted *Lionel*'s "good business reason" test. *See, e.g.*, *In re Modanlo*, 266 Fed. App'x 272, 274 (4th Cir. 2008) (affirming a bankruptcy court decision requiring a *Lionel* good business reason for a section 363(b) sale); *In re Met-L-Wood Corp.*, 861 F.2d 1012, 1017 (7th Cir. 1988) (citing the *Lionel* test); *Stephens Indus., Inc. v. McClung*, 789 F.2d 386, 390 (6th Cir. 1986) (adopting the reasoning in *Lionel*).

The Third Circuit, however, has held that when a bankruptcy court authorizes a sale of all or substantially all of the assets of a debtor under section 363(b)(1), it is required to make a finding of "good faith." *In re Abbotts Dairies of Pa., Inc.*, 788 F.2d 143, 147-50 (3d Cir. 1986). According to the *Abbotts Dairies* court, such a finding "prevents a debtor-in-possession or trustee from effectively abrogating the creditor protections of Chapter 11." *Id.* at 150 n.5. This test is in significant tension with the Second Circuit's "good business purpose" test, which by its terms does not preclude (as in this case) a sale that effectively abrogates chapter 11 plan protections.

The Fifth Circuit has adopted what is commonly known as the "*sub rosa*" plan test. In the *Braniff* case, that court held that, regardless of whether a "good business reason" exists, a purported section 363 sale of substantially all of a debtor's assets is generally prohibited as a *de facto* debt reorganization devoid of chapter 11 protections when it "attempts to specify the terms whereby a reorganization plan is to be adopted" such that "little would remain save fixed based equipment and little prospect or occasion for further reorganization." *Braniff*, 700 F.2d at 940. The Fifth Circuit determined that "[t]he 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."

Id.; *see also In re The Babcock & Wilcox Co.*, 250 F.3d 955, 960 (5th Cir. 2001) (noting that a sale cannot "change the fundamental nature of the estate's assets in such a way that limits a future reorganization plan"). The Fifth Circuit thus targets the same problems as the Third Circuit, but in terms at variance with the Third Circuit's nebulous search for "good faith."

Given these diverging tests and the vagueness of their directives, the Court should intervene to provide lower courts with more concrete guidance as to the interplay of chapter 11 plan requirements with section 363 sales. Currently, whether a transaction similar to the one proposed by Chrysler will be approved may depend largely on the jurisdiction in which the chapter 11 case is pending. Had Chrysler filed its bankruptcy case in the Fifth Circuit, the approved transaction most likely would have been denied as an attempt to complete an impermissible "*sub rosa*" reorganization—regardless of any "good business reason" for it. This unavoidable inference provides a powerful rationale for granting *certiorari*.

C. The decision below explained the increasing importance and recurrence of these issues—and the uncertainty surrounding them

In this case, the Second Circuit acknowledged the importance of the issue presented here, as well as the lack of authoritative guidance on how to address it. The court recognized that the increasing use of section 363 sales to avert the formal chapter 11 reorganization process is a serious issue of national importance. Pet.App. 16a-17a. It emphasized that section 363 sales "have become common practice in large-scale corporate bankruptcies[,]" Pet.App. 16a, and collected several scholarly articles discussing, and often criticizing, this phenomenon. Pet.App. 16a-20a.

Indeed, the court observed that "[i]n the current economic crisis of 2008-09, § 363(b) sales have become even more useful and customary." Pet.App. 17a. The court also candidly observed that "[a]s § 363(b) sales proliferate, the competing concerns [between section 363 and chapter 11] have become harder to manage." Pet.App. 20a. Continuing, the court commented that "[d]ebtors need flexibility and speed to preserve going concern value; yet one or more classes of creditors should not be able to nullify Chapter 11's requirements. A balance is not easy to achieve . . . ." Pet.App. 20a. Thus, the court acknowledged that current doctrine is jurisprudentially insufficient to address the emerging phenomenon of section 363 sales that effectively avoid the chapter 11 plan confirmation process.

Most tellingly, the Second Circuit observed that "[t]he 'side door' of § 363(b) may well 'replace the main route of chapter 11 reorganization plans.'"

Pet.App. 17a-18a (quoting Jason Brege, Note, *An Efficiency Model of Section 363(b) Sales*, 92 Va. L. Rev. 1639, 1640 (2006)). The problem is that the Bankruptcy Code provides no such "side door." Section 363 authorizes the sale of assets. It does not provide for the treatment of prepetition claims against the bankrupt entity. To hold otherwise is to undo the balance struck by the Bankruptcy Code between the competing policies of rehabilitating troubled businesses and protecting creditor rights. And the result, as shown by the circumstances of this case, is to permit the debtor and its most influential stakeholders—not the law—to dictate by private agreement which creditors get paid.

As a recent scholarly paper addressing this case put it, "Bankruptcy law . . . was largely in good shape doctrinally *before* [the Chrysler sale]." Mark J. Roe & David A. Skeel, *Assessing the Chrysler Bankruptcy*, Institute for Law & Economics, U. of Penn. Law School, Research Paper No. 09-22 at 7 (Aug. 12, 2009) (emphasis added). The Court should intercede to restore the integrity of the bankruptcy reorganization system.

II. This Case is an Excellent Vehicle for Addressing the Limits of Section 363 Sales

For several reasons, the Chrysler bankruptcy case—perhaps the most publicized and politicized bankruptcy case of all time—provides the best vehicle the Court is ever likely to see for addressing the inherent tensions between chapter 11 plan protections and section 363 sales. First, while other section 363 cases have only fostered uncertainty, the mandatory terms of the "sale" in this case—which defeated any meaningful test of whether the transaction was merely a substitute for a chapter 11 plan—provide a relatively bright line for resolution. If ever a sale crossed the line, this is it. Second, because the world is watching this case, it provides a unique opportunity to reassure capital markets of the integrity of our bankruptcy system. Third, although the sale has closed, the Indiana Pensioners would still benefit from reversal through redistribution of sales proceeds through the as-yet unresolved bankruptcy estate.

A. By failing to require a competitive auction for the "sale," the bankruptcy court exalted form over substance and tainted the validity of the transaction

It is a basic precept of bankruptcy law that "substance will not give way to form." *Pepper v. Litton*, 308 U.S. 295, 305 (1939); *see also In re SubMicron Sys. Corp.*, 432 F.3d 448, 454 (3d Cir. 2006). Bankruptcy courts consider proposed transactions based upon the true substance of the relief requested. *See Int'l Trade Admin. v. Rensselaer Polytechnic Inst.*, 936 F.2d 744, 748 (2d Cir. 1991) ("a court must look to the economic substance of the transaction and not its form") (internal quotations omitted); *see also United Airlines, Inc. v. HSBC Bank USA, N.A.*, 416 F.3d 609, 612 (7th Cir. 2005). By permitting a clever debtor to execute a "sale" using complex agreements, fictive structures, shell corporations and uncompetitive bidding rules, the courts below violated these principles and circumvented the express provisions of the Bankruptcy Code. One reason this case is well-suited for Supreme Court review is that these circumstances lend themselves to crafting useful section 363 sale rules.

1. The bankruptcy court approved, and the Second Circuit affirmed, a "sale" under section 363 that not only transferred substantially all of Chrysler's assets to a "New" Chrysler, but also dictated what creditors would receive for their claims. Under the Transaction Orders, New Chrysler paid $2 billion directly to the First Lien Lenders (approximately 29% of their first priority claims), but then also delivered over $20 billion of cash, debt and stock directly to Chrysler's other junior creditors. The Transaction Orders thus provided only a partial recovery to the First Lien Lenders, while effectively paying in full politically favored unsecured creditors. This "sale" transaction completed a restructuring of Chrysler's debt obligations that could not have been achieved through a chapter 11 plan as such a transaction would have been prevented by the creditor protections contained in sections 1122-1129 of the Bankruptcy Code.

Nonetheless, the bankruptcy court formalistically concluded that none of the transaction's proceeds were distributed outside the bankruptcy estate. In the view of the bankruptcy court, "[n]ot one penny of value of the Debtors' assets is going to anyone other than the First-Lien Lenders[,]" and the equity stakes in New Chrysler were handed out on account of new investment (Treasury) or new contracts (UAW and the VEBA) rather than prepetition claims. Pet.App. 126a n.10, 139a. To reach this conclusion, the lower courts accepted the fallacy that New Chrysler—a shell company that was created only to provide a "buyer" for the transaction—was the entity making distributions to the UAW and the VEBA using its own property.

2. Looking through form to the substance of the transaction, however, the facts do not bear out the lower courts' holdings. In addition to assuming all of Chrysler's junior unsecured trade, warranty and underfunded pension obligations following the sale, [Bankr. Docket 660, Annex 1], New Chrysler also paid the VEBA for its $10 million junior unsecured claims against Chrysler with 68% of the equity of New Chrysler and a $4.6 billion note, [Bankr. Docket 660, Ex. H, Ex. K]; JA-3651-53. Essentially, the lion's share of Chrysler's going concern value was distributed to favored junior unsecured creditors, while the First Lien Lenders received no more than what was allegedly liquidation value. Moreover, the "auction" procedures approved by the bankruptcy

court *required* that any other bid for Chrysler's assets assume, among other substantial obligations, responsibility for the UAW collective bargaining agreement and afford equity to the UAW and the VEBA. [Bankr. Docket 492, Ex. A]. Thus were the terms of the transaction rigged to protect the interests of junior creditors and to prevent any true market test of the value of the lender's Collateral.

In response to the obvious point that contracts benefiting Old Chrysler's retirees (*i.e.*, the beneficiaries of the VEBA) do not themselves add value to New Chrysler, the bankruptcy court said that these mandatory equity interests were a necessary condition to securing a skilled workforce because the UAW would not have agreed to a new collective bargaining agreement but for the equity infusion to the VEBA. Pet.App. 145a. This holding is facially at odds with the principle announced in *Norwest Bank Worthington v. Ahlers,* 485 U.S. 197, 199, 202, 204-05 (1988), that a promise to provide services in the future—sweat equity—cannot support the otherwise out-of-order recovery of junior stakeholders.

This use of section 363 to protect a politically powerful ally demonstrates exactly why the transaction was not a legitimate sale of assets. It shows that the transaction was nothing more than a way for the Government to pick winners and losers from among Chrysler's claimants, as opposed to a forthright attempt to maximize asset value subject to market competition and discipline. If the VEBA note and the UAW collective bargaining agreement were actually valuable to New Chrysler as a going concern, an unrestricted auction would have yielded similar terms. But under the terms dictated by Treasury, the transaction "breached appropriate bankruptcy practice in ways that made opaque both Chrysler's value in bankruptcy and the plan's allocation to the company's pre-bankruptcy creditors." Roe & Skeel, *supra*, at 2-3; *cf. 203 North LaSalle*, 526 U.S. at 458 (leaving open, in the reorganization context, the question whether "a market test would require an opportunity to offer competing plans" or would be satisfied by a right to bid on the same terms as the tendered offer).

All we really know is that Treasury, the VEBA and the UAW—the DIP financer and its favored constituents—are junior creditors that ultimately received much more value from the deal than did the First Lien Lenders. On its face, this deal smacks of the sort of insider favoritism that the Bankruptcy Code was designed to prevent. *See, e.g.*, Roe & Skeel, *supra*, at 4 ("the Chrysler reorganization reintroduced the equity receivership's most objectionable attributes, particularly its casual regard for priority"); *see also* Pet.App. 19a-20a (recognizing the "fear that one class of creditors may strong-arm the debtor-in-possession, and bypass the requirements of Chapter 11 to cash out quickly at the expense of other stakeholders, in a proceeding that amounts to a reorganization in all but name, achieved by stealth and momentum"). The Government's stratagem in this case represents a return to the bad old days of receivership, when he who had the gold made the rules.

Hence, the transaction was a "sale" in form only. Upon consummation, New Chrysler became Old Chrysler in every important respect, including its name, headquarters, employees, products manufactured and dealer network. The real substance of the transaction is the underlying reorganization it implements. Under the transaction, undesirable assets (and associated contingent liabilities) were set aside for liquidation; a new investor contributed certain technology and other intangibles in exchange for a minority stake in the business; new arrangements were put in place for the financing of the business, including dealer and fleet purchases; old equity retained no interest, and a new board was seated. Perhaps most importantly, the exact treatment of most of the claims against the Debtors was established.

Absent the Court's intervention, section 363 will only grow as a *de facto* fast-track reorganization strategy preferred by debtors to avoid compliance with the chapter 11 plan process. Although flexibility is a hallmark of chapter 11, section 363 sales may not be used as a "side door" restructuring statute, and the Court should grant *certiorari* to settle that question.

B. Given its high profile, this case affords a unique opportunity to clarify rules necessary for the stability of capital markets

Regardless of its outcome, the Chrysler bankruptcy carries profound implications for the Nation's economy. Going forward, nearly everyone will feel the impact, from auto workers and suppliers to pensioners and bondholders to unrelated companies who hope to raise money through the sale of secured debt in the future. This is all the more true because this case is but one of the most extreme manifestations of an increasingly common occurrence—the use of a section 363 sale to bypass the chapter 11 plan confirmation process.

Already, notable economics scholars have cautioned that allowing the Government to manipulate bankruptcies the way it did here will destabilize the investment market. *See* Richard A. Epstein, *The Deadly Sins of Chrysler Bankruptcy*, Forbes.com, May 12, 2009 ("It is absolutely critical to follow these priority rules inside bankruptcy in order to allow creditors to price risk outside of bankruptcy."); Todd J. Zywicki, *Chrysler and the Rule of Law*, Wall Street Journal Online, May 13, 2009 (suggesting that Government intervention with struggling companies will only become more commonplace if the rule of law is disrupted); Mark J. Roe, *Stress-Testing Washington's Chrysler Bankruptcy Plan*, Forbes.com, May 13, 2009 ("This is not a good economic time to disrupt lending to troubled companies.").

In fact, "businesses that might have received financing before . . . now will not, since lenders face the potential of future Government confiscation. In other words, Mr. Obama may have helped save the jobs of thousands of union workers whose dues, in part, engineered his election. But what about the untold number of job losses in the future caused by trampling the sanctity of contracts today?" Zywicki, *supra*.

With these results, it is hard to imagine why other companies facing mounting debt and possible bankruptcy would not take this path, even without Government financing. *See* Roe & Skeel, *supra*, at 26 ("a coalition of creditors, managers, and (maybe) shareholders could present a § 363 'plan' to the court for approval, and the plan could squeeze out any creditor class."); *see also* Micheline Maynard, *Automakers' Swift Cases in Bankruptcy Shock Experts*, N.Y. Times, July 6, 2009 ("For businesses that follow similar legal strategies, the G.M. and Chrysler cases could pave the way for a faster trip through court."). Any struggling company could, after having made side deals with its favorite creditors or equity holders that the bankruptcy court imposes on other potential bidders, use section 363 to "sell" its valuable assets to a shell company at a deflated price, and in so doing eliminate all of its other debt obligations.

Delphi has already threatened to use section 363 as a substitute for a reorganization plan. *See* Jewel Gopwani, *Creditors reject Delphi bankruptcy plan*, Detroit Free Press, July 20, 2009 (stating that if the creditors rejected its reorganization plan, Delphi would pursue the same result through a section 363 sale). Scholars have documented other interests in the Chrysler section 363 model as well. *See* Roe & Skeel, *supra*, at 3. If it catches on, this chapter 11 end-around could do real harm: "[i]f [the Chrysler sale] becomes the pattern, *Chrysler* could displace the traditional chapter 11 process, potentially affecting lending markets and vulnerable nonfinancial creditors adversely." *Id.* Such potentially broad national ramifications underscore the need for review.

The high profile of this case and the extremes to which the courts below went to bless the Chrysler sale have shone a light on issues critical to many bankruptcy cases and the capital markets. There can be little doubt that these issues demand the Court's attention. There will be no better chance to address them than this, the case that most profoundly presents them; and there will be no better time to review them than now, when the urgency of an impending sale has passed and there is time for cool reflection about the implications of what has transpired.

C. Although the Chrysler sale has closed, the Indiana Pensioners may yet recover in the bankruptcy case without affecting the validity of the sale to New Chrysler

As noted, the transaction has closed, and the Indiana Pensioners are aware that section 363(m) provides that "[t]he reversal or modification on appeal of an authorization under [section 363] of a sale . . . of property does not affect the validity of a sale, unless . . . such sale . . . were stayed pending appeal." 11 U.S.C. § 363(m).

The Indiana Pensioners, however, do not seek to unwind that sale by this appeal, and section 363(m), by its express terms, contemplates that a sale order can be reversed—even where a sale has been consummated—so long as "a remedy can be fashioned that will not affect the validity of the sale." *Krebs Chrysler-Plymouth, Inc. v. Valley Motors, Inc.*, 141 F.3d 490, 499 (3d Cir. 1998). Indeed, the Tenth Circuit has also held that, although section 363(m) "protects the validity of certain sales . . . from the potential consequences of an appeal, . . . where state law or the Bankruptcy Code provides remedies that do not affect the validity of the sale, § 363(m) does not moot the appeal." *In re Osborn*, 24 F.3d 1199, 1203-04 (10th Cir. 1994) (citations omitted) (imposing a constructive trust on sale proceeds would not "affect the validity" of the sale).

The Second Circuit itself has observed that it is not "clear why an appellate court, considering an appeal from an unstayed but unwarranted order of sale to a good faith purchaser, could not order some form of relief other than invalidation of the sale." *In re Gucci*, 105 F.3d 837, 840 n.1 (2d Cir. 1997) (citing *In re Lloyd*, 37 F.3d 271, 273 (7th Cir. 1994)*; see also In re Enron Corp.*, 291 B.R. 39, 41, 43 (S.D.N.Y. 2003) (holding that "inherent in the fact that § 363(m) provides only that the *validity* of an unstayed sale cannot be disturbed on appeal is the corollary that other relief may be available," and that the "redistribution sought by appellants does not require invalidation of the sale or prejudice to the buyer," and vacating and remanding for further proceedings) (emphasis in original).

Such is the case here, where the Indiana Pensioners seek reversal of the Transaction Orders only to the extent that the distribution of proceeds was inequitable. The effect of those unwarranted orders could be remedied without disturbing the validity of the sale to New Chrysler, for example, by compelling the VEBA and the UAW to return to the bankruptcy estate the $4.6 billion note and common stock that they received under the transaction to be properly distributed pursuant to a chapter 11 plan of reorganization.

Accordingly, this case, with all the issues that it crystallizes and all the attention it commands, remains vital to the parties concerned. It is therefore an appropriate—if not ideal—vehicle for addressing the limits of section 363 sales.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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Dated: September 3, 2009

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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09-2311-bk
In Re: Chrysler LLC et al.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 2008

(Argued: June 5, 2009 Decided: June 5, 2009
Opinion filed: August 5, 2009)

Docket No. 09-2311-bk

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IN RE CHRYSLER LLC,

Debtor.

- - - - - - - - - - - - - - - - - - - -x

INDIANA STATE POLICE PENSION TRUST, INDIANA STATE TEACHERS RETIREMENT FUND, and INDIANA MAJOR MOVES CONSTRUCTION FUND,

Objectors-Appellants,

THE AD HOC COMMITTEE OF CONSUMER-VICTIMS OF CHRYSLER LLC, Objector-Apellant,

WILLIAM LOVITZ, FARBOD NOURIAN, BRIAN CATALON, CENTER FOR AUTO SAFETY, CONSUMER ACTION, CONSUMERS FOR AUTO RELIABILITY AND SAFETY, NATIONAL ASSOCIATION OF CONSUMER ADVOCATES, and PUBLIC CITIZEN,

Objectors-Appellants,

PATRICIA PASCALE,

Objector-Appellant,

- v.-

CHRYSLER LLC, aka Chryser Aspen, aka Chrysler Town & Country, aka Chrysler 300, aka Chrysler Sebring, aka Chrysler PT Cruiser, aka Dodge, aka Dodge Avenger, aka Dodge Caliber, aka Dodge Challenger, aka Dodge Dakota, aka Dodge Durango, aka Dodge Grand Caravan, aka Dodge Journey, aka Dodge Nitro, aka Dodge Ram, aka Dodge Sprinter, aka Dodge Viper, aka Jeep, aka Jeep Commander, aka Jeep Compass, aka Jeep Grand Cherokee, aka Jeep Liberty, aka Jeep Patriot, aka Jeep Wrangler, aka Moper, aka Plymouth, aka Dodge Charger

Debtors-Appellees,

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE, AND

AGRICULTURAL IMPLEMENT WORKERS
UNION OF AMERICA, AFL-CIO ("UAW"),

Appellee,

FIAT S.P.A. and NEW CARCO ACQUISITION LLC,

Appellees,

CHRYSLER FINANCIAL SERVICES AMERICAS LLC,

Appellee,

THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS,

Appellee,

UNITED STATES OF AMERICA,

Appellee,

EXPORT DEVELOPMENT CANADA

Appellee.*
- -x

* The Clerk of the Court is directed to amend the official caption as set forth above.

Before: JACOBS, Chief Judge, KEARSE and SACK, Circuit Judges.

Appeals from an order entered in the United States Bankruptcy Court for the Southern District of New York (Gonzalez, J.) dated June 1, 2009, authorizing the sale of substantially all of debtor Chrysler LLC's assets to New CarCo Acquisition LLC. On June 2, 2009 we granted a motion for a stay and for expedited appeal directly to this Court, pursuant to 28 U.S.C. § 158(d)(2). On June 5, 2009, we heard oral argument, and ruled from the bench and by written order. We affirmed the June 1, 2009 order "for the reasons stated in the opinions of Bankruptcy Judge Gonzalez," stating that an opinion or opinions would follow. We now issue this opinion to further explain our affirmance.
AFFIRMED.

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Amici Curiae Oppenheimer Senior
Floating Rate Fund and
Oppenheimer Master Loan
Fund, LLC

DENNIS JACOBS, Chief Judge:

The Indiana State Police Pension Trust, the Indiana State Teachers Retirement Fund, and the Indiana Major Moves Construction Fund (collectively, the "Indiana Pensioners" or "Pensioners"), along with various tort claimants and others, appeal from an order entered in the United States Bankruptcy Court for the Southern District of New York, Arthur J. Gonzalez, Bankruptcy Judge, dated June 1, 2009 (the "Sale Order"), authorizing the sale of substantially all of the debtor's assets to New CarCo Acquisition LLC ("New Chrysler"). On June 2, 2009 we granted the Indiana Pensioners' motion for a stay and for expedited appeal directly to this Court, pursuant to 28 U.S.C. § 158(d)(2). On June 5, 2009 we heard oral argument, and ruled from the bench and by written order, affirming the Sale Order "for the reasons stated in the opinions of Bankruptcy Judge Gonzalez," stating that an opinion or opinions would follow. This is the opinion.

In a nutshell, Chrysler LLC and its related companies (hereinafter "Chrysler" or "debtor" or "Old Chrysler") filed a pre-packaged bankruptcy petition under Chapter 11 on April 30, 2009. The filing followed months in which Chrysler experienced deepening losses, received billions in bailout funds from the Federal Government, searched for a merger partner, unsuccessfully sought additional government bailout funds for a stand-alone restructuring, and ultimately settled on an asset-sale transaction pursuant to 11 U.S.C. § 363 (the "Sale"), which was approved by the Sale Order. The key elements of the Sale were set forth in a Master Transaction Agreement dated as of April 30, 2009: substantially all of Chrysler's operating assets (including manufacturing plants, brand names, certain dealer and supplier relationships, and much else) would be transferred to New Chrysler in exchange for New Chrysler's assumption of certain liabilities and $2 billion in cash. Fiat S.p.A agreed to provide New Chrysler with certain fuel-efficient vehicle platforms, access to its worldwide distribution system, and new management that is experienced in turning around a failing auto company. Financing for the sale transaction–-$6 billion in senior secured financing, and debtor-in-possession financing for 60 days in the amount of $4.96 billion--would come from the United States Treasury and from Export Development Canada. The agreement describing the United States Treasury's commitment does not specify the source of the funds, but it is undisputed that prior funding came from the Troubled Asset Relief Program ("TARP"), 12 U.S.C. § 5211(a)(1), and that the parties expected the Sale to be financed through the use of TARP funds. Ownership of New Chrysler was to be distributed by membership interests, 55% of which go to an employee benefit entity created by the United Auto Workers union, 8% to the United States Treasury and 2% to Export Development

Canada. Fiat, for its contributions, would immediately own 20% of the equity with rights to acquire more (up to 51%), contingent on payment in full of the debts owed to the United States Treasury and Export Development Canada.

At a hearing on May 5, 2009, the bankruptcy court approved the debtor's proposed bidding procedures. No other bids were forthcoming. From May 27 to May 29, the bankruptcy court held hearings on whether to approve the Sale.[1] Upon extensive findings of fact and conclusions of law, the bankruptcy court approved the Sale by order dated June 1, 2009.

After briefing and oral argument, we affirmed the bankruptcy court's order on June 5, but we entered a short stay pending Supreme Court review. The Supreme Court, after an extension of the stay, declined a further extension. The Sale closed on June 10, 2009.

The factual and procedural background is set out in useful detail in the opinions of Bankruptcy Judge Gonzalez. This opinion is confined to a discussion of the arguments made for vacatur or reversal. The Sale Order is challenged essentially on four grounds. First, it is contended that the sale of Chrysler's auto-manufacturing assets, considered together with the associated intellectual property and (selected) dealership contractual rights, so closely approximates a final plan of reorganization that it

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[1] Twelve witnesses testified (either live or through positions), and 48 exhibits were introduced.

constitutes an impermissible "*sub rosa* plan," and therefore cannot be accomplished under § 363(b). We consider this question first, because a determination adverse to Chrysler would have required reversal. Second, we consider the argument by the Indiana Pensioners that the Sale impermissibly subordinates their interests as secured lenders and allows assets on which they have a lien to pass free of liens to other creditors and parties, in violation of § 363(f). We reject this argument on the ground that the secured lenders have consented to the Sale, as per § 363(f)(2). Third, the Indiana Pensioners challenge the constitutionality of the use of TARP funds to finance the Sale on a number of grounds, chiefly that the Secretary of the Treasury is using funds appropriated for relief of "financial institutions" to effect a bailout of an auto- manufacturer, and that this causes a constitutional injury to the Indiana Pensioners because the loss of their priorities in bankruptcy amounts to an economic injury that was caused or underwritten by TARP money. We conclude that the Indiana Pensioners lack standing to raise this challenge. Finally, we consider and reject the arguments advanced by present and future tort claimants.

DISCUSSION

We review a bankruptcy court's conclusions of law *de novo*, and its findings of fact under the clearly erroneous standard. See Babitt v. Vebeliunas (In re Vebeliunas), 332 F.3d 85, 90 (2d Cir. 2003).

I

The Indiana Pensioners characterize the Sale as an impermissible, *sub rosa* plan of reorganization. See Pension Benefit Guar. Corp. v. Braniff Airways, Inc. (In re Braniff Airways, Inc.), 700 F.2d 935, 940 (5th Cir. 1983) (denying approval of an asset sale because the debtor "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"). As the Indiana Pensioners characterize it, the Sale transaction "is a 'Sale' in name only; upon consummation, new Chrysler will be old Chrysler in essentially every respect. It will be called 'Chrysler.' . . . Its employees, including most management, will be retained. . . . It will manufacture and sell Chrysler and Dodge cars and minivans, Jeeps and Dodge Trucks. . . . The real substance of the transaction is the underlying reorganization it implements." Indiana Pensioners' Br. at 46 (citation omitted).

Section 363(b) of the Bankruptcy Code authorizes a Chapter 11 debtor-in-possession to use, sell, or lease estate property outside the ordinary course of business, requiring in most circumstances only that a movant provide notice and a hearing. 11 U.S.C. § 363(b).[2] We have identified an "apparent conflict" between the expedient of a § 363(b) sale and the otherwise applicable features and safeguards of

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[2] The section provides: "The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate . . . ." 11 U.S.C. § 363(b)(1).

Chapter 11.[3] Comm. of Equity Sec. Holders v. Lionel Corp. (In re Lionel Corp.), 722 F.2d 1063, 1071 (2d Cir. 1983); cf. Braniff, 700 F.2d at 940.

In Lionel, we consulted the history and purpose of § 363(b) to situate § 363(b) transactions within the overall structure of Chapter 11. The origin of § 363(b) is the Bankruptcy Act of 1867, which permitted a sale of a debtor's assets when the estate or any part thereof was "of a perishable nature or liable to deteriorate in value." Lionel, 722 F.2d at 1066 (citing Section 25 of the Bankruptcy Act of 1867, Act of March 2, 1867, 14 Stat. 517) (emphasis omitted). Typically, courts have approved § 363(b) sales to preserve "'wasting asset[s].'" Id. at 1068 (quoting Mintzer v. Joseph (In re Sire Plan, Inc.), 332 F.2d 497, 499 (2d Cir. 1964)). Most early transactions concerned perishable commodities; but the same practical necessity has been recognized in contexts other than fruits and vegetables. "[T]here are times when it is more advantageous for the debtor to begin to sell as many assets as quickly as possible in order to insure that the assets do not lose value." Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc., 128 S. Ct. 2326, 2342 (2008) (Breyer, J., dissenting) (internal quotation marks omitted); see also In re Pedlow, 209 F. 841, 842 (2d Cir. 1913) (upholding sale of a bankrupt's stock of handkerchiefs because the sale price was above the appraised value and "Christmas sales had

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[3] Section 363(b) may apply to cases arising under Chapters 7, 11, 12, and 13 of the Bankruptcy Code. In this case, as in Lionel, we consider only its applicability in the context of Chapter 11 cases.

commenced and . . . the sale of handkerchiefs depreciates greatly after the holidays"). Thus, an automobile manufacturing business can be within the ambit of the "melting ice cube" theory of § 363(b). As Lionel recognized, the text of § 363(b) requires no "emergency" to justify approval. Lionel, 722 F.2d at 1069. For example, if "a good business opportunity [is] presently available," id., which might soon disappear, quick action may be justified in order to increase (or maintain) the value of an asset to the estate, by means of a lease or sale of the assets. Accordingly, Lionel "reject[ed] the requirement that only an emergency permits the use of § 363(b)." Id. "[I]f a bankruptcy judge is to administer a business reorganization successfully under the Code, then . . . some play for the operation of both § 363(b) and Chapter 11 must be allowed for." Id. at 1071.

At the same time, Lionel "reject[ed] the view that § 363(b) grants the bankruptcy judge *carte blanche*." Id. at 1069.[4] The concern was that a quick, plenary sale of assets outside the ordinary course of business risked circumventing key features of the Chapter 11 process, which afford debt and equity holders the opportunity to vote on a proposed plan of reorganization after receiving meaningful information. See id. at 1069-70. Pushed by a bullying creditor, a § 363(b) sale might evade such requirements as disclosure, solicitation, acceptance, and confirmation of a plan. See 11 U.S.C. §§ 1122-29. "[T]he natural tendency of a debtor in distress," as a

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[4] If unfettered use of § 363(b) had been intended, there would have been no need for the requirement of notice and hearing prior to approval.

Senate Judiciary Committee Report observed, is "to pacify large creditors with whom the debtor would expect to do business, at the expense of small and scattered public investors." Lionel, 722 F.2d at 1070 (quoting S. Rep. No. 95-989, 2d Sess., at 10 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 5787, 5796 (internal quotation marks omitted)).

To balance the competing concerns of efficiency against the safeguards of the Chapter 11 process, Lionel required a "good business reason" for a § 363(b) transaction[5]:

> [A bankruptcy judge] should consider all salient factors pertaining to the proceeding and, accordingly, act to further the diverse interests of the debtor, creditors and equity holders, alike. [A bankruptcy judge] might, for example, look to such relevant factors as the proportionate value of the asset to the estate as a whole, the amount of elapsed time since the filing, the likelihood that a plan of reorganization will be proposed and confirmed in the near future, the effect of the proposed disposition on future plans of reorganization, the proceeds to be obtained from the disposition vis-a-vis any

[5] The Lionel standard has subsequently been adopted in sister Circuits. See, e.g., Stephens Indus. v. McClung, 789 F.2d 386, 389-90 (6th Cir. 1986); Inst. Creditors of Continental Air Lines, Inc. v. Continental Air Lines, Inc. (In re Continental Air Lines, Inc.), 780 F.2d 1223, 1226 (5th Cir. 1986).

> appraisals of the property, which of the alternatives of use, sale or lease the proposal envisions and, most importantly perhaps, whether the asset is increasing or decreasing in value. This list is not intended to be exclusive, but merely to provide guidance to the bankruptcy judge.

722 F.2d at 1071.

After weighing these considerations, the Court in Lionel reversed a bankruptcy court's approval of the sale of Lionel Corporation's equity stake in another corporation, Dale Electronics, Inc. ("Dale"). The Court relied heavily on testimony from Lionel's Chief Executive Officer, who conceded that it was "only at the insistence of the Creditors' Committee that Dale stock was being sold and that Lionel 'would very much like to retain its interest in Dale,'" id. at 1072, as well as on a financial expert's acknowledgment that the value of the Dale stock was not decreasing, see id. at 1071-72. Since the Dale stock was not a wasting asset, and the proffered justification for selling the stock was the desire of creditors, no sufficient business reasons existed for approving the sale.

In the twenty-five years since Lionel, § 363(b) asset sales have become common practice in large-scale corporate bankruptcies. See, e.g., Robert E. Steinberg, *The Seven Deadly Sins in § 363 Sales*, Am. Bankr. Inst. J., June 2005, at 22, 22 ("Asset sales under § 363 of the Bankruptcy Code have become the preferred method of monetizing the assets of a debtor company."); 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, 194-96 (2004). A law review article recounts the phenomenon:

> Corporate reorganizations have all but disappeared. . . . TWA filed only to consummate the sale of its planes and landing gates to American Airlines. Enron's principal assets, including its trading operation and its most valuable pipelines, were sold within a few months of its bankruptcy petition. Within weeks of filing for Chapter 11, Budget sold most of its assets to the parent company of Avis. Similarly, Polaroid entered Chapter 11 and sold most of its assets to the private equity group at BankOne. Even when a large firm uses Chapter 11 as something other than a convenient auction block, its principal lenders are usually already in control and Chapter 11 merely puts in place a preexisting deal.

Douglas G. Baird & Robert K. Rasmussen, *The End of Bankruptcy*, 55 Stan. L. Rev. 751, 751-52 (2002) (internal footnotes omitted). In the current economic crisis of 2008- 09, § 363(b) sales have become even more useful and customary.[6] The "side

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[6] For instance, Lehman Brothers sold substantially all its assets to Barclays Capital within five days of filing for bankruptcy. Lehman Brothers filed for bankruptcy in the early morning hours of September 15, 2008. On

door" of § 363(b) may well "replace the main route of Chapter 11 reorganization plans." Jason Brege, Note, *An Efficiency Model of Section 363(b) Sales*, 92 Va. L. Rev. 1639, 1640 (2006).

Resort to § 363(b) has been driven by efficiency, from the perspectives of sellers and buyers alike. The speed of the process can maximize asset value by sale of the debtor's business as a going concern. Moreover, the assets are typically burnished (or "cleansed") because (with certain limited exceptions) they are sold free and clear of liens, claims and liabilities. See infra (discussing § 363(f) and tort issues). A § 363 sale can often yield the highest price for the assets because the buyer can select the liabilities it will assume and purchase a business with cash flow (or the near prospect of it). Often, a secured creditor can "credit bid," or take an ownership interest in the company by bidding a reduction in the debt the company owes. See 11 U.S.C. § 363(k) (allowing a secured creditor to credit bid at a § 363(b) sale).

This tendency has its critics. See, e.g., James H.M. Sprayregen et al., *Chapter 11: Not Perfect, but Better than the Alternative*, Am. Bankr. Inst. J., Oct.

September 20, 2008, the bankruptcy court approved the sale to Barclays of Lehman's investment banking and capital markets operations, as well as supporting infrastructure including the Lehman headquarters in midtown Manhattan for $1.7 billion. See Bay Harbour Mgmt., L.C. v. Lehman Bros. Holdings Inc. (In re Lehman Bros. Holdings Inc.), No. 08-cv-8869(DLC), 2009 WL 667301, at *8 (S.D.N.Y. Mar. 13, 2009) (affirming the § 363(b) sale order).

2005, at 1, 60 (referencing those who "decr[y] the increasing frequency and rise in importance of § 363 sales"). The objections are not to the quantity or percentage of assets being sold: it has long been understood (by the drafters of the Code,[7] and the Supreme Court[8]) that § 363(b) sales may encompass all or substantially all of a debtor's assets. Rather, the thrust of criticism remains what it was in Lionel: fear that one class of creditors may strong-arm the debtor-in-possession, and bypass the requirements of

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[7] As stated in Lionel, "[t]he Commission on the Bankruptcy Laws of the United States submitted a draft provision that would have permitted resort to section 363(b) in the absence of an emergency, even in the case of 'all or substantially all the property of the estate.' See Report of the Commission on the Bankruptcy Laws of the United States, H.R. Doc. No. 93-137, 93rd Cong., 1st Sess. (1973) at 239 (proposed § 7-205 and accompanying explanatory note). Congress eventually deleted this provision without explanation . . . ." Lionel, 722 F.2d at 1069-70 n.3.

[8] The Supreme Court has noted that § 363(b) is sometimes used to sell all or substantially all of a debtor's assets. In a footnote in Florida Department of Revenue v. Piccadilly Cafeterias, the Court wrote:

> Chapter 11 bankruptcy proceedings ordinarily culminate in the confirmation of a reorganization plan. But in some cases, as here, a debtor sells all or substantially all its assets under § 363(b)(1) (2000 ed., Supp. V) before seeking or receiving plan confirmation. In this scenario, the debtor typically submits for confirmation a plan of liquidation (rather than a traditional plan of reorganization) providing for the distribution of the proceeds resulting from the sale. 128 S. Ct. at 2330 n.2.

Chapter 11 to cash out quickly at the expense of other stakeholders, in a proceeding that amounts to a reorganization in all but name, achieved by stealth and momentum. See, e.g., Motorola, Inc. v. Official Comm. of Unsecured Creditors and J.P. Morgan Chase Bank, N.A. (In re Iridium Operating LLC), 478 F.3d 452, 466 (2d Cir. 2007) ("The reason *sub rosa* plans are prohibited is based on a fear that a debtor-in-possession will enter into transactions that will, in effect, short circuit the requirements of Chapter 11 for confirmation of a reorganization plan." (internal quotation marks and alteration omitted)); Brege, *An Efficiency Model of Section 363(b) Sales*, 92 Va. L. Rev. at 1643 ("The cynical perspective is that [§ 363(b)] serves as a loophole to the otherwise tightly arranged and efficient Chapter 11, through which agents of the debtor-in-possession can shirk responsibility and improperly dispose of assets."); see also Steinberg, *The Seven Deadly Sins in § 363 Sales*, Am. Bankr. Inst. J., at 22 ("Frequently, . . . the § 363 sale process fails to maximize value . . . .").

As § 363(b) sales proliferate, the competing concerns identified in Lionel have become harder to manage. Debtors need flexibility and speed to preserve going concern value; yet one or more classes of creditors should not be able to nullify Chapter 11's requirements. A balance is not easy to achieve, and is not aided by rigid rules and prescriptions. Lionel's multi-factor analysis remains the proper, most comprehensive framework for judging the validity of § 363(b) transactions.

Adopting the Fifth Circuit's wording in Braniff, 700 F.2d at 940, commentators and courts--including ours --have sometimes referred to improper § 363(b) transactions as "*sub rosa* plans of reorganization." See, e.g., In re Iridium, 478 F.3d at 466 ("The trustee is prohibited from such use, sale or lease if it would amount to a *sub rosa* plan of reorganization."). Braniff rejected a proposed transfer agreement in large part because the terms of the agreement specifically attempted to "dictat[e] some of the terms of any future reorganization plan. The [subsequent] reorganization plan would have to allocate the [proceeds of the sale] according to the terms of the [transfer] agreement or forfeit a valuable asset." 700 F.2d at 940. As the Fifth Circuit concluded, "[t]he 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." Id.

The term "*sub rosa*" is something of a misnomer. It bespeaks a covert or secret activity, whereas secrecy has nothing to do with a § 363 transaction. Transactions blessed by the bankruptcy courts are openly presented, considered, approved, and implemented. Braniff seems to have used "*sub rosa*" to describe transactions that treat the requirements of the Bankruptcy Code as something to be evaded or subverted. But even in that sense, the term is unhelpful. The sale of assets is permissible under § 363(b); and it is elementary that the more assets sold that way, the less will be left for a plan of reorganization, or for liquidation. But the size of the transaction, and the residuum of corporate assets, is, under our precedent, just one consideration for the exercise of discretion by the bankruptcy judge(s), along with an open- ended list of other salient factors. See Lionel, 722 F.2d at 1071 (a bankruptcy judge should consider "such relevant factors as the proportionate value of the asset to the estate as a whole").

Braniff's holding did not support the argument that a § 363(b) asset sale must be rejected simply because it is a sale of all or substantially all of a debtor's assets. Thus a § 363(b) sale may well be a reorganization in effect without being the kind of plan rejected in Braniff.[9] See, e.g., Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc., 128 S. Ct. at 2330 n.2. Although Lionel did not involve a contention that the proposed sale was a *sub rosa* or *de facto* reorganization, a bankruptcy court confronted with that allegation may approve or disapprove a § 363(b) transfer that is a sale of all or substantially all of a debtor's assets, using the analysis set forth in Lionel in order to determine whether there was a good business reason for the sale. See In re Iridium, 478 F.3d at 466 & n.21 ("The

[9] The transaction at hand is as good an illustration as any. "Old Chrysler" will simply transfer the $2 billion in proceeds to the first lien lenders, and then liquidate. The first lien lenders themselves will suffer a deficiency of some $4.9 billion, and everyone else will likely receive nothing from the liquidation. Thus the Sale has inevitable and enormous influence on any eventual plan of reorganization or liquidation. But it is not a "sub rosa plan" in the Braniff sense because it does not specifically "dictate," or "arrange" *ex ante*, by contract, the terms of any subsequent plan.

trustee is prohibited from such use, sale or lease if it would amount to a *sub rosa* plan of reorganization. . . . In this Circuit, the sale of an asset of the estate under § 363(b) is permissible if the 'judge determining [the] § 363(b) application expressly find[s] from the evidence presented before [him or her] at the hearing [that there is] a good business reason to grant such an application.'" (citing Lionel, 722 F.2d at 1071)).

The Indiana Pensioners argue that the Sale is a *sub rosa* plan chiefly because it gives value to unsecured creditors (*i.e.*, in the form of the ownership interest in New Chrysler provided to the union benefit funds) without paying off secured debt in full, and without complying with the procedural requirements of Chapter 11. However, Bankruptcy Judge Gonzalez demonstrated proper solicitude for the priority between creditors and deemed it essential that the Sale in no way upset that priority. The lien holders' security interests would attach to all proceeds of the Sale: "Not one penny of value of the Debtors' assets is going to anyone other than the First-Lien Lenders." Opinion Granting Debtor's Motion Seeking Authority to Sell, May 31, 2009, ("Sale Opinion") at 18. As Bankruptcy Judge Gonzalez found, all the equity stakes in New Chrysler were entirely attributable to new value—-including governmental loans, new technology, and new management--which were not assets of the debtor's estate. See, e.g., id. at 22-23.

The Indiana Pensioners' arguments boil down to the complaint that the Sale does not pass the discretionary, multifarious Lionel test. The bankruptcy court's findings constitute an adequate rebuttal. Applying the Lionel factors, Bankruptcy Judge Gonzalez found good business reasons for the Sale. The linchpin of his analysis was that the only possible alternative to the Sale was an immediate liquidation that would yield far less for the estate–-and for the objectors. The court found that, notwithstanding Chrysler's prolonged and well-publicized efforts to find a strategic partner or buyer, no other proposals were forthcoming. In the months leading up to Chrysler's bankruptcy filing, and during the bankruptcy process itself, Chrysler executives circled the globe in search of a deal. But the Fiat transaction was the *only* offer available. Sale Opinion at 6; see id. at 16–17 ("Notwithstanding the highly publicized and extensive efforts that have been expended in the last two years to seek various alliances for Chrysler, the Fiat Transaction is the only option that is currently viable. The only other alternative is the immediate liquidation of the company.").[10]

The Sale would yield $2 billion. According to expert testimony[11]–-not refuted by the objectors--an

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[10] The bankruptcy court noted that Chrysler had discussed potential alliances with General Motors, Fiat, Nissan, Hyundai-Kia, Toyota, Volkswagen, Tata Motors, GAZ Group, Magna International, Mitsubishi Motors, Honda, Beijing Automotive, Tempo International Group, Hawtai Automobiles, and Chery Automobile Co. Sale Opinion at 6.

[11] The Indiana Pensioners moved to strike the testimony of Chrysler's valuation witness because he has a financial interest in the outcome of the case: his firm would receive a transaction fee when the Sale was consummated. The

immediate liquidation of Chrysler as of May 20, 2009 would yield in the range of nothing to $800 million.[12] Id. at 19. Crucially, Fiat had conditioned its commitment on the Sale being completed by June 15, 2009. While this deadline was tight and seemingly arbitrary, there was little leverage to force an extension. To preserve resources, Chrysler factories had been shuttered, and the business was hemorrhaging cash. According to the bankruptcy court, Chrysler was losing going concern value of nearly $100 million each day. Sale Order at 7.

On this record, and in light of the arguments made by the parties, the bankruptcy court's approval of the Sale was no abuse of discretion. With its revenues sinking, its factories dark, and its massive debts growing, Chrysler fit the paradigm of the melting ice cube. Going concern value was being

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bankruptcy court denied the motion on the grounds that such arrangements are typical; that the Indiana Pensioners did not object to the retention of the witness'sfirm; and that the witness's interest goes to weight of the evidence, not admissibility. Sale Opinion at 19 n.17. The Indiana Pensioners have not persuaded us that the bankruptcy court abused its discretion. See generally Gen. Elec. Co. v. Joiner, 522 U.S. 136, 138–39, 141–43 (1997); Ball v. A.O. Smith Corp., 451 F.3d 66, 69 (2d Cir. 2006) ("We review the bankruptcy court's evidentiary decisions for abuse of discretion.").

[12] The expert's earlier estimates of liquidation value had been higher. For example, in early May 2009, the same expert opined that a liquidation might yield between nothing and $1.2 billion. But, from the beginning of May until the end, Chrysler expended $400 million in cash collateral. Sale Opinion at 19.

reduced each passing day that it produced no cars, yet was obliged to pay rents, overhead, and salaries. Consistent with an underlying purpose of the Bankruptcy Code--maximizing the value of the bankrupt estate--it was no abuse of discretion to determine that the Sale prevented further, unnecessary losses. See Toibb v. Radloff, 501 U.S. 157, 163 (1991) (Chapter 11 "embodies the general [Bankruptcy] Code policy of maximizing the value of the bankruptcy estate.").

The Indiana Pensioners exaggerate the extent to which New Chrysler will emerge from the Sale as the twin of Old Chrysler. New Chrysler may manufacture the same lines of cars but it will also make newer, smaller vehicles using Fiat technology that will become available as a result of the Sale–-moreover, at the time of the proceedings, Old Chrysler was manufacturing no cars at all. New Chrysler will be run by a new Chief Executive Officer, who has experience in turning around failing auto companies. It may retain many of the same employees, but they will be working under new union contracts that contain a six-year no-strike provision. New Chrysler will still sell cars in some of its old dealerships in the United States, but it will also have new access to Fiat dealerships in the European market. Such transformative use of old and new assets is precisely what one would expect from the § 363(b) sale of a going concern.

II

The Indiana Pensioners next challenge the Sale Order's release of all liens on Chrysler's assets. In general, under § 363(f), assets sold pursuant to § 363(b) may be sold "free and clear of any interest" in the assets when, *inter alia*, the entity holding the interest consents to the sale. 11 U.S.C. § 363(f)(2). The bankruptcy court ruled that, although the Indiana Pensioners did not themselves consent to the release, consent was validly provided by the collateral trustee, who had authority to act on behalf of all first-lien credit holders.

We agree. Through a series of agreements, the Pensioners effectively ceded to an agent the power to consent to such a sale; the agent gave consent; and the Pensioners are bound. Accordingly, questions as to the status or preference of Chrysler's secured debt are simply not presented in this case.

The first-lien holders--among them, the Indiana Pensioners--arranged their investment in Chrysler by means of three related agreements: a First Lien Credit Agreement, a Collateral Trust Agreement, and a Form of Security Agreement. Together, these agreements create a framework for the control of collateral property. The collateral is held by a designated trustee for the benefit of the various lenders (including the Indiana Pensioners). In the event of a bankruptcy, the trustee is empowered to take any action deemed necessary to protect, preserve, or realize upon the collateral. The trustee may only exercise this power at the direction of the lenders' agent; but the lenders are required to authorize the agent to act on their behalf, and any action the agent takes at the request of lenders holding a majority of Chrysler's debt is binding on all lenders, those who agree and those who do not.

When Chrysler went into bankruptcy, the trustee had power to take any action necessary to realize upon the collateral--including giving consent to the sale of the collateral free and clear of all interests under § 363. The trustee could take such action only at the direction of the lenders' agent, and the agent could only direct the trustee at the request of lenders holding a majority of Chrysler's debt. But if those conditions were met--as they were here-- then under the terms of the various agreements, the minority lenders could not object to the trustee's actions since they had given their authorization in the first place.

The Indiana Pensioners argue that, by virtue of a subclause in one of the loan agreements, Chrysler required the Pensioners' written consent before selling the collateral assets. The clause in question provides that the loan documents themselves could not be amended without the written consent of *all* lenders if the amendment would result in the release of all, or substantially all, of the collateral property. This clause is no help to the Indiana Pensioners. The § 363(b) Sale did not entail amendment of any loan document. To the contrary, the § 363(b) sale was effected by implementing the clear terms of the loan agreements--specifically, the terms by which (1) the lenders assigned an agent to act on their behalf, (2) the agent was empowered, upon request from the majority lenders, to direct the trustee to act, and (3) the trustee was empowered, at the direction of the agent, to sell the collateral in the event of a bankruptcy. Because the Sale required no amendment to the loan documents, Chrysler was not required to seek, let alone receive, the Pensioners' written consent.

Anticipating the consequence of this contractual framework, the Indiana Pensioners argue as a last resort that the majority lenders were intimidated or bullied into approving the Sale in order to preserve or enhance relations with the government, or other players in the transaction. Absent this bullying, the Pensioners suggest, the majority lenders would not have requested the agent to direct the sale of the collateral, and the Sale would not have gone through. The Pensioners argue that this renders the lenders' consent ineffective or infirm.

The record before the bankruptcy court, and the record before this Court, does not support a finding that the majority lenders were coerced into agreeing to the Sale. On the whole, the record (and findings) support the view that they acted prudently to preserve substantial value rather than risk a liquidation that might have yielded nothing at all. Moreover, it is not at all clear what impact a finding of coerced consent would have on the validity of the consent given, or whether the bankruptcy court would have jurisdiction--or occasion--to adjudicate the Indiana Pensioners' allegation. Because the facts alleged by the Indiana Pensioners are not substantiated in this record, their arguments based on those allegations provide no ground for relief in this proceeding, and we decline to consider whether the allegations might give rise to some independent cause of action.

III

The Indiana Pensioners argue that the Secretary of the Treasury ("Secretary") exceeded his statutory authority and violated the Constitution by using TARP money to finance the sale of Chrysler's assets. Pensioners raise interesting and unresolved constitutional issues concerning the scope of the Secretary's authority under TARP and the use of TARP money to bail out an automobile manufacturer. However, federal courts are constrained by our own constitutional limitations, including the non-waivable Article III requirement that we have jurisdiction over the case or controversy before us. See, e.g., United States v. Hays, 515 U.S. 737, 742 (1995); Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992); United States v. City of New York 972 F.2d 464, 469–70 (2d Cir. 1992). We do not decide whether the Secretary's actions were constitutional or permitted by statute, because we conclude that the Indiana Pensioners lack standing to raise the TARP issue, and that we lack jurisdiction in this case to entertain that challenge.

Congress enacted the Emergency Economic Stabilization Act ("EESA") on October 3, 2008 in order "to immediately provide authority and facilities that the Secretary of the Treasury can use to restore liquidity and stability to the financial system of the Unites States . . . ." 12 U.S.C. § 5201(1). Title I of EESA authorizes the Treasury Secretary "to establish the Troubled Asset Relief Program (or 'TARP') to purchase, and to make and fund commitments to purchase, troubled assets from any financial institution, on such terms and conditions as are determined by the Secretary." Id. § 5211(a)(1). Financial institutions include, but are not limited to, "any bank, savings association, credit union, security broker or dealer, or insurance company." Id. § 5202(5).

The statute details procedures for judicial review of the Secretary's decisions, limitations on available relief for TARP violations, and a host of legislative oversight mechanisms. See, e.g., id. §§ 5214–15, 5229(a), 5233. For example, courts review the Secretary's TARP decisions in accordance with standards set forth in the Administrative Procedure Act, 5 U.S.C. § 701 et. seq., and the Secretary's actions "shall be held unlawful and set aside if found to be arbitrary, capricious, an abuse of discretion, or not in accordance with law." 12 U.S.C. § 5229(a)(1). Injunctions are available only to remedy constitutional violations and must be "considered and granted or denied by the court on an expedited basis," id. § 5229(a)(2)(A),(C),(D); likewise, requests for temporary restraining orders must be considered and decided by the court "within 3 days of the date of the request," id. § 5229(a)(2)(B). As for legislative oversight, the statute calls for (among other things) the creation of the Financial Stability Oversight Board, which reviews the exercise of the Secretary's authority (§ 5214), the submission of periodic reports from the Secretary to Congress (§ 5215), the creation of a Congressional Oversight Panel to provide periodic updates to Congress (§ 5233), and the appointment of a special TARP Inspector General (§ 5214(a)(3)). In short, the statute provides swift, narrow, and deferential judicial review of the Secretary's TARP decisions, limits judicial relief, and relies instead on multi-faceted legislative oversight.

The Indiana Pensioners contend that the Secretary exceeded his statutory authority and violated the Constitution by using TARP money to fund the Sale because, *inter alia*: auto companies are not "financial institutions" under TARP; TARP does not authorize the Secretary to arrange and finance the reorganization of a private company; and the Sale effects an unconstitutional taking. In sum, they contend that the Secretary--and by extension, the Executive branch--violated the Constitution by dispensing federal money in excess of the statutory authority awarded by Congress under TARP.[13]

It is clear that TARP gives the Secretary broad discretion to apply financial aid when and where he decides it will best promote the stated goal of restoring stability to the financial markets. But, as detailed above, TARP also contains explicit limitations on the Secretary's authority, and provides for review and oversight, so that TARP is not all-purpose. At oral argument, the government suggested that any industry so "inter-related" with banks that its dealings could adversely impact the national banking system is, for TARP purposes, a financial institution.[14] This is surely an expansive

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[13] See, e.g., Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 562, 585 (1952) (Executive power "must stem either from an act of Congress or from the Constitution itself.").

[14] The government asserted at oral argument that:

> [T]he Secretary of the Treasury, in determining what is a financial institution, looks at the interrelatedness [of the company and its financing arm]
>
> . . . . .

definition of "financial institution," albeit broadly protective of the nation's financial structures and arguably related to TARP's mandate of "restor[ing] liquidity and stability" to our markets. The scope of TARP is a consequential and vexed issue that may inevitably require resolution in some later case; but this Court lacks power to resolve it in the present dispute.

Article III of the Constitution limits the judicial power of the United States to the resolution of "cases" and "controversies." U.S. Const. art. III, § 2. This limitation is effectuated in part through the requirement of standing. See Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc., 454 U.S. 464, 471- 72 (1982). The doctrine of standing separates "those disputes which are appropriately resolved through the judicial process," Whitmore v. Arkansas, 495 U.S. 149, 155 (1990), from those "generalized grievances" which are reserved for other branches of government, Valley Forge, 454 U.S. at 475 (internal quotation marks omitted). The requirement of standing would be unnecessary if the "federal courts [were] merely publicly funded forums for the ventilation of public

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> Chrysler Financial can't survive without Chrysler. . . . Without [Chrysler], the financial institution goes down. . . . [Chrysler Financial] is the financial institution and the relationship [with Chrysler is the one] that the Secretary of the Treasury based his determination on, and that determination is entitled to deference by this court under administrative law principles.

Transcript of Oral Argument at 52.

grievances or the refinement of jurisprudential understanding." Id. at 473.

At an "irreducible constitutional minimum," Article III standing requires that: (1) the plaintiff suffer an injury in fact; (2) the injury be fairly traceable to the challenged conduct; and (3) the injury will likely be redressed by a favorable decision from the court. Lujan, 504 U.S. at 560-61. "The party invoking federal jurisdiction bears the burden of establishing these elements." Id. at 561. We conclude that the Indiana Pensioners lack standing because they cannot demonstrate they have suffered an injury in fact.

An injury in fact is "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) 'actual or imminent, not conjectural or hypothetical.'" Lujan, 504 U.S. at 560 (internal citations, quotation marks and footnote omitted). The Indiana Pensioners contend primarily that their injury in fact arises from the release of the collateral supporting their secured loans. But that collateral was released in exchange for a $2 billion cash payment and a residual deficiency claim. At oral argument, the Pensioners touted the value of the collateral at "around $25 billion" and complained that the value received pursuant to the Sale was a tithe of the actual asset value and an inadequate return on their investment. However, the Indiana Pensioners' argument ignores the bankruptcy court's *finding* that, in the absence of another buyer, the only viable alternative--liquidation-- would yield an even *lower* return than the one achieved through the sale funded by TARP money. Judge Gonzales found, as a fact, that the liquidation value of the collateral "was no greater than $2 billion, i.e., the same amount the first lien secured lenders are receiving under the transaction." Opinion and Order Regarding Emergency Economic Stabilization Act of 2008 and Troubled Asset Relief Program, May 31, 2009, at 5. Since "the Indiana [Pensioners] will receive [their] pro-rata distribution of the value of the collateral," they simply "cannot allege injury in fact." Id. The release of collateral for fair (but less-than-hoped-for) value is not injury in fact sufficient to support standing.

Furthermore, even if the Indiana Pensioners could demonstrate injury in fact, there would still be a question as to whether they have standing to challenge the use of TARP funds here. Under the terms of the various agreements (as outlined in Section II), the lenders had authorized the trustee to consent to the Sale on their behalf. Under those circumstances (and well-established agency principles), such consent may bar the Pensioners from challenging the trustee's actions and litigating a claim that would in effect bind all of the first-lien creditors.

IV

Finally, several objectors appeal from that portion of the Sale Order extinguishing all existing and future claims against New Chrysler, that "(a) arose prior to the Closing Date, (b) relate[] to the production of vehicles prior to the Closing Date or (c) otherwise [are] assertable against the Debtors or [are] related to the Purchased Assets prior to the closing date." Sale Order at 40. The objectors can be divided into three groups: (1) plaintiffs with existing product liability claims against Chrysler; (2) plaintiffs with existing asbestos-related claims against Chrysler; and (3) lawyers undertaking to act on behalf of claimants who, although presently unknown and unidentified, might have claims in the future arising from Old Chrysler's production of vehicles. We consider each group's arguments in turn.

A. Existing Product Liability Claims

The Ad Hoc Committee of Consumer-Victims of Chrysler LLC and William Lovitz et al. challenge the foreclosing of New Chrysler's liability for product defects in vehicles produced by Old Chrysler.[15] Section 363(f) provides, in relevant part, that a "trustee may sell property . . . free and clear of *any interest in such property*," under certain circumstances. 11 U.S.C. § 363(f) (emphasis added). The objectors argue that personal injury claims are not "interests in property," and that the district court's reliance on In re Trans World Airlines, Inc., 322 F.3d 283 (3d Cir. 2003) ("TWA"), which advances a broad reading of "interests in property," was misplaced.

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[15] The Sale Order does not limit the right of tort plaintiffs to pursue existing claims against Old Chrysler. However, it is undisputed that little or no money will be available for damages even if suits against Old Chrysler succeed.

We have never addressed the scope of the language "any interest in such property," and the statute does not define the term. See, e.g., Precision Indus., Inc. v. Qualitech Steel SBQ, LLC, 327 F.3d 537, 545 (7th Cir. 2003) ("The Bankruptcy Code does not define 'any interest,' and in the course of applying section 363(f) to a wide variety of rights and obligations related to estate property, courts have been unable to formulate a precise definition.").

In TWA, the Third Circuit considered whether (1) employment discrimination claims and (2) a voucher program awarded to flight attendants in settlement of a class action constituted "interests" in property for purposes of § 363(f). See 322 F.3d at 285. The Third Circuit began its analysis by noting that bankruptcy courts around the country have disagreed about whether "any interest" should be defined broadly or narrowly.[16] Id. at 288-89. The

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[16] For examples of bankruptcy courts' divergent rulings on this issue, compare, e.g., P.K.R. Convalescent Ctrs., Inc. v. Commonwealth of Va., Dept. of Med. Assistance Serv. (In re P.K.R. Convalescent Ctrs., Inc.), 189 B.R. 90, 94 (Bankr. E.D. Va. 1995) (holding that Virginia's depreciation-recoupment interest in the debtor's property was an "interest in property," even though the interest was not a lien), and Am. Living Sys. v. Bonapfel (In re All Am. of Ashburn, Inc.), 56 B.R. 186, 189-90 (Bankr. N.D. Ga. 1986) (holding that § 363(f) permitted the sale of assets free and clear and precluded successor liability in product liability suit against purchaser for cause of action that arose prior to date of sale), with Schwinn Cycling and Fitness, Inc. v. Benonis (In re Schwinn Bicycle Co.), 210 B.R. 747, 761 (Bankr. N.D. Ill. 1997) (holding that § 363(f) "in no way protects the buyer from current or

Third Circuit observed, however, that "the trend seems to be toward a more expansive reading of 'interests in property' which 'encompasses other obligations that may flow from ownership of the property.'" Id. at 289 (quoting 3 Collier on Bankruptcy ¶ 363.06[1]); see also George W. Kuney, *Misinterpreting Bankruptcy Code Section 363(f) and Undermining the Chapter 11 Process*, 76 Am. Bankr. L.J. 235, 267 (2002) ("[T]he dominant interpretation is that § 363(f) can be used to sell property free and clear of claims that could otherwise be assertable against the buyer of the assets under the common law doctrine of successor liability.").

The Third Circuit reasoned that "to equate interests in property with only *in rem* interests such as liens would be inconsistent with section 363(f)(3), which contemplates that a lien is but one type of interest." 322 F.3d at 290. After surveying its owns precedents and the Fourth Circuit's decision in United Mine Workers of Am. 1992 Benefit Plan v. Leckie Smokeless Coal Co. (In re Leckie Smokeless Coal Co.), 99 F.3d 573 (4th Cir. 1996),[17] the TWA

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future product liability; it only protects the purchased assets from lien claims against those assets"), and Volvo White Truck Corp. v. Chambersburg Beverage, Inc. (In re White Motor Credit Corp.), 75 B.R. 944, 948 (Bankr. N.D. Ohio 1987) (stating that "[g]eneral unsecured claimants including tort claimants, have no specific interest in a debtor's property" for purposes of § 363(f)).

[17] In Leckie, the Fourth Circuit held that Coal Act premium payment obligations owed to employer-sponsored benefit plans were interests in property under § 363(f). 99 F.3d at 582. The Fourth Circuit explained "while the plain meaning of the phrase 'interest in such

court held that "[w]hile the interests of the [plaintiffs] in the assets of TWA's bankruptcy estate are not interests in property in the sense that they are not *in rem* interests, . . . they are interests in property within the meaning of section 363(f) in the sense that they *arise from the property* being sold." 322 F.3d at 290 (emphasis added).

Shortly after TWA was decided, the Southern District of California concluded that TWA applied to tort claimants asserting personal injury claims. See Myers v. United States, 297 B.R. 774, 781-82 (S.D. Cal. 2003). Myers involved claims arising from the negligent handling of toxic materials transported pursuant to a government contract. Id. at 781. Applying TWA, the Myers court ruled that the plaintiff's "claim for personal injury does arise from the property being sold, i.e. the contracts to transport toxic materials." Id.; see also Faulkner v. Bethlehem Steel/Int'l Steel Group, No. 2:04-CV-34 PS, 2005 WL 1172748, at *3 (N.D. Ind. April 27, 2005) (applying TWA to bar successor liability for racial discrimination claim).

Appellants argue that these decisions broadly construing the phrase "any interest in such property" fail to account for the language of 11 U.S.C. § 1141(c), a provision involving confirmed

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property' suggests that not all general rights to payment are encompassed by the statute, Congress did not expressly indicate that, by employing such language, it intended to limit the scope of section 363(f) to in rem interests, strictly defined, and [it would] decline to adopt such a restricted reading of the statute . . . ." Id.

plans of reorganization. Section 1141(c) provides that "except as otherwise provided in the [reorganization] plan or in the order confirming the plan, after confirmation of a plan, the property dealt with by the plan is free and clear of *all claims and interests* of creditors, equity security holders, and of general partners in the debtor." 11 U.S.C. § 1141(c) (emphasis added). Appellants argue that Congress must have intentionally included the word "claims"[18] in § 1141(c), and omitted the word from § 363(f), because it was willing to extinguish tort claims in the reorganization context, but unwilling to do so in the § 363 sale context. Appellants account for this discrepancy on the basis that reorganization provides unsecured creditors procedural rights that are not assured in a § 363(b) sale.

We do not place such weight on the absence of the word "claims" in § 363(f). The language and structure of § 1141(c) and § 363(f) differ in many respects. Section 1141(c), for example, applies to all reorganization plans; § 363(f), in contrast, applies

[18] The Bankruptcy Code defines "claim" as:

> A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or
> (B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.

11 U.S.C. § 101(5).

only to classes of property that satisfy one of five criteria. See 11 U.S.C. § 363(f)(1)-(5). Thus, while § 363 sales do not afford many of the procedural safeguards of a reorganization, § 363(f) is limited to specific classes of property.

Given the expanded role of § 363 in bankruptcy proceedings, it makes sense to harmonize the application of § 1141(c) and § 363(f) to the extent permitted by the statutory language. See In re Golf, L.L.C., 322 B.R. 874, 877 (Bankr. D. Neb. 2004) (noting that, while § 363(f) requires less notice and provides for less opportunity for a hearing than in the reorganization process, "as a practical matter, current practice seems to have expanded § 363(f)'s use from its original intent"). Courts have already done this in other contexts. For example, § 1141(c) does not explicitly reference the extinguishment of liens, while § 363(f) does. Notwithstanding this distinction, courts have uniformly held that confirmation of a reorganization can act to extinguish liens. See, e.g., JCB, Inc. v. Union Planters Bank, NA, 539 F.3d 862, 870 (8th Cir. 2008) ("Confirmation of the reorganization plan replaces prior obligations, and a lien not preserved by the plan may be extinguished." (internal citation omitted)); Elixir Indus., Inc. v. City Bank & Trust Co. (In re Ahern Enters., Inc.), 507 F.3d 817, 820-22 (5th Cir. 2007) (holding that § 1141(c) extinguishes liens that are not specifically preserved in a reorganization plan, and citing cases from the Fourth, Seventh, Eighth and Tenth Circuits reaching the same conclusion).

We agree with TWA and Leckie that the term "any interest in property" encompasses those claims that "arise from the property being sold." See TWA, 322 F.3d at 290. By analogy to Leckie (in which the relevant business was coal mining), "[appellants'] rights are grounded, at least in part, in the fact that [Old Chrysler's] very assets have been employed for [automobile production] purposes: if Appellees had never elected to put their assets to use in the [automobile] industry, and had taken up business in an altogether different area, [appellants] would have no right to seek [damages]." Leckie, 99 F.3d at 582.

"To allow the claimants to assert successor liability claims against [the purchaser] while limiting other creditors' recourse to the proceeds of the asset sale would be inconsistent with the Bankruptcy Code's priority scheme." TWA, 322 F.3d at 292. Appellants ignore this overarching principle and assume that tort claimants faced a choice between the Sale and an alternative arrangement that would have assured funding for their claims. But had appellants successfully blocked the Sale, they would have been unsecured creditors fighting for a share of extremely limited liquidation proceeds. Given the billions of dollars of outstanding secured claims against Old Chrysler, appellants would have fared no better had they prevailed.

The possibility of transferring assets free and clear of existing tort liability was a critical inducement to the Sale. As in TWA, "a sale of the assets of [Old Chrysler] at the expense of preserving successor liability claims was necessary in order to preserve some [55],000 jobs, . . . and to provide funding for employee-related liabilities, including retirement benefits [for more than 106,000 retirees]." TWA, 322 F.3d at 293; see also Sale Opinion at 3.

It is the transfer of Old Chrysler's tangible and intellectual property to New Chrysler that could lead to successor liability (where applicable under state law) in the absence of the Sale Order's liability provisions. Because appellants' claims arose from Old Chrysler's property, § 363(f) permitted the bankruptcy court to authorize the Sale free and clear of appellants' interest in the property.

B. Asbestos Claims

On behalf of herself and others with outstanding or potential claims against Old Chrysler resulting from exposure to asbestos, Patricia Pascale argues that the Sale Order improperly grants New Chrysler immunity without assuring compliance with 11 U.S.C. § 524(g).

Section 524(g) "provides a unique form of supplemental injunctive relief for an insolvent debtor confronting the particularized problems and complexities associated with asbestos liability." Johns-Manville Corp. v. Chubb Indem. Ins. Co. (In re Johns-Manville Corp.), 517 F.3d 52, 67 (2d Cir. 2008), overruled on other grounds by Travelers Indem. Co. v. Bailey, 129 S.Ct. 2195 (2009). The statute authorizes the court "to enjoin entities from taking legal action for the purpose of directly or indirectly collecting, recovering, or receiving payment or recovery with respect to any [asbestos-related] claim or demand." 11 U.S.C. § 524(g)(1)(B).

To obtain relief under § 524(g), a debtor must "[c]hannel[] asbestos-related claims to a personal injury trust [to] relieve[] the debtor of the uncertainty of future asbestos liabilities." In re Combustion Eng'g, Inc., 391 F.3d 190, 234 (3d Cir. 2004). Injunctions granting relief under this provision are subject to numerous requirements and conditions. See 11 U.S.C. § 524(g)(2)(B); Combustion Eng'g, 391 F.3d at 234 & n.45.

By its terms, however, § 524(g) applies only to "a court that enters an order confirming a plan of reorganization under chapter 11." 11 U.S.C. § 524(g)(1)(A); see also Combustion Eng'g, 391 F.3d at 234 n.46. Sections I and II of this opinion conclude that the Sale was proper under § 363. That determination forecloses the application of § 524(g) because there is no plan of reorganization as yet. Moreover, the bankruptcy court in this case did not issue an injunction, as is permitted by § 524(g)(1)(B), and the debtor did not establish a trust subsuming its asbestos liability. Accordingly, there is no merit to Pascale's argument that the Sale Order violates § 524(g).

C. Future Claims

The Sale Order extinguished the right to pursue claims "on any theory of successor or transferee liability, . . . whether known or unknown as of the Closing, now existing or hereafter arising, asserted or unasserted, fixed or contingent, liquidated or unliquidated." Sale Order at 40-41. This provision is challenged on the grounds that: (1) the Sale Order violates the due process rights of future claimants by extinguishing claims without providing notice; (2) a bankruptcy court is not empowered to trump state successor liability law; (3) future, unidentified claimants with unquantifiable interests could not be compelled "to accept a money satisfaction," 11 U.S.C. § 363(f)(5); and (4) future causes of action by unidentified plaintiffs based on unknown events cannot be classified as "claims" under the Bankruptcy Code.

We affirm this aspect of the bankruptcy court's decision insofar as it constituted a valid exercise of authority under the Bankruptcy Code. However, we decline to delineate the scope of the bankruptcy court's authority to extinguish future claims, until such time as we are presented with an actual claim for an injury that is caused by Old Chrysler, that occurs after the Sale, and that is cognizable under state successor liability law.

CONCLUSION

We have considered all of the objectors-appellants' contentions on these appeals and have found them to be without merit. For the foregoing reasons, we affirm the June 1, 2009 order of the bankruptcy court authorizing the Sale.

MANDATE

SDNY/NYNY
09-50002
Hon. Gonzalez

United States Court of Appeals
Filed
Jun – 5 2009
Catherine O'Hagan Wolfe,
Clerk Second Circuit

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 5th day of June two thousand nine.

Before: HON. Dennis Jacobs, Chief Judge,
HON. Amalya L. Kearse,
HON. Robert D. Sack,
Circuit Judges.

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

ORDER
Docket Number 09-2311-bk

Debtor-Plaintiffs-Petitioners.

The June 1, 2009 order of the United States Bankruptcy Court for the Southern District of New York, authorizing the sale of substantially all of the debtors' assets, on terms stated therein, is affirmed for substantially the reasons stated in the opinions of Bankruptcy Judge Gonzalez, entered May 31, 2009. An opinion (or opinions) of this Court will issue in due course. The mandate shall issue forthwith.

The stay entered by this Court on June 2 will continue until the earlier of 4:00 p.m. on Monday, June 8, 2009 or the time at which a stay is denied by the U.S. Supreme Court.

FOR THE COURT

\s\ Catherine O'Hagan Wolfe
Catherine O'Hagan Wolfe
Clerk of the Court

A TRUE COPY
Catherine O'Hagan Wolfe, Clerk
by: \s\ Joseph M. Modriguez
DEPUTY CLERK

ISSUED AS MANDATE:

JUN 05 2009

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re :
Chapter 11

CHRYSLER LLC, *et al.*, :
Case No. 09 B 50002 (AJG)

Debtors. :
(Jointly Administered)

ORDER (I) AUTHORIZING THE SALE OF SUBSTANTIALLY ALL OF THE DEBTORS' ASSETS FREE AND CLEAR OF ALL LIENS, CLAIMS, INTERESTS AND ENCUMBRANCES, (II) AUTHORIZING THE ASSUMPTION AND ASSIGNMENT OF CERTAIN EXECUTORY CONTRACTS AND UNEXPIRED LEASES IN CONNECTION THEREWITH AND RELATED PROCEDURES AND (III) GRANTING RELATED RELIEF

This matter coming before the Court on the motions, dated May 3, 2009 and May 22, 2009 (Docket Nos. 190 and 1742) (collectively, the "Sale Motion")[1] filed by the above-captioned debtors and

[1] Unless otherwise stated, all capitalized terms not defined herein shall have the meanings given to them in the Sale Motion and the Bidding Procedures Order (as defined below).

debtors in possession (collectively, the "Debtors") for entry of an order (the "Sale Order"), pursuant to sections 105, 363 and 365 of the United States Bankruptcy Code, 11 U.S.C. §§ 101, et seq. (the "Bankruptcy Code"), Rules 2002, 6004, 6006, 9008 and 9014 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules") and Rules 2002-1, 6004-1, 6006-1 and 9006-1(b) of the Local Bankruptcy Rules for the United States Bankruptcy Court for the Southern District of New York: (i) authorizing and approving the entry into, performance under and terms and conditions of the Master Transaction Agreement, dated as of April 30, 2009 (collectively with all related agreements, documents or instruments and all exhibits, schedules and addenda to any of the foregoing, and as amended, the "Purchase Agreement"), substantially in the form attached hereto as Exhibit A (without all of its voluminous exhibits), between and among Fiat S.p.A. ("Fiat"), New CarCo Acquisition, LLC (the "Purchaser"), a Delaware limited liability company formed by Fiat, and the Debtors,[2] whereby the Debtors have agreed to sell,

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[2] The following Debtors are "Sellers" under the Purchase Agreement: Alpha Holding, LP ("Alpha"), Chrysler, LLC; Chrysler Aviation Inc.; Chrysler Dutch Holding LLC; Chrysler Dutch Investment LLC; Chrysler Dutch Operating Group LLC; Chrysler Institute of Engineering; Chrysler International Corporation; Chrysler International Limited, L.L.C.; Chrysler International Services, S.A.; Chrysler Motors LLC; Chrysler Realty Company LLC; Chrysler Service Contracts Florida, Inc.; Chrysler Service Contracts Inc.; Chrysler Technologies Middle East Ltd.; Chrysler Transport Inc.; Chrysler Vans

and the Purchaser has agreed to purchase the "Purchased Assets" (as such term is defined in Section 2.06 of the Purchase Agreement), which Purchased Assets include, without limitation, the Assumed Agreements (as defined below), substantially all of the Debtors' tangible, intangible and operating assets related to the research, design, manufacturing, production, assembly and distribution of passenger cars, trucks and other vehicles (including prototypes) under brand names that include Chrysler, Jeep® or Dodge (the "Business"), certain of the facilities related thereto and all rights, intellectual property, trade secrets, customer lists, domain names, books and records, software and other assets used in or necessary to the operation of the Business or related thereto to the Purchaser (collectively, and including all actions taken or required to be taken in connection with the implementation and consummation of the Purchase Agreement, the "Sale Transaction"); (ii) authorizing and approving the sale by the Debtors of the Purchased Assets, free and clear of liens, claims (as such term is defined by section 101(5) of the Bankruptcy Code), liabilities, encumbrances, rights, remedies, restrictions and interests and encumbrances of any kind or nature whatsoever whether arising before or after the Petition Date,[3]

LLC; DCC 929, Inc.; Dealer Capital, Inc.; Global Electric Motorcars, LLC; NEV Mobile Service, LLC; NEV Service, LLC; Peapod Mobility LLC; TPF Asset, LLC; TPF Note, LLC; and Utility Assets LLC.

[3] As used herein, "Petition Date" refers to (a) April 30, 2009 for all of the Debtors other than Alpha and (b) May 19, 2009 for Alpha.

whether at law or in equity, including all claims or rights based on any successor or transferee liability, all environmental claims, all change in control provisions, all rights to object or consent to the effectiveness of the transfer of the Purchased Assets to the Purchaser or to be excused from accepting performance by the Purchaser or performing for the benefit of the Purchaser under any Assumed Agreement and all rights at law or in equity (collectively, "Claims") (other than certain liabilities that are expressly assumed or created by the Purchaser, as set forth in the Purchase Agreement or as described herein (collectively, the "Assumed Liabilities")); (iii) authorizing the assumption and assignment to the Purchaser of certain executory contracts and unexpired leases of the Debtors (collectively, the "Assumed Agreements") in accordance with the Contract Procedures set forth in the Bidding Procedures Order, the Purchase Agreement and this Sale Order; (iv) authorizing and approving the entry into, performance under and terms and conditions of the UAW Retiree Settlement Agreement (as defined herein); and (v) granting other related relief; the Court having conducted a hearing on the Sale Motion on May 27, 2009 through May 29, 2009 (collectively, the "Sale Hearing") at which time all interested parties were offered an opportunity to be heard with respect to the Sale Motion; the Court having reviewed and considered, among other things, (i) the Sale Motion and the exhibits thereto, (ii) the Purchase Agreement attached hereto as Exhibit A, (iii) this Court's prior order (Docket No. 492), dated May 8, 2009 (the "Bidding Procedures Order") approving competitive bidding procedures for the Purchased Assets (the "Bidding Procedures"), (iv) all objections to the Sale Transaction filed in accordance with the Bidding Procedures Order or raised on the record at the Sale Hearing, (v) Memorandum of Law in Support of Sale Motion (Docket No. 191), (vi) Supplemental Memorandum of Law in Support of Sale Motion (Docket No. 2130), (vii) the Consolidated Reply to Objections to the Sale Motion (Docket Nos. 2155 and 2565), (viii) the Statement of the United States Department of the Treasury in Support of the Commencement of Chrysler LLC's Chapter 11 Case (Docket No. 69), (ix) the Statement of the Official Committee of Unsecured Creditors in Support of Debtors Motion for Order Authorizing the Sale of Substantially All of the Debtors' Assets Free and Clear of Liens, Claims, Interests and Encumbrances (the "Creditors' Committee Statement"), and the related Memorandum of Law (Docket No. 1846 and 2147); (x) the Response to Various Objections Relating to Successor Liability Issues (Docket No. 2111); (xi) the Response of International Union, United Automobile, Aerospace and Agricultural Implement Workers of America to Motion of the Debtors and Debtors in Possession for an Order Authorizing the Sale of Substantially All of the Debtors' Operating Assets and Other Relief (Docket No. 2085); (xii) the Supplemental Statement of the International Union, United Automobile, Aerospace, and Agricultural Implement Workers Union of America, AFL-CIO in Support of Motion of the Debtors and Debtors in Possession for an Order Authorizing the Sale of Substantially All of the Debtors' Operating Assets and Other Relief and

Response to Individual Retiree Statements Concerning Approval of UAW Retiree Settlement Agreement (Docket No. 2094) and (xiii) the arguments of counsel made, and the evidence proffered or adduced, at the Sale Hearing; and it appearing that due notice of the Sale Motion and the Bidding Procedures Order has been provided in accordance with the Bidding Procedures Order and that the relief requested in the Sale Motion is in the best interests of the Debtors, their estates and creditors and other parties in interest; and upon the record of the Sale Hearing and these cases; and after due deliberation thereon; and good and sufficient cause appearing therefore, including for the reasons set forth in the Court's Opinion dated May 31, 2009 (Docket No. 3073);

IT IS HEREBY FOUND AND DETERMINED THAT:

THE DEBTORS AND THESE CASES

A. As of the Petition Date and for a period of more than a year before the commencement of these chapter 11 cases, the Debtors worked with financial advisors and with their various constituencies to try to raise capital or implement a viable transaction that would allow them to continue the Debtors' operations. (See DX 20; May 27, 2009 Hearing Tr. (Testimony of Tom Lasorda); May 28, 2009 Hearing Tr. (Testimony of Robert Nardelli); Deposition of Scott Garberding, May 24, 2009, Exhibit 2, at 87-92). The Debtors presented credible evidence that, as of the Petition Date, they had explored strategic alternatives for the Business over an extended period of time and had communicated with more than 15 parties about possible sales, mergers, combinations and alternatives regarding debt or equity capital investments or financing and had prepared standalone business plans in the event that strategic alternatives did not materialize or were insufficient. (See Id.). The Sale Transaction is the result of the Debtors' extensive efforts.

JURISDICTION, FINAL ORDER AND STATUTORY PREDICATES

B. This Court has jurisdiction over the Sale Motion, the Sale Transaction and the Purchase Agreements pursuant to 28 U.S.C. §§ 157(b)(1) and 1334(a), and this matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (N) and (O). Venue of these cases and the Sale Motion in this district is proper under 28 U.S.C. §§ 1408 and 1409. Debtor Peapod Mobility LLC ("Peapod") is a New York limited liability company. Debtor Chrysler Realty Company LLC ("Chrysler Realty") is the owner of certain valuable real property located on 11th Avenue in New York, New York. Debtor Chrysler is the direct or indirect parent of Peapod, Chrysler Realty and each of the other Debtors.

C. This Sale Order constitutes a final and appealable order within the meaning of 28 U.S.C. § 158(a). Notwithstanding Bankruptcy Rules 6004(h) and 6006(d), the Court expressly finds that there is no just reason for delay in the implementation of this Sale Order, and expressly directs entry of judgment as set forth herein.

D. The statutory predicates for the relief sought in the Sale Motion and granted in this Sale Order include, without limitation, sections 105(a), 363(b), (f) and (m) and 365(a), (b) and (f) of the Bankruptcy Code, and Bankruptcy Rules 2002, 6004 and 6006.

JUDICIAL NOTICE

E. Pursuant to Federal Rule of Evidence 201(c), incorporated into these proceedings pursuant to Bankruptcy Rule 9017, the Court takes judicial notice of the (1) March 30, 2009 Remarks by the President of the United States on the American Automotive Industry; (2) April 30, 2009 Remarks by the President of the United States on the Auto Industry; and (3) the fact of the publication of the Notice of Proposed Sale of Substantially All of the Debtors' Assets Free and Clear of Liens, Claims, Interests and Encumbrances and Final Sale Hearing Related Thereto in the national editions of The New York Times on May 12, 2009, The Wall Street Journal on May 12, 2009 and USA Today on May 13, 2009, and the worldwide edition of The Financial Times on May 13, 2009. (See DX 8; DX 18; DX 19).

SOUND BUSINESS PURPOSE

F. The Debtors seek to convey the Purchased Assets, including those related to the research, design, manufacture (at 16 domestic manufacturing facilities), assembly (at seven domestic assembly plants) and wholesale distribution of passenger cars and trucks under the brand names Chrysler, Jeep® and Dodge, all of which are subject to Claims, including those held by the Debtors' prepetition secured lenders. (See DX 64, at §2.06).

G. In the second half of 2008, Chrysler began to experience an "unprecedented" loss of cash (See May 28, 2009 Hearing Tr. (Testimony of Robert Nardelli)). Currently, the Debtors are losing over $100 million dollars per day. (See Deposition of Matthew Feldman, May 26, 2009, at 65:18-66:5). Unless the Sale Transaction is approved without delay, the Debtors' assets will continue to erode, and they will be forced to liquidate in the near term. (See May 28, 2009 Hearing Tr. (Testimony of Robert Nardelli); Deposition of Frank Ewasyshyn, May 24, 2009, at Exhibit 1, at 7-29)).

H. The Debtors have demonstrated, and the Purchase Agreement reflects, both (1) good, sufficient and sound business purposes and justifications for the immediate approval of the Purchase Agreement and the Sale Transaction (May 28, 2009 Hearing Tr. (Testimony James Chapman); May 28, 2009 Hearing Tr. (Testimony of Robert Nardelli)); and (2) compelling circumstances for the approval of the Purchase Agreement and the Sale Transaction outside of the ordinary course of the Debtors' business pursuant to section 363(b) of the Bankruptcy Code prior to, and outside of, a plan of reorganization in that, among other things, the Debtors' estates will suffer immediate and irreparable harm if the relief requested in the Sale Motion is not granted on an expedited basis (See May 28, 2009 Hearing Tr. (Testimony of Alfredo Altavilla); May 28, 2009 Hearing Tr. (Testimony of Robert Nardelli); Deposition of Scott Garberding, May 24, 2009, Exhibit 2, at 9-27; Deposition of Frank Ewasyshyn, May 24, 2009, Exhibit 1, at 8-29). In light of the exigent circumstances of these chapter 11 cases and the risk of deterioration in the going concern value of the Purchased Assets pending the proposed Sale Transaction, time is of the essence in (a) consummating the Sale Transaction, (b) preserving the viability of the Debtors' businesses as going concerns and (c) minimizing the widespread and adverse economic consequences for the Debtors' estates, their creditors, employees, retirees, the automotive industry and the broader economy that would be threatened by protracted proceedings in these chapter 11 cases. (See DX 13; DX 14; May 27, 2009 Hearing Tr. (Testimony of Thomas Lasorda); May 28, 2009 Hearing Tr. (Testimony of Ronald Nardelli); May 27, 2009 Hearing Tr. (Testimony of Alfredo Altavilla); May 28, 2009 Hearing Tr. (Testimony of James Chapman); Deposition Tr. of Ronald Bloom, at 65; see generally DX 20).

I. The consummation of the Sale Transaction outside of a plan of reorganization pursuant to the Purchase Agreement neither impermissibly restructures the rights of the Debtors' creditors nor impermissibly dictates the terms of a liquidating plan of reorganization for the Debtors. The Sale Transaction does not constitute a sub rosa plan of reorganization. (See DX 4; DX 5; DX 10; May 27, 2009 Hearing Tr. (Testimony of Robert Manzo)).

J. Entry of an order approving the Purchase Agreement and all the provisions thereof is a necessary condition precedent to the Purchaser's consummation of the Sale Transaction, as set forth in the Purchase Agreement. (See DX 64, at § 8.02(q)).

K. The Purchase Agreement was not entered into, and none of the Debtors, the Purchaser or the Purchaser's present or contemplated owners, have entered into the Purchase Agreement or propose to consummate the Sale Transaction, for the purpose of hindering, delaying or defrauding the Debtors' present or future creditors. None of the Debtors, the Purchaser nor the Purchaser's present or contemplated owners is entering into the Purchase Agreement, or proposing to consummate the Sale Transaction, fraudulently for the purpose of statutory and common law fraudulent conveyance and fraudulent transfer claims whether under the Bankruptcy Code or under the laws of the United States, any state, territory, possession thereof, or the District of Columbia or any other applicable jurisdiction with laws substantially similar to the foregoing. (See DX 5; DX 6; DX 10; May 27, 2009 Hearing Tr. (Testimony of Altavilla)).

HIGHEST AND BEST OFFER

L. On May 8, 2009, this Court entered the Bidding Procedures Order approving Bidding Procedures for the Purchased Assets. The Bidding Procedures provided a full, fair and reasonable opportunity for any entity to make an offer to purchase the Purchased Assets. No additional Qualifying Bids for the Purchased Assets were received by the Debtors. Therefore, the Purchaser's bid, as reflected in the Purchase Agreement, is the only Qualified Bid for the Purchased Assets and was designated as the Successful Bid pursuant to the Bidding Procedures Order (Docket No. 492). Likewise, no party came forward at the Sale Hearing with a bid or offer. As such, no Auction was conducted, and the Purchaser's bid, as reflected in the Purchase Agreement, was presented to the Court as the Successful Bid. (See May 27, 2009 Hearing Tr. (Testimony of Robert Manzo)).

M. As demonstrated by the testimony and other evidence proffered or adduced prior to or at the Sale Hearing, and in light of the exigent circumstances presented and emergency nature of the relief requested (1) the Debtors have adequately marketed the Purchased Assets (See May 27, 2009 Hearing Tr. (Testimony of Thomas Lasorda); May 28, 2009 Hearing Tr. (Testimony of Robert Nardelli); Deposition of Scott Garberding, May 24, 2009, Exhibit 2, at 87-92)); (2) the Purchased Assets are deteriorating rapidly in value and there are good business reasons to sell these assets outside of a plan of reorganization (See May 28, 2009 Hearing Tr. (Testimony of Robert Nardelli); Deposition of Frank Ewasyshyn, May 24, 2009, at Exhibit 1, at 7-29; Deposition of Matthew Feldman, May 26, 2009, at 65:21-66:5)); (3) the consideration provided for in the Purchase Agreement constitutes the highest or otherwise best offer for the Purchased Assets and provides fair and reasonable consideration for the Purchased Assets (See May 27, 2009 Hearing Tr. (Testimony of Robert Manzo); May 28, 2009 Hearing Tr. (Testimony of Robert Nardelli)); (4) the Sale Transaction, as a transfer of deteriorating assets, is an extraordinary, non-market transaction, the consideration for which exceeds what would have been obtainable in a transaction subject to ordinary market forces (See Deposition of Ronald Bloom, May 26, 2009, at 65:4-66:10); (5) the Sale Transaction is the only alternative to liquidation available to the Debtors (See May 28, 2009 Hearing Tr. (Testimony of Robert Nardelli)); (6) if the Sale Transaction is not approved and consummated, the Debtors will have no alternative but to cease operations and liquidate (See May 28, 2009 Hearing Tr. (Testimony of Robert Nardelli)); (7) the Sale Transaction will provide a greater recovery for the Debtors' creditors than would be provided by any other practical available alternative, including, without limitation, liquidation whether under chapter 11 or chapter 7 of the Bankruptcy Code (See DX; May 27, 2009 Hearing Tr. (Testimony of Robert Manzo)); (8) no other party or group of parties has offered to purchase the Purchased Assets for greater economic value to the Debtors or their estates (See May 27, 2009 Hearing Tr. (Testimony of Robert Manzo); May 27, 2009 Hearing Tr. (Testimony of Thomas Lasorda); May 28, 2009 Hearing Tr. (Testimony of Robert Nardelli)); (9) the consideration to be paid by the Purchaser under the Purchase Agreement exceeds the liquidation value of the Purchased Assets (See May 27, 2009 Hearing Tr. (Testimony of Robert Manzo)) and (10) the consideration to be paid by the Purchaser under the Purchase Agreement constitutes reasonably equivalent value and fair consideration (as those terms may be defined in each of the Uniform Fraudulent Transfer Act, Uniform Fraudulent Conveyance Act and section 548 of the Bankruptcy Code) under the Bankruptcy Code and under the laws of the United States, any state, territory or possession thereof or the District of Columbia, or any other applicable jurisdiction with laws substantially similar to the foregoing. (See DX 14; DX 15; May 28, 2009 Hearing Tr. (Testimony of James Chapman); May 28, 2009 Hearing Tr. (Testimony of Robert Nardelli)). The Debtors' determination that the Purchase Agreement constitutes the highest and best offer for the Purchased Assets constitutes a valid and sound exercise of the Debtors' business judgment. (See May 27, 2009 Hearing Tr. (Testimony of Thomas Lasorda); May 28, 2009 Hearing Tr. (Testimony of James Chapman); May 28, 2009 Hearing Tr. (Testimony of Robert Nardelli)).

N. Neither the Purchaser nor Fiat have furnished the Debtors with a good faith deposit in connection with the Purchase Agreement. The Debtors submit that in light of the extensive prepetition negotiations culminating in the various complex agreements with the Debtors, the United States Department of the Treasury (the "U.S. Treasury"), the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (the "UAW") and other stakeholders, as well as Fiat's substantial investment of time and resources, the Purchaser's and Fiat's commitment to consummate the Fiat Transaction is clear without the need to provide a good faith deposit. See May 27, 2009 Hearing Tr. (Testimony of Alfredo Altavilla); May 28, 2009 (Testimony of David Curson); May 28, 2009 (Testimony of Robert Nardelli); May 28, 2009 (Testimony of James Chapman); Deposition of Matthew Feldman, May 26, 2009, at 37:21-39:1)).

BEST INTEREST OF CREDITORS

O. Approval of the Purchase Agreement and the consummation of the Sale Transaction with the Purchaser at this time is in the best interests of the Debtors, their estates, creditors, employees, retirees and other parties in interest. (See DX 6; Creditors' Committee Statement, at ¶ 2, Docket No. 1846; May 28, 2009 Hearing Tr. (Testimony of David Curson)).

DESCRIPTION OF THE PURCHASER AND THE PURCHASER'S GOOD FAITH

P. The Purchaser is a newly formed Delaware limited liability company that as of the date of the Sale Hearing, is a wholly-owned subsidiary of Fiat. The Purchaser is not an "insider" of any of the Debtors, as that term is defined by section 101(31) of the Bankruptcy Code. (See DX 64, at Art. IV-A).

Q. Upon the closing of the Sale Transaction (the "Closing"), (1) Fiat will contribute to the Purchaser certain valuable technology and management expertise, (2) the U.S. Treasury and Export Development Canada ("EDC") will lend the Purchaser approximately $8 billion in new financing and (3) the UAW Retiree Settlement Agreement, the entry into which is a condition to the UAW CBA (as defined below) and its assumption and assignment to Purchaser, will become effective. Following the making of the foregoing contributions to the Purchaser, Fiat, the VEBA (as defined below), the U.S. Treasury and EDC, through 7169931 Canada Inc., will hold 100% of the equity in the Purchaser. (DX 3; DX 64, Exhibit J, K).

R. The Purchaser is a person with whom the Debtors are associated within the meaning of section 525 of the Bankruptcy Code.

S. The Purchase Agreement and each of the transactions contemplated therein were negotiated, proposed and entered into by the Debtors and the Purchaser in good faith, without collusion and from arm's-length bargaining positions. The Purchaser has proceeded in good faith in all respects in connection with this proceeding, is a "good faith purchaser" within the meaning of section 363(m) of the Bankruptcy Code and, as such, is entitled to all the protections afforded thereby. None of the Debtors, the Purchaser nor the Purchaser's present or contemplated owners have engaged in any conduct that (1) would cause or permit the Purchase Agreement or any of the transactions contemplated thereby to be avoided; (2) would tend to hinder, delay or defraud creditors; or (3) impose costs and damages under section 363(n) of the Bankruptcy Code. (See May 27, 2009 Hearing Tr. (Testimony of Alfredo Altavilla); May 27, 2009 (Testimony of Robert Manzo); May 28, 2009 Hearing Tr. (Testimony of David Curson); May 28, 2009 Hearing Tr. (Testimony of Robert Nardelli); Deposition of Matthew Feldman, May 26, 2009, at 37:21-39:1; Deposition Tr. of Ronald Bloom, at 87).

<u>NOTICE OF THE SALE MOTION, AND THE CURE AMOUNTS</u>

T. As evidenced by the affidavits and certificates of service filed with the Court, in light of the exigent circumstances of these cases and the wasting nature of the Debtors' temporarily idled facilities and assets and based upon the representations of counsel at the Sale Hearing and the testimony of the Debtors' claims and noticing agent, the Court finds that: (1) proper, timely, adequate and sufficient notice of the Sale Motion, the Bidding Procedures Order, the Sale Hearing and the UAW Retiree Settlement Agreement has been provided by the Debtors in accordance with the Bidding Procedures Order; (2) such notice, and the form and manner thereof, was good, sufficient, reasonable and appropriate under the exigent circumstances prevailing in these chapter 11 cases; and (3) no other or further notice of the Sale Motion, the Sale Transaction, the Bidding Procedures, the Sale Hearing or the UAW Retiree Settlement Agreement is or shall be required. (See DX 7; May 27, 2009 Hearing Tr. (Testimony of Daniel McElhinney)). In light of the need to grant the relief requested in the Sale Motion on an expedited basis to avoid any erosion in the going concern value of the Purchased Assets, a reasonable opportunity to object or be heard with respect to the Sale Motion and the relief requested therein has been afforded to all interested persons and entities, including, but not limited to, the following:

(i) counsel to the Official Committees of Unsecured Creditors appointed in these chapter 11 cases under section 1102 of the Bankruptcy Code (the "Creditors Committee");
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(ii) the U.S. Treasury, a prepetition lender and the provider of the debtor in possession financing approved by this Court on a final basis on May 20, 2009 (the "DIP Financing Facility")"), outside counsel to the U.S. Treasury and the Acting United States Attorney for the Southern District of New York;

(iii) counsel to EDC, a lender under the DIP Financing Facility;

(iv) counsel to the UAW;

(v) counsel to the Purchaser;

(vi) counsel to the administrative agent and collateral agent for the Debtors' prepetition secured First Lien Lenders (as defined below);

(vii) counsel to Cerberus;

(viii) counsel to Daimler;

(ix) parties who, in the past year, have expressed in writing to the Debtors an interest in acquiring the Purchased Assets;

(x) nondebtor parties (collectively, the "Non-Debtor Counterparties") to the Assumed Agreements;

(xi) all parties who are known or reasonably believed to have asserted a lien, encumbrance, claim or other interest in the Purchased Assets or who are reflected as secured parties in lien searches conducted by the Debtors;

(xii) the Securities and Exchange Commission;

(xiii) the Internal Revenue Service;

(xiv) all applicable state attorneys general, local environmental enforcement agencies and local regulatory authorities;

(xv) all applicable state and local taxing authorities;

(xvi) the Office of the United States Trustee for the Southern District of New York;

(xvii) the Federal Trade Commission;

(xviii) the United States Attorney General/Antitrust Division of Department of Justice;

(xix) the Environmental Protection Agency;

(xx) the United States Attorney;

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(xxi) the Pension Benefit Guaranty Corporation;

(xxii) applicable foreign regulatory authorities in non-U.S. countries in which the Debtors do business;

(xxiii) all parties that filed objections to the Sale Motion;

(xxiv) all entities that have requested notice in these chapter 11 cases under Bankruptcy Rule 2002;

(xxv) the Debtors' retirees and surviving spouses represented by the UAW, including the members of the "Class" as defined in the UAW Retiree Settlement Agreement;

(xxvi) all employees of the Debtors;

(xxvii) all dealers with current agreements for the sale or leasing of Chrysler, Jeep or Dodge brand vehicles;

(xxviii) any other party identified on the creditor matrix in these cases.

(See DX 7).

U. Additionally, the Debtors published notice of the Sale Transaction in the national editions of USA Today, The Wall Street Journal and The New York Times, as well as the worldwide edition of The Financial Times. (See DX 8). With regard to parties who have claims against the Debtors, but whose identities are not reasonably ascertainable by the Debtors (including, but not limited to, parties with potential contingent warranty claims against the Debtors), the Court finds that such publication notice was sufficient and reasonably calculated under the circumstances to reach such parties.

V. In accordance with the Contract Procedures as set forth in the Bidding Procedures Order, the Debtors have provided notice or shall provide notice (an "Assignment Notice") of their intent to assume and assign the Assumed Agreements and of the related proposed amounts ("Cure Costs") to cure prepetition and postpetition defaults under Assumed Agreements with each such Non-Debtor Counterparty. See Notices of Filing of Schedules of Designated Agreements (DX 16; DX 62; DX 63; Deposition of Scott Garberding, May 24, 2009, Exhibit 1). The service and provision of the Assignment Notices that were served in accordance with the Bidding Procedures Order, was good, sufficient and appropriate under the circumstances and no further notice need be given with respect to the Cure Costs for the Assumed Agreements described by the Assignment Notices and the assumption and assignment of the Assumed Agreements. (See Affidavits of Service (Docket Nos. 1041, 1996, 1997, 1998, 2003, 2004, 2016, 2017, 2018, 2019, 2020, 2022, 2023, 2025, 2026, 2027, 2028, 2029, 2030, 2081 and 2108). All Non-Debtor Counterparties to the Assumed Agreements have had an opportunity to object to both the Cure Costs listed in the Assignment Notices and the assumption and assignment of the Assumed Agreements (including objections related to the adequate assurance of future performance and objections based on whether applicable law excuses the Non-Debtor Counterparty from accepting performance by, or rendering performance to, the Purchaser for purposes of section 365(c)(1) of the Bankruptcy Code). With respect to executory contracts or unexpired leases that are designated by the Debtors as Assumed Agreements pursuant to the Contract Procedures and Section 2.10 of the Purchase

Agreement and for which responses to Assignment Notices are due after the entry of this Sale Order, the Contract Procedures provide all Non-Debtor Counterparties to such Assumed Agreements with the opportunity to object to both the Cure Costs identified in any Assignment Notice delivered to any such Non-Debtor Counterparty and the assumption and assignment of the applicable Assumed Agreement (including objections related to the adequate assurance of future performance and objections based on whether applicable law excuses the Non-Debtor Counterparty from accepting performance by, or rendering performance to, the Purchaser for purposes of section 365(c)(1) of the Bankruptcy Code).

SECTION 363(F) REQUIREMENTS MET FOR FREE AND CLEAR SALE

W. The Debtors may sell the Purchased Assets free and clear of all Claims because, in each case where a Claim is not an Assumed Liability, one or more of the standards set forth in section 363(f)(1)-(5) of the Bankruptcy Code have been satisfied. Except as provided in this Sale Order, the assumption and assignment of each of the Assumed Agreements is also free and clear of all Claims other than the payment of the Cure Costs.

X. The Debtors are the sole and lawful owners of the Purchased Assets and no other person has any ownership right title or interest therein. The Debtors' non-Debtor affiliates have acknowledged and agreed to the sale and, as required by and in accordance with the Transition Services Agreement, transferred any legal, equitable or beneficial right, title or interest they may have in or to the Purchased Assets to the Purchaser. (See DX 64).

Y. The transfer of Purchased Assets constituting "Collateral" as defined under that certain Second Amended and Restated Collateral Trust Agreement (the "CTA"), dated as of January 2, 2009, among, inter alia, certain of the Debtors and their subsidiaries, JPMorgan Chase Bank, N.A. as both First Priority Agent ("First Priority Agent") and Second Priority Agent, the U.S. Treasury as Third Priority Agent and Wilmington Trust Company as Collateral Trustee (the "Collateral Trustee") has been consented to for purposes of section 363(f)(2) of the Bankruptcy Code, subject to and in accordance with that certain Consent to Sale and Liquidation of Collateral delivered by the First Priority Agent as "Controlling Party" under the CTA to the Debtors (the "First Priority Consent"), subject to the terms of the First Priority Consent, including, without limitation, to the indefeasible payment by the Purchaser immediately upon the sale of the Purchased Assets of $2 billion in immediately available funds to the First Priority Agent to be applied as set forth in the First Priority Consent. The First Priority Consent binds all parties holding debt under the First Lien Credit Agreement in their capacity as such (collectively, the "First Lien Lenders"). (See DX 55; DX 57).

Z. In addition, those holders of Claims who did object fall within one or more of the other subsections of sections 363(f) and 365 of the Bankruptcy Code as (1) the consideration received in exchange for the Purchased Assets is greater than the aggregate value of all liens on the Purchased Assets (See May 27, 2009 Hearing Tr. (Testimony of Robert Manzo)), (2) there is a bona fide dispute with respect to certain of the Claims asserted (e.g., claims of certain dealers relating to the proposed rejection of their dealership agreements) (See May 28, 2009 Hearing Tr. (Testimony of Peter Grady); May 27, 2009 Hearing Tr. (Testimony of Alfredo Altavilla)); or (3) such holders could be compelled in a legal or equitable proceeding to accept a money satisfaction of their Claims. The transfer of the Purchased Assets to the Purchaser under the Purchase Agreement will be a legal, valid and effective transfer of all of the legal, equitable and beneficial right, title and interest in and to the Purchased Assets free and clear of all Claims that are not Assumed Liabilities (including, specifically and without limitation, any products liability claims, environmental liabilities, employee benefit plans and any successor liability claims), except as otherwise provided in this Sale Order. All holders of Claims are adequately protected — and the Sale Transaction thus satisfies section 363(e) of the Bankruptcy Code — by having their Claims, if any, attach to the proceeds of the Sale Transaction ultimately attributable to the property against which they have a Claim or other specifically dedicated funds, in the same order of priority and with the same validity, force and effect that such Claim holder had prior to the Sale Transaction, subject to any rights, claims and defenses of the Debtors or their estates, as applicable, or as otherwise provided herein.

AA. The Purchaser would not have entered into the Purchase Agreement and would not consummate the Sale Transaction, thus adversely affecting the Debtors, their estates, creditors, employees, retirees and other parties in interest if the sale of the Purchased Assets was not free and clear of all Claims other than Assumed Liabilities, or if the Purchaser would, or in the future could, be liable for any such Claims, including, without limitation and as applicable, certain liabilities (collectively, the "Excluded Liabilities") that expressly are not assumed by the Purchaser, as set forth in the Purchase Agreement or in this Sale Order. The Purchaser asserts that it will not consummate the Sale Transaction unless the Purchase Agreement specifically provides and this Court specifically orders that none of the Purchaser, its affiliates, their present or contemplated members or shareholders (other than the Debtors as the holder of equity in Purchaser), or the Purchased Assets will have any liability whatsoever with respect to, or be required to satisfy in any manner, whether at law or in equity, whether by payment, setoff or otherwise, directly or indirectly, (a) any Claim other than (x) an Assumed Liability or (y) a Claim against any "Purchased Company" (as such term is defined in the Purchase Agreement) or (b) any successor liability for any of the Debtors. (See May 27, 2009 Hearing Tr. (Testimony of Alfredo Altavilla)).

BB. Without limiting the generality of the foregoing, the Purchase Agreement provides the Debtors with reasonably equivalent value and fair consideration (as those terms are defined in the Uniform Fraudulent Transfer Act, the Uniform Fraudulent Conveyance Act and the Bankruptcy Code), and was not entered into for the purpose or, nor does it have the effect of, hindering, delaying or defrauding creditors of any of the Debtors under any applicable laws. Except for the Assumed Liabilities, the Sale Transaction shall not impose or result in the imposition of any liability or responsibility on Purchaser or its affiliates, successors or assigns or any of their respective assets (including the Purchased Assets), and the transfer of the Purchased Assets to the Purchaser does not and will not subject the Purchaser or its affiliates, successors or assigns or any of their respective assets (including the Purchased Assets), to any liability for any Claims, including, without limitation, for any successor liability or any products liability for the sale of any vehicles by the Debtors or their predecessors or affiliates, except as expressly identified as an Assumed Liability.

ASSUMPTION AND ASSIGNMENT OF THE ASSUMED AGREEMENTS

CC. The assumption and assignment of the Assumed Agreements are integral to the Purchase Agreement, are in the best interests of the Debtors and their estates and represent the reasonable exercise of the Debtors' sound business judgment. (See May 27, 2009 Hearing Tr. (Testimony of Alfredo Altavilla); May 28, 2009 Hearing Tr. (Testimony of David Curson); May 28, 2009 Hearing Tr. (Testimony of Peter Grady); May 27, 2009 Hearing Tr. (Testimony of Thomas Lasorda); May 28, 2009 Hearing Tr. (Testimony of Robert Nardelli); May 28, 2009 Hearing Tr. (Testimony of James Chapman)).

DD. With respect to each of the Assumed Agreements, the Debtors have met all requirements of section 365(b) of the Bankruptcy Code. Further, the Purchaser has provided all necessary adequate assurance of future performance under the Assumed Agreements in satisfaction of sections 365(b) and 365(f) of the Bankruptcy Code. (See May 27, 2009 Hearing Tr. (Testimony of Alfredo Altavilla)). Accordingly, the Assumed Agreements can be assumed by the Debtors and assigned to the Purchaser, as provided for in the Contract Procedures set forth in the Bidding Procedures Order, the Sale Motion and the Purchase Agreement. The Contract Procedures are fair, appropriate and effective and, upon the payment by the Purchaser of all Cure Costs (which costs are the sole obligation of the Purchaser under the Purchase Agreement) and the payment of such other obligations assumed pursuant to this Sale Order and approval of the assumption and assignment for a particular Assumed Agreement thereunder, the Debtors shall be forever released from any and all liability under the Assumed Agreement.

EE. The Purchaser has acknowledged that it will be required to comply with the National Traffic and Motor Vehicle Safety Act, as amended and recodified ("NTMVSA"), as applicable to the business of the Purchaser after the Closing Date. In addition, the Purchaser has agreed to assume as Assumed Liabilities under the Purchase Agreement and this Sale Order the Debtors' notification, remedy and other obligations under 49 U.S.C. §§ 30116 through 30120 of the NTMVSA relating to vehicles manufactured by the Debtors prior to the Closing

Date that have a defect related to motor vehicle safety or do not to comply with applicable motor vehicle safety standards prescribed under the NTMVSA. The Purchaser shall not otherwise be liable for any failure by the Debtors to comply with the provisions of the NTMVSA.

FF. For the avoidance of doubt, and notwithstanding anything else in this Sale Order to the contrary:

- the Debtors are neither assuming nor assigning to the Purchaser the settlement agreement (the "2008 Settlement Agreement") between the Debtors, the UAW and certain of the Debtors' retirees, dated March 31, 2008, which was approved by the United States District Court for the Eastern District of Michigan on July 31, 2008, in the class action of Int'l Union, UAW, et al. v. Chrysler, LLC, Case No. 07-CV-14310 (E.D. Mich. filed Oct. 11, 2007) and established, among other things, an independent Voluntary Employee Beneficiary Association (the "VEBA") that would become responsible for retiree health care on behalf of current and future UAW retirees of the Debtors and their surviving spouses and eligible dependents (the "English Case VEBA") (DX 4; May 28, 2009 Hearing Tr. (Testimony of David Curson));

- the 2007 Chrysler-UAW National Agreement, including (1) the Production, Maintenance and Parts National Agreement, (2) the Engineering Office & Clerical National

Agreement, (3) the Toledo Assembly Plant/Jeep Unit, Local 12 Agreement, (4) Daimler Chrysler Financial Services North America, LLC (Farmington) and (5) Daimler Chrysler Financial Services North America, LLC (Detroit), and all appendices, memoranda of understanding, supplemental agreements, local agreements and benefit plans, as modified effective April 30, 2009 (the "UAW CBA"), shall be assumed by the Debtors and assigned to the Purchaser pursuant to this Sale Order and section 365 of the Bankruptcy Code. Assumption and assignment of the UAW CBA is integral to the Sale Transaction and the Purchase Agreement, is in the best interests of the Debtors and their estates, creditors, employees and retirees and represent the reasonable exercise of the Debtors' sound business judgment (See May 28, 2009 Hearing Tr. (Testimony of David Curson));

- the UAW, as the exclusive collective bargaining representative of employees of the Purchaser and the "authorized representative" of UAW-represented retirees of the Debtors under section 1114(c) of the Bankruptcy Code, and the Purchaser engaged in good faith negotiations in conjunction with the Sale Transaction regarding the funding of retiree health benefits within the meaning of section 1114(a) of the Bankruptcy Code. Conditioned upon the consummation of the Sale Transaction and the assumption and assignment of the UAW CBA, the UAW and the Purchaser have entered into a Retiree Settlement Agreement (the "UAW Retiree Settlement Agreement"), which, among other things, provides for the financing by the Purchaser of modified retiree health care obligations for the Class and Covered Group (as defined in the UAW Retiree Settlement Agreement) through contributions by the Purchaser to the English Case VEBA. The Debtors, the Purchaser and the UAW specifically intend that their actions in connection with the UAW Retiree Settlement Agreement and related undertakings incorporate the compromise of certain claims and rights and shall be deemed to satisfy the requirements of 29 U.S.C. § 186(c)(2) (See DX 4; May 28, 2009 Hearing Tr. (Testimony of David Curson)); and

- the Debtors' sponsorship of the Internal Existing VEBA (as defined in the UAW Retiree Settlement Agreement) shall be transferred to the Purchaser under the Purchase Agreement (See DX 64, at § 6.08).

VALIDITY OF THE TRANSFER

GG. As of the closing of the Sale Transaction (the "Closing"), the transfer of the Purchased Assets to the Purchaser will be a legal, valid and effective transfer of the Purchased Assets, and will vest the Purchaser with all right, title and interest of the Debtors in and to the Purchased Assets, free and clear of all Claims other than Assumed Liabilities.

HH. With the entry of this Sale Order, the Debtors (1) have full corporate power and authority to execute the Purchase Agreement and all other documents contemplated thereby, and the Sale Transaction has been duly and validly authorized by all necessary corporate action of the Debtors; (2) have all of the corporate power and authority necessary to consummate the transactions contemplated by the Purchase Agreement; (3) have taken all actions necessary to authorize and approve the Purchase Agreement and the consummation by the Debtors of the transactions contemplated thereby; and (4) upon entry of this Sale Order, need no consents or approvals, other than those expressly provided for in the Purchase Agreement, which may be waived by the Purchaser, to consummate such transactions. (See DX 38; DX 64 at Art. IV-A).

II. To the extent that the right, title and interest of the Debtors in and to any of the Purchased Assets ultimately is transferred to the Purchaser after the Closing pursuant to a plan of reorganization confirmed in these chapter 11 cases, such transfer shall be deemed a transfer pursuant to section 1146 of the Bankruptcy Code and shall not be taxed under any law imposing a stamp, transfer or any other similar tax.

PERSONALLY IDENTIFIABLE INFORMATION

JJ. The Debtors currently maintain certain privacy policies that govern the use of "personally identifiable information" (as such term is defined by section 101(41A) of the Bankruptcy Code) in the operation of their businesses. The Debtors propose to sell certain assets containing personally identifiable information in a manner that is not in compliance with their current existing privacy policies. As such, in the Bidding Procedures Order, the Court directed the U.S. Trustee to promptly appoint a consumer privacy ombudsman in accordance with section 332 of the Bankruptcy Code, and Alan Chapell, CIPP (the "Privacy Ombudsman") was appointed as a consumer privacy ombudsman under section 332 of the Bankruptcy Code on May 11, 2009 (Docket No. 594). The Privacy Ombudsman is a disinterested person as required by section 332(a) of the Bankruptcy Code. The Privacy Ombudsman filed his report with the Court on May 28, 2009 (Docket No. 2790) (the "Ombudsman Report") and presented his report at the Sale Hearing, and the Ombudsman Report has been reviewed and considered by the Court. The Court has given due consideration to the (1) facts, (2) exigent circumstances surrounding and (3) the conditions of the sale of personally identifiable information in connection with the Sale Transaction, including as set forth in the Ombudsman Report. No showing has been made that the sale of personally identifiable information in connection with the Sale Transaction violates applicable non-bankruptcy law, and the Court concludes that such sale is appropriate in conjunction with the Sale Transaction.

NOW THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED THAT:

GENERAL PROVISIONS

1. The Sale Motion is granted in its entirety and entry into and performance under and in respect of the Purchase Agreement and the Sale Transaction is approved, as set forth in this Sale Order.

2. The findings of fact and conclusions of law set forth in the Court's Opinion, dated May 31, 2009 (Docket No. 3073), as supplemented by the findings of fact stated above and conclusions of law stated herein shall constitute this Court's findings of fact and conclusions of law pursuant to Bankruptcy Rule 7052, made applicable to this proceeding pursuant to Bankruptcy Rule 9014. To the extent any finding of fact later shall be determined to be a conclusion of law, it shall be so deemed, and to the extent any conclusion of law later shall be determined to be a finding of fact, it shall be so deemed.

3. All objections, if any, to the Sale Motion or the relief requested therein that have not been withdrawn, waived or settled as announced to the Court at the Sale Hearing or by stipulation filed with the Court, and all reservations of rights included therein, are hereby overruled on the merits with prejudice, except as expressly provided herein. Attached hereto as Exhibit B is a summary schedule of filed objections and the treatment of each.

APPROVAL OF THE PURCHASE AGREEMENT

4. The Purchase Agreement, all transactions contemplated therein and all of the terms and conditions thereof are hereby approved, subject to the terms and conditions of this Sale Order to the extent of any express conflict herewith. In the event of any direct conflict between the terms and conditions of the Purchase Agreement and those of this Sale Order as in effect at the Closing Date, the terms and conditions of this Sale Order shall govern, provided that no change to this Sale Order made after the Closing Date without the consent of the Purchaser shall affect the rights or obligations of the Purchaser arising out of or relating to the Purchase Agreement in any manner.

5. Pursuant to sections 105, 363 and 365 of the Bankruptcy Code, the Debtors are authorized and directed to perform their obligations under and comply with the terms of the Purchase Agreement and consummate the Sale Transaction, pursuant to and in accordance with the terms and conditions of the Purchase Agreement and this Sale Order.

6. The Debtors, as well as their affiliates, officers, employees and agents, are authorized and directed to execute and deliver, and empowered to perform under, consummate and implement, the Purchase Agreement, in substantially the same form as the Purchase Agreement attached hereto as Exhibit A, together with all additional instruments and documents that may be reasonably necessary or desirable to implement the Purchase Agreement and

to take all further actions and execute such other documents as may be (a) reasonably requested by the Purchaser for the purpose of assigning, transferring, granting, conveying and conferring to the Purchaser, or reducing to possession, the Purchased Assets (including, but not limited to, all necessary transition services to be provided to the Purchaser by the Debtors), (b) necessary or appropriate to the performance of the obligations contemplated by the Purchase Agreement and (c) as may be reasonably requested by Purchaser to implement the Purchase Agreement and consummate the Sale Transaction in accordance with the terms thereof, all without further order of the Court.

7. This Sale Order and the Purchase Agreement shall be binding in all respects upon the Purchaser, the Debtors, their affiliates, any trustees appointed in the Debtors' cases (whether under chapter 11 or chapter 7 of the Bankruptcy Code), all creditors (whether known or unknown) of any Debtors, all interested parties and their successors and assigns, including, but not limited to, any party asserting a Claim and any Non-Debtor Counterparty to the Assumed Agreements. Nothing contained in any chapter 11 plan confirmed in these bankruptcy cases or the order confirming any such chapter 11 plan shall conflict with or derogate from the provisions of the Purchase Agreement or this Sale Order, and to the extent of any conflict or derogation between this Sale Order or the Purchase Agreement and such future plan or order, the terms of this Sale Order and the Purchase Agreement shall control to the extent of such conflict or derogation.

8. All amounts, if any, to be paid by Debtors' pursuant to the Purchase Agreement shall constitute administrative expenses pursuant to sections 503(b) and 507(a)(1) of the Bankruptcy Code and shall be due and payable if and when any Debtors' obligations arise under the Purchase Agreement without further order of the Court.

TRANSFER OF PURCHASED ASSETS FREE AND CLEAR

9. Pursuant to sections 105(a) and 363(f) of the Bankruptcy Code, the Debtors are authorized and directed to transfer the Purchased Assets in accordance with the terms of the Purchase Agreement. The Purchased Assets shall be transferred to the Purchaser, and upon consummation of the Purchase Agreement, such transfer (a) shall be a valid, legal, binding and effective transfer; (b) shall vest the Purchaser with all right, title and interest of the Debtors in the Purchased Assets; and (c) shall be free and clear of all Claims except for Assumed Liabilities with all such Claims to attach to the proceeds of the Sale Transaction ultimately attributable to the Purchased Assets against or in which such Claims are asserted, or other specifically dedicated funds, in the order of their priority, with the same validity, force and effect which they now have as against the Purchased Assets, subject to any rights, claims and defenses the Debtors or their estates, as applicable, may possess with respect thereto.

10. In connection with the transfer of the Purchased Assets to the Purchaser (a) the Debtors

are authorized and directed to execute, deliver and perform their obligations under the First Priority Consent, including by indefeasibly paying, or causing the indefeasible payment of, immediately upon consummation of such transfer of the Purchased Assets, $2 billion in immediately available funds to the First Priority Agent to be applied as set forth in the First Priority Consent; and (b) Wilmington Trust Company as Collateral Trustee under the CTA is authorized and directed to comply with the Direction Letter dated as of May 27, 2009 delivered to it by the First Priority Agent as "Controlling Party" under the CTA, including by executing and delivering such documents as are necessary to permit the transfer of the Purchased Assets free and clear of liens on the Purchased Assets held by Wilmington Trust Company as Collateral Trustee under the CTA.

11. Notwithstanding paragraph 15 below or anything to the contrary in this Sale Order or the Purchase Agreement, (a) any Purchased Asset that is subject to any mechanics', carriers', workers', repairers', shippers', marine cargo, construction, toolers', molders' or similar lien or any statutory lien on real and personal property for property taxes not yet due shall continue to be subject to such lien after the Closing Date if and to the extent that such lien (i) is valid, perfected and enforceable as of the Petition Date (or becomes valid, perfected and enforceable after the Petition Date as permitted by section 546(b) or 362(b)(18) of the Bankruptcy Code), (ii) could not be avoided by any Debtor under sections 544 to 549, inclusive, of the Bankruptcy Code or otherwise, were the Closing not to occur; and

(iii) the Purchased Asset subject to such lien could not be sold free and clear of such lien under applicable non-bankruptcy law, and (b) any Liability as of the Closing Date that is secured by a lien described in clause (a) above (such lien, a "Continuing Lien") that is not otherwise an Assumed Liability shall constitute an Assumed Liability with respect to which there shall be no recourse to the Purchaser or any property of the Purchaser other than recourse to the property subject to such Continuing Lien. The Purchased Assets are sold free and clear of any reclamation rights; provided, however, that nothing, in this Sale Order or the Purchase Agreement shall in any way impair the right of any claimant against the Debtors with respect to any alleged reclamation right to the extent such reclamation right is not subject to the prior rights of a holder of a security interest in the goods or proceeds with respect to which such reclamation right is alleged, or impair the ability of a claimant to seek adequate protection against the Debtors with respect to any such alleged reclamation right. Further, nothing in this Sale Order or the Purchase Agreement shall prejudice any rights, defenses, objections or counterclaims that the Debtors, the Purchaser, the U.S. Treasury, EDC, the Creditors' Committee or any other party in interest may have with respect to the validity or priority of such asserted liens or rights, or the type (or amount), if any, of required adequate protection.

12. Except as otherwise provided in the Purchase Agreement, all persons and entities (and their respective successors and assigns), including, but not limited to, all debt security holders, equity security

holders, affiliates, governmental, tax and regulatory authorities, lenders, customers, dealers, employees, trade creditors, litigation claimants and other creditors, holding Claims (whether legal or equitable, secured or unsecured, known or unknown, matured or unmatured, contingent or non-contingent, liquidated or unliquidated, senior or subordinated) except for Assumed Liabilities or Claims against any Purchased Company, arising under or out of, in connection with, or in any way relating to, the Debtors, the Purchased Assets, the operation of the Business prior to Closing or the transfer of the Purchased Assets to the Purchaser, are hereby forever barred, estopped and permanently enjoined from asserting such Claims against the Purchaser, its successors or assigns, its property or the Purchased Assets. No such persons or entities shall assert against the Purchaser or their successors in interest any Claim arising from, related to or in connection with the ownership, sale or operation of any Asset prior to the Closing, except for Assumed Liabilities.

13. This Sale Order (a) shall be effective as a determination that, as of the Closing, (i) no Claims other than (x) Assumed Liabilities relating to the Purchased Assets or (y) Claims against any Purchased Company, will be assertable against the Purchaser, its affiliates, successors or assigns or any of their respective assets (including the Purchased Assets), (ii) the Purchased Assets shall have been transferred to the Purchaser free and clear of all Claims and (iii) the conveyances described herein have been effected; and (b) is and shall be binding upon and govern the acts of all entities, including,

without limitation, all filing agents, filing officers, title agents, title companies, recorders of mortgages, recorders of deeds, registrars of deeds, registrars of patents, trademarks or other intellectual property, administrative agencies, governmental departments, secretaries of state, federal and local officials and all other persons and entities who may be required by operation of law, the duties of their office or contract, to accept, file, register or otherwise record or release any documents or instruments, or who may be required to report or insure any title or state of title in or to any lease; and each of the foregoing persons and entities is hereby directed to accept for filing any and all of the documents and instruments necessary and appropriate to consummate the transactions contemplated by the Purchase Agreement.

14. If any person or entity that has filed financing statements, mortgages, mechanic's liens, lis pendens or other documents or agreements evidencing Claims against or in the Debtors or the Purchased Assets shall not have delivered to the Debtors prior to the Closing of the Sale Transaction, in proper form for filing and executed by the appropriate parties, termination statements, instruments of satisfaction, releases of all interests that the person or entity has with respect to the Debtors or the Purchased Assets or otherwise, then only with regard to Purchased Assets that are purchased by the Purchaser pursuant to the Purchase Agreement and this Sale Order (a) the Debtors are hereby authorized and directed to execute and file such statements, instruments, releases and other documents on behalf of the person or entity with respect to the Purchased Assets; and (b) the Purchaser is hereby authorized to

file, register or otherwise record a certified copy of this Sale Order, which, once filed, registered or otherwise recorded, shall constitute conclusive evidence of the release of all Claims against the applicable Purchased Assets other than the Assumed Liabilities. This Sale Order is deemed to be in recordable form sufficient to be placed in the filing or recording system of each and every federal, state, or local government agency, department or office.

15. All persons or entities in possession of some or all of the Purchased Assets are directed to surrender possession of such Purchased Assets to the Purchaser or its respective designees at the time of the Closing of the Sale Transaction.

16. Following the Closing of the Sale Transaction, no holder of any Claim shall interfere with the Purchaser's title to or use and enjoyment of the Purchased Assets based on or related to any such Claim, or based on any actions the Debtors may take in their chapter 11 cases.

17. All persons and entities are prohibited and enjoined from taking any action to adversely affect or interfere with the ability of the Debtors to transfer the Purchased Assets to the Purchaser in accordance with the Purchase Agreement and this Sale Order.

18. To the extent provided by section 525 of the Bankruptcy Code, no governmental unit may revoke or suspend any permit or license relating to the operation of the Purchased Assets sold, transferred or conveyed to the Purchaser on account of the filing

or pendency of these chapter 11 cases or the consummation of the Sale Transaction contemplated by the Purchase Agreement.

19. Notwithstanding anything else contained herein or in the Purchase Agreement, in connection with the purchase of the Debtors' brands and related Purchased Assets, the Purchaser, from and after the Closing, will recognize, honor and pay liabilities under Lemon Laws for additional repairs, refunds, partial refunds (monetary damages) or replacement of a defective vehicle (including reasonable attorneys' fees, if any, required to be paid under such Lemon Laws and necessarily incurred in obtaining those remedies), and for any regulatory obligations under such Lemon Laws arising now, including but not limited to cases resolved prepetition or in the future, on vehicles manufactured by the Debtors in the five years prior to the Closing (without extending any statute of limitations provided under such Lemon Laws), but in any event not including punitive, exemplary, special, consequential or multiple damages or penalties and not including any claims for personal injury or other consequential damages that may be asserted in relationship to such vehicles under the Lemon Laws. As used herein, "Lemon Law" means a federal or state statute, including, but not limited to, claims under the Magnuson-Moss Warranty Act based on or in conjunction with a state breach of warranty claim, requiring a manufacturer to provide a consumer remedy when the manufacturer is unable to conform the vehicle to the warranty after a reasonable number of attempts as defined in the applicable statute. In connection with the foregoing, the

Purchaser has agreed to continue addressing Lemon Law claims (to the extent that they are Assumed Liabilities) using the same or substantially similar procedural mechanisms previously utilized by the Debtors.

20. The Purchased Owned Real Property and PP&E (as such terms are defined in the Purchase Agreement) that, as of the Closing, are subject to existing statutory liens or any liens that may be created or perfected in accordance with section 362(b)(18) of the Bankruptcy Code shall be transferred to the Purchaser subject to (a) any applicable property taxes for the tax year 2009 (collectively, the "2009 Property Taxes") owed to state and local taxing authorities in the United States (collectively, the "Relevant Taxing Authorities") and (b) any liens related to such 2009 Property Taxes. The 2009 Property Taxes shall be paid by the Purchaser; however, as between the Purchaser and the Debtors such 2009 Property Taxes shall be prorated as of the Closing Date and settled upon receipt of the relevant property tax bills. The Relevant Taxing Authorities shall bill their 2009 Property Taxes to the Purchaser in the ordinary course, not as an expedited or jeopardy assessment.

21. The Debtors shall deposit designated funds in the amount of $63 million in a dedicated escrow account (the "Tax Escrow") to satisfy sales and use taxes, Michigan business taxes and other taxes owed to the Relevant Taxing Authorities in respect of any of the Debtors (including predecessors of the Debtors) and not covered by paragraph 20 above, to

the extent such taxes are (a) secured taxes or may become secured by liens that may be created or perfected in accordance with section 362(b)(18) of the Bankruptcy Code or (b) of the nature authorized to be paid under the Order, Pursuant to Sections 105(a), 363(b), 507(a) and 541 of the Bankruptcy Code, Authorizing the Debtors and Debtors in Possession to Pay Certain Prepetition Taxes (Docket No. 355) to the extent such taxes were or may be asserted or assessed against individuals (collectively, the "Additional Taxes"). Any Claims for Additional Taxes shall attach to, and be satisfied from, the Tax Escrow.

22. (a) Notwithstanding any contrary provision of this Sale Order or the Purchase Agreement, the 61 Vehicles, as described and defined in the response of Wilmington Trust Company to the Sale Motion (Docket No. 1188), will be treated as Excluded Assets that will not be transferred to the Purchaser.

(b) Pursuant to sections 105(a), 363 and 365 of the Bankruptcy Code, the Debtors' assumption and assignment to the Purchaser of all of the Debtors' right, title and interest in or under the Debtors' guaranteed depreciation program agreement and ancillary agreements related thereto (collectively, the "GDP Agreement") with Dollar Thrifty Automotive Group, Inc. and its affiliates (collectively, "DTAG") are hereby approved, and all requirements of section 365 of the Bankruptcy Code are hereby deemed satisfied as of the date of, and effective only upon, the Closing of the Sale Transaction. DTAG has consented to such assumption and assignment and agrees that, subject to payment of Cure Costs, such assumption and assignment shall not constitute an event of default thereunder or permit the termination thereof. The Debtors and DTAG shall confer in good faith to determine the amount of the Cure Costs to be paid under the GDP Agreement. If the Debtors and DTAG are unable to reach a resolution of such cure cost amount, either of such parties may apply to the Court for an order, upon notice and a hearing, determining the correct Cure Cost amount.

(c) All obligations of Chrysler LLC under the GMAC MAFA Term Sheet (the "GMAC Term Sheet") attached to the Purchase Agreement as Exhibit A, or if executed, the definitive GMAC Master Autofinance Agreement, which agreement shall be substantially on the same terms as the GMAC Term Sheet or the Annexes thereto, as well as any intellectual property licensing agreements entered into connection therewith and all the other agreements that are specified in the GMAC Term Sheet, including, without limitation, one or more repurchase agreements with substantially the same terms as set forth in Annex D to Exhibit A of the Purchase Agreement (collectively with the GMAC Term Sheet, the "GMAC MAFA Documents") shall be assigned by the Debtors to the Purchaser, and the Purchaser shall be deemed to have assumed the GMAC MAFA Documents, pursuant to this Sale Order and the Bidding Procedures Order, and each non-Debtor party to the GMAC MAFA Documents shall be deemed to have consented to such assumption and assignment. Assumption and assignment of the GMAC MAFA Documents are integral to the Sale Transaction and the Purchase Agreement, are in the best interests of the Debtors and their estates, creditors, employees and retirees and represent the reasonable exercise of the Debtors' sound business judgment.

(d) At the Purchaser's written election, to be made by notice to Chrysler Financial Services Americas LLC ("Chrysler Financial") no later than June 12, 2009, or such other date as the Purchaser and Chrysler Financial may agree, either: (i) (A) the vehicles related to unperformed or partially unperformed repurchase obligations arising from or related to agreements between the Debtors and dealers whose dealerships were terminated prepetition, or arising from or related to prepetition agreements between Chrysler Financial and the Debtors (collectively, the "Repurchased Vehicles"), and (B) the vehicles commonly referred to by Chrysler Financial and the Debtors as "conversion vehicles" that are currently in the possession of entities that convert such vehicles into "conversion vehicles" (together with Repurchased Vehicles, the "Conversion and Repurchased Vehicles"), will be treated as "Excluded Assets" that will not be transferred to the Purchaser; or (ii) will be treated as Purchased Assets and the alleged liens in favor of Chrysler Financial or its affiliates on the Conversion and Repurchased Vehicles will be Continuing Liens to the extent they meet the requirements of subparagraphs 11(a)(i) through (iii) above.

(e) Chrysler Financial and its affiliates object to the sale to the Purchaser of any insurance policy, surety bond or related indemnity arrangement to the extent that it (i) is an executory contract to extend a financial accommodation or a personal services contract and therefore not assumable and assignable to the Purchaser pursuant to section 365(c)(1) or (c)(2) of the Bankruptcy Code or (ii) is property the sale of which is not permitted under state or contract law and that entitles Chrysler Financial and its affiliates to adequate protection pursuant to section 363(e) of the Bankruptcy Code or that may not be sold free and clear of the interests of Chrysler Financial and its affiliates pursuant to section 363(f) of the Bankruptcy Code. The parties reserve all rights (including, without limitation, any rights under the Contract Procedures and, in the case of the Purchaser, any rights against the Debtors pursuant to Sections 2.11 and 2.12 of the Purchase Agreement) and agree that no such policy, bond or arrangement shall be deemed to be transferred to Purchaser and that no liens, rights of setoff, equitable subrogation or equitable lien arising in favor of Chrysler Insurance Company, as insurer or surety, as against any Debtor's estate shall be terminated, diminished or affected by reason of any provision of the Purchase Agreement or this Sale Order until such objections are resolved by the Court.

23. Nothing in this Sale Order or in the Purchase Agreement releases, nullifies or enjoins the enforcement of any liability to a governmental unit under police and regulatory statutes or regulations that any entity would be subject to as the owner or operator of property after the date of entry of this Sale Order.

APPROVAL OF UAW RETIREE SETTLEMENT AGREEMENT

24. The UAW Retiree Settlement Agreement, all transactions contemplated therein and all of the terms and conditions thereof are fair, reasonable and in the best interests of the retirees and are hereby approved. The Debtors, the Purchaser and the UAW are authorized to perform their obligations under, or in connection with, the implementation of the UAW Retiree Settlement Agreement and comply with the terms of the UAW Retiree Settlement Agreement pursuant to and in accordance with the terms and conditions of the UAW Retiree Settlement Agreement and this Sale Order. The Trust Amendments are hereby approved and the English Case VEBA Trust Agreement is reformed accordingly (as such terms are defined in the UAW Retiree Settlement Agreement).

ASSUMPTION AND ASSIGNMENT OF ASSUMED AGREEMENTS

25. Pursuant to sections 105(a), 363 and 365 of the Bankruptcy Code, and in accordance with the Contract Procedures, the Debtors' assumption and assignment or other transfer to the Purchaser of all of the Debtors' right, title and interest in or under the Assumed Agreements are hereby approved, with only such exceptions as Purchaser may agree in writing, and all requirements of section 365 of the Bankruptcy Code are hereby deemed satisfied. For the avoidance of doubt, subject to the Contract Procedures (including the resolution of any Section 365 Objection and the issuance of a Confirmation

Notice, as set forth in the Bidding Procedures Order), the Debtors shall be deemed to have assumed and assigned each of the Assumed Agreements as of the date of and effective only upon the Closing of the Sale Transaction and, absent such Closing, each of the Assumed Agreements shall neither be deemed assumed nor assigned and shall in all respects be subject to subsequent assumption or rejection by the Debtors under the Bankruptcy Code.

26. Except as provided herein, the Debtors are hereby authorized in accordance with sections 105(a) and 365 of the Bankruptcy Code and the Contract Procedures to assume and assign, sell and otherwise transfer the Assumed Agreements of all of the Debtors' right, title or interest therein or thereunder to the Purchaser free and clear of all Claims, and to execute and deliver to the Purchaser such documents or other instruments as may be necessary to assign and transfer the Assumed Agreements to the Purchasers.

27. In accordance with the Contract Procedures, the Assumed Agreements shall be transferred to, and remain in full force and effect for the benefit of, the Purchaser in accordance with their respective terms, notwithstanding any provision in any such Assumed Agreement (including those of the type described in sections 365(e)(1) and (f) of the Bankruptcy Code) that prohibits, restricts or conditions such assignment or transfer. There shall be no rent accelerations, assignment fees, penalties, increases or any other fees charged to the Purchaser or the Debtors as a result of the assumption or

assignment of the Assumed Agreements. No Assumed Agreement may be terminated, or the rights of any party modified in any respect, including pursuant to any "change of control" clause, by any other party thereto as a result of the transactions contemplated by the Purchase Agreement.

28. To the extent that the Purchaser exercises its right to exclude any Assumed Agreement from the Sale Transaction prior to the applicable Agreement Assumption Date, such Assumed Agreement shall (a) be deemed never to have been assumed by the Debtors or assigned to the Purchaser and (b) remain subject to assumption, rejection or assignment by the Debtors at any time in the future.

29. Except as may be otherwise agreed to by the parties to an Assumed Agreement, the Cure Costs under the Assumed Agreements shall be paid by the Purchaser as soon as practicable and in no event later than ten days after the later of (a) the Closing of the Sale Transaction or (b) following the date on which such Assumed Agreement is deemed assumed and assigned in accordance with the Contract Procedures. With respect to Disputed Cure Costs, the Purchaser shall reserve sufficient funds to pay the full amount of any Disputed Cure Costs related to the Sale Transaction until such time as there is a resolution among the parties or a final order of this Court determining the correct Cure Costs. In addition to the Cure Costs (but without duplication), the Purchaser will assume and pay, in the ordinary course of business and as they come due, all amounts for goods delivered and services provided prepetition for which payment was not due as of the Petition

Date and for postpetition goods delivered and services provided to the Debtors under each Assumed Agreement to the extent due and payable and not otherwise paid by the Debtors.

30. Payment of the Cure Costs shall be a full satisfaction of any and all defaults under the Assumed Agreements, whether monetary or non-monetary, and upon payment of the Cure Costs any default of the Debtors thereunder shall have been irrevocably cured. Upon the assumption and assignment of an Assumed Agreement under the Contract Procedures, the Debtors shall be released from any liability whatsoever arising under the Assumed Agreements and the Cure Costs and ongoing obligations under the Assumed Agreement shall be solely the obligation of the Purchaser. Except as otherwise provided in this Sale Order, each Non-Debtor Counterparty to an Assumed Agreement hereby is forever barred, estopped and permanently enjoined from asserting against the Debtors or the Purchaser, their successors or assigns or the property of any of them, any default existing as of the date of the assumption of the Assumed Agreement.

31. The failure of the Debtors or the Purchaser to enforce at any time one or more terms or conditions of any Assumed Agreement shall not be a waiver of such terms or conditions, or of the Debtors' and the Purchaser's rights to enforce every term and condition of the Assumed Agreements.

32. Upon the Agreement Assumption Date (or such earlier date as set forth in the Contract

Procedures), the Purchaser shall be fully and irrevocably vested with all right, title and interest of the Debtors under the Assumed Agreements.

33. The assignments of each of the Assumed Agreements are made in good faith under sections 363(b) and (m) of the Bankruptcy Code.

34. In connection with the foregoing and consistent with the Contract Procedures, the Purchaser and the Creditors' Committee have agreed to the following: (a) no later than the second calendar day after the initial Section 365 Objection Deadline, the Purchaser will serve Confirmation Notices on the applicable Non-Debtor Counterparties; (b) no later than the second calendar day after the initial Section 365 Hearing, the Purchaser will serve additional Confirmation Notices on the applicable Non-Debtor Counterparties; (c) the Purchaser and the Creditors' Committee acknowledge that, if the Closing occurs prior to June 12, 2009, the terms of the Contract Procedures provide that the Assurance Letter procedure will not apply; and (d) paragraph 20 of the Bidding Procedures Order is clarified to provide that all Designated Agreements (rather than all contracts) that have not become Confirmed Contracts as of the Closing Date shall constitute "Excluded Contracts" for purposes of the Purchase Agreement (without any requirement to update the Company Disclosure Letter) unless such Designated Agreements subsequently become Confirmed Contracts in accordance with the Contract Procedures. The failure of the Purchaser to deliver a Confirmation Notice with respect to any Non-Debtor

Counterparty as contemplated in clause (a) and (b) of this paragraph 34, whether because the parties have not agreed to Cure Costs or otherwise, shall not preclude the ability of the Purchaser to deliver a Confirmation Notice to such Non-Debtor Counterparty after such time and prior to the "Final Designation Date" (as defined in the Bidding Procedures Order).

ADDITIONAL PROVISIONS

35. Except for the Assumed Liabilities expressly set forth in the Purchase Agreement or described therein or Claims against any Purchased Company, none of the Purchaser, its successors or assigns or any of their respective affiliates shall have any liability for any Claim that (a) arose prior to the Closing Date, (b) relates to the production of vehicles prior to the Closing Date or (c) otherwise is assertable against the Debtors or is related to the Purchased Assets prior to the Closing Date. The Purchaser shall not be deemed, as a result of any action taken in connection with the Purchase Agreement or any of the transactions or documents ancillary thereto or contemplated thereby or the acquisition of the Purchased Assets, to: (a) be a legal successor, or otherwise be deemed a successor to the Debtors (other than with respect to any obligations arising under the Assumed Agreements from and after the Closing); (b) have, de facto or otherwise, merged with or into the Debtors; or (c) be a mere continuation or substantial continuation of the Debtors or the enterprise of the Debtors. Without limiting the foregoing, the Purchaser shall not have any successor, derivative or vicarious liabilities of

any kind or character for any Claims, including, but not limited to, on any theory of successor or transferee liability, de facto merger or continuity, environmental, labor and employment, products or antitrust liability, whether known or unknown as of the Closing, now existing or hereafter arising, asserted or unasserted, fixed or contingent, liquidated or unliquidated.

36. The Purchaser (or its designee) is authorized and directed, in accordance with Section 5.20 of the Purchase Agreement, to substitute, backstop or replace, as the case may be, in a manner reasonably satisfactory to the Debtors, those letters of credit existing as of the Closing that secure future obligations of the Purchaser under an Assumed Agreement and are identified in writing by the Debtors as part of the Cure Costs. The Purchaser shall cause the originals of any such substituted or replaced letters of credit to be returned to the Debtors or the issuer thereof with no further drawings made thereunder.

37. The Purchaser is hereby granted a first priority lien and super-priority administrative claim over the proceeds of any tax refunds (including interest thereon), returns of withholding taxes or similar payments, and any proceeds of tax sharing, contribution or similar agreements (in each case, other than on refunds due to be paid to third parties pursuant to the Original Contribution Agreement, as defined in the Purchase Agreement) to secure the payment of all amounts due to the Purchaser from any of the Debtors under the tax indemnities in Article 9 of the Purchase Agreement.

38. Effective upon the Closing and except as otherwise set forth herein or provided by stipulations filed with or announced to the Court with respect to a specific matter, all persons and entities are forever prohibited and enjoined from commencing or continuing in any matter any action or other proceeding, whether in law or equity, in any judicial, administrative, arbitral or other proceeding against the Purchaser, its successors and assigns, or the Purchased Assets, with respect to any (a) Claim other than (i) Assumed Liabilities or (ii) Claims against any Purchased Company or (b) successor liability of the Purchaser for any of the Debtors, including, without limitation, the following actions with respect to clauses (a) and (b): (i) commencing or continuing any action or other proceeding pending or threatened against the Debtors as against the Purchaser, or its successors, assigns, affiliates or their respective assets, including the Purchased Assets; (ii) enforcing, attaching, collecting or recovering in any manner any judgment, award, decree or order against the Debtors as against the Purchaser or its successors, assigns, affiliates or their respective assets, including the Purchased Assets; (iii) creating, perfecting or enforcing any lien, claim, interest or encumbrance against the Debtors as against the Purchaser or its successors, assigns, affiliates or their respective assets, including the Purchased Assets; (iv) asserting any setoff, right of subrogation or recoupment of any kind (in the case of recoupment only, except as a defense for payment of an obligation other than an Assumed Agreement) for any obligation of any of the Debtors as against any obligation due the Purchaser or its successors,

assigns, affiliates or their respective assets, including the Purchased Assets; (v) commencing or continuing any action, in any manner or place, that does not comply, or is inconsistent with, the provisions of this Sale Order or other orders of this Court, or the agreements or actions contemplated or taken in respect thereof; or (vi) revoking, terminating or failing or refusing to renew any license, permit or authorization to operate any of the Purchased Assets or conduct any of the businesses operated with such assets.

39. Except for the applicable Assumed Liabilities, the Purchaser shall not have any liability or other obligation of the Debtors or their affiliates arising under or related to the Purchased Assets. Without limiting the generality of the foregoing, and except as otherwise specifically provided herein or in the Purchase Agreement, the Purchaser shall not be liable for any claims against the Debtors or any of their predecessors or affiliates, and the Purchaser shall have no successor or vicarious liabilities of any kind or character, including, but not limited to, any theory of antitrust, environmental, successor or transferee liability, labor law, de facto merger or substantial continuity, whether known or unknown as of the Closing, now existing or hereafter arising, whether fixed or contingent, asserted or unasserted, liquidated or unliquidated, with respect to the Debtors or their affiliates or any obligations of the Debtors or their affiliates arising prior to the Closing, including, but not limited to, liabilities on account of any taxes arising, accruing or payable under, out of, in connection with, or in any way

relating to the operation of the Purchased Assets prior to the Closing of the Sale Transaction.

40. Upon the Debtors' assignment of the Assumed Agreements to the Purchaser under the provisions of this Sale Order and any additional order contemplated by the Purchase Agreement, no default shall exist under any Assumed Agreement, and no counterparty to any Assumed Agreement shall be permitted to declare a default by the Purchaser under such Assumed Agreement or otherwise take action against the Purchaser as a result of any Debtor's financial condition, bankruptcy or failure to perform any of its obligations under the relevant Assumed Agreement.

41. For the avoidance of doubt:

(a) with respect to each Excluded Contract, the Purchaser is not acquiring any right, title or interest in, to and under such Excluded Contract, including without limitation any claim, cause of action, right of recoupment or receivable (whether for money or property), and all rights of a Non-Debtor Counterparty against the Debtors arising under such Excluded Contract, including rights of setoff, are not modified or waived;

(b) with respect to each Assumed Agreement, nothing in this Sale Order or the Purchase Agreement affects the contractual rights and remedies of a Non-Debtor Counterparty under such Assumed Agreement, including, without limitation, any right of setoff, recoupment, subrogation, indemnity rights and any defenses to performance, except to the extent such contractual rights and remedies result from the financial condition or bankruptcy of a Debtor or arise out of or relate to a default or failure to perform under such Assumed Agreement at or prior to the time of assumption and assignment;

(c) with respect to Purchased Assets (whether Assumed Agreements or other Purchased Assets such as Claims and receivables), nothing in this Sale Order or the Purchase Agreement affects any other defense or right of the non-Debtor obligor under applicable law, provided that a non-Debtor obligor may not assert any setoff, recoupment or other right or defense to the extent (a) resulting from the financial condition or bankruptcy of a Debtor or arising out of or relating to a default or failure to perform under such Assumed Agreement at or prior to the time of assumption and assignment or (b) arising out of or relating to an Excluded Liability; and

(d) with respect to leases, nothing in this Sale Order or the

> Purchase Agreement shall (a) affect the rights of any lessor of property leased by a Debtor under an unexpired lease except to the extent such unexpired lease becomes an Assumed Agreement in accordance with the Contract Procedures and applicable law, (b) sell to the Purchaser any leased property not owned by a Debtor or (c) with respect to leases that are Excluded Contracts, affect possessory or ownership rights as against any Debtor or the Purchaser.

42. The Purchaser has given substantial consideration under the Purchase Agreement for the benefit of the holders of Claims. The discrete consideration given by the Purchaser shall constitute valid and valuable consideration for the releases of any potential claims of successor liability of the Purchaser, which releases shall be deemed to have been given in favor of the Purchaser by all holders of any Claims of any kind whatsoever.

43. While the Debtors' bankruptcy cases are pending, this Court shall retain jurisdiction to, among other things, interpret, enforce and implement the terms and provisions of this Sale Order and the Purchase Agreement, all amendments thereto, any waivers and consents thereunder (and of each of the agreements executed in connection therewith in all respects), to adjudicate disputes related to this Sale Order or the Purchase Agreement and to enter any orders under sections 105, 363 and/or 365 (or other relevant provisions) of

the Bankruptcy Code with respect to the Assumed Agreements.

44. Nothing in this Sale Order or the Purchase Agreement releases, nullifies, or enjoins the enforcement of any liability to a governmental unit under environmental statutes or regulations (or any associated liabilities for penalties, damages, cost recovery or injunctive relief) that any entity would be subject to as the owner or operator of property after the date of entry of this Sale Order. Notwithstanding the foregoing sentence, nothing in this Sale Order shall be interpreted to deem the Purchaser as the successor to the Debtors under any state law successor liability doctrine with respect to any liabilities under environmental statutes or regulations for penalties for days of violation prior to entry of this Sale Order or for liabilities relating to off-site disposal of wastes by the Debtors prior to entry of this Sale Order. Nothing in this paragraph should be construed to create for any governmental unit any substantive right that does not already exist under law.

45. No bulk sales law, or similar law of any state or other jurisdiction shall apply in any way to the transactions contemplated by the Purchase Agreement, the Sale Motion and this Sale Order.

46. The transactions contemplated by the Purchase Agreement are undertaken by the Purchaser in good faith, as that term is used in section 363(m) of the Bankruptcy Code, and accordingly, the reversal or modification on appeal of the authorization provided herein to consummate

the Sale Transaction shall not affect the validity of the Sale Transaction (including the assumption and assignment of the Assumed Agreements), unless such authorization is duly stayed pending such appeal.

47. The consideration provided by the Purchaser for the Purchased Assets constitutes reasonably equivalent value and fair consideration (as those terms may be defined in each of the Uniform Fraudulent Transfer Act, Uniform Fraudulent Conveyance Act and section 548 of the Bankruptcy Code) under the Bankruptcy Code and under the laws of the United States, any state, territory or possession thereof or the District of Columbia or any other applicable jurisdiction with laws substantially similar to the foregoing.

48. The Sale Transaction may not be avoided under section 365(n) of the Bankruptcy Code.

49. The terms and provisions of the Purchase Agreement and this Sale Order shall be binding in all respects upon, and shall inure to the benefit of, the Debtors, their estates, their creditors, the Purchaser, the respective affiliates, successors and assigns of each, and any affected third parties, including, but not limited to, all persons asserting claims in the Purchased Assets to be sold to the Purchaser pursuant to the Purchase Agreement, notwithstanding any subsequent appointment of any trustee(s), examiner(s) or receiver(s) under any chapter of the Bankruptcy Code or any other law, and all such provisions and terms shall likewise be binding on such trustee(s), examiner(s) or receiver(s)

and shall not be subject to rejection or avoidance by the Debtors, their estates, their creditors, their shareholders or any trustee(s), examiner(s), or receiver(s).

50. The failure specifically to include any particular provision of the Purchase Agreement in this Sale Order shall not diminish or impair the effectiveness of such provision, it being the intent of the Court that the Purchase Agreement and its exhibits and ancillary documents be authorized and approved in their entirety.

51. The Purchase Agreement may be modified, amended or supplemented by the parties thereto, in a writing signed by both parties, and in accordance with the terms thereof, without further order of the Court, provided that any such modification, amendment or supplement does not materially change the terms of the Purchase Agreement or modify the express terms of this Sale Order.

52. Each and every federal, state and local governmental agency, department or official is hereby directed to accept any and all documents and instruments necessary and appropriate to consummate the transactions contemplated by the Purchase Agreement.

53. Subject to further order of the Court and consistent with the terms of the Purchase Agreement and the Transition Services Agreement, the Debtors and the Purchaser are authorized to, and shall, take appropriate measures to maintain and preserve, until the consummation of any chapter

11 plan for the Debtors, the books, records and any other documentation, including tapes or other audio or digital recordings and data in or retrievable from computers or servers relating to or reflecting the records held by the Debtors or their affiliates relating to the Debtors' businesses.

54. Consistent with the terms of the Purchase Agreement and the Transition Services Agreement, the Debtors have agreed to transfer to the Purchaser (or one or more of its subsidiaries, as applicable) a substantial portion of the Debtors' cash management system maintained pursuant to an order of this Court (Docket No. 1303) entered on May 20, 2009, including, without limitation, several bank accounts maintained by the Debtors. Such cash management system assets, including such bank accounts, constitute Purchased Assets under the Purchase Agreement. Notwithstanding the foregoing transfers, the Debtors will maintain such bank accounts and a cash management system that is necessary to effect the orderly administration of the Debtors' chapter 11 estates, including any modifications thereof after the Closing, to ensure a reasonable accounting and segregation of the Debtors' cash To the extent any funds of the Debtors that do not constitute Purchased Assets are held in accounts transferred to the Purchaser (or one or more of its subsidiaries), such funds shall be promptly returned to the appropriate Debtor, and such funds shall remain subject to any and all liens of the Debtors' lienholders thereon. Likewise, to the extent that any funds that constitute Purchased Assets are held in accounts maintained by one or more Debtors after the Closing, such funds shall be promptly

transferred to the Purchaser. The applicable Debtors and the Purchaser (and/or one or more of its subsidiaries, as applicable), may execute any agreement, assignment, novation, instrument or other document the parties deem necessary or appropriate to effectuate the transfers described in this paragraph, which is consistent with the general authority to the same provided in paragraph 6 hereof.

55. Those powers of attorney granted by Chrysler LLC and any of the other Debtors and any related documentation entered into by such entities for the purpose of (a) effectuating the transfers of such entities' interests in their non-debtor foreign affiliates to the Purchaser, Chrysler Motors LLC or their respective designees in connection with consummation of the Sale Transaction or (b) effectuating the transfers of interests in certain foreign affiliates to Chrysler LLC or any of the other Debtors prior to consummation of the Sale Transaction are here by ratified and approved in all respects, regardless of whether such powers of attorney or other documentation were issued or entered into prior to or subsequent to the Petition Date.

56. The Debtors are hereby authorized and empowered, upon and in connection with the Closing, to change their corporate names and the caption of these chapter 11 cases, consistent with applicable law. The Debtors shall file a notice of change of case caption within one business day of the Closing, and the change of case caption for these

chapter 11 cases shall be deemed effective as of the Closing.

57. As provided by Bankruptcy Rules 6004(h) and 6006(d), this Sale Order shall not be stayed for ten days after its entry and shall be effective as of 12:00 noon, Eastern Time, on Friday June 5, 2009, and the Debtors and the Purchaser are authorized to close the Sale Transaction on or after 12:00 noon, Eastern Time, on Friday June 5, 2009.[4] Any party objecting to this Sale Order must exercise due diligence in filing an appeal and pursuing a stay or risk its appeal being foreclosed as moot in the event Purchaser and the Debtors elect to close prior to this Sale Order becoming a Final Order.

58. Any amounts payable to the Purchaser shall be paid by the Debtors in the manner provided in the Purchase Agreement without further order of this

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[4] The Court considered the Debtor's request for a waiver of the stay imposed, pursuant to Bankruptcy Rules 6004(h) and 6006(d), objections filed to that request, and Debtors' modified request as of June 1, 2009, whereby Debtors' sought a waiver of the stay imposed to permit a closing to take place on Thursday, June 4, 2009 at 9:00 a.m. In their modified request, the Debtors reference the deposition testimony of Matthew Feldman, an advisor to the President's Auto Task Force, indicating that the Debtors are losing $100 million a day, and the other exigent circumstances facing Chrysler, including the continuing deterioration of its asset value, its supply chain, and its going-concern value. The Court determines that a partial waiver of the stay is justified. Any request to further modify the stay should be made to the appellate court.

Court, shall be an allowed administrative claim under sections 503(b) and 507(a)(2) of the Bankruptcy Code, shall be protected as provided in the Bidding Procedures Order and shall not be altered, amended, discharged or affected by any plan proposed or confirmed in these cases without the prior written consent of the Purchaser.

59. This Court retains jurisdiction to interpret, implement and enforce the terms and provisions of this Sale Order including to compel delivery of the Purchased Assets, to protect the Purchaser against any Claims and to enter any orders under sections 105, 363 or 365 (or other applicable provisions) of the Bankruptcy Code to transfer the Purchased Assets and the Assumed Agreements to the Purchaser.

Dated: New York, New York
June 1, 2009
s/Arthur J. Gonzalez
UNITED STATES BANKRUPTCY JUDGE

EXHIBIT A
PURCHASE AGREEMENT

[The Master Transaction Agreement can be found at chryslerrestructuring.com, docket number 3232, Exhibit A]

EXHIBIT B

SUMMARY SCHEDULE OF FILED OBJECTIONS

[The Summary Schedule of Filed Objections can be found at chryslerrestructuring.com, docket number 3232, Exhibit B]

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re	: Chapter 11
CHRYSLER LLC, *et al.*,	: Case No. 09 B 50002 (AJG)
Debtors.	: (Jointly Administered)

OPINION GRANTING DEBTORS' MOTION SEEKING AUTHORITY TO SELL, PURSUANT TO 11 U.S.C. § 363, SUBSTANTIALLY ALL OF THE DEBTORS' ASSETS

Before the Court is a motion seeking authority to sell substantially all of the debtors' operating assets, free and clear of liens, claims, interests and encumbrances to a successful bidder and to authorize the assumption and assignment of certain executory contracts and unexpired leases in connection with the sale, as well as certain other related relief. The sale transaction for which authorization is sought (the "Sale Transaction" or "Fiat Transaction") is similar to that presented in other cases in which exigent circumstances warrant an expeditious sale of assets prior to confirmation of a plan. The fact that the U.S. government is the primary source of funding does not alter the analysis under bankruptcy law.

FACTS[1]

On April 30, 2009 (the "Petition Date"), Chrysler LLC ("Chrysler") and 24 of its domestic direct and indirect subsidiaries (collectively with Chrysler, the "Original Debtors") filed for protection under title 11 of the United States Code (the "Bankruptcy Code"). On May 1, 2009, an Order was entered directing that the Original Debtors' cases be jointly administered for procedural purposes, pursuant to Rule 1015(a) of the Federal Rules of Bankruptcy Procedure. On May 19, 2009, Alpha Holding LP[2] ("Alpha" and with the Original Debtors, the "Debtors") filed a petition for relief under title 11 of the Bankruptcy Code. On May 26, 2009, an order (the "Alpha Order") was entered directing the joint administration of Alpha's bankruptcy case with the cases of the Original Debtors.[3] The Debtors continue to operate their

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[1] The findings of fact and conclusions of law herein shall constitute the Court's findings of fact and conclusions of law pursuant to Bankruptcy Rule 7052, made applicable to this proceeding pursuant to Bankruptcy Rule 9014. To the extent any finding of fact later shall be determined to be a conclusion of law, it shall be so deemed, and to the extent any conclusion of law later shall be determined to be a finding of fact, it shall be so deemed. Further, modifications and amplifications of the findings of facts and conclusions of law herein may be made in the final order approving the sale.

[2] Alpha is a holding company that conducts no business other than holding capital stock of Chrysler Canada Inc. and Chrysler Mexico Holding S.de R.L de C.V.

[3] In addition, the Alpha Order provided that, to the extent applicable, (a) any order that previously had been entered in the jointly administered Original Debtors'

respective businesses as debtors-in-possession pursuant to sections 1107 and 1108 of the Bankruptcy Code.

On May 5, 2009, an Official Committee of Unsecured Creditors (the "Creditors' Committee") was formed. By order, dated May 1, 2009, the Court approved the Debtors' motion to retain Capstone Advisory Group ("Capstone") to provide financial consulting and advisory services to the Debtors. On May 20, 2009, subject to the submission of an agreed-upon order, the Court approved the retention of Greenhill & Co., LLC ("Greenhill"), as the Debtors' investment advisor.[4]

On May 14, 2009, the Debtors filed a motion seeking to reject executory contracts and unexpired leases affecting 789 domestic car dealerships. The motion is currently scheduled to be heard on June 3, 2009.

The Debtors and their non-debtor direct and indirect subsidiaries (collectively, the "Chrysler Companies") comprise one of the largest manufacturers and distributors of automobiles and other vehicles, together with related parts and accessories. At the Petition Date, Chrysler had 32 manufacturing and assembly facilities and 24 parts

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cases was applicable to Alpha, nunc pro tunc, to the date that Alpha filed its bankruptcy petition, and (b) that future orders entered in the Debtors cases would apply to Alpha.

[4] As of this date, an agreed-upon proposed order has not been submitted.

depots worldwide; and in addition, at the Petition Date, it had a network of 3,200 independent dealerships in the United States, with 72% of Chrysler sales occurring in the United States.

Prior to the bankruptcy filing, Chrysler had a worldwide annual production of approximately 2 million vehicles under the Chrysler, Dodge and Jeep® brands. The Debtors primary competitors are other major Original Equipment Manufacturers ("OEM's"). These include domestic OEM's: Ford Motor Company ("Ford") and General Motors Corporation ("GM"), as well as international OEM's that have assembly and/or manufacturing plants in the United States: Toyota Motor Corporation ("Toyota"), Nissan Motor Company ("Nissan"), Honda Motor Company ("Honda"), and Hyundai Motor Company ("Hyundai-Kia").

As of the Petition Date, the Chrysler Companies employed approximately 55,000 hourly and salaried workers, with approximately 70% or 38,500 of that workforce based in the United States. Approximately 70% or 27,600 of the domestic workforce is covered by a collective bargaining agreement. In addition, as of the Petition Date, the Debtors made payments for health care and related benefits to over 106,000 retirees.

For the twelve month period ending December 31, 2008, the revenue recorded for the Chrysler Companies was more than $48.5 billion, with assets of approximately $39.3 billion and liabilities of $55.2 billion. For that same period, the net loss was $16.8 billion.

Chrysler's ultimate parent company is Chrysler Holding LLC ("Holding"). The owners of Holding are Cerberus Capital Management L.P. ("Cerberus") and Daimler AG ("Daimler"). As of the Petition Date, Cerberus or its affiliates held 80.1% of the membership interests in Holding, and Daimler or its affiliates held 19.9% of its membership interests.

Pursuant to an Amended and Restated First Lien Credit Agreement dated as of November 29, 2007 (the "First Lien Credit Agreement")[5] a $10 billion term loan that matures on August 2, 2013 was made available to Chrysler. JP Morgan Chase Bank N.A. is the administrative agent (the "Administrative Agent") under the First Lien Credit Agreement. Chrysler's obligations under the First Lien Credit Agreement are secured by a security interest in and first lien on substantially all of Chrysler's assets. In addition, those obligations are guaranteed by certain other Debtors. The guarantees by these "other" Debtors are secured by a first priority lien on substantially all of such Debtors' respective assets. On the Petition Date, Chrysler owed the first-lien prepetition lenders (the "First-Lien Lenders") approximately $6.9 billion under that term loan.

In addition, under a Second Lien Credit Agreement (the "Second Lien Credit Agreement"), Chrysler received a $2 billion term loan that is

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[5] The First Lien Credit Agreement actually amended and restated an original first lien credit agreement that was issued on August 3, 2007. Subsequently, on January 2, 2009, April 6, 2009, and April 24, 2009, the First Lien Credit Agreement was further amended.

scheduled to mature on February 3, 2014. The $2 billion loan is comprised of $1.5 billion from Daimler Financial, an affiliate of Daimler and $500 million from Madeleine LLC, an affiliate of Cerberus. The Second Lien Credit Agreement provides that these second-lien prepetition lenders hold a second-priority security interest in the same collateral that secures the First Lien Credit Agreement.

In late 2008, Congress promulgated the Emergency Economic Stabilization Act of 2008 ("EESA") Pub. L. NO. 110-343, 122 State. 3765 (Oct. 3, 2008) (codified at 12 U.S.C. §§ 5201 *et seq*.), which established the Troubled Asset Relief Program ("TARP"). TARP authorizes the Secretary of the Treasury to purchase troubled assets to restore confidence in the economy and stimulate the flow of credit. Pursuant to a Loan and Security Agreement (the "TARP Loan Agreement"), dated as of December 31, 2008, Holding has borrowed $4 billion from the U.S. Treasury for general corporate and working capital, with a maturity of no later than January 2, 2012 (the "TARP Loan").[6] Holding has also provided the U.S. Treasury with a separate promissory note in the amount of $267 million that matures on January 2, 2012 (the "TARP Note" and, together with the TARP Loan, the "TARP Financing"). As security for the TARP Financing, the U.S. Treasury was granted a first-priority lien on all unencumbered

[6] The government had the right to accelerate the entire amount due if Chrysler failed to submit a restructuring plan, or "viability plan," acceptable to the government by February 17, 2009.

assets and Chrysler's MOPAR[7] parts inventory, and a third-priority lien on other assets serving as collateral for obligations owed the first and second lien prepetition lenders.

As of the Petition Date, the Debtors estimate that they had approximately $5.34 billion outstanding debt with trade creditors, including domestic and foreign suppliers, shippers, warehousemen and customs brokers.

Restructuring Efforts

In early 2007, prior to filing for bankruptcy, Chrysler initiated an operational restructuring effort that initially met set targets through the first half of 2008. Part of that restructuring included a search for potential partners and strategic alliances that would impact its cost structure and allow it to expand into new products, market segments and geographic locations. Specifically, Chrysler sought a strategic partner with expertise in smaller, more fuel efficient vehicles. Chrysler also sought to increase its size and to have more of a global presence. To that end, in 2007 and 2008, Chrysler discussed and negotiated for potential alliances with GM, Fiat S.p.A ("Fiat"), Nissan, Hyundai-Kia, Toyota, Volkswagen, Tata Motors, GAZ Group, Magna International, Mitsubishi Motors, Honda, Beijing Automotive, Tempo International Group, Hawtai Automobiles and Chery Automobile Co.

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[7] Since 1930, Chrysler has operated a vehicle parts division under the MOPAR brand.

In the fall of 2008, a global credit crisis affecting the liquidity markets impacted the availability of loans both to dealers and consumers, resulting in the erosion of consumer confidence and a sharp drop in vehicle sales. Chrysler was forced to use cash reserves to compensate for the reduction in cash flow and the resulting losses. The losses eliminated the gains that Chrysler had made early in its restructuring effort. Moreover, other OEM's were impacted, forcing them to confront their own liquidity issues.

As a result, in late 2008, Chrysler and other entities sought assistance from the government to obtain new financing to fund their operations to carry them through the liquidity crunch. In response, the TARP Financing was provided. Chrysler sought $7 billion and they were given $4 billion. Pursuant to the terms of the loan, Chrysler was required to submit a plan showing that it was able to achieve and sustain long-term viability, energy efficiency, rationalization of costs and competitiveness in the U.S. marketplace (the "Viability Plan"), which would indicate Chrysler's ability to repay the TARP Financing.

The Debtors used the $4 million TARP Loan to operate their business, including paying vendors and other ordinary course payables, and to fund their effort to pursue the Viability Plan. At the same time, Chrysler continued to pursue an alliance with Fiat; Chrysler considered Fiat to be a good prospect because it viewed Fiat's products and distribution network as complementary to those of Chrysler.

On January 16, 2009, Chrysler entered into a term sheet with Fiat for a strategic alliance (the "Fiat Alliance") pursuant to which Fiat would acquire 35% of the equity of Chrysler and would provide access to competitive fuel-efficient vehicle platforms, distribution capabilities in key growth markets and substantial cost-saving opportunities. The Fiat Alliance also would provide Chrysler with a distribution network outside of the North American region.

The Debtors viewed the Fiat Alliance as strengthening Chrysler for the long-term, thereby maximizing the value of the Debtors' enterprise for the benefit of all constituents, including U.S. taxpayers, employees, creditors, dealers and suppliers. The Fiat Alliance was conditioned on meeting other parts of the Viability Plan. The Debtors continued with their efforts to pursue the Viability Plan and obtain concessions from various stakeholders, including the International Union, United Automobile Aerospace and Agricultural Implement Workers of America (the "UAW"), secured lenders, dealers and suppliers.

On February 17, 2009, Chrysler provided to the U.S. Treasury a submission, which included three potential scenarios (a) a stand-alone restructuring of Chrysler (the "Stand-Alone Viability Plan") with concessions from all key constituents, some of which had already been agreed upon and some of which remained subject to ongoing negotiations; (b) a scenario showing positive synergies from the Fiat Alliance (the "Alliance Viability Plan"), which was Chrysler's preferred alternative and a focus of much of the submission; and (c) an orderly winddown plan for the Debtors' operations if neither the Stand-Alone Viability Plan nor the Alliance Viability Plan could be achieved. The February 2009 Submission included the proposed concessions from all key stakeholder groups, equity holders, union and non-union employees and retirees, first and second lien prepetition lenders, Chrysler Financial Services Americas LLC,[8] suppliers and dealers. In addition, in the February 2009 Submission, Chrysler requested additional TARP funding of $5 billion by March 15, 2009 for working capital and other operating expenses.

On February 20, 2009, the President's Auto Task Force[9] (the "Task Force") was put in place to evaluate Chrysler's Viability Plan. The Task Force retained a group of advisors, including investment bankers and a bankruptcy and restructuring attorney. The Task Force entered into discussions with Chrysler and its advisors and other key

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[8] Chrysler Financial Services Americas LLC is a non-debtor affiliate of Chrysler, operating under a separate governance structure. It was formerly Chrysler's car-financing arm, operating to fund vehicle purchases by Chrysler's dealers and end consumer.

[9] The members of the Task Force are top government officials: the Treasury Secretary, the National Economic Council Director, the Secretary of Transportation, the Secretary of Commerce, the Secretary of Labor, the Secretary of Energy, the Chair of the President's Council of Economic Advisers, the Director of the Office of Management and Budget, the Environmental Protection Agency Administrator and the Director of the White House Office of Energy and Climate Change.

stakeholders, and negotiated with all parties to obtain concessions and agreements.

On March 30, 2009, the Task Force advised Chrysler of the results of its evaluation, which was that Chrysler could emerge as a viable entity with an appropriate strategic partner, such as Fiat. Further, subject to Chrysler meeting certain other aspects of the Viability Plan and obtaining additional concessions from key stakeholders, the U. S. Treasury indicated that it was prepared to provide additional capital to fund the Viability Plan, if it included a modified Fiat Alliance addressing certain concerns and goals of the U.S. government, and as long as the issues were resolved within 30 days. Consistent with these goals, a revised term sheet for a Fiat Alliance was signed on March 29, 2009. The U.S. government agreed to provide Chrysler's working capital needs through April 30, 2009.

Efforts to meet the requirements for a Fiat Alliance and satisfy the concerns of the U.S. government continued. New CarCo Acquisition LLC (the "New Chrysler"), a newly established Delaware limited liability company, was formed by Fiat to serve as an alliance entity.[10] The parties negotiated for a new collective bargaining relationship between

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[10] None of the Debtors' equity holders will receive an interest in New Chrysler. There will be a new CEO, among other management changes. Any prepetition creditor of the Debtors who will hold equity in New Chrysler will receive such interest on account of value that each provides to New Chrysler in its efforts to compete effectively in the auto industry.

the UAW and New Chrysler that will establish, as of the closing date (the "Closing Date") of the sale, a new wage structure and work rules required to implement the Viability Plan. In addition, New Chrysler will enter into a new settlement (the "UAW Retiree Settlement") agreement relating to the settlement Agreement, dated March 30, 2008 (the "2008 Settlement Agreement") in the class action of *Int'l Union UAW, et al. v. Chrysler, LLC*, Case No. 07-CV-14310 (E.D. Mich.), which established a voluntary employees' beneficiary association ("VEBA") structure to fund legacy retiree health care obligations. Under the UAW Retiree Settlement, the 2008 Settlement Agreement would be modified and VEBA would be funded by a combination of a 55% equity interest in New Chrysler and a new $4.587 billion note. The U.S. government required that 50% of the funding for VEBA be in the form of equity of Chrysler.

Chrysler, Fiat and New Chrysler tentatively entered into a Master Transaction Agreement, dated as of April 30, 2009 (collectively with other ancillary and supporting documents (the "MTA"), pursuant to which (a) Chrysler will transfer substantially all of its operating assets to New Chrysler; and (b) in exchange for those assets, New Chrysler will assume certain liabilities of Chrysler and pay Chrysler $2 billion in cash. Prior to the Closing Date, (a) Fiat will contribute to New Chrysler access to competitive fuel-efficient vehicle platforms, certain technology, distribution capabilities in key growth markets and substantial cost saving opportunities, and (b) New Chrysler will issue Membership Interests in New Chrysler, with 55% going to the VEBA, 8% to the

U.S. Treasury and 2% to Export Development Canada. After the conclusion of the Fiat Transaction, a subsidiary of Fiat will own 20% of the equity of New Chrysler, with the right to acquire up to an additional 31% of New Chrysler's Membership Interest under certain circumstances.[11]

In addition, the parties negotiated with the U.S. Treasury for financing related to the Sale Transaction. The U.S. Treasury and Export Development Canada (together, the "Governmental Entities") agreed to provide the debtor-in-possession financing for 60 days in the amount of $4.96 billion. Thereafter, the Governmental Entities agreed to provide a $6 billion senior secured financing facility to support New Chrysler's operations after the sale.

Procedural History

On May 1, 2009, at the first hearing before the Court in this case, the Debtors sought approval for expedited hearings for various motions, including a proposed motion they intended to file in which they would seek approval of bidding procedures and to schedule a hearing to consider the sale of the Debtors' assets. At the May 1st hearing, the Debtors

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[11] Upon the closing of the sale, the Governmental Entities will hold 12.31% (the U.S. Treasury will hold 9.85% and Export Development Canada will hold 2.46%), VEBA will hold 67.69%, and Fiat will hold 20%. Upon reaching certain milestones, Fiat's interest will increase to 35%, with the right to acquire an additional 16% by buying shares. Fiat cannot get control of New Chrysler until the outstanding debts to the U.S. Treasury and Export Development Canada are paid in full.

indicated that they would be filing that motion, together with a copy of the proposed bidding procedures, later that evening or the following morning. Based upon that representation, the Court scheduled the hearing to consider bidding procedures for May 4, 2009 and the hearing to consider the sale of the Debtors' assets for May 21, 2009. In addition, certain objection deadlines were set. The referenced motion, however, was not filed until Sunday evening, May 3, 2009. Consequently, at the May 4th hearing, the Court adjourned consideration of the bidding procedures motion until May 5, 2009.

On May 5, 2009, the Court held a hearing (the "Bidding Procedures Hearing") to consider the bidding procedures. At the conclusion of that hearing, with certain modifications made at the Court's direction, the Court granted the request to approve the bidding procedures. An order to that effect, dated May 7, 2009 (the "Bidding Procedures Order"), was entered. In addition, at the Creditors' Committee request, the date for the hearing to consider the motion (the "Sale Motion") for the sale of the assets was re-scheduled for May 27, 2009, and certain objection deadlines were extended, as well.

On May 19, 2009, the Indiana State Teachers Retirement Fund, Indiana State Police Pension Trust, and Indiana Major Move Construction (the "Indiana Funds"), which oversee the investment of retirement assets for certain civil servants in the state of Indiana, filed an objection to the Sale Motion. The Indiana Funds hold approximately $42 million of the $6.9 billion in first priority secured claims, which represents less than 1% of the first-lien debt. In their objection, the Indiana Funds argue that pursuant to the Sale Motion, the First-Lien Lenders' collateral would be stripped and, in return, those lenders would be paid 29 cents on the dollar. The collateral would then be transferred to New Chrysler, where, according to the Indiana Funds, it would be worth significantly more than the money paid to the First-Lien Lenders. The Indiana Funds further argue that unsecured deficiency claims would not be paid while unsecured trade debt would be paid in full. In addition, the Indiana Funds contend that their senior claims will be impaired while the Governmental Entities, as junior lienholders and VEBA and the UAW, as unsecured creditors, will receive value. The Indiana Funds also object to Fiat receiving a stake in New Chrysler for its grant of access to the "small car" technology without a cash contribution.

In addition, objections to the Sale Motion were filed by numerous Dealers, who had received notices that their dealership agreements were being rejected and, therefore, would not be assigned to New Chrysler. Attorneys General of certain states also filed objections to the Sale Motion regarding the rejection of the dealership agreements, taxing and local government issues, and issues arising under workers' compensation and consumer protection laws. Also, objections were filed by retirees, tort and consumer claimants, holders of mechanics and other liens, certain lessors and parties with cure, setoff or recoupment claims, as well as certain other miscellaneous objectors.

The Court conducted a 3-day evidentiary hearing on May 27th through 29th, 2009, (the "Sale Hearing") to consider the sale of substantially all of the Debtors' assets.[12]

DISCUSSION

Section 363(b) of the Bankruptcy Code provides, in relevant part, that after notice and a hearing, a trustee or debtor-in-possession[13] "may use, sell, or lease, other than in the ordinary course of business, property of the estate." 11 U.S.C. § 363(b). In *Comm. of Equity Sec. Holders v. Lionel Corp. (In re Lionel Corp.)*, 722 F.2d 1063, 1066 (2d Cir. 1983), the Second Circuit was 09-50002-ajg Doc 3073 Filed 05/31/09 Entered 05/31/09 23:15:29 Main Document called upon to determine whether, pursuant to § 363(b) of the Bankruptcy Code, a major asset of a bankruptcy estate could be sold "out of the ordinary course of business and prior to acceptance and outside of any plan of reorganization."

The *Lionel* court reviewed the history of a court's administrative power to authorize asset sales. Initially, in the context of a sale of estate assets prior to a liquidation, authorization for a sale was granted when the asset was physically perishable, or liable to

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[12] In addition to the value of the remaining assets of the estate not subject to the sale, the U.S. Treasury is providing an additional $260 million to the Debtor to facilitate the wind down of its operations and the filing of a plan.

[13] Pursuant to section 1107 of the Bankruptcy Code, subject to certain limitations, a debtor-in-possession has the rights, powers and duties of a trustee.

deteriorate or depreciate in price and value. *Lionel*, 722 F.2d at 1067 (citing Sec. 25 of the Bankruptcy Act of 1867 (Act of March 2, 1967, 14 Stat.517); General Bankruptcy Order No. XVIII(3), adopted by the Supreme Court in 1898; General Order in Bankruptcy No. XVIII, 89 F. viii November 28, 1898); *In re Pedlow*, 209 F. 841, 842 (2d Cir. 1913)). When reorganizations were introduced, a procedural rule was promulgated, pursuant to which asset sales prior to reorganization could be authorized "upon cause shown." *Id.* (citing the Chandler Act of 1938, § 116(3), 11 U.S.C. § 516(3), as applicable to ch. X and § 313(2), 11 U.S.C. § 713(2) as applicable to ch. XI; as well as, Rules 10-607(b), 11-545 of the Rules of Bankruptcy Procedure applicable in Chapters X and XI). Nevertheless, courts continued to view such sales as exceptional, and continued to require that the proponent show that the assets were perishable or that there was an imminent danger that the asset would deteriorate or depreciate substantially or rapidly in value if prompt action were not taken, thereby jeopardizing the estate. *Id.* (citing *Frank v. Drinc-O-Matic, Inc.*, 136 F.2d 906 (2d Cir. 1943); *In re Loewer's Gambrinus Brewery Co.*, 141 F.2d 747, 748 (2d Cir. 1944)). If this emergent need were shown, however, even sales of substantially all of a debtor's assets could be authorized. *Id.* (citing *Loewers Gambrinus*, 141 F.2d at 748; *Patent Cereals v. Glynn*, 149 F.2d 711, 712-13 (2d Cir. 1945)). Moreover, if a "wasting asset" that could only deteriorate in value were at issue, a quick sale would be appropriate. *Id.* at 1068 (citing *In re Sire Plan, Inc.*, 332 F.2d 497, 499 (2d Cir. 1964)).

The Bankruptcy Reform Act of 1978 introduced section 363(b), which does not constrain a court with strict limitations on its ability to authorize the sale of estate assets. *Lionel*, 722 F.2d at 1069. In analyzing section 363(b), the Second Circuit eschewed a literal interpretation which would have permitted unfettered use, sale and leasing of estate property outside of the ordinary course of a debtor's business. *Id*. at 1069-70. The Second Circuit viewed such an interpretation as undermining "the congressional scheme" established for corporate reorganization. *Id*. at 1066. The court referenced the statutory safeguards included in the Bankruptcy Code that provided for creditors and equity holders to have a vote on approval of a proposed plan of reorganization after having been provided with meaningful information concerning such plan. *Id*. at 1071. The measures to safeguard the rights of constituents include disclosure, solicitation, voting, acceptance and confirmation of a plan of reorganization. Addressing the concerns of equity holders, the *Lionel* court concluded that one of the purposes for inclusion of these safeguards under the Bankruptcy Code was to allow for "a greater voice in reorganization plans" for equity interests. *Id*. The court indicated certain of the salutary effects of the safeguards that warranted protection, including that disclosure provided a "fairer" method for reorganization and that the requirement for acceptance of the plan by a certain percentage of creditors and stockholders for confirmation promoted negotiations by those parties and the debtor. *Id*. at 1070. Thus, the court was concerned with adequately protecting the interests of creditors and investors.

Additionally, the court maintained that if § 363(b) had been intended to afford a court unrestricted discretion to allow a sale, there would have been no need for the requirement of a notice and hearing on the issue. *Id*. at 1069.

The *Lionel* court, however, also recognized the policy considerations that support affording a court the freedom to exercise its broad discretion to tailor orders to meet the particular circumstances presented. *Id*. at 1069. Thus, if a favorable business opportunity is presented that is only available if acted upon quickly, the court has to have the ability to authorize what is best for the estate. *Id*.

In *Lionel*, the Second Circuit established the standard for a court's determination of whether to authorize a § 363(b) sale "prior to acceptance and outside of any plan of reorganization." In that regard, the Second Circuit sought to strike a balance between a debtor's ability to sell assets and a constituent's right to an informed vote on confirmation of a plan.

The *Lionel* court concluded that there has to be some articulated business justification for the use, sale or lease of property outside of the ordinary course of business. *Id*. at 1070. Thus, a court rendering a section 363(b) determination must "expressly find from the evidence presented . . . a good business reason to grant such application." *Id*. at 1071. In making the determination, a court should consider all of the "salient factors pertaining to the proceeding" and "act to further the diverse interests of the debtor, creditors and equity holders." *Id*. The

Lionel court then set forth a nonexclusive list to guide a court in its consideration of the issue:

> - the proportionate value of the asset to the estate as a whole
>
> - the amount of elapsed time since the filing
>
> - the likelihood that a plan of reorganization will be proposed and confirmed in the near future
>
> - the effect of the proposed disposition on future plans of reorganization
>
> - the proceeds to be obtained from the disposition vis-a-vis any appraisals of the property
>
> - which of the alternatives of use, sale or lease the proposal envisions

and the factor, which the *Lionel* court labeled as most important

> - whether the asset is increasing or decreasing in value.

Lionel, 722 F.2d at 1071. In addition, a court must consider if those opposing the sale produced some evidence that the sale was not justified. *Id*. at 1071.

A debtor cannot enter into a transaction that "would amount to a *sub rosa* plan of reorganization" or an attempt to circumvent the chapter 11 requirements for confirmation of a plan of reorganization. *Motorola v Comm of Unsecured Creditors (In re Iridium Operating LLC*), 278 F.3d 452, 466 (2d Cir. 2007) (citing *Pension Benefit Guar. Corp. v. Braniff Airways, Inc. (In re Braniff Airways, Inc)*, 700 F.2d 935, 940 (5th Cir. 1983). If, however, the transaction has "a proper business justification" which has potential to lead toward confirmation of a plan and is not to evade the plan confirmation process, the transaction may be authorized. *Id.* at 467.

A debtor may sell substantially all of its assets as a going concern and later submit a plan of liquidation providing for the distribution of the proceeds of the sale. *See Florida Dept. Of Revenue v. Piccadilly Cafeterias, Inc.*, 128 S. Ct. 2326, 2331 n.2 (2008). This strategy is employed, for example, when there is a need to preserve the going concern value because revenues are not sufficient to support the continued operation of the business and there are no viable sources for financing. *In re Decora Indus.*, No. 00-4459, 2002 WL 32332749, at *3 (D. Del. May 20, 2002). Recently several sales seeking to preserve going concern value have been approved in this district. *See e.g., In re Silicon Graphics, Inc.,* Case No. 09-11701 (MG), Dkt. No. 292*; In re BearingPoint, Inc.*, Case No. 09-10692 (REG); and *In re Lehman Brothers Holdings, Inc.*, Case No. 08-13555 (JMP), Dkt. No. 258.

Here, the Debtors have established a good business reason for the sale of their assets at the early stages of these cases. Notwithstanding the highly publicized and extensive efforts that have been expended in the last two years to seek various alliances for Chrysler, the Fiat Transaction is the only option that is currently viable. The only other alternative is the immediate liquidation of the company. Further, the whole enterprise may be worth more than the sum of its parts because of the synergy between Chrysler, which provides its network of dealerships, its productions of larger cars, and Fiat, which provides the smaller car technology, and the access to certain international markets. Indeed, because of the overriding concern of the U.S. and Canadian governments to protect the public interest, the terms of the Fiat Transaction present an opportunity that the marketplace alone could not offer, and that certainly exceeds the liquidation value.

Moreover, the Debtors were forced to cease operations in order to conserve resources. That action, however, was done with a view towards ensuring that the facilities were prepared to resume normal production quickly after any sale, and that consumers were not impacted. Any material delay would result in substantial costs in several areas, including the amounts required to restart the operations, loss of skilled workers, loss of suppliers and dealers who could be forced to go out of business in the interim, and the erosion of consumer confidence. In addition, delay may vitiate several vital agreements negotiated amongst the Debtors and various constituents. Thus, approval of the

Debtors' proposed sale of assets is necessary to preserve some portion of the going concern value of the Chrysler business and to maximize the value of the Debtors' estates. Further, the procedures utilized by the Debtors to determine which contracts would be assumed and assigned to the purchaser was a reasonable exercise of the Debtors' business judgment.

The Governmental Entities, the funding sources for the Fiat Transaction, have emphasized that the financing offered is contingent upon a sale closing quickly. Moreover, if a sale has not closed by June 15th, Fiat could withdraw its commitment.[14] Thus, the Debtors were confronted with either (a) a potential liquidation of their assets which would result in closing of plants and layoffs, impacting suppliers, dealers, workers and retirees, or (b) a government-backed purchase of the sale of their assets which allowed the purchaser to negotiate terms with suppliers, vendors, dealerships and workers to satisfy whatever obligations were owed to these constituencies.[15] The Debtors focused on

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[14] If regulatory approval is not received by June 15th, that date could be extended for 30 days as a matter of right.

[15] The Indiana Funds suggest that the Debtors had a third option. Based upon the U.S. government's substantial interest in preserving the automobile-industry jobs and retiree benefits, the intimation is that the government was bluffing when it indicated that it would walk away from exploring other options if the Fiat Transaction did not close quickly. The proposed third option is that the Debtors could have refused to accede to the government's terms in the hope that the government

maintaining the integrity of the operation and exercised their fiduciary duty by electing the only option available other than piecemeal liquidation. The International Union, the UAW, the Creditors' Committee and almost all other stakeholders support an expeditious sale of the assets. As subsequently discussed, the consummation of the Sale Transaction was conducted in good faith and at arms' length and is in the best interest of the Debtors' estates.

Moreover, the sale of assets is not a *sub rosa* plan of reorganization. The Debtors are receiving fair value for the assets being sold. Not one penny of value of the Debtors' assets is going to anyone other than the First-Lien Lenders. Capstone's Executive Director was the Debtors' valuation expert. This testimony, which is unrebutted, is that the $2 billion New Chrysler is paying for the Debtors' assets exceeds the value that the First-Lien Lenders could recover in an immediate liquidation. After the Bidding Procedures Hearing, the Debtors' financial advisor, Capstone, revised its analysis and concluded that liquidation would generate between zero and $1.2 billion. The reduction in the high end of the range from the financial advisor's previous

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would capitulate and agree to consider other alternatives. The Court concludes that gambling on the possibility that the government was bluffing, and risking the potential for a lesser recovery in a resulting liquidation, would have been a breach of the Debtors' fiduciary duty. This was simply not a viable option.

calculation[16] reflected (a) a $930 million decrease in the Debtors' cash, (b) the sale of cars over that period, which result in the current availability of potentially fewer asset proceeds, and (c) the fact that two car lines were not profitable, which lines were then assessed at liquidation value, rather than going concern value. At the Sale Hearing, the financial advisor indicated that the high end of the range has been further reduced because the Debtors have already expended the $400 million cash collateral that was available on the filing date. Therefore, on the high end of the range, an immediate liquidation would generate $800 million. Thus, the First-Lien Lenders will receive a greater return under the proposed sale, which reflects the going concern value, than under a piecemeal liquidation.[17]

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[16] In the previous calculation, the range was between zero and $2.6 billion.

[17] The Indiana Funds, and one other creditor, moved to strike the testimony of the Debtors' valuation witness because he has a financial interest in the outcome of the case in that, under Capstone's retention agreement, there is a $17 million transaction fee to be paid if this, or any other sale of substantially all of the Debtors' assets, is consummated and the witness would receive a significant portion of that amount. On the record, the Court denied the motion to strike. The testimony of the witness is consistent with the Court-authorized role of Capstone under the retention agreement. Moreover, these types of arrangements are typical in bankruptcy cases. In addition, as the Court noted at the Sale Hearing, the witness's financial interest goes to the weight of the evidence. Moreover, the movants did not object to the retention of Capstone which set forth the terms of the

Further, the true test of value is the sale process itself. In that regard, no bidder other than Fiat came forward. The First-Lien Lenders had numerous options under the Bankruptcy Code: they could have refused to consent to the sale or, having consented, they could have chosen to credit bid instead of agreeing to take cash.

After the conclusion of the Fiat Transaction, the Debtors will continue to administer their estates, including disposing of remaining assets and evaluating claims, contracts and leases. Thereafter, the Debtors will seek to confirm a plan that will provide for the distribution of assets in the Debtors' estates. Thus, the classification of claims is independent of the sale process and the Debtors are not attempting to evade the plan confirmation procedures.

In support of their position that the proposed sale is a *sub rosa* plan, the Indiana Funds site to *Contrarian Funds, LLC v. Westpoint Stevens Inc. (In re Westpoint Stevens Inc.,* 333 B.R. 30, 51 (S.D.N.Y. 2005), which held that a bankruptcy court does not have authority under section 363 of the Bankruptcy Code "to impair the claim satisfaction rights of

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engagement. Although they may not have known the precise amount that the witness might receive, they were aware that he was an executive director of Capstone and would likely have an interest in any fees earned. Further, the Indiana Funds did not raise that issue even though it was clear he would likely be testifying since he had testified on two previous occasions, as proposed financial advisor, concerning valuation issues.

objecting creditors or to eliminate the replacement liens" as such action "would preempt or dictate the terms of a Chapter 11 plan." *Id.* at 52.

In the *Westpoint* case, the terms of the sale order allocated the sales proceeds between the first and second lien lenders, and directed that the distribution fully satisfied the underlying claims by terminating the lenders' security interest in those claims, thereby usurping the role of the confirmation process. The *Westpoint* court, however, recognized that, pursuant to section 363, a bankruptcy court had authority to authorize a sale of assets in exchange for stock and the granting of replacement liens. *Id.* at 51.

In the case at bar, there is no attempt to allocate the sale proceeds away from the First- Lien Lenders. Rather, the security interest of the First-Lien Lenders will attach to the sale proceeds and there will be an immediate and indefeasible distribution of all of the $2 billion dollar cash sale price to the First-Lien Lenders, who are owed $6.9 billion. As previously noted, the $2 billion sale price exceeds the value in liquidation of $800 million, which is the only alternative available to the Debtors. The full value of the collateral will be distributed to the First-Lien Lenders. Moreover, the MTA does not dictate terms of a plan of reorganization.

Pursuant to section 365(a) of the Bankruptcy Code, a debtor-in-possession may assume executory contracts or unexpired leases and, pursuant to section 365(f), it may assign such contract or lease. As in any case, the potential purchaser, New

Chrysler identified the assets it desired to purchase, which of necessity dictated the contracts that the Debtor would assume. *See In re G Survivor Corp.*, 171 B.R. 755, 759 (Bankr. S.D.N.Y. 1994) (finding that "the ability to designate which contracts it wished to have rejected was a valuable right, for which [the purchaser] bargained"); *In re Maxwell Newspapers, Inc.*, 981 F.2d 85, 90-91 (2d Cir. 1992) (finding, under the higher "good cause" standard of § 1113(c)(2), that it is permissible to reject a contract to make a sale more attractive to a buyer). Further, parties to contracts that are assumed in a bankruptcy case are entitled to cure payments and adequate assurance of future performance. 11 U.S.C. § 365(b). Therefore, it is recognized that such creditors may receive more favorable treatment than other creditors either in their class or a higher priority class. Nevertheless, such treatment is not considered a violation of the priority rules nor does it transform a sale of assets into a *sub rosa* plan.

Here, as part of the economic valuation of the transaction, New Chrysler indicated which of the Debtors' contracts it considered valuable to its future venture and directed that those be assumed and assigned to it. Obviously, the value that New Chrysler would agree to pay for the assets has to be impacted by the inclusion or exclusion of certain contracts. Fair value has been paid for the assets to be transferred. The purchaser has made a business decision as to which contracts it desires to assume. Indeed, other OEM's are engaged in cost-cutting efforts to enhance their liquidity and are following similar strategies by rationalizing their dealership networks. In every bankruptcy case involving the sale of substantially all of a debtor's assets, a purchaser may decide to assume certain contracts but not others.[18] Moreover, the purchaser is not accorded any less right because the purchase is funded by the government.

New Chrysler negotiated with various constituencies that are contributing and essential to the new venture, including Fiat - contributing technology and expertise; the Governmental Entities - contributing billions of dollars in funding; and Chrysler's employees - contributing a skilled workforce with a more competitive cost structure. In negotiating with those groups essential to its viability, New Chrysler made certain agreements and provided ownership interests in the new entity, which was neither a diversion of value from the Debtors' assets nor an allocation of the proceeds from the sale of the Debtors' assets. The allocation of ownership interests in the new enterprise is irrelevant to the estates' economic interests.

In addition, the UAW, VEBA, and the Treasury are not receiving distributions on account of their prepetition claims. Rather, consideration to these entities is being provided under separately-

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[18] New Chrysler has determined that, to effectively carry on its business, it should take over certain other of the Debtors' obligations. Any such assumption of liability reflects the purchaser's business judgment, the effect of which does not constitute a sub rosa plan because the obligation is negotiated directly with the counterparty. Thus, any of the obligations under those agreements are satisfied by New Chrysler and do not constitute a distribution of proceeds from the Debtors' estates.

negotiated agreements with New Chrysler. As discussed previously, New Chrysler views the skilled workforce as essential to its future operations and, as a natural consequence, has engaged in negotiations with their representative. As part of those negotiations, New Chrysler and the workers have reached agreement on terms for collective bargaining agreements with the UAW. As part of those negotiations, the parties also agreed to modify the funding arrangements for VEBA, the trust which funds benefits for employees and retirees.[19] That New Chrysler and the UAW have agreed to fund the VEBA with equity and a note is part of a bargained-for exchange between New Chrysler and the UAW. The UAW states that it agreed to the UAW Retiree Settlement both as a condition to the UAW's amendment of their collective bargaining agreements and in settlement of potential claims for retiree benefit obligations against New Chrysler, as purported successor to the Debtors. The UAW further states that its leadership would not have recommended that its members ratify the amended collective bargaining agreements unless New Chrysler agreed to fund the VEBA. The consideration provided to New Chrysler by the UAW in exchange for New Chrysler's agreement to take over obligations under VEBA are unprecedented modifications to the collective bargaining agreement, including a six-year no-strike clause. The consideration provided by New Chrysler in that

[19] The Debtors are neither assuming, nor assigning to New Chrysler, the 2008 Settlement Agreement among the Debtors, the UAW, and certain of Debtors' retirees.

exchange is not value which would otherwise inure to the benefit of the Debtors' estates.

Similarly, the Governmental Entities' receipt of an equity interest in New Chrysler is not based upon their prepetition claims against Old Chrysler. Rather, it is an unrelated transaction that was negotiated between New Chrysler and the source of its funds - the Governmental Entities. It reflects additional consideration to the Governmental Entities for making the $6.2 billion loan to New Chrysler to fund the purchase of Old Chrysler's business and its ongoing operations. Further, the *sub rosa* objection of the Affected Dealers regarding the various settlements has no merit. None of these settlement motions have an impact on the *sub rosa* analysis. Each settlement will be evaluated on its own merit.

Sale of Assets Free and Clear of Liens and Interests Pursuant to Section 363(f)

Having determined that the criteria of section 363(b) of the Bankruptcy Code has been met because the proposed sale satisfies the *Lionel* standard established by the Second Circuit, the Court must now consider whether the sale may be authorized free and clear of any liens and interests of an entity other than the estate. In considering this issue, the Court must determine whether any of the elements of section 363(f) are satisfied. Section 363(f) of the Bankruptcy Code provides that

> The trustee may sell property under subsection (b) or (c) of this section free and

clear of any interest in such property of an entity other than the estate, only if - -

(1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;

(2) such entity consents;

(3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;

(4) such interest is in bona fide dispute; or

(5) such entity could be compelled, in a legal or equitable proceeding to accept a money satisfaction of such interest.

11 U.S.C. § 363(f). The Debtors maintain that section 363(f) authorizes the sale of the assets, free and clear of the liens held by the Collateral Trustee pursuant to the First Lien Credit Agreement because the holder of the liens, the Collateral Trustee, has consented. The Indiana Funds argue that the sale is not authorized under section 363(f) because they are parties in interest and have not consented.

The Indiana Funds are parties to the First Lien Credit Agreement as assignees to a portion of the debt. As previously noted, Chrysler's obligation to repay the loans under the First Lien Credit Agreement is secured by liens on most of its assets.

Consequently, two additional documents are relevant: an Amended and Restated Collateral Trust Agreement, dated November 29, 2007 (as amended, the "CTA")[20], pursuant to which Wilmington Trust Company is the collateral trustee (the "Collateral Trustee"); and the Security Agreement, pursuant to which Chrysler grants a security interest in most of its assets, and the proceeds thereof, to the Collateral Trustee. *Security Agreement*, § 2(a). Thus, while the liens are for the benefit of the lenders under the First Lien Credit Agreement, the liens themselves were granted to and are held by the Collateral Trustee. *See CTA* at p.1.

Each lender under the First Lien Credit Agreement irrevocably designated the Administrative Agent to act as such lender's agent in exercising the powers delegated to the Administrative Agent and to be bound by its action. *First Lien Credit Agreement*, §§ 8.1, 8.4. The lenders, including the Indiana Funds, agreed to be bound by the Administrative Agents' action made at the request of lenders holding a majority of the indebtedness under the First Lien Credit Agreement (the "Required Lenders"). *Id*. at § 1.1 & § 8.4.

[20] Similar to the First Lien Credit Agreement, the CTA amended an original collateral trust agreement, dated August 3, 2007. In addition, the CTA was further amended and restated as of January 2, 2009. The subsequent amendments to the First Lien Credit Agreement and the CTA are not relevant to the discussion of the section 363(f) issue.

The commencement of the Debtors' bankruptcy cases was an event of default under the First Lien Credit Agreement, *Id*. at § 7(e)(i)(A). The CTA defines the Administrative Agent as the "Controlling Party" as long as the first and second secured obligations have not been paid. *CTA* § 1.1. Upon receipt of a "notice of event of default," the Collateral Trustee exercises the rights and remedies provided for in the CTA, and related security documents, "subject to the direction of the Controlling Party." *CTA* § 2.1(a). A notice of event of default is deemed to be in effect whenever there is a bankruptcy filing. *CTA* § 2.1(b). While such notice of an event of default is in effect, the Collateral Trustee has power to take any Collateral Enforcement Actions permitted under the security documents or any action it "deems necessary to protect or preserve the Collateral and to realize upon the Collateral," including selling all or any of the Collateral. *CTA* §§ 2.2. & 2.3. A Collateral Enforcement Action is defined, with respect to any secured party, as exercising, instituting or maintaining or participating "in any action or proceeding with respect to, any rights or remedies with respect to any Collateral, including . . . exercising any other right or remedy under the Uniform Commercial Code or any applicable jurisdiction or under any Bankruptcy Law or other applicable law. *CTA* § 1.1.

Further, section 2.5(b) of the CTA provides that the Administrative Agent, as Controlling Party, has the right to direct, among other things, "the taking or the refraining from taking of any action authorized by this Collateral Trust Agreement or any Trust Security Document." Further, section 2.5(c) of the CTA provides, in relevant part:

> Whether or not any Insolvency Proceeding has been commenced by or against any of the [Chrysler parties to the CTA], no ... [secured party] shall do . . . any of the following without the consent of the Controlling Party; (i) take any Collateral Enforcement Action . . . or (ii) object to, contest or take any other action that is reasonably likely to hinder (1) any Collateral Enforcement Action initiated by the Collateral Trustee, (2) any release of Collateral permitted under Section 6.12, whether or not done in consultation with or with notice to such Secured Party or (3) any decision by the Controlling Party to forbear or refrain from bringing or pursuing any such Collateral Enforcement Action or to effect any such release.

Thus, section 2.5, concerning the exercise of powers, gives the Collateral Trustee the exclusive right to pursue all of the lenders' rights and remedies concerning the Collateral and, further, gives the Administrative Agent, as Controlling Party, the exclusive authority to direct the Collateral Trustee's action concerning the Collateral.

In accordance with the direction of the Administrative Agent, the Collateral Trustee, who is the holder of the liens, has consented to the Fiat

Transaction. The right to consent to the sale of the Debtors' assets that constitute Collateral is a Collateral Enforcement Action. It is an exercise of a right pursuant to Bankruptcy Law concerning the Collateral. *CTA*, § 1.1. The Administrative Agent has received the concurrence of 92.5% of the outstanding principal amount of the loans under the First Lien Credit Agreement. Thus, the Administrative Agent has obtained the needed support of the Required Lenders. Consequently, pursuant to the CTA, the Administrative Agent properly directed the Collateral Trustee, who holds the liens, to consent to the section 363 sale of the Collateral. Moreover, the Administrative Agent acted as agent to the Indiana Funds and on their behalf. Thus, the Indiana Funds are bound by the Administrative Agent's action in that regard. *First Lien Credit Agreement*, §§ 8.1(a), 8.4. Therefore, the Administrative Agent's consent to the sale of the assets and its direction to the Collateral Trustee to consent, under section 363(f)(2) of the Bankruptcy Code, satisfies that section and allow for the purchased assets to be sold free and clear of the liens on the property held by the Collateral Trustee.

The Indiana Funds direct the Court's attention to section 9.1(a)(iii) of the First Lien Credit Agreement and argue that it requires the Administrative Agent to receive the consent of all Lenders before it can release collateral. The section referenced by the Indiana Funds, however, concerns waivers, amendments, supplements or modifications to the First Lien Credit Agreement and related documents. The transfer of the purchased assets to New Chrysler pursuant to section 363 of the Bankruptcy

Code does not require any amendment, supplement or modification to the loan documents. *See In re GWLS Holdings, Inc.*, No. 08-12430, 2009 Bankr. LEXIS 378 (Bankr. D. Del. Feb. 23, 2009) (concluding that a provision concerning waivers, amendments, supplements or modifications after execution of certain related credit agreements did not override the provision concerning the right of the lenders' agent to credit bid). *See also Beal Sav. Bank v. Sommer*, 8 N.Y.3d 318 * 9-10 (N.Y. 2007) (concluding that provisions in a syndicate loan arrangement requiring unanimous consent by participating lenders in order to amend, modify or waive terms of related loan agreements did not preclude application of specific provisions which accomplished the parties' agreed-upon intent for collective action through an agent upon default by borrower). The purpose of section 9.1(a)(iii) of the First Lien Credit Agreement is to ensure that unless there is unanimous consent by all lenders under the related loan agreements, the terms of those agreements cannot be altered in a manner that is inconsistent with the terms originally agreed to by the parties. *See id*. It does not concern collective action to enforce rights as authorized under the agreed-upon specific provisions of the parties' loan agreements.

Upon an Event of Default, the CTA expressly granted the Collateral Trustee the right to sell any or all of the Collateral. Thus, the loan documents authorized the Collateral Trustee to consent to the sale without the need to amend or modify the loan documents. Further, the Administrative Agent and Collateral Trustee are operating under their exclusive authority to take any Collateral Enforcement Action necessary to realize upon the Collateral. Moreover, it is not a "release" of collateral because the lien attaches to the proceeds of the sale, which remain as collateral to secure the loan made by the Lenders. Finally, even if the action were viewed as an amendment to the loan documents, the prohibition against releasing collateral without the consent of all lenders under section 9.1(iii) of the First Lien Credit Agreement, itself has an exception where the action is otherwise provided for in the loan documents. Here, the loan documents expressly provide for the Administrative Agent to direct the Collateral Trustee to take Enforcement Actions, including the sale of all or any of the Collateral.

The Court concludes that the purpose of the relevant provisions of the First Lien Credit Agreement, the CTA, and the Security Agreements is to have the Administrative Agent and Collateral Trustee act in the collective interest of the lenders. Restricting enforcement to a single agent to engage in unified action for the interests of a group of lenders, based upon a majority vote, avoids chaos and prevents a single lender from being preferred over others. *In re Enron Corp.*, 302 B.R. 463, 475 (Bankr. S.D.N.Y. 2003), *aff'd* 2005 U.S. Dist. LEXIS 2134 (S.D.N.Y. Feb. 14, 2005). Pursuant to the CTA, the Indiana Funds are bound by the Administrative Agent's direction to the Collateral Trustee to consent to the sale of its collateral free and clear of liens and other interests in exchange for the $2 billion cash payment.

Finally, with respect to the consenting First-Lien Lenders, the Indiana Funds question their independence in entering into the compromise to allow the sale of the assets free and clear of the lien. Inasmuch as certain of the individual-consenting lenders were recipients of government loans under the TARP program, the objecting lenders seek to portray the TARP recipient lenders as being intimidated by the government. A compromise that is not based upon business considerations, including an assessment of litigation risks, would raise issues regarding the Administrative Agent's obligations, if any to the Indiana Funds, under the agreement. Clearly, that issue is not before this Court.

The Indiana Funds seem to be asking that, if the Court finds that they are bound under the governance provisions of the First Lien Credit Agreement, the Court should nullify the consent given because it was brought about by undue pressure by the U.S. government on the TARP recipient lenders, who voted to give consent to the transaction before the Court.

In the first instance, it is not clear that this Court would even have jurisdiction over this inter-creditor dispute. However, the suggestion that the TARP-recipient lenders have been pressured to the point that they would breach their fiduciary duty and capitulate to the settlements presented is without any evidentiary support. It is mere speculation and without merit.

The Indiana Funds contracted away their right to act inconsistently with the determination of the

Required Lenders. In that regard, if they did not want to waive such rights, they should not have invested in an investment with such restrictions. The fact that they do not like the outcome is not a basis to ignore the governance provisions of the relevant agreements.

The First-Lien Lenders had limited options: demand a liquidation of the collateral, negotiate with the only available source of funding, i.e., the Governmental Entities, or provide funding to sustain the Debtors on a stand-alone basis. The First-Lien Lenders, operating under their governance structure, decided to concentrate their efforts on negotiating with the only available source of funding, the Governmental Entities, and to accept their proposal.

Government as an Entity Funding a Sale Transaction

The decision of the U.S. Treasury and Export Development Canada to fund the Fiat Transaction is a political issue that is motivated, in part, by non-economic considerations. The Governmental Entities have made the determination that it is in their respective national interests to save the automobile industry, in the same way that the U.S. Treasury concluded that it was in the national interest to protect financial institutions. Many of the jobs in the automobile industry that are being preserved would have been lost, as is the case in many struggling industries, if the government did not see them as part of an industry necessary to be preserved in the national interest.

The underlying argument of many of those opposing the transaction is not against the Government Entities' involvement. Rather, it is the desire to have the Governmental Entities protect every constituency within the auto industry from economic loss, and not to limit the protection to those interests that the government perceives as being essential to the survival of a successful "New Chrysler." For example, any dealership rejection that is approved will cause hardship to the particular dealership involved but may well be necessary if New Chrysler is to survive. These are the kinds of economic decisions that have to be made in every bankruptcy case.

The extent to which a governmental entity should be involved in protecting certain industries is a political decision, and the Court does not express a view as to the Governmental Entities' involvement here. Rather, the Court observes that these are the dynamics within which this case is presented to the Court. The economic reality is that no one was willing to lend other than the Governmental Entities. Further, in the current economic climate, the only alternative would be an immediate liquidation, which the evidence has shown would not bring a higher return to creditors.

Moreover, the fact that an entity that is providing the funding may have the capacity to provide more funds or to assume more risk does not enable a bankruptcy court to require it to do so. A court's role is to either grant or deny the relief sought based upon the record before it, not to interject itself into the business judgment of the entity funding the transaction, even if that lender is the government.

Debtors' Fiduciary Duty[21]

The Debtors' compliance with their fiduciary duty has been put at issue. First, it is suggested that the Debtors failed to fulfill their fiduciary obligations because they did not directly participate in the negotiations between the First-Lien Lenders and the Governmental Entities funding the Fiat Transaction. In addition, certain objectors question the Debtors' decision not to pursue certain other restructuring proposals that the objectors contend presented better going concern or enterprise value.

The Debtors were prepared to participate in any negotiations. The First-Lien Lenders formed a steering Committee (the "Steering Committee") to negotiate with the Governmental Entities. The evidence established that, notwithstanding the Debtors offer to be involved in the negotiations, neither the Steering Committee nor the Governments sought the Debtors' involvement.

With respect to the pursuit of other proposals, the evidence shows that the Debtors engaged in an 18-month worldwide search to seek potential alliance

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[21] At the Sale Hearing, the issue concerning admission of Debtors' Exhibit 57 was taken under advisement. The Court finds that the document is relevant to allegations regarding the fiduciary duty of the Debtors' management. Further, it is not protected by Fed. R. Evid. 408 because it is not being admitted to establish the value of the collateral for purposes of this proceeding.

partners. They discussed and negotiated with numerous domestic and international OEM's. However, no other bidder stepped forward. Inasmuch as Fiat was the only OEM that was prepared to enter into an alliance, the Board of Managers (the "Board") was faced with either accepting the Fiat Transaction or liquidating. The Board reviewed the fairness opinion prepared by Greenhill, as well as the liquidation analysis prepared by Capstone, and concluded that the Fiat Transaction was a better alternative to liquidation.

Moreover, the funding provided by the Governmental Entities here has been the sole source of any debt or equity funding and, as such, the Governmental Entities are the lenders of last resort. Consequently, the Debtors are limited to pursuing only those proposals that the Governmental Entities view as viable, regardless of the Debtors' view of a particular approach. Thus, whether one is considering a stand-alone restructuring or other option, absent the consent of the entity that will provide capital to fund the effort, any perceived "going concern value" or "enterprise value" cannot be realized.

At the Sale Hearing references were made to the assessment by the Independent Managers on the Board, at different stages of the restructuring effort, concerning various other proposals. Those analyses, however, were all made on the assumption that financing could be obtained for the particular structure. As one Independent Manager testified, the Independent Managers' determination, concerning the Greenhill proposal, was made assuming that there was financing.

The record establishes that, at every turn, the Debtors pursued options they believed were in their best interest and in the best interest of all their constituencies. To suggest that the Debtors should have pursed proposals that could not have been consummated because of lack of funding, is to suggest that the Debtors should have breached their fiduciary duty. The Debtors consistently believed in, and pursued, their Stand-Alone Viability Plan as the option they considered to have the greatest enterprise value. That view was not shared by anyone who was willing and able to finance such proposal. In the absence of funding for it, the Debtors were precluded from pursuing it. Further, no other potential alliance partner came forward who would be willing to contribute funds for any other partnership venture. Regardless of their view of the viability of their preferred option, once the Governmental Entities rejected the Debtors' Stand-Alone Viability Plan, and in the absence of an alliance partner willing to contribute to another proposed venture, the Debtors' options were limited. They could either liquidate on a piecemeal basis or accept the Governmental Entities' terms, and assist that process to preserve as much value as possible.

The absence of other entities coming forward to fund any transaction highlights the risk presented to distressed companies that are situated similarly to Chrysler. Accompanying that risk is the lender's ability to dictate many of the key terms upon which any funding will occur.[22] The hard-fought "take it or leave it" approach that often drives the outcome of this type of negotiation is troubling to some, but such is the harsh reality of the marketplace. Here, the Governmental Entities, as lenders of last resort, are dictating the terms upon which they will fund the transaction, thereby leaving the Debtors with few options. Nevertheless, the usual marketplace dynamics play out and the Court applies the same bankruptcy law analysis. Moreover, the Debtors' CEO testified that the demands from the Governmental Entities were not greater than that presented by other lenders, and in some aspects were not as onerous.

Good Faith Purchaser

Section 363(m) of the Bankruptcy Code provides, in relevant part, that

> The reversal or modification on appeal of an authorization under [section 363] of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization

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[22] The Auto Task Force employed the tactics of many "lenders of last resort," including dictating certain of the terms of the deal such as what assets and obligations they were willing to fund in any Sale Transaction.

> and such sale or lease were stayed pending appeal.

11 U.S.C. § 363(m). Thus, absent a stay pending appeal, a finding that a purchaser acted in good faith protects the finality of a sale that has been authorized even if it is reversed on appeal.

A purchaser's good faith "is shown by the integrity of his conduct during the course of the sale proceedings." *In re Gucci*, 126 F.3d 380, 390 (2d Cir. 1997) (quoting *In re Rock Industries Machinery Corp.*, 572 F.2d 1195, 1198) (other citations omitted). A good faith finding is precluded if fraud, collusion or attempts "to take grossly unfair advantage of other bidders" are present. *Gucci*, 126 F.3d at 390.

The Indiana Funds argue that a good faith finding is inappropriate because the U.S. Treasury is improperly controlling the Debtors; the U.S. Treasury does not have authority to enter into these transactions;[23] and it is on both sides of the

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[23] Contemporaneous with the entry of this Opinion, the Court has entered a separate Opinion and Order Regarding Emergency Economic Stabilization Act of 2008 and Troubled Asset Relief Program, dated June 1, 2009, in which it determined that, although the Indiana Funds have a right to be heard in this contested matter under section 1109(a) of the Bankruptcy Code, they do not have standing under EESA to challenge the U.S. Treasury's use of the TARP funds.
Further, The issue of waiver of the Indiana Funds' right to challenge the U.S. Treasury's actions under EESA and TARP was not properly presented before the Court as there was no briefing on the issue, and the issue was

transaction because it is controlling both the Debtors and New Chrysler. The Indiana Funds assert that government pressure to consummate the Fiat Transaction, exerted through threats to withhold

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raised after the Indiana Funds had argued their objection. However, certain facts are before the Court that are relevant to the waiver issue. The Indiana Funds maintain that, because they were looking for a safe vehicle in which to invest, they chose a secured note with a comparatively low interest rate. That statement as to investment strategy appears inconsistent with the facts at the time of the investment. By the time the Indiana Funds made their investment, it was a distressed debt investment. The Indiana Funds paid 43¢ on the dollar for their investment. As a result, the effective rate of interest was, at least, twice the stated rate, inasmuch as interest was paid on the face value of the participation and not on the amount that they paid for the notes. Further, the record reflects that after Chrysler received the TARP Financing in January 2009, it continued to make interest payments to the Indiana Funds, thereby benefitting the Indiana Funds by the receipt of those TARP-financed interest payments. In addition, the record reflects that the debtor-in-possession loan of nearly $5 billion, made to preserve the value of their collateral, was not objected to by the Indiana Funds. Most striking, however, is that the Indiana Funds' main argument regarding breach of fiduciary duties by management, is that management did not hold out for more TARP funding. Further, the Indiana Funds argue that the U.S. Treasury acted unlawfully by providing TARP funds to the Debtors and New Chrysler, but premise most of their other arguments and development of the record by maintaining that more TARP funds should have gone to them. In essence, their position is that the U.S. Treasury's alleged unlawful acts did not benefit them enough; therefore, they object.

debtor-in-possession financing or financing to New Chrysler, caused the Debtors to reverse their business judgment regarding the Stand-Alone Viability Plan. The Indiana Funds contend that, as a result, the U.S. Treasury is an "insider" of the Debtors' and the Debtors are an "instrument" of the U.S. Treasury.

As previously discussed, there had been extensive marketing of the Debtors and their assets for approximately two years in a highly publicized setting. Any entity that had the resources and interest in either acquiring the Debtors or engaging in a strategic partnership with the Debtors had the opportunity to perform due diligence. The Debtors discussed and negotiated with other OEM's, concerning the potential for a strategic partnership for the benefit of both parties to any such alliance. The Fiat Transaction was the only alternative available, and better option, to liquidation.

Further, the terms of the Fiat Transaction was finalized only after months of intense, good-faith negotiations. As was more fully discussed in the section concerning the Debtors' fiduciary duty, the ordinary marketplace dynamic played out with respect to the lenders and whatever ability they had to dictate terms. The fact that the lenders of last resort happened to be Governmental Entities did not alter that dynamic. The Governmental Entities did not preclude other entities from participating or negotiating, they merely set forth the terms that they required to provide financing and the parties were either amenable to them or not. Finally, as noted, the Governmental Entities had no obligation to fund the transaction and Chrysler and Fiat were free to walk away from the negotiations..

Nor did the Governmental Entities control the Debtors in that regard or become "insiders" of the Debtors. *See In re KDI Holdings, Inc.*, 277 B.R. 493, 511 (Bankr. S.D.N.Y. 1999) (concluding that a lender does not control a debtor when it offers advice to its management, "even where the lender threatens to withhold future loans should the advice not be taken"). The U.S. Treasury, as lender, merely conditioned its lending to the Debtors and to New Chrysler on the consummation of the Sale Transaction. In the same way that potential-partner OEM's could elect not to accede to such terms and refuse to purchase the assets, the Debtors were free to reject the funding offer. The Debtors, however, indicated that had they done so, they would have had to liquidate. Thus, the Debtors exercised their own business judgment under the circumstances, as then presented, and determined to consummate the Fiat Transaction rather than liquidate. The fact that the Debtors initially preferred the Stand-Alone Viability Plan is irrelevant to the determination it made in its business judgment, once it realized that there was no funding for the Stand-Alone Viability Plan. Nor is it relevant to consideration of the Sale Transaction currently before the Court given that without the Governmental Entities' funding, there is no funding from any source for such an alternative.

Thus, the Governmental Entities, as lenders, are neither controlling the Debtors nor New Chrysler and, therefore, are not on both sides of the Sale Transaction before the Court. There is no fraud or collusion and the Governmental Entities have authority to enter into this transaction.[24] Further, there are no allegations regarding Fiat's conduct in this transaction that would raise any issue as to the purchaser's good faith. Thus, New Chrysler is a good faith purchaser pursuant to § 363(m) of the Bankruptcy Code.

Sale Process, Including Bidding Procedures

Prior to their filing for bankruptcy protection, there had been extensive marketing of the Debtors and their assets for approximately two years. That marketing took place in the context of the high profile setting of the federal government's involvement in the process. By the time of the Bidding Procedures Hearing, viable potential purchasers with any interest already had obtained relevant information or due diligence. The evidence elicited at the Bidding Procedures Hearing established that the Debtors had investigated various alternative synergies, sharing relevant information with other participants in the industry. The only parties willing to step forward to provide financing for the purchase of the Debtors' assets, in the form of the Fiat Transaction, were the

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[24] Regardless of whether the U.S. Treasury was authorized to use TARP funds to provide the funding for the transaction before the Court, the integrity of the process was not harmed in any way. Specifically, the record supports the finding that the U.S. Treasury based its involvement on a reasonable interpretation of the authority under which it acted and there was no harm to any party as a result of source of the funding.

Governmental Entities, which had determined that the auto industry should be preserved in furtherance of each nation's economic interest. The Governmental Entities loaned the Debtors at least $4 billion prepetition, and nearly $5 billion postpetition, all of which is a secured debt obligation of the Debtors. The only other available alternative was immediate liquidation. At this point, the total secured debt of the Debtors exceeds $16 billion.

At the Bidding Procedures Hearing, opposition was voiced to the terms required to be accepted by any competing bidder. The structure of the contract, as proposed, reflected the fact that any likely purchaser would be involved in or intend to operate in the auto industry. Therefore, it was determined that a contract with that framework would aid in an orderly bidding process. The Court, however, expressed certain concerns regarding the limitations imposed on alternative purchase proposals. In response, at the Bidding Procedures Hearing, the Debtors acknowledged their fiduciary duty to consider any other proposals that were presented in the context of advancing the best interest of the Debtors' estates. Moreover, language was included in the Bidding Procedures Order reflecting the Debtors' fiduciary duty to consider any alternative proposals.[25] In addition, it was observed that any

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[25] In Section VIII of the Bidding Procedures, attached as Exhibit "A" to the Bidding Procedures Order, language was added to indicate that a "Qualified Bid" included not only bids that met the previously set forth requirements but, in addition, any bid that "after consultation with the Creditors' Committee, the U.S. Treasury and the UAW,

viable bidder would be a sophisticated party with the knowledge and capability to bring their offer and position to the attention of the relevant parties and the Court.

Thus, the Court concluded that the bidding procedures, as approved, provided another opportunity for any interested bidder to come forward, and also provided a safeguard to test the value offered. The Court further concluded that the bidding procedures would encourage bidding from any interested party with the wherewithal and interest to consummate a purchase transaction to ensure that the highest and best offer was attained. Further, the Court concluded that the bidding procedures were appropriate and necessary.

Due Process

Based upon the need for relief on an expedited basis to prevent the erosion of the going concern value of the Debtors' assets, the Court determined that shortened notice was proper for the Bidding Procedures Hearing. The same concern applies to the Sale Hearing.[26] The notice of the Sale Motion was

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[was] determined by the Debtors in the exercise of their fiduciary duties to be a Qualified Bid."

[26] Regarding the Indiana Funds' Motion to Strike Last-Minute Declarations, filed on May 27, 2009 (the "Motion to Strike"), oral motions were made at the Sale Hearing by the Indiana Funds concerning certain of those declarations. The Court denied the oral motions because it held that the use of the declarations was consistent with the Court's ruling in a telephonic conference conducted prior to the commencement of the Sale

provided to all necessary parties pursuant to the procedures established by this Court. One day after the Bidding Procedures Order was entered, the Debtors mailed notice of the Sale Motion, including that the proposed sale contemplated the assumption and assignment of various contracts. Notice of the Sale Transaction was published in the national editions of USA Today, the Wall Street Journal and the New York Times, as well as the worldwide edition of the Financial Times. Moreover, even prior to the bankruptcy filing, the circumstances of these Debtors were under scrutiny and the events leading up to the filing, including the proposal for the sale of the assets was highly publicized. Under the exigent circumstances, the Court determines that notice of the Sale Hearing is proper and adequate.

Additional Objections

Certain other issues were raised in the objections filed. The objections fall into seven general categories: (1) retirees and separated employees, (2) dealers, (3) tort and consumer objections, (4) state and local government objections, (5) supplier and production-related objections, (6) cure and assumption objections, and (7) miscellaneous objections. Many of the objections have been resolved by the Debtors and the objector, including by the modification of relevant language in the final order, or withdrawn by the objector. The objections in

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Hearing. The Indiana Funds had a full and lengthy opportunity to cross-examine all the witnesses, including those whose declarations were filed. Accordingly, the Motion to Strike was denied.

category (6) which have not been withdrawn object to the cure amount or other terms proposed by the Debtors in connection with the assumption and assignment of an executory contract or unexpired lease and, therefore, have been preserved and deferred to the Cure Amount Hearings currently scheduled for June 4, 2009, and June 23, 2009. Accordingly, the objections as to those issues in category (6) are not discussed herein; objections touching upon notice and due process issues in category (6) are overruled but addressed by the relevant sections of this Opinion. Additionally, objections related to issues discussed elsewhere in this Opinion are not reiterated here.

Category (1) consists of retirees and separated employees who are represented by the UAW and those who are not. Some of these objections sought clarification as to which plans would be assumed and assigned by the Debtors and which would be rejected. The Debtors have since filed a list specifying this information, and in that respect the objections are partially resolved. The objecting retirees represented by the UAW objected to the modification of retiree benefits under the settlement agreement between New Chrysler and the UAW, but those objections are overruled because the UAW was the objectors' authorized representative under section 1114, and the modifications were negotiated in good faith pursuant to that section. The objecting retirees not represented by the UAW whose benefits are adversely impacted may have unsecured claims against the Debtors' estates, but the purchased assets are sold free and clear of those potential unsecured claims. For those reasons, their objections to the Sale Motion are overruled. Further, the Court finds that if the Sale Motion were not approved, which would likely result in the Debtors' liquidation, there would likely be no value to distribute any retirees, all of whom would be unsecured creditors. Other objections in this category touch upon notice and due process issues, all of which are overruled as to those issues but addressed by the relevant sections of this Opinion.

Category (2) consists in large part of dealers whose Dealer Agreements are proposed to be rejected by Debtors pursuant to section 365. To the extent an objection raises a *bona fide* dispute related to that issue, the objection as to that issue has been preserved and deferred to the Rejection Hearing on June 3, 2009, at 11:00 a.m., but the objection is otherwise overruled. Other dealer objectors question the process for assumption and assignment of the Dealer Agreements, but this objection is overruled as untimely because that process was approved in the Bidding Procedures Order. Other dealer objectors argue that the Debtors' providing designation rights to New Chrysler to finalize assumption decisions post-closing is improper. This objection is overruled because similar procedures have been approved in this district and elsewhere and this Court finds that the analysis set forth in *Ames* fully supports the Debtors' position herein. *See*, *e.g.*, *In re Ames Dep't Stores, Inc.*, 287 B.R. 112, 115 (Bankr. S.D.N.Y. 2002). Objectors arguing that the purchased assets are subject to setoff or recoupment rights may have unsecured claims against Debtors' estates, but the purchased assets are sold free and clear of those potential unsecured claims. Additionally, the Court notes that the objectors' rights are contractual and not an "interest" that attaches to the Debtors' property, notwithstanding any suggestion or implication that state dealer statutes create such an "interest," and, therefore, objections raising that issue are overruled. Other objections in this category touch upon notice and due process issues, as well as contend that the Sale Transaction is a *sub rosa* plan, all of which are overruled as to those issues but addressed by the relevant sections of this Opinion.

Category (3) consists of tort and consumer objections. Those objections relating to lemon law and warranty claims have been resolved by the modification of relevant language in the Fale order. An objection (ECF Docket No. 1231) was raised regarding an environmental claim, but the property to which the claim related is no longer owned by the Debtors and the objection is therefore overruled. Various objections were raised related to property damage claims and personal injury and wrongful death claims, including those which have not yet occurred. Some of these objectors argue that their claims are not "interests in property" such that the purchased assets can be sold free and clear of them. However, the leading case on this issue, *In re Trans World Airlines, Inc.*, 322 F.3d 283 (3d Cir. 2003) ("*TWA*"), makes clear that such tort claims are interests in property such that they are extinguished by a free and clear sale under section 363(f)(5) and are therefore extinguished by the Sale Transaction. *See id.* at 289, 293. The Court follows *TWA* and overrules the objections premised on this argument. Even so, *in personam* claims, including any potential state successor or transferee liability claims against

New Chrysler, as well as *in rem* interests, are encompassed by section 363(f) and are therefore extinguished by the Sale Transaction. *See*, *e.g.*, *In re White Motor Credit Corp.*, 75 B.R. 944, 949 (Bankr. N.D. Ohio 1987); *In re All Am. Of Ashburn, Inc.*, 56 B.R. 186, 190 (Bankr. N.D. Ga. 1986). The Court also overrules the objections premised on this argument.

Additionally, objections in this category touching upon notice and due process issues, particularly with respect to potential future tort claimants, are overruled as to those issues because, as discussed elsewhere in this Opinion, notice of the proposed sale was published in newspapers with very wide circulation. The Supreme Court has held that publication of notice in such newspapers provides sufficient notice to claimants "whose interests or whereabouts could not with due diligence be ascertained." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 317 (1950). Accordingly, as demonstrated by the objections themselves, the interests of tort claimants, including potential future tort claimants, have been presented to the Court, and the objections raised by or on behalf of such claimants are overruled.

Other objections in this category are premised on the argument that a free and clear sale would be fundamentally unfair, inequitable, or in bad faith. The policy underlying section 363(f) is to allow a purchaser to assume only the liabilities that promote its commercial interests. *See*, *e.g.*, *In re New England Fish Co.*, 19 B.R. 323, 328-29 (Bankr. W.D. Wash. 1982); *White Motor Credit*, 75 B.R. at 951. Accordingly, objections premised on this argument are overruled. An objection in this category raised the Takings Clause of the Fifth Amendment, but this objection is overruled because the objector holds an unsecured claim, rather than a lien in some collateral that is property of the estate, which is a necessary prerequisite to a Fifth Amendment Takings Clause claim in the bankruptcy context. *See U.S. v. Security Industrial Bank*, 459 U.S. 70 (1982). The same objection also raised the issue of the break-up fee being excessive, but this objection is overruled as untimely because that fee was approved in the Bidding Procedures Order and is not implicated since the assets are being sold to the original bidder. Another objection related to an asbestos claim raised both the failure to comply with section 524(g) and that the Sale Transaction improperly provides for the release of third parties, but this objection is overruled as to both issues because section 524(g) is inapplicable to a free and clear sale under section 363 and the Sale Transaction does not contain releases of third parties. Such claims can still be asserted against the Debtors' estate. Other objections in this category which contend that the Sale Transaction is a *sub rosa* plan are overruled as to that issue but are addressed by the relevant sections of this Opinion.

Category (4) consists of state and local government objections related to taxes and workers' compensation. All of these objections have been withdrawn or resolved by relevant language in the final order. An objection by the State of Michigan related to taxes which are or may become subject to a tax lien has been resolved by the deposit of designated funds in a dedicated escrow account.

Category (5) consists of supplier and production-related objections. All of the objections related to statutory liens, setoff and/or recoupment rights, and the assumption or rejection of unexpired leases have been withdrawn or resolved by relevant language in the final order. Specifically, various parties objected to the sale to the extent it proposes to extinguish or impair rights of setoff, recoupment, subrogation, indemnity, defenses to performance under the particular agreement, and any valid statutory or possessory liens such as the liens of mechanics' liens, marine cargo liens, construction liens or the liens of carriers, workers, repairers, shippers, toolers, molders or any similar liens. The Debtors have agreed to include language in the final preserving such rights. Further, since such rights will not be extinguished by the sale under section 363(f), there is no need to provide adequate protection to those parties under section 362(e) or section 361. An objection by several parties (ECF Docket No. 1187), most of which have withdrawn the objection, related to information regarding the assets to be sold is overruled. Such information has been provided by the Debtors. To the extent any objection in this category which has not been withdrawn raises an objection related to the assumption and assignment or rejection of an executory contract or unexpired lease, including cure amounts, the objection as to that issue has been preserved and deferred to the Cure Amount Hearings and the Rejection Hearing. Other objections in this category touch upon notice and due process issues, all of which are overruled as to those issues but addressed by the relevant sections of this Opinion.

Category (7) consists of miscellaneous objections. The objections of the Non-TARP Lenders and the Indiana Funds are overruled but discussed elsewhere in this Opinion. The objection of Jonathan Lee Riches d/b/a Irving Picard is overruled because there is no basis for the objection. The objection of Wilmington Trust Company has been resolved by relevant language in the final order. The objections of Chrysler Financial have been resolved by relevant language in the final order. The objection of Automobile Plant GAZ is overruled as to the notice and due process issues, which are addressed by the relevant sections of this Opinion, and, to the extent it raises a *bona fide* dispute relating to the assumption and assignment or rejection of an executory contract, including cure amount, the objection as to that issue has been preserved and deferred to the Cure Amount Hearings or Rejection Hearing, as the case may be.

CONCLUSION

The Court after having given due consideration, among other things, to the factors set forth in *Lionel*, the Court finds that all relevant standards have been established to grant the relief requested. Further, the Court finds that the Sale Transaction is not a *sub rosa* plan; the Debtors did not breach their fiduciary duty regarding the Sale Transaction; the assets in the Sale Transaction are sold free and clear of liens, claims, interests, and encumbrances pursuant to section 363(f); and the protections of a good faith purchaser pursuant to section 363(m) shall apply.

The Sale Motion is granted in its entirety and entry into and performance under and in respect of the Purchase Agreement and the Sale Transaction is approved.[27] All objections, if any, to the Sale Motion or the relief requested therein that have not been withdrawn, waived, or settled as announced to the Court at the Sale Hearing or by stipulation filed with the Court, and all reservation of rights included therein, are hereby overruled, except as expressly provided in the final order.

Accordingly, the relief sought in the Sale Motion is granted. A final order will be entered consistent with this Opinion.

Dated: New York, New York
May 31, 2009

s/Arthur J. Gonzalez
UNITED STATES
BANKRUPTCY COURT

[27] The Rule 6004 relief requested by the Debtors will be addressed in the final order or by a separate order.

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

In re	Chapter 11
CHRYSLER LLC, *et al.*,	Case No. 09 B 50002 (AJG)
Debtors.	(Jointly Administered)

OPINION AND ORDER REGARDING EMERGENCY ECONOMIC STABILIZATION ACT OF 2008 AND TROUBLED ASSET RELIEF PROGRAM

On April 30, 2009 (the "Petition Date"), Chrysler LLC ("Chrysler") and 24 of its domestic direct and indirect subsidiaries (collectively with Chrysler, the "Original Debtors") filed for protection under title 11 of the United States Code (the "Bankruptcy Code"). On May 1, 2009, an Order was entered directing that the Original Debtors' cases be jointly administered for procedural purposes, pursuant to Rule 1015(a) of the Federal Rules of Bankruptcy Procedure. On May 19, 2009, Alpha Holding LP[1] ("Alpha" and with the

[1] Alpha is a holding company that conducts no business other than holding capital stock of Chrysler Canada Inc. and Chrysler Mexico Holding S.de R.L de C.V.

Original Debtors, the "Debtors") filed a petition for relief under title 11 of the Bankruptcy Code. On May 26, 2009, an order (the "Alpha Order") was entered directing the joint administration of Alpha's bankruptcy case with the cases of the Original Debtors.[2] The Debtors continue to operate their respective businesses as debtors-in-possession pursuant to sections 1107 and 1108 of the Bankruptcy Code. On May 5, 2009, an Official Committee of Unsecured Creditors (the "Creditors' Committee") was formed.

There is no dispute that the Indiana State Teachers Retirement Fund, Indiana State Police Pension Trust, and the Indiana Major Move Construction (the "Indiana Funds") are parties in interest in this bankruptcy case under § 1109(b). *See* 11 U.S.C. § 1109(b) ("A party in interest, including the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee, may raise and may appear and be heard on any issue in a case under this chapter."). The Indiana Funds are creditors in this case and may be heard on the issues they raised. *See In re Comcoach Corp.*, 698 F.2d 571, 573 (2d Cir. 1983). But standing under § 1109(b) is "generally interpreted broadly to allow parties in

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[2] In addition, the Alpha Order provided that, to the extent applicable, (a) any order that previously had been entered in the jointly administered Original Debtors' cases was applicable to Alpha, nunc pro tunc, to the date that Alpha filed its bankruptcy petition, and (b) that future orders entered in the Debtors cases would apply to Alpha.

interest an opportunity to appear and be heard in proceedings that affect their interests." *Asbestos Settlement Tr. v. Porth Auth. of N.Y & N.J. (In re Celotex Corp.)*, 377 B.R. 345, 350 (Bankr. M.D. Fla. 2006). However, standing to be heard under § 1109(b) does not automatically impart upon the Court the ability to adjudicate all issues raised by parties in interest. *Allen v. Wright*, 468 U.S. 737, 750-51 (1984) ("In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues.") (citing *Warth v. Seldin*, 422 U.S. 490, 498 (1975)). Rather, the Indiana Funds must still satisfy the prerequisites of standing that are attendant to any attempt to have a federal court adjudicate a dispute.

Standing Under the Emergency Economic Stabilization Act of 2008

In late 2008, Congress promulgated the Emergency Economic Stabilization Act of 2008 ("EESA") Pub L. NO. 110-343, 122 Stat. 3765 (Oct. 3, 2008) (codified at 12 U.S.C. §§ 5201 *et seq.*), which established the Troubled Asset Relief Program ("TARP"). TARP authorizes the Secretary of the Treasury (the "Secretary") to purchase troubled assets to restore confidence in the economy and stimulate the flow of credit. The Indiana Funds have raised the issue that the U.S. Treasury has exceeded its Congressional grant of authority under EESA by providing financing under TARP to New CarCo Acquisition LLC (the "New Chrysler") to facilitate the acquisition of the Debtor's assets pursuant to the § 363 sale. Specifically, the Indiana Funds claim that the U.S. Treasury cannot use funds under TARP to finance the transaction because Congress prescribed the scope of EESA to permit the Secretary to purchase "troubled assets from any financial institution . . . ." 12 U.S.C. § 5211(a)(1).

As a threshold inquiry, the Court must determine whether the Indiana Funds have standing to challenge the actions of the U.S. Treasury pursuant to EESA and TARP. *See Warth*, 422 U.S. at 498 ("In its constitutional dimension, standing imports justiciability: whether the plaintiff has made out a 'case or controversy' between himself and the defendant within the meaning of Art. III. This is the threshold question in every federal case, determining the power of the court to entertain the suit."). In a hearing before the United States District Court for the Southern District of New York (the "District Court"), the District Court found that the Indiana Funds have standing to raise and be heard on the motions before the District Court, namely, the Indiana Funds' (1) Motion to Withdraw the Reference and (2) Motion for a Stay. Nowhere in the District Court's opinion or the transcript of the hearing, referenced by the District Court in its opinion, did the District Court reach the issue of the Indiana Funds' standing under EESA. Rather, the District Court found that TARP and EESA needed to be interpreted. Interpretation of those statutes necEESArily requires a determination of whether the parties have standing to have the issues adjudicated. *See e.g., Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 831 (1999) (a "court must be sure of its own jurisdiction before getting to the merits.") (citing

Steel Co. v. Citizens For Better Environment, 523 U.S. 83, 88-89 (1998)).

The issue of standing "involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise." *Bennett v. Spear*, 520 U.S. 154, 162 (1997). The Supreme Court's standing jurisprudence has established three prerequisite elements to constitutional standing: (1) the plaintiff must have suffered an "injury in fact," which is actual or imminent, and that is a concrete and particularized invasion of a legally protected right; (2) there must be a causal connection between the injury and the conduct complained of; and (3) it must be likely, not merely speculative, that the injury will be redressed by a favorable decision. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (internal citations omitted). These elements must be shown to satisfy the "case or controversy" requirement of Article III. Further, there are judicially-proscribed prudential limitations to standing, one of which is "the plaintiff's grievance must arguably fall within the zone of interests protected or regulated by the statutory provision or constitutional guarantee invoked in the suit." *Bennett,* 520 U.S. at 162 (internal citations omitted).

The Court finds that the Indiana Funds do not have standing under EESA to challenge the actions of the U.S. Treasury's pursuant to TARP in connection with this case. With respect to their secured claims, the Indiana Funds cannot allege an injury in fact for two reasons. First, in the "Opinion and Order Granting Debtor's Motion Seeking

Authority to Sell, Pursuant to 11 U.S.C. § 363, Substantially All of the Debtors' Assets," (the "Sale Opinion") issued contemporaneously with this Opinion and Order, the Court found that the Indiana Funds are bound, under the Collateral Trust Agreement, by the Administrative Agent's agreement to consent to the sale under § 363(f)(2) and to receive $2 billion upon the release of the collateral. The Administrative Agent agreed to the disposition of the collateral as set forth under the terms of the § 363 sale. Therefore the Indiana Funds are bound by that action and cannot allege an injury. Second, even if the Indiana Funds were not bound by the Administrative Agent's actions, in the Sale Opinion the Court found that the value of the collateral at issue was no greater than $2 billion, *i.e.*, the same amount the first lien senior secured lenders are receiving under the transaction approved pursuant to the Sale Opinion. Therefore, the Indiana Funds will receive the pro-rata distribution of the value of the collateral and cannot allege injury in fact.

Further, even if the Indiana Funds had an injury in fact with respect to their secured claim, the Indiana Funds cannot show the alleged injury is fairly traceable to the U.S. Treasury's use of TARP funds. If a non-governmental entity were providing the funding in this case, the Indiana Funds would be alleging the same injury, *i.e.*, interference with their collateral. In this light, it is not the actions of the lender that the Indiana Funds are challenging but rather the transaction itself. Specifically, the Indiana Funds' alleged injury is not fairly traceable to the U.S. Treasury's actions because the Indiana

Funds would suffer the same injury regardless of the identity of the lender. For these reasons, the Court finds that the Indiana Funds do not have standing under EESA to challenge the actions of the U.S. Treasury pursuant to TARP. Turning to the unsecured deficiency claim of the Indiana Funds, the Court finds that the Indiana Funds have similarly failed to show any injury in fact. In view of the fact that the face value of liens on the collateral exceeds the value of the collateral itself, all holders of unsecured claims are receiving no less than what they would receive under aliquidation. Therefore, there is no injury with respect to the unsecured deficiency claim of the Indiana Funds. *See* 11 U.S.C. § 1129(a)(7)(A)(ii).

Further, as explained and for the reasons set forth above, even if an injury could be shown with respect to the Indiana Funds' unsecured claim, it is not fairly traceable to the actions of the U.S. Treasury under EESA and TARP.

Because the Indiana Funds do not have standing, the Court does not reach the merits of any of the TARP and EESA issues raised by the Indiana Funds.

Accordingly, it is hereby

ORDERED, the Indiana Funds lack standing to challenge the U.S. Treasury's actions under EESA and TARP; and it is further

ORDERED, any request for relief related to the issues regarding EESA and TARP is denied.

Dated: New York, New York
May 31, 2009

<u>s/Arthur J. Gonzalez</u>
UNITED STATES BANKRUPTCY JUDGE

Cite as: 556 U. S. _ (2009)

PER CURIAM

SUPREME COURT OF THE UNITED STATES

Nos. 08AI096, 08-1513 (08AI099), 08A1100

INDIANA STATE POLICE PENSION TRUST ET AL.
08A1096 *v.*
CHRYSLER LLC ET AL.

CENTER FOR AUTO SAFETY ET AL.
08-1513 (08A1099) *v.*
CHRYSLER LLC ET AL.

PATRICIA PASCALE
08A1100 *v.*
CHRYSLER LLC ETAL.

ON APPLICATIONS FOR STAY

[June 9, 2009]

PER CURIAM.

The applications for stay presented to JUSTICE GINSBURG and by her referred to the Court are denied. The temporary stay entered by JUSTICE GINSBURG on June 8, 2009, is vacated.

A denial of a stay is not a decision on the merits of the underlying legal issues. In determining whether to grant a stay, we consider instead whether the applicant has demonstrated "(1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari or to note probable jurisdiction; (2) a fair prospect that a majority of the Court will conclude that the decision below was erroneous; and (3) a likelihood that irreparable harm will result from the denial of a stay." *Conkright* v. *Fommert,* 556 U. S. __, __ (2009) (slip op., at 1-2) (GINSBURG, J., in chambers) (internal quotation marks and alterations omitted). In addition, "in a close case it may be appropriate to balance the equities," to assess the relative harms to the parties, "as well as the interests of the public at large." *Id.,* at __. (slip op., at 2) (internal quotation marks omitted).

"A stay is not a matter. of right, even if irreparable injury might otherwise result." *Nken* v. *Holder,* 556 U. S. ___, ___ (2009) (slip op., at 14) (internal quotation marks omitted). It is instead an exercise of judicial discretion, and the "party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion." *Ibid.* The applicants have not carried that burden.

"[T]he propriety of [a. stay] is dependent upon the circumstances of the particular case," and the "traditional stay factors contemplate individualized judgments in each case." *Ibid.* (internal quotation marks omitted). Our assessment of the stay factors here is based on the record and proceedings in this case alone.

Supreme Court of the United States

No. 08A1096

INDIANA STATE POLICE PENSION TRUST, ET AL.,
Applicants,
v.

CHRYSLER LLC, ET AL.

ORDER

UPON CONSIDERATION of the application of counsel for the applicants, and the responses filed thereto,

IT IS ORDERED that the orders of the Bankruptcy Court for the Southern District of New York, case No. 09-50002, dated May 31 and June 1, 2009, are stayed pending further order of the undersigned or of the Court.

/s/ Ruth Bader Ginsburg
Associate Justice of the Supreme
Court Of the United States

Dated this 8th
day of June 2009.

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 2nd day of June, two thousand and nine.

PRESENT: HON. Dennis Jacobs, Chief Judge
HON. Amalya L. Kearse
HON. Robert D. Sack
Circuit Judges.

In re: Chrysler LLC, aka Chrysler Aspen, aka Chrysler Town & Country, aka Chrysler 300, aka Chrysler Sebring, aka Chrysler PT Cruiser, et. al

Debtor-Plaintiff-Petitioners

ORDER
Docket Number: 09-2311-mb

The motion for a stay and for expedited appeal filed by appellants Indiana State Teachers' Retirement Fund, et al., is granted. All parties are directed to file simultaneous merits briefs by noon on Thursday, June 4, 2009 via email to the Clerk of Court at Catherine_Wolfe@ca2.uscourts.gov. The parties may presume that the Court will have read the opinions of the Bankruptcy Court. Oral argument on the appeal will be heard by this panel on Friday, June 5, 2009 at 2:00 p.m. in the Ceremonial Courtroom, 9th Floor, 500 Pearl Street, N.Y., N.Y.

FOR THE COURT,

By: \s\Catherine O'Hagan Wolfe
Catherine O'Hagan Wolfe, Clerk

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 2nd day of June, two thousand and nine.

PRESENT: HON. Dennis Jacobs, Chief Judge
HON. Amalya L. Kearse
HON. Robert D. Sack
Circuit Judges.

In re: Chrysler LLC, aka Chrysler Aspen, aka Chrysler Town & Country, aka Chrysler 300, aka Chrysler Sebring, aka Chrysler PT Cruiser, et. al

Debtor-Plaintiff-Petitioners

ORDER
Docket Number: 09-2311-mb

IT IS HEREBY ORDERED that the petition of Appellant Chrysler LLC for leave to appeal pursuant to 28 U.S.C. §158(d) is GRANTED.

FOR THE COURT,

By: \s\Catherine O’Hagan Wolfe
Catherine O’Hagan Wolfe, Clerk

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re
Chapter 11

CHRYSLER LLC, *et al.*,
Case No. 09 B 50002 (AJG)

Debtors.
(Jointly Administered)

ORDER CERTIFYING SALE ORDER FOR IMMEDIATE APPEAL TO UNITED STATES COURT OF APPEALS, PURSUANT TO 28 U.S.C. § 158(d)(2)

This matter coming before the Court on the Motion of Debtors and Debtors in Possession for an Order Certifying the Sale Order for Immediate Appeal to United States Court of Appeals, Pursuant to 28 U.S.C. § 158(d)(2) (the "Motion"),[1] filed by the above-captioned debtors and debtors in possession (the "Debtors"); the Court having reviewed the Motion and the prior proceedings herein; and the Court having found that (i) the Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1334 and 157, (ii) this is a core proceeding pursuant to 28 U.S.C. § 157(b) and (iii) notice of the

[1] Capitalized terms not otherwise defined herein shall have the meanings given to them in the Motion.

Motion was sufficient under the circumstances; and having considered the response of the Indiana Pensioners; and the Court having determined that the legal and factual bases set forth in the Motion establish just cause for the relief granted herein;

IT IS HEREBY ORDERED THAT:

1. The Motion is GRANTED as set forth herein.

2. The Court certifies that an immediate Appeal of the Sale Opinion, the TARP Opinion and Sale Order is appropriate because this case involves a matter of public importance, and an immediate appeal may materially advance the progress of this case.

3. This Court therefore certifies the Sale Opinion, the TARP Opinion and Sale Order for immediate appeal, pursuant to 28 U.S.C. § 158(d)(2).

Dated: New York, New York
June 2, 2009

s/Arthur J. Gonzalez
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

____________ x	Chapter 11
:	
In re :	Case No 09-500002 (AJG)
:	Jointly Administered
CHRYSLER, LLC, :	
et al., :	Civ. Case No. 09 Civ. 4743
:	(LAP)
Debtors :	
____________ x	**OPINION**

There are three motions before this court. The first is to withdraw the reference to the Bankruptcy Court. The second is to stay proceedings in the Bankruptcy Court pending determination of the motion to withdraw the reference. The third, assuming the withdrawal of the reference, is to appoint a Chapter 11 trustee and also to appoint an examiner.

For the reasons hereafter stated, the motion to withdraw the reference is denied. The motion for a stay is also denied since there is no reason for any such stay. Finally, since the motion to withdraw the reference is denied, the issues about appointment of a trustee and an examiner will remain with the Bankruptcy Court.

The above motions were filed in the District Court last Wednesday, May 20. The immediate purpose of the motion to withdraw the reference is to remove from the Bankruptcy Court the issues now scheduled to be heard in that Court tomorrow, Wednesday, May 27. These issues relate to the proposal to sell virtually all the assets of Chrysler to a new company, spoken of as "New Chrysler." This proposed sale will be described in more detail hereafter. The motion to withdraw the reference and the related motions have been extensively briefed, and were the subject of a lengthy hearing held today. At the conclusion of that hearing, the Court announced the disposition of the motions in accordance with what is stated above. The purpose of the present opinion is to explain the reasons for the rulings, and this explanation will necessarily be somewhat brief in nature.

It might be useful here to explain what is meant by a motion to withdraw the reference. A Bankruptcy Court is part of the local United States District Court. In order for a bankruptcy case to be litigated in the Bankruptcy Court, there must be a reference of that matter by the District Court to the Bankruptcy Court. However, under established procedures all bankruptcy cases are considered to be automatically referred to a Bankruptcy Court. But under the bankruptcy law there can be, under certain circumstances, the "withdrawal of the reference," in order to move a particular matter back to the District Court.

The following is the background of the motion to withdraw the reference in the present case. The various Chrysler entities filed under Chapter 11 on April 30. The culmination of the rather short bankruptcy process has been the proposal to sell virtually all the assets of Chrysler to "New Chrysler," to be owned by the U.S. Treasury Department, the Italian automaker Fiat, and an entity named VEBA Trust, connected with the United Auto Workers. The proposed sale is under Section 363 of the Bankruptcy Law, 11 U.S.C. § 363.

The terms of this proposed sale are objected to by various parties, who have filed such objections with the Bankruptcy Court. The parties whose objections have materialized into the motion to withdraw the reference are certain Indiana State pension and benefit funds (the "Indiana Funds"), which hold approximately $40 million in Chrysler's Senior Secured Loans. The total amount of such Senior Secured Loans outstanding is approximately $7 billion. These loans are secured by substantially all of Chrysler's assets. Under their terms they are scheduled to mature in 2013. Interest is paid quarterly. Thus far there have been no defaults in the payment of interest.

If the proposed § 363 sale is approved and takes place, virtually all of the collateral for the Senior Secured Loans will be transferred to New Chrysler, and will no longer be security for the Loans. The sum of $2 billion will be paid to the bankruptcy estate for distribution to the Senior Secured Lenders. The loans will remain outstanding to the extent that there will be a deficiency of about $5 billion. This deficiency will be secured by assets left behind at the old Chrysler entity, which assets are of uncertain value but will surely amount to only a fraction of $5 billion.

The Indiana Funds have objected to the proposed § 363 sale. Although about 90% of the Senior Secured Lenders have consented to the sale, the

Indiana Funds and certain other Senior Secured Lenders take an independent position, and assert that their priority position has not been properly accounted for in the proposed sale. They argue that the terms of the proposed sale were arrived at in a manner which was not faithful to the proper and legal handling of a Chapter 11 proceeding. They argue that the Chrysler management failed to perform its fiduciary duty to protect interested parties, including Senior Secured Lenders. The Indiana Funds argue that the Federal Government, specifically the White House and the Treasury Department, dictated the terms of the sale and provided a limited amount of financing, all without statutory or other legal basis. The Federal Government takes the position that what it has done in the Chapter 11 proceeding and in connection with the proposed sale is to be found in the Emergency Economic Stabilization Act of 2008 ("EESA"), 12 U.S.C. §§ 5201 *et seq.,* which established the Troubled Asset Relief Program ("TARP").

The Indiana Funds take the position that EESA and TARP, properly interpreted, do not provide any authority for what the Federal Government did here. They claim that the Federal Government has therefore committed a major violation of a federal statute.

It is necessary at this point to present certain details of what occurred. In early 2009 the Federal Government loaned Chrysler $4 billion on the basis that the EESA and the TARP program permitted loans to auto companies. When the Chrysler bankruptcy emerged, the Federal Government took two basic steps. The Government agreed to provide debtor-in-possession financing in the amount of about $3 billion. It should be noted that the Canadian Government agreed to make such financing available in the amount of about $ 1 billion, for a total of such financing from both Governments of over $4 billion. The other activity of the Federal Government in connection with the Chapter 11 proceeding was to take the steps that it did to arrange for the proposed § 363 sale.

As already indicated, the Indiana Funds contend that these actions by the Federal Government were not authorized by EESA and TARP, and therefore had no legal authority. They also urge that the movement of the collateral for the Senior Secured Loans to New Chrysler would amount to a taking in violation of the Constitution.

The position of the Indiana Funds is vigorously contested by Chrysler, by Fiat, by the representative of the 90% of the Senior Secured Lenders, by the Committee of Unsecured Creditors, by the Federal Government, and by the Canadian Government. In essence, they argue that the Federal Government had legal authority for what it did, that the proposed § 363 sale was the result of vigorous negotiation in which the responsible parties did their duty, and that the overwhelming majority of the relevant "constituents" are in favor of the proposed sale.

Above all, as relates to the issues before the court today, they oppose taking away the matter from the Bankruptcy Court. The applicable statute is Section 157(d) of the bankruptcy law, 28 U.S.C. § 157(d), which provides:

> The district court shall, on timely motion of a party, ... withdraw a proceeding if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.

However, the Second Circuit has expressly held that this language must be "construed narrowly." Shugrue v. Air Line Pilots Ass'n Int'l (In re Ionosphere Clubs. Inc.), 922 F.2d 984, 995 (2d Cir.1990). This narrow construction means that a District Court should not withdraw the reference where bankruptcy issues to be resolved depend on the interpretation of a non-bankruptcy statute but that this interpretation is closely intertwined with standard bankruptcy considerations.

The latter is surely true in the present case. There is certainly a need to interpret EESA and TARP. But resolution of the issues about the § 363 sale involve a number of standard factual and legal issues presented in bankruptcy matters, including whether responsible parties performed their fiduciary duties, whether the terms of the proposed sale are such as to give proper recognition to secured creditors, and whether the proposed sale is in fact a reorganization, requiring the procedural protections given to the later kind of proceeding.

There are surely issues to be decided by the Bankruptcy Court. But that is where they should be decided, subject to the right of appeal. At this late stage, when the Bankruptcy Court is nearing the completion of its work, it would be disruptive to remove the issues from a bankruptcy judge who has the background and is ready to complete his work.

There should be a word about the issue of standing. This issue has been discussed extensively in the briefs. There is no time for full discussion in this opinion. The Court simply reiterates what was said at the hearing, and that is that the Indiana Funds have standing to make their motion to withdraw the reference and to make the related motions.

Conclusion

The motions to withdraw the reference, to grant a stay, and to have the District Court appoint a receiver and an examiner, are denied.

SO ORDERED.

Dated: New York, New York
May 26, 2009

/s/ Thomas P. Griesa
Thomas P. Griesa
U.S.D.J.

CONSTITUTIONAL AND STATUTORY PROVISIONS

11 U.S.C. § 363(f) provides:

The trustee may sell property under [11 U.S.C. § 363(b) or (c)] free and clear of any interest in such property of an entity other than the estate only if—

(1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;
(2) such entity consents;
(3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;
(4) such interest is in bona fide dispute; or
(5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

11 U.S.C. § 506(a)(1) provides:

An allowed claim of a creditor secured by a lien on property in which the estate has an interest, or that is subject to setoff under Section 553 of this title, is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, or to the extent of the amount subject to setoff, as the case may be, and is an unsecured claim to the extent that the value of such creditor's interest or the amount so subject to setoff is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.

11 U.S.C. § 1122 provides:

(a) Except as provided in subsection (b) of this section, a plan may place a claim or an interest in a particular class only if such claim or interest is substantially similar to the other claims or interests of such class.

(b) A plan may designate a separate class of claims consisting only of every unsecured claim that is less than or reduced to an amount that the court approves as reasonable and necessary for administrative convenience.

11 U.S.C. § 1123 provides:

(a) Notwithstanding any otherwise applicable nonbankruptcy law, a plan shall—

(1) designate, subject to section 1122 of this title, classes of claims, other than claims of a kind specified in section 507 (a)(2), 507 (a)(3), or 507 (a)(8) of this title, and classes of interests;

(2) specify any class of claims or interests that is not impaired under the plan;

(3) specify the treatment of any class of claims or interests that is impaired under the plan;

(4) provide the same treatment for each claim or interest of a particular class, unless the holder of a particular claim or interest agrees to a less favorable treatment of such particular claim or interest;

(5) provide adequate means for the plan's implementation, such as—

(A) retention by the debtor of all or any part of the property of the estate;

(B) transfer of all or any part of the property of the estate to one or more entities, whether organized before or after the confirmation of such plan;

(C) merger or consolidation of the debtor with one or more persons;

(D) sale of all or any part of the property of the estate, either subject to or free of any lien, or the distribution of all or any part of the property of the estate among those having an interest in such property of the estate;

(E) satisfaction or modification of any lien;

(F) cancellation or modification of any indenture or similar instrument;

(G) curing or waiving of any default;

(H) extension of a maturity date or a change in an interest rate or other term of outstanding securities;

(I) amendment of the debtor's charter; or

(J) issuance of securities of the debtor, or of any entity referred to in subparagraph (B) or (C) of this paragraph, for cash, for property, for existing securities, or in exchange for claims or interests, or for any other appropriate purpose;

(6) provide for the inclusion in the charter of the debtor, if the debtor is a corporation, or of any corporation referred to in paragraph (5)(B) or (5)(C) of this subsection, of a provision prohibiting the issuance of nonvoting equity securities, and providing, as to the several classes

of securities possessing voting power, an appropriate distribution of such power among such classes, including, in the case of any class of equity securities having a preference over another class of equity securities with respect to dividends, adequate provisions for the election of directors representing such preferred class in the event of default in the payment of such dividends;

(7) contain only provisions that are consistent with the interests of creditors and equity security holders and with public policy with respect to the manner of selection of any officer, director, or trustee under the plan and any successor to such officer, director, or trustee; and

(8) in a case in which the debtor is an individual, provide for the payment to creditors under the plan of all or such portion of earnings from personal services performed by the debtor after the commencement of the case or other future income of the debtor as is necessary for the execution of the plan.

(b) Subject to subsection (a) of this section, a plan may—

(1) impair or leave unimpaired any class of claims, secured or unsecured, or of interests;

(2) subject to section 365 of this title, provide for the assumption, rejection, or assignment of any executory contract or unexpired lease of the debtor not previously rejected under such section;

(3) provide for—

(A) the settlement or adjustment of any claim or interest belonging to the debtor or to the estate; or

(B) the retention and enforcement by the debtor, by the trustee, or by a representative of the estate appointed for such purpose, of any such claim or interest;

(4) provide for the sale of all or substantially all of the property of the estate, and the distribution of the proceeds of such sale among holders of claims or interests;

(5) modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims; and

(6) include any other appropriate provision not inconsistent with the applicable provisions of this title.

(c) In a case concerning an individual, a plan proposed by an entity other than the debtor may not provide for the use, sale, or lease of property exempted under section 522 of this title, unless the debtor consents to such use, sale, or lease.

(d) Notwithstanding subsection (a) of this section and sections 506 (b), 1129 (a)(7), and 1129 (b) of this title, if it is proposed in a plan to cure a default the amount necessary to cure the default shall be determined in accordance with the underlying agreement and applicable nonbankruptcy law.

11 U.S.C. § 1124 provides:

Except as provided in section 1123 (a)(4) of this title, a class of claims or interests is impaired under a plan unless, with respect to each claim or interest of such class, the plan—

(1) leaves unaltered the legal, equitable, and contractual rights to which such claim or interest entitles the holder of such claim or interest; or

(2) notwithstanding any contractual provision or applicable law that entitles the holder of such claim or interest to demand or receive accelerated payment of such claim or interest after the occurrence of a default—

(A) cures any such default that occurred before or after the commencement of the case under this title, other than a default of a kind specified in section 365 (b)(2) of this title or of a kind that section 365 (b)(2) expressly does not require to be cured;

(B) reinstates the maturity of such claim or interest as such maturity existed before such default;

(C) compensates the holder of such claim or interest for any damages incurred as a result of any reasonable reliance by such holder on such contractual provision or such applicable law;

(D) if such claim or such interest arises from any failure to perform a nonmonetary obligation, other than a default arising from failure to operate a nonresidential real property lease subject to section 365 (b)(1)(A), compensates the holder of such claim or such interest (other than the debtor or an insider) for any actual pecuniary loss incurred by such holder as a result of such failure; and

(E) does not otherwise alter the legal, equitable, or contractual rights to which such claim or interest entitles the holder of such claim or interest.

11 U.S.C. § 1125 provides:

(a) In this section—

(1) "adequate information" means information of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor's books and records, including a discussion of the potential material Federal tax consequences of the plan to the debtor, any successor to the debtor, and a hypothetical investor typical of the holders of claims or interests in the case, that would enable such a hypothetical investor of the relevant class to make an informed judgment about the plan, but adequate information need not include such information about any other possible or proposed plan and in determining whether a disclosure statement provides adequate information, the court shall consider the complexity of the case, the benefit of additional information to creditors and other parties in interest, and the cost of providing additional information; and

(2) "investor typical of holders of claims or interests of the relevant class" means investor having—

(A) a claim or interest of the relevant class;

(B) such a relationship with the debtor as the holders of other claims or interests of such class generally have; and

(C) such ability to obtain such information from sources other than the disclosure required by this section as holders of claims or interests in such class generally have.

(b) An acceptance or rejection of a plan may not be solicited after the commencement of the case under this title from a holder of a claim or interest with respect to such claim or interest, unless, at the time of or before such solicitation, there is transmitted to such holder the plan or a summary of the plan, and a written disclosure statement approved, after notice and a hearing, by the court as containing adequate information. The court may approve a disclosure statement without a valuation of the debtor or an appraisal of the debtor's assets.

(c) The same disclosure statement shall be transmitted to each holder of a claim or interest of a particular class, but there may be transmitted different disclosure statements, differing in amount, detail, or kind of information, as between classes.

(d) Whether a disclosure statement required under subsection (b) of this section contains adequate information is not governed by any otherwise applicable nonbankruptcy law, rule, or regulation, but an agency or official whose duty is to administer or enforce such a law, rule, or regulation may be heard on the issue of whether a disclosure statement contains adequate information. Such an agency or official may not appeal from, or otherwise seek review of, an order approving a disclosure statement.

(e) A person that solicits acceptance or rejection of a plan, in good faith and in compliance with the applicable provisions of this title, or that participates, in good faith and in compliance with the applicable provisions of this title, in the offer, issuance, sale, or purchase of a security, offered or sold under the plan, of the debtor, of an affiliate participating in a joint plan with the debtor, or of a newly organized successor to the debtor under the plan, is not liable, on account of such solicitation or participation, for violation of any applicable law, rule, or regulation governing solicitation of acceptance or rejection of a plan or the offer, issuance, sale, or purchase of securities.

(f) Notwithstanding subsection (b), in a small business case—

(1) the court may determine that the plan itself provides adequate information and that a separate disclosure statement is not necessary;

(2) the court may approve a disclosure statement submitted on standard forms approved by the court or adopted under section 2075 of title 28; and

(3)

(A) the court may conditionally approve a disclosure statement subject to final approval after notice and a hearing;

(B) acceptances and rejections of a plan may be solicited based on a conditionally approved disclosure statement if the debtor provides adequate information to each holder of a claim or interest that is solicited, but a conditionally approved disclosure statement shall be mailed not later than 25 days before the date of the hearing on confirmation of the plan; and

(C) the hearing on the disclosure statement may be combined with the hearing on confirmation of a plan.

(g) Notwithstanding subsection (b), an acceptance or rejection of the plan may be solicited from a holder of a claim or interest if such solicitation complies with applicable nonbankruptcy law and if such holder was solicited before the commencement of the case in a manner complying with applicable nonbankruptcy law.

11 U.S.C. § 1126 provides:

(a) The holder of a claim or interest allowed under section 502 of this title may accept or reject a plan. If the United States is a creditor or equity security holder, the Secretary of the Treasury may accept or reject the plan on behalf of the United States.

(b) For the purposes of subsections (c) and (d) of this section, a holder of a claim or interest that has accepted or rejected the plan before the commencement of the case under this title is deemed to have accepted or rejected such plan, as the case may be, if—

(1) the solicitation of such acceptance or rejection was in compliance with any applicable nonbankruptcy law, rule, or regulation governing the adequacy of disclosure in connection with such solicitation; or

(2) if there is not any such law, rule, or regulation, such acceptance or rejection was solicited after disclosure to such holder of adequate information, as defined in section 1125 (a) of this title.

(c) A class of claims has accepted a plan if such plan has been accepted by creditors, other than any entity designated under subsection (e) of this section, that hold at least two-thirds in amount and more than one-half in number of the allowed claims of such class held by creditors, other than any entity designated under subsection (e) of this section, that have accepted or rejected such plan.

(d) A class of interests has accepted a plan if such plan has been accepted by holders of such interests, other than any entity designated under subsection (e) of this section, that hold at least two-thirds in amount of the allowed interests of such class held by holders of such interests, other than any entity designated under subsection (e) of this section, that have accepted or rejected such plan.

(e) On request of a party in interest, and after notice and a hearing, the court may designate any entity whose acceptance or rejection of such plan was not in good faith, or was not solicited or procured in good faith or in accordance with the provisions of this title.

(f) Notwithstanding any other provision of this section, a class that is not impaired under a plan, and each holder of a claim or interest of such class, are conclusively presumed to have accepted the plan, and solicitation of acceptances with respect to such class from the holders of claims or interests of such class is not required.

(g) Notwithstanding any other provision of this section, a class is deemed not to have accepted a plan if such plan provides that the claims or interests of such class do not entitle the holders of such claims or interests to receive or retain any property under the plan on account of such claims or interests.

11 U.S.C. § 1127 provides:

(a) The proponent of a plan may modify such plan at any time before confirmation, but may not modify such plan so that such plan as modified fails to meet the requirements of sections 1122 and 1123 of this title. After the proponent of a plan files a modification of such plan with the court, the plan as modified becomes the plan.

(b) The proponent of a plan or the reorganized debtor may modify such plan at any time after confirmation of such plan and before substantial consummation of such plan, but may not modify such plan so that such plan as modified fails to meet the requirements of sections 1122 and 1123 of this title. Such plan as modified under this subsection becomes the plan only if circumstances warrant such modification and the court, after notice and a hearing, confirms such plan as modified, under section 1129 of this title.

(c) The proponent of a modification shall comply with section 1125 of this title with respect to the plan as modified.

(d) Any holder of a claim or interest that has accepted or rejected a plan is deemed to have accepted or rejected, as the case may be, such plan as modified, unless, within the time fixed by the court, such holder changes such holder's previous acceptance or rejection.

(e) If the debtor is an individual, the plan may be modified at any time after confirmation of the plan but before the completion of payments under the plan, whether or not the plan has been substantially consummated, upon request of the debtor, the trustee, the United States trustee, or the holder of an allowed unsecured claim, to—

(1) increase or reduce the amount of payments on claims of a particular class provided for by the plan;

(2) extend or reduce the time period for such payments; or

(3) alter the amount of the distribution to a creditor whose claim is provided for by the plan to the extent necessary to take account of any payment of such claim made other than under the plan.

(f)

(1) Sections 1121 through 1128 and the requirements of section 1129 apply to any modification under subsection (a).

(2) The plan, as modified, shall become the plan only after there has been disclosure under section 1125 as the court may direct, notice and a hearing, and such modification is approved.

11 U.S.C. § 1128 provides:

(a) After notice, the court shall hold a hearing on confirmation of a plan.

(b) A party in interest may object to confirmation of a plan.

11 U.S.C. § 1129 provides:

(a) The court shall confirm a plan only if all of the following requirements are met:

(1) The plan complies with the applicable provisions of this title.

(2) The proponent of the plan complies with the applicable provisions of this title.

(3) The plan has been proposed in good faith and not by any means forbidden by law.

(4) Any payment made or to be made by the proponent, by the debtor, or by a person issuing securities or acquiring property under the plan, for services or for costs and expenses in or in connection with the case, or in connection with the plan and incident to the case, has been approved by, or is subject to the approval of, the court as reasonable.

(5)

(A)

(i) The proponent of the plan has disclosed the identity and affiliations of any individual proposed to serve, after confirmation of the plan, as a director, officer, or voting trustee of the debtor, an affiliate of the debtor participating in a joint plan with the debtor, or a successor to the debtor under the plan; and

(ii) the appointment to, or continuance in, such office of such individual, is consistent with the interests of creditors and equity security holders and with public policy; and

(B) the proponent of the plan has disclosed the identity of any insider that will be employed or retained by the reorganized debtor, and the nature of any compensation for such insider.

(6) Any governmental regulatory commission with jurisdiction, after confirmation of the plan, over the rates of the debtor has approved any rate change provided for in the plan, or such rate change is expressly conditioned on such approval.

(7) With respect to each impaired class of claims or interests—

(A) each holder of a claim or interest of such class—

(i) has accepted the plan; or

(ii) will receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of this title on such date; or

(B) if section 1111 (b)(2) of this title applies to the claims of such class, each holder of a claim of such class will receive or retain under the plan on account of such claim property of a value, as of the effective date of the plan, that is not less than the value of such holder's interest in the estate's interest in the property that secures such claims.

(8) With respect to each class of claims or interests—

(A) such class has accepted the plan; or

(B) such class is not impaired under the plan.

(9) Except to the extent that the holder of a particular claim has agreed to a different treatment of such claim, the plan provides that—

(A) with respect to a claim of a kind specified in section 507 (a)(2) or 507 (a)(3) of this title, on the effective date of the plan, the holder of such claim will receive on account of such claim cash equal to the allowed amount of such claim;

(B) with respect to a class of claims of a kind specified in section 507 (a)(1), 507 (a)(4), 507 (a)(5), 507 (a)(6), or 507 (a)(7) of this title, each holder of a claim of such class will receive—

(i) if such class has accepted the plan, deferred cash payments of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or

(ii) if such class has not accepted the plan, cash on the effective date of the plan equal to the allowed amount of such claim;

(C) with respect to a claim of a kind specified in section 507 (a)(8) of this title, the holder of such claim will receive on account of such claim regular installment payments in cash—

(i) of a total value, as of the effective date of the plan, equal to the allowed amount of such claim;

(ii) over a period ending not later than 5 years after the date of the order for relief under section 301, 302, or 303; and

(iii) in a manner not less favorable than the most favored nonpriority unsecured claim provided for by the plan (other than cash payments made to a class of creditors under section 1122 (b)); and

(D) with respect to a secured claim which would otherwise meet the description of an unsecured claim of a governmental unit under section 507 (a)(8), but for the secured status of that claim, the holder of that claim will receive on account of that claim, cash payments, in the same manner and over the same period, as prescribed in subparagraph (C).

(10) If a class of claims is impaired under the plan, at least one class of claims that is impaired under the plan has accepted the plan, determined without including any acceptance of the plan by any insider.

(11) Confirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan.

(12) All fees payable under section 1930 of title 28, as determined by the court at the hearing on confirmation of the plan, have been paid or the plan provides for the payment of all such fees on the effective date of the plan.

(13) The plan provides for the continuation after its effective date of payment of all retiree benefits, as that term is defined in section 1114 of this title, at the level established pursuant to subsection (e)(1)(B) or (g) of section 1114 of this title, at any time prior to confirmation of the plan, for the duration of the period the debtor has obligated itself to provide such benefits.

(14) If the debtor is required by a judicial or administrative order, or by statute, to pay a domestic support obligation, the debtor has paid

all amounts payable under such order or such statute for such obligation that first become payable after the date of the filing of the petition.

(15) In a case in which the debtor is an individual and in which the holder of an allowed unsecured claim objects to the confirmation of the plan—

(A) the value, as of the effective date of the plan, of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or

(B) the value of the property to be distributed under the plan is not less than the projected disposable income of the debtor (as defined in section 1325 (b)(2)) to be received during the 5-year period beginning on the date that the first payment is due under the plan, or during the period for which the plan provides payments, whichever is longer.

(16) All transfers of property of the plan shall be made in accordance with any applicable provisions of nonbankruptcy law that govern the transfer of property by a corporation or trust that is not a moneyed, business, or commercial corporation or trust.

(b)

(1) Notwithstanding section 510 (a) of this title, if all of the applicable requirements of subsection (a) of this section other than paragraph (8) are met with respect to a plan, the court, on request of the proponent of the plan, shall confirm the plan notwithstanding the requirements of such paragraph if the plan does

not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.

(2) For the purpose of this subsection, the condition that a plan be fair and equitable with respect to a class includes the following requirements:

(A) With respect to a class of secured claims, the plan provides—

(i)

(I) that the holders of such claims retain the liens securing such claims, whether the property subject to such liens is retained by the debtor or transferred to another entity, to the extent of the allowed amount of such claims; and

(II) that each holder of a claim of such class receive on account of such claim deferred cash payments totaling at least the allowed amount of such claim, of a value, as of the effective date of the plan, of at least the value of such holder's interest in the estate's interest in such property;

(ii) for the sale, subject to section 363 (k) of this title, of any property that is subject to the liens securing such claims, free and clear of such liens, with such liens to attach to the proceeds of such sale, and the treatment of such liens on proceeds under clause (i) or (iii) of this subparagraph; or

(iii) for the realization by such holders of the indubitable equivalent of such claims.

(B) With respect to a class of unsecured claims—

(i) the plan provides that each holder of a claim of such class receive or retain on account of such claim property of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or

(ii) the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property, except that in a case in which the debtor is an individual, the debtor may retain property included in the estate under section 1115, subject to the requirements of subsection (a)(14) of this section.

(C) With respect to a class of interests—

(i) the plan provides that each holder of an interest of such class receive or retain on account of such interest property of a value, as of the effective date of the plan, equal to the greatest of the allowed amount of any fixed liquidation preference to which such holder is entitled, any fixed redemption price to which such holder is entitled, or the value of such interest; or

(ii) the holder of any interest that is junior to the interests of such class will not receive or retain under the plan on account of such junior interest any property.

(c) Notwithstanding subsections (a) and (b) of this section and except as provided in section 1127 (b) of this title, the court may confirm only one plan, unless the order of confirmation in the case has been revoked under section 1144 of this title. If the requirements of subsections (a) and (b) of this section are met with respect to more than one plan, the court shall consider the preferences of creditors and equity security holders in determining which plan to confirm.

(d) Notwithstanding any other provision of this section, on request of a party in interest that is a governmental unit, the court may not confirm a plan if the principal purpose of the plan is the avoidance of taxes or the avoidance of the application of section 5 of the Securities Act of 1933. In any hearing under this subsection, the governmental unit has the burden of proof on the issue of avoidance.

(e) In a small business case, the court shall confirm a plan that complies with the applicable provisions of this title and that is filed in accordance with section 1121 (e) not later than 45 days after the plan is filed unless the time for confirmation is extended in accordance with section 1121 (e)(3).