

WHITE & CASE LLP
1155 Avenue of the Americas
New York, New York 10036-2787
(212) 819-8200
Glenn M. Kurtz
Gerard H. Uzzi

Wachovia Financial Center, Suite 4900
200 South Biscayne Blvd.
Miami, Florida 33131
(305) 371-2700
Thomas E Lauria (*admitted pro hac vice*)

ATTORNEYS FOR THE CHRYSLER
NON-TARP LENDERS

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

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| _____ |) | |
| In re |) | Chapter 11 |
| |) | |
| CHRYSLER, LLC, <u>et al.</u> , |) | Case No. 09-50002 |
| |) | Jointly Administered |
| Debtors. |) | |
| _____ |) | |

**FIRST SUPPLEMENTAL OBJECTION OF THE CHRYSLER NON-TARP LENDERS
TO THE DEBTORS' MOTION FOR AN ORDER (A) APPROVING BIDDING
PROCEDURES AND BIDDER PROTECTIONS FOR THE SALE OF SUBSTANTIALLY
ALL OF THE DEBTORS' ASSETS AND (B) SCHEDULING A FINAL SALE HEARING
AND APPROVING THE FORM AND MANNER OF NOTICE THEREOF**

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

The Chrysler Non-TARP Lenders,¹ by and through their undersigned counsel,
hereby file this first supplemental objection (the "Objection") to the first order requested by the
Debtors' Motion for An Order (A) Approving Bidding Procedures and Bidder Protections for the

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

Sale of Substantially All of the Debtors' Operating Assets (B) Scheduling a Final Sale Hearing and (C) Approving the Form and Manner of Notice Thereof [Docket No. 190] (the "Sale Motion") filed by Chrysler, LLC ("Chrysler") and the above-captioned debtors and debtors in possession (collectively, the "Debtors").² In support of its Objection, the Chrysler Non-TARP Lenders respectfully state and represent as follows:

PRELIMINARY STATEMENT

The Sale Motion seeks approval of bidding procedures and a sale schedule (collectively, "Sale Procedures") that are designed to prevent, not encourage, competitive bidding. Indeed, the Sales Procedures are designed to do nothing more than give the appearance of legitimacy to a sale that is facially defective and constitutes an illegal *sub rosa* plan. Through the Sale Procedures, the Debtors in effect preclude anyone but the government from bidding on the Debtors' assets. Accordingly, the Sale Procedures are inherently unfair and do not comply with the fundamental purpose for bidding procedures – to maximize the sale price for the Debtors' assets.

The Sale Procedures provide just over one week for potential bidders to bid on substantially all of the Debtors' assets. To compound this absurdity, the Debtors mandate virtually every term of a potential bid, with each restriction designed not to generate bids but rather to discourage them. For example, under the Sale Procedures, the Debtors require that the purchase price and terms as well as the conditions of bids be substantially the same as those set forth in the proposed Purchase Agreement. (Indeed, the Debtors even seek a "redline" of any proposed agreement reflecting changes against the Purchase Agreement). This assures that the

² This Objection does not constitute the Chrysler Non-TARP Lenders' Objection to each of the orders requested in the Debtors' Sale Motion set forth in Docket No. 190, but only an objection to the limited portions of that Sale Motion discussed herein. The Chrysler Non-TARP Lenders intend to file an objection to the Sale Motion in its entirety by the objection deadline.

government's stalking horse bid will prevail because the proposed sale is structured to achieve political, not economic, goals. The Debtors would require bids (amounting in the billions of dollars) to be made without the protection of any due diligence, financing contingencies, or other bid protections. The Debtors would require bidders to agree to certain collective bargaining agreements, without any showing that such agreements benefit the estates or are critical to maximizing value for the estates. Finally, in an attempt to impose their *sub rosa* plan and make an end run around the priority scheme of chapter 11, the Debtors intend to require a bidder to assume billions in liabilities held by certain favored unsecured creditors, whether or not doing so maximizes value for the estates. Such a provision serves no purpose other than ensuring that the government is the only bidder and the prearranged government/Chrysler/UAW/Fiat *sub rosa* plan gets pushed through this Court. Finally, the Sale Procedures do not preserve the section 363(k) rights of the Chrysler Non-TARP Lenders.

Tellingly, the Sale Procedures provide for broad rights to reject bids upon consultation with, among others, the U.S. Treasury—one of the sponsors of the Debtors' proposed sale transaction. The Sale Procedures are simply further evidence of the Debtors', and the U.S. government's, attempt to mandate the proposed sale to Fiat, and thereby take away the Chrysler Non-TARP Lenders' property rights without providing them due process of law.

The requested order for the proposed Sale Procedures should be denied.

BACKGROUND³

1. On April 30, 2009 (the "Petition Date"), each of the Debtors filed petitions for relief under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code"), thereby commencing their respective chapter 11 cases (collectively, the "Chapter 11 Cases"). The

³ Certain of the facts set forth herein are based upon the representations of the Debtors in the Sale Motion. The Chrysler Non-TARP Lenders reserve the right to challenge such representations, and nothing herein shall constitute a waiver of such right.

Debtors are operating their business as debtors and debtors in possession pursuant to sections 1107 and 1108 of the Bankruptcy Code. The Chapter 11 Cases are being jointly administered for procedural purposes.

2. Chrysler and certain of its affiliates are parties to that certain Amended and Restated First Lien Credit Agreement, dated as of August 3, 2007 (as may have been amended or supplemented, the “Senior Credit Agreement”) with JPMorgan Chase Bank N.A., as administrative agent, and certain lenders party thereto from time to time (the “Senior Lenders”), under which the Senior Lenders are owed \$6.9 billion (the “Senior Debt”) secured by a first lien on substantially all of the Debtors’ U.S. assets, including its plants, equipment, inventory and bank accounts (the “Collateral”).

3. On May 3, 2009, the Debtors filed the Sale Motion, seeking approval of bidding procedures and approval of a sale of substantially all of the Debtors’ assets.

I. The Sale Procedures Are Defective Because They Are Designed to Chill the Bidding Process Rather Than Induce an Open and Fair Public Sale that Maximizes Value for the Estates.

4. Bidding procedures are intended to facilitate a fair sale of a chapter 11 debtor’s assets through a process that maximizes the value of the estate. See, e.g., Four B. Corp. v. Food Barn Stores, Inc. (In re Food Barn Stores, Inc.), 107 F.3d 558, 564 (8th Cir. 1997) (in bankruptcy sales, “a primary objective of the Code [is] to enhance the value of the estate at hand”); In re E-Z Serve Convenience Stores, Inc., 289 B.R. 45, 54 (Bankr. M.D.N.C. 2003) (denying approval of a sale where it was not in the best interest of the estate and the auction procedures were “patently unfair and inequitable”); In re Edwards, 228 B.R. 552, 561 (Bankr. E.D. Pa. 1998) (finding that the purpose of bid procedures is “to facilitate an open and fair public sale”); In re President Casinos, Inc., 314 B.R. 784, 786 (Bankr. E.D. Mo. 2004) (authorizing debtor to conduct asset sale but refusing to approve bid procedures that could have chilled bidder

interest).

5. To that end, courts have recognized that procedures intended to enhance competitive bidding are consistent with the goal of maximizing the value received by the estate and, therefore, are appropriate in the context of bankruptcy sales. See Wintz v. Am. Freightways, Inc. (In re Wintz Cos.), 230 B.R. 840, 846 (B.A.P. 8th Cir. 1999), aff'd, 219 F.3d 807 (8th Cir. 2000). “Structured bid procedures should provide a vehicle to enhance the bid process and should not be a mechanism to chill prospective bidders’ interests.” President Casinos, 314 B.R. at 786. Bidding procedures “must not chill the receipt of higher and better offers and must be consistent with the seller’s fiduciary duties.” General Order M-331 of the United States Bankruptcy Court, Southern District of New York, p. 3.

6. The Sale Procedures should be rejected because they do the opposite of what is required. Rather than facilitate an open and fair public sale designed to maximize value to the estates, the Sale Procedures are designed to chill, if not wholly to eliminate, the bidding process and to prevent the estates and their creditors from exploring the possibility of alternative transactions.

7. Indeed, the Debtors admit that they “have no reason to believe that a Qualified Bidder (as defined in the Sale Procedures) other than the Purchaser will be deemed the Successful Bidder.” See Sale Motion, ¶ 69. Given the unreasonable procedures the Debtors propose, that is no doubt true.

A. The Timing of the Sale Procedures Is Grossly Unfair.

8. A debtor may only use property of the estate outside the ordinary course of business after “notice and a hearing.” See 11 U.S.C. § 363(b). Notice must be “appropriate in the particular circumstances.” 11 U.S.C. § 102(1). The timing of the Sale Procedures effectively nullifies the possibility that anyone other than the government and Fiat can bid. In sum, they

would require that:

- Bids be placed by May 15, 2009 without financing or due diligence contingencies; and that
- The Sale hearing be conducted on May 21, 2009.

9. This timing is patently inadequate for the sale of substantially all of the Debtors' assets in these Chapter 11 Cases, which the Debtors have represented as being the fourth largest bankruptcy in U.S. history. This is especially true in a case such as this because the proposed sale is not an arms' length bargain but rather is tainted by government domination and control. At a bare minimum, the estates and their various parties in interest should be allowed sufficient time to evaluate the assets and explore the possibility of alternate transactions.

B. The Remaining Sale Procedures Are Unreasonable On Their Face.

10. The restrictions on bids in the Sale Procedures are onerous and discourage competing bids. Essentially, these procedures are crafted to ensure one result: consummation of the Debtors' proposed transaction under section 363 of the Bankruptcy Code. Among other conditions, the Sale Procedures require the following from potential third-party bidders:

- The Sale Procedures demand that all bids be subject to the same terms and conditions that are in the proposed transaction with the government and Fiat. In essence, no one can bid for any part of the Debtors' business, even if it could benefit the estates (such as a sale of a profitable division).
- The Sale Procedures provide that bids may not be subject to due diligence or financing contingencies. No one can conduct adequate due diligence with respect to a multi-billion dollar transaction in a week. It is virtually impossible.
- The Sale Procedures demand that bidders must assume the collective bargaining agreements between the Debtors and the UAW. No valid reason exists for

this limitation.

- The Sale Procedures demand that bidders must provide financing programs upon the Debtors' terms and conditions, whether or not such programs are consistent with the business plan of a competing bidder. No valid reason exists for the Debtors to make such a demand.

- The Sale Procedures demand that bidders list all executory contracts to be assumed and demonstrate an ability to cure all costs associated with such contracts and provide adequate assurance of future performance. The Debtors likely have thousands of contracts that would need to be reviewed. Reviewing them all on the Debtors' timetable is an impossibility. Moreover, the Debtors are selling their assets; no valid reason exists for the Debtors to attempt to impose any limits on how a purchaser manages them.

- The Sale Procedures demand that bidders make a "good faith" cash deposit equal to 10% of the proposed purchase price, even though no good faith deposit has been made for the sale proposed by Debtors. Through this limitation, the Debtors seek to, among other things, improperly limit the Chrysler Non-TARP Lenders' ability to credit bid.

- The Sale Procedures give the Debtors complete discretion (after consultation with the government) to determine whether bids are "Qualified" and to reject any bids.

11. In sum, the procedures give the Debtors unfettered discretion to reject anything that is submitted, whether it will benefit the estates or not. Indeed, a cash-only offer of \$40 billion—a transaction that clearly would be substantially more valuable to these estates—would not be considered a "Qualified Bid" under the Sale Procedures. The conditions imposed are so restrictive that it would be virtually impossible for any prospective purchaser to succeed in

placing a “Qualified Bid” on the Debtors’ assets.

C. The Sale Procedures Fail to Preserve the Chrysler Non-TARP Lenders’ Right Under Section 363(k) of the Bankruptcy Code.

12. The proposed Sale Procedures, in their current form, do not expressly preserve the Chrysler Non-TARP Lenders’ right to credit bid their debt under section 363(k) of the Bankruptcy Code.⁴ To the extent that the Sale Procedures alter, interfere with, or otherwise impair their credit bid rights, the Chrysler Non-TARP Lenders object. As the Debtors recognize, the right to credit bid is a fundamental protection afforded lienholders under the Bankruptcy Code. See Memorandum of Law in Support of the Sale Motion, at 25 (citing John Collen, What Do the Subsections of Section 363(f) Really Mean?, 6 J. Bankr. L. & Prac. 563, 572 (1997)). Accordingly, the proposed Sale Procedures should be modified to clearly provide that the Chrysler Non-TARP Lenders’ right to credit bid is not impaired.

II. The Sale Procedures Are Defective Because the Proposed Sale Is Facially Defective

13. The Sale Procedures should be rejected because they unnecessarily set the Debtors on a path to an illegal sale that ultimately cannot be approved by the Court, and therefore do not constitute a wise use of judicial resources. As described in the Chrysler Non-TARP Lenders’ Preliminary Objection to the Sale Motion [Docket No. 204], and as will be further explained when the Chrysler Non-TARP Lenders file their full objection, the sale proposed under section 363 of the Bankruptcy Code is an illegal *sub rosa* plan. Bankruptcy courts consistently refuse to approve such inappropriate sales because they “short circuit” the requirements of chapter 11, “run roughshod over disfavored creditors’ rights,” and improperly “sidestep” creditor protections afforded in the Bankruptcy Code. See, e.g., PBGC v. Braniff

⁴ Indeed, the required “good faith” cash deposit (which the Debtors have not required from the government or Fiat) appears designed specifically to impair the ability of the Senior Lenders to exercise their right to credit bid the full amount of their secured claim.

Airways, Inc. (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).

14. Further, the proposed sale does not comply with section 363(f)(3) of the Bankruptcy Code because the Debtors do not propose to sell the Collateral for more than the value of the Senior Lenders' liens. See In re Riverside Inv. P'ship, 674 F.2d 634, 640-1 (7th Cir. 1982); Clear Channel Outdoor, Inc. v. Knupfer (In re PW, LLC), 391 B.R. 25, 40-1 (9th Cir. B.A.P. 2008) (holding that section 363(f)(3) of the Bankruptcy Code does not authorize the sale free and clear of a lienholder's interest if the price of the estate property is equal to or less than the aggregate amount of all claims held by creditors who hold a lien or security interest in the property being sold); In re General Bearing Corp., 136 B.R. 361 (Bankr. S.D.N.Y. 1992). Nor have the Debtors proposed this transaction in good faith under section 363(m) of the Bankruptcy Code, given the U.S. government's domination and control over the process. The Court should not approve the Sale Procedures in connection with a facially flawed sale.

CONCLUSION

15. For the foregoing reasons, the Chrysler Non-TARP Lenders respectfully request that the Court deny the Sale Procedures, and, if the Court intends to allow the Debtors to proceed with a sale at all, substantially modify them to make them appropriate to facilitate an open and fair public sale that maximizes value to the estates.

Dated: May 5, 2009
New York, New York

WHITE & CASE LLP
1155 Avenue of the Americas
New York, New York 10036-2787
Telephone: (212) 819-8200
Facsimile: (212) 354-8113
Glenn M. Kurtz

By: /s/ Gerard H. Uzzi
Gerard H. Uzzi

Wachovia Financial Center
200 South Biscayne Boulevard, 49th Floor
Miami, Florida 33131
Telephone: (305) 371-2700
Facsimile: (305) 358-5744
Thomas E Lauria (*admitted pro hac vice*)

ATTORNEYS FOR THE
CHRYSLER NON-TARP LENDERS