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ATTORNEYS FOR THE CHRYSLER
NON-TARP LENDERS

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

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

OMNIBUS OBJECTION OF THE CHRYSLER NON-TARP LENDERS TO THE DEBTORS MOTIONS FOR ORDERS AUTHORIZING THEM TO PAY CERTAIN PREPETITION CLAIMS

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 Omnibus Objection (the "Objection") of the Chrysler Non-TARP Lenders to the: (i) Motion of Debtors and Debtors in Possession, Pursuant to Sections 105(a) and 363(c) of the Bankruptcy Code, for Interim and Final Orders Authorizing Them to Honor or Pay Prepetition Obligations to or for the Benefit of Their Dealers and Other Customers, and for Related Relief

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

[Docket No. 27] (the "Customer Obligation Motion"); (ii) Motion of Debtors and Debtors in Possession, Pursuant to Sections 105(a), 363(b) and 503(b)(9) of the Bankruptcy Code, for Interim and Final Orders Authorizing Them to Pay the Prepetition Claims of Certain Essential Suppliers and Administrative Claimholders, Continuing the Debtors' Troubled Supplier Program and Granting Certain Related Relief [Docket No. 41] (the "Essential Supplier Motion"); and (iii) Motion of Debtors and Debtors in Possession Pursuant to Sections 105(a), 363(b), 507(a) and 541 of the Bankruptcy Code, Authorizing Them to Pay Certain Prepetition Taxes [Docket No. 43] (the "Prepetition Tax Motion,") (collectively, the "Motions To Pay Prepetition Claims"). In support of the Motions To Pay Prepetition Claims, the Chrysler Non-TARP Lenders respectfully state as follows:

PRELIMINARY STATEMENT

As part of its package of first day motions, the Debtors seek authority to pay approximately $8 billion of prepetition unsecured claims on the premise that such expenditures are necessary to preserve the going concern value of the Debtors pending a proposed sale of substantially all of their assets. Such relief is inappropriate under the circumstances of these chapter 11 cases and should be rejected by the Court. Put simply, the going concern value is not being preserved for the estate but rather is being directed to unsecured creditors and others in violation of the priority scheme established in the Bankruptcy Code. The Debtors propose to pay certain junior prepetition unsecured creditors in full while conceding that they intend to pay the Chrysler Non-TARP Lenders (which have a senior lien on substantially all of the Debtors' assets) less than thirty cents on the dollar. There is no basis for using estate assets to pay unsecured creditors while senior secured creditors remain unpaid.

Notwithstanding the clear violation of the Bankruptcy Code's priority scheme, the

Debtors argue that such payments should be approved because it is the only way to preserve value pending the sale. This places the cart before the horse. The proposed sale of the Debtors to New Chrysler is objectionable, fails to meet the requirements of the Bankruptcy Code, and cannot be approved by the Court as currently structured. Contrary to the public pronouncements, the sale is not a *fait accompli* and the Court should not authorize the payment of approximately $8 billion of estate cash to the holders of prepetition unsecured claims. No doubt, the Motions To Pay Prepetition Claims inverts the priorities established by the Bankruptcy Code to support a misguided proposed sale transaction that produces a greater recovery for unsecured creditors than for the creditors with liens on substantially all of the Debtors' assets. The request to pay prepetition creditors should be denied.

BACKGROUND[2]

I. Procedural Background

1. On April 30, 2009 (the "Petition Date"), Chrysler LLC and numerous affiliates ("Chrysler" and together with its affiliated debtors and debtors in possession, 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 Debtors are operating their businesses 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

[2] Certain of the facts set forth herein are based upon the representations of the Debtors. The Chrysler Lenders Group reserves the right to challenge such representations, and nothing herein shall constitute a waiver of such right.

administrative agent, and certain lenders party thereto from time to time (the "Senior Lenders"), under the Senior Lenders are owed a $6.9 billion senior loan (the "Senior Debt") secured by substantially all of the Debtors' assets (the "Collateral").

II. Facts Relevant to this Omnibus Objection.

A. The Senior Lenders Loan Billions of Dollars To Chrysler.

3. The Chrysler Non-TARP Lenders are holders of first priority secured claims. These claims arise out of nearly $7 billion of loans taken out by Chrysler when it was re-purchased from the German automaker Daimler in 2007. Loan and Security Agreement § 2.1. These loans financed the purchase of the company, and were hailed at the time for returning Chrysler to U.S. control. The loans were secured by first priority liens on substantially all of Chrysler's U.S. assets, including its plants, equipment, inventory and bank accounts. Loan and Security Agreement § 2(a).

4. The Senior Lenders invested in these loans because they were secured by first priority liens on substantially all of Chrysler's U.S. assets. These liens, and the security they afforded, were crucial to the Senior Lenders, who invest billions of dollars on behalf of pension funds, university endowments and individuals. The Senior Lenders paid for this security. In exchange for the lower risk of secured liens, the Senior Lenders agreed to accept an interest rate that was far lower than would have been paid for an unsecured loan, and far lower than the rate of return paid to many of the Debtors' other creditors.

B. Chrysler's Severe Financial Problems.

5. In December of 2007, less than a month after the Senior Lenders' loan to Chrysler, the United States economy entered possibly the most severe recession in the last 60 years. Over the course of 2008, Chrysler's business, along with that of the rest of the U.S. auto industry, deteriorated dramatically. See Chrysler Plan for Long-Term Viability, Feb. 17, 2009 at

U32-37 (the "Feb. 17, 2009 Viability Report"); Kolka Aff. ¶¶ 55-58. According to the Debtors, frozen credit markets and low consumer confidence took hold by the second quarter of 2008, resulting in the lowest U.S. auto sales since the early 1980s. Feb. 17, 2009 Viability Report at U32-37; Chrysler's Plan for Short-Term and Long-Term Viability, Dec. 2, 2008 at 4 (the "Dec. 2, 2008 Viability Report"); Kolka Aff. ¶57. This cost Chrysler over $16 billion in lost revenue. Kolka Aff. ¶ 57. The result created tremendous pressure on both Chrysler's financial performance and cash position. Id. In the twelve months ending in December of 2008, Chrysler had lost almost $17 billion and was left with only $1.9 billion in cash. See Chrysler LLC and Consolidated Subsidiaries Financial Statements, April 6, 2009.

C. Chrysler Seeks Government Assistance.

6. By the fourth quarter of 2008, Chrysler's deteriorating cash position caused it to seek financial assistance from the United States government. See Dec. 22, 2008 Plan; Kolka Aff. ¶ 59. According to Chrysler, it required a $7 billion cash infusion from the government in order to implement an out-of-court restructuring that would allow it to continue as a going concern. Dec. 22, 2008 Plan at 4; Kolka Aff. ¶ 62.

7. On December 31, 2008, Chrysler entered into a Loan and Security Agreement with the United States Treasury. Kolka Aff. ¶ 68. Under the terms of that agreement, the government loaned Chrysler $4 billion on a third-priority secured basis at roughly 5% interest. Appendix A, Supplement to Loan and Security Agreement § 2.01; Loan and Security Agreement §§ 2.05, 4.01.

D. Chrysler Files Bankruptcy To Force the Sale to Fiat And Wipe Out Secured Debt.

8. On April 30, 2009, the Debtors commenced these Chapter 11 cases. Although the Debtors filed under chapter 11 of the Bankruptcy Code, their first day filings make

clear that they have no intention (or even the possibility) of reorganizing. Instead, the Debtors filed a motion seeking approval to sell substantially all of their assets, free and clear of liens, to a newly formed company created for the purpose of this transaction ("New Chrysler"). Kolka Aff. ¶ 88. The purpose of this transaction is to transfer value from the Senior Lenders' collateral to other stakeholders in the Debtors, in violation of the priority scheme established in the Bankruptcy Code. In exchange for these assets, New Chrysler would pay the Debtors $2 billion in cash, which would be subject to the Chrysler Non-TARP Lenders' liens and return approximately 29% of the amount of their loans. Meanwhile, in satisfaction of certain unsecured prepetition claims against the Debtors, 55% of the stock in New Chrysler and a $4.6 billion note will be provided to VEBA. This provides a higher recovery rate to these unsecured creditors than paid to the Senior Lenders or than those creditors would have received under a chapter 11 plan. As such, the Debtors' plan is to strip itself of the assets previously pledged to the Senior Lenders and put those assets to the benefit of unsecured creditors instead of the Senior Lenders even though the Senior Lenders will not have been paid in full.

E. Chrysler Files Motions To Pay Prepetition Claims to Support the Proposed Sale.

9. By the Motions To Pay Prepetition Claims the Debtors seek authority to pay approximately $8 billion of prepetition unsecured claims.

10. The Customer Obligation Motion seeks to pay out approximately $4.2 billion to unsecured creditors. This includes paying $2.8 million for warranty programs, $980 million for extended service programs, $375 million for incentive and rebate programs, and $54 million for dealer support programs and promotional allowances.

11. The Essential Supplier Motion seeks to pay out $3.65 billion to unsecured creditors. This includes paying $1.7 billion to direct production part suppliers, $600 million to

indirect suppliers, $550 million to extend secured and unsecured financing to troubled suppliers, and $800 million for twenty-day administrative claims.

12. The Prepetition Tax Motion also seeks to make payments to creditors with respect to certain unspecified liens that would be junior to the liens of the Senior Lenders. Thus, collectively, these motions seek to pay approximately $8 billion to unsecured creditors whose priority position is junior to that of the Senior Lenders.

OBJECTION

I. The Motions To Pay Prepetition Claims Should Be Denied Because The Debtors Are Liquidating Their Assets.

13. The Debtors argue that paying prepetition claims is necessary to prevent the "loss of the going concern value of their chapter 11 estates" and "increase the value of their estates by promoting the Debtors' ability to complete" their proposed 363 sale (the "363 Sale"). (Debtors' Consolidated Memorandum, at 7.) As described above, the Debtors propose to protect their proposed sale by paying approximately $8 billion to satisfy the prepetition claims of various payments to suppliers, dealers, employees, and other unsecured and administrative claims, which are junior in priority to the secured claims of the Senior Lenders.

14. Yet, while satisfying all of these junior claims in full, the Debtors propose to pay the Senior Lenders a cash payment of $2 billion—a fraction of the Senior Debt—upon consummation of the 363 Sale. Although many of the Senior Lenders, including the Chrysler Non-TARP Lenders, have not consented to this treatment, throughout their papers the Debtors attempt to justify this result by arguing that $2 billion is more than the Senior Lenders would

receive in a liquidation of the Debtors' assets.[3] So, the Debtors impliedly argue, the Senior Lenders have no reason to complain.

15. The problem with this reasoning, however, is that the Debtors' stated goal in fact is to liquidate—they plan to sell substantially all of their assets in the proposed 363 Sale. Accordingly, any preserved "going concern value" will not benefit the Debtors' estates. Moreover, none of this preserved going concern value will flow to the Senior Lenders, who have first priority to the Collateral that the Debtors propose to transfer pursuant to the proposed 363 Sale. Rather, this value will flow to the purchaser under the proposed 363 Sale, as well as to select junior claimants who will receive distributions (e.g., in the form of assumption of liability in the proposed sale and payment of prepetition claims pursuant to the Motions To Pay Prepetition Claims) on their claims as part of the transaction.

16. Given the magnitude of the junior claims that the Debtors seek authority to satisfy in full, it appears that the Senior Lenders likely would receive more than the approximately $2 billion estimated by the Debtors' experts. Accordingly, because paying the prepetition claims will not provide a benefit to the Debtors' estates, the Motions To Pay Prepetition Claims should be denied.

II. Payment Of Approximately $8 Billion In Prepetition Claims Is Not Supported By The Necessity Of Payment Doctrine Or Any Other Applicable Authority.

17. Contrary to the Debtors' assertions, the "doctrine of necessity" does not provide unlimited authority to pay prepetition claims whenever a debtor asserts, in its sole discretion, that such payments should be made. Granting a debtor authority to pay such claims

[3] See Declaration of Robert Manzo, ¶ 80 ("Based upon the Liquidation Analysis, the First Lien holders are expected to recover between 9% and 38% of their claims, on a net present value basis. This translates into a range of between $654 million and $2.6 billion. It is my professional opinion that given the market developments subsequent to this analysis, coupled with the limited success of other OEM efforts to move individual car lines, the First Lien holders would likely recover at the low end of this range as part of any liquidation of the Company.").

should be done "only under the most extraordinary circumstances." In re CoServ, L.L.C., 273 B.R.487, 494 (Bankr. N.D. Tex. 2002). In considering authorizing such extraordinary relief courts must focus on their duty to "maintain the estate for the benefit of all creditors" and failure to "demonstrate any benefit to the estate or its creditors, other than benefit to the [selected prepetition claimants]" should not be granted. In re Ionosphere Clubs, Inc., 98 B.R. 174, 178-79 (Bankr. S.D.N.Y. 1989) (emphasis in original). Here, as is more fully described below, the Debtors utterly fail to demonstrate how paying approximately $8 billion in prepetition claims benefits all creditors, and in particular the Chrysler Non-TARP Lenders, and not just the junior and unsecured creditors that will benefit from the Debtors' payment of prepetition claims and the proposed sale. The doctrine of necessity does not support inverting the priority scheme and paying approximately $8 billion in prepetition claims junior to the Chrysler Non-TARP Lenders' claims.

18. Moreover, the Debtors' request to unilaterally pay approximately $8 billion in prepetition claims is vastly overbroad and fails to establish that the proposed payments are truly "critical." The Seventh Circuit in Kmart laid out a stringent test to determine when a vendor is really critical to a debtor's reorganization. In re Kmart Corp., 359 F.3d 866 (7th Cir. 2004). The debtor must "show not only that the disfavored creditors will be as well off with reorganization as with liquidation . . . but also that the supposedly critical vendors would have ceased deliveries if old debts were left unpaid while the litigation continued." Id. at 873. The Kmart court of appeals affirmed the district court's reversal of the critical vendor authorization, finding that the bankruptcy court had granted the critical vendor motion without hearing any meaningful evidence as to whether vendors were threatening to cease shipments to Kmart, or whether other alternatives to a large critical vendor payment were feasible. Id.

19. The Debtors fail to satisfy either of the two requirements set out in Kmart. First, the Debtors make no showing that the Non-Tarp Lenders would be as well off with reorganization as with liquidation. While the Debtors summarily state that "evidence demonstrates that all creditors ultimately are likely to benefit from the payment of the [prepetition] claims," (Debtors' Consolidated Memorandum, ¶ 17), the evidence actually points to the opposite conclusion – that the Non-Tarp Lenders would be severely harmed if the Debtors are allowed to pay prepetition claims. The Debtors' first day motions seek to pay approximately $8 billion in prepetition claims notwithstanding the Debtors' stated liquidation value of $2 billion. Even if the Debtors burned through the entire amount of the proposed DIP financing ($1.8 billion on an interim basis and up to $4.5 billion upon entry of a final order approving), there would still be a shortfall of $1.7 billion in financing to pay the prepetition claims. The numbers are clear – the $2 billion the Secured Lenders are to receive in the proposed sale is less than they would receive upon immediate liquidation and is indisputably less than the approximately $8 billion in prepetition claims the Debtors seek authority to pay.

20. The Debtors also fail to carry their burden to show that their suppliers would cease deliveries if the prepetition claims remain unpaid. The Debtors offer one conclusory argument in support of this factor of the Kmart test – that "potentially harmful consequences [ ] could befall the Debtors." Debtors' Consolidated Memorandum, ¶ 17. This singular argument can hardly be deemed sufficient evidence to warrant paying out approximately $8 billion in prepetition debt for a company they allege is worth only $2 billion dollars.

21. Furthermore, in addition to failing the Kmart test, the Debtors also fail to satisfy the test set forth in CoServ. In CoServ, the bankruptcy court for the Northern District of Texas set out three elements that a debtor must show before it can make payment on a

prepetition claim: (1) it must be critical that the debtor deal with the claimant; (2) unless the debtor deals with the claimant, the debtor risks the probability of harm, or alternatively, loss of economic advantage to the estate or the debtor's going concern value, which is disproportionate to the amount of the claimant's prepetition claim; and (3) there is no practical or legal alternative by which the debtor can deal with the claimant other than by payment of the claim. CoServ, 273 B.R. at 496-97. The Debtors fall flat on all three elements.

22. First, it is not critical that the Debtors deal with the prepetition claimants. In fact, it is better that the Debtors do not deal with these claimants at all. The Debtors' estates and their stakeholders will be better served if the estates do not pay out approximately $8 billion (that they do not have) to allegedly preserve "going concern value" for a sale that returns only $2 billion to the estates. The Debtors have failed to provide any sound reason as to why it is "critical" to the estates – not New Chrysler – to sell substantially all of the Debtors' assets for $2 billion, when the Debtors could potentially realize more value to the Senior Lenders in liquidation.

23. Similarly, failure to deal with the prepetition claimants will not result in any additional harm or eliminate a disproportionate amount of economic advantage. First, no economic advantage will accrue to the estates and their stakeholders from dealing with the prepetition claimants. Only economic detriment will accrue. Paying approximately $8 billion in prepetition claims and remaining in operation until the proposed sale adds no value to the estates, only to New Chrysler and junior unsecured creditors. Accordingly, the evidence demonstrates the opposite of what the second element requires – dealing with the prepetition claimants will result in a disproportionate amount of additional harm to the estates' value.

24. Lastly, there is no evidence that no practical alternatives exist other than payment of the approximately $8 billion in prepetition claims. Moreover, payment of the prepetition claims here is inconsistent with the CoServ court's rationale that satisfaction of prepetition claims would only be authorized where it is necessary for the debtor in possession to carry out its fiduciary duty to protect and preserve the estate. Id. at 497. As iterated multiple times in this objection, the payment of approximately $8 billion in prepetition claims does not protect or preserve the estates, but rather harms and diminishes their value. Accordingly, paying approximately $8 billion in prepetition claims would be a breach of the Debtors' fiduciary duty and should not be allowed.

III. Granting the Motions To Pay Prepetition Claims Will Cause Immediate and Irreparable Harm.

25. Contrary to the Debtors' assertion, Bankruptcy Rule 6003(b) requires denial of the Motions To Pay Prepetition Claims. Rather than preventing immediate and irreparable harm to the Debtors' estates, as the Motions To Pay Prepetition Claims assert and Bankruptcy Rule 6003(b) requires, if prepetition claims are to be paid as requested, granting an administratively insolvent debtor authority to pay approximately $8 billion of prepetition claims will cause irreparable harm to the estates and the Chrysler Non-TARP Lenders' ability to preserve their interests. The Debtors have continuously lost money over the past 16 months of operation. In 2008, the Debtors lost almost $17 billion. See Chrysler LLC and Consolidated Subsidiaries Financial Statements, April 6, 2009. Sustained by government infusions of $4 billion from the U.S. Treasury and $600 million from the Canadian government, the Debtors' cash burn continued to escalate in 2009. Kolka Aff. ¶9. Accordingly, the Debtors consumed approximately $6.5 billion in cash in the past four months. Thus, comparing the average cash burn rate of approximately $1.7 billion per month with what the Debtors contend is the fair

purchase price of substantially all of the Debtors' assets of $2 billion – it is readily apparent that allowing the Debtors to operate their business to preserve "going concern value" will cost more than the purported "fair" sale price of $2 billion in just over one month.

IV. The Sale And Redistribution Of Value Unfairly Favors Certain Creditors And/Or Classes Of Creditors.

26. Section 105(a) of the Bankruptcy Code "does not create discretion to set aside the Code's rules about priority and distribution." In re Kmart Corp., 359 F.3d at 871. "Every circuit that has considered the question has held that this statute does not allow a bankruptcy judge to authorize full payment of any unsecured debt, unless all unsecured creditors in the case are paid in full." Id. The Motions To Pay Prepetition Claims seek to turn these well established principles on their head and not only vacate the Bankruptcy Code's well established rules of priority and distribution but also pay approximately $8 billion of certain unilaterally selected junior and unsecured claims in advance of not only the Chrysler Non-TARP Lender claims but similarly situated unsecured creditors.

27. Additionally, the proposed re-distribution of value violates the absolute priority rule. The structure of the transaction seeks to target the value of the Debtors, and in fact siphons off value, that is property of the Chrysler Non-TARP Lenders as senior secured lienholders, to junior and unsecured creditors who would achieve a windfall at the expense of the Chrysler Non-TARP Lenders. The payment of some general unsecured claims would effectuate the restructuring of creditors' rights, which restructuring may only be accomplished in the context of a plan of reorganization and not pursuant to the Motions To Pay Prepetition Claims. The Debtors cannot be allowed to employ sections 105 and 363 of the Bankruptcy Code to accomplish indirectly what section 1129 of the Bankruptcy Code precludes them from accomplishing directly. See In re George Walsh Chevrolet, Inc., 118 B.R. 99, 102 (Bankr. E.D.

Mo. 1990). Allowing the payment of approximately $8 billion in prepetition claims, four times the amount the Debtors allege is fair payment for substantially all of the assets of the Debtors, tramples the rights of the Chrysler Non-TARP Lenders, who are left recovering less than they would under a fire sale liquidation. As such, approval of the Motions To Pay Prepetition Claims would constitute the complete circumvention of the procedures and substantive rights provided in the Bankruptcy Code.

V. The Proposed Sale Constitutes An Illegal *Sub Rosa* Plan That Redistributes Value Among Creditor Classes.

28. The Motions To Pay Prepetition Claims seek to effect a plan without the procedural protections of a plan. They adopt a priority scheme that is inappropriate by diverting value from senior lienholders to unsecured creditors. Further, according to the Debtors' own Viability Report, the value that the Chrysler Non-TARP Lenders would receive in a liquidation of the Debtors' assets could exceed even the value of the property that it would receive under the proposed sale, which payment of prepetition claims purports to support. Indeed, the Viability Report admits a potential liquidation value of over $3.2 billion. See Viability Report, at 167. Simply put, the Debtors' Motions To Pay Prepetition Claims sole purpose is to continue to pursue a transaction that the Government insists upon, even though the Chrysler Non-TARP Lenders could receive more value in a straight liquidation of the Debtors' assets.

29. Further, even if the Motions To Pay Prepetition Claims do not constitute a *sub rosa* plan themselves, the Motions To Pay Prepetition Claims facilitates a *sub rosa* plan—i.e., the 363 Sale.[4] Instead of merely proposing a sale to maximize value for their estates, the Debtors' proposed sale appears to be driven by the desire to shift value away from the Senior Lenders in favor of a select group of junior, unsecured claimants and other interests. Indeed, the

[4] The Chrysler Non-TARP Lenders reserve the right to further explain and object to the 363 Sale.

terms of the proposed sale, as explained in the Debtors' current papers, will provide for the definitive allocation of the sale proceeds along these lines. Such a restructuring of creditors' rights and diversion of value amounts to an illegal *sub rosa* plan. See PBGC v. Braniff Airways, Inc. (In re Braniff Airways, Inc.), 700 F.2d 935, 940 (5th Cir. 1983) ("The debtor and the Bankruptcy Court should not be able to short circuit the requirements of Chapter 11 for confirmation of a reorganization plan by establishing the terms of the plan *sub rosa* in connection with a sale of assets.").

30. The Debtors impermissibly seek to use the proposed 363 Sale to bind the Chrysler Non-TARP Lenders to a treatment of their claims without having that proposed treatment tested by the standards of the Bankruptcy Code. Accordingly, such a proposed sale cannot proceed. See, e.g., In re Westpoint Stevens Inc., 333 B.R. 30, 52 (S.D.N.Y. 2005) ("Where it is clear that the terms of a section 363(b) sale would preempt or dictate the terms of a Chapter 11 plan, the proposed sale is beyond the scope of section 363(b) and should not be approved under that section."); Institutional Creditors of Cont'l Air Lines, Inc. v. Cont'l Air Lines, Inc. (In re Cont'l Air Lines, Inc.), 780 F.2d 1223, 1226-28 (5th Cir. 1986) (same). Simply, a 363 sale is not a substitute for a plan of reorganization. See Westpoint Stevens Inc., 333 B.R. at 52 (noting that when a proposed transaction specifies terms for adopting a reorganization plan, the parties and the court "must scale the hurdles erected in Chapter 11") (citation omitted); see also In re Iridium Operating LLC, 478 F.3d 452, 466 (2d Cir. 2007) (The "trustee is prohibited from such use, sale or lease if it would amount to a *sub rosa* plan of reorganization."); In re Abbotts Dairies of Pa., Inc., 788 F.2d 143 (3d Cir. 1986) (finding that section 363 does not permit a debtor to abrogate the protections afforded creditors by section 1129 and the plan confirmation process).

31. In sum, the Motions To Pay Prepetition Claims should be denied because the Motions To Pay Prepetition Claims constitute an impermissible *sub rosa* plan or, at the very least, approval of the Motions To Pay Prepetition Claims would authorize expenditure of approximately $8 billion – over four times what the Debtors assert the Secured Lenders should accept as fair payment for substantially all of the assets of the Debtors – forcing the imposition of an illegal *sub rosa* plan upon the Debtors' estates and their stakeholders.

VI. Granting the Debtors Authority to Utilize TARP Funds to Pay Prepetition Claims Is a Violation of the Constitution of the United States.

32. The Motions To Pay Prepetition Claims are premised on the financial demands of the Treasury Department, which have set strict preconditions to Chrysler receiving DIP and exit financing from the Treasury Department. The Motions To Pay Prepetition Claims, if granted, will provide a higher recovery rate to the selected prepetition unsecured creditors than paid to the Senior Lenders or than those creditors would have received under a chapter 11 plan. As such, the Debtors' plan is to strip themselves of the assets previously pledged to the Senior Lenders and allocate those assets to the benefit of unsecured creditors **instead of** the Senior Lenders **even though** the Senior Lenders will not have been paid in full.

33. The Treasury Department relies on TARP as the purported authority to justify this taking, even though TARP was enacted after the Senior Lenders liens on the Debtors' property were already in place. The Supreme Court long ago recognized, however, that a secured creditor's interest in specific property is protected in bankruptcy under the Fifth Amendment. Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555, 594 (1935). That case involved a Depression-era statute that was intended to help bankrupt farmers avoid losing their land in mortgage foreclosure. The statute in Radford provided that the bankrupt debtor could achieve a release of the security interests either (i) with the lender's consent, purchasing the

property at its then appraised value by making deferred payments for two to six years at statutorily-set interest rates; or (ii) by seeking from the bankruptcy court a stay of the proceedings for up to five years during which time the debtor could use the property by paying a rent set by the court, which payments would be for the benefit of all creditors, with a purchase option at the end of that period. Id. at 856-57.

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

35. Relying on purported authority provided by TARP, the Treasury Department is demanding that Chrysler's assets be stripped away from the coverage of the Senior Lenders' liens – thereby impairing the rights of the Senior Lenders to realize upon those assets – so that those assets may be put in New Chrysler and used to the benefit of unsecured creditors in this proceeding, who will then be paid much more than the Senior Lenders. But, even assuming that TARP provides the Treasury Department with authority to provide funding to the Debtors and impose the transfer of collateral away from the Senior Lenders, TARP was

enacted long after the Senior Lenders contracted with the Debtors and received senior liens on the Debtors' property. Radford specifically disallowed the use of a law to retroactively alter existing liens on property.

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

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

CONCLUSION

38. For the foregoing reasons, the Chrysler Non-TARP Lenders respectfully request that the Court deny the Motions to Pay Prepetition Claims in their entirety.

Dated: May 4, 2009
New York, New York

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