Bidding Procedures Order Hearing Date and Time: May 4, 2009 at 10:00 a.m., ET
Sale Approval Hearing: TBD
Sale Objections Due: TBD

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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

MEMORANDUM OF LAW IN SUPPORT OF MOTION OF DEBTORS AND DEBTORS IN POSSESSION, PURSUANT TO SECTIONS 105, 363 AND 365 OF THE BANKRUPTCY CODE AND BANKRUPTCY RULES 2002, 6004 AND 6006, FOR (I) AN ORDER (A) APPROVING BIDDING PROCEDURES AND BIDDER PROTECTIONS FOR THE SALE OF SUBSTANTIALLY ALL OF THE DEBTORS' OPERATING ASSETS (B) SCHEDULING A FINAL SALE HEARING AND (C) APPROVING THE FORM AND MANNER OF NOTICE THEREOF; AND (II) AN ORDER (A) AUTHORIZING THE SALE OF SUBSTANTIALLY ALL OF THE DEBTORS' OPERATING ASSETS, FREE AND CLEAR OF LIENS,

CLAIMS, INTERESTS AND ENCUMBRANCES, (B) AUTHORIZING THE ASSUMPTION AND ASSIGNMENT OF CERTAIN EXECUTORY CONTRACTS AND UNEXPIRED LEASES IN CONNECTION THEREWITH AND RELATED PROCEDURES AND (C) GRANTING CERTAIN RELATED RELIEF

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TO THE HONORABLE ARTHUR J GONZALEZ
UNITED STATES BANKRUPTCY JUDGE:

Chrysler LLC ("Chrysler") and 24 of its domestic direct and indirect subsidiaries, as debtors and debtors in possession (collectively with Chrysler, the "Debtors"), respectfully submit this memorandum of law in support of the motion (the "Motion")[1] of the Debtors seeking, pursuant to sections 105, 363 and 365 of title 11 of the United States Code (the "Bankruptcy Code"), entry of:

(i) an order (the "Bidding Procedures Order") (a) approving bidding procedures and bidder protections for the sale of substantially all of the Debtors' operating assets (the "Offered Assets"), (b) scheduling a final sale hearing (the "Sale Hearing") and (c) approving the form and manner of notice thereof (the "Sale Notice"); and

(ii) an order (the "Sale Order") (a) authorizing the sale of substantially all of the Debtors' operating assets, free and clear of liens, claims, interests and encumbrances to the Successful Bidder (as such term is defined in the Bidding Procedures), (b) authorizing the assumption and assignment of certain executory contracts and unexpired leases (the "Assumed Agreements") in connection therewith and establishing certain related procedures and (c) granting certain related relief.

PRELIMINARY STATEMENT

The survival of Chrysler's business is at stake in these proceedings, as is the fate of hundreds of suppliers and thousands of Chrysler dealers around the country. Absent immediate action, the Debtors will lose the only opportunity available to them to preserve their business as a going concern and to avoid the economic devastation that will occur if Chrysler's business, and Chrysler's suppliers and dealers, are forced to shut down.

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

Fortunately, the governments of both the United States and Canada share the goal of avoiding that devastation and Chrysler's sense of urgency; they are offering to fund a new venture that will combine substantially all of the Debtors' core operating assets with advanced automotive manufacturing, technology and distribution capabilities from Fiat S.p.A. ("Fiat") and thereby create one of the most formidable automobile companies in the world (the "Fiat Transaction"). Indeed, under these extraordinary and urgent circumstances, the governments are willing to act as lenders of last resort – providing financing when no one else will. Because of the governments' participation, the Fiat Transaction provides the Debtors with a much greater return on their assets than they could ever achieve in the market. Knowing how quickly Chrysler's prospects can deteriorate, however, the governments have placed stringent conditions on their commitment. As a consequence, *the Fiat Transaction must be closed in just a few weeks.*

The Fiat Transaction, *if consummated without delay*, will maximize the value available for Chrysler's stakeholders, save hundreds of thousands of jobs, and strengthen the U.S. automotive sector and the economy generally. Should the Fiat Transaction *not* be allowed to proceed, on the other hand, the Debtors will likely face the immediate, piecemeal liquidation of their assets in a severely depressed market – affording the Debtors and their stakeholders little hope of realizing any significant value. Moreover, thousands of Chrysler employees, and hundreds of thousands of others who work for Chrysler's suppliers and dealers, will lose their jobs in a terrible economic upheaval. Accordingly, the Debtors are seeking the Court's approval to proceed expeditiously with the Fiat Transaction.

JURISDICTION

This Court has subject matter jurisdiction to consider this matter pursuant to 28 U.S.C. § 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

STATEMENT OF FACTS

The facts are set forth in detail in the Motion and in the declarations referenced in the Motion. Where specific facts are relied upon in this Memorandum, citations are made by identifying the declarant's last name and the particular supporting paragraph(s) of his declaration.

ARGUMENT

A. The Fiat Transaction Achieves The Fundamental Purpose Of Reorganization

The fundamental and overriding objective of a business reorganization in bankruptcy is – and always has been – to enable the debtor to preserve its business as a going concern. NLRB v. Bildisco & Bildisco, 465 U.S. 513, 528 (1984) ("fundamental purpose of reorganization is to prevent the debtor from going into liquidation, with an attendant loss of jobs and possible misuse of economic resources"); North Am. Car Corp. v. Peerless Weighing & Vending Mach. Corp., 143 F.2d 938, 940 (2d Cir. 1944) ("the purpose of reorganization clearly is to rehabilitate the business and start it off on a new and to-be-hoped-for more successful career").

Preserving the debtor's business as a going concern permits the economy to benefit from the continued participation of the debtor's productive assets; it permits the debtor's employees to keep their jobs; and it preserves for the debtor's creditors the incremental value of the going concern over the liquidation value. See 7 Collier on Bankruptcy ¶ 1100.01 (Resnick & Sommer eds., 15th ed. rev. 2008) ("Chapter 11 embodies a policy that it is generally preferable to enable a debtor to continue to operate and to reorganize its business rather than simply to liquidate a troubled business. Continued operation may enable the debtor to preserve any positive difference between the going concern value of the business and the liquidation value. Moreover, continued operation can save the jobs of employees, the tax base of communities, and generally reduce the upheaval that can result from termination of a business.").

When Congress undertook to overhaul the nation's bankruptcy laws with the Bankruptcy Reform Act of 1978, it underscored this fundamental objective of a business reorganization in what is now chapter 11 of the United States Bankruptcy Code, 11 U.S.C. §§ 101 *et seq*. (the "Bankruptcy Code"). See H.R. Rep. No. 95-595, at 220 (1977), reprinted in U.S. Code Cong. & Admin. News, 1978, p. 5787 ("The purpose of a business reorganization case, unlike a liquidation case, is to restructure the business's finances so that it may continue to operate, provide its employees with jobs, pay its creditors, and produce a return for its stockholders. The premise of a business reorganization is that assets that are used for production in the industry for which they were designed are more valuable than those same assets sold for scrap. . . . It is more economically efficient to reorganize than to liquidate, because it preserves jobs and assets.").

Thus, in a business reorganization case, among all the other policies served by specific provisions of the Bankruptcy Code, this fundamental objective of preserving the debtor's business as a going concern is paramount. In re Ionosphere Clubs, Inc., 98 B.R. 174, 176 (Bankr. S.D.N.Y. 1989) ("The policy of equality among creditors . . . may be of significance in liquidation cases under Chapter 7, however, the paramount policy and goal of Chapter 11, *to which all other bankruptcy policies are subordinated*, is the rehabilitation of the debtor.") (emphasis added).[2]

[2] See Fields Station LLC v. Capitol Food Corp. of Fields Corner (In re Capitol Food Corp. of Fields Corner), 490 F.3d 21, 25 (1st Cir. 2007) (primary purposes of chapter 11 are preservation of businesses as going concerns and maximizing recoverable assets); NMSBPCSLDHB, L.P. v. Integrated Telecom Express, Inc. (In re Integrated Telecom Express, Inc.), 384 F.3d 108, 119 (3d Cir. 2004) (same); Johnson v. Alvarez (In re Alvarez), 224 F.3d 1273, 1278 n.9 (11th Cir. 2000) (purpose of chapter 11 is to provide creditors with going-concern value rather than more meager satisfaction through liquidation); Canadian Pacific Forest Prods. Ltd. v. J.D. Irving, Ltd. (In re Gibson Group, Inc.), 66 F.3d 1436, 1442 (6th Cir. 1995) (same); In re Timbers of Inwood Forest Assocs., Ltd., 808 F.2d 363, 373 (5th Cir. 1987), aff'd, 484 U.S. 365 (1988) (principal goal of reorganization is to "preserve[e] going-concern values and thereby enhance[e] the amounts recovered by all creditors."); Fitzsimmons v. Walsh (In re Fitzsimmons), 725 F.2d 1208, 1210 (9th Cir. 1984) (chapter 11 seeks to preserve foundering business as going concern because assets are often more valuable when so maintained than when liquidated).

Because of the paramount importance of this fundamental objective, reorganization courts have long recognized that, where the sale of the debtor's assets prior to the plan process is necessary to preserve the business as a going concern, the court has the authority to approve the sale – pursuant to both specific authorizations in the statute and the power implied from the general equity powers of the court. See Florida Dept. of Revenue v. Piccadilly Cafeteria, Inc., 128 S. Ct. 2326, 2331 n.2 (2008) (noting that chapter 11 "expressly contemplates" a debtor "selling substantially all its assets as a going concern" and then later submitting "a plan of liquidation (rather than a traditional plan of reorganization) providing for the distribution of the proceeds resulting from the sale"); Van Huffel v. Harkelrode, 284 U.S. 225, 227-28 n.1 (1931) (finding that, while the "Bankruptcy Act, unlike the Act of 1867, contains no provision which in terms confers upon bankruptcy courts the power to sell property of the bankrupt free from encumbrances," "[w]e think it clear that the power was granted by implication," and observing that "[t]he lower federal courts have consistently held that the bankruptcy court possesses the power, stating that it must be implied from the general equity powers of the court" and its duty to administer the estate); see generally Houston v. City Bank of New Orleans, 47 U.S. 486, 506 (1848).

Thus, the long history of bankruptcy reorganizations in this country is replete with examples of debtors, facing circumstances similar to those Chrysler faces here, obtaining court approval (often at the outset of the case) to sell substantially all of their assets prior to the process of confirming a plan, in order to preserve the going concern value of the debtor's business. In Piccadilly, for example, the Supreme Court addressed a tax dispute that arose after the debtor received bankruptcy court approval for the sale of substantially all of its assets three months after it filed its chapter 11 case. While Justice Breyer dissented from the majority's opinion in that

case as to the proper tax treatment of the sale, he explained the justification for such sales at the outset of chapter 11 cases in appropriate circumstances: "[O]ne major reason why a transfer may take place before rather than after a plan is confirmed is that the preconfirmation bankruptcy process takes time. . . . And a firm (or its assets) may have more value (say, as a going concern) where sale takes place quickly. . . . Thus, an immediate sale can often make more revenue available to creditors or for reorganization of the remaining assets." Piccadilly, 128 S. Ct. at 2342 (7-2 decision) (Breyer, J., dissenting) (citations omitted).

Similarly, in In re Trans World Airlines, Inc., No. 01-00056, 2001 WL 1820326 (Bankr. D. Del. Apr. 2, 2001), the court entered an order approving the sale of substantially all of TWA's assets at the very outset of the chapter 11 case where "TWA had no other strategic transaction available to it and had no other offer for value to which it could turn. Nor could TWA rely on its self-help plan because TWA was unable to procure adequate capital infusion to implement that plan. Its only alternative was a free fall chapter 11 filing with the high likelihood of a piecemeal liquidation of the enterprise." TWA, 2001 WL 1820326, at *4. In denying requests for a stay pending appeal of its sale order, the court found:

> [T]here is a substantial public interest in preserving the value of TWA as a going concern and facilitating a smooth sale of substantially all of TWA's assets to American. This includes the preservation of jobs for TWA's 20,000 employees, the economic benefits the continued presence of a major air carrier brings to the St. Louis region, and preserving consumer confidence in purchased TWA tickets American will assume under the sale. . . . [T]he Sale Order implements the public interest that favors an organized rehabilitation (albeit here as only a part of a larger viable enterprise) of a financially distressed corporation which lies at the core of chapter 11. I conclude that the alternative to the Sale Order in this case is a free-fall chapter 11 leading to a liquidation with the subsequent substantial disruption of diverse economic relationships and likelihood of material adverse harm to a very broad spectrum of creditor constituencies.

Id. at *14.

Piccadilly and TWA are just two relatively recent examples from the long history of reorganization courts exercising their authority to approve a sale of substantially all the assets of a debtor prior to the plan process to preserve the going concern value of the business.[3] When Congress enacted section 363 of the Bankruptcy Code as part of the bankruptcy Reform Act of 1978, it codified what reorganization courts already knew: a debtor must be permitted to sell its assets during the course of a reorganization case when necessary to preserve value for the estate. As detailed below, the Fiat Transaction – the only alternative available to Chrysler to preserve its business as a going concern – meets the requirements of section 363 for the sale of the Debtors' business free and clear of all liens and other interests in the assets to be sold.

B. The Fiat Transaction Is Authorized By Section 363(b) Of The Bankruptcy Code

Section 363(b) of the Bankruptcy Code provides, in pertinent part, that "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). Section 363(b) thus expressly

[3] See, e.g., In re Decora Indus., Inc., No. 00-4459, 2002 WL 32332749, at *3 (D. Del. May 20, 2002) (approving 363(f) sale of substantially all assets of chapter 11 debtor that had no source of future financing: "Debtors have two alternatives: (1) proceed with the Proposed Transaction, or (2) terminate business operations, employees and commence a liquidation of assets. . . . All parties agree that an asset sale, as opposed to liquidation, will provide more money to the estate to satisfy the creditors' claims, as well as maintaining the going concern value of Debtors. . . . [T]he Proposed Transaction, as with any sale, preserves the going-concern value of Debtors' business and the jobs of Debtors' employees."); In re Med. Software Solutions, 286 B.R. 431, 441 (Bankr. D. Utah 2002) (court approved sale of essentially all of debtor's assets at outset of chapter 11 case, finding (i) there would be substantial decrease in the value of the assets if not sold immediately, (ii) existing customers would be reluctant to purchase services and goods from company "in tenuous financial condition" and (iii) company would be "unsustainable as a going concern without additional capital - which is unavailable"); In re Naron & Wagner, Chartered, 88 B.R. 85, 90 (Bankr. D. Md. 1988) (approving sale of operating subsidiary where purchase price exceeded its estimated liquidation value and "failure to close the sale quickly will likely result in a halt of [subsidiary]'s continuous operations. If [subsidiary] cannot be sold as a going concern, there will be a substantial decrease in its value to the Debtor's estate."); In re Airlines Transp. Carrier, 129 F. Supp. 679, 683 (S.D. Cal. 1955) ("The salutary purpose of the Bankruptcy Act is to preserve the assets of the bankrupt for the benefit of the creditors. An order authorizing the sale of the assets of the bankrupt is intended to effectuate this purpose."); In re Strunks Lane & Jellico Mountain Coal & Coke Co., 64 F. Supp. 731, 733 (E.D. Ky. 1946) ("'Judicial sales are an indispensable part of the machinery employed in administering bankrupt estates.' Public policy requires that nothing be done to impair confidence in the stability of such judicial sales, and bona fide purchasers should not be deprived of their rights without just cause.") (citation omitted).

authorizes a debtor in possession to sell estate assets prior to and outside a plan of reorganization. Section 363 is a grant of broad and flexible power to the bankruptcy court grounded in business judgment and practical reality. In Comm. of Equity Sec. Holders v. Lionel Corp. (In re Lionel Corp.), 722 F.2d 1063, 1070 (2d Cir. 1983), the Second Circuit explained its sweep and the precedential standards. The court began with an historical overview of the bankruptcy provisions that have permitted the sale of a debtor's assets outside a final plan of liquidation or reorganization. 722 F.2d at 1066-68. The court noted that initially such sales were permitted only where the property to be sold was "of a perishable nature, or likely to deteriorate in value." Id. at 1066 (quoting Section 25 of the Bankruptcy Act of 1867, 14 Stat. 517).

However, the standard evolved beyond "perishable" situations, to cases where property might lose value due to a broad range of economic exigencies. Thus, in In re Penlow, 209 F. 841 (2d Cir. 1913), for example, the court authorized a private sale of a stock of handkerchiefs during the Christmas season, noting that the value of the handkerchiefs "would decline greatly after the holidays." 722 F.2d at 1067. Still later, the Lionel court explained, the principle was further extended to instances where "a good business opportunity was presently available, *so long as the parties could act quickly*." 722 F.2d at 1069 (citing In re Sire Plan, Inc., 392 F.2d 497 (2d Cir. 1964)) (emphasis added).

Ultimately, an even broader standard emerged, as reflected in the seemingly unqualified language of section 363(b). 722 F.2d at 1069. Under that standard, as articulated in Lionel, a bankruptcy judge is afforded "considerable discretion" in determining whether to allow a sale prior to confirmation of a plan, but must "expressly find . . . a *good business reason* to grant such an application." 722 F.2d 1066, 1071 (emphasis added). See also Licensing By Paolo, Inc. v. Sinatra (In re Gucci), 126 F.3d 380, 387 (2d Cir. 1997); In re Chateaugay Corp., 973 F.2d

141, 144 (2d Cir. 1992); In re Global Crossing Ltd., 295 B.R. 726, 743 (Bankr. S.D.N.Y. 2003); In re Ionosphere Clubs, Inc., 100 B.R. 670, 675 (Bankr. S.D.N.Y. 1989).

1. The Immediate Sale of Chrysler's Primary Assets Is Necessary To Preserve Chrysler's Business as a Going Concern

As the Lionel court's discussion of section 363(b) makes clear, the quintessential "good business reason" on which reorganization courts have historically justified the sale of a debtor's property prior to a plan is when any delay in the sale of the property threatens to erode significantly the value of that property. Lionel, 722 F.2d at 1066-69; see also In re V. Loewer's Gambrinus Brewery Co., 141 F.2d 747, 749 (2nd Cir. 1944). As the Lionel court stated, "[i]n such cases . . . the bankruptcy machinery should not straightjacket the bankruptcy judge so as to prevent him from doing what is best for the estate." Lionel, 722 F.2d at 1069.

Thus, courts applying 363(b) have routinely authorized the sale of a debtor's operating assets in advance of the plan process where the debtor did not have sufficient liquidity to continue operating, and the cessation of operations was likely or certain to result in the debtor's inability to realize the going concern value of its business.[4]

[4] See, e.g., Stephens Indus. v. McClung, 789 F.2d 386, 390 (6th Cir. 1986) (approving sale of radio station where debtor lacked funds to continue operations and could lose broadcast license if station went off the air); In re Brookfield Clothes, Inc., 31 B.R. 978 (S.D.N.Y. 1983) (approving sale of clothing manufacturer that had shut down due to lack of cash prior to petition date); In re Lady H Coal Co., Inc., 193 B.R. 233, 244 (Bankr. S.D. W.Va. 1996) (approving sale of coal producer that could not fund operations and was nearly out of cash needed to operate pumps that prevented mines from flooding); In re WBQ P'ship, 189 B.R. 97, 102-03 (Bankr. E.D. Va. 1995) (approving sale of nursing homes as necessary to protect going concern value); In re Weatherly Frozen Food Group, Inc., 149 B.R. 480, 483 (Bankr. N.D. Ohio 1992) (approving sale of ice cream producer that lacked cash needed to perform maintenance necessary to continue operations); In re Titusville Country Club, 128 B.R. 396, 400 (Bankr. W.D. Pa. 1991) (approving sale of golf course at start of golf season where debtor had inadequate funds to maintain course for the season); In re Channel One Comm., Inc., 117 B.R. 493, 496 (Bankr. E.D. Mo. 1990) (approving sale of radio station because of lack of funds needed to continue to operate); In re Naron & Wagner, Chartered, 88 B.R. at 90 (Bankr. D. Md. 1988) (approving sale of computer business where debtor was unable to continue operations due to lack of liquidity); In re Condere Corp., 228 B.R. 615, 629 (Bankr. S.D. Miss. 1998) (approving sale of tire plant that needed major capital infusion to reach necessary production levels); In re Boogaart of Fla., Inc., 17 B.R. 480, 483 (Bankr. S.D. Fla. 1981) (approving liquidation of grocer operating at a continual loss).

That is exactly the situation that Chrysler faces now. Because delay in this instance will lead to an almost immediate loss in value for the Debtors' assets, the Fiat Transaction should be approved promptly.

a. Delay in consummating the Fiat Transaction will result in a rapid and severe loss of value.

There is no assurance that an alliance, a supplier network, a dealer network, a financing party or, ultimately, Chrysler, will still be around at the end of an extended sale process. The United States and Canadian governments have conditioned their financial commitment on the consummation of a deal with Fiat within 60 days, and have offered to provide debtor-in-possession financing for only that truncated period. Because no other source of funding is available, when that period expires, so does the going concern value of the Debtors' assets. A delay would thus deprive Chrysler of the financial support that is critical to preserving value. [Kolka Dec. ¶¶ 12, 99; LaSorda Dec. ¶ 27.]

Indeed, the governments' timing conditions are based on a thoughtful consideration of the realities of the situation. Key components of the going concern value of the Debtors' assets are viable, integrated networks of suppliers and dealers, along with a skilled workforce. Chrysler's suppliers are interdependent, so that an interruption in any part of the automotive supply chain can have a far-reaching effect on suppliers, manufacturers, and dealers. And, as plants sit idle, Chrysler's workforce will dissipate. In fact, it is Chrysler's view that any material delay could render the Fiat Transaction moot, as its business will likely perish by then. And while no one can predict with certainty the precise breaking point, it is clear that the longer the delay, the greater the probability that Chrysler's plants and equipment will require hundreds of millions of dollars to repair and restart, that its workers will move on, and that its suppliers

and dealers will either find other partners or, more likely, fail themselves. [Garberding Dec. ¶¶ 11-27; Ewasyshyn Dec. ¶¶ 7-29; Arrigo Dec. ¶¶ 11-12, 21-22; Schenden Dec. ¶¶ 12-13.]

In addition, any prolonged bankruptcy process will rapidly erode consumer confidence. Chrysler's dealers have already experienced a precipitous decline in sales directly attributable to consumer concern about the future of Chrysler generally and the possibility of a bankruptcy filing in particular. Many potential customers visiting Chrysler showrooms want to "see what happens" before investing in a new Chrysler vehicle. Those concerns will only intensify as the uncertainties associated with a prolonged bankruptcy process persist. And those previously-loyal Chrysler customers who choose to purchase other brands of vehicles may be lost forever. [Arrigo Dec. ¶¶ 16-19; Schenden Dec. ¶¶ 7-10.; Grady Dec. ¶¶ 22-28; Ewasyshyn Dec. ¶ 25; Garberding Dec. ¶ 31.]

In short, any significant delay in consummating the Fiat Transaction will diminish substantially the value of the Debtors' assets. Even taking the full 60-day period the governments have given the Debtors to complete the transaction may threaten the opportunity to move forward in a manner that maximizes New Chrysler's prospects for success.

b. Delay in consummating the Fiat Transaction will have devastating economic consequences.

It is not just the company itself that is hanging in the balance. The need to proceed with the Fiat Transaction without delay is further supported by a consideration of the devastating economic effects an immediate liquidation would have on the Debtors' employees and retirees, on communities around the country and on the economy as a whole. For more than 80 years, Chrysler has been one of the most innovative car manufacturers in the world. Of Chrysler's 55,000 current employees, more than 70% – or 40,000 skilled workers – are in the United States. As of the Petition Date, Chrysler had 32 manufacturing and assembly facilities,

23 of which are located in the United States, and 24 parts depots worldwide, including 20 in this country. Chrysler has some 1,300 suppliers and an expansive dealer network, with over 3,200 dealerships in the United States selling Chrysler cars and trucks. [Kolka Dec. ¶¶ 17-18; Garberding Dec. ¶ 14; Grady Dec. ¶ 6.]

A liquidation would mean the immediate loss of 38,500 Chrysler jobs in the United States. Chrysler's thousands of workers and retirees would forfeit $9.8 billion of health care and other benefits and $2 billion in annual pension payments. All 23 of Chrysler's manufacturing facilities and 20 parts depots in the United States would shut down (as well as 18 additional plants and parts depots worldwide). Chrysler's 3,200 dealers would also be put out of business and the 140,000 employees of those dealerships would lose their jobs. In addition, some $5.3 billion in outstanding auto parts and service supplier invoices will go unpaid, shutting down hundreds of suppliers and eliminating several hundred thousand more jobs. [Kolka Dec. ¶ 4; LaSorda Dec. ¶¶ 7-9.]

And not only Chrysler is at stake. The fate of GM and Ford is largely tied to Chrysler through their common supplier base, and many if not most of those suppliers are not financially stable enough to withstand the shutdown of any one of the Big Three. Ninety-six of Chrysler's top 100 suppliers are used by at least one of the other big three American automobile companies; eighty-four of the top 100 are used by all three companies. [Garberding Dec. ¶ 12; LaSorda Dec. ¶ 8.]

According to the Center for Automotive Research ("CAR"), if at least one of the three major American automakers fails in 2009, the United States economy could lose nearly 2.5 million jobs this year – 239,341 at the three OEMs, 795,371 supplier/indirect jobs and over

1.4 million spin-off (that is, expenditure-induced) jobs.[5] The effect in those cities where the automotive industry is centered (the Great Lakes region and the Southern U.S.) will be particularly devastating. In metropolitan Detroit, nearly one out of every seven jobs is in the auto and auto parts industries.[6] But the effect will not be localized. Should the industry collapse, CAR estimates that during the first three years following the collapse, $65 billion in personal income taxes and $55 billion of social security receipts will be lost. [Kolka Dec, ¶ 4.]

In the end, it is difficult to overstate the problems a liquidation would create for families, schools and communities around the country. Tax revenues would plunge while social service resources would strain to meet the public's needs. As recognized by Congress when drafting the Bankruptcy Code, "[b]ankruptcy cases often impact entire communities; and occasionally the entire nation." 123 Cong. Rec. H35448 (Oct. 27, 1977) (statement of Rep. Al Ullman (D-OR)). These are precisely the systemic adverse economic consequences that chapter 11 is intended to prevent, by providing the debtor with the tools to preserve its business as a going concern. See 7 Collier on Bankruptcy ¶ 1100.01 ("Chapter 11 embodies a policy that it is generally preferable to enable a debtor to continue to operate[, which] can save the jobs of employees, the tax base of communities, and generally reduce the upheaval that can result from termination of a business."). Indeed, it is due to the scope and severity of these dire and inevitable adverse consequences that the U.S. government is willing to invest in the Fiat Alliance. Unlike other lenders, the government has the public interest to consider.

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[5] David Cole & Sean McAlinden & Kristin Dziczek & Debra Maranger, CAR Research Memorandum: The Impact on the U.S. Economy of a Major Contraction of the Detroit Three Automakers, Center for Automotive Research, Nov. 4, 2008.

[6] Howard Wial, How a Metro Nation Would Feel the Loss of the Detroit Three Automakers, Metropolitan Policy Program at Brookings, http://www.econ.wayne.edu/agoodman/7500/functions/automakers_wial.pdf

2. The Debtors Have Exercised Sound Business Judgment in Proposing the Fiat Transaction

In considering the "good business reason" for pursuing sale of a debtor's assets pursuant to section 363(b), Lionel, 722 F.2d at 1070-71, the debtor's business judgment is the focus of the inquiry. See Chateaugay, 973 F.2d at 143. A showing of a legitimate business justification gives rise to a presumption that the debtor's decision was made "on an informed basis, in good faith and in the honest belief that the action was taken in the best interests of the company." In re Integrated Res., Inc., 147 B.R. 650, 656 (S.D.N.Y. 1992) (quoting Smith v. Van Gorkom, 488 A.2d 858, 872 (Del. 1985)), appeal dismissed, 3 F.3d 49 (2d Cir. 1993). As courts in this district have stated, "[w]here the debtor articulates a reasonable basis for its business decisions (as distinct from a decision made arbitrarily or capriciously), courts will generally not entertain objections to the debtor's conduct." Comm. Of Asbestos-Related Litigants v. Johns-Manville Corp. (In re Johns-Manville Corp.), 60 B.R. 612, 616 (Bankr. S.D.N.Y. 1986).

The Lionel court concluded with words that sustain this Court's power and discretion to respond to the situation presented here: "a bankruptcy judge must not be shackled with unnecessarily rigid rules when exercising the undoubtedly broad administrative power granted him under the [Bankruptcy] Code." Lionel, 722 F.2d at 1069. Consistent with that instruction, bankruptcy courts have been afforded wide discretion in applying this business judgment test when deciding whether to authorize a sale under section 363. See Chateaugay, 973 F.2d at 144-45.

This discretion is not limited to any particular type of sale. More specifically, this Court has frequently recognized that a chapter 11 debtor may sell all or substantially all of its assets pursuant to section 363(b), provided there is a good business reason for the transaction. See, e.g., In re Thomson McKinnon Secs., Inc., 120 B.R. 301, 307 (Bankr. S.D.N.Y. 1990); In re

Crowthers McCall Pattern, Inc., 114 B.R. 877, 881-82 (Bankr. S.D.N.Y. 1990); In re Oneida Lake Dev., Inc., 114 B.R. 352, 355-56 (Bankr. N.D.N.Y. 1990); In re Au Natural Rest., Inc., 63 B.R. 575, 579-80 (Bankr. S.D.N.Y. 1986).

The Fiat Transaction is the right decision for the Debtors – a necessary decision that has resulted from a painstaking process. Whether analyzed as a matter of process or on the merits, the Debtors' business judgment meets the standards for approval under section 363.

a. The Fiat Transaction is the product of a good faith, arm's length negotiation process.

The very process that produced the Fiat Transaction establishes that it falls within the Debtors' exercise of sound business judgment. As detailed throughout the Debtors' supporting declarations, the Fiat Transaction resulted from intense, arm's length negotiations among all interested stakeholders over a four-month period. Those negotiations were conducted in good faith – most under the direct guidance and leadership of the United States government. Throughout the process, Chrysler's management has discussed quite publicly its goals, strategy and efforts to transform the company. Indeed, the entire process could not have been more transparent or energetic. And when it concluded, and this deal emerged from the crucible of this multi-party negotiation, the Debtors sought and received a fairness opinion from an independent financial advisor.

As this record proves, the negotiations that produced the Fiat Transaction were conducted with great care, in good faith and at arm's length. Based on process alone, the proposed sale meets the business judgment test. See In re Loral Space & Com. Ltd., et al., Case No. 03-41710 (RRD), transcript at 318-19 (Bankr. S.D.N.Y. Oct. 24, 2003) ("if process, itself, was pursued with due care and good faith on arm's length basis, the Court is loathe to intervene

and second guess the [d]ebtor's business judgment") (citing In re Global Crossing Ltd., 295 B.R. at 744).

b. Under the terms of the Fiat Transaction, the Debtors will receive fair consideration.

Under the terms of the Fiat Transaction, Chrysler will transfer its core assets and certain obligations, as a going concern, to a newly-created corporation, New CarCo Acquisition LLC ("New Chrysler"). In exchange for those assets, the Debtors will receive cash from New Chrysler in the amount of $2 billion; in addition, as discussed below, they will be relieved of several billions of dollars of liabilities as a result of the transaction. [Kolka Dec. ¶¶ 13, 88.] Should the Fiat Transaction not be approved, however, the Debtors' advisors have calculated that the proceeds available for claimants from liquidation of all of the Debtors' assets, other than causes of action, will range from only $900 million to $3.2 billion, with the likely recovery for the First Lien Holders falling within the lower end of a range between $654 million and $2.6 billion. [Manzo Dec. ¶¶ 52, 78-80.] [7] Because the consideration the Debtors will receive in the Fiat Transaction is substantially in excess of the likely liquidation value, the Debtors are receiving fair value. [Robins Dec. ¶¶ 6, 13.]

Indeed, in the extraordinary circumstances of this case, the Debtors are receiving an above-market price in connection with the Fiat Transaction. Until the governments offered to provide financing for a transaction, no lenders were available to facilitate the Fiat Transaction or any other Chrysler business combination. [Kolka Dec. ¶¶ 12, 99; LaSorda Dec. ¶ 27.] In the absence of such financing, no participant in the automotive industry could be interested in

[7] As detailed in the declaration of the Debtors' financial advisor, the environment in which such a liquidation would take place is already depressed, and getting progressively worse. Limited buyer potential, industry overcapacity and the significant time and costs associated with any re-launch effort will reduce the proceeds from any asset sales. Indeed, recent unsuccessful efforts to sell Saturn, Opel, SAAB and Hummer indicates an extremely depressed market for stand-alone automotive brands. [Manzo Dec. ¶¶ 24, 52.]

purchasing Chrysler's assets as a going concern. There is simply no way to achieve anything that approaches the values represented by the Fiat Transaction without the financial support offered by the U.S. and Canadian governments. Thus, by stepping in to protect the public interest, the governments have created an opportunity to preserve Chrysler's business as a going concern where none previously existed. The governments have thus afforded the Debtors a unique and extraordinary opportunity to preserve and realize value that is otherwise unavailable in the market.

c. The Fiat Transaction will maximize the Debtors' ability to pay claims.

The Fiat Transaction will maximize the Debtors' ability to satisfy claims against their estates. Assets that are *not* being transferred to New Chrysler in the Fiat Transaction consist primarily of: eight manufacturing facilities and related machinery and equipment, with a total book value of $2.3 billion; other property, with a book value of $3.6 billion; and potential causes of action against third parties. [Kolka Dec. ¶ 14; Manzo Dec. ¶ 48.] Those assets will remain part of the Debtors' estates and, along with the $2 billion in cash from the Fiat Transaction, will be available to satisfy the remaining claims against the estates. In addition, the Debtors will retain $200 million to fund an orderly wind down and sale of their property. Doing so will allow the Debtors to liquidate their remaining assets in a much more controlled environment, which will maximize claimants' recoveries. [Kolka Dec. ¶ 14; Manzo Dec. ¶¶ 46, 55] Thus, should the Fiat Transaction go forward, significant resources will be available to the Debtors to secure and satisfy claims.

In addition, as a consequence of the Fiat Transaction, the Debtors will be relieved of substantial liabilities. [Manzo Dec. ¶ 49.] For example, as part of the Fiat Transaction, the Debtors will assume and then assign to New Chrysler various contracts, including the majority of

Chrysler's dealer agreements. Were all of those dealer agreements rejected (rather than assumed and then assigned to New Chrysler), the Debtors could face billions of dollars of potential claims.

Similarly, New Chrysler will assume liability for various customer obligations (warranties, extended service contracts, etc.) and for payments owed to shippers, suppliers and warehousemen. Virtually all other obligations associated with the Offered Assets will also be assumed. These liabilities likewise involve hundreds of millions of dollars.

Lastly, in anticipation of the Fiat Transaction, the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (the "UAW") has agreed to enter into a new collective bargaining agreement that will establish a new wage structure and work rules at New Chrysler. The UAW has also agreed to create a new VEBA funding arrangement with New Chrysler that will enable the Debtors to avoid several billions of dollars of additional claims against their estates arising out of their legacy retiree health obligations.

In the end, the Fiat Transaction will both substantially increase the resources available to the Debtors to pay claims in these cases, and substantially reduce the total amount of claims the Debtors will face: a sound and necessary business judgment.

d. The Fiat Transaction is the only alternative available for preserving Chrysler's going concern value.

In the years leading up to the Petition Date, Chrysler faced a number of challenges borne of its product mix, geographic reach, and scale. Chrysler's product offerings have become too heavily weighted towards large vehicles; it effectively has no dealer or distribution network outside of North America; and it is competitively disadvantaged by its relatively small scale. [Kolka Dec, ¶ 4; LaSorda Dec. ¶¶ 10-13.]

Notwithstanding its challenges, Chrysler continues to hold value as a going concern. The Debtors' core group of operating assets function as an integrated business engaged in designing, assembling and selling automobiles. Those assets include a skilled and well-trained workforce, a national system of independent dealers, and an integrated network of suppliers that provide the thousands of components used to build automobiles. Moreover, Chrysler has a number of high-performing brands and models – including its Jeep and Dodge Truck nameplates and certain minivan lines – that have enjoyed strong sales and provided solid returns to the Company for many years. [Kolka Dec. ¶ 94.]

Given these circumstances, for some time Chrysler has engaged in a highly visible search for a strategic alliance with a suitable partner. Discussions with Nissan began in 2007, but failed to generate a deal. Merger talks with GM that had commenced in the fall of 2008 ended in November of the same year when, as a result of the economic meltdown, GM suspended negotiations to focus on its own liquidity problems. Other potential partners with which Chrysler communicated unsuccessfully in 2008 included Toyota, Volkswagen, Tata Motors, GAZ Group, Magna International, Hyundai-Kia and Kia, Mitsubishi Motors and Honda Motor Company. Also fruitless were Chrysler's inquiries regarding possible asset sales with Beijing Automotive, Tempo International Group, Hawtai Automobiles and Chery Automobile Co. [LaSorda Dec. ¶¶ 25, 28-52; Garberding Dec. ¶¶ 86-101.]

Fortunately, Chrysler's discussions with one potential partner have proven to be more successful. Chrysler first began discussing a broad collaboration with Fiat in April 2008. In light of their respective strengths and weaknesses, the companies concluded that they were well matched to form a successful alliance. The companies' product offerings and international distribution networks have minimal overlap, thus offering complementary product and markets

portfolios. These product and market synergies create the opportunity for New Chrysler to become a strong, innovative, and competitive force in the automobile industry. As the sixth largest automaker in the world, New Chrysler will have a truly global footprint and access to state-of-the art small car technology. [Garberding Dec. ¶¶ 102-107; LaSorda Dec. ¶¶ 6, 15-23.]

In short, the alliance with Fiat will maximize the sale value of the Offered Assets by preserving their going concern value. It will allow for the continuation of Chrysler, albeit in a new structure with a new business plan, *as an ongoing business*, with products and assets intact. [Manzo Dec. ¶¶ 29-41.] It therefore will serve the core interest that lies at the very heart of chapter 11 of the Bankruptcy Code.

Chrysler has no other alternative that would result in the preservation of its business. Notwithstanding the general awareness of Chrysler's situation that exists *outside* the auto industry – and the intense scrutiny of that situation that has occurred *inside* the industry – the proposed combination with Fiat is the only transaction that has emerged. There are no other alternatives. [Kolka Dec. ¶ 76; LaSorda Dec. ¶¶ 24-26.].

Failure to consummate the Fiat Transaction is thus likely to result in the immediate, piecemeal liquidation of the Debtors' assets in a distressed market. That is a scenario that is neither in the best interest of Chrysler's stakeholders nor consistent with Congress's intent in enacting chapter 11 of the Bankruptcy Code. This reality is unfortunate, but the Debtors have faced it squarely and constructively; moving forward with the Fiat Transaction is a sound business judgment to maximize and preserve value.

e. The Fiat Transaction is the only alternative for addressing the divergent positions of the Debtors' principal constituents.

Notwithstanding their disparate economic interests, key Chrysler constituencies have come together to support the Fiat Transaction *and only the Fiat Transaction*. For example,

as described above, the UAW has agreed to significant wage and work rule concessions, and has consented to the creation of a new VEBA funding arrangement with New Chrysler for the benefit of Chrysler's employees and current retirees. Critically, the UAW has offered these concessions *only* as part of the Fiat Transaction. Similarly, virtually all of Chrysler's other stakeholders, including its dealers and suppliers, its equityholders, and its largest secured creditors, have been willing to compromise their interests to assist the Debtors in the implementation of the Fiat Transaction. [Kolka Dec. ¶ 6.] [8] They have done so because they recognize that Chrysler and Fiat can forge a successful partnership that can compete in the global automotive marketplace, yield value and save jobs.

f. <u>The Fiat Transaction is the only alternative the U.S. and Canadian governments have agreed to support.</u>

The U.S. government and the automotive task force of the U.S. Treasury, along with the Canadian government, have been directly engaged in scrutiny of the Fiat alliance, and based on that scrutiny, are helping to make it happen.

The governments have now agreed to make available to New Chrysler up to $6 billion of incremental funding for up to seven years, and a reduced amount for one year thereafter. The governments have also agreed to provide debtor-in-possession financing in the amount of $4.5 billion to allow the Debtors to complete the Fiat Transaction and commence the orderly wind down of their estates. The governments have to date been unwilling to provide long-term funding for any other arrangement. Indeed, no other lender has offered to finance another transaction. As a result, the Fiat Transaction stands alone in attracting the funding that is

[8] The primary remaining constituency that does not support the Fiat Transaction are the hedge funds and other financial investors who hold approximately 30% of Chrysler's first tier debt. Chrysler's distressed debt currently trades at around 15 cents on the dollar.

key to the Debtors realizing the going concern value of their assets. [Kolka Dec. ¶ 12; LaSorda Dec. ¶ 57.]

For all these reasons, the Debtors submit that they have exercised sound business judgment in proposing the Fiat Transaction. Accordingly, the sale is appropriate and should be approved under section 363(b).

C. The Sale Of The Debtor's Assets Free And Clear Of Liens Is Authorized By Section 363(f) Of The Bankruptcy Code

Pursuant to section 363(f) of the Bankruptcy Code, the Debtors may sell the Offered Assets free and clear of any interest in the property if any one of the following conditions is satisfied:

> (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).

As discussed in detail below, at least two of these conditions – (f)(2) and (f)(3) – apply to the Fiat Transaction.

1. Section 363(f)(2) Is Satisfied as to Those Parties that Have Failed To Object to the Fiat Transaction

Section 363(f)(2) applies to those parties that have failed to object or otherwise dispute the Fiat Transaction. As dozens of courts have recognized, where an entity has not objected to a section 363 sale, consent may be implied for purposes of section 363(f)(2). See, e.g., FutureSource LLC v. Reuters Ltd., 312 F.3d 281, 285 (7th Cir. 2002) (in context of section 363(f), "lack of objection (provided of course there is notice) counts as consent."); In re James, 203 B.R. 449, 453 (Bankr. W.D. Mo. 1997) (section 363(f)(2) satisfied where secured creditor failed to object to proposed sale and thus "implicitly conveyed its consent to the sale"); In re Tabone, Inc., 175 B.R. 855, 858 (Bankr. D.N.J. 1994) (because of tax lien holder's failure to object to sale, it "may be deemed to have consented to the sale for purposes of section 363(f)(2)"); In re Elliot, 94 B.R. 343, 345-46 (E.D. Pa. 1988) (implied consent sufficient to authorize section 363(f)(2) sale; consent implied from non-debtor that "received notice of the proposed sale and also admits that it did not file any timely objection."); In re Gabel, 61 B.R. 661, 664-65 (Bankr. W.D. La. 1985) (estopping secured creditor that was properly noticed and failed to object from denying its implied consent to sale of property under 363(f)).

Courts in this district have applied the same principle. See, e.g., In re Enron Corp., No. 01-16034 (AJG), 2004 WL 5361245, at *2 (Bankr. S.D.N.Y. Feb. 5, 2004); In re WestPoint Stevens, Inc., No. 03-13532 (RDD), Notice of Sale Hearing at 190:6-194:16, (Bankr. S.D.N.Y. June 29, 2005) ("I find that by their absence of objection, all other lenders who have been on notice of this sale have consented."), rev'd on other grounds 333 B.R. 30 (S.D.N.Y. 2005).

In light of these authorities, any party in interest in the Debtors' chapter 11 cases who has failed to object to the Fiat Transaction should be deemed to have consented to the sale of the Debtors' assets free and clear of any liens, claims, interests and encumbrances pursuant to section 363(f)(2) of the Bankruptcy Code.

2. Section 363(f)(3) Is Satisfied Because the Price at which the Debtors' Property Is To be Sold Is Greater than the Aggregate Value of the Liens on the Property

a. "Aggregate value of all liens" means the economic value of those liens.

A sale can be made free and clear of any liens pursuant to section 363(f)(3) so long as the purchase price exceeds "the aggregate value of all liens on such property." While the interpretation of (f)(3) has produced some division in the courts, this Court has adopted the better-reasoned view that the "aggregate value of all liens" means the actual economic value placed on the liens – not the face amount of the liens.

This Court thoroughly analyzed the issue in one of the most oft-cited and influential cases in the area, In re Beker Indus., Inc., 63 B.R. 474, 477 (Bankr. S.D.N.Y. 1986). In Beker, a chapter 11 debtor sought to sell real property free and clear of all liens. Although the proposed sale price was less than the total face amount of the liens on the property, the court granted the debtor's motion.

To fix the meaning of the term "value," as used in (f)(3), the Court looked to Congress' use of the same word in section 506(a) of the Bankruptcy Code, which provides:

> An allowed claim of a creditor secured by a lien on property [of the estate] . . . is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property . . . and is an unsecured claim to the extent that the value of such creditor's interest . . . 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. § 506(a). Examining this language, the Court correctly noted that "the term 'value,' as used in § 506(a) with respect to the interest of a creditor, means its actual value as determined by the Court, as distinguished from the amount of the lien." Beker, 63 B.R. at 476. The Court went on to find that there was "strong[] support [for] the conclusions that the term 'value,' as employed in § 363(f)(3) is to be similarly interpreted." Id.

The Beker Court further reasoned that interpreting "value" to mean the economic value of a secured claim (rather than its face amount) was consistent with other provisions of the Bankruptcy Code, including the concept of adequate protection set forth in section 361. A secured creditor can require adequate protection for its claim only to the extent it is secured by property with an economic value. Id. And chapter 11 allows the sale of encumbered property for less than the face amount of a lien pursuant to sections 1129(b)(2)(A)(ii) and 363(k) of the Bankruptcy Code. Id. at 476-77. Lastly, the Court noted (and commentators have agreed) that if objecting lienholders actually believe that a higher sale price could be obtained for the property, they have the ability to acquire the property and sell it themselves. See id. at 478; John Collen, What Do the Subsections of Section 363(f) Really Mean?, 6 J. Bankr. L. & Prac. 563, 572 (1997) (section 363(k) of Bankruptcy Code offers "significant protection" to lienholder against collateral being sold for less than debt it secures (if such value exists)).

In the end, the Court in Beker summarized: "Here, the statutory language and scheme are patently clear enough; they control. . . . [Section] 363(f)(3) is to be interpreted to mean what it says: the [proposed purchase] price must be equal to or greater than the aggregate value of the liens asserted against it, not their [face] amount." Beker, 63 B.R. at 476 (citations omitted).

Myriad other courts have reached the same conclusion. For example, in In re Terrace Gardens Park P'ship, 96 B.R. 707 (Bankr. W.D. Tex. 1989), a chapter 11 debtor owning real property secured by senior and junior liens proposed to sell two of the six buildings that comprised the collateral for the liens. Authorizing the sale under section 363, the court applied Beker's market-based approach, finding that the face value interpretation "ignores the Code's laws on protecting the value of collateral, thereby allowing an undersecured creditor to obstinately block an otherwise sensible sale." 96 B.R. at 712. Further criticizing the face value approach, the court stated that "[i]t makes no sense to read into Section 363(f)(3) a restriction inconsistent with the adequate protection scheme which pervades both Section 363 and the rest of the Code, just because the sale is free of liens." Id. at 713; see also In re Levitz Home Furnishings, Inc., No. 05-45189 (BRL) (Bankr. S.D.N.Y. Dec. 14, 2005) (rejecting creditor's "face value" argument, finding requirements of section 363(f) satisfied and interests of secured creditors adequately protected by attachment of their liens to sales proceeds).[9]

Mindful of the rights of secured creditors, the Beker court further instructed that, where the purchase price will not "produce full compensation for secured creditors [or] equity for the estate," property may be sold free and clear of interests only where "special circumstances" are present, despite the debtor having facially satisfied section 363(f)(3) of the Bankruptcy Code. These "special circumstances" include (i) the debtor having obtained the best price available for its property under the circumstances and (ii) the potential for rapid

[9] Accord In re Collins, 180 B.R. 447, 450 (Bankr. E.D. Va. 1995) (characterizing as "a better reasoned solution" the interpretation that section 363(f)(3) authorizes sale free and clear where price is lower than face amount of liens, but greater than secured value of claims); In re WBQ P'ship, 189 B.R. at 105-06 (Bankr. E.D. Va. 1995) (sale permitted under section 363(f)(3) if purchase price equals or exceeds value of liened property); In re WPRV-TV, Inc., 143 B.R. 315, 320 n.14 (D.P.R. 1991) (citing Beker as "better reasoned view" and describing face value interpretation as "highly criticized and unduly strict"); Oneida, 114 B.R. at 356-57 (Bankr. N.D.N.Y. 1990) (value and not amount of liens is what the court must look at in applying section 363(f)(3)); In re Microwave Prods. of Am., Inc., 102 B.R. 659, 660-61 (W.D. Tenn. 1989) (if debtor realizes from sale an amount equal to value of encumbered property, it satisfies liens under section 363(f)(3)).

depreciation of the property to be sold. See Beker, 63 B.R. at 477-78 (special circumstances present where the debtor receives "the best price obtainable under the circumstances of a particular case . . . ."); see also Oneida, 114 B.R. at 357 (following Beker and finding that "the apparent rapid depreciation of the property provide[s] special circumstances which suggest that the Debtor has met the requirements of Code § 363(f)(3)").

b. The purchase price to be paid the Debtors exceeds the economic value of the liens on the property being transferred.

Construing section 363(f)(3) as informed by Beker, the Debtors' estates will clearly receive value that exceeds the "aggregate value of all liens" on the property to be sold. The purchase price here is an *immediate* cash payment from New Chrysler in the amount of $2 billion, in addition to the value of the liabilities assumed by New Chrysler. In contrast, the Debtors' advisors have calculated that the total proceeds eventually available for recovery by the first lien holders should their collateral be liquidated would fall within the lower end of a range between $654 million and $2.6 billion. [Kolka Dec. ¶ 88; Manzo Dec. ¶¶ 52, 78-80.]

Moreover, without question the consideration the Debtors will receive in connection with the Fiat Transaction is the best price available for the Debtors' assets. In order to safeguard the economy in each nation, the U.S. and Canadian governments have agreed to provide several billion dollars to fund the Fiat Transaction. As previously noted, no one else is willing to do that, or to finance any other Chrysler transaction. For that reason, the Fiat Transaction is placing the Debtors – and their secured lenders – in a better position than they could ever achieve in a normal market transaction.

Finally, as described above, should the Fiat Transaction *not* go forward, the Debtors' assets will rapidly lose value that can never be restored. By agreeing to fund the Fiat Transaction, the United States and Canadian governments are presenting Chrysler with the

opportunity to avoid an immediate liquidation. Once that opportunity is lost, so is most of the value associated with the Debtors' assets.

Under these circumstances, section 363(f)(3) applies and the Debtors' property can be sold free and clear of all liens on that property. [10]

D. The Sale Of The Offered Assets May Be Made Free And Clear Of Liens Because Secured Creditors' Interests Have Been Afforded Adequate Protection As Required By Section 363(e)

When a debtor in possession proposes to sell property pursuant to section 363 of the Bankruptcy Code, subsection (e) of that section affords any entity with an interest in that property the right to request "adequate protection" of that interest. The Second Circuit has characterized as "long recognized" the principle that "when a debtor's assets are disposed of free and clear of third-party interests, the third party is adequately protected if his interest is assertable against the proceeds of the disposition." MacArthur Co. v. Johns-Manville Corp., 837 F.2d 89, 94 (2d Cir. 1988) (citing Ray v. Norseworthy, 90 U.S. 128, 134-35 (1874)); S. Rep. No. 95-989 (1978), reprinted in U.S. Code Cong. & Admin. News, 1978, pp. 5787, 5842 (committee report on 11 U.S.C. § 363(f)) ("Most often, adequate protection in connection with a sale free and clear of other interests will be to have those interests attach to the proceeds of the sale."); see also In re Collins, 180 B.R. at 452 ("[t]he commonly accepted method for adequate[ly]

[10] The debtor in Beker also argued that its proposed sale was authorized by section 363(f)(5) because the secured creditor was subject to being crammed down pursuant to section 1129(b)(2) of the Bankruptcy Code. The Court disagreed, however, concluding that subsection (f)(5) does not apply where the "interest" at issue is a lien, as the sale of property free of liens is, in the Beker court's view, governed only by (f)(3) and not also by (f)(5). 63 B.R. at 478. Nevertheless, some other courts have applied section 363(f)(5) when authorizing the sale of estate property free and clear of liens when "equitable considerations" justify lien extinguishment upon realization of less than the full amount of the secured debt. See Richardson v. Pitt County (In re Stroud Wholesale, Inc.), 47 B.R. 999, 1002-03 (E.D.N.C. 1985), aff'd mem., 983 F.2d 1057 (4th Cir. 1986) (section 363(f)(5) should not be interpreted as requiring full money satisfaction in chapter 11 rehabilitation cases where equitable considerations dictate otherwise); In re Heine, 141 B.R. 185, 189-90 (Bankr. D.S.D. 1992) (equitable considerations may allow court to approve sale free and clear of liens even though creditors receive less than full satisfaction of their interests); In re Wing, 63 B.R. 83, 85 (Bankr. M.D. Fla. 1986) (if equitable considerations dictate, court may approve sale free and clear of liens even though creditors receive less than full satisfaction).

protecting a secured creditor when a sale is authorized under section 363(f) is to order liens to attach to the proceeds of the sale").

Here, the Debtors' first lien lenders' interest in the transferred assets will attach to the $2 billion in cash proceeds of the Fiat Transaction. Thus, the first lien lenders' interests are adequately protected as required by section 363(e), such that the Debtors' assets can be sold under section 363(b).

E. New Chrysler Is A Good Faith Purchaser Entitled To The Full Protection Of Section 363(m) Of The Bankruptcy Code; The Fiat Transaction Does Not Violate Section 363(n) Of The Bankruptcy Code

Section 363(m) of the Bankruptcy Code affords a good faith purchaser of a debtor's assets pursuant to section 363 the assurance that a subsequent reversal of the Court's decision authorizing the sale does not void the transaction. In particular, the statute provides:

> The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section 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 and such sale or lease were stayed pending appeal.

11 U.S.C. § 363(m). Although the Bankruptcy Code does not define "good faith," the Second Circuit has held that the:

> [g]ood faith of a purchaser is shown by the integrity of his conduct during the course of the sale proceedings; where there is a lack of such integrity, a good faith finding may not be made. A purchaser's good faith is lost by 'fraud, collusion between the purchaser and other bidders or the trustee, or an attempt to take grossly unfair advantage of other bidders.'

In re Gucci, 126 F.3d at 390 (quoting In re Rock Indus. Mach. Corp., 572 F.2d 1195, 1198 (7th Cir. 1978)) (interpreting Bankruptcy Rule 805, the precursor of section 363(m) of the Bankruptcy Code); see also Evergreen Int'l Airlines Inc. v. Pan Am Corp. (In re Pan Am Corp.),

Nos. 91 Civ. 8319 - 8324 (LMM), 1992 WL 154200, at *4 (S.D.N.Y. June 18, 1992); In re Sasson Jeans, Inc., 90 B.R. 608, 610 (S.D.N.Y. 1988).

There can be little question regarding New Chrysler's good faith here. The Fiat Transaction is the culmination of a nearly 30-month effort on the part of Chrysler's senior management to find a suitable strategic alliance to permit Chrysler to compete with its larger, more diversified competitors. It was finalized only after months of intense, good-faith negotiations between Fiat and Chrysler (as well as the U.S. Treasury and the UAW). Those negotiations were conducted at arm's length, and will give rise to a strong auto company poised to compete in the global marketplace. Thus, the Debtors intend to request at the Sale Hearing a finding that New Chrysler is a good-faith purchaser entitled to the protections of section 363(m) of the Bankruptcy Code.

Section 363(n) of the Bankruptcy Code allows a trustee to avoid a section 363 sale where there has been collusion among bidders. As there is no suggestion that the Fiat Transaction is the product of collusion, section 363(n) is inapplicable.

F. The Debtors' Assumption and Assignment To New Chrysler Of The Assumed Agreements Is Authorized By Section 365 Of The Bankruptcy Code

Sections 365(a) and (b) of the Bankruptcy Code authorize a debtor to assume, subject to court approval, executory contracts or unexpired leases. See 11 U.S.C. §§ 365(a)-(b). Under section 365(a), a debtor, "subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor." 11 U.S.C. § 365(a). Section 365(b)(1), in turn, codifies the requirements for assuming an unexpired lease or executory contract:

> (b)(1) If there has been a default in an executory contract or unexpired lease of the debtor, the trustee may not assume such contract or lease unless, at the time of assumption of such contract or lease, the trustee—

> (A) cures, or provides adequate assurance that the trustee will promptly cure, such default other than a default that is a breach of a provision relating to the satisfaction of any provision (other than a penalty rate or penalty provision) relating to a default arising from any failure to perform nonmonetary obligations under an unexpired lease of real property, if it is impossible for the trustee to cure such default by performing nonmonetary acts at and after the time of assumption, except that if such default arises from a failure to operate in accordance with a nonresidential real property lease, then such default shall be cured by performance at and after the time of assumption in accordance with such lease, and pecuniary losses resulting from such default shall be compensated in accordance with the provisions of this paragraph;
>
> (B) compensates, or provides adequate assurance that the trustee will promptly compensate, a party other than the debtor to such contract or lease, for any actual pecuniary loss to such party resulting from such default; and
>
> (C) provides adequate assurance of future performance under such contract or lease.

11 U.S.C. § 365(b)(1).

Like a proposed sale of assets under section 363, a debtor's decision to assume and assign, or to reject, an executory contract or unexpired lease under section 365 is subject to a sound business judgment standard. See, e.g., Orion Pictures Corp. v. Showtime Networks, Inc. (In re Orion Pictures Corp.), 4 F.3d 1095, 1098 (2d Cir. 1993) (section 365 "permits the trustee or debtor-in-possession, subject to the approval of the bankruptcy court, to go through the inventory of executory contracts of the debtor and decide which ones it would be beneficial to adhere to and which ones it would be beneficial to reject."). A court will approve the assumption of executory contracts and unexpired leases under section 365 upon a finding that the debtor has exercised sound business judgment in determining that assumption is in the best interests of the debtor, its creditors and other parties in interest. See, e.g., In re Bradlees Stores, Inc., 194 B.R. 555, 558 n.1 (Bankr. S.D.N.Y. 1996); In re Johns-Manville Corp., 60 B.R. at 615-16 ("[T]he

Code favors the continued operation of a business by a debtor and a presumption of reasonableness attaches to a debtors' management decisions.").

Here, the Debtors seek authority to assume (and assign) the Assumed Agreements. As discussed above, the Fiat Transaction will provide significant benefits to the Debtors' estates. Because those benefits depend upon the assumption of the Assumed Agreements referenced above, that assumption falls within the sound exercise of the Debtors' business judgment.

Further, a debtor in possession may assign an executory contract or unexpired lease if it does so in accordance with section 365(a) and provides adequate assurance of future performance by the assignee. See 11 U.S.C. § 365(f)(2). Although not defined in the Bankruptcy Code, the meaning of "adequate assurance of future performance" depends on the facts of each case, and Congress intended that it be given "practical, pragmatic construction." In re Sanshoe Worldwide Corp., 139 B.R. 585, 592 (S.D.N.Y. 1992) (citing In re Bygaph, 56 B.R. 596, 605 (Bankr. S.D.N.Y. 1986); In re Natco Indus., Inc., 54 B.R. 436, 440 (Bankr. S.D.N.Y. 1985), aff'd, 993 F.2d 300 (2d Cir. 1993).

Adequate assurance under section 365 does not require an absolute guarantee of performance. See, e.g., In re Westview 74th St. Drug Corp., 59 B.R. 747, 754 (Bankr. S.D.N.Y. 1986) ("The test is not one of guaranty but simply whether it appears that the [obligations] will be paid and . . . met"); Natco, 54 B.R. at 440 ("As designed by Congress, the phrase [adequate protection] does not mean absolute insurance that the debtor will thrive and make a profit.") (citing In re Alipat, Inc., 36 B.R. 274, 278 (Bankr. E.D. Mo. 1984)). Among other things, adequate assurance may be provided by demonstrating the assignee's financial health and experience in managing the type of enterprise or property assigned. See, e.g., Richmond Leasing Co. v. Capital Bank, N.A., 762 F.2d 1303, 1309-10 (5th Cir. 1985) (adequate assurance was

present where debtors' income was sufficient to make lease payments); Bygaph 56 B.R. at 605-06 (adequate assurance of future performance present where prospective lease assignee with adequate financial resources has expressed willingness to devote funding sufficient to afford business strong likelihood of succeeding).

Pursuant to the terms of the Master Transaction Agreement, all applicable Cure Amounts in connection with the Assumed Agreements will be paid. Furthermore, New Chrysler has sufficient assets to continue the performance called for by those agreements. To the extent necessary to satisfy the Court, the Debtors will demonstrate at the Sale Hearing that New Chrysler (a) has assets sufficient to provide adequate assurance of future performance and (b) is willing and able to perform under the Assumed Agreements from and after the Closing Date. The Sale Hearing will therefore provide the Court and other interested parties the opportunity to evaluate the ability of New Chrysler to provide adequate assurance of future performance under the Assumed Agreements, as required by section 365(b)(1)(C) of the Bankruptcy Code.

Accordingly, the Debtors submit that the assumption and assignment of the Assumed Agreements as set forth herein should be approved.

To facilitate the assumption and assignment of the Assumed Agreements, the Debtors also request an order providing that any anti-assignment provisions in the Assumed Agreements shall not limit or prohibit the assumption or assignment of the Assumed Agreements and are deemed to be unenforceable anti-assignment provisions within the meaning of section 365(f) of the Bankruptcy Code. Section 365(f)(1) provides:

> [N]otwithstanding a provision in an executory contract or unexpired lease of the debtor, or in applicable law, that prohibits, restricts, or conditions the assignment of such contract or lease, the trustee may assign such contract or lease under paragraph (2) of this subsection.

11 U.S.C. § 365(f)(l). Section 365(f)(l) thus invalidates provisions that purport to prohibit, restrict or condition assignment of an executory contract or unexpired lease. See, e.g., In re The Circle K Corp., 127 F. 3d 904, 910-11 (9th Cir. 1997) ("no principle of bankruptcy or contract law precludes us from permitting the Debtors here to extend their leases in a manner contrary to the leases' terms, when to do so will effectuate the purposes of section 365").

Section 365(f)(3) expands even further a debtor's right to assume and assign by prohibiting enforcement of any clause creating a right to modify or terminate a contract or lease upon a proposed assumption or assignment thereof. See, e.g., In re Jamesway Corp., 201 B.R. 73, 77-78 (Bankr. S.D.N.Y. 1996) (section 365(f)(3) prohibits enforcement of any lease clause creating right to terminate lease because it is being assumed or assigned, thereby indirectly barring assignment by debtor; all lease provisions, not merely those entitled anti-assignment clauses, are subject to court's scrutiny regarding anti-assignment effect); see also Ramco-Gershenson Props., L.P. v. Serv. Merch. Co., Inc., 293 B.R. 169, 174 (M.D. Tenn. 2003) ("courts may temporarily render anti-assignment clauses unenforceable so that a debtor's assignment is not blocked"); In re Rickel Home Ctrs., Inc., 240 B.R. 826, 831 (D. Del. 1998), app. dismissed, 209 F.3d 291 (3d Cir. 2000), cert. denied, 531 U.S. 873 (2000) ("In interpreting Section 365(f), courts and commentators alike have construed the terms to not only render unenforceable lease provisions which prohibit assignment outright, but also lease provisions that are so restrictive that they constitute de facto anti-assignment provisions."); In re Mr. Grocer, Inc., 77 B.R. 349, 354 (Bankr. D.N.H. 1987) ("the court does retain some discretion in determining that lease provisions, which are not themselves *ipso facto* anti-assignment clauses, may still be refused enforcement in a bankruptcy context in which there is no substantial economic detriment to the

landlord shown, and in which enforcement would preclude the bankruptcy estate from realizing the intrinsic value of its assets").

Under these established principles, the Debtors request that any provisions contained in the Assumed Agreements that directly or indirectly purport to limit the assignability of those agreements be deemed unenforceable under section 365(f) of the Bankruptcy Code.

CONCLUSION

The path to the proposed transaction has been steep. To reach this point has required immense effort on the part of hundreds if not thousands of people – representing a variety of interests. Indeed, it was difficult to imagine even a month ago that those disparate interests could come together in support of a plan to move Chrysler forward. And while it is regrettable that the Debtors had to file these cases at all, it is clear that there can be a future for Chrysler.

The Fiat Transaction – the only viable alternative available to the Debtors and their stakeholders – is that future. By transferring the Debtors' assets as a going concern, the sale to New Chrysler will provide the greatest possible recovery to all stakeholders. A piecemeal liquidation in a severely distressed market cannot possibly yield comparable value. And a liquidation would have catastrophic economic consequences for Chrysler's workers, for those employed by Chrysler's 1,300 suppliers and 3,200 dealers, for all of their families and for communities around the country.

Inasmuch as the Fiat Transaction represents a sound exercise of the Debtors' business judgment and otherwise meets the requirement of section 363 of the Bankruptcy Code, it should be authorized by this Court substantially in the form set forth in the Sale Order.

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Respectfully submitted,

/s/ Corinne Ball

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