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GENERAL STATEMENT

Although my presentation today will focus on the Chrysler case, there is no doubt that the potential failure of GM, the largest of the three U.S. auto manufacturers, was a greater threat to that industry and to the U.S. economy, than the risk posed by Chrysler's failure. But within the bankruptcy process, it was the Chrysler case that came first and ultimately set the stage for GM's journey through the bankruptcy process. At the conclusion of my presentation, I will identify certain aspects of the GM case that support the notion that GM, the government and other parties "went to school" on the Chrysler bankruptcy filing. In other words, the approach to certain issues in the GM case was informed by the reaction to the treatment of those issues in the Chrysler case.

U.S. AUTO INDUSTRY PROBLEMS

Long before the 2008 financial crisis, the U.S. auto industry was steadily losing market share. This was due, in part, to the industry's failure to produce fuel-efficient vehicles, as well as its soaring labor costs and associated legacy costs. As for Chrysler, it was the smallest of the three major U.S. auto companies and had no small car platform. It had performed well with its mini-van line and Jeep product. Although Chrysler's Jeep product continued to be successful, Chrysler no longer dominated the mini-van market. As Chrysler continued to suffer increasing losses, the company and major lenders sought alternatives as early as 2007 for a possible sale or merger of its business.

EFFORTS PRIOR TO 2008 FINANCIAL CRISIS

It was widely known that as Chrysler continued to lose market share, its owners and lenders sought a solution. Generally, as part of that effort, there were continued discussions with the United Auto Workers Union regarding contract terms and conditions.

2008 FINANCIAL CRISIS IMPACT ON AUTO INDUSTRY

By the fall of 2008, as the slowdown in the global economy took its toll on an already struggling U.S. auto industry, both GM and Chrysler were running out of cash, and traditional sources of funding were no longer available.

These two companies had very different debt and equity structures. GM was a publicly held company and had very little in terms of secured debt. Chrysler, on the other hand, was a private company that had virtually all of its assets encumbered. But each company, as referenced above, shared a common problem—they had no ability to access the capital markets, and they had an unsustainable cost structure.

Because of these and other factors in the midst of the financial crisis, although Chrysler continued its efforts to seek a merger of some kind, no one was willing to fund such a venture.

INITIAL GOVERNMENT INTERVENTION

As a result, this deteriorating situation required government intervention. Both Chrysler and GM were forced to turn to the U.S. government as the lender of "last resort." By the end of 2008, after contentious congressional hearings, several unsuccessful legislative initiatives and in response to requests from Chrysler and GM for loans of over $25 billion, then Treasury Secretary Paulson of the Bush administration announced that Chrysler and GM initially would receive access to $17.4 billion in funds from the Troubled Asset Relief Program (known as, "TARP"). Thereafter, as auto sales continued to decline, it became apparent that additional funding was

necessary. Such funding would need to exceed the level that was originally anticipated. As a result, Chrysler and GM sought additional TARP funding.

Regarding the TARP loans, the terms of those loan agreements were identical for both Chrysler and GM. Each agreement required the submission of revised business plans by February 17, 2009 establishing each company's viability and ability to repay the loans.

ESTABLISHMENT OF THE PRESIDENT'S AUTO TASK FORCE

By the end of January 2009, the new Obama administration was in place. The viability plans, referenced previously, would be reviewed by President Obama's designee who would then make the decision regarding any additional loans and make recommendations regarding the ultimate fate of the two companies.

By the end of February 2009, President Obama had formed the Presidential Task Force on the Auto Industry to be his designee under the Chrysler and GM TARP loan agreements. The Task Force included as its co-chairs the Treasury Secretary and the Director of the National Economic Council, and there were also other members of the President's cabinet. In addition, the Task Force included a former private equity fund partner, a former senior advisor to the United Steelworkers Union and a restructuring professional.

THE PRESIDENT'S MARCH 31ST STATEMENT

Following the February submission of Chrysler's plan and after review by the Task Force, President Obama stated in his March 31st speech that a successful turnaround would require "unions and workers who have already made hard extraordinarily painful concessions to do more, . . . creditors to recognize that they can't hold out for the prospect of endless government bailouts, . . . [and] efforts from a whole host of other stakeholders, including dealers and suppliers." At the same time, President Obama announced that without an agreement with Fiat

(or another appropriate partner) and other stakeholders, the U.S. government would refuse additional investment in 30 days. Meanwhile, GM was also under a great deal of pressure to work with its essential constituents to reach an accord on labor and other costs.

REACTION TO MARCH 31ST STATEMENT

As the threat of the ultimate downward spiral into liquidation loomed, Chrysler and its interested parties, including Fiat, began round-the-clock negotiations to reach a deal. Fiat had emerged as a possible merger partner prior to the President's March 31st statement. Quite simply, all the pieces needed to come together; otherwise Chrysler would face the ultimatum presented by the Obama administration.

FIAT, UNITED AUTO WORKERS UNION & NOTEHOLDERS: PRELIMINARY NEGOTIATIONS & OTHER ISSUES

In advance of Chrysler's filing for relief under the bankruptcy code, the preliminary negotiations involving Chrysler, Fiat, the UAW and Noteholders laid the groundwork for what ultimately proved to be a successful restructuring and sale of Chrysler. While establishing the terms of a sale to Fiat, negotiations with lenders and the United Auto Workers Union were simultaneously underway. A resolution was in sight for all the relevant constituents, except the first lien creditors who held $6.9 billion in claims. The last pre-bankruptcy proposal to Chrysler's first priority secured Noteholders involved eliminating their $6.9 billion in debt in exchange for $2.25 billion in cash, but only if 100 percent acceptance could be achieved. Absent that acceptance, the offer was $2.0 billion under a sale proposal in a bankruptcy proceeding. Although Chrysler's largest Noteholders agreed to the debt exchange, smaller Noteholders demanded a higher offer, resulting in the rejection of the offer and the reduction in the proposal to $2 billion in cash. Absent unanimous consent from the Noteholders, Chrysler was forced to proceed with its bankruptcy filing. As an aside, it is not clear as to whether, even if unanimous

consent of its lenders had been received, Chrysler would still have had to file for relief under the bankruptcy code to accomplish some of the cost-cutting measures it needed to achieve.

Even though Chrysler was left with no choice but to file for bankruptcy protection, the pre-bankruptcy negotiations proved to be an essential framework for the successful restructuring and sale of Chrysler to the Fiat alliance company. The Fiat and UAW agreements, and the willingness of a majority of Noteholders to accept the $2 billion cash price, proved vital in securing the U.S. government's funding for a quick and efficient restructuring.

KEY PRE-BANKRUPTCY ISSUES FOR CHRYSLER: VENUE & STRATEGIC CONSIDERATIONS FOR FILING

Additional significant pre-bankruptcy issues confronted the Auto Task Force, Chrysler and other players involved. These issues included (i) jurisdictional questions concerning venue, (ii) strategic questions relating to Chrysler's labor costs, dealerships, technology and the company's relationships with the UAW and Noteholders. From the court system's perspective, in the fall of 2008, it was quite clear that Chrysler or GM or both would likely seek some form of relief in bankruptcy. Once the strategy was in place as to the types of relief that would be sought in a bankruptcy filing, a decision needed to be made as to where the cases would be filed, in other words, the *venue* for the bankruptcy case. At the early stages, however, it was simply unclear in what venue Chrysler would file.

The administrative arm of the U.S. court system began to prepare the likely venues of those cases for the possible filings. Venue can be a very significant issue in a bankruptcy filing. Under our federal court system, the highest court is the Supreme Court, but the appellate courts immediately below the Supreme Court are the various courts of appeal—known as circuit courts. A circuit court's decisions are binding upon all the lower courts within that circuit. Therefore, since there are relatively few cases that ultimately reach the Supreme Court, circuit court

decisions are very important and create much of the controlling *jurisprudence* that impacts our judicial system.

Under our statutes and rules, there were three likely jurisdictions in which the companies could file: Detroit, Michigan (representing the principal place of business of the parent company and many of its subsidiaries as well as the location of the parent's principal assets); Wilmington, Delaware (representing the state of incorporation of the parent company and many of its subsidiaries); and New York, New York. (Under the venue rules governing affiliate case filing, if the first filed case has venue in a particular jurisdiction, affiliate cases can file there for venue purposes. At least one of the affiliates in each of the auto companies had an affiliate that would qualify for venue purposes in New York).

With that said, various efforts were made to prepare each of the likely jurisdictions for the possible filing. These efforts included setting up computer systems that would be equipped to deal with the presumed massive amount of activity that was expected from a filing with the magnitude and huge public interest of an auto industry case.

As for the companies themselves, in 2008 each retained law firms and other professionals to provide advice regarding a possible bankruptcy filing.

During this period, there were efforts by the Noteholders, equity holders and the unions to try to develop a solution to the problem. In spite of all the effort, by the spring of 2009, it was clear that Chrysler and GM would file for bankruptcy protection.

The Auto Task Force continued to develop a strategy for a bankruptcy filing. The crucial questions were: What was to be achieved? And, how would it best be achieved? The Task Force identified a number of central issues that needed to be addressed through a bankruptcy filing. The cost of labor was a significant issue. In addition, the number of dealerships caused some

concern. Further, Chrysler specifically needed to obtain small car technology. To achieve a reduction in labor costs, an understanding was reached with the UAW that, in exchange for protection of the UAW retirees' health and welfare system, the employees would agree to wage reductions and beneficial work rule changes. Chrysler agreed to reduce its dealership network, and the majority of the Noteholders agreed to accept the $2.0 billion offer. Since Chrysler also had operations in Canada, it was also a participant in the process and the various financings. Fiat was to be the purchaser along with the governments, subject to higher and better offers, if any, during the sale process. Fiat's participation brought Chrysler the small car technology that it wanted, and Fiat in exchange was to receive access to the U.S. market for its models.

NOTEHOLDERS' CONCERNS AND FINANCING CONSIDERATIONS

The Noteholders certainly wanted to receive more but also knew that a complete liquidation of Chrysler would have resulted in less of a recovery. Further, the Noteholders did not want to fund a bankruptcy filing—even one that would contemplate a sale within a relatively short period of time. The risks were too great that the process could get delayed and the funding for the bankruptcy might never be recovered.

There were also a number of other strategic financing considerations that confronted Chrysler and other involved parties with respect to a possible bankruptcy filing. One must start with: What are the goals and options for the company? A company that enters the bankruptcy process must be able to fund its operations in order to sustain it business operation during the pendency of the case and hopefully preserve the "going concern" value of the entity. With that said, how does an entity sustain itself during a bankruptcy filing? One method would be from business operations. Another would be if an entity accumulates a great amount of cash before the filing to sustain itself during the bankruptcy process. Still another method would be to obtain

financing that under our system would have a priority over unsecured claims. However, if the assets of the debtor are secured by other financing, the new financing would not receive a priority position over already existing secured interests unless the court orders such priming after a showing that the existing lenders are adequately protected or the senior lenders consent to such priming. Consensual priming is granted at times, but non-consensual priming is very seldom granted.

Therefore, (i) the debtor who must look to new lending arrangements to finance its operation in Chapter 11 and (ii) the length of time it is able continue in operation in Chapter 11 are both greatly influenced by the post-petition lender. Whether that lender is a new lender or any existing lender willing to lend new money to the debtor, a court cannot force a lender to advance funds to a debtor. A court could refuse to approve the terms of a loan which would then result in the loan not being made unless the court was satisfied, but the court cannot change the terms and require that the loan be made.

Where then did that leave a company like Chrysler? Virtually all of its assets were subject to the lien of the Noteholders' lending facility. It was widely accepted that those assets were worth far less that the amount due the Noteholders. There was still another lien that followed the Noteholders lien and then the TARP loan lien followed that lien. The options were limited. A common source of lending in this type of situation would be a loan from the first lien holders in what would be characterized as a "defensive loan." It is "defensive" in the sense that the loan is made to protect the "going concern" value long enough to sell the assets in an orderly manner, so as to avoid the risk of a much lower recovery in a piecemeal rapid liquidation of assets.

Such lending from the Noteholders was not forthcoming. The only potential lender that surfaced was the U.S. Government. The government had previously lent TARP funds to Chrysler under the Bush administration in early 2009, before President Obama took office. One thing appeared clear: neither President Bush nor President Obama was willing to risk being accused of inaction regarding the crisis in the auto industry.

The Auto Task Force then proceeded to analyze the needs of the auto industry and specifically address the needs of Chrysler and what course of action to take. There was little doubt that an attempt would be made to save the auto industry. But a question remained: was Chrysler's existence necessary for the survival of the industry and, if so, at what cost to the U.S. taxpayers?

That question was ultimately answered in the affirmative. It has been written that the determination to save Chrysler was made by the President. It appears that although Chrysler, as the smallest of the U.S. Auto companies, would have been allowed to fail if it were not for the collateral impact its failure would have had on the fragile state of the U.S. auto parts manufacturers. It was argued that a failure of Chrysler would cause the auto parts manufacturers that also supplied both GM and Ford to become distressed, cause their collapse and have a severe and negative impact on GM and Ford.

Having made the determination that Chrysler would not be left to fail without an attempt at saving it through a bankruptcy process, the Auto Task Force needed to make a number of decisions. These decisions included determining the place of filing for Chrysler (as mentioned previously), the type of transaction to be pursued in bankruptcy, etc.

From one standpoint, it is necessary to know what type of relief will be sought in order to decide among the various venue options. The relief to be sought in each was a very quick sale of

substantially all assets outside of a plan of reorganization. That type of relief has been granted in bankruptcy cases before, and the leading case setting forth the applicable standard for such relief was in the Court of Appeals for the Second Circuit. The bankruptcy court in New York is in the Second Circuit and is bound by the standards set forth in the circuit case dealing with the sale of substantially all its asset outside of a plan of reorganization. The law was not as fully developed in the other circuit in which the issue was considered. There are certainly other factors that are taken into consideration when determining choice of venue, including factors such as the experience of the court and its judges to handle cases of the size, significance and public interest of the Auto Industry cases; the convenience of the court to the central parties in the case, etc.

How many of these and other factors were considered by the debtors and the U.S. government is not something for which I have any first-hand knowledge. Simply put, the determination was made to file in the Southern District of New York.

On the morning of April 30, 2009, Chrysler filed its petitions in the United States Bankruptcy Court for the Southern District of New York, and I was assigned the case.

What followed was a remarkable journey that culminated in the sale of Chrysler, which became the blueprint for the sale of GM. The Chrysler sale was all completed within 42 days of the filing on April 30, 2009. But the preparation for the 42-day journey began many months before the filing.

CHRYSLER'S BANKRUPTCY LITIGATION: THE COURSE OF EVENTS

I will now try to summarize the course of key events that followed in the subsequent 42 days, culminating with the closing sale of Chrysler as contemplated by the Auto Task Force.

April 30, 2009—the date of Chrysler's filing for relief—was a Thursday, and the parties did not seek to come before the Court until the following Wednesday, May 5th. Often, debtors

need to be before the court on the first or second day of the case to seek some immediate relief. Generally, relief is sought in most large cases on the first or second day of the case. These hearings often address issues related to financing so as to enable the debtor to continue its operations. Here, an agreement was reached with the Noteholders on the use of the funds that were in the bank accounts of the Debtors and for which the Noteholders had a security interest. Therefore, there was no need to be before the Court prior to the May 5th date. At that hearing, the most important issue raised before the Court was the proposed sale of the Chrysler assets. Immediately before the filing, Chrysler had shut all its plants and did not plan to reopen them unless a sale was consummated. During this time, it was estimated that Chrysler was losing $100 million a day in "going concern" value. Even though it had shut down operations, Chrysler was still spending a great deal of cash maintaining its plants and equipment as well as paying its employees.

DEALERS, TORT CLAIMANTS & CERTAIN NOTEHOLDERS

There were three groups that expressed great concern about the process. One group consisted of the dealers who were concerned about whether Chrysler intended to reject dealerships contracts as part of the sale process. Another group consisted of those who had tort liability claims against Chrysler and who were concerned that the purchaser would not be liable for such claims, thereby leaving only the Debtors liable for the claims. The third group was a minority group of Noteholders who argued that the process should be delayed to allow for further negotiations with the government—seemingly recognizing that a sale was necessary but that the government-funded price was not high enough.

DYNAMICS OF THE CHRYSLER SALE PROCESS

After hearing among a number of parties, including the creditors' committee counsel, a schedule was set for the sale that was about a week longer than requested by the Debtors. The U.S. government—which was providing the financing to the Debtors—agreed to the delay in the sale process. This point is key to understanding the dynamics here of the influence that the lenders have in our system. If a debtor does not have sufficient cash to continue in Chapter 11, if it has insufficient unencumbered assets to obtain financing from traditional sources of funding, the lender who comes forward to provide the financing can demand terms that limit a debtor's ability to stay in Chapter 11 beyond the time that is agreed to by the lender. As I mentioned before, the Court could not approve the lending if it believed that the terms were unreasonable or improper. But without the consent of the lender, the Court cannot impose terms upon the lender.

In the Auto Industry bankruptcies, the government functioned as the lender of last resort. And in each case, the government refused to extend its lending for a period of time necessary for a plan process to take place. It was argued that such a process could be dragged out for an extended period of time, and that would have a dramatic negative impact on the survival of each entity and the auto industry itself. One cannot lose sight of the government's purpose under the circumstances. It was to save an industry, not just to preserve an entity. So, on the one hand, some of the decisions may not have been rational from an economic point of view with respect to the likelihood of being paid back and may have presented far greater risks than a typical lender would be willing take.

A central theme articulated by many of the objectors throughout the sale process was that if the Court denied the relief sought, the government—which has a limitless supply of funds—would put more money into the process. Whether that was accurate or not, it seemed to me to

place the Court in a position of advancing one side's position to the detriment of the other was improper. In my view, as long as the integrity of the process was maintained, it was not the Court's role to deny relief sought because I thought that the government would increase the price if I simply denied the relief. It was a process, in my view, in which the government bore the burdens and benefits of any funder of a sale process.. It should be a market-driven process, and if the market did not provide greater consideration than what was being offered, it is not the role of the Court to alter that process.

Turning back to the time frame at issue, the sale hearing was set to begin on Wednesday, May 26th and to continue until concluded. During the period before the sale, the parties engaged in extensive discovery in preparation for the sale. This discovery occurred in three different cities, seven days a week. During this period, one of the Noteholders—the Indiana Pensioners—sought relief from the District Court—the court level above the bankruptcy court—to stay the sale process. That request was denied, and the preparation for the sale process continued.

While the parties prepared for the hearing, the court and its staff prepared to write an opinion. The Debtors had submitted a number of declarations that set forth the background facts, including the efforts to find financing and other interested buyers or merger partners. The Court spent a considerable amount of time researching the standard for a sale as proposed. As the hearing approached, the tension grew among the parties.

On Wednesday, May 26th, the sale hearing began. It concluded on Friday at about 10:00 pm. Over those three days, it consumed about 30 hours of hearing time. The Court and the staff worked throughout the weekend, and on Sunday, May 31st at 11:00 PM the Court issued its opinion approving the sale. In the opinion, the Court directed the Debtors to submit an order to the Court regarding the approval of the sale. The Court further set June 5th at 12:00 PM as the

earliest time for the sale. Under the rules in effect at the time of the sale hearing, a 10-day stay was put in place unless, for cause, the court sets another period of time that may be shorter or longer than the 10-day period. If the court was to set a longer period, a request would often be made by the prevailing party that a bond be put in place by the party seeking an extension of the stay to protect the estate against a loss of value resulting from a delay.

On Monday morning of June 1st, in the midst of the ongoing Chrysler sale process, GM filed its petition in bankruptcy. Later that morning in the Chrysler proceedings, the counsel for the Indiana pensioners sought a stay of the closing. The District Court said at that time that the request was premature since an order had not been entered by the bankruptcy court as of that time. The Debtors argued that it was premature, but also argued that the appeal in this case met the standard for immediate review by the court of appeals, and therefore sought relief before the bankruptcy court to certify the case to the court of appeals on a direct appeal.

Later that day, the Court certified the matter to the court of appeals. On Tuesday, the Court of Appeals set an expedited hearing time of Friday at 2:00 PM for argument on the appeal. The Court of Appeals also extended the stay that the Court had put in place and they ruled upon the matter. There was a two-day hearing before the Circuit, and, after a brief recess, the Circuit ruled that for substantially the same reasons set forth in the bankruptcy judge's opinion, they affirmed and extended the stay of the closing until Monday, June 5th at 4:00 PM. This was done to afford the parties an opportunity to seek relief in the United States Supreme Court. Relief was subsequently sought in the Supreme Court in the form of a request to further stay the sale until it was able to provide a complete review of the transaction. At 4:00 p.m. on that Monday, June 8, 2012 the Supreme Court continued the stay put in place by the Circuit until it ruled on a further

staying of the closing of the sale. On Tuesday, June 9, 2012 the Supreme Court lifted the stay that allowed the closing to go forward and, in fact, went forward on June 10, 2012.

The Circuit issued an opinion explaining its basis for affirming on June 5, 2009 the sale opinion in August 2009 that was subsequently vacated by the Supreme Court on procedural grounds. As a result of that vacatur, there is no appellate opinion regarding the May 31, 2009.

The appellate law on a sale of substantially all the assets outside of a plan of reorganization remains unchanged.

In forty-two days, the sale of Chrysler was closed. There were two trips to the district court within that time, a circuit court's full review and the Supreme Court ruling on a stay of the closing. I know of no other bankruptcy matter that went through these stages of the appellate process as quickly.

It is certainly true that each court recognized the importance of the issue to the parties but more fundamentally to the public interest. Recognizing the importance of the case and being able to meet the needs of the case from a judicial efficiency perspective represent very different concepts.

As I mentioned at the outset, I want to identify briefly for you certain aspects of the GM case that support the notion that GM, the government and other parties "went to school" on the Chrysler bankruptcy filing. In other words, the approach to certain issues in the GM case was informed by the reaction to the treatment of those issues in the Chrysler case. A number of observations support this point.

First, with respect to the dealership rejection process, Chrysler's experience clearly illustrated the massive political uproar that such rejections could generate. Cognizant of Chrysler's experience in this respect, GM decided not to proceed as aggressively as Chrysler had

in rejecting dealership contracts. Second, GM was additionally informed by the Chrysler case, because GM learned from the negative public reaction that would result from limiting certain successor liability for personal injuries. Third, as for warranties, GM was less aggressive than Chrysler. Again, GM was confronted with a situation where there was a serious risk of negative public reaction. The recognition of Chrysler's experience worked its way into the thinking of GM as to how aggressive GM should be in pressing for this limitation.

CONCLUSION

To a great extent, for better or worse, the United States has an extremely litigious legal culture. The legal culture is experienced in that regard and prepared to move at a very rapid pace. Add to that the American court system, which, when confronted with time demands, can react effectively. Layer on top of all of this a degree of experience and sophistication that has developed in U.S. bankruptcy courts that handle large Chapter 11 cases. That experience has enabled U.S. bankruptcy courts to be very responsive to the demands presented by those large cases.

It would make no sense for me to work all weekend to issue an opinion on a Sunday night if the administrative arm of the Court was not equally committed to the same level of responsiveness.

To develop a court that can act with this alacrity, one must look to develop that mindset at every level of the judicial structure, including among the professionals that practice before the court.