

UNITED STATES BANKRUPTCY COURT  
MIDDLE DISTRICT OF FLORIDA  
TAMPA DIVISION

In re:

Chapter 11

MRH OF LAKELAND, INC., and  
T. THOMAS CHEVROLET, INC.,

Case No. 8:09-bk-08090  
8:09-bk-08092

Jointly Administered Under  
Case No. 8:09-bk-08090

Debtors.

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**DEBTORS' MOTION FOR ORDER (A) AUTHORIZING SALE OF  
SUBSTANTIALLY ALL OF THEIR ASSETS FREE AND CLEAR OF  
LIENS, CLAIMS AND ENCUMBRANCES, (B) APPROVING BIDDING  
AND SALE PROCEDURES; (C) APPROVING AMOUNT OF MINIMUM  
OVERBID; (D) APPROVING BREAK-UP FEE; (E) APPROVING FORM  
AND MANNER OF NOTICE; AND (F) AUTHORIZING TERMINATION  
OF DEALERSHIP AGREEMENTS PURSUANT TO 11 U.S.C. § 363**

**An initial preliminary hearing on this Motion to consider approval of the bidding procedures requested herein, including the Overbid Amount and Break-Up Fee, will be held on Friday, May 8, 2009 at 9:30 a.m. at Sam M. Gibbons United States Courthouse, 801 North Florida Avenue, Courtroom 9B, Tampa, Florida 33602**

T. THOMAS CHEVROLET, INC. (“**T. Thomas**”) and MRH OF LAKELAND, INC. (“**MRH**”), as debtors and debtors in possession (collectively, the “**Sellers**” or the “**Debtors**”), by and through their undersigned counsel, hereby file their Motion for Order (A) Authorizing the Sale of Substantially All of Their Assets Free and Clear of Liens, Claims and Encumbrances; (B) Approving Bidding and Sale Procedures; (C) Approving Amount of Minimum Overbid; (D) Approving Break-Up Fee; (E) Approving Form and Manner of Notice and (F) Authorizing Termination of Dealership Agreements Pursuant to 11 U.S.C. §363 (“**Sale Motion**”), pursuant to 11 U.S.C. §§105 and 363, 28 U.S.C.

§157(b)(2)(A), (M), and (O), and Rules 2002, 6004, and 9014 of the Federal Rules of Bankruptcy Procedure (the “**Rules**”), and, in support of their Sale Motion, say:

### **INTRODUCTION**

1. On April 24, 2009 (the “**Petition Date**”), the Debtors filed Voluntary Petitions for Relief under Chapter 11 of Title 11 of the United States Code (the “**Bankruptcy Code**”).

2. Each of the Debtors continues to manage their properties as debtors in possession pursuant to Sections 1107(a) and 1108 of the Bankruptcy Code.

3. No trustee or examiner has been appointed in these cases and no official committees have yet been appointed pursuant to §1102 of the Bankruptcy Code.

4. The common stock ownership in the Debtors is owned 100% by Michael Holley who is also the sole officer and director of the Debtors.

5. No previous application for the relief sought herein has been made by the Sellers to this Court or any other court.

6. By order dated April 30, 2009, these cases are being jointly administered for procedural purposes only (Dkt. No. 19).

7. T. Thomas operated the Michael Holley Chevrolet dealership (the “**Chevrolet Dealership**”) at 925 U.S. Hwy 98 S., Lakeland, Florida. MRH operated the Michael Holley Kia dealership, which is located at 1025 U.S. Hwy 98 S., Lakeland, Florida (the “**Kia Dealership**”) and together with the Chevrolet Dealership, the “**Dealerships**”). As a result of economic conditions, the performance of the Dealerships began to suffer. The Debtors seek to accomplish an orderly liquidation of their

businesses that will maximize the recovery to all of the creditors, whether secured, unsecured or priority pursuant to the Bankruptcy Code.

8. The Debtors' primary secured creditor is GMAC, LLC ("GMAC"). Prior to the Petition Date, the Debtors entered into various revolving lines of credit and floor plan financing facilities with GMAC, secured by substantially all of their assets. Upon information and belief, GMAC asserts secured claims against the Debtors totaling approximately \$25 million.

### **JURISDICTION AND VENUE**

9. This Court has subject matter jurisdiction over this Sale Motion pursuant to 28 U.S.C. §1334. This is a core proceeding pursuant to 28 U.S.C. §157(b)(1). Venue of these proceedings and the Sale Motion is proper in this district pursuant to 28 U.S.C. §§1408 and 1409.

### **THE EXISTING OFFER TO PURCHASE DEBTORS' ASSETS**

10. On January 15, 2009, the Sellers entered into an Asset Purchase Agreement (as amended by the First Amendment, the "**Agreement**") with Lakeland Chevrolet, LLC and its assigns ("**Purchaser**" or "**Buyer**"), pursuant to which Sellers have agreed to sell, and the Purchaser has agreed to purchase, substantially all of the assets of the Sellers ("**Assets**").<sup>1</sup> On March 26, 2009, the Sellers and Purchaser executed that certain First Amendment to Asset Purchase Agreement (the "**First Amendment**").

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<sup>1</sup>The Assets are described in paragraph 12 below.

A copy of the Agreement<sup>2</sup> and the First Amendment are attached hereto as Composite Exhibit “A”<sup>3</sup> and incorporated herein by reference.

11. The description of the Agreement contained in this Sale Motion is intended only as a summary and is qualified in its entirety by reference to the Agreement itself. To the extent there is any inconsistency between the language of the Agreement and the description set forth in this Sale Motion, the terms and conditions of the Agreement shall control any such inconsistency. Each creditor of the Debtors and any party in interest should read, consider and carefully analyze the terms and provisions of the Agreement.

12. Pursuant to the terms of the Agreement, Sellers, subject to entry of the Approval Order (as defined below), have agreed to sell, transfer, convey, assign and deliver to the Purchaser, and the Purchaser has agreed to purchase and acquire from Sellers, substantially all of the assets owned by Sellers on the Closing Date, including, without limitation, the following:

- a. Parts and Accessories;
- b. Equipment;
- c. New Vehicles;
- d. Used Vehicles;
- e. Goodwill;
- f. Work in Progress.

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<sup>2</sup> Unless otherwise defined herein, capitalized terms have the same meaning ascribed to them in the Agreement.

<sup>3</sup> The schedules to the Asset Purchase Agreement are too voluminous to attach, but are available upon request to counsel for the Debtors.

(collectively, the “**Assets**”).

13. As part of the sales transaction, Michael Holley, the sole officer and shareholder of the Sellers, and the Purchaser have entered into a Consulting and Non-Competition Agreement pursuant to which, in consideration for certain services to be performed by Michael Holley and his agreement not to compete with the Purchaser on certain terms and conditions, Michael Holley will receive a consulting and noncompete fee of \$8,500.00 per month for sixty (60) months.

14. The real estate and dealership facility for the Kia Dealership is owned by Holley Real Estate Holdings of Lakeland, LLC (“**Holley Real Estate**”). Michael Holley is the sole officer and shareholder of Holley Real Estate. The Purchaser will lease this property from Holley Real Estate in the form of the Holley Real Estate lease agreement attached as Exhibit K to the Agreement. Additionally, the Purchaser will lease additional property owned by Holley-Barber Investments, LLC (“**Holley-Barber**”). Michael Holley is the sole officer and shareholder of Holley-Barber. The Purchaser will lease this property from Holley-Barber pursuant to the form of the Holley-Barber lease agreement attached as Exhibit K to the Agreement.

15. The Assets will be sold to the Purchaser free and clear of any and all liens, claims, security interests and encumbrances of any nature whatsoever (collectively, “**Liens**”) except for the Assumed Liabilities (as defined below). The Liens of the secured creditors will attach to the sale proceeds to the same extent, validity and priority as existed on the Assets as of the Petition Date. The Purchaser is purchasing the Assets

from Sellers on an “AS IS” and “WHERE IS” basis with no representations and warranties of any nature whatsoever from Sellers, except as provided in the Agreement.

16. Under the Agreement, the liabilities of Sellers to be assumed by the Purchaser are the following:

- a. all liabilities and obligations of Sellers at the Closing Date pertaining to the pending customer sales contracts set forth on Schedule 2 of the Agreement (for which the purchase price paid hereunder shall be reduced on a dollar for dollar basis) other than any liability for any breach by Sellers or any employee or agent of Sellers hereunder;
- b. advanced payment obligations of Sellers under said pending customer sale contracts (for which the purchase price paid hereunder shall be reduced on a dollar for dollar basis);
- c. security deposit obligations of Sellers under said pending customer sale contracts (for which the purchase price paid hereunder shall be reduced on a dollar for dollar basis);
- d. all liabilities and obligations arising out of or resulting from the operation of the business by Buyer, except Excluded Liabilities (as defined in Section 2(B) of the Agreement) occurring subsequent to the Closing Date; and
- e. all liabilities arising after the Closing Date with respect to the contracts and leases on Schedule 10-2 of the Agreement.

All of the liabilities and obligations in subparagraphs (a) through (e) above to be performed and/or assumed by the Purchaser shall be referred to as the **“Assumed Liabilities.”**

17. Subject to the terms and conditions set forth in the Agreement and the First Amendment, the purchase price (“**Purchase Price**”) to be paid by the Purchaser for the purchase of the Assets consists of the sum of the following:

New Vehicles	\$9,064,089.00
Certain Used Vehicles	TBD
Work-in Process	TBD
Fixed Assets	300,000.00
New GM Parts	300,000.00
New Kia Parts	200,000.00
Goodwill	10,000.00
Total	\$9,874,089.00

After payment of unpaid payroll taxes, unpaid sales taxes and Buyer Paid Seller Expenses (as defined below)(which deduction shall not be available to a successful bidder other than the Purchaser), the amount of the Purchase Price allocated to New Vehicles and Used Vehicles not subject to third party liens will be paid to GMAC at closing either in cash or through a transfer of this amount to the Purchaser’s floor plan financing with GMAC. The amount of the Purchase Price allocated to Fixed Assets, New GM Parts, and New Kia Parts will be paid at Closing to GMAC pursuant to its valid and first priority perfected lien on said assets. Pursuant to Section G of Schedule 1 of the Agreement, as amended in the First Amendment, the Purchaser has the right to elect which Used Vehicles not subject to third party liens, if any, it decides to purchase. The price for such Used Vehicles not subject to third party liens is to be determined by negotiations between the Purchaser and Sellers prior to the Closing Date.

18. With respect to certain used vehicles that are presently subject to third party liens from persons other than the Sellers’ floorplan lender (“**Third Party Liened**

**Vehicle Inventory**”), the parties will negotiate in good faith to determine an actual cash value based on the recent Manheim Auction index (Southeast region) average price column (“**ACV**”) for each such vehicle and the Purchaser is obligated to purchase the Third Party Liened Vehicle Inventory from the Sellers at the ACV mutually agreed upon by the parties. It is anticipated that all third party purchase money liens on the Third Party Liened Vehicle Inventory will be satisfied. The balance of the Purchase Price allocated to Goodwill will be paid to the Debtors.

19. Pursuant to paragraph 25(R) of the Agreement, the Purchaser may elect to pay the Debtors’ expenses, including attorney fees and costs (as defined in the Agreement, the “**Buyer Paid Seller Expenses**”). In the event that the sale closes, the Purchaser is entitled to either a credit towards the Purchase Price or a reduction of the Purchase Price at the Closing, as the parties may agree, for such Buyer Paid Seller Expenses that the Purchaser has paid. As further discussed below, in the event that the sale does not close for any reason other than a default by the Purchaser, the Debtors are required to reimburse the Purchaser for the Buyer Paid Seller Expenses. Pursuant to this provision, the Purchaser has paid \$55,000 of the Debtors’ fees and costs through a secured loan to the Debtors and has escrowed an additional \$40,000 for prepetition fees and costs of Clark, Campbell, Mawhinney & Lancaster, P.A., proposed special counsel for the Debtors.

20. The Closing under the Agreement will be held on the second Monday following receipt of GM and Kia’s approval as set forth in Section 9(B)(10) of the

Agreement and after the Court's entry of the Approval Order (as defined in Paragraph 21 below).

21. The conditions precedent to the Closing under the Agreement include: (a) the entry of a final order of this Court approving and authorizing Sellers to enter into the Agreement and to consummate the transactions contemplated by the Agreement ("**Approval Order**"), (b) the Purchaser's receipt of approvals from the Chevrolet Division of General Motors Corporation and Kia Motors of America, (c) the termination of the Chevrolet Division Sales and Service Agreement and the Kia Sales and Service Agreement, and (d) the execution of Lease Agreements for certain property in the forms attached as Exhibit K to the Agreement.

22. The Agreement may be terminated on the following terms and conditions:
- a. by mutual written agreement of Sellers and Buyer; or
  - b. by either Buyer or the Sellers if the Closing Date does not occur on or before one hundred twenty (120) days after the execution of the Agreement, provided the terminating party has not, through breach of a representation, warranty or covenant, prevented the Closing from occurring on or before such date; or
  - c. by either Buyer or Sellers if, prior to the Closing Date, the other party is in material breach of any representation, warranty, covenant or agreement contained in the Agreement and such breach is not cured within ten (10) days of the date of notice of default served by the party claiming such material breach; provided that such terminating party is not also in material breach of the Agreement at the time notice of termination is delivered; or
  - d. by Buyer, if any of the conditions in Section 9 of the Agreement have not been satisfied as of the Closing Date (or such earlier date as may be applicable), if satisfaction of such a condition is or becomes impossible (other than through the failure of Buyer to comply with its obligations under the Agreement), and Buyer has not waived such condition on or before the Closing Date; or

- e. by Buyer, if the Lease Agreement is terminated in accordance with its provisions or by the non-breaching party if the Lease Agreement is terminated due to breach by a party thereto; or
- f. by Buyer, if the Bankruptcy Court denies the Approval Motion, materially revises the terms of the proposed Sale Order, or orders the sale of the Assets to a third party.

23. If the Agreement is terminated by either Buyer or Sellers pursuant to the provisions of Section 15 of the Agreement, the Agreement becomes void and there is no further obligation on the part of any party to the Agreement except: (1) pursuant to the provisions of Sections 17 and 25 of the Agreement (which shall survive and continue pursuant to their terms); and (2) to the extent that such termination results from Buyer's failure to close at the Closing, without breach of the Seller, once the Bankruptcy Court has approved the Agreement pursuant to the Sale Order. However, a termination of the Agreement does not relieve any party to the Agreement from any liability for damages incurred as a result of a breach by such party of its representations, warranties, covenants, agreements or other obligations hereunder occurring prior to such termination. Except as a result of any such breach, no party to the Agreement will have any liability to the other party as a result of the termination of the Agreement or the failure to complete the transactions contemplated in the Agreement for any reason whatsoever.

24. Subject to approval of this Court, in the event that the Buyer is not approved by the Bankruptcy Court because it is not the winning bidder resulting from the auction process approved herein, then the Buyer is entitled to receive a break-up fee of \$250,000.00 from the Sellers plus reimbursement of Buyer Paid Seller Expenses (the

“**Break-Up Fee**”) as a result of its efforts with respect to the transactions set forth in the Agreement.

**RELIEF REQUESTED AND GROUNDS  
FOR RELIEF; BIDDING AND SALE PROCEDURES**

25. This Sale Motion is filed, in part, to seek approval of bidding and sale procedures in connection with the sale of substantially all of the Sellers’ assets, which procedures are designed to allow other prospective purchasers to submit a higher and better offers for the Assets.

26. The Sellers believe that the Court should approve certain bidding procedures in order to determine that the Purchaser’s offer is the highest and best offer available to Sellers for the purchase of the Assets and to ensure that the Sellers receive the highest and best offers for the Assets. The Sellers believe that these procedures are favorable to the Sellers, their estate and creditors, and create a fair and level playing field for all interested bidders. The Sellers submit that these proposed procedures will satisfy the interests of all creditors by assuring that the Sellers will achieve the maximum value for the sale of substantially all of their assets.

27. The Sellers respectfully request that this Court approve the following procedures for the submission and consideration of any competing bid (“**Bid**”) by any competing bidder (“**Bidder**”) for the Assets:

- a. On May 8, 2009, the Court will conduct an initial preliminary hearing on this Sale Motion (“**Procedures Hearing**”), to consider entry of an order approving these bidding procedures, including the Overbid Amount (as defined in subparagraph (i) below) (“**Procedures Order**”).

- b. The Seller further requests that, by no later than **June 1, 2009**, the Court will conduct a hearing (“**Sale Hearing**”) to consider the Agreement and any higher or better offers submitted in accordance with the procedures set forth herein.
- c. Any Bidder must deliver a Bid for the Assets *so that it is actually received* by no later than 5:00 p.m. (Eastern Daylight Time) on the day which is two (2) business days prior to the date of the Sale Hearing (or such later date agreed to by Seller) (“**Bid Deadline**”), to the following parties:

**Sellers:**

T. Thomas Chevrolet, Inc. and  
MRH of Lakeland, Inc.  
Attn: Michael Holley, President  
P.O. Box 1787  
Lakeland, FL 33802

**counsel to Sellers:**

Stichter, Riedel, Blain & Prosser, P.A.  
Attn: Edward J. Peterson, Esq.  
110 East Madison Street, Suite 200  
Tampa, FL 33602;

**GMAC:**

GMAC, LLC  
Attn: Gregory Schultz  
3885 Crestwood Parkway  
Suite 400  
Duluth, GA 30096-0000

**counsel to GMAC:**

Charles Tatelbaum, Esq.  
Adorno & Yoss, LLP  
350 East Las Olas Blvd.  
Suite 1700  
Fort Lauderdale, FL 33301;

**Kia:**

KIA Motors America, Inc.  
Attn: Susan Van Trease  
Southern Region  
100 Galleria Pkwy., #1550  
Atlanta, GA 30339

**counsel to Kia:**

Dean Bunch, Esq.  
Nelson Mullins Riley & Scarborough LLP  
3600 Maclay Blvd S Ste 202  
Tallahassee, Florida 32312-1267

**Purchaser:**

Lakeland Chevrolet, LLC  
Attn: Len Nadolski  
5000 East Grand River  
Howell, MI 48843

**Counsel to Purchaser:**

Andrew M. Brumby, Esq.  
J. Gregory Humphries, Esq.  
Shutts & Bowen, LLP  
P.O. Box 4965  
Orlando, FL 32802-4956

**U.S. Trustee:**

Theresa M. Boatner, Esq.  
Office of the United States Trustee  
501 East Polk Street  
Room 1200  
Tampa, FL 33602

- d. The Bid shall include the following:
  - i. A copy of an executed written contract in substantially the same form as the Agreement. Any alterations to the terms of the Agreement must be redlined;

- ii. Relevant background and financial information reasonably satisfactory to the Sellers (including without limitation the latest available audited and unaudited financial statements) demonstrating the Bidder's financial ability to close and to consummate an acquisition of the Assets, such as (1) evidence of the Bidder's ability to assume or satisfy the terms of its offer to purchase, pay the remaining portions of the Purchase Price and/or (2) an unconditional lending commitment from a recognized financial institution or cash sources in the amount of the Bid; and
- iii. A good faith deposit in immediately available funds in the amount of \$100,000.00 ("**Bid Deposit**"), which shall be made payable to and/or delivered to Sellers' counsel by the Bid Deadline. The Bid Deposit shall be deposited into a non-IOTA interest-bearing trust account maintained by Sellers' counsel. Such Bid Deposit will be non-refundable to the Bidder in the event such Bidder's Bid is selected by the Court at the Sale Hearing as the highest and best offer and said Bidder fails to close on the purchase of the Assets for any reason. The Bid Deposit will be applied against the purchase price at Closing. Within three (3) business days following the Closing, Sellers' counsel will return the Bid Deposit (inclusive of any earned interest) of any Bidder that is not selected as the highest and best offer at the Sale Hearing.
- e. Any Bid shall not be contingent upon receipt of financing necessary to its consummation;
- f. Any Bid shall not contain any conditions precedent to such Bidders' obligation to purchase or otherwise acquire the Assets and assume and perform the Assumed Liabilities;
- g. The Assets will be sold without any representation or warranties, "**AS IS**" and "**WHERE IS**," with all liens and encumbrances, if any, to attach to the sale proceeds;
- h. An auction ("**Auction**") to consider any competing bids in respect of the Purchased Assets will be held at Stichter, Riedel, Blain & Prosser, P.A., 110 E. Madison St., Suite 200, Tampa, Florida 33602, on the business day preceding the date of the Sale Hearing. At the Sale Hearing, the Sellers will recommend to the Court the offer or offers that they consider to be the highest and best offer for the

Assets. The Court will determine the highest and best offer at the Sale Hearing;

- i. The initial Bid must exceed the existing Purchase Price by at least \$100,000.00 (the “**Overbid Amount**”) plus the Break-Up Fee. All subsequent Bids for the Assets must be in incremental increases of at least the Overbid Amount and be payable in cash. The Purchaser shall be entitled to match any competing bid, net of the Break-Up Fee;
- j. If any Bid does not conform to all of the requirements set forth above, such Bid may not be considered by the Court or be admissible at the Sale Hearing;
- k. The Court shall register the second highest Bid(s) and Bidder(s) (the “**Backup Bidder(s)**”), who shall be entitled to enter into a binding contract or contracts, as the case may be, with the Seller(s) in the event the successful Bidder(s) fails to consummate the acquisition of the Assets in accordance with the provisions described above. Any closing with the Backup Bidder(s) shall occur within three (3) business days of notification that the successful Bidder(s) failed to close;
- l. Each Bidder shall execute a confidentiality or nondisclosure agreement in a form acceptable to Seller. Upon executing such agreement, each Bidder shall be entitled to conduct due diligence as to the dealership until the day preceding the Auction.
- m. In the event a Bidder, other than Purchaser, is the successful Bidder and acquires the Assets, then Purchaser shall be entitled to a Break-Up Fee in the amount not to exceed \$250,000.00 plus reimbursement of Buyer Paid Seller Expenses. The reasonableness and the amount of the Break-up Fee shall be subject to approval by this Court. The Break-up Fee shall serve as reimbursement for: (1) the Purchaser’s reasonable expenses incurred in entering into the Agreement, (2) the Seller’s expenses that the Purchaser paid on behalf of Seller to allow the Agreement to be consummated and the parties to proceed with the filing of the bankruptcy petitions, and (3) the benefit to the Sellers that the Agreement created in attracting other Bids in excess of the Purchase Price.

28. The Sellers request that the Court’s approval of the procedures set forth in Paragraph 27, including the Break-Up Fee (subject to final approval by the Court), be set

forth in the Procedures Order. The Sellers intend to prepare a form of notice containing such procedures that will be attached to the Procedures Order.

### **SALE OF ASSETS**

29. By this Motion, the Sellers request that this Court, pursuant to §§363(b), (f) and (m) of the Bankruptcy Code and Rule 6004 of the Federal Rules of Bankruptcy Procedure, approve the offer or offers to purchase and the sale of the Assets to the successful purchaser or purchasers, as the case may be, free and clear of Liens other than the Assumed Liabilities.

#### **A. APPROVAL OF THE SALE IS APPROPRIATE UNDER SECTION 363(b) OF THE BANKRUPTCY CODE.**

30. Section 363(b)(1) states 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). Courts usually defer to the business judgment of a debtor in deciding whether or not to authorize a debtor to sell property outside the ordinary course of business. *See e.g., In re Continental Airlines, Inc.*, 780 F.2d 1223 (5<sup>th</sup> Cir. 1986); *In re Lionel Corp.*, 722 F.2d 1063, 1071 (2<sup>nd</sup> Cir. 1983); *In re Mason’s Nursing Center, Inc.*, 73 E.R. 360, 362 (Bankr. S.D. Fla. 1987).

31. For all of the reasons set forth in this Sale Motion, Sellers, through the exercise of their business judgment, have determined that the sale of their assets to a purchaser or purchasers approved by this Court is in the best interests of all creditors. A sale at this time is necessary to preserve the value of the Sellers’ assets. The Sellers have attempted to market their assets and have determined, at this time, that the Purchase Price

is reasonable, represents fair market value, and that this proposed sale is in the best interests of the estate.

32. The proposed sale to the Purchaser is subject to higher and better offers which will ensure that the price is fair and reasonable.

33. For all the reasons set forth above, the Sellers believe that the sale of the Assets pursuant to the Agreement is reasonable under the circumstances and in the best interests of the estate.

**B. APPROVAL OF THE SALE FREE AND CLEAR OF LIENS, CLAIMS AND ENCUMBRANCES IS APPROPRIATE UNDER SECTION 363(f) OF THE BANKRUPTCY CODE.**

34. Section 363(f) of the Bankruptcy Code provides:

- (f) The Trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if –
  - (1) applicable non bankruptcy 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 completed, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

11 U.S.C. §363(f).

35. Section 363(f) is drafted in the disjunctive. Thus, satisfaction of any of the five requirements enumerated therein will suffice to warrant the sale of the subject

property free and clear of all Liens. The proposed sale will meet at least one of the Section 363(f) requirements as will be demonstrated at the Sale Hearing. Without limitation, GMAC consents to the sale to the Purchaser pursuant to the Agreement. Accordingly, the Debtors request that the Assets be transferred to the highest bidder free and clear of all Liens with such Liens to attach to the proceeds of the sale in accordance with their existing priorities.

**C. THE PURCHASER QUALIFIES AS A GOOD FAITH PURCHASER UNDER 11 USC §363(m).**

36. Section 363(m) of the Bankruptcy Code 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 purchaser,” the phrase encompasses one who purchases in “good faith” and for “value.” *In re Ewell*, 958 F.2d 276, 281 (9<sup>th</sup> Cir. 1992).

37. The terms and conditions of the Agreement were negotiated in good faith at arm’s length. The Purchaser does not hold any interests in the Debtors and is not otherwise affiliated with any of the Debtors or any of their officers. Moreover, the Purchaser is not an “insider” of any of the Debtors within the meaning of §101(31) of the Bankruptcy Code and is not controlled by, or acting on behalf of, any insider of any of the Debtors. *See, e.g., In re After Six, Inc.*, 154 B.R. 876, 883 (Bankr. E.D. Pa. 1993) (good faith found where officers, directors and employees of debtor had no apparent

connection to purchasers). Additionally, the Sellers commit to negotiate any alternative bid at arm's length and in good faith within the meaning of §363(m). The Sellers will present evidence at the hearing on the Sale Motion to prove the foregoing. Accordingly, the Sellers request that the Court determine the Purchaser or, to the extent applicable, an alternative bidder, to be acting in good faith and entitled to the protections of a good faith purchaser under §363(m) of the Bankruptcy Code.

**D. THE BREAK UP FEE AND OVERBID AMOUNT ARE REASONABLE AND NECESSARY.**

38. In order to induce the Purchaser to conduct due diligence as to the Assets and reach agreement on definitive agreements, the Debtors and the Purchaser agreed upon the Overbid Amount and the Break-Up Fee, which includes the reimbursement of the Buyer Paid Seller Expenses.

39. The Agreement requires the Debtors to pay the Purchaser the Break-Up Fee for: (1) the Purchaser's time, expenses, and lost opportunities in the event the Debtors accept an offer from a competing Bidder whose Bid is approved by order of this Court, and (2) reimbursement of the Buyer Paid Seller Expenses. The Debtors believe that the Break-Up Fee, including the reimbursement of the Buyer Paid Seller Expenses, is fair and reasonable, especially after taking into account the significant time, effort and expenses of the Purchaser in conducting its due diligence of the Assets, negotiating the Agreement and paying expenses of the Debtors to allow the Agreement to be consummated and the bankruptcy petitions to be filed. In addition, a break-up fee encourages an initial purchaser to act as a stalking horse whose initial bid will be used to attract higher offers.

40. The Purchaser has expended significant amounts of money in reaching a determination to acquire the Assets, in negotiating the Agreement, and in funding expenses for the Debtors to negotiate the Agreement and file the bankruptcy petitions. These efforts will inevitably be of value to any competing bidder, inasmuch as the framework for the transaction will have been structured through the efforts of the Debtors and the Purchaser. The Purchaser was unwilling to expend substantial time and effort reaching a definitive agreement, performing the necessary due diligence and paying expenses on behalf of the Debtors, only to find itself outbid in Court, absent the Break-Up Fee and the right to reimbursement of the Buyer Paid Seller Expenses set forth in the Agreement. In addition, the Debtors have benefited substantially from the willingness of the Purchaser to proceed forward with this transaction, notwithstanding the fact that the transaction is subject to overbid in this Court. For all of these reasons, the Debtors believe that the Purchaser is entitled to the Break-Up Fee in the event a higher and better offer for the Assets is received and approved by the Court.

41. The Debtors respectfully submit that the Overbid Amount and the Break-Up Fee, including the requirement for reimbursement of the Buyer Paid Seller Expenses to the Purchaser, are equitable and in the best interests of the Debtors' estates. Given the size of the transaction and the amount of diligence and effort required by the Purchaser to complete the transaction, it would be inequitable to allow a bidder to outbid the Purchaser by an amount less than the Overbid Amount. Additionally, in proceeding with negotiations of the Agreement, the Purchaser, with the knowledge of the Debtors, has relied upon the Debtors' agreement to the Overbid Amount and the Break-Up Fee,

including the agreement for reimbursement of the Buyer Paid Seller Expenses to the Purchaser. Finally, the Debtors believe that without reaching some accommodation with the Purchaser regarding the scope of higher and better offers, the Debtors might have lost the bid from the Purchaser.

#### **TERMINATION OF THE DEALERSHIP AGREEMENTS**

42. As discussed above, a condition precedent to Closing is the termination of the Dealership Agreements. Accordingly, pursuant to Section 363 of the Bankruptcy Code, the Debtors seek the Court's permission to terminate the Dealership Agreements in order to allow them to be terminated.

#### **ADVERTISING THE SALE**

43. A copy of this Sale Motion, including the attached Exhibit "A" or notice thereof, is being sent to: (i) the parties listed in paragraph 27 above; and (ii) all creditors and parties in interest. Additionally, the Sellers will serve a copy of this Sale Motion on any party that has expressed an interest in acquiring the Assets. The Sellers will file an affidavit of mailing on or before the date of the Sale Hearing.

44. The Sellers will use reasonable diligence to advertise the sale and to seek competitive bids. The Sellers specifically propose to advertise the sale once each in the following publications:

- a. *The Lakeland Ledger*;
- b. *St. Petersburg Times*;
- c. *The Tampa Tribune*;
- d. *Automotive News*; and
- e. Any other publication requested by the Court or reasonably requested by a party in interest.

45. Bankruptcy Rule 6004(g) provides that an “order authorizing the use, sale, or lease of property....is stayed until the expiration of 10 days after entry of the order, unless the court orders otherwise.” Accordingly, the Debtors request that any order ultimately authorizing the consummation of the transactions contemplated hereunder be effective immediately by providing that the 10-day stay is not applicable. **Any objection to the relief requested in this paragraph must be filed with the Court and served on the parties listed in Paragraph 27 above so as to be actually received by no later than the Bid Deadline.**

WHEREFORE, the Sellers respectfully request that this Court enter its order: scheduling a preliminary hearing to consider approval of the procedures set forth in Paragraph 27, including the Break-Up Fee (subject to final approval by the Court) at the Court's earliest convenience; approving the procedures established in this Sale Motion; scheduling a final hearing to consider approval of the sale to the highest and best bidder(s); granting the Sale Motion; and providing for such other and further relief as is just.

DATED: May 1, 2009

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing Debtors' Motion For Order (A) Authorizing Sale Of Substantially All Of Their Assets Free And Clear Of Liens, Claims And Encumbrances, (B) Approving Bidding And Sale Procedures; (C) Approving Amount Of Minimum Overbid; (D) Approving Break-Up Fee; and (E) Approving Form And Manner Of Notice; and (F) Authorizing Termination of Dealership Agreements Pursuant to 11 U.S.C. §363 has been furnished via the Court's CM/ECF System or U.S. MAIL or in the manner indicated on this 1<sup>st</sup> day of May, 2009 to:

Office of the United States Trustee

All creditors and parties in interest

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