

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re: DECISION & ORDER
LEAST CHEVROLET INC., CASE NO. 01-24200
Debtor.

In re:
LEAST FORD INC., CASE NO. 01-24206
Debtor.

In re:
LEAST CHRYSLER PLYMOUTH DODGE, INC.
d/b/a LEAST CHRYSLER DODGE JEEP, CASE NO. 01-24207
Debtor.

BACKGROUND

On November 2, 2001, Least Chevrolet, Inc. ("Least Chevrolet"), which operates a Chevrolet franchise in Livonia, New York, filed a petition initiating a Chapter 11 case.

On November 5, 2001, Least Ford, Inc. ("Least Ford"), which operates a Ford and Mercury franchise in Geneseo, New York, filed a petition initiating a Chapter 11 case.

On November 5, 2001, Least Chrysler Plymouth Dodge, Inc. d/b/a Least Chrysler Dodge Jeep ("Least Chrysler"), which

BK. 01-24200
 01-24206
 01-24207

operates a Chrysler, Dodge and Jeep franchise in Geneseo, New York, filed a petition initiating a Chapter 11 case.

On the dates of the filing of their respective petitions, each of the Debtors filed a Chapter 11 Plan, without a Disclosure Statement, which essentially provided for the dealerships to continue to operate until such time as they could be sold to third party buyers.

Least Chevrolet has acknowledged that General Motors Acceptance Corporation ("GMAC") holds a blanket security interest and lien on all of its tangible personal property assets and on its intangible dealership franchise (the "Chevrolet Franchise"). GMAC has alleged, and Least Chevrolet has not denied, that prior to the filing of its bankruptcy petition, Least Chevrolet had sold vehicles "out of trust" in that it had sold vehicles without paying GMAC the floor plan indebtedness due against that particular vehicle. In addition, GMAC has alleged that Least Chevrolet had provided it with falsified reports concerning leased and demonstration vehicles.

Least Ford and Least Chrysler have each acknowledged that Ford Motor Credit Company ("Ford Credit") holds a blanket security interest and lien on all of their tangible personal

BK. 01-24200
 01-24206
 01-24207

property assets and on their respective intangible dealership franchises (the "Ford Franchise" and the "Chrysler Franchise"). Ford Credit has alleged, and the respective Debtors have not denied, that prior to the filing of their petitions, Least Ford and Least Chrysler had sold vehicles "out of trust."

On November 9, 2001, each of the Debtors filed an emergency motion for leave to pay: (1) pre-petition payroll due November 8, 2001; and (2) the amounts required to purchase needed parts inventories, from the proceeds of the post-petition sales of vehicles, which proceeds they agreed were cash collateral, as defined in Section 363, in which GMAC or Ford Credit had an interest. On November 9, 2001, the Court, after conducting an emergency hearing, authorized the payment of the pre-petition payroll and the required parts from the retail sales of vehicles, because GMAC and Ford Credit, without waiving any of their rights with respect to any further use of cash collateral, essentially consented. GMAC and Ford Credit were concerned that the innocent employees would otherwise be unreasonably impacted by the respective Debtors' current financial difficulties.

On November 8, 2001, Least Chevrolet filed an emergency motion for approval to use cash collateral under Section 363

BK. 01-24200
 01-24206
 01-24207

(the "Least Chevrolet Cash Collateral Motion"). The Least Chevrolet Cash Collateral Motion alleged that: (1) GMAC was owed \$331,822.00; and (2) the Debtors' tangible personal property assets securing the GMAC indebtedness were, as follows:

a.	Vehicles new and used (at invoice for new and Blackbook wholesale for used)	\$457,435.83
b.	Parts Inventory	\$ 55,000.00
c.	Customer Accounts Receivable	\$ 83,688.56
d.	Factory Account Receivables	\$ 8,900.00 (Note)
e.	Equipment	<u>\$ 40,000.00</u>
	Total	\$636,124.39

The Least Chevrolet Motion further alleged and asserted that: (1) the Chevrolet Franchise had a minimum value of \$500,000.00; (2) GMAC specifically did not consent to the use of the cash collateral; (3) the Debtors should be authorized to sell new and used vehicles at retail, pay to GMAC the invoice cost for new vehicles or the Blackbook wholesale value for used vehicles, and retain any excess proceeds to fund the operation of the dealership for a reasonable period of time in order to sell the dealership, including the Chevrolet Franchise; and (4) GMAC was adequately protected because: (a) it was oversecured

BK. 01-24200
 01-24206
 01-24207

and had an "equity cushion" when the value of the Debtor's tangible personal property assets plus the value of its franchise was compared against the outstanding indebtedness due to GMAC; and/or (b) GMAC was adequately protected with respect to each individual sale of a new or used motor vehicle at retail, since all that the Debtor was required to pay GMAC in order to provide it with adequate protection was the value of the vehicle collateral, which was the invoice cost for new vehicles and the Blackbook wholesale cost for used vehicles, values which were equal to or greater than what GMAC could realize if it repossessed and sold the vehicle.

On November 8, 2001, Least Ford filed an emergency motion for approval to use cash collateral under Section 363 (the "Least Ford Cash Collateral Motion"). The Least Ford Cash Collateral Motion alleged that: (1) Ford Credit was owed \$841,211.56; and (2) the Debtor's tangible personal property assets securing the Ford Credit indebtedness were, as follows:

- | | | |
|----|---|--------------|
| a. | Vehicles new and used
(at invoice for new and
Blackbook wholesale for used) | \$ 67,800.00 |
| b. | Parts Inventory | \$350,000.00 |
| c. | Customer Accounts Receivable | \$ 67,381.80 |

BK. 01-24200
 01-24206
 01-24207

d. Factory Account Receivables	\$ NONE
e. Equipment	\$ 50,000.00
f. Furniture and Fixtures	<u>\$ 15,000.00</u>
Total	\$550,181.80

The Least Ford Motion further alleged and asserted that: (1) the Ford Franchise had a minimum value of \$500,000.00; (2) Ford Credit specifically did not consent to the use of cash collateral; (3) the Debtors should be authorized to sell new and used vehicles at retail, pay to Ford Credit the invoice cost for new vehicles or the Blackbook wholesale value for used vehicles, and retain any excess proceeds to fund the operation of the dealership for reasonable period of time in order to sell the dealership, including the Ford Franchise; and (4) Ford Credit was adequately protected because: (a) it was oversecured and had an "equity cushion" when the value of the Debtor's tangible personal property assets plus the value of its franchise was compared against the outstanding indebtedness due to Ford Credit; and/or (b) Ford Credit was adequately protected with respect to each individual sale of a new or used motor vehicle at retail, since all that the Debtor was required to pay Ford Credit in order to provide it with adequate protection was the

BK. 01-24200
 01-24206
 01-24207

value of the vehicle collateral, which was the invoice cost for new vehicles and the Blackbook wholesale value for used vehicles, values which were equal to or greater than what Ford Credit could realize if it repossessed and sold the vehicle.

On November 8, 2001, Least Chrysler filed an emergency motion for approval to use cash collateral under Section 363 (the "Least Chrysler Cash Collateral Motion"). The Least Chrysler Cash Collateral Motion alleged that: (1) Ford Credit was owed \$181,418.93; and (2) the Debtor's tangible personal property assets securing the Ford Credit indebtedness were, as follows:

a. Vehicles new and used (at invoice for new and Blackbook wholesale for used)	\$139,000.00
b. Parts Inventory	\$100,000.00
c. Customer Accounts Receivable	\$ 16,186.10
d. Factory Account Receivables	\$ 12,000.00
e. Equipment	\$ 70,000.00
f. Furniture and Fixtures	<u>\$ 15,000.00</u>
Total	\$352,186.10

The Least Chrysler Motion further alleged and asserted that:
(1) the Chrysler Franchise had a minimum value of \$500,000.00;
(2) Ford Credit specifically did not consent to the use of cash

BK. 01-24200
 01-24206
 01-24207

collateral; (3) the Debtors should be authorized to sell new and used vehicles at retail, pay to Ford Credit the invoice cost for new vehicles or the Blackbook wholesale value for used vehicles, and retain any excess proceeds to fund the operation of the dealership for reasonable period of time in order to sell the dealership, including the Chrysler Franchise; and (4) Ford Credit was adequately protected because: (a) it was oversecured and had an "equity cushion" when the value of the Debtor's tangible personal property assets plus the value of its franchise was compared against the outstanding indebtedness due to Ford Credit; and/or (b) Ford Credit was adequately protected with respect to each individual sale of a new or used motor vehicle at retail, since all that the Debtor was required to pay Ford Credit in order to provide it with adequate protection was the value of the vehicle collateral, which was the invoice cost for new vehicles and the Blackbook wholesale value for used vehicles, values which were equal to or greater than what Ford Credit could realize if it repossessed and sold the vehicle.

GMAC interposed Opposition to the Least Chevrolet Cash Collateral Motion which alleged that: (1) at the time of the filing of the petition, Least Chevrolet owed GMAC \$931,331.59,

BK. 01-24200
 01-24206
 01-24207

\$327,703.07 of which represented amounts due in connection with "out of trust" sales; (2) the value of the tangible personal property collateral securing its indebtedness was less than that alleged by Least Chevrolet, however, even using the Debtor's asset values, GMAC was undersecured by the Debtor's tangible personal property assets; (3) even if the Chevrolet Franchise was worth as much as \$150,000.00, the maximum value GMAC believed it could possibly be worth, there was no "equity cushion" which would provide adequate protection for the Debtor's use of cash collateral, since there was still a deficiency of \$145,207.20 [$\$931,331.59 - (\$636,124.39 + \$150,000.00) = (\$145,207.20)$]; (4) GMAC was entitled to all of the proceeds of the sale of any of its collateral, including the full proceeds of sales of vehicles at retail; and (5) a payment to it in connection with any retail sale of a vehicle in an amount equal to the invoice cost for a new vehicle or the Blackbook wholesale value for a used vehicle: (a) was not permissible under Section 363; and (b) would not provide GMAC with adequate protection.

Ford Credit interposed Opposition to the Least Ford Cash Collateral Motion which alleged that: (1) at the time of the

BK. 01-24200
 01-24206
 01-24207

filing of the petition, Least Ford owed Ford Credit \$633,642.80; (2) even using the Debtor's asset values, Ford Credit was undersecured by the Debtor's tangible personal property assets ($\$633,642.80 - \$550,181.10 = \$83,461.70$); (3) Ford Credit was entitled to all of the proceeds of the sale of any of its collateral, including the full proceeds of sales of vehicles at retail; and (4) a payment to it in connection with any retail sale of a vehicle in an amount equal to the invoice cost for a new vehicle or the Blackbook wholesale value for a used vehicle: (a) was not permissible under Section 363; and (b) would not provide Ford Credit with adequate protection.

Ford Credit interposed Opposition to the Least Chrysler Cash Collateral Motion which alleged that: (1) at the time of the filing of the petition, Least Chrysler owed Ford Credit \$1,271,009.00; (2) even using the Debtor's asset values, Ford Credit was undersecured by the Debtor's tangible personal property assets ($\$1,271,009.00 - \$352,186.10 = \$918,822.90$); (3) Ford Credit was entitled to all of the proceeds of the sale of any of its collateral, including the full proceeds of sales of vehicles at retail; and (4) a payment to it in connection with any retail sale of a vehicle in an amount equal to the invoice

BK. 01-24200
 01-24206
 01-24207

cost for a new vehicle or the Blackbook wholesale value for a used vehicle: (a) was not permissible under Section 363; and (b) would not provide Ford Credit with adequate protection.

On November 14, 2001, the Court conducted an emergency interim hearing (the "Hearing"). At the conclusion of the Hearing, the Court determined, in its discretion, that it would not allow any of the respective Debtors to use the cash collateral of GMAC or Ford Credit in the operation of its business without the consent of GMAC or Ford Credit. This was without prejudice to the respective Debtors making additional and better supported requests for the use of cash collateral at any final hearing. At the conclusion of the Hearing the Court indicated that it would issue a written Decision & Order or place a Decision on the record by no later than 3:00 p.m. on Friday, November 16, 2001, so that the respective Debtors, if they wished to appeal the Decision to the United States District Court for the Western District of New York, would have a concise statement of the Court's ruling and analysis.¹

¹ The Hearing concluded after 7:00 p.m. on November 14, 2001. On November 16, 2001, the Court advised the parties that it would e-mail them a Decision & Order by the close of business. Because of the short time-frame between the conclusion of the hearing and November 16, 2001 and the Court's scheduled pretrial hearings and Chapter 13 confirmation hearings, this Decision & Order has set forth the Court's reasoning and analysis in detail. However,

BK. 01-24200
 01-24206
 01-24207

DISCUSSION

I. RELEVANT STATUTES

The respective Debtors' request to use cash collateral in which either GMAC or Ford Credit have an interest, requires the Court to address the interplay of three sections of the Bankruptcy Code, Sections 363, 361 and 506(a).

Section 363(a) defines "cash collateral" to include the proceeds, products, offspring, rents or profits of property of the estate, which in these cases would include all of the proceeds of the retail sales of motor vehicles owned by the respective Debtors at the time of the filing of their petitions, and covered by the liens of GMAC and Ford Credit.

Section 363(b)(1) provides that a debtor-in-possession, after notice and a hearing, may use, sell or lease property of the estate, other than in the ordinary course of business. In the cases at hand, the ordinary course of pre-petition business for the respective Debtors was to sell the vehicles covered by the liens of GMAC and Ford Credit and pay GMAC or Ford Credit the floor plan amounts due against that particular vehicle. Since the respective Debtors have not proposed to continue that

there has simply not been sufficient time to set out extensive legal citations.

BK. 01-24200
 01-24206
 01-24207

course of business post-petition, sales of motor vehicles for these Debtors are not even arguably in the ordinary course of business, so that for the Debtors to be able to sell vehicles without paying GMAC or Ford Credit an agreed amount, a Court Order is required.

Furthermore, Section 363(c)(2) provides that a debtor-in-possession may not use cash collateral unless either: (1) the entity that has an interest in such collateral consents; or (2) the Court, after notice and a hearing, authorizes the use in accordance with the provisions of this Section. In addition, Section 363(c)(4) provides that, in the absence of the consent of a secured creditor with an interest in the cash collateral or a Court order allowing the use of cash collateral, the debtor-in-possession shall segregate and account for any cash collateral.

In addition to the cash collateral provisions contained in Section 363, Section 363(f) also provides that the debtor-in-possession may sell property, whether in or other than in the ordinary course of business, free and clear of any interest in the property other than the interest of the estate, only if the entity with the other interest consents, or the other interest

BK. 01-24200
 01-24206
 01-24207

is a lien, and the price at which such property is to be sold is greater than the aggregate "value of all liens" on the property.

If a Court allows a debtor-in-possession to use cash collateral or sell property subject to a security interest over the objection of the secured creditor, it must insure that the secured creditor which has an interest in the cash collateral or property to be sold, in this case GMAC or Ford Credit, has been provided adequate protection, as required by Section 361, which provides as follows:

When adequate protection is required under section 362, 363, or 364 of this title of an interest of an entity in property, such adequate protection may be provided by -

(1) requiring the trustee to make a cash payment or periodic cash payments to such entity, to the extent that the stay under section 362 of this title, use, sale, or lease under section 363 of this title, or any grant of a lien under section 364 of this title results in a decrease in the value of such entity's interest in such property;

(2) providing to such entity an additional or replacement lien to the extent that such stay, use, sale, lease, or grant results in a decrease in the value of such entity's interest in such property; or

(3) granting such other relief, other than entitling such entity to compensation allowable under section 503(b)(1) of this

BK. 01-24200
 01-24206
 01-24207

title as an administrative expense, as will result in the realization by such entity of the indubitable equivalent of such entity's interest in such property.

11 U.S.C. § 361 (2000).

Also relevant is Section 506(a) which reads as follows:

a) An allowed claim of a creditor secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of this title, is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, or to the extent of the amount subject to setoff, as the case may be, and is an unsecured claim to the extent that the value of such creditor's interest or the amount so subject to setoff 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) (2000).

As set forth in Section 506(a), value is always to be determined by the Court in light of the purpose of the valuation and of the proposed disposition or use of the property being valued.

BK. 01-24200
 01-24206
 01-24207

II. SUMMARY OF DECISION.

Section 363(c)(3) provides that in a preliminary hearing such as the Hearing conducted on November 14, 2001, the Court may authorize the use of cash collateral only if there is a reasonable likelihood that the debtor-in-possession will prevail at a final hearing.

Based upon all of the evidence presented in the parties' respective submissions, and the evidence and testimony presented at the Hearing, the Court cannot conclude that there is a reasonable likelihood that the respective Debtors could prevail at a final hearing to demonstrate their entitlement to use any of the proceeds of the sales of motor vehicles at retail covered by the liens of GMAC or Ford Credit.

Although the respective Debtors' dealership franchises may have value under some circumstances: (1) the Debtors' consultant and expert, David Costa ("Costa"), principal of DMC Consultants, did not provide any credible evidence to support his opinion of value, and, therefore, the Court cannot make a finding that the dealership franchises have any value; and (2) without the dealership franchises having significant value, it is not clear from the evidence that any of the Debtors have tangible personal

BK. 01-24200
 01-24206
 01-24207

property assets with a value in excess of the outstanding secured debt against them held by either GMAC or Ford Credit.

In the case of each dealership, there is no agreement among the parties as to the full nature, extent and value of the various items of tangible personal property, the secured creditors have not had an opportunity to physically inspect and appraise those assets, and there still appears to be some dispute as to the amounts owed to GMAC and Ford Credit from the respective Debtors.

Therefore, the Court cannot conclude from the evidence presented that GMAC or Ford Credit have an "equity cushion" which would provide them with the required adequate protection to allow any of the Debtors to sell vehicles at retail and pay over to GMAC or Ford Credit less than all of the proceeds received.

Furthermore, since the Court believes that Section 363(f) prevents it from authorizing the respective Debtors to sell vehicles at retail without paying to GMAC or Ford Credit all of the sale proceeds, because: (1) those entities have not consented to such sales; and (2) since the face amount and, therefore, the value of the liens of GMAC and Ford Credit on

BK. 01-24200
 01-24206
 01-24207

each vehicle are in amounts greater than the full retail proceeds to be realized on each sale, Section 363(f)(3) cannot be complied with unless all of the proceeds are paid to the secured creditor. Section 363(f)(3) requires that when an interest is a lien, the price at which such property is to be sold must be greater than the aggregate value of all liens on the property. In interpreting Section 363(f)(3), the Court believes that the value of the liens on the property is the face amount of the liens if the liens exceed the sale proceeds.

III. EQUITY CUSHION.

A. Dealership Franchises.

At the Hearing, Costa confirmed that: (1) each of the respective Debtors had sold vehicles "out of trust" pre-petition; (2) each of the respective Debtors was unprofitable; (3) each of the respective Debtors was undercapitalized; and (4) each of the respective dealerships had failed to meet their "Planning Potential," a theoretical number of new cars that the manufacturer believes the dealership can sell if it is properly capitalized.

In testifying as to what he believed were the values of the respective Debtors' dealership franchises, Costa: (1) used a

BK. 01-24200
 01-24206
 01-24207

formula (the "Costa Formula") of (a) Planning Potential times (b) a standard capitalization rate of \$1,500.00 times (c) a multiplier of three and one-half ($3 \frac{1}{2}$) for the Chevrolet Franchise, three and one-half ($3 \frac{1}{2}$) for the Ford Franchise, and four (4) for the Chrysler Franchise; (2) concluded, using this Formula, that the Chevrolet Franchise owned by Least Chevrolet had a value of \$1,102,500.00, the Ford Franchise owned by Least Ford had a value of \$1,365,000.00 and the Chrysler Franchise owned by Least Chrysler had a value of \$870,000.00; and (3) used half of the foregoing franchise values to conclude that the actual value of the franchises were \$500,000.00 for the Chevrolet Franchise, \$650,000.00 for the Ford Franchise and \$440,000.00 for the Chrysler Franchise.

When Costa was asked how he could verify these multiples, his only response was either everyone knows them, or you can check with various Dealer associations or the manufacturers. Costa could not provide the Court with any independent verification of these multiples used in his Formula.

In addition, Costa could not provide the Court or the secured creditors with the verifiable details of any comparable dealership sales from which the Court could confirm the

BK. 01-24200
 01-24206
 01-24207

applicability of his Formula or the multiples he used. Details of prior sales of similar dealerships, perhaps with similar financial profiles and in Chapter 11, would allow the Court to compare the sold dealership's balance sheet at the time of sale with the relevant purchase and sale documents to verify the applicability of the Costa Formula.

Gary Least, the principal of the respective Debtors, also testified as to his purchase of the Least Chevrolet dealership in 1998. He provided the Court with a copy of a Buy/Sell Agreement, which did not include all of the payments he testified he was making to the prior owner for the purchase of his stock. In addition, Gary Least was unable to provide the Court with a copy of the balance sheet for the dealership at the time of his acquisition. Therefore, once again, the Court could not determine, in connection with the acquisition of the Chevrolet dealership in 1998, whether the Costa Formula would have been applicable. Furthermore, Gary Least testified that he did not know whether the dealership was profitable at the time of his acquisition.

It has been the Court's experience that unless manufacturers cooperate in the sale of a dealership and its franchise, the

BK. 01-24200
 01-24206
 01-24207

franchise had very little independent value to the dealer. Furthermore, it has been the Court's experience that when dealerships are successfully sold in Chapter 11, the manufacturer, floor plan lender, and dealer are usually working in concert to achieve that result.

Although the respective Debtors' franchises might under some circumstances have value, the Court cannot conclude from the testimony of Costa and Gary Least that the dealership franchises in question have any value whatsoever under current facts and circumstances.² Therefore, no value can be added to the value of the respective Debtors' tangible personal property assets to provide GMAC or Ford Credit with an "equity cushion," and, therefore, adequate protection for the sale of vehicles at retail and the payment to them of less than all of sale proceeds.

B. Value of Tangible Personal Property Assets.

At the Hearing, Costa provided the Court with a listing of corporate assets and testimony in connection with the list that indicated that the tangible personal property of Least Ford had

² I acknowledge that the Opposition of GMAC indicates the Chevrolet Franchise may have a value of as much as \$150,000.00. However, that still does not provide GMAC with an "equity cushion."

BK. 01-24200
 01-24206
 01-24207

a value of \$919,012.00, a value of \$368,831.00 higher than the value set forth in the Least Ford Cash Collateral Motion. This value included in excess of \$110,000.00 more of non-vehicle inventory value and \$53,000.00 more of furniture, fixtures and equipment value, as well as a \$150,000.00 value assigned to a undetailed "other" asset.

Even if the Ford Credit debt on the Least Ford assets was only the \$683,000.00 alleged by Least Ford at the time of the Hearing, there is no "equity cushion" when the value is compared against the asset values set forth in the Least Ford Cash Collateral Motion of the \$550,181.80.

Since the Debtor did not advise Ford Credit or the Court prior to the Hearing that it believed that its tangible personal property assets were of a value greater than \$550,181.80, no opportunity was requested by Ford Credit or granted, for it to do an inspection and review of the Least Ford, tangible personal property assets, so that Ford Credit could determine what it believed to be the value of those assets.

The testimony of Costa at the Hearing was not sufficiently credible as to the value of the tangible personal property assets of Least Ford, so that the Court can conclude that they

BK. 01-24200
 01-24206
 01-24207

are of a value, for purposes of the use of cash collateral and adequate protection, in excess of the outstanding indebtedness due to Ford Credit, whether it is the \$683,000.00 as alleged by Least Ford at the Hearing, the \$841,211.56 alleged by the Debtor in its Cash Collateral Motion, or the \$633,642.80 alleged by Ford Credit in its Opposition to the Least Ford Cash Collateral Motion.

The value of the tangible personal property assets of Least Chevrolet and Least Chrysler, by all parties' agreement at the Hearing, does not exceed the indebtedness due to GMAC and Ford Credit in connection with those dealerships.

C. Conclusion.

There was insufficient evidence provided to the Court at the Hearing to enable it to conclude that the values of the assets in which GMAC and Ford Credit have security interests in exceed the indebtedness owed to them from the respective Debtor dealerships. Therefore, there are no "equity cushions" that would enable any of the respective dealers to sell motor vehicles at retail and pay over to GMAC or Ford Credit less than all of the cash collateral proceeds of the retail sales. These secured creditors would have no adequate protection for the loss

BK. 01-24200
 01-24206
 01-24207

of any of their collateral, which includes, as cash collateral, all of the proceeds of the sale of the vehicles at retail.

IV. SECTION 363(f) and SECTION 506(a).

The respective Debtors assert that they can sell new and used vehicles at retail and only pay over to GMAC and Ford Credit the realizable value of those vehicles, which the Debtors assert are the invoice costs for new vehicles and Blackbook wholesale value for used vehicles. This assertion appears to be based upon the respective Debtors' belief that Section 363(f) only requires that a secured creditor receive the value of the property being sold, rather than the value of its lien, which would be all of the sale proceeds in the case where the indebtedness secured by the lien exceeds the total proceeds from the sale.

I acknowledge that there is some difference of opinion among the Courts as to the proper interplay of Sections 506(a), 361 and 363(f) and the overall interpretation of Section 363(f)(3) as it applies to sales of estate property when there is a secured creditor who does not consent to the sale and has an indebtedness secured by a lien on the property to be sold which is in an amount greater than the aggregate sale proceeds, so

BK. 01-24200
 01-24206
 01-24207

that the secured creditor's indebtedness cannot be paid in full from the sale.³

However, I believe that the analysis of United States Bankruptcy Judge Alexander L. Paskay in *In re Feinstein Family Partnership*, 247 B.R. 502 (Bankr. M.D.Fla. 2000) ("*Feinstein*") is the correct analysis and interpretation. In *Feinstein* Judge Paskay cited to the analysis in the Decision of the United States Court of Appeals for the Seventh Circuit in *Matter of Riverside Inv. Partnership*, 674 F.2d. 634 (7th Cir. 1982) ("*Riverside*"), which analyzed the legislative history to Section 363(f)(3) and concluded that it was clear that Congress intended Section 363(f)(3) to protect the amount of the secured debt and not the economic value of the lien. Furthermore, in *Feinstein* Judge Paskay concluded that the 1984 Amendments to the Bankruptcy Code further demonstrated this interpretation, because the language of the Subsection was amended to allow sales of free and clear liens only if the proceeds of the sale

³ The Debtors in a last minute submission have cited to *In re George Ruggiere Chrysler-Plymouth*, 727 F.2d 1017 (11th Cir. 1984) ("*Ruggiere*"). Although *Ruggiere*, decided before the 1984 Amendments to the Bankruptcy Code, supports the Debtors' position, it does not address the requirements of Section 363(f)(3). If the Debtors are not authorized to sell the new and used vehicles and retain any of the proceeds because of the requirements of Section 363(f)(3), the question of adequate protection is moot.

BK. 01-24200
 01-24206
 01-24207

exceeded the value of all liens on the property, rather than the previous version which allowed such a sale if the sale proceeds exceeded the value of the interests of the secured creditors.

Judge Paskay in *Feinstein* further went on to discuss the interplay between Section 506 and Section 363(f)(3) and concluded that Section 506 cannot be relied upon to justify the sale of encumbered property without complying with the requirements of Section 363(f)(3), which requires the full satisfaction of all valid liens encumbering the property.

Adopting Judge Paskay's analysis and reasoning, I conclude that the respective Debtors' argument that all it is required to do to meet the provisions of Section 363(f)(3) is to pay GMAC or Ford Credit the invoice cost or Blackbook wholesale value is misplaced. In this Court's view, in order to comply with the provisions of Section 363(f)(3), until all of the secured indebtedness of GMAC and Ford Credit is paid in full, or it is sufficiently demonstrated to the Court that they are oversecured, all of the sale proceeds of the disposition of any of their collateral must be paid over to them, unless they consent to any particular sale on different terms.

BK. 01-24200
 01-24206
 01-24207

CONCLUSION

The respective Debtors' request to be able to sell new and used vehicles at retail without paying all of the proceeds of the sales to GMAC and Ford Credit until their secured indebtedness is paid in full or it is sufficiently demonstrated to the Court that they are oversecured, is denied. This does not prevent GMAC or Ford Credit from consenting to the Debtors' sale of any particular vehicle on terms acceptable to them, which might include the receipt by them of less than all of the sale proceeds.

The emergency request of the respective Debtors to be allowed to use cash collateral in which GMAC or Ford Credit has an interest, including the proceeds of the sale of new and used vehicles which are subject to the liens of GMAC and Ford Credit is denied. The respective Debtors have not demonstrated at the Hearing, which was an interim hearing, that there is an "equity cushion" available to either GMAC or Ford Credit in any of the dealerships, which would be required in order to provide the secured creditors with adequate protection. This determination is without prejudice to the respective Debtors, or any one of them, demonstrating to the satisfaction of the Court for the

BK. 01-24200
 01-24206
 01-24207

purposes of the Bankruptcy Code provisions regarding cash collateral, that its assets, either its tangible personal property assets alone or in combination with a Court-determined value for its dealership franchise, exceeds the secured indebtedness of that dealership to GMAC or Ford Credit.

IT IS SO ORDERED.

_____/s/_____
HON. JOHN C. NINFO, II
CHIEF U.S. BANKRUPTCY JUDGE

Dated: November 16, 2001