UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

Hearing Date: October 21, 2011, 9:45 a.m.

In re: MOTORS LIQUIDATION COMPANY, *et al*., f/k/a General Motors Corp., *et al.*, Debtors. OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF MOTORS LIQUIDATION COMPANY, *et al.*, Plaintiff, - against - UNITED STATES DEPARTMENT OF THE TREASURY, EXPORT DEVELOPMENT CANADA, Defendants.	**No. 09-50026 (REG) (Ch. 11)** **Adv. P. No. 11-09406 (REG)**

GOVERNMENT'S MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF GOVERNMENT'S CROSS-MOTION FOR SUMMARY JUDGMENT

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Preliminary Statement

The United States of America, by its attorney Preet Bharara, United States Attorney for the Southern District of New York, on behalf of the United States of America, including but not limited to the United States Department of the Treasury ("**Treasury**") as debtor-in-possession ("**DIP**") lender, respectfully submits this memorandum of law in opposition to the motion for summary judgment filed by the Official Committee of Unsecured Creditors (the "**Committee**") in the above-referenced adversary proceeding, and in support of Treasury's cross-motion for summary judgment.

The Committee is not entitled to summary judgment, first because, as Treasury has shown in its pending motion to dismiss, the Complaint should be dismissed pursuant to both Rule 12(b)(1) of the Federal Rules of Civil Procedure (and Bankruptcy Rule 7012), for failure to present a ripe and redressable case or controversy, and Rule 12(b)(6), because the very orders on which the Committee relies grant Treasury and its co-DIP lender Export Development Canada ("**EDC**") an allowed super-priority administrative expense claim for "all principal, accrued interest, costs, fees, expenses and all other amounts . . . due under the DIP Credit Facility."

Moreover, were the Court to deny Treasury's motion to dismiss, it nevertheless should deny the Committee's motion for summary judgment, and grant summary judgment for Treasury. While Treasury agrees that there is no genuine dispute of material fact, in light of those facts, the law authorizes the DIP Lenders to receive from the estate full payment of their $1.175 billion administrative claim from any available estate assets, including any eventual proceeds of the Avoidance Action. The Committee's motion impermissibly reads the DIP Lenders' super-priority administrative expense claims out of the negotiated governing agreements and orders. Yet those administrative expense claims were an integral and critical part of the parties' agreement, and under basic principles of contract interpretation they must be

given effect. Only Treasury's reading does so; summary judgment therefore should be entered in favor of the defendant DIP Lenders.

The applicable orders and deal documents fully support the DIP Lenders' position. Treasury and EDC made an unprecedented commitment to fund up to $1.175 billion of this bankruptcy's administrative costs to achieve important public purposes, but only on the express and critical understanding that any funds available after the estate's administration was complete would be used first to repay the DIP Lenders before estate funds not otherwise earmarked (as were the Committee's equity interests) could be released to other creditors. Consistent with this understanding, the confirmed Plan in this case provides that the DIP Lenders' super-priority administrative claim is to be paid out of any available estate funds. And, also consistent with this understanding, the Committee's own complaint in the Avoidance Action, titled *Official Committee of Unsecured Creditors of Motors Liquidation Co. v. JPMorgan Chase Bank, N.A. at al.*, Adv. P. No. 09-00504 (REG)), seeks to recover funds for "the estates," not merely for the Committee's constituents or any subset of creditors.

Tellingly, nothing in any relevant order or agreement excludes the potential Avoidance Action proceeds from the estate assets available to pay the DIP Lenders' super-priority administrative claim. The lack of such an exclusion is especially striking because the parties agreed upon just such an exclusion for another purpose, namely, to ensure payment of certain professional fees and expenses through a "Carve-Out" that expressly rendered funds for such fees not only excluded from the DIP Lenders' collateral, but also excluded from assets that could be used to repay the DIP Lenders' super-priority claim. This difference removes any possible doubt that, had the parties agreed to exclude Avoidance Action proceeds from the universe of

estate assets that could be used to repay the DIP Lenders (which they did not), the parties knew how to say so, and would have done so. But they did not.

Treasury and EDC financing has facilitated an extraordinarily successful outcome of the GM bankruptcy, which has already permitted unsecured creditors to recover vastly more than they would have absent the DIP Lenders' agreement to finance these cases while bearing risks that no commercial lender would have accepted. The DIP Lenders undisputedly did agree that the Committee had standing to litigate the Avoidance Action, and that the Avoidance Action was not part of the DIP Lenders' collateral. But the parties' agreements, the Bankruptcy Code and the Committee's own complaint all make clear that estate funds will include any eventual recovery from the Avoidance Action, and there is nothing in any agreement or order excluding use of the estate's recovery from the Avoidance Action to repay the DIP Lenders' super-priority administrative expense claim. To the extent that recovery, coupled with any additional available funds, exceeds the amount then due administrative claimants including the DIP Lenders, then unsecured creditors will recover the balance. That outcome reflects the actual agreement reached by the parties, it is the only possible outcome that gives full accord to all provisions in the DIP Loan orders and agreements and is consistent with the Bankruptcy Code, and it is the only equitable result, especially in light of taxpayers' enormous financial contributions toward achieving the strong results that already have been realized in the case (and their funding of the Avoidance Action litigation itself). For these reasons, the Court should deny the Committee's motion, and, if the complaint is not dismissed, should grant summary judgment in favor of the DIP Lenders.

STATEMENT OF FACTS

The parties agree that this case is governed by a small set of agreements and orders, four of which are annexed to the Declaration of Thomas Moers Mayer in support of the Committee's motion. Salient provisions are as follows.

A. Orders (i) Authorizing Debtor-in-Possessing Financing, (ii) Granting Super-Priority Administrative Expense Claims to the DIP Lenders, (iii) Defining the DIP Lenders' Collateral and Recourse, and (iv) Excluding Assets Not at Issue Here From Funds Available to Repay the DIP Lenders

On June 25, 2009, the Bankruptcy Court entered the "Final Order Pursuant to Bankruptcy Code Sections 105(a), 361, 362, 363, 364 and 507 and Bankruptcy Rules 2002, 4001 and 6004 (A) Approving a DIP Credit Facility and Authorizing the Debtors to Obtain Post-Petition Financing Pursuant Thereto, (B) Granting Related Liens and Super-Priority Status, (C) Authorizing the Use of Cash Collateral and (D) Granting Adequate Protection to Certain Pre-Petition Secured Parties" (the "**Final DIP Order**") [Dkt. No. 2529].

Under the Final DIP Order, Treasury and EDC, as lenders (together, the "**DIP Lenders**"), were granted "an allowed super-priority administrative expense claim . . . for all loans, reimbursement obligations and any other indebtedness or obligations, contingent or absolute, which may now or from time to time be owing by any of the Debtors to the DIP Lenders under the DIP Credit Facility." Final DIP Order ¶ 5 at 14. The DIP Credit Facility contemplated by the Final DIP Order was in an amount up to $950 million. *See* Final DIP Order at 15 ¶ 5.

Also pursuant to the Final DIP Order, the Court granted the Committee the authority and standing to investigate and bring actions challenging the senior secured liens of certain lenders, including JPMorgan Chase Bank, N.A. (the "**Prepetition Term Lenders**"), under the Prepetition Term Loan Agreement, pursuant to which the Prepetition Term Lenders received a $1.5 billion post-petition payment. *See* Final DIP Order ¶ 19(d) ("The Committee shall have automatic

standing and authority to both investigate the Reserved Claims and bring actions based upon the Reserved Claims against the Prepetition Senior Facilities Secured Parties."). This investigation ultimately led to initiation of the Avoidance Action.

On July 5, 2009, the Court entered the "Order Pursuant to Bankruptcy Code Sections 105(a), 361, 362, 363, 364 and 507 and Bankruptcy Rules 2002, 4001 and 6004 (A) Approving Amendment to DIP Credit Facility to Provide for Debtors' Post-Petition Wind-Down Financing dated July 5, 2009" (the "**Wind-Down Order**") [Dkt. No. 2969], which authorized execution of the $1,175,000,000 Amended and Restated Secured Superpriority Debtor-in-Possession Credit Agreement (the "**Amended DIP Facility**"), by and among the Debtors and the DIP Lenders.

The Wind-Down Order ratifies the DIP Lenders' "allowed super-priority administrative expense claim," which is granted in the Final DIP Order. See Final DIP Order at 14 ¶ 5. The Wind-Down Order provides that "except as modified by the Amended DIP Facility or this Order, the Final DIP Order shall remain in full force and effect," and further provides that:

> [T]he claims of the DIP Lenders arising from the Amended DIP Facility . . . and all other obligations owing to the DIP Lenders under the DIP Credit Facility shall be and are accorded a super-priority administrative expense status in each of these cases, and, subject only to the Carve-Out, shall have priority over any and all other administrative expenses and unsecured claims arising in these cases. . . .

Wind-Down Order at 4.[1] The "Carve-Out" referenced in this provision refers only to the customary provision in debtor-in-possession financing providing funds necessary to cover certain

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[1] The Wind-Down Order also granted the DIP Lenders, "pursuant to section 364(c)(2) of the Bankruptcy Code, valid, perfected, first-priority security interests in and liens on all Property that is not subject to non-avoidable, valid and perfected liens in existence as of the Petition Date . . . ." (the "**First Priority DIP Lien**"), and "pursuant to section 364(c)(3) of the Bankruptcy Code, valid, perfected junior security interests in and liens on all Property that is subject to non-avoidable, valid and perfected liens in existence as of the Petition Date . . . ." (the "**Junior DIP**

fees and expenses of a debtor's estate in the event of a default, and does not purport to exclude from the DIP Lenders' super-priority administrative expense claim any ability to be repaid from any Avoidance Action proceeds. *See* Wind-Down Order at 1 n.2 (capitalized terms not defined in Wind-Down Order have meaning stated in Final DIP Order); Final DIP Order at 21, ¶ 16 (defining Carve-Out).

The Wind-Down Order also provides that:

> [T]he Loans (as defined in the Amended DIP Facility) shall be non-recourse to the Borrower and the Guarantors, such that the DIP Lenders' recourse under the Amended DIP Facility shall be only to the Collateral (as defined in the Amended DIP Facility) securing the DIP Loans, and nothing in this Order, the Final DIP Order, the DIP Credit Facility or the Amended DIP Facility shall, or shall be construed in any way, to authorize or permit the DIP Lenders to seek recourse against the New GM Equity Interests at any time. . . .

Wind-Down Order at 6. The Amended DIP Facility similarly states that "the Loans shall be non-recourse to the Borrower and the Guarantors and recourse only to the Collateral." Amended DIP Facility at 24. Despite these provisions concerning the extent of the DIP Lenders' liens and collateral, however, nothing in the Wind-Down Order, the Final DIP Order, the Amended DIP Facility or any other agreement or order barred or limited eventual use of any Avoidance Action proceeds to pay off the DIP Lenders' super-priority administrative expense claim. Unlike the limited provisions excluding any proceeds from the Avoidance Action from the DIP Lenders' collateral and liens, the Amended DIP Facility's professional fee "carve-out" applied both to the DIP Lenders' Super-Priority Administrative Expense Status and their liens. *See* Amended DIP Facility, § 3.24(b)(i) (making § 364(c)(2) liens subject to Carve-Out), § 3.24(b)(ii) (making §

Lien" and with the First-Priority DIP Lien, the "**DIP Liens**"). Final DIP Order at 3-5; Wind-Down Order at 4.

364(c)(3) liens subject to Carve-Out) and 3.24(c) (making super-priority claims subject to Carve-Out).

Similarly, the New GM equity interests that undisputedly were reserved for the sole benefit of unsecured creditors were explicitly excluded from the reach of the DIP Lenders' super-priority administrative expense claim. The Wind-Down Order provides, "nothing in this Order, the Final DIP Order, the DIP Credit Facility or the Amended DIP Facility shall, or shall be construed in any way, to authorize or permit the DIP Lenders to seek recourse against the New GM Equity Interests at any time." Wind-Down Order at 6. Those orders, of course, included and authorized the DIP Lenders' super-priority administrative expense claim. And the Amended DIP Facility that the Wind-Down Order approved specifies, "[e]ach [DIP] Lender hereby acknowledges and agrees that it, and each Affiliate of any Lender, (a) shall have no right, in any manner whatsoever, to the New GM Equity Interests or any proceeds received from the sale or distribution thereof in satisfaction or repayment of the Loans." Amended DIP Facility § 8.20. Again, no similar provision exists as to any proceeds of the Avoidance Action.

B. <u>The Term Loan Avoidance Action</u>

On July 31, 2009, the Committee commenced the Avoidance Action, which seeks to avoid as unperfected a lien asserted by the lenders under a "Prepetition Term Loan Agreement," and to recover more than $1.5 billion in payments made to the lenders under that agreement. The complaint in the Avoidance Action seeks the "recover[y] *for the Debtors' estates* [of] the proceeds or value of" the transfers at issue. Complaint, July 31, 2009, at ¶ 452 (emphasis added); *see generally id.* ¶¶ 438-464 (claims for relief seeking avoidance and/or return of funds to the estates); *see also id.* at 55-56 ("pray[ers] for judgment" seeking relief in form of avoidance and restoration of funds "for the benefit of the estates pursuant to 11 U.S.C. § 551").

Following discovery, cross-motions for summary judgment in the Avoidance Action are pending before the Court.

C. The Debtors' Plan and Confirmation

On March 18, 2011, the Debtors filed their Second Amended Joint Chapter 11 Plan (as amended, the "**Plan**"). On March 29, 2011, the Court entered its Findings of Fact, Conclusions of Law, and Order Pursuant to Sections 1129(a) and (b) of the Bankruptcy Code and Rule 3020 of the Federal Rules of Bankruptcy Procedure Confirming the Debtors' Second Amended Joint Chapter 11 Plan (the "**Confirmation Order**").

Pursuant to the Debtors' Plan, the DIP Lenders were granted "an Allowed Administrative Expense for the total amount due under the DIP Credit Agreement as of the Effective Date." Plan, § 2.4. Nothing in the Plan (or any other document) provides that the resulting DIP Lender administrative claim may not be collected from funds recovered through the Avoidance Action. In addition, the Plan established the Avoidance Action Trust, which administers the Avoidance Action Trust Assets, including the proceeds of the Avoidance Action. *See* Plan, § 6.5. The DIP Lenders and the general unsecured claimants are the current beneficiaries of the Avoidance Action Trust. *See* Avoidance Action Trust Agreement, § 1.1(ppp).

D. The Committee's Motion to Enforce and Subsequent Complaint and Motion at Issue Here

On October 4, 2010, the Committee filed the "Motion of the Official Committee of Unsecured Creditors of Motors Liquidation Company to Enforce (A) the Final DIP Order, (B) the Wind-Down Order, and (C) the Amended DIP Facility" (the "**Motion to Enforce**") [Dkt. No. 7226], seeking a ruling that the DIP Lenders have no interest in the Avoidance Action proceeds, and that any Avoidance Action proceeds should be distributed exclusively to general unsecured

creditors. On October 21, 2010, in a bench decision, the Court denied the Motion to Enforce on the ground of ripeness [Dkt. No. 7642].

On June 7, 2011, the Committee commenced an adversary proceeding against the DIP Lenders, titled *Official Committee of Unsecured Creditors of Motors Liquidation Co. v. United States Department of the Treasury, Export Development Canada,* Adv. Pro. No. 11-09406 (REG) (Bankr. S.D.N.Y.). In its Complaint for Declaratory Judgment [Dkt. No. 1], the Committee seeks a ruling that the DIP Lenders are not entitled to any Avoidance Action proceeds, and that general unsecured creditors have the exclusive right to any Avoidance Action proceeds. On July 22, 2011, the Committee filed its First Amended Complaint for Declaratory Judgment ("**Complaint**") [Dkt. No. 8] and the instant motion, supported in part by Plaintiff's Memorandum of Law In Support of Motion for Summary Judgment ("**Pl. Mem.**") [Dkt. No. 11], requesting a ruling that the DIP Lenders have no interest in the Avoidance Action or the Avoidance Action Trust, and a ruling that general unsecured creditors have the exclusive right to the Avoidance Action's potential future proceeds and are the exclusive beneficiaries of the Avoidance Action Trust. Plaintiff emphasizes that the Wind-Down Order provided that the DIP facility was "non-recourse" as to any recovery from the Avoidance Action, and that the DIP Lenders' collateral does not include any such proceeds. *See, e.g.,* Complaint ¶¶ 31-35.

ARGUMENT

POINT I – THE COURT SHOULD DENY SUMMARY JUDGMENT FOR PLAINTIFF AND GRANT TREASURY'S CROSS-MOTION, BECAUSE THE GOVERNING ORDERS AND AGREEMENTS GRANT TREASURY A SUPER-PRIORITY ADMINISTRATIVE CLAIM AND DO NOT PRECLUDE PAYMENT FROM ANY AVOIDANCE ACTION RECOVERY

A. Applicable Legal Standards

Summary judgment is warranted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P.

56(a).[2] Courts deciding motions for summary judgment "construe the evidence in the light most favorable to the non-moving party and draw[] all reasonable inferences in its favor." *Federal Ins. Co. v. American Home Assurance Co.*, 639 F.3d 557, 566 (2d Cir. 2011) (quoting *Fincher v. Depository Trust & Clearing Corp.*, 604 F.3d 712, 720 (2d Cir. 2010)). "Summary judgment is appropriate where there exists no genuine issue of material fact and, based on the undisputed facts, the moving party is entitled to judgment as a matter of law." *Id.* (quoting *O & G Indus., Inc. v. Nat'l R.R. Passenger Corp.*, 537 F.3d 153, 159 (2d Cir. 2008)).

In interpreting contracts, the Second Circuit has held, "[i]f the court finds that the contract is not ambiguous it should assign the plain and ordinary meaning to each term and interpret the contract without the aid of extrinsic evidence and it may then award summary judgment." *Int'l Multifoods Corp. v. Commercial Union Ins. Co.*, 309 F.3d 76, 83 (2d Cir. 2002) (citations and quotation marks omitted). Even where language in a contract is ambiguous, summary judgment can be granted "if the non-moving party fails to point to any relevant extrinsic evidence supporting that party's interpretation of the language." *Compagnie Financiere de CIC et de L'Union Europeenne v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 232 F.3d 153, 158 (2d Cir. 2000) (quoted in *Federal Ins. Co.*, 639 F.3d at 567).

B. The Avoidance Action and Its Proceeds Belong to the Debtors' Estates and the Committee Only Has Derivative Standing to Bring the Avoidance Action

1. The Committee's Derivative Authority to Pursue Claims

The Avoidance Action and its proceeds are (or were at all relevant times) property of the Debtors' estates. Section 541(a)(1) of the Bankruptcy Code states a debtor's estate includes "all

[2] Although Rule 56 was extensively rewritten effective December 1, 2010, the advisory committee note states that despite the new language, the "standard for granting summary judgment remains unchanged," and "[s]ubdivision (a) carries forward the summary-judgment standard expressed in former subdivision (c)." Fed. R. Civ. P. 56 adv. comm. note 2010.

legal or equitable interests of the debtor in property as of the commencement of the case." Property of the estate also includes "any interest in property that the trustee recovers under section 329(b), 363(n), 543, 550, 553, 723 of this title." 11 U.S.C. § 541(a)(3). Under the Plan, any proceeds of the Avoidance Action, which originally was property of Debtors' estate, are to vest in the Avoidance Action Trust. *See* Plan ¶ 6.5(c).

Debtors frequently litigate avoidance actions that constitute property of their estates during the course of, or after, their bankruptcy. *See Global Crossing Estate Representative v. Alta Partners Holdings LDC, (In re Global Crossing, Ltd.),* 385 B.R. 52, 59 (Bankr. S.D.N.Y. 2008) (noting that the estate representative had filed over 1,000 avoidance actions post-confirmation). It is common for the Court to also grant derivative standing to a statutory committee of unsecured creditors, as an estate representative, to pursue claims on behalf of the estate where a debtor has waived the right to pursue those claims. *See Official Comm. of Equity Sec. Holders of Adelphia Communications Corp. v. Official Comm. of Unsecured Creditors of Adelphia Communications Corp. (In re Adelphia Communications Corp.),* 544 F.3d 420, 424 (2d Cir. 2008) (bankruptcy courts have power to "confer derivative standing upon a committee with the consent of either the debtor-in-possession or trustee" and withdraw standing where it no longer serves the best interests of the estate); *Commodore Int'l Ltd. v. Gould (In re Commodore Int'l Ltd.),* 262 F.3d 96, 100 (2d Cir. 2001) (finding that "a creditors' committee may acquire standing to pursue the debtor's claims if (a) the committee has the consent of the debtor in possession or trustee, and (b) the court finds that the suit by the committee is (i) in the best interests of the bankruptcy estate, and (ii) is necessary and beneficial to the fair and efficient resolution of the bankruptcy proceedings."); *In re Racing Services, Inc.*, 540 F.3d 892, 904-05

(8th Cir. 2008) ("a creditor (or creditor's committee) may obtain derivative standing to pursue avoidance actions").

But standing to pursue a claim is distinct from ownership of any proceeds of that claim. Thus, an unsecured creditors committee is often authorized to pursue claims where recoveries may benefit creditor constituencies other than unsecured creditors. *See Official Comm. of Unsecured Creditors of TOUSA, Inc. v. Technical Olympic, S.A. (In re TOUSA, Inc.),* No. 09-1616-JKO, 2010 WL 3835829, at *3 (Bankr. S.D. Fla. Oct. 4, 2010) (noting that a recovery obtained on behalf of a debtor subsidiary conferring derivative standing would go to the estate of such subsidiary and not to the committee); *see* also *Official Committee of Unsecured Creditors of Cybergenics Corp. v. Chinery*, 330 F.3d 548, 569-70 (3d Cir. 2003) (en banc) (observing that derivative standing is conferred on a committee on the assumption that action is being pursued "*for the estate's direct benefit* rather than [the committee's] own" (emphasis in original)).

Here, with the agreement of the DIP Lenders and the Debtors, the Court granted the Committee both the authority and standing to pursue the Avoidance Action on behalf of the Debtors' estates. *See* Final DIP Order ¶ 19(d) ("The Committee shall have automatic standing and authority to both investigate the Reserved Claims and bring actions based upon the Reserved Claims against the Prepetition Senior Facilities Secured Parties."). The Court did not, however, grant unsecured creditors ownership of the litigation, nor of its proceeds (if any). Indeed, the Avoidance Action complaint itself, drafted by the Committee, seeks to recover funds specifically "for the Debtors' estates," *see supra* at 7 – not for the sole benefit of unsecured creditors.

2. The Avoidance Action Proceeds Belong to the Estate and Must Be Distributed Consistently With the Bankruptcy Code's Requirements

The Bankruptcy Code specifically requires that, irrespective of who brings an avoidance action, if the estate successfully avoids a transfer and claws back a prior payment, it does so for

the benefit of all creditors of the estate. "Any transfer avoided under section 522, 544, 545, 547, 548, 549 or 724(a) of this title . . . is preserved for the benefit of the estate . . . ." 11 U.S.C. § 551.

This Court has stated that:

> The rationale behind the automatic preservation rule [found in section 551 of the Bankruptcy Code] for transfers and liens avoided by a trustee in bankruptcy is that the estate should benefit from each avoidance rather than promoting the priority of unavoidable junior secured interests who would otherwise improve their positions at the expense of the estate.

Matter of DeLancey, 94 B.R. 311, 313 (Bankr. S.D.N.Y. 1988); *see also Morris v. St. John Nat'l Bank (In re Haberman)*, 516 F.3d 1207, 1210 (10th Cir. 2008) ("the trustee, on behalf of the entire estate, assumes the original lienholder's position in the line of secured creditors").

In re Blanks, 64 B.R. 467, 468-69 (Bankr. E.D.N.C. 1986), makes clear that, under section 551, avoidance action recoveries by the estate are available to fund estate payments to administrative and priority claimants. In *Blanks*, the trustee brought adversary proceedings to avoid two deeds of trust against the same collateral. *Id.* at 468. The court allowed the Debtors to avoid the senior lien, and held that "[p]reservation of an avoided lien is not conditioned on nonpriority unsecured creditors receiving the proceeds." *Id.* at 468-69. Rather, "[p]reservation is . . . 'for the benefit of the estate' . . . . Clearly, the estate benefits if the proceeds will be used to pay costs of administration and priority claimants" before paying recoveries to unsecured claimants. *Id.*

The mere fact that a party has derivative standing to bring an avoidance action on behalf of the estate does not grant that party ownership over the litigation. *See Adelphia*, 544 F.3d at 423 (rejecting the Equity Committee's argument that as a result of its derivative standing it acquired ownership over claims it brought on behalf of the estate); *Official Comm. of Equity Sec.*

Holders v. nVidia Corp. (In re 3dfx Interactive, Inc.), No. 06-5115, 2009 WL 223266, at *6 (Bankr. N.D. Cal. Jan. 6, 2009) ("[D]erivative standing, a salutary element of the chapter 11 process, does not confer ownership of the claims on the party proceeding in that capacity.").

In this case, by routine operation of the Bankruptcy Code, any proceeds recovered on behalf of the Debtors' estates should be distributed to all priority unsecured claimants (including administrative expense claimants) before distribution to general unsecured claimants. *See infra* Point I.C.3. To do otherwise would be to defeat the Bankruptcy Code's carefully established order of priority among creditors, which, as explained below, was never modified as to the Avoidance Action by any prior agreement of the parties or order of the Court in these cases.

Nevertheless, plaintiff now requests a declaratory judgment finding that interests in the Avoidance Action shall be distributed exclusively to the general unsecured creditors, and/or that the DIP Lenders have no interests in the Avoidance Action Trust. *See* Pl. Mem. at 13; *see* also Complaint ¶ 1. Yet nothing in the Code or the Plan, and no fact adduced by plaintiff in support of its summary judgment motion, alters the fundamental precept under the Bankruptcy Code that holders of allowed administrative claims – especially super-priority administrative claims like those of the DIP Lenders – are entitled to be paid from estate assets before estate assets are used to pay unsecured creditors. *See In re DBSD North America, Inc.*, 634 F.3d 79, 86 (2d Cir. 2011) (describing requirements of "absolute priority rule"), 11 U.S.C. § 1129(a)(9)(A). The Committee's request, if granted, would impermissibly transform the Avoidance Action from its proper role under the Bankruptcy Code – *i.e.*, an action to recover assets of the estate – into an action for the exclusive benefit of unsecured creditors. Such relief would violate the Bankruptcy Code requirements that avoidance action recoveries flow into the estate, and that holders of

administrative claims are entitled to be paid in full from estate assets before unsecured creditors recover anything.

3. The Committee Has Not Overcome the Fundamental Bankruptcy Precept That DIP Lenders Are Entitled to Cash Payment in Full of Their Super-Priority Administrative Expense Claim

As holders of an allowed super-priority administrative expense claim, the DIP Lenders are entitled to be paid in full from available estate funds before lower-priority creditors receive anything. Section 1129(a)(9)(A) of the Bankruptcy Code provides: "with respect to a claim specified in section 507(a)(2) or 507(a)(3) of this title, on the effective date of the plan, the holder of such claim will receive on account of such claim cash equal to the allowed amount of such claim." Section 507(a)(2), in turn, establishes the priority of administrative expenses. Pursuant to these Code provisions, courts have regularly found administrative claimants are entitled to payment in full in cash on their claim as a condition of confirmation of a plan. *See, e.g.*, *Chateaugay Corp. v. LTV Steel Co. (In re Chateaugay Corp.),* 10 F.3d 944, 960 (2d Cir. 1993) (noting that section 1129(a)(9)(A) requires "full cash payment of all administrative claims"); *see also Former Employees of Builders Square Retail Stores v. Hechinger Inv. Co. of Del. (In re Hechinger Inv. Co. of Del.),* 298 F.3d 219, 224 (3d Cir. 2002) ("In a Chapter 11 case, a court cannot confirm a distribution plan unless the plan provides full cash payment of all § 503(b) administrative expense claims or the claim holder agrees to different treatment.").

In this case, the Wind-Down Order grants the DIP Lenders a super-priority administrative expense claim pursuant to sections 364(c)(1) and 507(b) of the Bankruptcy Code. See Wind-Down Order at 4 ("the claims of the DIP Lenders arising from the Amended DIP Facility pursuant to sections 364(c)(1) and 507(b) of the Bankruptcy Code, and all other obligations owing to the DIP Lenders under the DIP Credit Facility shall be and are accorded a super-priority administrative expense status in each of these cases . . . ."). While the confirmed plan

did reflect the DIP Lenders' agreement to delay their receipt of payment solely to the extent necessary to facilitate confirmation by leaving in place funds needed for post-confirmation administration, the Plan did not otherwise modify the DIP Lenders' allowed administrative expense status, and it explicitly afforded the DIP Lenders the right to payment out of whatever funds were available after wind-down expense obligations were met, while explicitly reserving for future resolution the entitlement to any possible future Avoidance Action proceeds. *See* Plan ¶ 2.4.[3]

Tellingly, the DIP Lenders' administrative claim was expressly made subject to the Carve-Out of necessary fees and administrative costs, *see* Wind-Down Order at 4-5, but no similar limitation was included as to the potential Avoidance Action recovery.[4] This contrast

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[3] The relevant Plan provision provides in relevant part:

2.4 DIP Credit Agreement Claims. *The DIP Lenders shall have an Allowed Administrative Expense for the total amount due under the DIP Credit Agreement as of the Effective Date*, ratably in accordance with their respective interests in the DIP Credit Agreement Claims, subject to any applicable provisions of (A) paragraph 5 of the Final Order approving the DIP Credit Agreement (ECF No. 2529) and (B) the Final Order approving the amendment to the DIP Credit Agreement to provide for the Debtors' postpetition wind-down financing (ECF No. 2969). *The Debtors shall pay on account of the amounts outstanding under the DIP Credit Agreement an amount equal to all Cash and Cash equivalents, if any, remaining after funding all obligations and amounts to be funded under the Plan*. . . . To the extent it is determined that the DIP Lenders are entitled to any proceeds of the Term Loan Avoidance Action either by (i) mutual agreement between the U.S. Treasury and the Creditors' Committee or (ii) Final Order, the DIP Lenders shall receive the proceeds of the Term Loan Avoidance Action in accordance with Sections 4.3 and 6.5 hereof and the Avoidance Action Trust Agreement. . . . At such time as all payments in respect of the DIP Credit Agreement Claims have been made pursuant to the Plan, any outstanding balance of the DIP Credit Agreement Claims shall be cancelled. Notwithstanding the foregoing, the DIP Credit Agreement Claims shall remain outstanding until such time as the Term Loan Avoidance Action Beneficiaries are determined either by (x) mutual agreement between the U.S. Treasury and the Creditors' Committee or (y) Final Order. (Emphasis added.)

[4] The DIP Credit Agreement likewise also excluded the Carve-Out from both the DIP Lenders' super-priority claim and their liens. *See* DIP Credit Agreement, § 3.24(b)(i) (making § 364(c)(2) liens subject to Carve-Out), § 3.24(b)(ii) (making § 364(c)(3) liens subject to Carve-Out) & 3.24(c) (making super-priority claims subject to Carve-Out).

demonstrates that, where the parties wanted to exclude specific assets from the DIP Lenders' rights with respect to both their lienholder rights and their super-priority position, the parties knew how to, and did, make the DIP Lenders rights' expressly subject to limitations. *See* Wind-Down Order at 6. In the absence of such a specific limitation as to possible Avoidance Action proceeds, adoption of the Committee's contentions would impermissibly make the super-priority provisions of the DIP Credit Agreement and related orders superfluous; as the Committee itself recognizes, *see* Pl. Mem. at 11, contracts should be interpreted "in such a way that no language is rendered superfluous," *Aeronautical Indus. Dist. Lodge 91 v. United Techs. Corp.*, 230 F.3d 569, 576 (2d Cir. 2000); *see also Trump-Equitable Fifth Ave. Co. v. H.R.H. Constr. Corp.*, 485 N.Y.S.2d 65, 67 (1st Dep't 1983), *aff'd*, 488 N.E.2d 115 (1985);[5] *Beal Sav. Bank v. Sommer*, 8 N.Y.3d 318, 324-25, 834 N.Y.S.2d 44, 865 N.E.2d 1210 (2007) (contract should not contract be interpreted to "render any portion meaningless").

In contrast to the explicit "Carve-Out" removing funds earmarked for professional fees from the reach of the DIP Lenders' super-priority administrative claim, and contrary to the Committee's contentions, *see* Complaint at ¶¶ 32-33, neither the DIP orders at issue nor anything else preclude the DIP Lenders from being repaid from any Avoidance Action proceeds. Rather, the DIP Orders do not discuss distribution of the proceeds of the Avoidance Action at all, nor do they purport to supplant the Bankruptcy Code or the plan confirmation process. Thus, the Committee's reading of the DIP Orders as reserving Avoidance Action proceeds solely for unsecured creditors is unsupported by the actual language of those orders, and no other order, agreement or law supports the relief the Committee seeks.

[5] The Amended DIP Facility specifies that New York law governs. *See* Amended DIP Facility, § 8.11.

Against the backdrop of the DIP Lenders' allowed administrative claims and the lack of any express provision governing allocation of Avoidance Action proceeds, the Court should reject the Committee's reliance on the fact that the Amended DIP Facility is "non-recourse to the Borrower and the Guarantors, such that the DIP Lenders' recourse under the Amended DIP Facility shall be only to the Collateral . . . securing the DIP Loans . . . ." Wind-Down Order at 6; *see* Complaint ¶¶ 31-35, Pl. Mem. at 9-11. This fact does not justify the extraordinary conclusion that the Committee argues flows from it – especially when the orders and Plan allow the DIP Lenders' administrative claims without limitation as to the Avoidance Action proceeds or anything else other than the Carve-Out and the New GM equity interests that were reserved for unsecured creditors, and do not explicitly determine the ultimate distribution of any Avoidance Action proceeds, which are for the benefit of the estate as a whole. The Government is aware of no case holding that an administrative claim-holder loses its statutory entitlement to full payment under a plan – which, here, the Plan in fact requires – merely by providing credit on a non-recourse basis. Nor does the Committee identify any such case.

Outside bankruptcy, a non-recourse loan is "a secured loan that allows the lender to attach only the collateral, not the borrower's personal assets, if the loan is not repaid." BLACK'S LAW DICTIONARY 1020-21 (9th ed. 2009). In a non-recourse loan transaction, the borrower also grants a security interest in its property to secure the payment of a loan. However, in the event of default, the secured creditor has no right (or recourse) to assert a claim for amounts in excess of the value of the pledged collateral. Rather, the secured creditor's recourse "is limited to the collateral, i.e., the property of the [borrower] that secures the repayment of the loan." *Id*.

Nothing about these general characteristics of non-recourse debt implicitly or explicitly precludes simultaneously allowing a lender an enforceable claim in bankruptcy on account of the

full outstanding loan amount, especially where, as here, the relevant loan documents, orders, and confirmed Plan provisions *all* expressly state that the DIP Lenders have a super-priority administrative claim in the total loan amount outstanding. Moreover, nothing in the Bankruptcy Code supports disregarding the effect of the DIP Lenders' administrative claim based on the non-recourse nature of their debt as to the avoidance action proceeds. The only Code section that mentions non-recourse debt is section 1111(b)(1)(A), which provides, subject to certain exceptions, that an undersecured non-recourse creditor is entitled to have its entire claim treated as though the loan transaction was recourse for the purposes of the chapter 11 proceeding. Thus, section 1111(b)(1)(A) by its terms suggests that in the bankruptcy context non-recourse lenders can obtain relief beyond merely recovering their collateral, even if they thereby would obtain more relief than they could in the non-bankruptcy context. This directly contradicts the Committee's assertion that, by deeming the loan non-recourse, the DIP Lenders waived their right to payment of their administrative claim from Avoidance Action proceeds.

Meanwhile, the Committee now invokes legislative history relating to section 102(2) of the Bankruptcy Code, *see* Pl. Mem. at 10-11, but this discussion (of the definition of "claim against the debtor") is inapplicable here. Rather, it simply makes clear that the definition of "claim" is broad enough to include entitlements arising from "nonrecourse loan agreements where the creditor's only rights are against property of the debtor, and not the debtor personally." *See id.* (quoting H.R. Rep. No. 95-595, at 315 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6272; S. Rep. No. 95-989, at 28 (*reprinted in* 1978 U.S.C.C.A.N. 5787, 5815). This definitional clarification has no bearing on agreements like the one here, which arose after the petition date, and which explicitly grants the DIP Lenders an allowed super-priority administrative expense in the full amount of its outstanding debt, subject only to an unrelated Carve-Out whose existence

underscores the absence of any similar agreement to except the Avoidance Action proceeds from the DIP Lenders' administrative claim.

Finally, even if relevant DIP Order and agreement provisions were in tension – and, as just explained, they are not – when faced with two potentially contradictory provisions of an order, a court should attempt to read those provisions in harmony. *See Schlaifer Nance & Co. v. Estate of Warhol,* 119 F.3d 91, 100 (2d Cir. 1997) (noting "well-established principles of contract interpretation, which require that all provisions of a contract be read together as a harmonious whole, if possible"); *see also SmithKline Beecham Consumer Healthcare, L.P. v. Watson Pharm., Inc.,* 211 F.3d 21, 27-28 (2d Cir. 2000) (resolving apparent conflict between statutes by "applying the familiar canon that, where two laws are in conflict, courts should adopt the interpretation that preserves the principal purposes each"); *TIG Ins. Co. v. Combustion Eng'g, Inc. (In re Combustion Eng'g, Inc.),* 366 F. Supp. 2d 224, 229 (D. Del. 2005) (noting that courts frequently attempt to harmonize conflicting provisions in an agreement in order to determine the intent of the parties). Here, the Committee scarcely if at all acknowledges the DIP Lenders' allowed super-priority administrative claim, much less explains how the relevant provisions could be "harmonized" by wiping out the DIP Lenders' entitlements as holders of super-priority administrative claims as to an Avoidance Action recovery that, by law and as stated in the Committee's own complaint, would be *for the estate*.

Thus, at bottom, a ruling in the Committee's favor would impermissibly write out of the DIP Orders and the confirmed Plan the provisions that provide the DIP Lenders with allowed super-priority administrative claims, provisions to which all parties, including the Committee, agreed, after extensive and hard-fought negotiation. *See Aeronautical Indus. Dist. Lodge 91 v. United Techs. Corp.,* 230 F.3d 569, 576 (2d Cir. 2000) (contracts should be interpreted "in such a

way that no language is rendered superfluous").[6] The Court should deny the Committee's application for summary judgment because, while expressly premised on other aspects of the DIP Orders, it completely disregards a critical and negotiated provision of those very orders that flatly precludes the relief the Committee seeks. Conversely, the Court should grant summary judgment in favor of Treasury, because its position is the only one that can be squared with the plain meaning of the governing documents as a whole.

Further, plaintiff's allegations concerning the purported logic of the "deal" ring hollow, both because such arguments cannot overcome the plain language of agreements and orders, and because plaintiff's asserted "logic" is faulty, and so does not support a ruling in the Committee's favor. While the Committee asserts that in some scenarios a recovery on the Avoidance Action actually could reduce unsecured creditors' recoveries by increasing the size of the unsecured creditor pool and thereby diluting their recoveries, *see* Pl. Mem. at 7, this analysis ignores the obvious fact that the Amended DIP Facility was for $1.175 billion (and when the relevant provisions were first negotiated was for less than $1 billion), and thus unsecured creditors stand to benefit by whatever proceeds of their $1.5 billion action remain after the obligation to the DIP

[6] For example, the Committee's interpretation of the Wind-Down Order would eliminate the DIP Lenders' administrative priority claim granted under section 364(c)(1) of the Bankruptcy Code, which the Court ordered. *See* Wind-Down Order at 4 ("the claims of the DIP Lenders arising from the Amended DIP Facility, pursuant to sections 364(c)(1) and 507(b) of the Bankruptcy Code . . . shall be and are accorded a super-priority administrative expense status . . . ."). Section 364(c)(1) of the Bankruptcy Code provides that the Court may grant administrative expense status "with priority over any or all administrative expenses of the kinds specified in section 503(b) or 507(b) of this title." *See* 11 U.S.C. § 364(c)(1). The Bankruptcy Code does not provide for a section 364(c)(1) claim to be secured by collateral. Therefore, the recourse provisions of the Wind-Down Order cannot logically be read to somehow limit the DIP Lenders' rights under their section 364(c)(1) administrative expense status. By contrast, under the Committee's interpretation, if the DIP Lenders' recovery under the Wind-Down Order is limited solely to the value of the collateral securing the Loans, then the DIP Lenders' section 364(c)(1) claim, which involves no collateral, is valueless. This interpretation would impermissibly render the section 364(c)(1) provisions of the Wind-Down Order superfluous and meaningless.

Lenders is satisfied, whether from Avoidance Action proceeds or any other source. In addition, the Complaint fails to mention the existing protection for dilution from additional allowed general unsecured claims that increase the size of the claims pool above $35 billion. In particular, New GM will issue up to an additional 2% of the outstanding common stock as of the closing of the section 363 Transaction. *See* Disclosure Statement at 15-16. As a result, the increase to the size of the claims pool is felt less (if at all) by the holders of unsecured claims if claims fall between $35 billion and $42 billion and more by larger holders of equity of New GM such as the DIP Lenders. Finally, the Committee's claims of hardship and prejudice are mitigated, if not negated, by the fact that their costs and fees are being paid by the estate, which is funded by the Wind-Down Facility that is funded exclusively by the DIP Lenders.

Even more fundamentally, though, the Committee's analysis ignores the fact that there is a compelling rationale supporting *Treasury's* understanding of the deal, which, unlike the Committee's, is entirely consistent with the agreement and orders at issue. The DIP Lenders agreed that they would not have a lien on the Avoidance Action and that the Committee would be charged with litigating the Avoidance Action. By giving up their liens, the DIP Lenders agreed that even in the event of a default on the Amended DIP Facility, they would not seize control of the Avoidance Action by asserting their rights as a secured creditor. When considered in company with the DIP Lenders' allowed administrative claim (as well as the ongoing administrative claims of others not party to this dispute), this agreement served to allow the Committee – rather than Debtors – to conduct and direct the litigation, which was of value to the Committee because it ensured that Debtors would not settle the Avoidance Action for an unacceptably low amount that might fail to enhance the recovery of unsecured creditors, or refuse to bring the Avoidance Action at all. Throughout this process, of course, the Committee's

fees and expenses are being financed by the DIP Lenders, who, if the Committee prevails in this action, will stand to receive no financial benefit from the fruit of the labor they financed.

Thus, the parties' agreement ensured that, if the Committee succeeded in the Avoidance Action, any cash not needed to cover a shortfall in funds available to repay the DIP Lenders would flow to the unsecured creditors, boosting their recovery. That possibility constituted value to the unsecured creditor community (including, potentially, the leverage to negotiate for a portion of any settlement below $1.175 billion). Had the Committee actually obtained agreement that the DIP Lenders would waive any recovery from Avoidance Action proceeds even at the cost of not being repaid on their administrative claim, the documents would have said so plainly, as they did about the fee Carve-Out. But the documents say no such thing. Rather, the documents repeatedly reaffirm that the DIP Lenders have an allowed super-priority administrative expense claim that will be paid to the extent cash remains available when the case's administration is complete, and no relevant document waives or expunges this claim, nor authorizes a failure to pay the DIP Lenders on account of their claim.

CONCLUSION

For the foregoing reasons, the Court should deny the Committee's motion for summary judgment, and, to the extent the complaint is not dismissed, should grant summary judgment in favor of the defendant DIP Lenders.

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