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 REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF GOVERNMENT'S CROSS-MOTION FOR SUMMARY JUDGMENT

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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 reply memorandum of law in further support of Treasury's cross-motion for summary judgment.

To minimize repetition, Treasury relies on its initial memorandum opposing plaintiff's summary judgment motion and supporting Treasury's cross-motion for summary judgment, as well as Treasury's papers in support of its motion to dismiss. We make only a few specific observations about Plaintiff's Reply to Defendants' Opposition to Plaintiff's Motion for Summary Judgment and Response to Defendants' Cross-Motion for Summary Judgment ("**Pl. Reply Mem.**"). Capitalized terms not otherwise defined herein have the same meaning as in Treasury's memorandum in support of its cross-motion.

First, despite the Committee's continued insistence that the non-recourse nature of the DIP Facility requires a ruling in the Committee's favor, *see* Pl. Reply Mem. at 1-3, the Committee still has not acknowledged or rebutted the Government's showing that the same controlling documents specify that the DIP Lenders are entitled to be repaid in the amount outstanding on the DIP Facility, and that that entitlement is on a superpriority administrative expense basis. *See, e.g.*, Final DIP Order at 14 ¶ 5 (DIP Lenders have "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"); Wind-Down Order at 4 ("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" and "shall have priority over any and all other . . . unsecured claims arising in these cases"). And, while express provisions make clear that the DIP Lenders cannot be paid directly or indirectly from the "Carve-Out" for certain professional fees and the equity interests reserved for unsecured creditors, *see* Government's Memorandum of Law in Opposition to Plaintiff's Summary Judgment Motion and in Support of Government's Cross-Motion for Summary Judgment ("**Gov't SJ Mem.**") at 5, 7, there is no textual basis – let alone DIP Lender agreement – to similarly insulate any estate recovery from the Avoidance Action from being used by the estate to repay the DIP Lenders.[1]

Second, the Committee's protestations (*see* Pl. Reply Mem. at 3-4, 6) that Treasury's position leaves unsecured creditors at risk of suffering financial harm by pursuing the Avoidance Action ignores the fact that that action seeks to recover an amount that substantially exceeds the maximum possible repayment obligation under the DIP Facility. Further, because the Committee currently has the sole right to pursue the action, it retains sufficient control over the action to minimize or eliminate the possibility of adverse consequences for unsecured creditors – if necessary by negotiating with parties including the DIP Lenders. Relatedly, neither the Committee's assertion that the DIP Lenders have not actively participated in the Avoidance Action, nor the Committee's observation that the DIP Lenders did not file pleadings during the

[1] Plaintiff's new argument that Treasury should be "estopped from arguing that they have any recourse or claim against the Term Loan Avoidance Action," Pl. Reply at 2 n.2, is a red herring. Treasury does not contend that it has "recourse" against the Avoidance Action in the sense that it used that term at the July 2, 2009 hearing referenced by the Committee. Treasury at all times has acknowledged that it cannot directly enforce security rights against that action. What is at issue is whether the undisputed fact that the DIP Facility is "on a non-recourse basis" negates other provisions expressly giving Treasury a superpriority administrative expense claim in the full amount outstanding on the DIP Facility, notwithstanding the striking absence of any provision making Avoidance Action proceeds off limits for direct or indirect use by the estate to repay the DIP Lenders.

Avoidance Action's early stages, *id.* at 5, is relevant. The Committee undisputedly has had sole entitlement to prosecute the action, and there was no need for the DIP Lenders to take any active role until the Committee first suggested in its Avoidance Action summary judgment papers that the Avoidance Action was for the sole benefit of unsecured creditors.

Finally, Treasury is not "disingenuous[]" (Pl. Reply Mem. at 7) in its observation that it sought to preserve its ability to be repaid from funds that could be realized through the Avoidance Action, especially given the alternative, which is to fail to obtain repayment of taxpayers' billion-dollar financing of this bankruptcy. The Court should reject the Committee's suggestion (*see id.*) that, because Treasury agreed to finance this case to "achieve important public purposes," Treasury therefore lacks a genuine or legitimate interest in recovering as much as possible of its investment of public funds.

CONCLUSION

For the reasons stated herein and in Treasury's previous filings, 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.

Dated: New York, New York
September 28, 2011

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CERTIFICATE OF SERVICE

I, David S. Jones, am employed in the United States Attorney's Office for the Southern District of New York. On September 28, 2011, I caused the foregoing pleading to be served as follows:

By electronic notice via ECF to all persons registered to receive such notice;

By email to the following: Stephen Karotkin (Stephen.karotkin@weil.com); Thomas Moers Mayer (tmayer@kramerlevin.com); Michael Edelman (MJEdelman@vedderprice.com); Michael Schein (MSchein@vedderprice.com);

And by first class mail to the Office of the United States Trustee, and to all persons listed on the service list annexed hereto.

I declare under penalty of perjury that the foregoing is true and correct.

s/ David S. Jones

New York, New York
September 28, 2011

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