UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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

In re **MOTORS LIQUIDATION COMPANY, f/k/a General Motors Corporation, *et al.*** **Debtor.**	**Chapter 11 Case No. 09-50026 (REG)** **(Jointly Administered)**
OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF MOTORS LIQUIDATION COMPANY, *et al.*, **Plaintiff,** **- against –** **UNITED STATES DEPARTMENT OF THE TREASURY and EXPORT DEVELOPMENT CANADA,** **Defendants.**	**Adv. P. No. 11-09406 (REG)**

DEFENDANT EXPORT DEVELOPMENT CANADA'S REPLY MEMORANDUM OF LAW IN SUPPORT OF DIP LENDERS' CROSS-MOTION FOR SUMMARY JUDGMENT

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Export Development Canada ("**EDC**"), a Defendant in the above-captioned adversary proceeding and one of the debtor-in-possession lenders, by its undersigned counsel, respectfully submits this memorandum of law (a) in further support of the cross-motion, dated September 2, 2011 [Docket No. 17] (the "**Summary Judgment Cross Motion**") of Defendant United States of America, including but not limited to the United States Department of the Treasury ("**U.S. Treasury**", and, along with EDC, the "**DIP Lenders**"), as the other debtor-in-possession lender, and EDC's joinder to Treasury's Summary Judgment Cross Motion, dated September 2, 2011 [Docket No. 18] (the "**EDC's Joinder**"), each seeking an order pursuant to Federal Rule of Civil Procedure 56(a) and Federal Rule of Bankruptcy Procedure 7056 granting summary judgment in favor of the DIP Lenders, and (b) in reply to the responsive memorandum of law of the Plaintiff Official Committee of Unsecured Creditors (the "**Committee**"), dated September 22, 2011 [Docket No. 22] (the "**Committee's Response**"), in opposition to the Treasury's Summary Judgment Cross Motion and the EDC Joinder.[1]

REPLY

As most of the matters raised by the Committee in the Committee's Response are fully addressed in EDC's prior pleadings, this reply only addresses a few discrete arguments raised in the Committee's Response. To avoid duplicative filings and the waste of judicial resources, EDC hereby references and incorporates by reference its memorandum of law in opposition to the Committee's motion for summary judgment and joinder in support of Treasury's cross-motion for summary judgment, dated September 2, 2011 [Docket No. 18] (the "**Memorandum in Support of Cross-Motion for Summary Judgment**") and its reply memorandum of law in

[1] Capitalized terms not otherwise defined herein shall have the meanings ascribed to such terms in _____. To the extent not defined therein, capitalized terms have the meanings ascribed to

support of Treasury's motion to dismiss, dated September 22, 2011 [Docket No. 21] (the "**Reply Memorandum in Support of Motion to Dismiss**").

In the Committee's Response, the Committee again argues that payments to the DIP Lenders on account of the DIP Lenders' super-priority claims are limited to the DIP Lenders' Collateral.[2] To counter the contractual interpretation prohibition against rendering the DIP Lenders' super-priority contract terms superfluous and meaningless (due to such terms being fully duplicative of the DIP Lenders' liens on their Collateral under the Committee's interpretation of the Amended DIP Facility), the Committee posits that the purpose of the super-priority rights under the Wind-Down Order and the Amended DIP Facility is to protect the DIP Lenders from "any risk of 'cram-down' under 1129(b)." Specifically, the Committee alleges that:

> The Committee's interpretation actually *preserves* the DIP Lenders' entitlement to *full* payment on their administrative claim *from their Collateral*. The grant of a priority claim ensures that all Collateral will be devoted to repayment on the Effective Date under § 1129(a)(9)(A), without exposing the DIP Lenders to any risk of "cram-down" under 1129(b).

See Committee's response, at 6 (italics in original). Such conjecture, however, makes no sense and lacks any support in law or fact.

First, debtor-in-possession loans authorized under Section 364 of the Bankruptcy Code are not subject to cram-down treatment. As post-petition obligations, debtor-in-possession loans are treated as unclassified claims and are not a "class of claims" that votes upon reorganization plans – and, accordingly, are not subject to cram-down treatment under Bankruptcy Code

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such terms in the Amended DIP Facility.

[2] *See* Committee's response, at 6.

Section 1129(b). In fact, under the confirmed plan of reorganization in these cases (the "**Plan**"),[3] the claims of the DIP Lenders were not treated in Article III's classification of classes of claims and equity interests provisions, but were treated with the other unclassified claims in Article II of the Plan, where the treatment of "Administrative Expenses and Priority Tax Claims" was specified. In this regard, we have not (nor has the Committee cited to) any cases in which secured claims of debtor-in-possession lenders were subject to being crammed-down under Section 1129(b) of the Bankruptcy Code. In sum, as a matter of law, the DIP Lenders' DIP Loan claims are not subject to any risk of cram-down treatment under Section 1129(b) of the Bankruptcy Code.

Second, as a matter of fact in these cases, the Committee's posited rationale for the existence of the DIP Lenders' super-priority claims – that the super-priority claim rights in the Wind-Down Order was included to protect against cram-down -- lacks any factual basis. The Wind-Down Order that contains the super-priority rights that are at issue here was entered on July 5, 2009. Prior to the entry of that Wind-Down Order, this Court had previously entered its final order approving the DIP Loans on June 25, 2009 (*see* Docket No. 2529, the "**Final DIP Order**"), which order provides that:

> Except as provided in this Final Order or in the DIP Credit Facility, the DIP Liens, the Super-priority Claim, the Adequate Protection Liens and the Adequate Protection Claim, and *all rights and remedies of the DIP Lenders, shall not be modified, impaired or discharged by the entry of an order or orders confirming a plan or plans of reorganization* in any or all of these cases and, pursuant to section 1141(d)(4) of the Bankruptcy Code, each Debtor waives any discharge as to any remaining obligations under the DIP Credit Facility and this Final Order including, without limitation, the Additional Notes.

[3] The Debtors' Plan was attached as an exhibit to the confirmation order, dated March 29, 2011 [Docket No. 9941 in the main case].

See Final DIP Order, § 11 (emphasis added). Under such provision of the June 25, 2009 Final DIP Order, the DIP Lenders' rights are protected against being affected pursuant to any plan of reorganization or confirmation order and, as such, the Final DIP Order precludes any cram-down plan treatment against the DIP Lenders. Such protection for the benefit of the DIP Lenders remains in full force and effect under the Wind-Down Order.[4] In sum, as a matter of fact, prior to the entry of the Wind-Down Order, the DIP Lenders faced no cram-down risk due to the express protections provided by court order. Accordingly, there is no basis for the Committee's claim that the super-priority rights granted in the Wind-Down Order were built into the Wind-Down Order as a protection against the "risk of 'cram-down' under 1129(b)."

In addition to not having any legal or factual basis, by raising arguments about the supposed rationale for the super-priority claims and other matters (such as the Committee's allegations that it would not have pursued the Avoidance Action),[5] the Committee's contractual interpretation arguments impermissibly go beyond the four corners of the governing documents to change the express terms of the parties' agreements. *See John Hancock Mutual Life Ins. Co. v. Amerford Int'l Corp.*, 22 F.3d 458, 462 (2d Cir. 1994) (when the terms of a contract are clear and unambiguous, courts should not look beyond the four corners of the contract to interpret the parties' intentions.)

Further, the Committee's contractual interpretation argument is dependent upon reading the reference to "non-recourse" in isolation rather than based upon a review of the full terms of

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[4] 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." *See* Wind-Down Order, at 4. Nothing in the Wind-Down Order or the Amended DIP Facility affected the prohibition against any plan or confirmation order affecting the DIP Lenders' rights.

[5] *See* Committee's Response, at 3-5.

the governing documents.[6] Contrary to the Committee's wishes, "[t]he intention of the parties must be gleaned from all corners of the documents, rather than from sentences or clauses viewed in isolation." *Pantone, Inc. v. Esselte Letraset Ltd.*, 691 F. Supp. 768, 771 (S.D.N.Y.) (citations omitted), *aff'd*, 878 F.2d 601 (2d Cir. 1988). Indeed, the Second Circuit has rejected such myopic contractual interpretations of "non-recourse" provisions. Where the other terms and provisions of the governing documents evidence that lenders contracted to have payment rights from other sources, the Second Circuit has utilized the rules of contractual construction to determine that non-recourse provisions are trumped by other provisions of the governing contracts. *See Bank of New York v. First Millennium, Inc.*, 607 F.3d 905, 915-18 (2d Cir. 2010) (provision providing for recourse only to the noteholders' collateral held to be trumped by other provisions of the contracts that provided noteholders with rights to payments from sources beyond their collateral). Here, as set forth in EDC's Memorandum in Support of Cross-Motion for Summary Judgment and Reply Memorandum in Support of Motion to Dismiss, the rules of contract construction demonstrate that, notwithstanding the isolated references to "non-recourse", the DIP Lenders have superior rights to the proceeds of the Avoidance Action due to their super-priority claim rights. Specifically, as set forth in EDC's prior pleadings:

- The express terms of the Wind-Down Order and Amended DIP Facility grant the DIP Lenders broad super-priority rights, which rights are distinct from their Collateral/lien rights;
- The specific provisions granting the super-priority rights to the DIP Lenders are not restricted to the DIP Lenders' Collateral and do not carve out the proceeds of the Avoidance Action;
- Although the parties knew how to, and did, exclude Avoidance Action proceeds from the reach of the DIP Lenders' liens, no such exclusion was provided for in the grant of super-priority rights to the DIP Lenders;
- If the Committee's interpretation of the DIP Loan orders and agreements was to

[6] *See* Committee's Response, at 2-3.

be accepted – *i.e.*, that the non-recourse language carved out the proceeds of the Avoidance Action from the DIP Lenders' super-priority rights – numerous provisions of the governing orders and agreements would be rendered superfluous and meaningless (including, without limitation, the provisions granting the super-priority rights and the provision waiving the DIP Lenders' rights against the New GM Equity Interests);

- An interpretation of the operative documents that gives full effect to all contractual provisions demonstrates that the DIP Lenders are entitled to proceeds of the Avoidance Action on account of their super-priority rights.[7]

In sum, the Committee's efforts to interpret contract provisions in isolation to take away the express rights and protections negotiated by the DIP Lenders should not be accepted by this Court.

CONCLUSION

For the foregoing reasons, EDC respectfully requests that this Court (a) grant the DIP Lenders' Summary Judgment Cross Motion, (b) deny the Committee's motion for summary judgment and (c) grant such further relief as is just and proper.

Dated: New York, New York
September 29, 2011.

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[7] *See* EDC's Memorandum in Support of Cross-Motion for Summary Judgment and Reply Memorandum in Support of Motion to Dismiss for a full discussion of the matters summarized above.