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Proposed Attorneys for Movant Official Committee of Unsecured Creditors Holding Asbestos-Related Claims

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re	:	
MOTORS LIQUIDATION COMPANY, *et al.*, f/k/a General Motors Corp., *et al.*	:	Chapter 11 Case No.
	:	09-50026 (REG)
	:	(Jointly Administered)

REPLY MEMORANDUM OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS HOLDING ASBESTOS-RELATED CLAIMS IN SUPPORT OF APPLICATION TO RETAIN AND EMPLOY CAPLIN & DRYSDALE, CHARTERED *NUNC PRO TUNC* TO OCTOBER 6, 2009

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

The Official Committee of Unsecured Creditors Holding Asbestos-Related Claims (the "**Asbestos Claimants Committee**" or "**ACC**") hereby responds to the objection (the "**Objection**") of the United States Trustee ("**UST**") [D.I. 5389] to the ACC's application to retain the law firm of Caplin & Drysdale as its counsel, *nunc pro tunc* as of October 6, 2009 (the "**Application**") [D.I. 5304].

PRELIMINARY STATEMENT

The parties agree that Caplin & Drysdale meets all standards under the Bankruptcy Code for retention by an official committee and is well qualified by experience to represent the ACC in this case. Accordingly, the UST states that she "has no objection to the retention of Caplin & Drysdale as of the date of its selection by the Asbestos Committee." Objection at 1. The sole objection made to the Application is the UST's knee-jerk contention that, because she did not appoint the ACC until March 2, 2010, the retention of Caplin & Drysdale as of a prior date would be improper. This argument relies upon a strained inference from section 1103(a) to attempt to impose a limitation that nowhere appears in that provision and is inconsistent with the controlling precedent. More generally, the Objection elevates form over substance and ignores the exceptional circumstances that, under the governing case law, fully warrant an order approving of Caplin & Drysdale's retention *nunc pro tunc* as of October 6, 2009.

October 6, 2009 was the date when Caplin & Drysdale began to render legal services to a proposed fiduciary entity for the benefit of the Debtors' asbestos personal injury creditors and in the interest of expediting the formulation of a plan of liquidation. Expedition has been the watchword in this case from the beginning, yet the UST's limited objection would unfairly

penalize the ACC's counsel for having cooperated in pursuit of that shared goal of all parties in interest.

As set forth in the attached Supplemental Declaration of Elihu Inselbuch (the "**Inselbuch Supp. Declaration**"), most of Caplin & Drysdale's work during the period for which retroactive retention is sought was performed in January 2010 and thereafter. The UST acknowledges that commencing on January 11, 2010, she was in discussions with the respective counsel for the Debtors and the Official Committee of Unsecured Creditors ("**UCC**") about "the advisability of appointing an additional committee for the purpose of enabling the representation of the interests of current asbestos personal injury claim-holders in the Debtors' plan processes." Objection ¶ 9 at 4. That almost three more months passed before the UST actually appointed the ACC was a circumstance entirely out of Caplin & Drysdale's control. Meanwhile, the UCC put forward for Caplin & Drysdale's consideration certain issues bearing on potential litigation and plan formulation that were both highly sensitive and potentially important to asbestos personal injury claimants as a constituency. These matters required prompt attention, especially in view of the Debtors' stated goal of confirming a plan in April 2010. *See* Inselbuch Supp. Declaration ¶¶ 3, 5. The Objection should be overruled and the Application granted with effect as of October 6, 2009.

BACKGROUND

Because the appropriateness of *nunc pro tunc* retention turns on the circumstances surrounding the Application, the operative facts should be held clearly in view. *See* Declaration of Elihu Inselbuch ¶¶ 8-18, sworn to on March 18, 2010, and filed concurrently with the Application (the **"Inselbuch Declaration"**).

In early October 2009, counsel for the Debtors and counsel for the UCC proposed to John D. Cooney, Esq. that he serve as a subcommittee of the UCC, in his capacity as attorney for Mark Butitta.[1] This proposal recognized that confirming a plan of liquidation in this case requires estimation of the Debtors' liability for asbestos-related personal injury and wrongful death, so that the parties and this Court may determine what portion of the estate's assets should be distributed to a trust for asbestos victims. *See* Inselbuch Supp. Declaration ¶ 3. In the zero-sum game of allocating the assets, the interests of other creditors are diametrically opposed to those of the asbestos victims. Given this divergence of interests, the existing estate fiduciaries proposed to form an asbestos subcommittee of the UCC as a separate fiduciary entity to speak for the constituency of creditors who hold pending asbestos-related tort claims (the **"Subcommittee"**).[2] As part and parcel of the proposal, the new fiduciary entity was to be authorized to retain separate counsel.

The parties involved all considered it important that legal work begin at once on behalf of the constituency of existing asbestos tort claimants. Time was indeed of the essence, especially because it was the Debtors' announced goal to confirm a plan in April 2010. Inselbuch Supp. Declaration ¶ 3. Mr. Cooney therefore asked Caplin & Drysdale to serve as the Subcommittee's counsel on the understanding that approval of the firm's retention would be sought *nunc pro tunc*. With the knowledge and encouragement of counsel for the Debtors and

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[1] Mr. Butitta is a current asbestos tort creditor of the Debtors and was a member of the UCC until March 2010. He resigned from the UCC upon being appointed as a member of the ACC.

[2] Another aspect of the proposal was to obtain the appointment of a legal representative for holders of future asbestos claims, whose identities, by definition, cannot now be known. The Debtors moved on March 8, 2010, for this Court to appoint Dean Trafelet as Future Claims Representative (the **"FCR"**) [D.I. 5214], and a hearing on that motion is scheduled to be heard on the same date as the instant Application.

counsel for the UCC, Caplin & Drysdale began to work immediately on matters of particular interest to asbestos creditors.

From the time of Mr. Butitta's appointment to the UCC in June, 2009, Caplin & Drysdale had served as counsel to him and Mr. Cooney with respect to their participation in the affairs of the UCC. *See* Inselbuch Declaration ¶¶ 8, 9. The services rendered by Caplin & Drysdale in that capacity had been quite limited in scope, and the ACC does not seek retention *nunc pro tunc* to June. In his new proposed role as Subcommittee, however, Mr. Cooney was expected to take on much greater responsibility, with particular reference to estimating the Debtors' asbestos liabilities, negotiating related aspects of the plan, and, if necessary, litigating contested issues. Given the nature and scope of the new assignment, and the attendant need for expanded legal services, the Debtors and the UCC recognized that it would be unfair to burden Messrs. Cooney and Butitta personally with the expenses of those legal services, which should instead be borne by the estate. The good sense of that view is not altered by the events described below, in which the idea for a Subcommittee to represent the interests of present asbestos claimants eventually led to the appointment of a full committee — the ACC — through which Messrs. Butitta and Cooney, joined by others, will continue to serve the same constituency of present asbestos claimants. Inselbuch Supp. Declaration ¶ 9.

After a time, the Debtors, the UCC, and the UST entered into a prolonged discussion of the Subcommittee proposal. Neither Mr. Cooney nor Caplin & Drysdale was involved in or invited to participate in those discussions. We understand, however, that the UST recognized the need to create a fiduciary entity for holders of asbestos claims, but concluded after consideration that a full committee, rather than the Subcommittee, would be the preferable

vehicle for meeting that need. Rather than compounding the delays, the Debtors and the UCC bowed to the UST's view, and the UST went on to constitute the ACC and appoint its three members: Mark Butitta (whose appointment was conditioned on his resigning from the UCC), Sally Maziarz, and Charles Cantrell. Like Mr. Butitta, Ms. Maziarz is a client of Mr. Cooney; Mr. Cantrell is a client of attorney Steven Kazan. Inselbuch Declaration ¶¶ 8-9, 15-16.

The UST publicly announced the appointees to the ACC on March 5, 2010, and the ACC informed Mr. Inselbuch on the same day of Caplin & Drysdale's selection as counsel. *See* Inselbuch Supp. Declaration ¶ 2. On March 18, 2010, the ACC filed its application to retain Caplin & Drysdale. No objection to the retention has been received, except for the UST's limited objection, which challenges only the ACC's request that its counsel be deemed retained as of October 6, 2009.

By the time the ACC was officially formed, Caplin & Drysdale had accrued charges of approximately $100,000 in performing legal services under the rubric of the now-superseded Subcommittee. The bulk of these charges were incurred after January 1, 2010. From October 6, 2009 through December 31, 2009, Caplin & Drysdale's time charges came to about $8,000. The remainder were incurred from January 1, 2010 through March 5, 2010, during which the UCC requested Caplin & Drysdale's consideration, on behalf of asbestos claim-holders, of sensitive matters regarding potential litigation and bearing on plan formulation. *See* Inselbuch Supp. Declaration ¶ 5.

Caplin & Drysdale's work during the period proposed for retroactive retention was performed on behalf of Messrs. Cooney and Butitta, as the Subcommittee, for the benefit of

the same constituency of present asbestos creditors for whom they (along with Ms. Maziarz, Mr. Cantrell, and Mr. Kazan) will now act through the ACC. *See* Inselbuch Supp. Declaration ¶¶ 3, 7, 9. In that work, Caplin & Drysdale was rendering services that were and are necessary for the formulation of the plan of liquidation that the estate fiduciaries are laboring to complete. The estates and their creditors will benefit from the timely rendering of those services, just as they would have benefited if the UST had embraced the Subcommittee rather than forming the ACC.

ARGUMENT

Contrary to the apparent position taken by the UST in its objection, there is no *per se* prohibition in the Second Circuit against committee counsel being appointed *nunc pro tunc* to a date prior to the official appointment of the committee. To the contrary, the law is clear that this Court has discretion to grant *nunc pro tunc* retentions in the exercise of its equitable powers, taking account of the relevant facts and circumstances. The ACC respectfully submits that, given the relevant facts and circumstances in this case, the Court should authorize the retention of Caplin & Drysdale as the ACC's counsel with effect as of October 6, 2009.

"[B]ankruptcy courts, as courts of equity, are empowered to grant *nunc pro tunc* retention orders." 3 Alan N. Resnick & Henry J. Sommer, Collier on Bankruptcy ¶ 327.03[3] (15th ed. rev. 2009). *See* In re Hasset, Ltd., 283 B.R. 376, 379 (Bankr. E.D.N.Y. 2002) (approving *nunc pro tunc* retention application and noting that retroactive retentions have been permitted where the attorney performs services of "value" to the estate); In re Piecuil, 145 B.R. 777, 783 (Bankr. W.D.N.Y. 1992) ("the applicable case law permits this Court, as a court of equity, latitude to grant relief where the failure to file a timely [retention] application

has been explained, and the explanation has been found reasonable"). Indeed, this Court previously exercised such discretion in the case at bar when it appointed counsel for the UCC on July 1, 2009, *nunc pro tunc* to June 3, 2009. *See* Order, In re Motors Liquidation Co. (f/k/a General Motors Corp.), Case No. 09-50026 (Bankr. S.D.N.Y. July 1, 2009) [D.I. 2854].

In her Objection, the UST cites and relies upon various generic principles as to why court approval is required for retention under section 1103(a) of the Bankruptcy Code, while ignoring the facts and circumstances that demonstrate the appropriateness of Caplin & Drysdale's request for *nunc pro tunc* retention here. Of course, the ACC and Caplin & Drysdale acknowledge the necessity for this Court's approval of Caplin & Drysdale's retention, which is the subject of the Application. The UST does not deny that this Court has discretion to grant *nunc pro tunc* retentions where appropriate, as has been clearly enunciated by the relevant precedent. Yet, she argues for a cut-and-dried approach that would unduly limit this Court's exercise of such discretion by barring the retention of committee counsel retroactively for any services rendered before formal creation of the committee, irrespective of the facts and circumstances.

Moreover, the UST's own description of such cases on page 6 of the Objection shows that they are inapposite. Far from being an "officious intermeddler or a gratuitous volunteer," Objection at 6, Caplin & Drysdale was asked in October 2009 to represent pressing interests of the same constituency for which it now seeks *nunc pro tunc* retention. Mr. Cooney, the Debtors, and the UCC all recognized that exigent circumstances — especially the goal of confirming a plan in April 2010 — called for Caplin & Drysdale to begin work immediately.

See Inselbuch Declaration ¶ 12; Inselbuch Supp. Declaration ¶ 3. The UST has pointed to no "duplication of effort." Objection at 6.

Citing the Bankruptcy Code's provision in section 1103(a) for committees to select counsel, the UST draws the inference that *nunc pro tunc* retention can never be allowed for any period before a committee is formally constituted. But this is a great leap to a conclusion the statute itself neither states nor implies. Section 1103(a) does not purport to address the authority of bankruptcy courts to issue retroactive retention orders. Nor does the UST cite a single case that has adopted its rigid and formalistic position.

To the contrary, the Second Circuit has set forth a flexible test allowing *nunc pro tunc* retentions. In re Keren Ltd. P'ship, 189 F.3d 86, (2d Cir. 1999), *aff'g* In re Keren Ltd. P'ship, 225 B.R. 303, 306 (S.D.N.Y. 1998). Keren holds that, in exercising discretion on applications for *nunc pro tunc* retention, bankruptcy courts should consider whether, "(i) if the application had been timely, the court would have authorized the appointment, and (ii) the delay in seeking court approval resulted from extraordinary circumstances."[3] The UST acknowledges Keren (Objection at 7-8) but abandons the basic premises of that decision by insisting that retention of committee counsel retroactive to any date before official formation of the committee is impermissible *per se*. *See* Objection at 8.

With respect to the first Keren factor, no one has suggested that the Court would have rejected the Application in October 2009 if the ACC had been appointed at that time. It is

[3] *See* 3 Alan N. Resnick & Henry J. Sommer, Collier on Bankruptcy ¶ 327.03[3] (15th ed. rev. 2009) (noting that, although the Second Circuit previously adhered to a *per se* rule, it "[has] retreated from this approach and [has] indicated that an order approving *nunc pro tunc* retention can be granted in 'extraordinary circumstances'").

undisputed that Caplin & Drysdale is both disinterested and well-qualified to represent the ACC.

In considering the second Keren factor — whether "extraordinary circumstances" warrant relief — a bankruptcy court takes into account "whether the applicant or some other person bore responsibility for applying for approval; whether the applicant was under time pressure to begin service without approval; the amount of delay after the applicant learned that initial approval had not been granted; the extent to which compensation to the applicant will prejudice innocent third parties; and other relevant factors." In re Keren Ltd. P'ship, 225 B.R. 303, 306-07 (S.D.N.Y. 1998), *aff'd*, 189 F.3d 86 (2d Cir. 1999).

Caplin & Drysdale was of course unable to move for retention by the ACC until the UST appointed that committee, which did not occur until the UST had concluded discussions with the Debtors and the UCC about the specific form that a representative entity for asbestos creditors should take. Until that appointment, neither the ACC nor the Subcommittee that was already operating informally had the official existence requisite to its moving for retention of counsel. Thus, no one had the responsibility or even the ability to seek Caplin & Drysdale's retention before March 2, 2010, when the ACC was formed.[4] There is no question but that the ACC made its Application promptly, once it was in a position to do so.

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[4] The UST goes further and argues that "[t]here is, however, no authority in the Bankruptcy Code, the Rules or decisional law for the official appointment or standing of subcommittees, much less their retention of separate counsel." Objection at 10. This is incorrect. *See, e.g.,* In re Nat'l Century Fin. Enters., 298 B.R. 112, 114, 118 (Bankr. S.D. Ohio 2003) (approving the application of "the Official NPF VI Noteholders' Subcommittee" to retain two sets of counsel over the objection of the UST, after previously directing the UST to appoint such subcommittee from the unsecured creditors' committee). The decision in In re Allegheny Int'l, Inc., 139 B.R. 336, 346 (W.D. Pa. 1992), cited by the UST, is clearly distinguishable. In that case, the approval of the court pursuant to section 1102(a)(2) had

There was pressure for Caplin & Drysdale to begin work before its retention could be approved by the Court. The Debtors, the UCC and Mr. Cooney on behalf of the current asbestos constituency all considered it necessary for Caplin & Drysdale to commence working in October so that issues affecting the constituency of current asbestos creditors could be framed and addressed in time for the Debtors to meet what was then their goal of confirming a plan of liquidation in April 2010. Inselbuch Supp. Declaration ¶ 3; *see also* Inselbuch Declaration ¶ 12. As requested, therefore, Caplin & Drysdale turned immediately to the task of representing that constituency through the Subcommittee.

No third parties will suffer any prejudice if Caplin & Drysdale's retention is approved retroactively as of October 6, 2009. Neither the Debtors nor the UCC have objected to the *nunc pro tunc* retention of Caplin & Drysdale requested by the ACC. Indeed, through their own respective counsel, both the Debtors and the UCC were aware and approved of Caplin & Drysdale's beginning work in October, which served their shared goal of expediting the formulation and confirmation of a plan and was thus of value to the Debtors' estates. *See, e.g.*, In re Hasset, Ltd., 283 B.R. at 379 ("Because all parties in interest, including the Debtor, were aware that Scupp was serving as its counsel and because certain of the services performed by Scupp were of 'value' to the estate, the Court believes that *nunc pro tunc* approval of Scupp's retention should be granted."). Under the circumstances, it was more than reasonable for Caplin & Drysdale to begin work on behalf of the constituency of asbestos claim-holders without awaiting the formalities that were certain to follow. The delay in the

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neither been sought nor granted. *Id.* (emphasis added). In this case, by contrast, it was contemplated from the outset that the Debtors would move for the Court's approval of the Subcommittee, and that counsels' retention would be sought *nunc pro tunc*. *See* Inselbuch Declaration ¶ 12; Inselbuch Supp. Declaration ¶ 11.

formal appointment of the ACC was outside of Caplin & Drysdale's control, and the law firm should not be penalized for it.

The UST quotes In re Standard Steel Sections, Inc., 200 B.R. 511, 513 (S.D.N.Y. 1996) in arguing that there was no "necessity" for Caplin & Drysdale's services before the ACC was officially formed in early March 2010. *See* Objection at 10. But Standard Steel itself demonstrates that the contrary is true under the correct standard: By October 2009 it had become clear that current asbestos claim-holders have "a distinct and potentially conflicting interest in the disposition of the assets of the estate that requires separate legal representation." 200 B.R. at 513. Moreover, "as the legislative history of § 1103(a) indicates, Congress believed that separate legal representation of disparate and adversarial interests in a bankruptcy was necessary to the fair and efficient distribution of the assets of the estate and therefore ought to be eligible for reimbursement as an estate expense." *Id.* (citing Collier's on Bankruptcy ¶ 1103.05, at 1103-17 (15th ed. 1995)). Indeed, the UST does not dispute that Caplin & Drysdale's retention is "necessary" now; her objection goes only to timing.

Most important, although Caplin & Drysdale performed work under the aegis of the Subcommittee whose formal creation the UST ultimately declined to endorse, that work now inures to the benefit of the same constituency of asbestos victims that the ACC is meant to serve. *See* Inselbuch Supp. Declaration ¶¶ 3, 4. Somewhat coyly, the UST suggests without actually asserting that there could be a conflict of interest between the Subcommittee and the ACC, based on her apparent premise that the Subcommittee must have purported to represent the interests of future asbestos claimants, as well as asbestos victims with existing claims. But that premise is flatly mistaken. The Debtors, the UCC, Mr. Cooney, and Caplin & Drysdale

all understood from the beginning that the Subcommittee would represent only the interests of present, not future, asbestos claimants, and that the Debtors would move (as indeed they have done) for appointment of an FCR to act for future asbestos claimants. *See* Inselbuch Supp. Declaration ¶¶ 3-7. Underscoring the essential continuity of interest from the Subcommittee to the ACC is the fact that Mr. Cooney, who, as attorney for Mr. Butitta, was the sole member of the abortive Subcommittee, serves as attorney for two of the ACC's members, Mr. Butitta and Ms. Maziarz. The UST's objection gains nothing from the fact that the ACC also has a third member, Mr. Cantrell, represented by Mr. Kazan. Of course, all three members of the ACC are current (not future) asbestos claimants, as was the member of the Subcommittee.[5]

In sum, the circumstances are "extraordinary," Keren, 189 F.3d at 87, and justify Caplin & Drysdale's retention *nunc pro tunc* as of October 6, 2009, as a matter of the Court's sound discretion. Although the specific situation at hand is undoubtedly unique, the retention of committee counsel as of a date preceding the formation of the committee itself is not without example in the cases. In In re S.W.G. Realty Associates, II, L.P., 265 B.R. 534, 538 (E.D. Pa. 2001), the district court affirmed the bankruptcy court's order allowing an attorney for a creditors committee to receive compensation for services rendered prior to formation of the committee. The district court reasoned that such services had benefited the estate, and it noted that the bankruptcy court had earlier approved counsel's retention retroactively to the commencement of the chapter 11 case, which of course preceded the appointment of the

[5] The UST's notion that present asbestos claim-holders could have no need of representation until an FCR was in place (Objection at 2, 13-14) does not make sense. The allocation of estate assets between present and future claimants, through negotiations between the ACC and the FCR, is only one aspect of the case that implicates the interests of present asbestos claim-holders. Many other issues affect that constituency and therefore call for legal representation. *See* Inselbuch Supp. Declaration ¶¶ 3, 5-6.

committee. *Id.* at 538-39. *See also* In re Combustion Eng'g, Inc., Case No. 03-10495 (Bankr. D. Del. May 21, 2003) (order approving retention of future claimants representative and its special counsel *nunc pro tunc* to the petition date), (copy attached as Exhibit A)[6]; In re Serv. Merch. Co., 256 B.R. 738, 740-41 (Bankr. M.D. Tenn. 1999) (awarding fees to committee's professionals for work done prior to the existence of the committee where *nunc pro tunc* employment had earlier been ordered as of the petition date, before the committee's formation). In these cases, the retention of counsel retroactively to a date preceding formation of the applicant-committee was apparently unopposed. As such, we do not cite them as laying down any rule of law. But they do tend to show that, not infrequently, as in this case, the parties whose interests are actually at stake recognize the practical imperatives and considerations of fairness that should lead this Court to exercise discretion and grant the Application in its entirety, including the ACC's request to retain Caplin & Drysdale's *nunc pro tunc* as of October 6, 2009.

[6] The referenced order from Combustion Engineering was initially sought on noticed motion, but it appears that, after the filing of a certification of no objection, the motion was granted without a hearing.

CONCLUSION

For all of the foregoing reasons and those set forth in the Application and the declarations submitted in support thereof, the ACC respectfully requests that the Court enter an order authorizing it to retain and employ Caplin & Drysdale as its counsel *nunc pro tunc* as of October 6, 2009 and granting such other and further relief as the Court may deem just and proper.

Dated: New York, New York
April 5, 2010

Respectfully submitted,

CAPLIN & DRYSDALE, CHARTERED

/s/ Elihu Inselbuch

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Proposed Attorneys for Movant Official Committee of Unsecured Creditors Holding Asbestos-Related Claims

Exhibit A

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
	)	
COMBUSTION ENGINEERING, INC.,	)	Case No. 03-10495 (JKF)
	)	
Debtor.	)	Re: 370

ORDER AUTHORIZING THE RETENTION AND EMPLOYMENT OF GILBERT HEINTZ & RANDOLPH, LLP AS SPECIAL INSURANCE COUNSEL TO DAVID T. AUSTERN AS FUTURE CLAIMANTS' REPRESENTATIVE PURSUANT TO SECTION 1103(a) OF THE BANKRUPTCY CODE *NUNC PRO TUNC* AS OF THE PETITION DATE

Upon the application (the "Application") of David T. Austern, the proposed Future Claimants' Representative (the "FCR") in the above-captioned chapter 11 case of Combustion Engineering, Inc. (the "Debtor") for an order pursuant to section 1103(a) of title 11 of the United States Code (the "Bankruptcy Code") and Rule 2014 of the Federal Rules of Bankruptcy Procedure authorizing the FCR to employ and retain the law firm of Gilbert Heintz & Randolph LLP ("GHR" or "the Firm") as its special insurance counsel as of February 17, 2003 (the "Petition Date"), and upon the Verified Statement of Scott D. Gilbert (the "Verified Statement"), a partner of GHR, in support thereof; and the Court being satisfied based on the representations made in the Application, and in the Verified Statement, that: said attorneys represent no interest adverse to the future claimants with respect to the matters upon which they are to be engaged; that they are currently disinterested persons (except as disclosed) as that term is defined under section 101(14) of the Bankruptcy Code, as modified by section 1107(b) of the Bankruptcy Code; and that their employment is necessary and is in the best interests of the future claimants; and that this proceeding is a core proceeding pursuant to 28 U.S.C. § 158(a); and that notice of the Application was good and sufficient under the particular circumstances, and that no

further notice need be given; and after due deliberation and sufficient cause appearing therefore; it is hereby

ORDERED, ADJUDGED AND DECREED THAT:

1. The Application be, and it hereby is, approved;

2. Pursuant to section 1103(a) of the Bankruptcy Code, the FCR be, and hereby is, authorized to employ and retain GHR as special insurance counsel effective as of the Petition Date, upon the terms, and to perform the services, set forth in the Application and the Verified Statement, so long as David T. Austern serves as the legal representative for individuals who may assert asbestos-related claims and/or demands in the future against the Debtor;

3. GHR shall be compensated in accordance with the procedures set forth in sections 330 and 331 of the Bankruptcy Code and such Bankruptcy Rules and Local Rules as may then be applicable, from time to time, and such procedures as may be fixed by order of this Court; provided, however, that, notwithstanding any provisions of the Engagement Letter (as defined in the Verified Statement), any retainer provided by the Debtor to GHR prior to the Petition Date shall not be replenished after the Petition Date, and no additional retainer shall be provided to GHR, absent further order of the Court;

4. The fees and expenses of GHR allowed by the Court shall be an administrative expense of the Debtor's estate;

5. The Court shall retain jurisdiction with respect to all matters arising from or related to the implementation of this Order; and

6. Nothing in this Order authorizes, approves or affects liability for transfers that are or may be avoidable under 11 U.S.C. §§ 544-550 inclusive.

Judith K. Fitzgerald

The Honorable Judith K. Fitzgerald
United States Bankruptcy Judge

Dated: Wilmington, DE
~~April~~ May 21, 2003

HEARING DATE AND TIME: Apr. 8, 2010 at 9:45 a.m. (Eastern Time)
OBJECTION DEADLINE: Apr. 1, 2010 at 4:00 p.m. (Eastern Time)

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Proposed Attorneys for Movant Official Committee of Unsecured Creditors Holding Asbestos-Related Claims

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re	:	
MOTORS LIQUIDATION COMPANY, *et al.*, f/k/a General Motors Corp., *et al.*	:	Chapter 11 Case No.
	:	09-50026 (REG)
	:	(Jointly Administered)

SUPPLEMENTAL DECLARATION OF ELIHU INSELBUCH IN FURTHER SUPPORT OF APPLICATION FOR ORDER AUTHORIZING THE EMPLOYMENT AND RETENTION OF CAPLIN & DRYSDALE, CHARTERED, *NUNC PRO TUNC* TO OCTOBER 6, 2009, AS COUNSEL TO THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS HOLDING ASBESTOS-RELATED CLAIMS

Pursuant to Rules 2014(a) and 2016 of the Federal Rules of Bankruptcy Procedure, Elihu Inselbuch deposes and says as follows:

1. As a member in the law firm of Caplin & Drysdale, Chartered, I am authorized to make this Supplemental Declaration on its behalf. I make this Supplemental Declaration to attest to certain matters in response to the objection filed by the United States Trustee ("**UST**") on April 1, 2010 (the "**Objection**") with respect to the application of the Official Committee of Unsecured Creditors Holding Asbestos-Related Claims (the "**Asbestos Claimants Committee**" or "**ACC**") to retain Caplin & Drysdale as its counsel, *nunc pro tunc* as of October 6, 2009 (the "**Application**"). The Objection does not oppose Caplin & Drysdale's retention as such, but takes exception to the ACC's request that the retention be made retroactive to October 6, 2009. The facts set forth in this Declaration are personally known to me and, if called as a witness, I would testify as follows.

2. The Objection points out that "the Application does not set forth the exact date on which the Asbestos Committee convened a meeting and selected Caplin & Drysdale as counsel * * * ." Objection at 12 n.2. The ACC informed me of the firm's selection on March 5, 2010, after the UST issued notice of her appointment of that committee on the same day.

3. The Objection asserts that the Application "fails to identify the circumstances that caused "'time [to be] of the essence,' exactly what matters 'required immediate attention,' what services the Firm actually performed prior to its selection as counsel to the Asbestos Committee, or what prejudice would result to innocent third parties if the Application is not granted." Objection at 13 & n.4 (record citation omitted). In setting

forth the ACC's request that the Court authorize the retention of its counsel retroactively, the Application and my initial Declaration in support thereof explained that on October 6, 2009, Caplin & Drysdale commenced to render legal services to a Subcommittee of the Official Committee of Unsecured Creditors (the "**UCC**"), formed at the urging of the Debtors and the UCC for the purpose of protecting the interests of holders of pending asbestos personal injury claims against the Debtors herein.[1] *See* ¶ 12 of the Declaration of Elihu Inselbuch, sworn to on March 18, 2010 ("**Inselbuch Declaration**"); Application ¶ 6. Caplin & Drysdale was under pressure to begin work for the benefit of such claim-holders because the Debtors had set a goal of confirming a plan of liquidation during April 2010. The Debtors and the UCC both recognized that formulating such a plan would require estimation of the Debtors' liability for asbestos claims so that the parties and the Court could determine what portion of the estates' assets should be distributed to an asbestos trust. Estimating asbestos liabilities is a complex process that in many bankruptcy cases has taken years. In my experience, moreover, formulating a bankruptcy plan that deals with asbestos liabilities involves many issues affecting holders of pending asbestos claims besides the estimation itself. Thus, the Debtors' stated goal for the timing of confirmation was highly ambitious and could only be met if the parties were prepared to act quickly.

4. The Objection notes that Caplin & Drysdale "has not filed time records for the period prior to its selection by the Asbestos Committee." Objection at 13 n.4. The Application and the supporting Declaration alerted the Court and the parties that "[f]rom October 6, 2009, until its selection this month as counsel to the ACC, Caplin & Drysdale

[1] The Subcommittee had one member, John Cooney, the attorney for Mark Butitta. Mr. Butitta was a member of the UCC until he was appointed to the ACC.

accrued time charges of approximately $100,000, and approximately $3,500 of disbursements and other charges, in performing legal services on behalf of the then-proposed subcommittee." Inselbuch Declaration ¶ 14; Application ¶ 7. Those submissions also clearly stated that because the services rendered under the aegis of the Subcommittee

> will now inure to the benefit of the ACC and its constituency, it is Caplin & Drysdale's intention, with the approval of the ACC, to seek payment of those charges by the estate and authorization thereof by this Court as part of the normal fee application process in this case.

Inselbuch Declaration ¶ 14; Application ¶ 7. Accordingly, there is no possibility that Caplin & Drysdale's time charges and disbursements for the proposed period of retroactive retention will be paid without the Court's review and disclosure to the parties under the procedures laid down for those purposes. *See* Inselbuch Declaration ¶ 23, Application ¶ 29.

5. Without presuming to meld those fee-application procedures with the retention process itself, I would note that of the approximately $100,000 in time charges arising from Caplin & Drysdale's activities on behalf of the Subcommittee, about $8,000 pertains to the period from October 6 through December 31, 2009, while approximately $92,000 relates to the period between January 1 and March 5, 2010. During the first of those periods, Caplin & Drysdale's efforts consisted chiefly of reviewing and commenting on the Debtors' proposed motion for the appointment of the Subcommittee and of a legal representative for future asbestos claimants ("**FCR**"). In January 2010, the UCC's counsel put forward for Caplin & Drysdale's consideration certain issues bearing on potential litigation and plan formulation. These matters were both highly sensitive and potentially important to the

asbestos creditor constituency, and the UCC's counsel presented them as requiring prompt attention.

6. The Objection suggests that retroactive retention should not be approved because no FCR had been sought or appointed before the ACC selected Caplin & Drysdale as its counsel. *See* Objection at 11. The point seems to assume that the only function of a fiduciary for present asbestos claimants in this case is to participate with an FCR in determining the "ratable shares" of their respective constituencies in the consideration to be paid into an asbestos trust by the Debtors. *Id.* I respectfully submit that this assumption is misplaced. The constituency of present asbestos claimants has interests in the full range of matters that are implicated in the formulation of a liquidation plan under the complex circumstances of this case. It may be true that no such plan could be finalized in the absence of an FCR. But that certainly does not imply that there would have been any virtue in neglecting the needs of the constituency of present asbestos claimants during the months it has taken to bring the Debtors' application for appointment of an FCR before the Court for decision.

7. The Objection also suggests that the Subcommittee somehow purported to act both for present claimants and future claimants. *See* Objection at 11. It gives no factual basis for this contention, however, and there is none. Throughout the period when Caplin & Drysdale acted for present claimants through the Subcommittee, the Debtors were consulting Judge Trafalet and his representative about the proposal for him to serve as FCR, with the right to retain counsel, which proposal has now been formalized in unopposed motions that

await decision by the Court. Neither the Subcommittee nor Caplin & Drysdale ever presumed to speak for future claimants.

8. The Objection also contends that the *nunc pro tunc* retention of Caplin & Drysdale would somehow endorse "retroactive, simultaneous service to both the Subcommittee of the Creditors' Committee and the Asbestos Committee — *i.e.*, entirely different entities with potentially opposing views." Objection at 11. Here, the formalistic approach taken in the Objection leads to baffling absurdity. There is no question of anyone's serving "two masters," nor does the UST contend that any ethical barrier prevents Caplin & Drysdale's retention by the ACC.

9. In mid-January 2010, Caplin & Drysdale learned that the UST had voiced reservations about appointing the Subcommittee as an official fiduciary for asbestos claimants, taking the view that it would be preferable to constitute a full committee separate from the UCC for that purpose. But there was never any doubt that such a committee would represent the *same interest* that John Cooney had previously acted for in his capacity as the Subcommittee, that is, the interest of present asbestos claimants as a separate constituency. Events bore out this essential continuity when the UST appointed two of Mr. Cooney's clients to the three-person ACC, including his original client in this case, Mark Butitta, who promptly resigned from the UCC. Of course, the very idea for the Subcommittee, superseded now by the ACC, originated in the recognition that asbestos creditors and other kinds of unsecured creditors have a divergence of interests on some matters of importance to this case. The separate interests of non-asbestos creditors have been represented throughout by the UCC and its counsel, not by Mr. Cooney, Mr. Butitta, the Subcommittee, or the ACC.

10. Also puzzling is the assertion that Caplin & Drysdale's "involvement in these bankruptcy cases was unknown to the United States Trustee" before the ACC was formed. Objection at 10. *See id.* at ¶ 12 at 5. In this regard, the Objection is simply mistaken. Caplin & Drysdale attorneys assisted Mr. Cooney in obtaining Mr. Butitta's appointment to the UCC at the outset of these cases and communicated directly with the UST and her counsel in that effort, both orally and in writing. A Caplin & Drysdale attorney appeared and argued for Messrs. Cooney and Butitta, in their role as standard-bearers for asbestos personal injury victims, at the hearing on the Debtors' motion to sell substantially all of their assets to "New GM" under section 363 of the Bankruptcy Code. Of course, counsel for the UST also participated in that hearing. *See* D.I. 3062 at 5 & 8 (transcript of hearing of July 2, 2009) (noting the appearances of attorneys Davis and Masumoto for the Office of the United States Trustee and of Caplin & Drysdale attorneys Reinsel and Tobin on behalf of Mark Butitta).

11. In October 2009, when the Debtors and the UCC asked John Cooney to take on additional responsibilities for the asbestos personal injury constituency by serving as the Subcommittee, the task entailed a need for legal services within an expanded scope. The Debtor and the UCC recognized that it would be unfair to burden personally Mr. Cooney and his client, Mr. Butitta, with the expenses of those expanded services. Therefore, when Caplin & Drysdale was asked to serve as counsel for the Subcommittee, it did so on the understanding that its retention would be requested *nunc pro tunc* so that the estate would bear any approved fees and expenses incurred in the course of the assignment. The Subcommittee has been superseded by the ACC, at the direction of the UST and after delays for which Caplin & Drysdale bears no fault. But this does not alter the fact that Caplin & Drysdale's services throughout have been rendered for the benefit of the Debtors' asbestos personal injury claimants and pursuant to the goal shared by all parties of expediting the resolution of this case. I respectfully submit that the extraordinary circumstances described warrant the exercise of this Court's discretion to approve the ACC's retention of Caplin & Drysdale retroactively to October 6, 2009, whereas upholding the UST's Objection would penalize the law firm for no good reason.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed on April 2, 2010.

/s/ Elihu Inselbuch
Elihu Inselbuch