UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

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In the Matter of:

GENERAL MOTORS CORPORATION, ET AL., Main Case No.

Debtors. 09-50026-reg

- -x

OFFICIAL COMMITTEE OF UNSECURED CREDITORS,

Plaintiffs, Adv. Case No.

v. 11-09406-reg

UNITED STATES DEPARTMENT OF TREASURY, ET AL.,

Defendants.

- -x

United States Bankruptcy Court

One Bowling Green

New York, New York

October 21, 2011

9:50 AM

B E F O R E:

HON. ROBERT E. GERBER

U.S. BANKRUPTCY JUDGE

Main Case No. 09-50026-reg:

Hearing on Kramer Levin - Final Fee Application

Adv. Case No. 11-09406-reg:

Hearing on Motion for Summary Judgment - and - Cross Motion for Summary Judgment - Oral Argument

Hearing on Motion to Dismiss Adversary Proceeding

Transcribed by: Karen Schiffmiller

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P R O C E E D I N G S

THE COURT: Have seats, please. All right, ladies and gentlemen, we have two GM matters today, one Kramer Levin's final fee app; the second, the motions to dismiss and the cross motions for summary judgment on the ownership of the term loan action. What I want to do is, subject to the rights of the fee examiner and the U.S. Trustee's Office to be heard, to approve right here and now all of the creditors' committee's requested fees, except for the disputed 245,000 bucks. I'm not aware of any remaining objections, and I think the creditors' committee's counsel did an extraordinary job.

Then, while the 245,000 dollars is very important to the law firm, it's pocket change in the context of this case. And I want to put the remainder of that controversy to the end of the calendar, after we've dealt with the much more important issues that we have first. Mr. Mayer?

MR. MAYER: Your Honor, we would have no objection to that, again subject to one administrative detail. I believe Mr. Stenger is in court?

MR. STENGER: Yes.

MR. MAYER: Mr. Stenger provided a fairly simple affidavit. If you plan to cross him on that, then we need him in court, and if not, he can -- is free to go, and we're happy to push it to the end of the calendar.

THE COURT: Mr. Jones?

MR. JONES: No, we have no intention to question Mr. Stenger.

THE COURT: Okay, then Mr. Stenger can either stay or leave as he sees fit.

MR. MAYER: Thank you, Your Honor.

THE COURT: But before we get off the subject, I have some comments. You can sit down, Mr. Mayer.

On the 245,000 bucks, I know what the documents say, but that seems to me to be only part of the issue. Between now and the time we hear it, I want the government to advise me if he really wants to press this issue. I want the government to tell me whether it's going to exercise a little prosecutorial discretion. Frankly, folks, and I've said it in this courtroom in other cases. I don't remember whether I've said it in writing. It drives me ballistic when people try to use the power of the purse strings to tie their opponent's hands in litigation before me.

The underlying issues on the important thing we're going to be talking about today, as my preliminary remarks on that are going to address, are very, very close. But here we do not have, you know, a greedy debtor management trying to walk away from a deal that it made. You have an estate fiduciary trying to do its job for a couple of hundred thousand or more creditors, who have a legitimate interest in the fiduciary doing its job. And I'd always thought the government

shared the concern for those creditors as much as the creditors committee does and I do.

Now, you know, sometimes the government thinks it has to fight fights, and you know, whatever your rights will be, they'll be. But before we address that issue, I want the government to let me know whether it intends to continue to press that objection. Now, on the more important thing --

MR. JONES: Your Honor, can I quickly -- I just got a whispered indication that it's acceptable for us to drop the objection --

THE COURT: Oh.

MR. JONES: -- on the fee.

THE COURT: Okay.

MR. JONES: I have Treasury people here who were moved and persuaded, I believe.

THE COURT: All right, very good. Then is there any further business vis-à-vis the creditors' committee's Kramer Levin fees? Okay. Mr. Mayer, at your convenience, get the paperwork done. Run it past Treasury, U.S. Trustee's Office, fee examiner, Export Canada.

MR. MAYER: Thank you, Your Honor. And I wish to thank my adversaries for their exercise of discretion.

THE COURT: Okay. Thank you very much. Now, on the much more major matters that we have today, I'm going to need help from both sides. As usual, I want you to make your

presentations as you see fit, but I want you to address the following questions and concerns.

Subject to your rights to be heard, folks, it seems to me this is all about the cross motions for summary judgment, and not the 12(b)(6). Mr. Jones, when it's your turn to be heard on the 12(b)(6) prong, I'd like you to tell me, if it's not ripe now, when will it be? Or is it your contention that the possibility that whoever loses a dispute of this size is going to be appealing after a substantive decision, means that it would never be ripe. We have lots of big stakes litigation where the bankruptcy judge is the first step, but not the last.

And while this is plainly not just a core matter, but one that I think everybody agrees that a bankruptcy judge constitutionally can decide, in other areas that is even more so. And the creditors' committee has articulated strong reasons why a determination, up or down, is in the interest of the creditor community, and not just in their interest, but something where it is deserving of a judicial decision. And frankly, I'm not persuaded that insurance disputes -- insurance coverage disputes -- are uniquely distinguishable on that basis alone, it's just that that is very often, you know, a paradigmatic example of symptoms why you need a quick decision.

And the question I have is, isn't there now a pretty clearly sharp disagreement under circumstances that won't change? And I saw in the government's briefs the possibility,

which I think is at least a possibility -- I guess I've got probable cause to believe that it's a lot more than that -- that if the creditors' committee wins, it might have some difficulty getting back all the money that it's looking for. But it seems to me that wouldn't the unsecured creditor community benefit to the extent of whatever it can collect? So, it seems to me that this isn't really so much about ripeness. And in fact, I think it's all about the underlying merits, which we'll be getting to in a minute.

Then I need help from you, Mr. Jones, on the other prong of your 12(b)(6). And I think it's -- you're plainly right. I don't think Mr. Mayer disagrees with you on this. If he does, he'd have to -- he'd probably be disagreeing with me as well. That, of course, the creditors' committee is carrying the sword for the whole estate. It's not carrying it uniquely for the unsecured creditor community when it's going after JPMorgan Chase and its syndicate.

But why does that go to standing here, or even its ability to state a claim? It seems to me, isn't the real issue the granting documents under which the creditors' committee is acting, and any applicable orders or agreements under which the creditors' committee's ability to carry the sword, if you will, and to ultimately get the fruits of its recovery, ultimately are subject to the superpri that the government contends still exists?

Now, on a different front, I had some difficulty reading the papers and understanding the distinction between the summary judgment prong and the 12(b)(6). There is law out there -- and we all know it -- that says that you can go a little beyond the pleadings to look at underlying documents if they were documents that either were or should have been considered by a plaintiff. But when we're talking about the totality of this, and I got cross motions for summary judgment anyway, I have to understand the purpose in life of a 12(b)(6), because I don't see what the 12(b)(6) would accomplish that the summary judgment issues would not.

All right. So let's talk to summary judgment, because I think that's really what we're all talking about here. And as I think I telegraphed earlier, I think the issues are much, much closer. I understand both sides to be arguing, with one variant or another, the rule against surplusage and the underlying idea that everything in the DIP orders and the DIP lending agreement has to be read as having some purpose or meaning in life. The creditors' committee seems to be arguing most significantly that they're actually two separate clauses. One that says that the term loan isn't collateral, and the second that says the DIP loan is nonrecourse.

Meanwhile, the government seems to be arguing that the provisions for the superpri under 364(c)(1) are separate from those granting the lien under 364(c)(2) and (3), if I recall

the numbers correctly. And that each of those likewise had a purpose in life. And the two governmental agencies also point out that in at least two other contexts -- I shouldn't say "at least"; I think there are only two other contexts they point out -- one vis-à-vis a carve-out and one vis-à-vis the equity interest of New GM, that when the parties wanted to make the superpri unable to reach those things, they knew how to do it, and they did do it. And that there's no basis for ignoring the granting of the superpri under 364(c)(1).

Now, what I want both sides to deal with is that you have two aspects of the papers, one of each side, that tend to favor your respective positions. And what I got to deal with is how they coexist in the same universe under the familiar principle that you try to harmonize them and try to give meaning to every provision. And in one of the replies -- this is Mr. Mayer's reply -- I'm reading from his page 3, in the context of a provision that I -- of the code that I think we all agree upon, which is 1129(a)(9)(a), it says in substance that you got to pay off all admin claims on the effective date, unless otherwise agreed. And Mr. Mayer and his colleagues are arguing in substance that yeah, here it was otherwise agreed.

And then he goes on to say "the fact that they use somewhat different language, to otherwise agree with respect to the carve-out and the New GM Equity Interests, doesn't invalidate their otherwise agreed with respect to the term loan

avoidance action". That comes very close to being the issue that I need both sides to address more. Is the creditors' committee right on that, or is it wrong on that? Because plainly there is contrasting language, and I would be hard-pressed to ignore the presence of that contrasting language. And I need help from both sides on that. And I also need help from both sides on whether nonrecourse, which is very easy to understand in a secured loan context, is subject to multiple entendres, multiple meanings.

Lastly, I want both sides to help me with what I think you agree on, which is that neither side has any parol evidence it would suggest is relevant, if I found any of this ambiguous. So that up or down, you want me to decide it on what the documents say. I think that's implicit in both sides' cross motions for summary judgment, and I noticed that the governmental response to the creditors' committee 7056- -- and forgive me, I forgot what our local numbers -- which local rule it is, one or two, or whatever -- doesn't quarrel with what the relevant documents are, nor does it put forward any other facts. Everybody seems to be wanting to argue it on the terrain of this. And forgive me, folks, I said that was the last thing, and it's not the last thing.

Neither side seemed to give any real attention to anything that happened before the final DIP was entered into. And if any of you have anything to bring to the table on what

happened when I considered the interim DIP, I'd like you to help me on that. I have no memory of there being anything relevant in that. But I remember in other cases on my watch having focused on the fact that if carve-outs don't reach the superpri, as well as the DIP lenders' lien, they're not effective carve-outs. And that same principle, if it was discussed earlier, might be helpful here. Unfortunately, I don't easily have available to me transcripts of every time I've heard first day papers over the last eleven years. But I have a memory of somewhere having discussed this with parties before me, because when I saw your issue, I had deja vu about it.

Okay, with that said, since I got the 12(b)(6) first, let me hear first from you, Mr. Jones. And then under the circumstances, I think I'm going to let each of you take turns arguing back and forth, including surreply, until each of you has had a chance to speak. Of course, when we get to reply and surreply, it'll be limited to any new stuff that was put forward in the last round.

MR. JONES: Thank you, Your Honor. David Jones from the U.S. Attorney's Office, Southern District of New York for the United States, specifically Treasury, as DIP lender. And Your Honor, I will note that EDC wants to argue separately, but we've coordinated to try to avoid duplications.

THE COURT: Sure. I do want to hear from EDC. I

thought Canada had put some points in that I thought were kind of freestanding, and I did want to get its perspective.

MR. JONES: Your Honor, I will try to proceed immediately to the questions Your Honor raised as -- the ones in which the Court -- that the Court specifically wanted us to address, and I think the Court has really driven right down to the heart of the question. I will note that we do stand by our ripeness 12(b)(1) basis motion, and I'm not going to focus on it, because the Court has the papers and understands them.

One specific question the Court asked was "when will it be ripe in the government's view?" And I think as the case law recognizes that's, sort of, a totality of the circumstances analysis, so there's perhaps a sliding scale. And as to the specific question of would it become ripe based on a decision by this Court, even though that was subject to ongoing appeals, that would be one step further down the road, so it's certainly closer to ripe. I think we feel because it is a jurisdictional question, we're obliged to raise it and flesh it out to the Court, especially because we do think there's serious question about whether a case or controversy is presented here, but we've briefed it fully and we'll focus our arguments today as the Court suggests and requested.

On the question of 12(b)(6) versus summary judgment, and which has primacy, I think we're -- assuming the Court were to not dismiss under 12(b)(1) for lack of subject matter

jurisdiction, we'd be perfectly happy and delighted to receive summary judgment in our favor on the merits, and we -- I think all things being equal -- think that would be the sensible and perfectly desirable result for us, as opposed to a 12(b)(6) victory. Remember that when we started down this road, we were contemplating filing threshold dispositive motions, so use the 12(b)(6) rubric, but then the committee simultaneously launched summary judgment briefing, so we also cross-moved on that basis.

THE COURT: Pause then, please, Mr. Jones. Would you be troubled if I came to the view that it is ripe, if I regarding your 12(b)(6) second prong as merely having been subsumed within the subsequent summary judgment motions that I'm hearing anyway?

MR. JONES: No, Your Honor, that would be fine. I think they're really coextensive, and they're briefing identical issues. As Your Honor observed, the parties agree what the dispositive and the controlling documents are. We're fighting about the implications of terms that everybody can read and has read many times, and I think those can be imported into the pleadings for purposes of 12(b)(6), but they're equally susceptible of summary judgment resolution. And I think that's probably most efficient just to treat this as cross-motions for summary judgment at this point.

The Court -- Your Honor asked whether the parties

agree, as they implicitly seem to, that neither side wants to advance any parol evidence on this point. And certainly from our point of view, and I think the committee's, although they'll answer separately, the answer is yes. And the reason for that --

THE COURT: I forgot how you teed up the question to which the answer was yes.

MR. JONES: Oh, sorry. I don't think either side wants to present parol evidence, Your Honor. I think we're -- in one of our briefs, we cite a Second Circuit case, Compagnie Financiere, I think it's on page 10 of our reply perhaps on summary judgment, in which the Second Circuit says specifically "summary judgment can appropriately be entered even in a contractual dispute even if there are ambiguous provisions, so long as the nonmovant is not advancing parol evidence." And I think that's the posture we're in here.

So, I know from our point of view, what we think our parol evidence would show is entirely consistent with our interpretation, and I believe that to be the case on the committee's side as well. So I think we wouldn't really advance the ball, and this really is a dispute based on what the controlling documents show and mean. So, Your Honor, that does, I believe, get us down to the central merits issue here, which is on the closely related questions identified by Your Honor. What does nonrecourse mean in this context, and how to

harmonize the documents as a whole?

And if I may, Your Honor, although I know the Court has prepared well and very thoroughly, so this will be familiar ground, I just want to walk through the specific provisions we're relying on, which won't take a terrible amount of time, and which we believe makes very clear that they're both specific and written and conceptualized in a way that isn't susceptible of being modified by either the use of the term "nonrecourse" or the related exclusion of potential avoidance action proceeds from the government's collateral. So quite simply, we have freestanding, very express obligations, and protections for the DIP lenders that are not anywhere expressly modified or subject to a carve-out.

And as our papers note and Your Honor noted, we are relying in part on the fact that the very instruments we rely on expressly say that certain fees are carved out from any ability of the -- from any use to repay DIP lenders, and that in addition, the amended DIP facility, which was approved by the wind-down order, expressly provides that the DIP lenders have no right in any manner whatsoever to the New GM Equity Interests that have been reserved for the unsecured creditors or to any proceeds received from the sale or distribution thereof in satisfaction or repayment of the loans.

And so those specific provisions are examples of how the parties could have and should have similarly treated the

avoidance action proceeds, if there was in fact an agreement to make those proceeds unavailable for use by the estate to repay the DIP lenders. Now what we have here, by contrast, is an avoidance action which the committee had been authorized to bring, but which is on its face and by the Bankruptcy Code brought for the benefit of the estate; it's to be a recovery for the estate. And therefore, it's available, as under case law we've cited, for use by the estate for whatever the estate's legal obligations and needs are.

I'm going to interrupt myself, Your Honor, by saying I'm unaware of anything in the interim DIP that is relevant, and I believe Kramer Levin was not a party at that time. I had not anticipated or gone back to sift through earlier papers, so I can't -- recently -- so I can't --

THE COURT: Well, you're quite right in that regard, Mr. Jones. One of the reasons why we try to deal with as little as possible when we enter interim DIPs, typically on the first day of a case, is because the creditors' committee isn't yet at the table, and we don't want to prejudice the unsecured creditor community by acting in a way that's excessively activist. When I talk to younger lawyers, I analogize it to what you learn in medical school. On the first day of the case, you try to do no harm.

And but most well counseled creditors' committees, and here we have one of the best counseled creditors' committee

I've seen in a while, go back -- if they can get their hands on transcripts or audio recordings of what happened earlier -- just to see what happened before they were on the job. And if I had said something that would have telegraphed what people should do, that would be of interest to me. I don't know if I did that or not in this case. I know I did it in a slightly different way, but analogously in Lyondell Chemical for instance. And that's what I was driving at in my question, but if you don't have anything, and if Mr. Mayer likewise doesn't have anything, that issue will seemingly drop off the table.

MR. JONES: Okay, thank you, Your Honor. Then the reason I raise that at this time is that I think therefore the appropriate starting place is the final DIP order which was entered on June 25th, 2009. And as the Court knows, the DIP lenders under that order have an allowed superpriority administrative expense claim for all loans, reimbursement, obligations, and other indebtedness by the debtors, whether then existing or arising in the future under the facility. And one specific thing I want to note that that includes, to quote the DIP order paragraph 5, which is at page 14, without limitation --

THE COURT: This is the final DIP as contrasted to --

MR. JONES: Yes. I'm sorry, Your Honor. Yes, I'm talking about the final DIP order --

THE COURT: Which is the second of the three DIP

orders I entered into.

MR. JONES: Correct.

THE COURT: I entered. Paragraph 5?

MR. JONES: Yes, in paragraph 5, I don't want to over-dramatize it, but I want to make clear that it specifically says that this "superpriority claim is without limitation for all principal, accrued interest, and all other amounts due under the DIP credit facility." So that language establishes clearly that whatever amounts have been advanced are due back on a superpriority administrative expense claim basis. That would have been an appropriate place, if you were saying, oh, but this is limited to the value of the collateral, to say so.

And also, this grant -- in the same paragraph -- is under Section 364(c)(1) of the Code, which doesn't even implicate or render such a claim on a secured basis. So, whatever security treatment or collateral is backing this debt, the debt has independent status under Section 364(c)(1) and is entitled to treatment as a superpriority administrative expense without regard to what separate security interests and provisions have been made.

The ensuing order, of course, that we're also relying on is the wind-down order entered on July 5th, 2009, which we call that, because obviously that's the DIP order and agreement that provides the debt facility to finance the entire wind-down of the estate and administration of this case.

THE COURT: Let me interrupt you for a second, please, Mr. Jones.

MR. JONES: Yes.

THE COURT: Just confirm my understanding. The earlier main DIP was for a time pretty big, maybe as much as 33 billion dollars --

MR. JONES: Correct.

THE COURT: -- or something in that range?

MR. JONES: Yes.

THE COURT: And then the wind-down was a supplemental 1 billion or 1.2 billion, somewhere in that range, to carry the estate through during its wind-down process, especially in, like, dealing with environmental issues and other issues that needed to be dealt with after the 363 sale took place?

MR. JONES: That's correct, Your Honor. And the much large prior DIP facility entered in late June was partly to, sort of, provide bridge financing and handle other obligations of the estate. But the great bulk of that money was used, to the extent it was drawn down, to fuel the credit bid of the sale transaction. So the great majority of it was used and was satisfied through credit bidding at the time of the sale transaction. So what that left was the -- it's 1.175 billion, is the number of debt -- of the administrative debt facility -- DIP facility -- as of July 5th, 2009.

Now, I would note that the initial negotiations

involving both the reservation of the equity -- the New GM Equity Interests -- and then also touching on the avoidance action proceeds, and importantly also, simply setting up what the amount of the DIP facility was going to be for wind-down purposes contemplated only 950 million. And I don't know if the Court remembers, but during the sale hearing even, there were negotiations ongoing and due diligence being performed at a very fast clip to determine what the administrative needs of the estate would be. The amount was determined to be higher than that originally contemplated 950. And so Treasury and the DIP lenders agreed to increase it to 1.175 billion.

And the reason that has significance for today's proceeding, Your Honor, is that to the extent the committee's arguments based on the economics of this situation matter, and the notion that there wouldn't be enough money leftover if this money were available to pay the DIP lenders. That means that at the time this was originally negotiated, there was approximately a 500 million dollar potential recovery on top of the contemplated amount for the DIP facility. When the DIP facility went up more by a little over 200 million, that ate into the, sort of, potential additional upside that could have been realized by unsecured creditors, but --

THE COURT: I need you to say that again in a different way, or at the least, repeat it, because I didn't keep up with you.

MR. JONES: Okay, I'm sorry, Your Honor. When we first negotiated the overall structure -- or the parties, I should say, negotiated the overall structure -- of the DIP credit facility, what was going to be used to finance the ongoing administration of the case, and what assets were going to be reserved for unsecured creditors, and what the DIP lenders collateral was going to be. They thought -- everyone thought -- that at the time, although due diligence was ongoing, we'd be looking at a wind-down DIP facility of a little under a billion, I believe, 950 million.

And the reason I raise this is that the creditors' committee in part argues that because our DIP facility is now 1.175 billion, we're eating up the lion's share to all of a likely recovery on this 1.5 billion dollar avoidance action. And they say, you should -- the Court should infer from what they say is that economic reality that they wouldn't rationally have entered such a deal. So my response to that partly is to factually challenge it, by saying the assessment at the time was that there was over a 500 million dollar potential cushion on top of whatever the DIP lenders might need, as opposed to what now appears to be about a 300 million dollar cushion.

So, I mean, this isn't -- I don't think a driver for the Court's decision, it shouldn't be or for the legal analysis --

THE COURT: I would think it shouldn't be if you're

saying that you don't know of any useful parol evidence. You're not telling me that in exchange for a bigger DIP, something was given up by the creditors' committee. The bigger DIP was done to meet what was perceived to be simply a bigger cash need. Am I correct?

MR. JONES: Yes. I mean, I think -- yes, our primary point, Your Honor, is completely driven by the texts of the agreements and the orders. And so I'm perhaps detouring and bogging down a little, which isn't wise, but one point the committee has raised is this sort of economic incentives, and questioning what --

THE COURT: Your point is that whether the DIP were 950 million or is 1.075 billion, there is a still a delta as compared to the potential upside in the term loan action, which is presumably in the one and a half billion range. So there's still something in it for everybody.

MR. JONES: That's right. And they say, Government, your reading of these agreements must be wrong, because what kind of crazy unsecured creditors' committee would enter into a deal with these economics. And my point is theeconomics are -- first off, that doesn't really hold up even assuming the 1.175 billion DIP facility, but moreover, when they negotiated, that number was even smaller, meaning they had an even bigger upside. So I guess for purposes of argument, my analytical point I would like the Court to draw is that it shouldn't be

swayed by the committee's economic arguments among other things, because they don't actually hold up factually.

So then I will again progress to the July 5th, '09 wind-down order, which expressly approved and continued the terms of the final DIP order, subject only to modifications as set forth in that wind-down order. And again, as I've noted, that wind-down order preserves specifically the superpriority administrative expense status of the DIP lenders, by its terms subject only to the carve-out for fees -- for certain fees, which is unrelated to this dispute. And the wind-down order approves the amended DIP facility which was annexed to it, and so it forms part of the order. And that agreement or facility specifically provides that the DIP lenders have no right to receive whatsoever in any form the New GM Equity Interests or proceeds from them that have been reserved.

Again, there's absolutely no similar provision regarding the avoidance action proceeds. This brings me back to the meaning of the term "recourse", and the fact that the avoidance action proceeds are not included in the DIP lender's collateral, and whether those provisions can or do modify the superpriority administrative expense claim provisions that I've just been talking about. They certainly don't explicitly. And it's asking an awful lot of them to be an implicit modification of those protections and status of the DIP lenders, especially given the very specific carve-outs and treatments that have

been applied to other things. The GM Equity Interestss are excluded from collateral, but also made explicitly unavailable for repayment. Ditto the carve-out.

So given that, you have a textual basis to infer that the parties did not necessarily believe that merely using the word "recourse" was a sufficient way -- "nonrecourse" -- was a sufficient way to limit the effect of the superpriority claim.

THE COURT: Pause right there, please, Mr. Jones, because I understood that -- you and Export Canada made that point quite clear in your papers. But in essence, you haven't also talked about -- and if you were going to talk about it later, forgive me -- but move it up to talk about it now. The fact that just as you have language in the agreement that you contend is in surplusage, that of course being, I don't know how many, lines of text it gives your guys the superpri.

The creditors' committee has two separate lines, as best I recall, and correct me if my understanding of the facts is erroneous. One says that the avoidance action isn't collateral. Let me call that sentence one. And the second that says the loan is nonrecourse. We'll call that sentence two. Under your construction, and you'll not quarreling with it being nonrecourse insofar as it affects collateral, doesn't sentence one skin the cat? What's the purpose in life of sentence two?

MR. JONES: The two sentences being the exclusion of

this particular asset from collateral coupled with the nonrecourse --

THE COURT: Sentence one says it ain't collateral anyway.

MR. JONES: Right.

THE COURT: So what's the purpose of sentence two which adds "nonrecourse"?

MR. JONES: I conceive of those sentences as being different ways of saying the same thing. They're coextensive and they both mean that to the extent you treat the DIP loan as a secured loan, and it has also been given some security protections, and flowing from that, to the extent the DIP lenders have any rights to exercise remedies available to secured lenders, it is recourse only to their collateral, and their collateral doesn't include either the avoidance action or the New GM Equity Interests or the carve-out.

So that during the pendency of the case, if there was a complete meltdown and some need for the DIP lenders to come in and on some emergency basis seek to recapture their collateral, their remedies would have been limited to the universe of their collateral. In other words, they couldn't have grabbed on to the avoidance action; they couldn't have grabbed on to the New GM Equity Interests that are reserved for the unsecured creditors, and to the extent there's a little protected pool of fees, they couldn't have grabbed onto that.

But that simply has no bearing on either the existence of a textual obligation on the debtors to repay the amounts due under the DIP facility; that's established in the provisions I've been talking about and relying on. And particularly because we've got our status under Section 364(c)(1), which is independent of secured remedies, it doesn't affect our ability or the requirement that we be repaid from available funds at the end of the case, just under the ordinary operation of the Bankruptcy Code.

THE COURT: I think a colleague of yours wants to pass you something. I'll let him do that.

MR. JONES: Yeah, I'd like -- thanks.

UNIDENTIFIED SPEAKER: Sorry, thank you.

MR. JONES: Oh, okay. Yes, another meaning of "nonrecourse" which has been pointed out to me, or an implication of nonrecourse, is that we don't -- that precludes our asserting a general unsecured claim for the amount of any -- independently -- for the amount of any deficiency, which in this case, we wouldn't have anyway. But, so there's -- that's simply another consequence of the fact that this is a nonrecourse styled obligation.

But again, that's -- all of these things I'm saying are to respond to the question: why would -- I guess it's related questions. One is why have both the provisions governing collateral at the same time that you have the

nonrecourse provision; aren't those duplicative? And there's substantial overlap, although there may be some independent implications from each just as the limitation on being able to make a general unsecured deficiency claim flows from nonrecourse uniquely.

But then also the question of how do you -- why would those provisions exist, and how can they be harmonized with the world in which we also have -- we the DIP lenders -- have an allowed superpriority administrative claim? And, you know, that's my attempt to touch on both of those things. They do have significance. They are not rendered meaningless by the fact that we are -- have and continue to assert our allowed superpriority administrative expense claim. And so I think the doctrinal legal contract law answer is, these are all provisions that have independent meaning, but that -- and that don't render each other annullity, they simply operate independently.

So we have an unqualified superpriority claim that's entitled to treatment under the Code. We bargained for that; we got it. And it's very important, I should say, to the Treasury. I mean, just to step back to the real world, the commitment that Treasury made here was to fund the operation of these cases, to fund the wind-down, but that to the extent funds were available to repay it at the end of the day, to recapture it, we've used public funds to confer vast value on

many, many people, and we're happy to have done that, because that has brought about great public benefit.

But at the same time, we're trying to do so as responsibly as possible. And of course, to the extent we'd agreed otherwise, to have value preserved for other constituencies, as is the case of the New GM Equity Interests reserved for unsecureds, we are a hundred percent honoring that commitment. We don't believe there is any agreement -- any comparable agreement -- with regard to the treatment of the avoidance action proceeds. And in fact, we have specific contractual provisions and provisions in orders that provide that we're entitled to be repaid out of estate funds, which include recoveries in the avoidance action. And there's nothing in these documents to put that out of reach for use for repaying DIP lenders.

Your Honor, I am happy to answer any other questions the Court may have, but I think I have really walked through and presented the basis of our claim, to the extent I understand it, so.

THE COURT: I have one other that I didn't mention at the outset. I want you to respond to it; when it's Mr. Mayer's turn, I want him to do the same. We're out of 12(b)(6) territory. We're now in summary judgment territory, Rule 56. The Supreme Court has told us in Ashcroft somewhat to my surprise, but I do what the Supreme Court tells me, that

bankruptcy judges are allowed to use their experience in determining when contentions they hear are plausible.

Now we're beyond 12(b)(6) and I'm troubled by that, and I may have said this in other cases on my watch, because that would at least seemingly on a pure question of law give rise to different rules of law, depending on who is sitting up here. And I, by way of example, have seen a fair number of DIP financing documents over the years. I don't know if it's twenty or fifty or seventy-five, but more than other judges might have.

Have much do you think I can or should -- pause. Folks, historically that's resulted from people's Blackberrys interfering with our systems. Turn off your Blackberrys. I'm not going to make you give them up, but turn them off, please. How much, Mr. Jones, do you think it's appropriate for me to use my experience in ruling on this controversy?

MR. JONES: Your Honor, I know my Blackberry's off. I did triple-checked.

THE COURT: That's why I'm not saying anything to you, and I'm just scratching my head. Go ahead.

MR. JONES: I will confess that's a very hard question for me to answer, Your Honor. I'll sort of work -- as I see it, first off, the modified standard of review that Your Honor mentioned, is a 12(b)(6) standard of review. And, so a simple way to answer it is to say you can ignore that, because we're

going to resolve it on some --

THE COURT: It's just 12(b)(6).

MR. JONES: Yes.

THE COURT: But I take it you don't quarrel with the idea that both the 12(b)(6) and a Rule 56 are decisions on disputed matters of law. And most significantly, they're not discretionary decisions. If, as is very possible, whoever loses this case takes it up, you guys are going to be arguing whether I got it right or wrong, not whether I abused my discretion.

MR. JONES: That's right. I mean, Your Honor -- yeah, a decision on summary judgment or on 12(b)(6) is subject to de novo review. I'm going to get my crutch out, which is my brief standard of review discussion.

And again, I mentioned earlier the Compagnie Financiere case, 232 F.3rd 153 by the Second Circuit, which I think, in terms of procedural guidance, although it's from 2000, is about the best we find -- I found -- because it talks about the standard for summary judgment, which is simply that there has to be no material factual dispute, and then it's a decision is a matter of law. And that Compagnie Financiere case, which I mentioned, talks about -- makes clear that the court can decide disputed contentions arising from contracts, where the parties aren't advancing extrinsic or parol evidence, even if the court believes there's some ambiguity in the

agreement.

Now in terms of the Court's question, to what extent can you use your experience on that? I don't think the summary judgment case law as it's now written speaks specifically to that. I think every judge, of course --

THE COURT: Well, it's evidence outside the record, and I got to tell you, that because it's evidence outside the record, I'm uncomfortable in relying upon it. And you know, if this goes up, how is Joe or Jane appellate judge going to know whether I had a basis for applying my experience or not?

MR. JONES: Your Honor, I don't know that I have a very intelligent answer to that, other than to say, I think that to facilitate appellate review, it would be appropriate to articulate whatever factors, whether record or to the extent they're nonrecord factors considered, go into the Court's decision, and then an appellate judge would be able to review it. And if those factors are not articulated, they wouldn't be available for appellate review.

I'm a little unsure, to the extent the Court's talking about experience with proceedings or other filings or hearings in this case, that can form part of the record on review, and be susceptible of assessment and consideration. We haven't identified anything else relevant. If the Court does, of course, it's entitled to do so.

If the Court's talking about its more general

experience over the years in presiding over bankruptcy cases and substantial Chapter 11s, I'm -- you know, I think the Court inevitably will do that realistically. And I don't know that there's any special rule dictating to the extent to which that is or isn't permissible as you review the record before the Court.

THE COURT: Continue, please.

MR. JONES: Your Honor, I think on that equivocal note, if the Court has no other questions, I've covered the heart of our position. And to the extent the Court determines not to dismiss under 12(b)(1), we respectfully request entry of summary judgment in favor of the DIP lenders.

THE COURT: Okay, thank you.

MR. JONES: Thank you.

THE COURT: Mr. Mayer, I'm sure you're itching to speak, but should I be letting Mr. Schein or Mr. Edelman be heard -- is it Mr. Edelman, by the way? I know Mr. Schein a little better.

MR. EDELMAN: Yes, it is.

THE COURT: Okay. Do you want to be heard before Mr. Mayer?

MR. EDELMAN: It probably makes sense to have all arguments on -- it's up to you.

THE COURT: That's kind of why I was asking you -- inviting you to speak now. Yes, why don't you go ahead and do

that?

MR. MAYER: The committee would agree with that. It makes sense for Mr. Edelman to go first.

THE COURT: Sure, come on up, please, Mr. Edelman.

MR. EDELMAN: Good morning, Your Honor, Michael Edelman for Export Development Canada. I will try to be brief and not overlap too much --

THE COURT: Sure.

MR. EDELMAN: -- with the statements from my colleague from the United State's Attorney's Office. And I'll also try to focus on the questions that you asked.

One of the questions you asked was whether we thought that our interpretation of the documents, how do we explain the non -- the exclusion from collateral, and also of the nonrecourse? Those two provisions -- we believe that the nonrecourse language and the exclusion from collateral work hand in hand together. But there are some different purposes that are covered by the nonrecourse provision that is broader than just an exclusion from collateral.

As Mr. Jones stated that nonrecourse provision protects against any assertion of a general unsecured claim for any deficiency. That's important here, because -- and it's different than the -- you know, a general unsecured is different than our grant of superpriority. The grant of our superpriority is a separate freestanding right that has its own

exclusions. The nonrecourse language limits any deficiency from our liens from being converted into a general unsecured claim. And general unsecured claims in this case were entitled to distributions of the equity interests in the New GM assets.

So all those concepts, the exclusion of collateral, covers, you know, excludes from our liens, but it doesn't necessarily exclude from our deficiency claim, and that works in loan with our agreement that we would not seek to have any rights in the New GM Equity Interests and any plan distribution, as a result of our general unsecured claim arising from our deficiency.

It's also interesting to note that the nonrecourse terminology that's used consistently throughout the documents always talks about loans and collateral concepts, which work hand in hand together, whereas a different terminology is used when we talk about the scope of the superpriority rights. That extends to all obligations. So, even the terminology shows that there's a difference between the two concepts. So we do think that there is a distinction between those two matters.

THE COURT: Pause, please, Mr. Edelman, because I understood what you just said in the context of your superpri, but if it weren't for the nonrecourse feature, couldn't you look to your collateral to all obligations under your DIP as well?

MR. EDELMAN: Well, as for a general unsecured claim,

that's correct. But as I said, that doesn't give rise to --

THE COURT: No, I mean as a DIP loan.

MR. EDELMAN: We're -- see --

THE COURT: Oh, you're talking about nonrecourse having different meanings in the context of the ordinary pre-petition loan, which could have a deficiency and a post-petition loan where you got your lien under (c)(2) or (c))(3) -- 364(c)(2) or (c)(3).

MR. EDELMAN: I don't know if I was making that broad a proposition. I was just saying in the context of these documents, different terminology was used. And I think that shows that the intent was different between the scope of the superpriority and the meanings of the nonrecourse. And we believe, and I think the interpretation of the contracts show, that the nonrecourse is -- supplements the limitations on our liens, so that we do not have any lingering unsecured claims -- general unsecured claims. We do have our superpriority rights and there are express exclusions and limitations on those superpriority rights, but those are two separate, independent concepts under the documents.

THE COURT: Continue, please.

MR. EDELMAN: With respect to -- you know, you also asked, generally, is recourse a general concept. And our review of -- before, in putting together our papers, we believe that recourse is purely a concept that's used in collateral,

secured loan context. So I -- we didn't find any context other -- you know, outside of a secured loan context where recourse was used.

We believe that the -- there are four factors that -- that show that our interpretation of the contract is more appropriate. You know, first of all, the -- and I am not going to review all the rules of contract interpretation because I think all parties agree on the general rules. And we're not arguing as to what rules apply, but how they're applied in this case.

Here are the specific terms that talk about the superpriority. The grant to superpriority are very broad, but they do set forth certain delineated limitations. And so the rules where the specific governs over the general, we believe shows that the separate grant under 364(c)(1), which are dealt with under separate provisions under the loan agreement and also under the -- each of the DIP orders, shows that these rights are very broad, but only have certain delineated limitations. And none of those provisions limit the scope of the superpriority rights to collateral concepts, and none of them limit our rights for any proceeds from any of the estate assets, including the avoidance actions, other than the two specified carve-outs, which are the carve-out and also the limitations on seeking recovery from a new equity -- New GM Equity Interests.

Second, there is also a rule -- a presumption in contract interpretation where the Court should not read into exclusions that were easily added by the parties. And we've cited a number of cases. But here, the parties show that they knew how to add exclusions to DIP loans -- DIP liens and superpriority rights. And with respect to the carve-out, the carve-out was specifically set forth in both places, whereas for the grant of liens, the -- sorry, with respect to the New GM Equity Interests, it was specified with respect to both the liens and also under section 8.20 of the loan agreement under the wind-down loan facility that limit that -- the rights of the superpriority rights to attach to the New GM rquity interest.

No such exclusion with respect to proceeds of avoidance action was contained in the superpriority rights. And -- sorry. Going back, as the Court knows, the proceeds from the avoidance actions were specifically excluded from the grant -- the scope of our liens. So we think that the presumption against reading into the contract exclusions also controls here. It's also interesting to note that the exclusion under section 8.20 of the wind-down loan facility, that's actually a new exclusion that was added to the documents. That's a difference between the final DIP order and the wind-down credit agreement.

THE COURT: Pause, please, Mr. Edelman. I think you

said 8.20 and used the words "final DIP facility". Are you referring to the loan agreement for the wind-down or are you referring to the wind-down order or are you going back a step to the loan agreement under the final DIP --

MR. EDELMAN: I'm actually going back --

THE COURT: -- which was executed a couple of weeks earlier --

MR. EDELMAN: -- I'm going --

THE COURT: -- or the order at that time?

MR. EDELMAN: -- I'm going down -- back to the order that was approved as the -- under the final DIP order.

THE COURT: The thirty million -- thirty-three million buck one?

MR. EDELMAN: The -- thirty-three billion.

THE COURT: Forgive me. Billion, yes.

MR. EDELMAN: Sorry, I thought I didn't --

THE COURT: No, I thought I was used to the numbers in this case; I blew it.

MR. EDELMAN: Under the original final order, before it was modified for the wind-down -- under the wind-down order, that credit facility agreement did not have 8.20 in it.

THE COURT: Okay. So 8.20 was added with the wind-down?

MR. EDELMAN: That's right. And that's which -- you know, waives our rights to any proceeds from the new equity

interest, which effectively eliminates our superpriority rights. And so that was a change -- so that's worth noting that -- you know, the carve-outs and exclusions did evolve over time and that was specifically added, but no such express exclusion was added with respect to the avoidance actions.

Now, under the committee's arguments, there would be no need because if nonrecourse means what it means and -- under their view -- I'm not accepting that view -- you know, there'd be no need for the existence of 8.20 or actually, they need to add it between the time of the final DIP order agreement and the later wind-down agreement.

THE COURT: Pause; let me make sure I'm keeping up with you. Your point is that the nonrecourse language had preexisted as of the time of the second of the three DIP orders?

MR. EDELMAN: That's correct.

THE COURT: And therefore, if it -- your contention is that if it meant what your opponent says it means, it wouldn't have been necessary to add 8.20 because it already would have been covered by the nonrecourse language?

MR. EDELMAN: That's correct.

THE COURT: Okay. Go on.

MR. EDELMAN: So we think that the rule -- the presumption against adding inclusions and the history of how these documents evolved show that there is a difference

between -- that the nonrecourse language was meant to solely limit collateral concepts, and that we had the separate, freestanding superpriority rights under 364(c)(1) that was granted in the loan agreement. And the -- each of the DIP orders, which had no such exclusion with respect to the proceeds from the avoidance actions, shows that these are different concepts and different rights and the exclusions should not be added on belatedly by the committee.

The third rule of contractual construction, as a follow-on from the second that I just mentioned, is that we believe that numerous provisions would be read out of the contract. There would just be no need for, you know, provisions. And it's not just -- you know, frankly, the whole superpriority grant would be rendered superfluous; there'd be no purpose, no reason to have a separate provision for superpriority rights if we're solely limited to collateral. It just wouldn't make any sense.

If nonrecourse means that we don't have any superpriority rights, then why would we even have that provision? We'd be totally covered by the grant of liens under 364(c)(2) and (c)(3), and 364(d) in certain circumstances. So that separate 364(c)(1) right would be written out of the contract, effectively. Also, the add-on that I just talked about, 8.20, would not be needed. And as I said, that was specifically added between the time of the final DIP order

agreement and the later wind-down facility agreement. So, you know, their -- we view that concept of contractual interpretation also shows that these are separate concepts that should not be limited.

You know, as an add-on, under Chapter 11 cases, Section 1111 is the one provision that talks about nonrecourse treatment. That's true most of the cases deal with pre-petition obligations, but a pure reading of the statute shows that in a Chapter 11 case, so long as a debtor is subject to a case, that the secured creditor has a claim secured by a lien on the property and the property has not been sold, that nonrecourse in Chapter 11 cases -- you know, it does not mean that you don't have any claims.

THE COURT: I saw that in your brief, Mr. Edelman. I found that to be one of your less persuasive points --

MR. EDELMAN: And that's --

THE COURT: -- and let me tell you what was bothering me about it.

1111 -- and let me see if I can find it -- which talks about -- let me see if I can find it. It talks about not just a claim. I think we all agree -- or most of us who are experienced in bankruptcy matters agree -- that a claim can be both a pre-petition claim and a post-petition claim. But a creditor, unlike a claimant, has a pre-petition claim. And while claim, unlike creditor, isn't limited to pre-petition

claims, if you look in 1111(b)(1)(A), it talks about it being allowed or disallowed under 502 of the Code. And if you look at 502, it applies to claims that are filed by a creditor under 501, and a creditor has got to be a pre-petition creditor. So I'm not sure if 1111(b) is applied to post-petition claims or not.

MR. EDELMAN: I appreciate that argument, but if you look at the terms of 1111(b), it doesn't -- the entitlement goes to "a claim secured by a lien on property of the estate shall be allowed", and then it refers to 502. So I think the threshold issue for 1111 is if you're secured by property of the estate, then that provides for a treatment. It doesn't say that this is a creditor holding claims allowed under 502 that has security in property; it's just telling that the treat -- if you meet the first threshold, then you look at 502. I think that --

THE COURT: But I don't think it's productive to get into a debate on this, but it seems to say a claim secured by a lien on property of the estate will be allowed or disallowed under 502. And when you apply 502, you've got to go back to 501, and 501 seems to be limited to creditors. And that's what's bugging me. I'll look at your brief again, but that's what's bugging me.

MR. EDELMAN: No, I think that -- I understand that is an interpretation if you put emphasis on 502/501. And frankly,

one of the -- you know, that same limitation would actually also apply to the committee's argument stressing that cramdown treatment could be a potential reason why we added the nonrecourse treatment. And we don't believe that, you know, nonrecourse treatment -- sorry, sorry, cramdown treatment -- under 1129(b), cramdown treatment applies to classes of claims -- creditors holding claims under 501 or 502. So that same --

THE COURT: Let me keep with you on this, because that nuance hadn't occurred to me. You're talking about what subsection of 1129(b)?

MR. EDELMAN: It's 1129(b), the cramdown treatment and -- it's a --

THE COURT: Yes, I mean -- but cramdown against an unsecured or a secured or what or equity?

MR. EDELMAN: It's for other. It's talking about classes -- any voting classes under a plan.

You know, it talks about holders of plans -- claims entitled to vote. The only classes entitled to vote under -- you know, you go to legal cramdown treatments because you're dealing with 1129(a)(10), and the only classes entitled to vote are pre-petition --

THE COURT: Pre-petition claims.

MR. EDELMAN: -- pre-petition claims. So that whole purpose -- if you accept that argument, I don't think that

cramdown would work from that same statutory --

THE COURT: You can't cram down against your DIP lender; I think most of us agree with that much.

MR. EDELMAN: Yeah, and furthermore, cramdown just doesn't apply to post-petition obligations under 364(c) and (d).

So I appreciate, you know, that your interpretation of 1111(b) -- their -- I appreciate your interpretation.

THE COURT: Fair enough. Let's move on.

MR. EDELMAN: But going back to that point that -- you know, might as well address it since we just raised it. So the committee's argument that the purpose of the inclusion of the superpriority rights is to protect against cramdown doesn't work because cramdown doesn't -- is just not a concept that's applicable to a DIP lender who has a loan approved under 364(c) or (d).

We have not found any cases that deal with that, we don't think it works under the statutory construct. And we also have the protections from the original final DIP order that would protect us from any cramdown treatment. So all the provisions under the original final order still apply to the wind-down facility, except to the extent that they were expressly superseded and/or modified, and that protection was not modified. So the inclusion of superpriority is after we have the protections in the original final DIP order -- you

know, that -- there was no need for it. So that cannot explain the existence of the superpriority rights.

So in sum, we think that these provisions must be read in the entire construct of the contracts. We believe that the numerous statutory rules' construction show that our interpretation of the contracts should control -- and to explain the inconsistency -- you know, the facial inconsistency. And, accordingly, we believe that we should be granted summary judgment and go to DIP lenders.

THE COURT: Okay.

MR. EDELMAN: One other thing I'd like to add. You also asked if we thought that any parol evidence is needed and we agreed. We think that the documents can and should be read for the given or clear facial meaning, and no parol evidence is needed.

THE COURT: Okay. Folks, let's take a ten-minute recess and I'll hear you, Mr. Mayer, at 11:15.

MR. MAYER: Thank you.

(Recess from 11:04 a.m. until 11:41 a.m.)

THE COURT: Okay, Mr. Mayer, whenever you're ready.

MR. MAYER: Thank you, Your Honor. I will be brief. This issue has been -- the issues have been extensively briefed twice.

I want to go straight to your questions. First, you asked me to address why there is separate language for the

carve-out and for the New GM securities if, in fact, the superpriority claim is limited by the nonrecourse provision, as we assert it is.

The carve-out is the easiest to address. The purpose of carve-out is to ensure that there is a pool of assets that would otherwise be collateral that goes to very specific parties who are identified in the carve-out. To write a carve-out in a way that would have worked for the term loan avoidance action, we would have had to have drafted a carve-out that said, notwithstanding the lien and superpriority, there is a carve-out of the -- the term loan avoidance action for the benefit of all unsecured creditors. I don't think I would have gotten away with that. I would have loved to have tried. I guess I could have drafted it to say there will be a carve-out for the benefit of all parties in the estate other than the DIP lenders; that would have worked, too.

But that's not what a carve-out does. A carve-out says there are these very specific professionals whose work is necessary for the maintenance of the estate, and the secured lenders have agreed that their collateral will be used to pay those professionals. It is completely different in purpose and operation from the clause that we are talking about here. So I don't view the carve-out as being illustrative of any surplusage argument.

THE COURT: Don't they all, though, share the

characteristic of defining a zone of matters as to which rights that the post-petition lenders, protected by any of (c)(1), (c)(2) or (c)(3), would otherwise have ahead of the people who want to get paid with the carve-out proceeds?

MR. MAYER: Yes, Your Honor. Absolutely, they do. But the point, again, is the carve-out is limited to a narrowly-defined group of parties and, frankly, advances the interests of those parties ahead of creditors who would otherwise be in their same priority. A carve-out does not benefit post-petition trade; a carve-out does not benefit post-petition extenders -- slip-and-fall creditors, who have claims post-petition. It only benefits a limited class of professionals. It's entirely different from a nonrecourse provision such as we have here, which was intended to provide -- we believe did provide -- that the DIP lenders simply aren't going to touch that asset.

And that's for the benefit of the estate, as Your Honor pointed out. It's not for the benefit of any particular small universe of people; it's for the benefit of everybody. I say again, if we were going to draft the carve-out as -- to protect the term loan avoidance action, we would have had to have included in the beneficiaries of the carve-out everybody in the case other than the DIP lenders. I think it's a completely false analogy.

THE COURT: Continue, please.

MR. MAYER: The next issue is with respect to the superpriority and the New GM securities. I want a go at this head on, Your Honor. We believe that the superpriority claim is surplusage and the arguments in this Court illustrate why it is. Let us assume there was no superpriority claim. None at all; there were no provisions and -- in the order, there were no provisions in the loan agreement that ever referred to a superpriority claim. 364(c)(1), (2) and (3) never appeared anywhere. The arguments would be exactly the same.

Mr. Edelman is wrong; there can't be an interpretation here that says nonrecourse means you don't have an unsecured claim because they never have an unsecured claim. The worst they ever have is an administrative expense claim because they are an extender of post-petition credit. So even if they never got a superpri, they would still be here.

Your Honor, you asked -- cutting right to a question that you were asked about your experience. Matters of -- that you referred to, such as difference between one judge and the next are a little deep for me, and I won't venture there. But I do venture this --

THE COURT: I'm not sure if I do, either.

MR. MAYER: -- I do venture this, Your Honor, because I think this is an area where experience would be uniform across the judges in this district and probably everywhere else in the country. Post-petition lenders always ask for

superpriority claims. I believe you can rely on your experience to say that because I've never seen a DIP loan that didn't ask for a superpriority claim when it got a lien. And meaning no presumption, Your Honor, I would bet that you've never seen one, either. And if that's true --

THE COURT: Well, of course that's exactly correct. And for whatever reason, you correctly identified the issue that was under the covers. It is, in fact, true that in eleven years as a judge and nearly thirty before that, when I was doing what you guys do, I have never seen a post-petition lender not ask for it, either -- ask for both, either. In fact, I may have used my -- said to one of my law clerks when we were getting ready for this that in my experience, parties in our cases are like the kids in Oliver Twist, and they always want more. And I don't doubt that people ask for -- try to say things in different ways or ask for as much as they get.

But A, I am uncomfortable in using my personal experience on a disputed matter of law. And B, assuming that I could, the same argument applies to your saying first, that the collateral doesn't reach the avoidance action, and B, that it's nonrecourse. Everybody in cases on my watch says things three different ways and tries to get as much as they can. And I don't know if there's a principal basis upon which I can draw the line in that regard.

MR. MAYER: Well, Your Honor, if I may. And again, my

experience is limited; it is only what it is. But I've never seen another credit agreement -- a DIP loan credit agreement that has a nonrecourse provision in it. That's because the circumstances of this case were unique.

THE COURT: Yes, but you can't be cross-examined and I don't know whether, or to what extent, I can rely on your experience or mine or, you know, whether I can take a poll of the other judges in this court or the other 350 bankruptcy judges in the country.

MR. MAYER: Again, Your Honor, the issue of the difference in judicial experience is one that is a little deep for me, but I -- if I might suggest, it seems to me, under Ashcroft, you could appropriately note what your experience is and leave it for an appellate court, if there is one reviewing, to decide whether, under Ashcroft, that's the sort of thing they should pay attention to. And --

THE COURT: Yes, but you would certainly understand that I try to get it right the first time.

MR. MAYER: Yes, Your Honor.

THE COURT: And also, that although a few times over the years I've respectfully suggested to appellate courts that they reconsider principles, until they do, I follow.

MR. MAYER: Yes, Your Honor. I think I've said what I've had to say on this topic.

THE COURT: Okay.

MR. MAYER: With respect to the New GM Equity Interests, the arguments that have been made repeatedly by the debtors -- by -- strike that. I'm so used to, as a committee lawyer, arguing against debtors -- against the -- by the DIP lenders is that where I have a belt and I put on suspenders, it turns out that if one day I'm not wearing suspenders, my pants fall down. I believe that what we negotiated with respect to nonrecourse was fine on its own basis, and the fact that additional material is added in no way cuts against it.

I have a little demonstrative. It's a -- it's just a quotation of some language. And it's not -- you can say that there are other provisions that I didn't put in, but it is, nonetheless, illustration of the -- of the argument. If I may hand this up, Your Honor.

THE COURT: You can, but whenever somebody gives me a demonstrative -- although you're only using it as a demonstrative, I still give opponents a chance to be heard.

MR. MAYER: Of course.

This is just quotes from --

THE COURT: All right, pause for a second.

MR. MAYER: Certainly.

THE COURT: Mr. Jones, Mr. Edelman, any objection to me considering the demonstrative?

MR. MAYER: I've --

THE COURT: I think he's merely quoting from documents

that are in evidence, but I'll give you a chance to be heard.

MR. EDELMAN: It looks like they're just paraphrasing what's -- paraphrasing or quoting. We'd just like to note that there are numerous other provisions.

THE COURT: Sure, but that's what demonstratives always are.

MR. EDELMAN: Of course.

THE COURT: Okay.

MR. JONES: Yeah, I think that's fine, Your Honor. I haven't been able to fact-check it, but it looks -- it looks exactly like excerpts --

THE COURT: Mr. Mayer, if --

MR. JONES: -- and that's fine.

THE COURT: -- if you have -- if you've left out words or you changed it, I'm going to be mad at you, but I'm going to assume for the time being that what you said is what it says.

MR. MAYER: And I will concede, Your Honor, that there are other provisions that could be added to the right-hand side of this chart; it's not a complete list.

But for purposes of argument, our argument is that if you just take a look at the materials that aren't sheeted -- shaded by the sticky, I think you would agree, I hope -- it is our argument -- that these are sufficient to establish that the DIP lenders disclaimed an interest in the term loan litigation. And when you peel back the sticky, you see additional language

with respect to the New GM Equity Interests. And that's correct. Now, that doesn't make the preceding language any less enforceable.

And that, basically, is our argument. The fact that with respect to the New GM Equity Interests things were said three times, doesn't mean that when they were said once -- with respect to the term loan litigation -- that once was any less effective. Because we think nonrecourse means what everybody understands it to mean, which is that your rights are limited to your collateral. That's how I understand nonrecourse to work; I believe that's how everybody understands nonrecourse to work.

Nor was this a provision -- if we want to get into saying things multiple times. The feature of this, that this was a nonrecourse loan, was specifically mentioned by Mr. Jones at the hearing on the approval of this facility. This wasn't something that the unsecureds snuck in at any point in time; this is something that was in the document for a purpose and it was acknowledged by the government at the hearing at the wind-down agreement.

Which leads me to a -- I guess it's appropriate to say it here. I was going to end with it, but it's appropriate to say it here. Principle of contractual interpretation that I think is wholly appropriate here is that it is construed against the drafter.

And I think the record of this case -- this goes into your parol evidence question. We do not believe that witnesses add much, if anything, to this case. We don't believe discovery is appropriate. We do believe you are entitled to take cognizance of proceedings that happened before you, what you've seen in the hearings before you and the documents that have been filed before you, such as prior orders.

And it is really undeniable -- Canada advances what I think is not a particularly effective denial -- that these documents were in the care and feeding of Treasury's counsel from day one. Treasury was the drafter here; Treasury did provide the money; Treasury did control the documents. And I don't believe that's meaningfully contested.

When we were last here, indeed, we had a little kerfuffle over a change that the DIP lenders insisted be made even after the loan was approved. I don't think there's any meaningful contest to Treasury's role in controlling these documents. Canada asserts, in its papers, we were just along for the ride; you shouldn't hold us against us. I don't view that --

THE COURT: The "we" being the creditors' committee or "we" being Export Development Canada?

MR. MAYER: Export Development Canada was along for the ride; don't hold what Treasury -- the draft -- don't hold the interpret-the-document-against-the-drafts or against Canada

because Canada didn't draft the documents.

Your Honor, the DIP lenders have moved in tandem. Treasury took the lead; it drafted these documents. To the extent there is an ambiguity here, I think that should be construed against Treasury and through Treasury, against Canada.

Now I want to go to the broad context and end with that. At the beginning of the hearing, Your Honor, you said something with which we wholeheartedly agree, which is yes, we brought this action on behalf of the estate. The fact that we brought it doesn't mean that we own it. We understand that. That's not the issue. I know that's the way Treasury and Canada want to frame the issue. They want to say that we think we own it and no, it's not true; the estate owns it. That's right; the estate does own it.

But the question is what do the documents mean? What do they provide? Did the documents operate to exclude the DIP lenders from this asset or did it operate to reserve an interest to them in this asset? And that really is the question.

Now the question is -- and this -- I don't think this qualifies as parol evidence; it is a proceeding before this Court. The fact is that only the committee could bring this action. Treasury couldn't bring it; Canada couldn't bring it; only the committee could bring it. If the committee didn't

bring it, it wouldn't exist, because the initial order says that only the committee has the standing, on behalf of the estate, to go after the pre-petition lenders. Only the committee.

So what Treasury and Canada are asking you to do is to interpret documents they controlled to reserve to them the right to collect from an asset they had no ability to bring and whose existence is entirely dependent on the decision of a third party they don't control.

THE COURT: That ties into another distinction which, when you think about best practices, you focus on, but which I don't know if it's relevant here; we dealt with this in Lyondell Chemical.

Sometimes DIP documents give post-petition lenders a lien on proceeds and sometimes they give them on the avoidance action altogether, the difference being principally in the degree of control that the grant gives. But here, it gave you guys both, if I recall -- am I correct in that? It gave you both a -- or rephrasing it, they disclaimed a lien on the action and also, at least impliedly, on its proceeds, but was silent on the issue on the superpri. Am I correct?

MR. MAYER: Your Honor, again, this gets to the heart of the matter. We don't believe that calling a secured loan nonrecourse is silent on a superpriority claim. And again, because if the superpri didn't exist, they would have an admin;

we would had to have said they were nonrecourse anyway because it would be the only way to limit their admin. Nonrecourse is critical to the interpretation of the document as a whole.

With respect to proceeds, this is not -- we have not featured this argument because I'm not entirely crazy about it myself. But if you take a look at the definition of New GM Equity Interests in the critical document that grants the lien, which is the order, it actually refers back to the term loan avoidance action.

I'm not saying that anybody designed that definition that way. Your Honor was here --

THE COURT: Where does that appear, Mr. Mayer?

MR. MAYER: Okay. I'm sorry, Your Honor.

It's in the order approving the wind-down credit agreement, and it's on page 5 of that order. Lauren (ph.), do you have a copy? We have copies for everybody, but this is an order that everybody's got attached to everything.

THE COURT: Can I impose on you? I'm confident it's here, it's somewhere in this thick notebook --

MR. MAYER: I have a separate order for Your Honor.

THE COURT: Would you mind?

MR. MAYER: Certainly. Lauren, do you have copies for everybody else? May I approach, Your Honor?

THE COURT: Yes.

MR. MAYER: If you look at the very end of the indent

at the top of page 5, you will see a defined term "New GM Equity Interests". This is the critical paragraph.

(Pause)

THE COURT: All right. Repeat your point, please.

MR. MAYER: And as I said, Your Honor, we have not featured this argument. I say it only to indicate that you have to read this paragraph a certain way to give life to certain of their arguments.

The defined term "New GM Equity Interest" comes at the end of the proviso. And it could be read to apply to everything that goes before it, up to the proviso, including the term loan avoidance action.

THE COURT: I see why you didn't make that argument.

MR. MAYER: Thought I would bring it to the Court's attention.

In any event, Your Honor, the basic point remains -- the basic point remains that if you think this is a close call, one, I think you should construe it against the drafter. And two, it doesn't make sense to construe it to reserve to DIP lenders the rights to an action that wouldn't exist unless the third party brought it in the first place.

We do kind of feel we were snookered here. You can't -- the economic argument made by Mr. Jones can't be addressed without going beyond the record. But every dollar that's recovered on this term loan action creates an unsecured

claim and dilutes my clients' recovery. It's a point we made -- earlier, we did make it in our papers -- that we are never fully protected against the dilution. At best, we are protected against half of the dilution.

The issue isn't really why would we be dumb enough to bring this action if we weren't going to own it, because yeah, that gets to why I sometimes get emotional in private, hopefully, over why I'm standing here. The issue really is how do you interpret these documents; why would you interpret them to reserve to the DIP lenders an action they couldn't bring and wouldn't exist unless I brought it?

We asked for nonrecourse for a reason. We knew what it meant. We thought they knew what it meant. And the rest of this is taking belt-and-suspenders language that appears in every DIP loan request and saying look, we're going to say nonrecourse doesn't apply to the superpriority claim. What else would it possibly apply to? It can't apply to anything else; it has to apply to a claim that isn't secured. And that, really, is the essence. And if there was no superpriority grant here, I'd still need it to take care of their admin.

I'm not sure I have anything else to add. If you have questions, I'm happy to answer.

THE COURT: No, you took care of them as we go along.

I'll take a reply, making the obvious point that Mr. Mayer was a lot briefer than the folks were on the other side,

and I expect the reply to take that into account.

MR. JONES: Your Honor, David Jones, again, for the U.S. Attorney's Office.

I will try to be briefer yet. If the Court has any follow-up questions based on what Mr. Mayer said, I'm happy to address them. I think, as to his demonstrative, it shows half of the story: what the language is that makes this a nonrecourse facility for whatever that implies. But that doesn't demonstrate the existence of, as Section 1129 says, an agreement otherwise on the part of DIP lenders that they not receive payment in full on account of their allowed superpriority administrative claim in any way that affects entitlement to receive avoidance action proceeds.

A narrow point, Mr. Mayer relies heavily on the notion that any ambiguity should be construed against the drafter. But we presented case law in our briefs making clear that that principle does not apply and is not appropriately used where you have an actively negotiated document in which both parties were represented by sophisticated counsel, as is abundantly clearly the case here.

Your Honor, I believe that's all I have to say that's directly responsive. If the Court has questions, I'll entertain them. Otherwise, we'll rest on our papers. Thank you very much.

THE COURT: Okay. Mr. Edelman, anything else?

MR. EDELMAN: Your Honor, the committee points to the fact and raises issues about carve-out and how superpriority liens are included in almost every DIP. We're not talking about, you know, what's --

THE COURT: I think he said "every DIP". I --

MR. EDELMAN: I --

THE COURT: -- I think even -- I don't think he diluted his argument even to say "almost any". And I don't know if I'm allowed to consider my experience, but if I could, I would be either likely or certainly agreeing with him on that.

MR. EDELMAN: I would actually say almost every DIP because in our research, we actually saw some cases -- which I'm not familiar with -- but there are cases out there in which there has been granted liens where superpriority was also not included --

THE COURT: Okay. Fair enough.

MR. EDELMAN: -- so they exist. But I'm -- I'm not --

THE COURT: Which, of course, underscores why maybe guys like me shouldn't rely on our experience.

MR. EDELMAN: -- but I'm not quibbling with the concept that, you know, superpriority isn't -- and liens are -- go hand-in-hand together in most cases. I can't quibble with that because that's what the cases show. But I have seen the cases out there.

But we're not talking about the -- those provisions. What we're talking about are the exclusions. And yes, the carve-out is usually excluded, but, you know, the absence of other exclusions, we think, is telling here. And so the absence of any exclusion of the proceeds from the avoidance action, we think, is telling, whereas the carve-out and the avoidance actions were expressly excluded from our liens, only the carve-out was excluded from the superpriority claims in the paragraphs that specifically deal with those items.

The committee also raises a point that there was no possibility of us having an unsecured claim here. Well -- and they say that, you know, we would definitely have at least an administrative claim if -- to the extent that we weren't paid from our collateral. That's not true; there's case law out there that says unless you actually state in your loan that you're -- you're seeking 364(c) -- (b) treatment, you don't have administrative claim unless you meet the requirements under 503(b), and you have to prove your administrative claim. So at least conceptually, there would have been an ability to have an administrative claim. But we protected ourselves by having --

THE COURT: Say that again, slower, please, Mr. Edelman.

MR. EDELMAN: Sure. There's case law that exists that say that a DIP lender, to the extent that their collateral is

not sufficient to repay them, does not necessarily hold an administrative claim unless they were granted an administrative claim under 364(b), and that if you -- unless you specifically stated admin claim or superpriority claim, you wouldn't have that claim. So at least, you know, the statement -- I'm just saying that there was no ability to -- for us to have an unsecured claim is not true because we would --

THE COURT: Mr. Edelman, have you ever, in your life, seen a DIP financing order that invoked 364(b)? I sure have not. I mean, what lender in its right mind would take 364(b) priority?

MR. EDELMAN: As for a general DIP, I agree. There's been some specific equipment that's been financed, but those are very limited DIPs, not for general -- I've never seen a 364(b). Once again, under -- I've seen cases that talk about 364(b) grants of DIP priority, but I've never dealt with it.

THE COURT: I've never even seen one. I mean, it's close to lending malpractice, isn't it, to subject your post-petition lender to the risk of administrative insolvency, going pari passu with the remainder -- the administrative expense community. Not just vendors, but post-petition tort claimants and even, perish the thought, professionals?

MR. EDELMAN: Your Honor, I'm not going to -- we're not saying that this is what we did here. The statement was we could never have an unsecured deficiency claim. And the

statement -- that's just not correct. We've negotiated for something better by having, also, protection by including a superpriority claim.

So I'm not saying the statement by counsel --

THE COURT: If there were a difference in the scope of the liens granted on the post-petition basis, the post-petition superpri would obviously have a much greater relevance. But, you know, we were talking about Oliver, when the little kid comes up with his porridge bowl and asks for more. The -- I cannot remember a case -- there probably is one somewhere out there -- where, if a post-petition lender was getting 364(c)(2) and (3) liens, that it didn't ask for its liens on everything it could get its hands on. The reason why you have 364(c)(3) liens is because sometimes there's liens out there that you can't prime, so you take a junior lien, but you ask for that as well.

The problem I have is -- again, and raises the question as to whether I'm allowed to use my experience, but my experience has been that post-petition lenders go belt and suspenders and rope and everything else they can get their hands on as a matter of course. They try to get their hands on everything, whether or not it means -- it has economic significance. But I don't know if I'm allowed to consider that.

MR. EDELMAN: Your Honor, I think here, where you have

differences in the exclusions between the superpriority admin claim and the liens, I think that clearly shows that there is a difference between these two rights, and we think those -- the contractual provisions control. And we don't just write them away as mere surplus.

Your Honor, I'd also just like to address -- I know you've discounted this, but the committee raised, on page 5 of the wind-down order, the definition of New GM Equity Interests. I'd just like to point out that that paragraph only deals with the DIP liens. The previous page deals with the superpriority claims. And that paragraph talks about the claims, all claims of the DIP lenders, whereas the following page, the paragraph they cite, is that the DIP liens are limited.

One other point. In the original exit financing order, on page 15 of that order, there's a clear statement that the superpriority claim "shall be subject and subordinate only to the carve-out and the claims set forth in the preceding proviso." And the preceding proviso was the whole wind-down budget. Whereas the next paragraph, paragraph 6 on page 15 of the exit financing order, that -- and that's the order that stayed in effect, except as modified by the wind-down order. That -- paragraph 6 of the DIP lien shall be subject to the avoidance powers of the Bankruptcy Code. I paraphrase here because it lists all the avoidance sections. So we think that they're -- you know, the distinction that they're trying to

draw between these two rights have -- just has no bearing.

You know, in sum, you originally asked if the DIP lenders otherwise agreed. You've heard -- we briefed this, we think all the contractual interpretation shows this, that, you know, the DIP lenders agreed to many things for their superpriority liens -- sorry, superpriority claims. They agreed for the funding of the whole wind-down, about, you know, a billion dollars or so; we agreed to the carve-out; we agreed that the allowed -- the proceeds from the New GM Equity Interests would not be touched by the superpriority claim. But the DIP lenders never agreed -- and nowhere in the provisions, the deal -- in the contracts or the orders did the DIP lenders ever agree to so limit the superpriority claim rights with respect to the proceeds of the avoidance actions.

And so, going back to your original questions, we, EDC, never affirmatively otherwise agreed that -- not to touch the proceeds of the avoidance action with respect to the superpriority claims.

THE COURT: Okay, thank you.

MR. EDELMAN: Thank you.

THE COURT: Mr. Mayer, I didn't have a problem with you being heard; I just had a problem with you being in the middle of Mr. Edelman's argument. Did you rise for something?

MR. MAYER: Your Honor, I decided I -- I was confused as to what order he was referring to. But on reflection, I

don't think there's a need for me to respond.

THE COURT: Okay.

All right, has everybody had a chance to speak their piece? Well, folks, I'm going to have to take this under submission. I will get something out as quickly as a responsible decision permits.

Did I understand that the key date, from your perspective, Mr. Mayer, was December 15th?

MR. MAYER: Yes, Your Honor.

THE COURT: Okay.

All right. Thank you very much, folks. Very helpful arguments. We're adjourned.

MR. MAYER: Thank you.

MR. EDELMAN: Thank you, Your Honor.

MR. JONES: Thank you.

(Whereupon these proceedings were concluded at 11:49 AM)

I N D E X

RULINGS

C E R T I F I C A T I O N

I, Karen Schiffmiller, certify that the foregoing transcript is a true and accurate record of the proceedings.

Karen Schiffmiller

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