

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:

GUE LIQUIDATION COMPANIES, INC.,
et al.,

Liquidation Trust.

Case No. 19-11240-LSS

Chapter 11

Judge Laurie Selber Silverstein
(Jointly Administered)

Re: D.I. 1514

Obj. Deadline: Nov. 24, 2021 at 4:00 pm

Hrg.: Dec. 1, 2021 at 11:30 am

**UNITED STATES' OPPOSITION TO LIQUIDATION TRUST'S MOTION TO FILE
SUPPLEMENTAL POST-HEARING BRIEFING IN SUPPORT OF ITS MOTION**

The United States, through undersigned counsel, opposes the motion to file supplemental briefing [D.I. 1514] to the post-confirmation Liquidation Trust's motion under 11 U.S.C. § 505 [D.I. 1476] and states as follows:

1. The Liquidation Trust has already filed a motion with a supporting brief, a reply brief, and was fully heard at oral argument. Additional briefing, like a sur-reply, requires leave of the court, which should only grant relief if there is "new evidence, facts, or arguments." *St. Clair Intell. Prop. Consultants, Inc. v. Samsung Elecs. Co. Ltd.*, 291 F.R.D. 75, 80 (D. Del. 2013); *see also* Del. Bankr. L.R. 7007-1(b) (requiring leave), 9013-1(a) (incorporating Rule 7007-1 into contested-motion practice). The Liquidation Trust now asks for a fourth chance to make its argument via a post-hearing supplemental brief. The Liquidation Trust provides no new authority, new evidence, or new facts. Its argument is pure speculation, not relevant, and has already been presented to the Court at oral argument (even if it were not articulated in the way the Liquidation Trust may have specifically wanted). The motion to supplement should thus be denied.

2. The contested matter, which is now fully briefed and argued, turns on the meaning of "trustee" in 11 U.S.C. §§ 505 and 1104. The United States pointed out that only the trustee-in-

bankruptcy or debtor-in-bankruptcy can seek a refund claim in the Bankruptcy Court for the estate or seek an expedited determination of additional tax liability under 11 U.S.C. § 505(b). The United States cited the Second Circuit's *Bond* decision, which the Liquidating Trust conceded is indistinguishable from this matter and supports the United States' position. *United States v. Bond*, 762 F.3d 255 (2d Cir. 2014); [E.g., D.I. 1514, Ex. C., p. 8:2-24.]

3. In its proposed supplemental brief, the Liquidation Trust does not contest the text of 11 U.S.C. §§ 505 and 1104, does not raise any new legal authority, and does not even mention *Bond*. Instead, the Liquidation Trust's thesis is that if the Court rules in the United States' favor, it may slow down bankruptcy cases. It predicts bedlam and serious harm to the bankruptcy system as a whole. The argument was made at the hearing and lacks merit.¹

4. The Liquidating Trust already articulated this point at oral argument. [D.I. 1514, Ex. C, p. 19:1-23.] The Liquidation Trust cited no caselaw, studies, reports, or other recognizable evidence either at the hearing or in the proposed supplemental brief. The Liquidation Trust's argument is just pure speculation. Its speculation conspicuously ignores that *Bond* has been the

¹ Without addressing the merits of the proposed supplemental brief regarding these policy concerns, the Liquidation Trust appears less concerned with delay than with audit risk given the statements it made at oral argument and the relief it seeks. The Liquidation Trust wants to shift that risk — that the tentative refund was somehow incorrect — to the public fisc. Yet as noted during oral arguments, even a Chapter 7 trustee is not entitled to the *carte blanche* relief under section 505(b). As an issue of fundamental fairness, the Liquidation Trust should use the tools available to post-confirmation corporations or trusts, such as invoking the procedure to close a corporation under 26 U.S.C. § 6501(d) or accepting its own representations that it has \$300 million of unused NOLs to say the risk is *de minimis*. 26 C.F.R. § 1.486B-2(m) (providing that a qualified settlement trust, like the Liquidation Trust, can use § 6501(d)); *see generally* 26 U.S.C. § 6012(b)(3) (noting “receiver, trustee in a case under title 11 ..., or assignee,” for a corporation must file returns); *Holywell Corp. v. Smith*, 503 U.S. 47, 52-54 (1992) (holding a post-confirmation liquidation trust is an assignee without deciding if it also can qualify as a receiver or trustee under title 11). [See generally D.I. 1514, Ex. C, 26:11-21, 22:6-19, 30:12-31:4, 34:13-35:18 (discussing these issues)].

law in the Second Circuit for over six years, yet the Liquidation Trust does not point out ill effects in the Second Circuit approaching the chaos or systemic catastrophe it is predicting here.

5. Along with being already raised and being mere speculation, the Liquidation Trust's statements amount to little more than an irrelevant policy argument, making additional briefs futile. "When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law, and all persons are entitled to its benefit." *Bostock v. Clayton Cnty.*, 590 U.S. __, 140 S. Ct. 1731, 1737 (2020); *see also Dunn v. CFTC*, 519 U.S. 465, 480-81 (1997) ("[T]here is an important public policy dispute – with substantial arguments favoring each side," but "these are arguments best addressed to the Congress, not the courts."); *see also* [D.I. 1514, Ex. C, p. 15:15-23. (after the Liquidation Trust raising the fact that the United States' argument ran counter to "common practice," the Court noted that that "maybe someone needs to lobby Congress.")]. As the Second Circuit found, section 505's text is not ambiguous: trustees in this case mean pre-confirmation trustees, not post-

confirmation successors that happen to be classified as a trust. 11 U.S.C. §§ 505, 1104(a); *Bond*, 762 F.3d at 262 (“There is no need to look elsewhere if the text is clear, as it is here.”).

WHEREFORE, the United States respectfully requests that the Liquidation Trust’s motion for supplemental briefing should be denied.

DATED: November 22, 2021,

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CERTIFICATIONS PURSUANT TO LOCAL BANKRUPTCY RULE 9010-1(E)(I)

Pursuant to Local Bankruptcy Rule 9010-1(e)(i), I hereby certify: (a) that I am appearing on behalf of the United States of America; (b) that I am a member of the State Bar of Texas and duly admitted to practice before the Supreme Court of the United States and United States District Court for the Eastern District of Texas; (c) that I am in good standing in all jurisdictions in which I have been admitted; and (d) that I will be bound by these Local Rules and I submit to the jurisdiction of this Court for disciplinary purposes.

By: /s/ Ari D. Kunofsky
ARI D. KUNOFSKY
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U.S. Department of Justice, Tax Division

Pursuant to Local Bankruptcy Rule 9010-1(e)(i), I hereby certify: (a) that I am appearing on behalf of the United States of America; (b) that I am admitted to practice before the U.S. Court of Appeals for the Fourth Circuit, Virginia Supreme Court, U.S. District Court for the District of Colorado, U.S. District Court for the Western District of Virginia, U.S. District Court for the Eastern District of Virginia, U.S. Bankruptcy Court for the Western District of Virginia, and the U.S. Bankruptcy Court for the Eastern District of Virginia; (c) that I am in good standing in all jurisdictions in which I have been admitted; and (d) that I will be bound by these Local Rules and I submit to the jurisdiction of this Court for disciplinary purposes.

By: /s/ Alexander R. Kalyniuk
ALEXANDER R. KALYNIUK
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CERTIFICATE OF SERVICE

I hereby certify that on November 22, 2021, I electronically filed the foregoing document with the Clerk of Court of the U.S. Bankruptcy Court for the District of Delaware using the CM/ECF system, which will send notification of such filing to all parties that have elected to receive notice through the CM/ECF system.

/s/ Ari D. Kunofsky _____
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