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Company Avoidance Action Trust*

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

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In re:

MOTORS LIQUIDATION COMPANY, f/k/a
GENERAL MOTORS CORPORATION, *et al.*,

Chapter 11
Case No. 09-50026 (MG)
(Jointly Administered)

Debtors.

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MOTORS LIQUIDATION COMPANY AVOIDANCE
ACTION TRUST, by and through the Wilmington Trust
Company, solely in its capacity as Trust Administrator and
Trustee,

Adversary Proceeding
Case No. 09-00504 (MG)

Plaintiff,

against

JPMORGAN CHASE BANK, N.A., *et al.*,

Defendants.

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**PLAINTIFF’S STATEMENT OF UNDISPUTED FACTS IN SUPPORT OF
PLAINTIFF’S MOTION FOR PARTIAL SUMMARY JUDGMENT DISMISSING THE
NON-JPMORGAN TERM LENDERS’ EFFECTIVENESS DEFENSE**

Pursuant to Federal Rule of Civil Procedure 56 and Local Rule 7056-1(b) of this Court, and in conjunction with the Motion for Partial Summary Judgment made by Notices of Motion on September 14, 2018, Plaintiff Motors Liquidation Company Avoidance Action Trust (the “**Avoidance Action Trust**” or “**Plaintiff**”), through its undersigned counsel submits this Statement of Undisputed Facts in Support of Its Motion for Partial Summary Judgment Dismissing the Non-JPMorgan Term Lenders’ Effectiveness Defense. Pursuant to 7056-1(e) of the Local Rules of the United States Bankruptcy Court for the Southern District of New York, each statement of material fact is followed by a citation to evidence that would be admissible at trial.

I. THE COMMENCEMENT OF THIS ACTION

1. On June 1, 2009 (the “**Petition Date**”), General Motors Corporation (“**Old GM**”) filed for bankruptcy protection. Bankr. Dkt. No. 1.¹

2. Three weeks after the Petition Date, Old GM repaid a loan of approximately \$1.5 billion (the “**Term Loan**”) to a syndicate of lenders (the “**Term Lenders**”). Bankr. Dkt. No. 2529.

3. The Term Loan was secured in part by a UCC-1 filed with the Delaware Secretary of State and bearing the filing number “6416808 4” (the “**Main Lien**”). *Official Comm. of Unsecured Creditors or Motors Liquidation Co. v. JPMorgan Chase Bank, N.A. (In re Motors Liquidation Co.)*, 777 F.3d 100, 101 (2d Cir. 2015).

4. The Term Loan was governed by a term loan agreement, dated as of November 29, 2006, as amended on March 4, 2009 (the “**Term Loan Agreement**”) and an accompanying

¹ All references to the Adversary Docket are to *Motors Liquidation Company Avoidance Action Trust v. JPMorgan Chase Bank, N.A.*, Adv. Pro. No. 09-00504. All references to the Bankruptcy Docket are to *In re: Motors Liquidation Co. f/k/a General Motors Corporation*, Case No. 09-50026.

collateral agreement between JPMorgan, Old GM, and Saturn Corporation, dated as of November 29, 2006 (the “**Collateral Agreement**”). *Id.*

5. Pursuant to the Collateral Agreement, JPMorgan, as Administrative Agent, took a first priority security interest in the collateral securing the Term Loan (the “**Collateral**”). Declaration of Eric B. Fisher in Support of Plaintiff’s Motion for Partial Summary Judgment Dismissing the Non-JPMorgan Term Lenders’ Effectiveness Defense, dated September 13, 2018 (the “**Fisher Declaration**”) Ex. T (Collateral Agreement at Article II).

6. The Term Loan Agreement set forth the scope of JPMorgan’s role and responsibilities as Administrative Agent with respect to the Term Lenders and the Collateral. Fisher Decl. Ex. U (Term Loan Agreement § 8.01).

7. Pursuant to the Term Loan Agreement:

Each Lender hereby irrevocably designates and appoints the Agent [JPMorgan] as the agent of such Lender and each such Lender irrevocably authorizes the Agent, as the agent for such Lender, to take such action on its behalf under the provisions of this Agreement and the other Loan Documents and to exercise such powers and perform such duties as are expressly delegated to the Agent by the terms of this Agreement and the other Loan Documents, together with such other powers as are reasonably incidental thereto.

Id.

8. The Collateral Agreement provided that JPMorgan’s “sole duty with respect to the custody, safekeeping and physical preservation of the Collateral in its possession . . . shall be to deal with it in the same manner as the Agent deals with similar property for its own account.” Fisher Decl. Ex. T (Collateral Agreement § 6.02).

9. The Collateral Agreement also states that JPMorgan “shall be conclusively presumed to be acting as agent for the Secured Parties with full and valid authority so to act or refrain from acting, and no Grantor [Old GM and Saturn] shall be under any obligation, or entitlement, to make any inquiry respecting such authority.” *Id.* (Collateral Agreement § 6.04).

10. Prior to the loan being repaid (as set forth in paragraph 2 above), however, JPMorgan Chase Bank N.A. (“**JPMorgan**”), as administrative agent for the Term Loan, informed the Committee of Unsecured Creditors (the “**Committee**”) that a UCC-3 termination statement relating to the Main Lien (the “**2008 Termination Statement**”), had been inadvertently filed back in 2008, calling into question whether the Main Lien remained perfected. *In re Motors Liquidation Co.*, 777 F.3d at 102.

11. On June 25, 2009, the Bankruptcy Court entered the Final Order Pursuant to Bankruptcy Code Sections 105(a), 361, 363, 364 and 507 and Bankruptcy Rules 2002, 4001 and 6004 (A) Approving a DIP Credit Facility and Authorizing the Debtors to Obtain Post-Petition Financing Pursuant Thereto, (B) Granting Related Liens and Super-Priority Status, (C) Authorizing the Use of Cash Collateral and (D) Granting Adequate Protection to Certain Pre-Petition Secured Parties (the “**DIP Order**”), which preserved the right of the Committee to investigate and, if appropriate, challenge the purported perfection of the security interest related to the Term Loan. Bankr. Dkt. No. 2529 (DIP Order ¶19(d)).

12. A month after repayment of the Term Loan and following its investigation, the Committee filed its complaint in this action, seeking a determination that the 2008 Termination Statement was effective to terminate the Main Lien. Adv. Pro. Dkt. No. 1.

13. The Bankruptcy Court ordered that the litigation would occur in two phases: (i) the Committee (and later the Avoidance Action Trust, as successor plaintiff), and JPMorgan would first litigate whether the 2008 Termination Statement terminated the Main Lien (“**Phase I**”) and (ii) if the 2008 Termination Statement was held to be effective as to the Main Lien, Plaintiff would then serve the summons and complaint on the remaining Term Lenders and litigate the value of the Term Lenders’ remaining perfected security interest (“**Phase II**”).

Official Comm. of Unsecured Creditors or Motors Liquidation Co. v. JPMorgan Chase Bank, N.A. (In re Motors Liquidation Co.), 552 B.R. 253, 262-63 (Bankr. S.D.N.Y. 2016).

II. PHASE I SUMMARY JUDGMENT AND THE SECOND CIRCUIT APPEAL

14. After the conclusion of the discovery period for Phase I, Plaintiff and JPMorgan cross-moved for summary judgment on the effectiveness of the 2008 Termination Statement as to the Main Lien. Adv. Pro. Dkt. Nos. 24, 28; *see also Official Comm. of Unsecured Creditors or Motors Liquidation Co. v. JPMorgan Chase Bank, N.A. (In re Motors Liquidation Co.)*, 755 F.3d 78, 82 (2d Cir. 2014).

15. On March 1, 2013, the Bankruptcy Court granted summary judgment for JPMorgan, concluding that the 2008 Termination Statement was not a legally effective filing and thus did not cause the Main Lien to become unperfected. *Official Comm. of Unsecured Creditors of Motors Liquidation Co. v. JPMorgan Chase Bank, N.A. (In re Motors Liquidation Co.)*, 486 B.R. 596, 623-27 (Bankr. S.D.N.Y. 2013).

16. The Bankruptcy Court certified its summary judgment decision for direct appeal to the Second Circuit, Adv. Pro. Dkt. No. 74, and on March 7, 2013, Plaintiff appealed to the Second Circuit, *id.* 76.

A. The Record on Appeal to the Second Circuit

17. The evidence in the record before the Second Circuit in connection with Plaintiff's appeal included the complete deposition testimony of witnesses from JPMorgan, its counsel Simpson Thacher & Bartlett LLP ("**Simpson Thacher**"), Old GM, and Mayer Brown LLP ("**Mayer Brown**"), counsel for Old GM. *See generally* Fisher Decl. Ex. A (Gordon 2010 Deposition Tr.); *id.* Ex. B (Green 2010 Deposition Tr.); *id.* Ex. C (Gonshorek 2010 Deposition Tr.); *id.* Ex. H (Merjian 2010 Deposition Tr.); *id.* Ex. N (Duker 2010 Deposition Tr.).

1. The Synthetic Lease Termination Documents Included the Main Lien

18. The record before the Second Circuit established that, in 2001, Old GM entered into a synthetic lease financing transaction (the “**Synthetic Lease**”) with a syndicate group of lenders, secured by liens on twelve parcels of real estate. *In re Motors Liquidation Co.*, 777 F.3d 100, 101 (2d Cir. 2015).

19. JPMorgan served as the administrative agent for the Synthetic Lease and was identified as the secured party of record on the UCC-1 financing statements. *Id.*

20. In 2006, Old GM entered into the unrelated Term Loan and JPMorgan again served as the administrative agent and was identified as the secured party of record on the Main Lien. *Id.*

21. In the fall of 2008, Old GM planned to pay off the Synthetic Lease and asked its counsel, Mayer Brown, to prepare the necessary documents to repay JPMorgan and the other lenders and release the interests the Synthetic Lease lenders held in Old GM’s property. Fisher Decl. Ex. A (Gordon 2010 Deposition Tr. at 5:13-6:1); *id.* Ex. B (Green 2010 Deposition Tr. at 18:22-20:17); *id.* Ex. C (Gonshorek 2010 Deposition Tr. at 7:16-10:18); *id.* Ex. D (October 7, 2008 Email from Green to Perlowski); *see also In re Motors Liquidation Co.*, 777 F.3d at 102.

22. A partner at Mayer Brown, Robert Gordon, asked an associate, Ryan Green, to prepare a closing checklist and drafts of the documents required to pay off the Synthetic Lease and release the interests the Synthetic Lease lenders held in Old GM’s property. Fisher Decl. Ex. A (Gordon 2010 Deposition Tr. at 5:13-21); *see also In re Motors Liquidation Co.*, 777 F.3d at 102.

23. Green asked a paralegal, Michael Perlowski, to perform a search for UCC-1 financing statements that had been recorded against Old GM in Delaware. *See* Fisher Decl. Ex.

D (October 7, 2008 Email from Green to Perlowski); *see also In re Motors Liquidation Co.*, 777 F.3d at 102; *In re Motors Liquidation Co.*, 486 B.R. at 610.

24. The paralegal identified three UCC-1 financing statements, only two of which were related to the Synthetic Lease. *See* Fisher Decl. Ex. B (Green 2010 Deposition Tr. at 20:13-22:7); *see also In re Motors Liquidation*, 777 F.3d at 102; *In re Motors Liquidation Co.*, 486 B.R. at 610.

25. Neither the paralegal nor Green realized that the third UCC-1 financing statement related instead to the Term Loan Main Lien. *In re Motors Liquidation*, 777 F.3d at 102; *In re Motors Liquidation*, 486 B.R. at 610.

26. Green drafted a closing checklist for the Synthetic Lease that identified all three UCC-1 financing statements as statements that would be terminated. Fisher Decl. Ex. B (Green 2010 Deposition Tr. at 8:12-14); *see also In re Motors Liquidation*, 777 F.3d at 102; *In re Motors Liquidation*, 486 B.R. at 610.

27. Green asked a second paralegal, Stewart Gonshorek, to prepare the required UCC-3 termination statements and Gonshorek created three—two identifying the financing statements for the Synthetic Lease and one identifying the Main Lien. *See* Fisher Decl. Ex. C (Gonshorek 2010 Deposition Tr. at 9:6-10:8); *In re Motors Liquidation*, 486 B.R. at 611; *In re Motors Liquidation*, 777 F.3d at 102.

28. Green and Gonshorek also drafted an escrow agreement for the Synthetic Lease, identifying the documents that would be delivered to the title company and which, once Old GM repaid the Synthetic Lease, would be handled by the title company in accordance with the instructions in the escrow agreement. *See* Fisher Decl. Ex. B (Green 2010 Deposition Tr. at

52:4-53:3); *In re Motors Liquidation*, 486 B.R. at 612; *In re Motors Liquidation Co.*, 755 F.3d at 81.

29. The escrow agreement identified the three UCC-3 termination statements, including the one for the Main Lien, and provided that upon closing, the title company would forward the UCC-3 termination statements to Mayer Brown which would file them on Old GM's behalf. Fisher Decl. Ex. J (October 24, 2018 Email from Green to Wineman, Merjian and Ledyard, at JPMCB-STB-00000430); *In re Motors Liquidation Co.*, 755 F.3d at 81; *see also In re Motors Liquidation Co.*, 486 B.R. at 612.

2. JPMorgan and Its Counsel Reviewed and Approved the Termination Documents

30. Drafts of the closing checklist, the 2008 Termination Statement, and the escrow instructions that referenced the Main Lien were sent to and reviewed by JPMorgan and its counsel Simpson Thacher. Fisher Decl. Ex. E (October 15, 2008 Email from Green to Merjian); *id.* Ex. G (October 15, 2008 Email from Merjian to Duker); *In re Motors Liquidation*, 755 F.3d at 80-81; *see also In re Motors Liquidation*, 486 B.R. at 611- 12.

31. Green circulated an initial draft of the closing checklist to Old GM and Simpson Thacher, which forwarded it to JPMorgan. *See* Fisher Decl. Ex. I (October 15, 2008 Email from Merjian to Duker); *In re Motors Liquidation Co.*, 486 B.R. at 610.

32. Green subsequently circulated updated, but largely similar, drafts of the closing checklist to Simpson Thacher, among other parties. *See* Fisher Decl. Ex. G (October 15, 2008 Email from Green to Merjian and Leyard); *see also In re Motors Liquidation*, 486 B.R. at 610.

33. All of the drafts of the closing checklist identified the Main Lien as one of the financing statements to be terminated in connection with the payoff of the Synthetic Lease.

Fisher Decl. Ex. G (October 15, 2008 Email from Green to Merjian and Leyard); *see also In re Motors Liquidation*, 486 B.R. at 610.

34. Green also sent the draft UCC-3 termination statements, including the one identifying the Main Lien for termination, to Simpson Thacher. Fisher Decl. Ex. F (October 17, 2008 Email from Merjian to Green); *see also In re Motors Liquidation Co.*, 486 B.R. at 611-12.

35. The lawyer at Simpson Thacher in charge of the matter for JPMorgan, Mardi Merjian, responded to Green, stating, “Nice job on the documents.” *Id.*

36. Merjian forwarded the documents to his client contact, the responsible managing director at JPMorgan. Fisher Decl. Ex. H (Merjian 2010 Deposition Tr. at 18:15-19:11; 24:25-25:24); *id.* Ex. I (October 15, 2008 Email from Merjian to Duker); *id.* Ex. G (October 15, 2008 Email from Merjian to Duker).

37. No further comments were provided to Mayer Brown on the UCC-3 termination statements. Fisher Decl. Ex. B (Green 2010 Deposition Tr. at 47:1-17).

38. Green also sent Merjian the draft escrow instructions that identified the Main Lien as one of the financing statements that would be terminated once the Synthetic Lease was repaid. Fisher Decl. Ex. B (Green 2010 Deposition Tr. at 51:23-54:4); *id.* Ex. J (October 24, 2008 Email from Green to Wineman, Merjian and Ledyard); *id.* Ex. C (Gonshorek 2010 Deposition Tr. at 25:9-26:8); *id.* Ex. H (Merjian 2010 Deposition Tr. at 29:15-32:11); *see also In re Motors Liquidation Co.*, 486 B.R. at 612.

39. Green asked Merjian if he had any comments and Merjian replied that “it was fine.” Fisher Decl. Ex. B (Green 2010 Deposition Tr. at 54:5-55:23); *id.* Ex. J (October 27, 2008 Email from Merjian to Green); *see also Motors Liquidation*, 486 B.R. at 614.

40. Merjian signed the escrow agreement on behalf of JPMorgan. Fisher Decl. Ex. B (Green 2010 Deposition Tr. at 55:24-56:18); *id.* Ex. M (Final Fully Executed Escrow Instructions).

41. Before signing, Merjian reviewed the escrow instructions and understood that the termination statements listed on the document would be released upon the closing of the Synthetic Lease. *Id.* Ex. H (Merjian 2010 Deposition Tr. at 34:19-35:5).

3. The Parties and Their Counsel Did Not Recognize the Error in the Termination Statements

42. Neither the parties to the Synthetic Lease transaction nor their counsel realized that one of the UCC-3 termination statements filed as part of the Synthetic Lease transaction covered a financing statement unrelated to the Synthetic Lease, let alone one that would terminate the Main Lien. Fisher Decl. Ex. B (Green 2010 Deposition Tr. at 85:8- 87:25); *see also In re Motors Liquidation*, 777 F.3d at 102.

43. Neither Green nor Perlowski realized that one of the three UCC-1 financing statements identified by Perlowski was unrelated to the Synthetic Lease. Fisher Decl. Ex. B (Green 2010 Deposition Tr. at 99:1-8); *see also In re Motors Liquidation*, 777 F.3d at 102.

44. Similarly, no one at Mayer Brown involved in drafting the closing checklist, and no one at JPMorgan or Simpson Thacher which reviewed it, recognized that one of the financing statements was unrelated to the Synthetic Lease. Fisher Decl. Ex. B (Green 2010 Deposition Tr. at 99:1-8); *id.* Ex. H (Merjian 2010 Deposition Tr. at 33:14-18); *In re Motors Liquidation*, 486 B.R. at 610-11.

45. The record showed that when Gonshorek drafted the UCC-3 termination statements for the Synthetic Lease transaction, he intended to terminate only UCC financing

statements related to the Synthetic Lease. Fisher Decl. Ex. C (Gonshorek 2010 Deposition Tr. at 9:6-10:18); *see also In re Motors Liquidation Co.*, 486 B.R. at 610-11.

46. Both Gordon and Green from Mayer Brown thought they were filing documents exclusively relating to the Synthetic Lease and believed they were only authorized by JPMorgan to make filings as to the Synthetic Lease. Fisher Decl. Ex. B (Green 2010 Deposition Tr. at 85:8-89:9).

47. In fact, no one from Mayer Brown involved in the Synthetic Lease transaction knew about the existence of the Term Loan at that time. *Id.* Ex. B (Green 2010 Deposition Tr. at 84:12-23); *id.* Ex. C (Gonshorek 2010 Deposition Tr. at 47:2-19); *id.* Ex. A (Gordon 2010 Deposition Tr. at 66:18-67:6); *id.* Ex. H (Merjian 2010 Deposition Tr. at 54:17-55:15); *id.* Ex. N (Duker 2010 Deposition Tr. at 25:25-26:17).

48. Evidence regarding a conversation between Green and Gonshorek was also in the record before the Second Circuit. *Id.* Ex. B (Green 2010 Deposition Tr. at 96:22-98:1).

49. Green testified during his deposition that Gonshorek had asked him whether the properties identified in a schedule attached to one of the financing statements related to the Synthetic Lease because the cities and states listed in the schedule were broader than the properties involved in the Synthetic Lease. *Id.* at 98:2-98:13.

50. Green could not remember further specifics about the conversation, but testified that he never reached the conclusion that the documents included a UCC-3 termination statement for a financing statement unrelated to the Synthetic Lease. *Id.* at 98:20.

51. Green did not investigate and did not bring the issue to the attention of Gordon or anyone else. *Id.* at 98:21-25.

52. Following this conversation, Green still thought that the documents that he had prepared would only terminate financing statements relating to the Synthetic Lease. *Id.* at 99:1- 8.

53. No one at Mayer Brown (or at Simpson Thacher or JPMorgan) realized that the 2008 Termination Statement covered the Main Lien until June 2009, when the error was discovered by Morgan Lewis & Bockius LLP, JPMorgan's counsel on the Term Loan. Fisher Decl. Ex. B (Green 2010 Deposition Tr. at 64:8-66:9); *id.* Ex. C (Gonshorek 2010 Deposition Tr. at 26:5-28:1, 35:5-15); *see also In re Motors Liquidation*, 486 B.R. at 614; *In re Motors Liquidation*, 755 F.3d at 82.

54. After the error was discovered, Gordon, the Mayer Brown partner in charge of the Synthetic Lease transaction, signed an affidavit explaining that Mayer Brown had intended to terminate only liens related to the Synthetic Lease. Fisher Decl. Ex. O (June 19, 2009 Email attaching Gordon Affidavit); *see also In re Motors Liquidation*, 755 F.3d at 82.

B. The Second Circuit's Holding

55. On January 21, 2015, the Second Circuit issued its decision, reversing the Bankruptcy Court and ruling that the 2008 Termination Statement was effective to cause the Main Lien to become unperfected because JPMorgan had authorized the filing. *In re Motors Liquidation*, 777 F.3d at 105.

56. On that basis, the Second Circuit remanded with instructions to the Bankruptcy Court to enter partial summary judgment in favor of the Avoidance Action Trust on the question of the effectiveness of the Termination Statement. *Id.* at 105-06.

C. Phase II Discovery by the Non-JPMorgan Term Lenders

57. Following remand, the Bankruptcy Court permitted the Non-JPMorgan Term Lenders to retake discovery on the Phase I issues. *See Adv. Pro. Dkt. No. 634.*

58. Fact discovery on these issues is now complete. *Id.*

Dated: September 14, 2018
New York, New York

Respectfully submitted,

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