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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
MOTION FOR PARTIAL SUMMARY JUDGMENT DISMISSING THE
TERM LENDERS’ CONSTRUCTIVE TRUST 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 Notice of Motion on November 6, 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 Term Lenders’ Constructive Trust 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 TERM LENDERS AND OLD GM ENTER INTO THE TERM LOAN AGREEMENT AND COLLATERAL AGREEMENT

1. In 2006, approximately three years before it filed for bankruptcy, General Motors Corporation (“**Old GM**”) entered into an approximately \$1.5 billion syndicated commercial financing term loan (the “**Term Loan**”) with a group of bank lenders, who ultimately assigned some or all of their interests to over 500 Term Lenders. Declaration of Eric B. Fisher (“**Fisher Decl.**”), Ex. A (Term Loan Agreement at 1); Adv. Pro. Dkt. No. 962 (Joint Pretrial Order entered on April 19, 2017) (“**JPTO**”), Stipulated Facts ¶¶ 44-45.¹

2. To secure their obligations under the Term Loan, pursuant to a November 29, 2006 collateral agreement (the “**Collateral Agreement**”), Old GM (and Saturn Corporation) granted to JPMorgan Bank, N.A., as the Administrative Agent for the Term Loan (“**JPMorgan**”), a first-priority security interest in a large number of Old GM’s assets, including

¹ All references to the Adversary Docket are to *Motors Liquidation Co. 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 Corp.*, Case No. 09-50026.

certain equipment and fixtures at 42 Old GM facilities throughout the United States (the “**Collateral**”). Fisher Decl. Ex. B (Collateral Agreement Article II & Schedule 1).

3. This was an arm’s-length commercial transaction between Old GM, on the one hand, and JPMorgan and the Term Lenders, on the other. The Collateral Agreement specifies that, “neither the Agent nor any Secured Party has any fiduciary relationship with or duty to any Grantor arising out of or in connection with this Agreement or any of the other Loan Documents, and the relationship between the Grantors, on the one hand, and the Agent and Secured Parties, on the other hand, in connection herewith or therewith is solely that of debtor and creditor.”

Fisher Decl. Ex. B (Collateral Agreement, §7.12(b)).

A. JPMorgan, As Administrative Agent, Caused the Filing of the UCC-1 Financing Statements, Including the Financing Statement for the Main Lien

4. Pursuant to the Collateral Agreement, JPMorgan, as Administrative Agent, took a first priority security interest in the Collateral. *Id.* (Collateral Agreement § 3.02 & Article II).

5. The term loan agreement, dated as of November 29, 2006, and amended as of March 4, 2009 (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. A (Term Loan Agreement § 8.01).

6. 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.

7. The Collateral Agreement sets forth additional duties assumed by JPMorgan. JPMorgan was responsible for the Collateral, including filing UCC-1 financing statements to perfect the Term Lenders' security interests. Fisher Decl. Ex. B (Collateral Agreement §§ 6.02, 6.03).

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. B (Collateral Agreement § 6.02).

9. The Collateral Agreement also spelled out the authority granted to JPMorgan with respect to the Collateral, including 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.* (§ 6.04).

10. JPMorgan, as Administrative Agent, thereafter caused the filing of twenty-eight UCC-1 financing statements throughout the United States to perfect the Term Lenders' security interests in the Collateral. Fisher Decl. Ex. A (Term Loan Agreement, sched. 3.12); JPTO, Stipulated Facts ¶¶ 46-52.

11. One of the twenty-eight UCC-1 financing statements covered all the equipment and fixtures at the forty-two Old GM facilities and was filed with the Delaware Secretary of State and designated as file number 6416808 4 (the "**Main Lien**"). JPTO, Stipulated Facts ¶ 48; Adv. Pro. No. 31 (Affidavit of Richard W. Duker in Support of Defendant JPMorgan Chase Bank, N.A.'s Motion for Summary Judgment, dated June 29, 2010) (the "**Duker Aff.**") ¶ 13; Adv. Pro. Dkt. No. 37 (Duker Aff. Ex. I).

B. The Term Loan Agreement Requires Old GM to Provide Certain Information and Certifications to the Term Lenders

12. The Term Loan Agreement obligated Old GM to provide to JPMorgan, on behalf of the Term Lenders, certain information and certifications regarding Old GM's financial statements, performance of its contractual covenants, and the value of the Collateral on a quarterly basis. *See generally* Fisher Decl. Ex. A (Term Loan §§ 5.01, 5.02).

13. Old GM was required to furnish a certificate from an Old GM Financial Officer stating that, "to the best of such Financial Officer's knowledge," Old GM has performed in all material respects all of its covenants and other agreements under the Term Loan Agreements, and that no Default or Event of Default has occurred and is continuing. *Id.* §5.02(a).

14. It is an Event of Default under the Term Loan Agreement if "any of the Security Documents shall cease, for any reason, to be in full force and effect with respect to Collateral with a book value in excess of \$25,000,000 in the aggregate," or "any Lien created by any of the Security Documents shall cease to be enforceable and of the same effect and priority purported to be created thereby. . . ." *Id.* Art. VII (g). Article VII of the Term Loan Agreement sets out the relief available to the Term Lenders in an Event of Default. *Id.* Art. VII.

15. As part of its reporting obligations, Old GM was also required to provide collateral value certificates, which set forth the net book value of the Term Loan Collateral. *Id.* §§ 1.01 at 4 (definition of Collateral Value Certificates) and 5.02)

16. The collateral certificates were prepared by Old GM's Capital Markets Domestic Finance Group with the assistance of internal and external counsel, and were presented to Old GM's assistant treasurer for review and signature. *See* Fisher Decl. Ex. C (Deposition Transcript of Adil Mistry taken October 24, 2018 ("**Mistry Deposition Tr.**") at 126:5-127:11; 161:6-15).

17. Adil Mistry, who served as an assistant treasurer and signed the five certificates provided to JPMorgan from May 2008 to May 2009, took steps to ensure that the certificates were accurate. *See id.* at 125:7-24; 145:15-19; 155:12-25; 161:6-15; 183:11-18; 248:13-251:1; Fisher Decl. Ex. N (Copies of the collateral certificates delivered pursuant to the Term Loan Agreement).

18. During the relevant period, Mr. Mistry was unaware of any inaccuracy in any of the collateral certificates he provided; and he testified that, if he had any doubt about the accuracy of any certificate, he would not have signed it. Fisher Decl. Ex. C (Mistry Deposition Tr. at 250:8-11; 250:23-251:1).

II. JPMORGAN MISTAKENLY AUTHORIZES THE FILING OF THE 2008 TERMINATION STATEMENT, WHICH TERMINATES THE MAIN LIEN

19. In 2001—five years before the Term Loan transaction—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. *Official Comm. of Unsecured Creditors of Motors Liquidation Co. v. JPMorgan Chase Bank, N.A. (In re Motors Liquidation Co.)*, 777 F.3d 100, 101 (2d Cir. 2015).

20. 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.*

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. *Id.* at 102.

22. In drafting the UCC-3 termination statements, Mayer Brown inadvertently included a termination statement identifying the Main Lien for the unrelated Term Loan (the “**2008 Termination Statement**”). *Id.*

23. The draft documents, including the draft 2008 Termination Statement identifying the Main Lien, were sent to JPMorgan and its counsel, Simpson Thacher & Bartlett LLP (“**Simpson Thacher**”), along with draft escrow instructions that again identified the Main Lien as one of the financing statements that would be terminated once the Synthetic Lease was repaid. Fisher Decl. Ex. D (October 15, 2008 12:48 PM Email from Green to Merjian; October 15, 2008 12:54 PM Email from Merjian to Duker); *id.* Ex. E (October 15, 2008 5:27 PM Email from Green to Merjian and Ledyard; October 15, 2008 5:30 PM Email from Merjian to Duker); *id.* Ex. F (October 17, 2008 3:26 PM Email from Merjian to Green); *id.* Ex. G (October 24, 2008 10:07 AM Email from Green to Wineman, Merjian and Ledyard); *id.* Ex. H (October 27, 2008 10:49 AM Email from Merjian to Green).

24. JPMorgan and its counsel reviewed the draft documents and assented to their filing—including the 2008 Termination Statement. *Id.* Ex. F (October 17, 2008 3:26 PM Email from Merjian to Green); *id.* Ex. H (October 27, 2008 10:49 AM Email from Merjian to Green); *id.* Ex. I (October 29, 2008 executed escrow agreement); *In re Motors Liquidation*, 777 F.3d at 105-06.

25. 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. *In re Motors Liquidation Co.*, 777 F.3d at 102; *see also* Fisher Decl. Ex. J (Green 2010 Deposition Tr. at 85:8-87:25); Duker Aff. ¶ 29.

26. In fact, no one from Mayer Brown involved in the Synthetic Lease transaction worked on or recalled any information about the Term Loan at that time. *Id.* Ex. J (Green 2010 Deposition Tr. at 84:12-23); *id.* Ex. K (Gonshorek 2010 Deposition Tr. at 47:2-19); Ex. L (Gordon 2010 Deposition Tr. at 66:18-67:6), Ex. M (Merjian 2010 Deposition Tr. at 54:17-55:15).

27. On March 4, 2009, while all parties were still unaware of the mistaken filing of the 2008 Termination Statement, the Term Loan Agreement was amended, and Old GM and JPMorgan executed the First Amendment to the Term Loan Agreement (the “**Term Loan Amendment**”). *See* Duker Aff. ¶ 25; Adv. Pro. Dkt. No. 39 (Duker Aff. Ex. N); Fisher Decl. Ex. C (Mistry Deposition Tr. at 263:18-264:7).

III. OLD GM FILES FOR BANKRUPTCY AND THE TERM LOAN IS REPAYED SUBJECT TO THE CREDITORS’ COMMITTEE’S RIGHT TO BRING THIS LAWSUIT

28. On June 1, 2009 (the “**Petition Date**”), Old GM and certain of its subsidiaries filed voluntary Chapter 11 petitions in the United States Bankruptcy Court for the Southern District of New York. Bankr. Dkt. No. 1.

29. On the Petition Date, Old GM also filed a motion in this Court seeking approval to sell substantially all of its assets to a Government-sponsored entity in an expedited sale under Section 363 of the Bankruptcy Code (the “**363 Sale**”). JPTO, Stipulated Facts ¶ 32.

30. The Government-sponsored entity purchasing Old GM’s assets was to be a new company, NGMCO, Inc. (“**New GM**”). *Id.* ¶ 33.

31. The assets that New GM did not acquire would remain with Old GM for liquidation. *Id.*

32. The 363 Sale closed on July 10, 2009. *Id.* ¶ 43.

33. Of the 42 plants where Term Loan Collateral was located, most were sold to New GM, and the remaining plants (or portions thereof) were left behind with Old GM to be liquidated. *See* Fisher Decl. Ex. A (Term Loan Agreement, sched. 1) (listing 42 plants where Term Loan Collateral is located); Bankr. Dkt. No. 2649, Ex. A (Notice of Filing of the Amended Master Sale and Purchase Agreement and Certain Exhibits and Sections of the Disclosure Statement Thereto, Master Sale and Purchase Agreement § 2.2(b)(v)); *id.* Ex. F (Certain Excluded Owned Real Property) (listing the real property that is excluded from the 363 Sale).

34. On the Petition Date, the Debtors also filed a motion seeking authority from the Bankruptcy Court to obtain in excess of \$33 billion in post-petition financing (the “**DIP Financing**”) from the United States Department of the Treasury and Export Development Canada (collectively referred to as the “**DIP Lenders**”). Bankr. Dkt. No. 64 (December 9, 2010 Letter from JPMorgan to Judge Gerber); *see also* JPTO, Stipulated Facts ¶ 37.

35. The Debtors’ motion requested authority to use a portion of the DIP Financing to repay the Term Loan in full. Bankr. Dkt. No. 64 ¶ 75.

36. Days before entry of 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* on June 25, 2009, Bankr. Dkt. No. 2529 (the “**DIP Order**”), which provided for the final approval of the DIP Financing, the Committee learned that the Term Lenders’ security interests, in fact, may not all have been perfected as of the Petition Date due to the filing of the 2008 Termination Statement months before the Petition Date. *Official Comm. of Unsecured Creditors of Motors*

Liquidation Co. v. JPMorgan Chase Bank, N.A. (In re Motors Liquidation Co.), 755 F.3d 78, 102 (2d Cir. 2014); *see also* Duker Aff. ¶ 29.

37. The terms of the DIP Order had been negotiated by the Term Lenders, and the DIP Order was entered with notice to the Term Lenders and resolved any objections from them. Fisher Decl. Ex. O (Excerpt from the transcript of the June 25, 2009 hearing before the Bankruptcy Court).

38. The DIP Order uses the term “Prepetition Senior Facilities,” which is defined to include the “Prepetition Term Loan Agreement.” DIP Order at 5-6.

39. The DIP Order, while conditionally approving Old GM’s repayment of the Term Loan, expressly preserved the right of the Committee to investigate and bring actions based upon the purported perfection of the security interests related to the Term Loan. *Id.* ¶ 19(d).

40. Specifically, the DIP Order provided a general release from the Debtors to the Term Lenders with the exception of certain “Reserved Claims,” defined to include “the perfection of first priority liens” in connection with the Term Loan. *Id.*

41. The DIP Order further provided that “[t]he Committee shall have automatic standing and authority to both investigate the Reserved Claims and bring actions based upon the Reserved Claims against the Prepetition Senior Facilities Secured Parties not later than July 31, 2009.” *Id.*

42. The DIP Order also stated that the Committee’s grant of “automatic standing shall be without any further order of this Court or any requirement that the Committee file a motion seeking standing or authority to file a motion seeking standing or authority before prosecuting any such challenge.” *Id.*

43. Thus, while the DIP Order allowed payment in full to the Term Lenders under the provisional assumption that their security interest was perfected, it expressly carved out the authority of the Committee to bring an action to seek relief if it was discovered that the security interest was not in fact perfected. *Id.*

44. Following entry of the DIP Order, Old GM repaid the Term Lenders in full, ahead of other creditors of Old GM (the “**Term Loan Payoff**”). *See* JPTO, Stipulated Facts ¶ 54; DIP Order ¶ 19(a).

45. After Old GM paid JPMorgan the full amount due under the loan, JPMorgan transferred the payment to the Term Lenders, and the Term Lenders released their liens on the Term Loan Collateral. DIP Order ¶ 19(b).

46. The DIP Order states that upon the Term Loan Payoff, the Term Lenders “shall have no further rights with respect to the Debtors, the DIP Lenders, the Property or any claims or liens relating thereto (all of which liens and claims shall be deemed automatically satisfied and released without further action), whether such claims or liens arise under the Prepetition Term Loan Agreement, [other prepetition senior facilities] or related documents, and the Debtors and their estates shall have no further obligations” to the Term Lenders in connection with the Term Loan.” *Id.*

47. The DIP order also states that the Term Lenders’ “liens, claims and interests in the Property and any adequate protection claims or adequate protection liens, shall expire upon the Payment.” *Id.* ¶ 19(c).

48. Following the Term Loan Payoff, the DIP Lenders had a perfected security interest in and lien on the Collateral as security for the DIP Loan. *Id.* ¶ 19(e).

IV. THE AVOIDANCE ACTION

49. Pursuant to the authority conferred upon it in the DIP Order, the Committee filed this adversary proceeding (the “**Avoidance Action**”) seeking to recover amounts alleged to have been improperly paid by Old GM to the Term Lenders based on the erroneous assumption that the Term Lenders’ security interests were perfected, and their claims fully secured. Adv. Pro. Dkt. No. 1 (Adversary Complaint for (1) Avoidance of Unperfected Lien, (2) Avoidance and Recovery of Postpetition Transfers; (3) Avoidance and Recovery of Preferential Payments, and (4) Disallowance of Claims by Defendants).

50. It has now been established that 30% of distributable proceeds from the Avoidance Action are for the benefit of the DIP Lenders, and the remaining 70% are for the benefit of the unsecured creditors. Bankr. Dkt. No. 13744 (Memorandum Opinion and Order Approving Motion for an Order Approving Stipulation of Settlement and Other Relief) at 20.

51. The Debtors’ Second Amended Chapter 11 plan (the “**Second Amended Plan**”) created the Avoidance Action Trust and transferred to the Trust “the Term Loan Avoidance Action” and any proceeds of the action. Bankr. Dkt. No. 9941 (Findings of Fact, Conclusions of Law, and Order Pursuant to Sections 1129(a) and (b) of the Bankruptcy Code and Rule 3020 of the Federal Rules of Bankruptcy Procedure Confirming Debtors’ Second Amended Joint Chapter 11 Plan) ¶ 6 (transferring Avoidance Action Trust Assets to the Avoidance Action Trust); *see also* Bankr. Dkt. No. 11704 (Avoidance Action Trust Agreement §§ 1.1(f), (d)) (defining Avoidance Action Trust Assets to include, inter alia, “Avoidance Action Proceeds,” further defined as “the proceeds of the Term Loan Avoidance Action”).

52. On October 7, 2009, JPMorgan filed an answer asserting, among other defenses, that the “Bankruptcy Court should find that the Debtors held the collateral under the Term Loan

Agreement pursuant to a constructive trust.” Adv. Proc. Dkt. No. 12 (Answer of Defendant JPMorgan Chase Bank, N.A.) , at 80 (Second Defense).

A. The Parties Litigate Whether the 2008 Termination Statement was Effective to Terminate the Main Lien

53. The Bankruptcy Court (with the consent of JPMorgan) 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).

54. 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. Proc. Dkt. Nos. 24, 28; *see also In re Motors Liquidation Co.*, 755 F.3d at 82.

55. Among the arguments asserted in JPMorgan’s Memorandum of Law was a request for alternative relief in the form of the imposition of a constructive trust on the Collateral in favor of the Term Lenders. Adv. Proc. Dkt. No. 29 (Memorandum of Law in Support of Defendant JPMorgan Chase Bank, N.A. Motion for Summary Judgment) at 44.

56. JPMorgan stated that “[a]bsent [Old GM’s] pledge of the Term Loan Collateral, the Term Lenders would not have lent [Old GM] approximately \$1.5 billion under the Term Loan.” *Id.* at 47.

57. JPMorgan argued that the Term Lenders are entitled to a constructive trust on the Collateral as of the Petition Date because, among other reasons, “giving effect to the Unrelated Termination Statement would contravene the express agreement of the parties memorialized by the terms of the Term Loan Agreement. . . .” *Id.*

58. JPMorgan also noted that the Term Loan was repaid from the DIP Credit Facility and to the extent recovery of “amounts provided from the U.S. Treasury to repay the Term Loan lenders,” will be returned to the estate, the unsecured creditors would be grossly and unjustly enriched. *Id.* at 47-48.

59. 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).

60. The Bankruptcy Court did not rule on JPMorgan’s alternative constructive trust argument. *See id.* at 646 n. 216.

61. The Bankruptcy Court certified its summary judgment decision for direct appeal to the Second Circuit, and on March 7, 2013, Plaintiff appealed to the Second Circuit. Adv. Pro. Dkt. Nos. 74 and 76.

B. The Second Circuit Holds that JPMorgan Authorized the Filing of the 2008 Termination Statement That Caused the Main Lien to Become Unperfected

62. On January 21, 2015, the Second Circuit held that “although JPMorgan never intended to terminate the Main [Lien], it authorized the filing of a UCC-3 termination statement that had that effect.” *In re Motors Liquidation Co.*, 777 F.3d at 101.

63. The Second Circuit reversed the Bankruptcy Court's grant of summary judgment and remanded the case with instructions to enter partial summary judgment in favor of Plaintiff, which the Bankruptcy Court did on June 12, 2015. *Id.* at 105-06; Adv. Pro. Dkt. No. 96 (Order on Cross- Motions for Summary Judgment).

C. The Avoidance Action Trust Files an Amended Complaint and Certain Additional Term Lenders Assert a Constructive Trust Defense

64. Following the Second Circuit's decision, the parties commenced Phase II of the litigation. In May 2015, Plaintiff filed an amended complaint (the "**Amended Complaint**") and served the Non-JPMorgan Term Lenders. *See* Adv. Pro. Dkt. Nos. 91, 94, 95, 163, 164.

65. JPMorgan filed an amended answer in November 2015, wherein it repeated its constructive trust affirmative defense and added a defense stating that Plaintiff is barred from avoiding transfers under 11 U.S.C. § 549 "insofar as such transfers were not [sic] property of the estate." Adv. Proc. Dkt. No. 225 (Amended Answer of Defendant JPMorgan Chase, N.A.), at 85-86.

66. Other Term Lenders filed their answers also asserting a constructive trust defense. Generally, the Term Lenders' affirmative defense of constructive trust seeks a finding by the Court that Old GM held the Collateral under the Term Loan Agreement pursuant to a constructive trust, and some Term Lenders add that such collateral is therefore excluded from the

bankruptcy estate. *See, e.g.*, Adv. Proc. Dkt. Nos. 222, 224, 225, 227, 229, 230-234, 238, 241, 242, 280, 284, 292, 296, 297, and 334.

Dated: November 6, 2018
New York, New York

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