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VIA EMAIL, ECF, AND FEDERAL EXPRESS

The Honorable Martin Glenn
U.S. Bankruptcy Court
Southern District of New York
One Bowling Green, Courtroom 523
New York, New York 10004-1408

Re: *Motors Liquidation Company Avoidance Action Trust v. JPMorgan Chase Bank, N.A. et al.*, Case No. 09-00504 (MG)

Dear Judge Glenn:

We, along with our co-counsel Jones Day, represent a group of Term Lenders holding approximately $600 million in Term Loan debt, who were not served and who did not participate in what Plaintiff has termed "Phase I" of this litigation. We write in response to Plaintiff's letter of February 10, 2017 requesting a pre-motion conference to request leave to file a motion for summary judgment on (among other issues) the legal effectiveness of the Termination Statement. We write to explain why effectiveness cannot be decided on summary judgment, and to object to Plaintiff's request for expedited briefing.

This Court has held that, while the Second Circuit's decision in Phase I is binding precedent, the Term Lenders have a due process right to contest the effectiveness of the Termination Statement, including the right to raise factual or legal arguments that were not presented to the Second Circuit. Our clients intend to challenge the effectiveness of the Termination Statement through at least two arguments that were not presented to—and thus not decided by—the Second Circuit in Phase I. Both of these arguments raise material, disputed issues of fact that preclude their resolution on summary judgment.

1. There Is a Triable Issue of Fact as to Whether Mayer Brown Reasonably Believed That It Was Authorized to File the Termination Statement

The effectiveness of the Termination Statement turns, as an initial matter, on whether JPMorgan authorized GM's counsel, Mayer Brown, to file the Termination Statement. Although this is fundamentally a question of agency law, the parties in Phase I gave short shrift to whether the beliefs of the agent (Mayer Brown) in this respect were reasonable—instead focusing their arguments on the relevance of the subjective intent of the principal, JPMorgan. And, indeed, every one of the prior appellate opinions in this case took it as an undisputed fact that "[n]o one at … Mayer Brown … noticed" that the Main Term Loan UCC-1 pertained to collateral outside the Synthetic Lease. *Official Comm. of Unsecured Creditors of Motors Liquidation Co. v. JPMorgan Chase Bank, N.A.* ("*Motors II*"), 777 F.3d 100, 102 (2d Cir. 2015); *see also id.* ("Neither the paralegal nor the associate realized that only the first two of the UCC–1s were

related to the Synthetic Lease."); *Official Comm. of Unsecured Creditors of Motors Liquidation Co. v. JPMorgan Chase Bank, N.A.* ("*Motors I*"), 755 F.3d 78, 80 (2d Cir. 2014) ("Not noticing that one of the UCC-1s was unrelated to the Synthetic Lease, the associate placed all three for termination in the Closing Checklist."); *see also Official Comm. of Unsecured Creditors of Motors Liquidation Co. v. JPMorgan Chase Bank, N.A.*, 103 A.3d 1010, 1012 (Del. 2014) (accepting that "no one at . . . Mayer Brown . . . noticed this error" before the Termination Statement was filed).

To the contrary, the evidence shows that Mayer Brown *did* notice a discrepancy between the collateral covered by the Main Term Loan UCC-1 and the collateral for the Synthetic Lease—and therefore its alleged belief that it was authorized to file the Termination Statement was anything but reasonable. That evidence includes deposition testimony from the Mayer Brown associate responsible for preparing the paperwork for the Synthetic Lease, Ryan Green, who admitted that Mayer Brown noticed that there was a problem with the draft Termination Statement. Before the Termination Statement was filed, a paralegal, Stewart Gonshorek, approached Green with a "concern," namely that the schedule to the underlying financing statement (which related to the Term Loan) contained a list of properties far broader than the properties that were part of the Synthetic Lease. Notably, the schedule listed some forty-two properties in more than a dozen states, whereas the closing checklist listed just five properties, all of which were in Michigan. Remarkably, neither Green nor anyone else at Mayer Brown appears to have done anything to resolve this glaring discrepancy—an omission that, as two experienced UCC experts retained by our clients will testify, was wholly inconsistent with industry practice. When asked about this episode at his deposition last month, Green claimed to have suffered a complete and total loss of memory about all of the events surrounding the repayment of the Synthetic Lease, offering no explanation (reasonable or otherwise) for why he did not resolve or escalate the serious concerns raised by Gonshorek.

This evidence creates a triable issue of fact on the effectiveness of the Termination Statement. Under the test for authorization adopted by the Second Circuit, the scope of Mayer Brown's authority is to be judged by the "traditional principles of agency law" that apply to the relationship between principal and agent. *Motors I*, 755 F.3d at 84. Under those traditional principles, an agent who knows or reasonably should know that the principal's instructions are in error is duty bound *not* to follow them. Accordingly, Mayer Brown's lack of authorization can be established "by showing *either* that [Mayer Brown] did not believe, or could not reasonably have believed" that the filing of the Termination Statement was consistent with JPMorgan's intentions. Restatement (Third) of Agency § 2.02 cmt. e (emphasis added).

The Second Circuit had no occasion to apply this standard to the evidence above because neither Plaintiff nor JPMorgan seriously disputed Mayer Brown's beliefs in Phase I. We submit that the evidence will show that, on the contrary, Mayer Brown could not have reasonably believed that it was authorized to file the Termination Statement once it noticed the discrepancy between the Term Loan financing statement and the Synthetic Lease collateral. While Plaintiff undoubtedly will dispute the inferences to be drawn from the evidence, what Mayer Brown

believed and whether that belief was reasonable are quintessentially factual questions that cannot be decided on summary judgment.

2. There Is a Triable Issue of Fact as to Whether JPMorgan Filed the Termination Statement in its Capacity as Agent for the Term Lenders

Our clients intend to oppose summary judgment for a second reason. To the extent that JPMorgan "authorized" the filing of the Termination Statement, that authorization is not legally effective because JPMorgan did not do so in its capacity as *the agent of the Term Lenders*. Under the Uniform Commercial Code, only the "secured party of record" can authorize the filing of a termination statement. Here, the secured party of record for the Main Term Loan UCC-1 was JPMorgan as *administrative agent for the Term Loan*, not JPMorgan *as administrative agent for the Synthetic Lease*. Under settled principles of agency law, JPMorgan's two different capacities are treated as different legal persons. *See, e.g.*, *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 543 n. 6 (1986) ("Acts performed by the same person in two different capacities are generally treated as the transactions of two different legal personages.") (internal quotation marks omitted)). Acts that JPMorgan took in its capacity as administrative agent for the Synthetic Lease were the acts of a total stranger to the Term Loan UCC-1, and thus those acts were powerless to terminate it.

This argument, too, was never presented to the Second Circuit. While JPMorgan argued that it did not "authorize" the filing of the Termination Statement, the parties simply elided the statutory requirement that the relevant authorization come from the "secured party of record." *See* Del. Code Stat. tit. 6, § 509(d).

Based on its discovery responses, Plaintiff appears to dispute that JPMorgan was acting in its capacity as administrative agent under the Synthetic Lease when it purportedly authorized the filing of the Termination Statement. The evidence of the capacity in which JPMorgan acted is a factual question and amply supports a contrary finding, precluding resolution of this issue by motion for summary judgment.

For these reasons, we oppose Plaintiff's request for leave to file a motion for summary judgment on the effectiveness of the Termination Statement. If the Court grants leave to file that motion, given the substantial issues that have not been addressed by any court to date, we respectfully request that the Court provide for full and fair briefing schedule.

Very truly yours,

/s/ John W. Spiegel
John W. Spiegel

cc: Counsel of Record (via ECF)