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February 13, 2017

The Honorable Martin Glenn
United States Bankruptcy Court
Southern District of New York
One Bowling Green, Courtroom 523
New York, New York 10004

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

Dear Judge Glenn:

We, along with our co-counsel Munger, Tolles & Olson LLP, represent a group of Term Lenders holding approximately $600 million in Term Loan debt. Our co-counsel at Munger Tolles has written the Court to explain why Plaintiff's request for leave to file a motion for summary judgment against the non-JPMorgan defendants on the effectiveness of the UCC-3 termination statement should be denied. We write separately on behalf of the entire Defendants' Steering Committee to explain why Plaintiff's request should also be denied with respect to the earmarking and constructive trust affirmative defenses.

As an initial matter, it is premature for the Court now to determine whether, *after* the Representative Assets trial, it will turn out to be appropriate to receive summary judgment motions challenging the defenses of "earmarking" and "constructive trust." Having not even begun pre-trial proceedings, the Court and the parties are in no position now to determine whether they will be prepared at that point to entertain such motions. Moreover, all indications now are that such motions will not be appropriate at that time. Most obviously, the Court will then be in the midst of sorting through the voluminous trial record as well as the pre- and post-trial briefs. Further efforts to resolve this case cannot begin until the Court issues a decision on the 40 representative assets, and so it is in the parties' best interest to avoid burdening the Court with additional issues that have nothing to do with the 40 representative assets, such as the summary judgment issues the Plaintiff proposes.

More importantly, however, even if Plaintiff's summary judgment motions could be considered without delaying a decision on the 40 representative assets, such motions would still be premature with respect to the earmarking and constructive trust defenses. As Plaintiff acknowledges in its letter, "the fact discovery deadline has been deferred with respect to the affirmative defenses of earmarking and constructive trust." ECF No. 841, at 2. Although

Plaintiff asserts that additional discovery will not show a genuine issue of material fact, it offers no details or explanation to justify that assertion. In fact, Defendants consider it essential, with respect to both defenses, to depose at least Adil Mistry, and they have told the Plaintiff that, as well as having informed the Court. Mr. Mistry was "Old GM's" assistant treasurer, and no other Old GM employee has been deposed on these issues. Indeed, a subpoena for his deposition was served on "New GM's" outside counsel, who was working to schedule it until the subpoena was withdrawn because of the agreement by the parties in connection with the last scheduling order to defer discovery on all affirmative defenses unrelated to the representative assets trial. At that time, Defendants explained to Plaintiff and the Court that their inability to complete discovery on the affirmative defenses was the result of (1) Plaintiff's limited ability to staff overlapping depositions; and (2) an effort to focus the limited time for fact discovery on issues relevant to the representative assets proceeding—including the Plaintiff's request to depose 12 of the Defendants' experts as fact witnesses—in order to allow the parties to meet the schedule for that proceeding. The Defendants should not be penalized for their effort to focus discovery on the issues the Court itself encouraged the parties to focus on.

Moreover, in denying that there are genuine questions regarding these defenses, Plaintiff merely states its legal conclusions, without support or reasoning. Although plaintiff asserts that "no funds were earmarked for distribution to Defendants," the full record will show that there was an agreement requiring Old GM to use $1.5 billion of the DIP financing to pay off the Term Loan. The June 25, 2009 Final DIP Order—entered with the agreement of Old GM and the DIP lender, among others—expressly required Old GM to apply the DIP funding to repay the Term Loan. Dkt. No. 2529 at ¶ 19(a). Moreover, one witness who has already been deposed—Matt Feldman, Chief Legal Officer to the Presidential Task Force on the Auto Industry—testified that the United States government was aware of the Term Loan, that the amount of the Term Loan was a component in the sizing of the government's DIP financing and that the Automotive Task Force expected Old GM to use $1.5 billion of the DIP financing to pay off the Term Loan. *See, e.g.,* M. Feldman Dep. Tr. at 82, 102. Mr. Mistry, who worked closely with the Task Force to size the DIP financing and has knowledge regarding the intended use of proceeds, has yet to be deposed. Thus, the earmarking defense has both direct evidentiary support and remains the subject of needed discovery.

In equally conclusory fashion, Plaintiff claims that Defendants are "unable to meet the test for the creation of a constructive trust," but there is a genuine question regarding (among other things) the due diligence by and knowledge of Old GM between October 2008, when the UCC-3 was filed, and June 2009. For example, evidence uncovered in discovery has shown that bankruptcy counsel for Old GM (Weil, Gotshal & Manges LLP) had in its possession prior to the bankruptcy filing the results of lien searches run in December 2008 and April/May 2009, which not only showed that the termination statement had been filed, but actually contained the UCC-3 termination statement itself. *See, e.g.*, WEILJPMGM00609512; WEILJPMGM00610328;

WEILJPMGM00155196. Nonetheless, Old GM disregarded this information when requesting an amendment to the Term Loan Agreement in early 2009 and filing its bankruptcy petition in June 2009. And Old GM continued to sign collateral value certificates attesting to the fact that the Term Loan was fully secured right up to the time of the bankruptcy filing. In fact, Mr. Mistry himself signed the collateral value certificates issued on March 23, 2009, and May 28, 2009, which represented that "[a]s of March 31, 2009 . . . [Old GM] is in compliance with Section 6.04 of the [Term Loan] Agreement, [which governs the ratio of collateral value to total exposure]" and that "no Default or Event of Default has occurred and is continuing." JPMCB-1-00000057. Thus, the Term Lenders must have the opportunity to depose Mr. Mistry regarding what he knew about the Term Loan when he made these representations on behalf of Old GM and what he did to confirm the representations he made. Finally, Plaintiff also observes that the payments to Defendants "were authorized subject to the [Plaintiff's] express 'right to challenge the perfection of the first lien priority,'" ECF No. 841, at 2, but that authorization does not preclude any *defenses* to that challenge, including based on a pre-existing constructive trust.

In any event, the result of the 40 representative assets trial may moot these defenses, by showing that the Defendants were fully secured. In such case, the time and expense of preparing briefs and filings on summary judgment before a decision in that trial would prove to have been a waste. We therefore suggest that the Court defer decision on permitting these summary judgment motions until it has ruled in the 40 representative assets trial and, if necessary, Defendants have had the opportunity to complete discovery on the constructive trust and earmarking defenses, at which point Plaintiff may renew its request.

Sincerely,

/s/ Bruce S. Bennett

Bruce S. Bennett

cc: Counsel of Record (via ECF)