

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

In re:	:	Chapter 11 Case
MOTORS LIQUIDATION COMPANY, <i>et al.</i> ,	:	Case No. 09-50026 (REG)
Debtors.	:	(Jointly Administered)
OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF MOTORS LIQUIDATION COMPANY f/k/a GENERAL MOTORS CORPORATION,	:	Adversary Proceeding
Plaintiff,	:	Case No. 09-00504 (REG)
vs.	:	
JPMORGAN CHASE BANK, N.A., <i>et al.</i> ,	:	
Defendants.	:	

**Statement of Undisputed Material Facts Pursuant to Local Bankruptcy Rule 7056-1**

Pursuant to Rule 7056-1 of the Local Rules for the United States Bankruptcy Court for the Southern District of New York, plaintiff, by its counsel, respectfully submits the following statement of material facts as to which there is no genuine issue to be tried:

**The Parties Enter Into The Term Loan Agreement**

1. Among other parties, General Motors Corporation (“**Old GM**”), Saturn Corporation (“**Saturn**”), and JPMorgan Chase Bank, N.A., as administrative agent (“**JPMorgan**”) and a lender, entered into a term loan agreement dated as of November 29, 2006 (the “**Term Loan Agreement**”).<sup>1</sup>

<sup>1</sup> A copy of the Term Loan Agreement is attached as **Exhibit A** to the Declaration of Eric B. Fisher (the “**Fisher Declaration**”).

2. Richard W. Duker (“**Duker**”), as managing director of JPMorgan, signed the Term Loan Agreement on behalf of JPMorgan. (*Id.* at 121).

3. In connection with the Term Loan Agreement, Old GM, Saturn and JPMorgan entered into a collateral agreement dated as of November 29, 2006 (the “**Collateral Agreement**”).<sup>2</sup>

4. Section 6.04 of the Collateral Agreement entitled “Authority of Agent” states that as between JPMorgan and Old GM, JPMorgan “shall be conclusively presumed to be acting . . . with full and valid authority so to act” and Old GM shall not “be under any obligation, or entitlement, to make any inquiry respecting such authority.” (*Id.* at 125).

5. Duker, as managing director of JPMorgan, signed the Collateral Agreement on behalf of JPMorgan. (*Id.* at 131).

6. Duker has worked for JPMorgan and its predecessors for almost 25 years (Duker 8:16-17),<sup>3</sup> has been a managing director of JPMorgan since 2002 (Duker 5:4-6) and has been responsible for JPMorgan’s credit relationship with Old GM since 1999 (Duker 5:7-17).

7. Duker is familiar with how UCC filings operate and understands the purpose of UCC financing statements and termination statements. (Duker 9:8-25).

8. Under the Term Loan Agreement, certain lenders (the “**Term Loan Lenders**”) advanced \$1.5 billion in loan proceeds (the “**Term Loan**”) to certain of the debtors secured by a first-priority lien (the “**Lien**”) on certain assets of Old GM. (*See generally* Collateral Agreement; Term Loan Agreement).

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<sup>2</sup> A copy of the Collateral Agreement is attached as **Exhibit B** to the Fisher Declaration.

<sup>3</sup> Duker refers to the deposition testimony of Richard Duker dated February 9, 2010, which is attached as **Exhibit C** to the Fisher Declaration.

9. On November 30, 2006, a UCC-1 financing statement, filing # 64168084 (the “**Term Loan Financing Statement**”),<sup>4</sup> was filed with the Delaware Secretary of State in connection with the collateral securing the Term Loan Agreement. (Duker 14:18-23).

**The Synthetic Lease Is Paid Off And The Term Loan Termination Statement Is Filed**

10. In October 2008, Duker, on behalf of JPMorgan, was involved in another transaction with Old GM involving the payoff of an earlier synthetic lease (the “**Lease Payoff**”). (Duker 17:3-6; 15:4-6).

11. The synthetic lease transaction, which was paid off in October 2008, involved a participation agreement and amendment thereto. (Duker 16:13-15).

12. Both the participation agreement, dated as of October 31, 2001 between, among other parties, JPMorgan (f/k/a The Chase Manhattan Bank) and Old GM (the “**Participation Agreement**”), and the amendment thereto<sup>5</sup> were signed by Duker on behalf of JPMorgan. (*Id.* at 907, 1017).

13. Simpson Thacher & Bartlett LLP (“**Simpson Thacher**”) represented JPMorgan in connection with the synthetic lease transaction and the Lease Payoff. (Duker 17:8-14).

14. Mardi Merjian (“**Merjian**”) was the attorney at Simpson Thacher who handled the synthetic lease transaction and the Lease Payoff on JPMorgan’s behalf. (Merjian 9:5-10; 11:7-10).<sup>6</sup>

15. Merjian has represented JPMorgan on a significant number of transactions since 1987. (Merjian 7:1-13).

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<sup>4</sup> A copy of the Term Loan Financing Statement is attached as **Exhibit D** to the Fisher Declaration.

<sup>5</sup> A copy of the Participation Agreement and first amendment thereto is attached as **Exhibit E** to the Fisher Declaration.

<sup>6</sup> Merjian refers to the deposition testimony of Mardi Merjian dated February 4, 2010, which is attached as **Exhibit F** to the Fisher Declaration.

16. Merjian's position with Simpson Thacher is that of counsel, and he has practiced as a real estate lawyer with Simpson Thacher since graduating from law school in 1987.

(Merjian 4:8-5:8).

17. Merjian's work in the real estate department of Simpson Thacher involves UCC filings. (Merjian 5:13-16).

18. Duker was Merjian's client contact at JPMorgan with respect to the Lease Payoff. (Merjian 11:25-12:2).

19. Mayer Brown LLP ("**Mayer Brown**") represented Old GM, as lessee, in connection with the synthetic lease transaction (Gordon Affidavit ¶ 2)<sup>7</sup> and the Lease Payoff. (Green 10:20-21).<sup>8</sup>

20. Robert E. Gordon ("**Gordon**"), a partner at Mayer Brown, was responsible for the synthetic lease transaction (Gordon Affidavit ¶ 2) and supervised the Lease Payoff. (Green 50:2-7).

21. Gordon has worked in the real estate group of Mayer Brown since graduating law school in 1979 and has been a partner since 1986. (Gordon 4:20-5:12).<sup>9</sup>

22. In the fall of 2008, Gordon met with Ryan Green ("**Green**"), a Mayer Brown associate, to discuss the Lease Payoff. (Green 7:7-11).

23. Green graduated from law school in 2005 and has been an attorney in Mayer Brown's real estate group since June 2007. (Green 4:25-5:20).

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<sup>7</sup> A copy of Robert Gordon's affidavit, including exhibits (the "**Gordon Affidavit**"), is attached as **Exhibit G** to the Fisher Declaration.

<sup>8</sup> Green refers to the deposition testimony of Ryan Green dated January 27, 2010, which is attached as **Exhibit H** to the Fisher Declaration.

<sup>9</sup> Gordon refers to the deposition testimony of Robert Gordon dated January 28, 2010, which is attached as **Exhibit I** to the Fisher Declaration.

**A. The Term Loan Termination Statement Is Included On A Closing Checklist Sent To Simpson Thacher and JPMorgan**

24. On October 1, 2008, Gordon asked Green to put together a checklist for the Lease Payoff.<sup>10</sup>

25. In addition to Gordon and Green, Stewart Gonshorek, a Mayer Brown paralegal (“**Gonshorek**”), worked on the Lease Payoff. (Green 8:21-25).

26. Green and Gonshorek prepared a closing checklist (Green 11:24-12:2) that Gordon reviewed and commented on.<sup>11</sup> (Green 12:22-13:17).

27. The closing checklist contains a heading “General Documentation” below which it states, “Termination of UCCs” and describes three financing statements, including the related file number and date filed. (Fisher Declaration Exhibit K).

28. In order to determine the financing statements for which termination statements should be prepared, a UCC search was performed by Michael Perlowski (“**Perlowski**”), a Mayer Brown paralegal, at Green’s request (Perlowski 5:16-17; 11:7-9),<sup>12</sup> the results of which were reviewed and discussed among Perlowski, Green and Gonshorek. Perlowski, Green and Gonshorek all agreed on which UCC financing statements required termination statements. (Gonshorek 9:13-24; 11:19-25).<sup>13</sup>

29. The third financing statement listed on the closing checklist under “Termination of UCCs” is the Term Loan Financing Statement, identified as “Financing Statement as to

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<sup>10</sup> A copy of Gordon’s email is attached as Exhibit J to the Fisher Declaration.

<sup>11</sup> A copy of Green’s email is attached as Exhibit K to the Fisher Declaration.

<sup>12</sup> Perlowski refers to the deposition testimony of Michael Perlowski dated January 27, 2010, which is attached as Exhibit L to the Fisher Declaration.

<sup>13</sup> Gonshorek refers to the deposition testimony of Stewart Gonshorek dated January 28, 2010, which is attached as Exhibit M to the Fisher Declaration.

equipment, fixtures and related collateral located at certain U.S. manufacturing facilities recorded on 11.30.06 as File Number 64168084.” (Fisher Declaration Exhibit K at 4233).

30. On October 15, 2008, Green sent Arun Sundaram (“**Sundaram**”), one of his client contacts at Old GM, a draft of the checklist, which listed the Term Loan Financing Statement as a UCC for which a termination statement would be prepared,<sup>14</sup> to “keep them in the loop.” (Green 31:4-14).

31. On October 15, 2008, Duker received the draft checklist from Sundaram, which listed the Term Loan Financing Statement as a UCC for which a termination statement would be prepared.<sup>15</sup>

32. On October 15, 2008, Merjian received a draft of the checklist from Green, which listed the Term Loan Financing Statement as a UCC for which a termination statement would be prepared,<sup>16</sup> so Green could be sure they “were on the same page about what needed to be done for closing” the Lease Payoff. (Green 23:17-21).

33. On October 15, 2008, Duker again received a draft of the checklist, this time from Merjian, which listed the Term Loan Financing Statement as a UCC for which a termination statement would be prepared.<sup>17</sup>

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<sup>14</sup> A copy of Green’s email is attached as Exhibit N to the Fisher Declaration.

<sup>15</sup> A copy of Sundaram’s email is attached as Exhibit O to the Fisher Declaration.

<sup>16</sup> A copy of Green’s email is attached as Exhibit P to the Fisher Declaration.

<sup>17</sup> A copy of Merjian’s email is attached as Exhibit Q to the Fisher Declaration.

**B. The Draft Term Loan Termination Statement Is Sent To Simpson Thacher And JPMorgan**

34. On October 15, 2008, Merjian and Gordon received “drafts of the closing documents” from Green, which included a draft termination statement relating to the Term Loan Financing Statement (the “**Term Loan Termination Statement**”).<sup>18</sup>

35. The first line of the draft Term Loan Termination Statement reads “INITIAL FINANCING STATEMENT FILE # 64168084 on 11.30.06.” The second line has a box checked next to “TERMINATION: Effectiveness of the Financing Statement identified above is terminated with respect to security interest(s) of the Secured Party authorizing this Termination Statement.” The sixth line requests “CURRENT RECORD INFORMATION” and lists “GENERAL MOTORS CORPORATION.” The ninth line requests the “NAME OF SECURED PARTY OF RECORD AUTHORIZING THIS AMENDMENT” and lists “JPMORGAN CHASE BANK, AS ADMINISTRATIVE AGENT.” (*Id.* at 206).

36. On October 15, 2008, Duker received “drafts of the closing documents” from Merjian, identical to those received by Merjian from Green, which included a draft of the Term Loan Termination Statement.<sup>19</sup>

37. On October 17, 2008, Merjian replied to Green’s email (noted in paragraph 34 above), copying Gordon, stating, “Ryan Nice job on the documents.”<sup>20</sup>

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<sup>18</sup> A copy of Green’s email is attached as **Exhibit R** to the Fisher Declaration.

<sup>19</sup> A copy of Merjian’s email is attached as **Exhibit S** to the Fisher Declaration.

<sup>20</sup> A copy of Merjian’s email is attached as **Exhibit T** to the Fisher Declaration.

**C. Simpson Thacher Executes Escrow Instructions Authorizing The Filing Of The Term Loan Termination Statement**

38. On October 24, 2008, Merjian received draft escrow instructions from Green that were drafted for signature by counsel for Old GM, counsel for the trustee, counsel for the Administrative Agent and the title company.<sup>21</sup>

39. The first page of the draft escrow instructions shows “Termination of UCC Financing Statements (File Numbers . . . and 64168084).” (*Id.* at 430).

40. Green asked Merjian if he had any comments to the draft escrow letter. Merjian replied that “it was fine.”<sup>22</sup>

41. The escrow instructions were in fact signed by Green, as attorney for Old GM; Merjian, as attorney for JPMorgan; counsel for the trustee; and the title company.<sup>23</sup>

42. Merjian understood that the purpose of escrow instructions was to have the documents “placed with one party so that they could be released at the appropriate time to the appropriate parties.” (Merjian 33:19-34:4).

43. Merjian reviewed the escrow instructions and understood that the termination statements listed were documents that would be released to Mayer Brown upon the closing of the Lease Payoff. (Merjian 34:19-35:5).

44. Mayer Brown has a UCC compliance team that reviews draft UCC statements before they are filed to detect any issues. (Green 73:18-74:1). The UCC compliance team reviewed the draft Term Loan Termination Statement before it was filed. (Gordon 52:3-6).

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<sup>21</sup> A copy of Green’s email is attached as **Exhibit U** to the Fisher Declaration.

<sup>22</sup> A copy of Greens email and Merjian’s email is attached as **Exhibit V** to the Fisher Declaration.

<sup>23</sup> A copy of the final, fully-executed escrow instructions is attached as **Exhibit W** to the Fisher Declaration.



45. On October 30, 2008, the Lease Payoff closed and Green told Gonshorek to file the Term Loan Termination Statement. (Gonshorek 32:6-12).

46. On October 30, 2008, the Term Loan Termination Statement was filed without any changes to the draft received by Duker, Merjian and Gordon.<sup>24</sup>

47. Neither Merjian nor Duker ever told Mayer Brown not to file the Term Loan Termination Statement. (Green 49:11-15).

48. Neither Merjian nor Duker ever communicated changes to the closing checklist or asked questions about the list of financing statements it contained under “Termination of UCCs.” (Merjian 18:7-11; Duker 41:2-8).

49. Neither Merjian nor Duker ever communicated changes to the draft Term Loan Termination Statement. (Merjian 24:8-12; Duker 45:15-22).

#### **The Term Loan Agreement Is Amended**

50. In March 2009, the Term Loan Agreement was amended (the “**Amendment**”). (Duker 26:18-27:1).

51. Duker was involved in the Amendment and signed a fee letter pursuant to which JPMorgan received \$6 million as consideration for its agreement to arrange the then-proposed Amendment.<sup>25</sup>

52. Morgan, Lewis & Bockius LLP (“**Morgan Lewis**”) represented JPMorgan in connection with the Amendment and would know if any UCC searches had been performed in connection with the Amendment. (Duker 28:2-24).

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<sup>24</sup> A copy of the Term Loan Termination Statement is attached as **Exhibit X** to the Fisher Declaration.

<sup>25</sup> A copy of the executed first amendment fee arrangement letter is attached as **Exhibit Y** to the Fisher Declaration.

### **Duker Inquires About The Term Loan Collateral**

53. On May 6, 2009, Duker asked JPMorgan's traditional credit products group ("TCP") for a "summary of legal/collateral documentation including details on all UCC filings" regarding the Term Loan<sup>26</sup> because he was concerned about the potential bankruptcy of Old GM. (Duker 54:20-23).

54. TCP told Duker to email "IB Collateral Services" to inquire about collateral, and "LienPerfection Bangalore" to inquire about UCCs.<sup>27</sup>

55. Lien Perfection, Bangalore ("**Bangalore**") is a group within JPMorgan that "tracks UCC filings" (Duker 56:1-5), and it is Bangalore's responsibility to register UCC filings that relate to JPMorgan collateral in JPMorgan's books and records. (Duker 72:7-17).

56. Bangalore responded to Duker's inquiry<sup>28</sup> by providing documentation about the wrong facility. (Duker 60:9-14). Duker never received the information he requested from Bangalore on May 6, 2009 regarding the Term Loan. (Duker 62:14-17).

### **After The Old GM Bankruptcy Filing, JPMorgan Raises Questions About The Term Loan Termination Statement**

57. In June 2009, Morgan Lewis, counsel to JPMorgan, called Gordon to ask why Mayer Brown had filed the Term Loan Termination Statement. (Gordon 25:7-26:2).

58. In response to this query, Gordon called Green, indicating that there was concern about the Term Loan Termination Statement and asking Green to look into the matter further. (Green 64:14-66:9).

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<sup>26</sup> A copy of Duker's email to TCP is attached as **Exhibit Z** to the Fisher Declaration.

<sup>27</sup> A copy of TCP's email to Duker is attached as **Exhibit Z** to the Fisher Declaration.

<sup>28</sup> A copy of Bangalore's email to Duker is attached as **Exhibit Z** to the Fisher Declaration.

59. Green then met with Gordon to “let him know that the UCC causing the concern was referenced on the checklist and in the escrow instructions.” (Green 68:9-14).

60. Green showed Gordon the escrow instructions and the checklist so that Gordon could see that the Term Loan Termination Statement “was within the universe of documents involved in the” Lease Payoff. (Green 71:3-6).

### **The Gordon Affidavit Is Prepared By JPMorgan’s Counsel**

61. Mayer Brown, as counsel to Old GM, proposed to have Gordon execute an affidavit “in order to assist JPMorgan Chase in establishing that” the Term Loan Termination Statement “was erroneously filed.” (Gordon 36:6-17).

62. Morgan Lewis, as counsel to JPMorgan, prepared the initial draft of the affidavit (Gordon 32:25-33:2), which it then sent to Mayer Brown for review, explaining that JPMorgan was “very eager to be in a position for [the affidavit] to be executed . . .”<sup>29</sup>

63. Gordon revised the initial draft of the affidavit (Gordon 32:24), but claims that he did not include background about how the Term Loan Termination Statement came to be filed because Morgan Lewis did not consider those details to be relevant.<sup>30</sup>

64. Although the initial draft of the affidavit prepared by Morgan Lewis stated that Gonshorek “unfortunately terminated [the Term Loan Financing Statement] without [Gordon’s] direction and without authority” (Proposed Affidavit ¶ 9), Gordon deleted such statement from the final affidavit. (Gordon 42:18-43:1).

65. Although the initial draft of the affidavit prepared by Morgan Lewis stated that “Mayer Brown was not authorized to terminate any financing statement related to the Term Loan

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<sup>29</sup> A copy of Morgan Lewis’ email annexing the proposed affidavit (“**Proposed Affidavit**”) is attached as **Exhibit AA** to the Fisher Declaration.

<sup>30</sup> A copy of Mayer Brown’s email is attached as **Exhibit BB** to the Fisher Declaration.

Agreement” (Proposed Affidavit ¶ 10), the final affidavit instead states that Old “GM was not authorized **by the Termination Agreement** to terminate any financing statement related to the Term Loan Agreement.” (emphasis added, Gordon Affidavit ¶ 10).

66. On June 18, 2009, Gordon signed the final affidavit swearing that the filing of the Term Loan Termination Statement was “[u]nbeknownst” to him (Gordon Affidavit ¶ 8), although Gordon now acknowledges having received, in October 2008, a draft of the Term Loan Termination Statement and the checklist listing the Term Loan Financing Statement as a UCC for which a termination statement would be prepared. (Gordon 45:16-46:3).

67. On June 19, 2009, Morgan Lewis transmitted the final affidavit to counsel for the Committee, Debtors and United States Treasury, and asserted that the affidavit “makes clear” that the filing of the Term Loan Termination Statement was unauthorized. (Fisher Declaration Exhibit G).

### **DIP Order Is Entered**

68. On June 25, 2009, the *Final Order Pursuant to Bankruptcy Code Sections 105(a), 361, 362, 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**”) was entered by this Court, approving repayment of the Term Loan Lenders subject to the Committee’s right to investigate and challenge perfection of the Lien.<sup>31</sup>

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<sup>31</sup> A copy of Morgan Lewis’ email is attached as **Exhibit CC** to the Fisher Declaration.

69. Paragraph 19(d) of the DIP Order authorized the Committee to bring actions based upon the perfection of the Lien by July 31, 2009.<sup>32</sup>

70. On June 30, 2009, Duker, as managing director of JPMorgan, signed and sent a letter to Old GM, indicating that the total amount outstanding under the Term Loan was \$1,481,656,507.70.<sup>33</sup>

71. Old GM paid the Term Loan Lenders the amount outstanding under the Term Loan.

### **The Complaint Is Filed**

72. On July 31, 2009, the Committee filed a complaint (the “**Complaint**”) commencing this adversary proceeding against JPMorgan and the Term Loan Lenders (collectively, the “**Defendants**”).<sup>34</sup>

73. Pursuant to the Complaint, the Committee seeks to avoid the Lien as unperfected, avoid and recover all post-petition payments made to the Defendants, avoid and recover all payments made to the Defendants during the ninety days prior to the petition date, and disallow any claim of any Defendant until it has disgorged the applicable payment(s). (*Id.*)

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<sup>32</sup> A copy of the DIP Order is attached as **Exhibit DD** to the Fisher Declaration.

<sup>33</sup> A copy of the JPMorgan’s letter is attached as **Exhibit EE** to the Fisher Declaration.

<sup>34</sup> A copy of the Complaint is attached as **Exhibit FF** to the Fisher Declaration.

Dated: New York, New York  
July 1, 2010

BUTZEL LONG,  
a professional corporation

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