BINDER & SCHWARTZ

Eric B. Fisher
Binder & Schwartz LLP
366 Madison Avenue 6th Floor
New York, NY 10017
(T) 212.933.4551
(F) 212.510.7299
efisher@binderschwartz.com

July 31, 2018

By Email, ECF, and Federal Express

The Honorable Martin Glenn
United States 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 represent plaintiff Motors Liquidation Company Avoidance Action Trust (the "Avoidance Action Trust") and write to provide the Court with our views about the proposed path forward for this action. As the parties have previously advised the Court, we have been unable to reach a global resolution of this litigation. Where possible, however, the parties have sought to narrow the issues before the Court. In an effort to further narrow what remains in dispute, we respectfully request, pursuant to Local Bankruptcy Rule 7056-1(a) and as contemplated in the parties' proposed scheduling order submitted today, that a pre-motion conference be scheduled to address the issues described below.

I. Background and the Proposed Path Forward for this Case

The key issues before this Court remain: (i) whether and the extent to which the Defendants' $1.48 billion syndicated secured term loan to General Motors Corporation (the "Term Loan") was under-secured as of June 30, 2009; and (ii) whether and how much the Avoidance Action Trust is entitled to recover from Defendants, who on account of the Term Loan were paid in full ahead of other creditors.

The Court conducted a trial on 40 representative assets in this action and issued its decision on September 26, 2017 (as corrected on October 4, 2017) (the "Decision"). Adv. Pro. Dkt. Nos. 1015 & 1018.[1] The Court ruled in favor of the Avoidance Action Trust with respect to 7 of the representative assets,[2] determining that they were not part of the collateral securing the

[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 Company f/k/a General Motors Corporation*, Case No. 09-50026.

[2] The Court also held that portions of the CUC were part of the realty and not fixtures.

Term Loan, but overall the Decision adopted a taxonomy of fixtures that was both different and broader than the Avoidance Action Trust advocated for at trial. Applying the principles behind the rulings in the Decision to the remaining contested line items, the Avoidance Action Trust now concedes that tens of thousands of previously contested asset line items are included in the collateral securing the Term Loan, as will be reflected in Exhibit A to the stipulation regarding line items (the "Assets Stipulation") that the parties intend to file with the Court on August 7, 2018. However, despite these significant concessions, tens of thousands of asset line items remain in dispute. These asset disputes are the focus of ongoing mediation sessions, and the parties hope to substantially narrow these disputes in the coming months. The parties' shared goal is to reduce the burden on the Court and the resources expended by the parties to the fullest extent possible.

Separate and apart from determining the scope and value of Defendants' collateral, Defendants continue to maintain that, even if they are under-secured, they have no liability in this action.

First, Defendants argue that they have no liability because the $1.48 billion of proceeds that were used to pay Defendants on account of the Term Loan were earmarked for that purpose and are thus unrecoverable, even though the DIP Order carves out the right of the Official Creditors' Committee (and later the Avoidance Action Trust) to sue to recover those very payments and even though there is uncontradicted testimony that there was no earmarking.

Second, Defendants argue that they have no liability because the assets comprising their collateral should have been excluded from the General Motors Corporation bankruptcy estate ("Old GM") and subject to an equitable constructive trust imposed for the benefit of Defendants. Defendants' position contradicts the DIP Order, which carved out and preserved this action for the benefit of unsecured creditors and the DIP Lenders. Their position also cannot be reconciled with the Second Circuit's ruling that the mistaken UCC-3 filing (the "2008 Termination Statement") terminated Defendants' perfected security interest with respect to any collateral covered by the main UCC-1 financing statement (the "Main Term Loan UCC-1") that was at issue in the first phase of this case.

Finally, Defendants (except for JPMorgan Chase Bank, N.A. ("JPMorgan")) (the "Non-JPMorgan Defendants") argue that they have no liability because the Second Circuit's decision that the 2008 Termination Statement was a legally effective filing is not binding as to them. Defendants maintain this position even though this Court afforded them an opportunity for discovery on this issue and the discovery has not led to any facts that could support the conclusion that the Second Circuit's decision does not apply to them.

Unlike the fact-intensive asset disputes that the parties continue to mediate, the above three issues are each capable of resolution on summary judgment. Defendants' continued insistence on the legal viability of these three defenses poses a significant obstacle to the overall resolution of this case. Accordingly, the Avoidance Action Trust proposes to file summary

judgment motions directed to each of these three defenses. The basis for each of these motions is summarized in the next section of this letter.

Last, the Avoidance Action Trust has identified a discrete question of Louisiana fixture law (also discussed below) that has not previously been presented to the Court. The parties agree that this is a pure question of law and that resolution of this issue will contribute to the parties' ability to resolve their disputes about assets located in GM's Shreveport, Louisiana plant, which remained with Old GM following the bankruptcy.

II. The Proposed Summary Judgment Motions

A. The Defenses of Earmarking and Constructive Trust Should Be Resolved on Summary Judgment

The Avoidance Action Trust proposes to move for summary judgment to dismiss the defendants' earmarking defense. According to Defendants, a portion of the debtor-in-possession financing (the "DIP Financing") provided to Old GM was earmarked to repay the Term Loan because the DIP Order directed that Old GM "shall" use the funds in part to repay first priority liens, including the Term Loan.

Defendants' earmarking defense fails as a matter of law. The earmarking doctrine applies "where a third party lends money to the debtor for the specific purpose of paying a selected creditor." *Cadle Co. v. Managan (In re Flanagan)*, 503 F.3d 171, 184 (2d Cir. 2007). In other words, the debtor must receive the funds "subject to a clear obligation to use that money to pay off a preexisting debt" and use the funds specifically for that purpose. *Id*.; *see also Smyth v. Kaufman*, 114 F.2d 40, 42 (2d Cir. 1940). Here, although both the United States government and Old GM expected generally that the DIP Financing would be used by Old GM to pay off all first priority liens, including the Term Loan, there is no language in either the agreement between Old GM and the government or the Court's DIP Order that conditioned payment of the DIP Financing on the repayment of the Term Loan. Matthew Feldman, Chief Legal Officer to the Presidential Task Force on the Auto Industry, testified at his deposition in this case that no funds were earmarked for this specific purpose and, to the contrary, the government specifically chose *not* to impose obligations on how Old GM spent the DIP Financing. Moreover, there is no evidence of a separate account dedicated to the repayment of the Term Loan or any other attempt to segregate a portion of the DIP Financing for the repayment of the Term Loan, further supporting the conclusion that no funds were earmarked.

The Avoidance Action Trust also proposes to move for summary judgment dismissing Defendants' constructive trust defense. Defendants argue that Old GM had a confidential relationship with the Defendants pursuant to which Old GM expressly agreed to maintain a perfected security interest in the Term Loan collateral and that Old GM's filing of the 2008 Termination Statement, as well as its subsequent representations that there was no default, were at odds with this agreement. Defendants contend that because Old GM's actions deprived Defendants of the opportunity to preserve or restore their perfected security interest, Old GM

should be deemed to have held the Term Loan collateral in a constructive trust that never became part of the Old GM bankruptcy estate and is not subject to avoidance by the Avoidance Action Trust.

"[B]ankruptcy courts are generally reluctant to impose constructive trusts without a substantial reason to do so," and no such reason exists here. *See Superintendent of Ins. v. Ochs (In re First Cen. Fin. Corp.)*, 377 F.3d 209, 217 (2d Cir. 2004). Principally, the Term Loan agreements preclude Defendants from establishing the four elements required for a constructive trust: (1) a confidential or fiduciary relationship; (2) a promise; (3) a transfer of property made in reliance on that promise; and (4) unjust enrichment. *Id*. at 212. First, the relationship between Old GM and Defendants was that of arms-length borrower and lender as set out in the Term Loan agreements, and Defendants can point to no extrinsic facts that establish a special relationship of confidence and trust existed between them. *See Oddo Asset Mgmt. v. Barclays Bank PLC*, 973 N.E.2d 735, 19 N.Y. 3d 584, 593 (N.Y. 2012) (stating there is generally no fiduciary obligation in a contractual arm's length relationship between a debtor and creditor). Second, the promises Defendants purportedly relied upon arise out of the Term Loan agreements, meaning that Old GM's alleged failure to comply at most gives rise to a breach of contract claim, not an equitable defense. *See N. Shipping Funds I, LLC v. Icon Capital Corp.*, 921 F. Supp. 2d 94, 106 (S.D.N.Y. 2013) (dismissing constructive trust claim as "duplicative of the breach of contract claim because it arises from the same operative facts") (internal quotations omitted). Finally, because an adequate remedy at law exists, there can be no unjust enrichment. *See MBM Entm't LLC et al. v. M&M Developer, LLC et al. (In re MBM Entm't, LLC)*, 531 B.R. 363, 413 (Bankr. S.D.N.Y. 2015) (adequate legal remedy exists where parties' relationship is governed by valid and enforceable agreement).

Moreover, even if an equitable remedy were available despite the valid contracts (it is not), considerations of equity and good conscience do not support the imposition of a constructive trust. Old GM was unaware that the Main Term Loan UCC-1 had been terminated mistakenly and thus certified to the best of its knowledge that no default had occurred. *See Official Comm. of Unsecured Creditors of Motors Liquidation Co. v. JP Morgan Chase Bank, N.A. (In re Motors Liquidation Co.)*, 777 F.3d 100, 105 (2d Cir. 2015) ("No one at JPMorgan, Simpson Thacher, General Motors, or Mayer Brown took action intending to affect the Term Loan."). In any event, JPMorgan reviewed and approved the filing of the 2008 Termination Statement and had the same knowledge and access to the 2008 Termination Statement as Old GM when JPMorgan authorized its filing. *Id*. ("What JPMorgan intended to accomplish, however, is a distinct question from what actions it authorized to be taken on its behalf."). Although JPMorgan would like to disregard the Second Circuit's ruling about the 2008 Termination Statement and enforce what JPMorgan intended with respect to the Term Loan agreements, the purpose of a constructive trust is to be primarily "fraud rectifying rather than intent enforcing," *In re First Cen. Fin. Corp.*, 377 F.3d at 216 (internal quotations omitted), and thus a constructive trust is not appropriate in these circumstances.

Finally, Defendants' earmarking and constructive trust defenses are both at odds with the DIP Order itself, in which payments made to Defendants were authorized subject to the

Avoidance Action Trust's express right to challenge "the perfection of the first lien priority" of the Term Loan. Bankr. Dkt. No. 2529 ¶ 19(d). The notion that the doctrines of earmarking and constructive trust preclude the Avoidance Action Trust's ability to recover in this action improperly nullifies the DIP Order's preservation of this action for prosecution by the Official Creditors' Committee (and later the Avoidance Action Trust).

Although the fact discovery deadline has been deferred with respect to the affirmative defenses of earmarking and constructive trust, there has been considerable discovery to date concerning these issues and no further discovery would possibly create an issue of fact that would be essential to oppose the motion. *See* Fed. R. Civ. P. 56(d); *see also Merhav—Ampal Energy, Ltd. v. Merhav (M.N.F.) Ltd. (In re Ampal-Am. Israel Corp.)*, No. 12-13689 (SMB), 2015 WL 5176395, at *14 (Bankr. S.D.N.Y. Sept. 2, 2015), *aff'd*, No. 15-CV-7949 (JSR), 2016 WL 859352, at *4 (S.D.N.Y. Feb. 28, 2016).[3] Any request for additional discovery from Defendants, which would be fruitless and unnecessarily drag out resolution of these issues that are already ripe for summary judgment, should therefore be denied.

B. The Second Circuit's Decision Concerning the 2008 Termination Statement Binds All Defendants

The Second Circuit held during the first phase of this action that the Main Term Loan UCC-1 was terminated by the filing of the 2008 Termination Statement. In reaching its decision, the Second Circuit rejected JPMorgan's argument that Old GM and Old GM's counsel acted outside the scope of the authority given to them by JPMorgan because they knew at the time of filing the Termination Statement that they were not authorized to terminate the Main Term Loan UCC-1. The Second Circuit explained that JPMorgan and its counsel "knew that . . . Old GM's counsel was going to file the termination statement that identified the Main Term Loan UCC-1 for termination and that JPMorgan reviewed and assented to the filing of that statement," and that "[n]othing more is needed" to establish that the filing was authorized. *In re Motors Liquidation Co.*, 777 F.3d at 105. Thus, the Second Circuit has already ruled that Old GM and its counsel did not act outside the scope of their authority in filing the 2008 Termination Statement.

Although the Second Circuit held that the 2008 Termination Statement was effective as to the Main Term Loan UCC-1, this Court permitted the Non-JPMorgan Defendants to litigate the effect of the filing of the 2008 Termination Statement because, consistent with case management orders entered by this Court, the Non-JPMorgan Defendants were not served with

[3] Notwithstanding the fact that there is no relevant outstanding discovery on these issues, should the Court consider allowing Defendants to take additional discovery, the discovery should be limited to the deposition of Adil Mistry, Old GM's assistant treasurer, which Defendants have identified as the only discovery that is needed. Should the Court allow the deposition of Mr. Mistry, it should be ordered on an expedited schedule with the understanding that the Avoidance Action Trust will file its summary judgment motion as to the affirmative defenses of earmarking and constructive trust shortly afterwards.

the complaint until after the Second Circuit's decision. When the Non-JPMorgan Defendants challenged Judge Gerber's case management orders extending the time to serve, this Court ruled that "no justification exists for reconsidering the extension orders." Adv. Pro. Dkt. 643 at 34. This Court explained that, although the Second Circuit's decision did not have preclusive effect, it was still "law of the Circuit that binds this Court to the extent that the previously unserved defendants raise the same legal issues that have already been decided . . . ." *Id*. at 36. The Court, however, permitted the Non-JPMorgan Defendants an opportunity to present any "meritorious legal or factual defenses to liability or damages . . . ." *Id*. The Non-JPMorgan Defendants have since conducted additional discovery, which included re-taking the depositions of the key employees at Mayer Brown, JPMorgan, Old GM, and Simpson Thacher. No facts were adduced that raise any legal or factual defenses that have not already been considered and rejected by the Second Circuit. Accordingly, summary judgment as to the effectiveness of the 2008 Termination Statement is appropriate.

C. Louisiana Law Determines Whether Certain Assets in the Shreveport Plant Constitute "Fixtures" Subject to Defendants' Security Interests

The Avoidance Action Trust seeks a determination under Louisiana law as to what constitutes a fixture and thus what assets are secured by Defendants' financing statement filed with the Caddo Parish Clerk on February 16, 2007 (the "Louisiana Fixture Filing"). Under Louisiana law, fixtures that are already permanently attached to the realty at the time of a fixture filing are treated as component parts of the realty and not covered by the fixture filing. Unlike in other UCC states, a fixture filing in Louisiana may create or perfect a security interest only in goods that are permanently attached and become fixtures *after* the time of the fixture filing. *See* La. R.S. § 10:9-334(a) & § 10:9-102(a)(40). Specifically, Chapter 9 of Louisiana's Commercial laws applies to transactions that "create by contract a security interest in any type of personal property, standing timber that constitutes goods, or fixtures, *but as to fixtures only if the security interest has been perfected by a fixture filing when the goods become fixtures*." La. R.S. §10:9-109(a) (emphasis added). As explained in the Louisiana Official Revision Comments, "[u]nlike in the revised U.C.C. Article 9, a security interest under revised Chapter 9 may not be created or perfected in goods after they have become fixtures (component parts)." La. R. S. § 10:9-334 cmt. a (2004).

Accordingly, as a matter of black letter Louisiana law, the Louisiana Fixture Filing, which covers "ALL FIXTURES" located in GM's Shreveport plant excludes all assets already attached to, and thus already part of, the realty as of the date of the filing. Thus, the Avoidance Action Trust seeks a determination that approximately 9,020 assets that were already installed in the plant as of February 16, 2007, were considered realty as a matter of Louisiana law and thus are not part of Defendants' collateral.

With respect to the scheduling of a pre-motion conference in this action, we note that necessary members of our team are unavailable due to summer travel during the period from August 13 to August 17 and August 27 to 31. We respectfully request that the pre-motion conference not be scheduled during those dates.

We thank the Court for considering this request for a pre-motion conference.

Respectfully,

/s/ Eric B. Fisher
Eric B. Fisher

cc: All counsel of record (via ECF)