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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	Chapter 11 Case
MOTORS LIQUIDATION COMPANY, *et al.*,	Case No. 09-50026 (MG)
Debtors.	(Jointly Administered)
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,	
vs.	
JPMORGAN CHASE BANK, N.A., individually and as Administrative Agent for Various Lenders Party to the Term Loan Agreement described herein, *et al.*,	
Defendants.	

TERM LENDERS' MOTION TO FILE UNDER SEAL CONFIDENTIAL DOCUMENTS SUBMITTED IN SUPPORT OF THEIR OPPOSITION TO AVOIDANCE TRUST'S MOTION FOR PARTIAL SUMMARY JUDGMENT REGARDING EARMARKING DEFENSE

Pursuant to § 107(b) of the Bankruptcy Code, Federal Rule of Bankruptcy Procedure 9018, the parties' April 18, 2016 Amended Agreed Protective Order [Adv. Pro. Dkt. 489] (the "Protective Order"), and as permitted by Judge Glenn's Chambers' Rules for Sealing Orders, JPMorgan Chase Bank N.A. ("JPMorgan") and the other signatory defendants

(collectively, the "Defendants") file this motion (the "Motion to Seal") for an order granting leave to file under seal: (i) portions of the Term Lenders' Opposition to Avoidance Trust's Motion for Partial Summary Judgment Regarding Earmarking Defense (the "Earmarking Opposition Brief"); (ii) portions of the Term Lenders' Counterstatement of Facts Regarding Plaintiff's Motion for Partial Summary Judgment Dismissing Defendant's Earmarking Defense (the "Term Lenders' Counterstatement"); and the exhibits annexed to the Declaration of Joseph C. Celentino (the "Celentino Declaration") in support of the Earmarking Opposition Brief (the "Confidential Exhibits"). In support of the Motion to Seal, the Defendants respectfully state as follows:

BACKGROUND

1. On April 18, 2016, the Court approved the Protective Order in the above-captioned adversary proceeding. Adv. Pro. Dkt. 489.

2. Paragraph 12 of the Protective Order entered by the Court provides:

> All Confidential or OAEO Discovery Material filed with the Court, and all portions of pleadings, motions or other papers filed with the Court that disclose such Confidential or OAEO Discovery Material, shall be filed under seal with the Clerk of the Court and kept under seal until further order of the Court.

3. On November 6, 2018, the Avoidance Action Trust filed its motion for partial summary judgment seeking dismissal of Defendants' earmarking defense.

4. On November 30, 3018, Defendants will file their opposition to plaintiff's motion for partial summary judgment seeking dismissal of Defendants' earmarking defense.

BASIS FOR RELIEF

5. Portions of the Earmarking Opposition Brief, the Term Lenders' Counterstatement, and the Confidential Exhibits contain discussion of confidential documents

produced in this matter that have been marked "Confidential" pursuant to the terms of the Protective Order.

6. Therefore, in accordance with the terms of the Protective Order, Defendants request the Court's permission to file under seal: (i) designated portions of the Earmarking Opposition Brief; (ii) designated portions of the Term Lenders' Counterstatement; and (iii) the Confidential Exhibits (collectively, the "Confidential Materials").

7. Unredacted versions of the Confidential Materials will be shared with the Court by electronic mail and in hardcopy format, and will be shared with the parties to the above-captioned action by electronic mail.

8. Enclosed herewith as Appendices B through D, are redacted copies of the Earmarking Opposition Brief, the Term Lenders' Counterstatement, and the Celentino Declaration, respectively, for filing on the Court's electronic docket.

9. Provided to the Court as Appendices E through G are unredacted copies of the Confidential Materials marked as "CONFIDENTIAL" and "FILED UNDER SEAL" for the Court's consideration in connection with this Motion to Seal and for sharing with the other parties to the above-captioned action.

NO PRIOR REQUEST

10. No previous request for relief sought herein has been made by Defendants to this or any other court.

WHEREFORE, Defendants respectfully request entry of an order in the form of Appendix A hereto granting the relief requested herein and such other and further relief as is just and proper.

Dated: November 30, 2018
New York, New York

Respectfully submitted,

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re: MOTORS LIQUIDATION COMPANY, *et al.*, Debtors.	Chapter 11 Case Case No. 09-50026 (MG) (Jointly Administered)
MOTORS LIQUIDATION COMPANY AVOIDANCE ACTION TRUST, by and through the Wilmington Trust Company, solely in its capacity as Trust Administrator and Trustee, Plaintiff, vs. JPMORGAN CHASE BANK, N.A., individually and as Administrative Agent for Various Lenders Party to the Term Loan Agreement described herein, *et al.*, Defendants.	Adversary Proceeding Case No. 09-00504 (MG)

ORDER AUTHORIZING TERM LENDERS TO FILE UNDER SEAL CONFIDENTIAL DOCUMENTS SUBMITTED IN SUPPORT OF THEIR OPPOSITION TO AVOIDANCE TRUST'S MOTION FOR PARTIAL SUMMARY JUDGMENT REGARDING EARMARKING DEFENSE

UPON CONSIDERATION of the November 30, 2018 motion (the "Motion to Seal") of JPMorgan Chase Bank, N.A. ("JPMorgan") and the other signatory defendants to the Motion to Seal (collectively, the "Defendants") to file under seal: (i) portions of the Term Lenders' Opposition to Avoidance Trust's Motion for Partial Summary Judgment Regarding Earmarking Defense (the "Earmarking Opposition Brief"); (ii) portions of the Term Lenders' Counterstatement of Facts Regarding Plaintiff's Motion for Partial Summary Judgment Dismissing Defendant's Earmarking Defense (the "Term Lenders' Counterstatement"); and (iii)

the exhibits annexed to the Declaration of Joseph C. Celentino (the "Celentino Declaration") in support of the Earmarking Opposition Brief (the "Confidential Exhibits"); and

WHEREAS this Court has jurisdiction to consider the Motion to Seal and the relief requested therein pursuant to 28 U.S.C. §§ 157 and 1334;

WHEREAS the Motion is a core proceeding pursuant to 28 U.S.C. § 157; and

WHEREAS the legal and factual bases set forth in the Motion to Seal establish that (i) designated portions of the Earmarking Opposition Brief; (ii) designated portions of the Term Lenders' Counterstatement; and (iii) the Confidential Exhibits (collectively, the "Confidential Materials") contain information produced by a non-party to this action that the non-party designated as "CONFIDENTIAL" under the April 18, 2016 "Amended Agreed Protective Order" (the "Protective Order") [Adv. Pro. Dkt. 489] in the above-captioned action, and the Confidential Materials are therefore required to be filed under seal with the Clerk of Court pursuant to paragraph 12 of the Protective Order.

AFTER due deliberation and sufficient cause therefor, it is hereby:

1. ORDERED that the Motion is GRANTED; and it is further

2. ORDERED, pursuant to section 107(b)(1) of the Bankruptcy Code, Rule 9018 of the Bankruptcy Rules and General Order M-399, that Defendants are authorized to file the Confidential Materials under seal and the United States Bankruptcy Clerk for the Southern District of New York is directed to accept for filing and seal: (i) designated portions of the Earmarking Opposition Brief; (ii) designated portions of the Term Lenders' Counterstatement; and (iii) the exhibits annexed to the Celentino Declaration; and it is further

3. ORDERED that any other party to the above-captioned adversary proceeding may obtain an unredacted copy of the Confidential Materials on a CONFIDENTIAL

basis under the terms of the Protective Order by contacting JPMorgan's counsel and requesting such a copy; and it is further

4. ORDERED that, upon the conclusion of the above-captioned adversary proceeding, all parties will dispose of the Confidential Materials or, in the alternative, any party may file a motion to unseal any of the Confidential Materials; and it is further

5. ORDERED that this Order is without prejudice to the rights of any party in interest, or the United States Trustee, to seek to unseal the Confidential Materials; and it is further

6. ORDERED that this Court retains jurisdiction over the implementation of this Order.

IT IS SO ORDERED.

Dated: November ___, 2018
New York, New York

_____
Honorable Martin Glenn
United States Bankruptcy Judge

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	:	Chapter 11 Case
MOTORS LIQUIDATION COMPANY, *et al.*,	:	Case No. 09-50026 (MG)
Debtors.	:	(Jointly Administered)
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,	:	
vs.	:	
JPMORGAN CHASE BANK, N.A., individually and as Administrative Agent for Various Lenders Party to the Term Loan Agreement described herein, *et al.*,	:	
Defendants.	:	

TERM LENDERS' OPPOSITION TO AVOIDANCE TRUST'S MOTION FOR PARTIAL SUMMARY JUDGMENT REGARDING EARMARKING DEFENSE

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JPMorgan Chase Bank N.A. ("JPMorgan") and the other signatory defendants respectfully submit this memorandum of law in support of their opposition to the Motors Liquidation Company Avoidance Action Trust's (the "Avoidance Trust") motion for partial summary judgment on the Term Lenders' earmarking defense. Submitted herewith is the Declaration of Joseph C. Celentino (the "Celentino Decl.").

PRELIMINARY STATEMENT

The earmarking doctrine exists to prevent windfalls. When a debtor receives funds subject to a clear obligation to pay off a preexisting debt, and the funds are used for that purpose as part of a transaction that does not diminish the estate, the trustee cannot recover those funds for the benefit of unsecured creditors. The reason for this is simple and compelling: the unsecured creditors were not harmed by the transaction, and have no legitimate expectation of recovering the funds used to pay the preexisting debt.

The requirements for earmarking are readily satisfied here. As the evidence shows, Old GM received approximately $1.5 billion from the U.S. Treasury Department ("Treasury") and Export Development Canada (together with Treasury, the "DIP Lenders") subject to a court order — and a clear commercial agreement — requiring those funds to be used to repay the Term Loan. That the proceeds of the DIP Loan passed through Old GM is of no moment, inasmuch as the portion of those funds necessary to repay the secured debt was earmarked, including by the express terms of the DIP Order, and thus was never available to the unsecured creditors. The Old GM estate, moreover, was *not* diminished by the Term Loan repayment: to the contrary, the $1.5 billion was only made available to Old GM because of the need to repay the Term Loan.

In seeking summary judgment, the Avoidance Trust argues for a narrow application of the earmarking doctrine that has no basis in the law, the facts or the equities. Contrary to plaintiff's assertion, earmarking *does* apply to postpetition transactions, and earmarking does *not* require that the funds at issue be placed in escrow or the like rather than a general operating account. *See* Point I.A–B, *infra*. In addition, contrary to plaintiff's assertion, the reservation of rights in the Final DIP Order in no way precludes an earmarking defense.[1] The Final DIP Order merely carved out a potential challenge to perfection from the release of claims granted to the secured creditors elsewhere in the Order. That limited reservation of rights did not affect or impair any other defenses available to the Term Lenders, including reliance on the earmarking doctrine. *See* Point I.C, *infra.*

But there is a bigger picture, overlooked by the Avoidance Trust. The simple reality is that the Avoidance Trust is seeking an extraordinary windfall. The record shows that, if not for the need to repay the Term Loan, the $1.5 billion at issue would not have been extended to Old GM and unsecured creditors would not have received a dollar more. Instead, they would have received the *same* 10% of New GM common stock, along with warrants for an additional 15% of that stock (the "New GM Equity") — valued at between $7.4 and $9.8 billion — that they received anyway (via the GUC Trust). So the repayment of the Term Loan with the DIP Proceeds did not prejudice them.

Indeed, the unsecured creditors received a *greater* recovery than if the Term Lenders had been treated as unsecured creditors in 2009. In the unique circumstances of this case, the DIP Lenders wanted to facilitate New GM's expedited purchase of the Term Lenders'

[1] References to the "DIP Order" or the "Final DIP Order" are to Bankr. Dkt. 2529. References to the "Interim DIP Order" are to Bankr. Dkt. 292.

collateral free and clear of liens, and agreed that they would not recover on the DIP Loan from the New GM Equity channeled to the unsecured creditors. Thus, the Term Lenders were repaid from DIP Loan funds made available at no cost to the unsecured creditors. Had the Term Lenders not been repaid from the DIP Loan and instead been treated as unsecured creditors from the outset, they would have been entitled to a *pro rata* share of the New GM Equity, thus diluting the recovery of the other unsecured creditors.

And the potential for a windfall is even greater here. The relief sought by the Avoidance Trust would in effect amount to a double recovery. The typical avoidance action based on defective lien perfection seeks to recapture the value of the secured creditor's collateral, free and clear of liens, for the benefit of unsecured creditors. Here, however, that value was captured some nine years ago, when much of the Term Lenders' collateral, free and clear of the Term Lenders' liens, was included in the assets sold as a going concern to New GM. The New GM Equity paid in exchange for the Term Lenders' collateral and the other assets sold to New GM was allocated to the unsecured creditors, so they have *already* received the value of the Term Lenders' collateral (and much more), free and clear of the liens that the Avoidance Trust is seeking to avoid.

Through this action, the Avoidance Trust is trying to extract a second recovery from the Term Lenders' collateral. It is seeking (1) to capture the almost $1.5 billion paid from the DIP Loan to the Term Lenders in exchange for the release of their lien on the collateral, while (2) retaining the New GM Equity already paid to the unsecured creditors, a portion of which is the value paid by New GM for that same collateral. Avoidance of an unperfected lien is intended to permit unsecured creditors to benefit from the value of collateral free of the avoided lien. Here, plaintiff is seeking to get that value twice: the price paid for the collateral (the

portion of the New GM Equity attributable to the collateral) plus the amount paid for the release of the lien on the same collateral (approximately $1.5 billion of DIP Loan proceeds).

Allowing the Avoidance Trust to recover any portion of the $1.5 billion in DIP Loan proceeds — when the evidence shows that this amount would never have been available to unsecured creditors, but instead was provided and earmarked solely to free up the collateral to accomplish the 363 Sale, for the benefit of Old GM's unsecured creditors — would provide those unsecured creditors with an unprecedented and unjustified windfall. The earmarking doctrine provides the legal tools necessary to prevent that windfall.

RELEVANT BACKGROUND

A. The DIP Lenders Extended an Incremental $1.5 Billion of Credit to Ensure Repayment of the Term Loan

[redacted]

[2] References to "TL SOF" are to the *Term Lenders' Counterstatement of Facts Regarding Plaintiff's Motion for Partial Summary Judgment Dismissing Defendants' Earmarking Defense*, filed herewith.

[redacted]

The DIP Lenders had the final say on how much DIP Financing would be lent, and were very focused on the DIP sizing analyses because [redacted]

B. The DIP Credit Agreement and the Interim and Final DIP Orders Required GM to Repay the Term Loan as a Condition of the DIP Financing

Section 5.5 of the DIP Credit Agreement provides that Old GM "shall use the Loan proceeds only for the purposes set forth in Section 3.20 and *in a manner generally consistent with the Applicable Budget*." Final DIP Or., Ex. 1 (DIP Credit Agreement) § 5.5 (emphasis added). That budget contemplated that GM would make a $1.463 billion Term Loan repayment as part of the disbursements scheduled for July 13–19, 2009. TL SOF ¶¶ 59–61.

If Old GM failed to repay the Term Loan, its use of funds would not have been "generally consistent" with the Initial Budget and would therefore have required prior consent. *See* Final DIP Or., Ex. 1 (DIP Credit Agreement) §§ 5.5 & 6.18. Section 6.18 of the DIP Credit Agreement required Old GM to obtain the DIP Lenders' approval for any modifications to the Applicable Budget, and the DIP Lenders would not have consented to GM's failure to repay the Term Loan because, among other things, that would have jeopardized the 363 Sale. TL SOF ¶¶ 62–64.

The DIP Motion[3] requested authority to use a portion of the DIP Financing to repay the Term Loan, and the Interim and Final DIP Orders *required* Old GM to "apply the proceeds of the DIP Credit Facility to repay amounts outstanding under the Prepetition Senior Facilities . . . ." Final DIP Or. ¶ 19(a); TL SOF ¶¶ 67–68. [redacted]

Three business days after entry of the Final DIP Order, Old GM made the required repayment of the Term Loan. *Id.* ¶ 73.

C. Repayment of the Term Loan Did Not Diminish GM's Estate, it Augmented the Estate

Old GM's unsecured creditors received substantial consideration from the 363 Sale in the form of the New GM Equity. *Id.* ¶ 76. The 363 Sale could not have occurred unless the Term Lenders' collateral was available to be transferred free and clear of liens, as the assets sold to New GM included a substantial portion of the Term Lenders' most valuable collateral. *Id.* ¶¶ 81–82. [redacted] And the DIP Lenders agreed to make the DIP

[3] References to the "DIP Motion" are to Bankr. Dkt. 64.

Loan nonrecourse to the New GM Equity; the unsecured creditors' recovery was thus unaffected by the borrowing of the funds that repaid the Term Loan. *See* DIP Or. ¶ 6*;* TL SOF ¶¶ 79–80.

Had the Term Loan been treated as unsecured, the Term Lenders would have received a share of the New GM Equity, reducing every other unsecured creditor's recovery *pro rata*. The unsecured creditors therefore benefitted from the Term Loan being treated as fully secured and paid from the DIP Loan. TL SOF ¶ 88.

ARGUMENT

To grant the Avoidance Trust's motion for summary judgment striking the earmarking defense, the Court must find that "there is no genuine dispute as to any material fact and the movant [the Avoidance Trust] is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see McCord* v. *Ally Fin., Inc. (In re USA United Fleet, Inc.)*, 559 B.R. 41, 68–71 (Bankr. E.D.N.Y. 2016) (denying cross motions for summary judgment on avoidance claim and earmarking defense where material disputes remained as to whether debtor exercised control over transferred funds); *Glinka* v. *Bank of Vt. (In re Kelton Motors, Inc.)*, 153 B.R. 417, 429 (Bankr. D. Vt. 1993) (denying summary judgment on earmarking where there were "facts in dispute concerning Debtor's control of the [loan] proceeds"). In making this determination, the Court must "construe the facts in the light most favorable to the [Term Lenders] and must resolve all ambiguities and draw all reasonable inferences against the [Avoidance Trust]." *Beyer* v. *Cty. of Nassau*, 524 F.3d 160, 163 (2d Cir. 2008).

I. THE EVIDENCE SUPPORTS APPLICATION OF THE EARMARKING DOCTRINE AS A DEFENSE TO THE AVOIDANCE TRUST'S CLAIMS

The crux of the earmarking doctrine, as the Second Circuit "ha[s] long recognized," is "that where a debtor receives funds subject to a clear obligation to use that money to pay off a preexisting debt, and the funds are in fact used for that purpose, those funds

do not become part of the estate and the transfer cannot be avoided in bankruptcy." *In re Flanagan*, 503 F.3d 171, 185 (2d Cir. 2007). That is precisely what happened here.

At the time of Old GM's bankruptcy filing, the U.S. and Canadian governments were prepared to provide Old GM with DIP Financing to facilitate its continued operation until the proposed 363 Sale to New GM could occur. To close the 363 Sale, the Term Loan collateral had to be available for transfer to New GM, free and clear of liens, which necessitated that the Term Loan be repaid in full. The DIP Order therefore *required* Old GM to repay the Term Loan from the DIP Loan proceeds: "the Debtors . . . shall apply the proceeds of the DIP Credit Facility to repay amounts outstanding under the Prepetition Senior Facilities." Final DIP Or. ¶ 19(a).

The Avoidance Trust makes three principal arguments in seeking summary dismissal, prior to trial, of the Term Lenders' earmarking defense. As shown in greater detail below, none is persuasive.

First, the Avoidance Trust asserts the existence of a *per se* rule against applying the earmarking doctrine to a postpetition transfer. AAT Br. § II.A.[4] But no such rule exists, and such a rule would be inconsistent with the equitable purpose of the earmarking doctrine.

Second, the Avoidance Trust argues that because the DIP Lenders disbursed the loan into Old GM's account and did not escrow the amount required to repay the Term Loan, Old GM had dominion and control over those funds and was free to choose not to repay the Term Loan. AAT Br. § II.B.1. That conclusion is patently untrue, as it ignores the express language of the DIP Order that *required* Old GM to pay the prepetition secured debt in full, as

[4] References to "AAT Br." are to *Plaintiff's Memorandum of Law in Support of its Motion for Partial Summary Judgment Dismissing Defendants' Earmarking Defense*, filed in redacted form at Adv. Pro. Dkt. 1129-2.

well as the provisions in the DIP Credit Agreement requiring repayment of the Term Loan. *See* Point I.B.1 *infra*. It also ignores the parties' clear commercial agreement regarding the DIP Proceeds, as well as the calamitous results that would have ensued had it not been paid.

Third, the Avoidance Trust argues that the Old GM estate was diminished and the unsecured creditors harmed by the repayment of the Term Loan because, had the DIP Loan proceeds not been used to repay the Term Loan, those proceeds would have been distributed to unsecured creditors. AAT Br. § II.B.2. But there is no factual basis for this assertion.

Indeed, all of the evidence is to the contrary: If not for the need to repay the Term Loan and release the lien, the DIP Lenders would not have loaned the ~$1.5 billion designated for the Term Lenders without recourse to the New GM Equity, the Term Loan would have been an unsecured claim entitled to share proportionately in the New GM Equity, and unsecured creditors would thus have received a smaller *pro rata* share of the same New GM Equity from which they have already been paid. Any award of the proceeds of the DIP Loan used to repay the Term Loan is therefore a windfall for unsecured creditors.

A. The Earmarking Doctrine Is Equally Applicable to Actions Seeking to Avoid Prepetition Transfers and Postpetition Transfers

The earmarking doctrine is based on a simple equitable rule: "funds subject to a clear obligation to use that money to pay off a preexisting debt . . . in fact used for that purpose" simply never "become part of the estate." *In re Flanagan*, 503 F.3d at 185. "Reduced to its essence, the earmarking defense merely holds for the unsurprising conclusion that *where creditors would not otherwise have any reason or expectation to look to the assets transferred*," because the assets were only provided on account of the preexisting debt, "there is no diminution of the net recovery on account of the earmarked funds and there can therefore be no avoidance." *In re FBI Wind Down, Inc.*, 581 B.R. 116, 134 n.110 (Bankr. D. Del. 2018) (quoting *Cooper* v.

Centaur Invs. Ltd. (In re TriGem Am. Corp.), 431 B.R. 855, 864 (Bankr. C.D. Cal. 2010) (emphasis added)). Because "a debtor with earmarked funds is only a conduit to the transfer," *id.* at 134, a payment made in accordance with an earmarking obligation therefore "is held not to constitute a voidable" transfer, *In re Flanagan*, 503 F.3d at 184.

Despite its facial applicability to the situation at hand, the Avoidance Trust argues that the earmarking doctrine is inapplicable to avoidance of postpetition transfers pursuant to Section 549 of the Bankruptcy Code. AAT Br. § II.A. This is wrong, for several reasons.

First, the weight of the case law, including in this Circuit, is to the contrary. The Eastern District of New York, for example, has held that "the rationale of the earmarking doctrine is equally applicable to actions under both § 547(b) and § 549(a)." *In re Westchester Tank Fabricators, Ltd.*, 207 B.R. 391, 398 (Bankr. E.D.N.Y. 1997).[5]

Far from being "a single case" holding that earmarking applies to postpetition transfers, AAT Br. 13 n.3, *In re Westchester* is consistent with the majority of decisions that have considered the issue. *See In re Bos*, 561 B.R. 868, 894–95 (Bankr. N.D. Fla. 2016) (considering whether "certain post-petition payments were 'earmarked'"); *In re TriGem Am. Corp.*, 431 B.R. at 863 (Ninth Circuit had established that the "underlying precept" of the earmarking doctrine that "diminishment of property of the estate [is] a prerequisite to all avoidance cases," indicating the doctrine's applicability both pre- and postpetition); *In re Barefoot Cottages Dev. Co.*, No. 09-50089, 2009 WL 2842735, at *4 (Bankr. N.D. Fla. July 28, 2009) ("the critical question of whether there was a transfer of property which could have been a part of the bankruptcy estate

[5] The Avoidance Trust contends, without explanation, that *In re Westchester* nevertheless "makes clear that earmarking could not apply to the transfer of proceeds from a post-petition DIP loan." AAT Br. 13 n.3 (citing 207 B.R. at 401). The case does nothing of the sort. Rather, the court simply noted that defendant "does not dispute that the DIP Checks constituted property of the estate." 207 B.R. at 401.

available for distribution to all creditors" is equally applicable to post-petition transfers); *In re Network 90 Degrees, Inc.*, 98 B.R. 821, 837 (Bankr. N.D. Ill. 1989) ("While precedent does not clearly show that the earmarking rationale applies to postpetition transfers as well as prepetition transfers, the doctrine logically applies."), *aff'd*, 126 B.R. 990, 992 (N.D. Ill. 1991); *In re Price Chopper Supermarkets, Inc.*, 40 B.R. 816, 820 (Bankr. S.D. Cal. 1984) (rejecting trustee's distinguishing of earmarking cases as involving preferences and not postpetition transfers; "the critical question is whether there was a transfer of property which could have been a part of the estate available for distribution to all creditors.").[6]

The only case cited by the Avoidance Trust for the proposition that earmarking should not apply in the postpetition context merely contains a one-line statement without analysis. *See In re Garringer*, No. 05-31397, 2006 WL 3519342, at *3 (Bankr. W.D. Mo. Dec. 5, 2006) ("The Court is not aware of any cases that have applied the earmarking doctrine to validate or shield postpetition transfers of estate property, and the Court sees no legal or practical basis to extend its application here."). As explained above, however, that one-line statement is not in accord with other cases that have considered the issue.

Second, nothing about earmarking's underlying principle — that funds subject to an obligation that they be used to pay off a preexisting debt never become part of the estate — is confined to the prepetition context. As the cases cited above recognize, the central question under both Section 547(b) and Section 549(a) is whether there was an impermissible transfer of

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[6] *See also In re Macco Props., Inc.*, Nos. 10-16682, 10-16503, 2016 WL 3031050, at *5 (Bankr. W.D. Okla. May 23, 2016) ("assum[ing], without deciding, that an otherwise unauthorized postpetition transfer might be justified by establishing that the transferred funds were effectively earmarked, and that earmarked funds are not estate property"); *see also In re FBI Wind Down*, 581 B.R. at 134 n.109 ("[N]et diminution of expected recovery, . . . is and must be the touchstone of every avoidance action whether under §§ 547, 548 or 549." (quoting *In re TriGem Am. Corp.*, 431 B.R. at 864–65)).

estate property that would have otherwise been available for distribution to all creditors. Section 547(b), like Section 548(a), only allows the trustee to avoid a transfer of "an interest of the debtor in property." 11 U.S.C. §§ 547(b), 548(a). Section 549(a) likewise only allows the trustee to avoid a transfer of "property of the estate." 11 U.S.C. § 549(a).

The Bankruptcy Code elsewhere treats these two limiting phrases as identical, defining "property of the estate" to include "all legal or equitable interests of the debtor in property as of the commencement of the case" and "[a]ny interest in property that the estate acquires after the commencement of the case." 11 U.S.C. § 541(a)(1), (7). And the Supreme Court has stated that Congress intended Section 547(b)'s reference to "an interest of the debtor in property" to be "coextensive" with its prior reference to "property of the debtor." *Begier* v. *I.R.S.*, 496 U.S. 53, 59 n.3 (1990).

Finally, the Avoidance Trust's assertion that courts have "cautioned against extending the doctrine beyond the co-debtor context" is outdated and unpersuasive. AAT Br. 13. While some opinions dating back to the doctrine's early development limited its applicability to guarantors, this is not — and has never been — the law in the Second Circuit.

In *Flanagan*, the Second Circuit applied the earmarking doctrine beyond the guarantor context, explaining that while "[e]arly applications of the earmarking doctrine concerned situations in which the debtor's obligation was secured by a guarantor . . . [t]oday, the earmarking doctrine has been extended beyond the guarantor context and several courts have held that it applies whenever a third party provides funds to the debtor for the express purpose of enabling the debtor to pay a specified creditor, that is substituting a new creditor for an old creditor." 503 F.3d at 184 (collecting cases).

And this makes sense: Limiting the earmarking doctrine to the guarantor context does not comport with its underlying rationale — that "where a debtor receives funds subject to a clear obligation to use that money to pay off a preexisting debt, and the funds are in fact used for that purpose, those funds do not become part of the estate and the transfer cannot be avoided in bankruptcy." *Id.* at 185.

B. The $1.5 Billion Directed to the Term Loan Was Subject to a Clear Obligation and Was Never Within Old GM's Dispositive Control

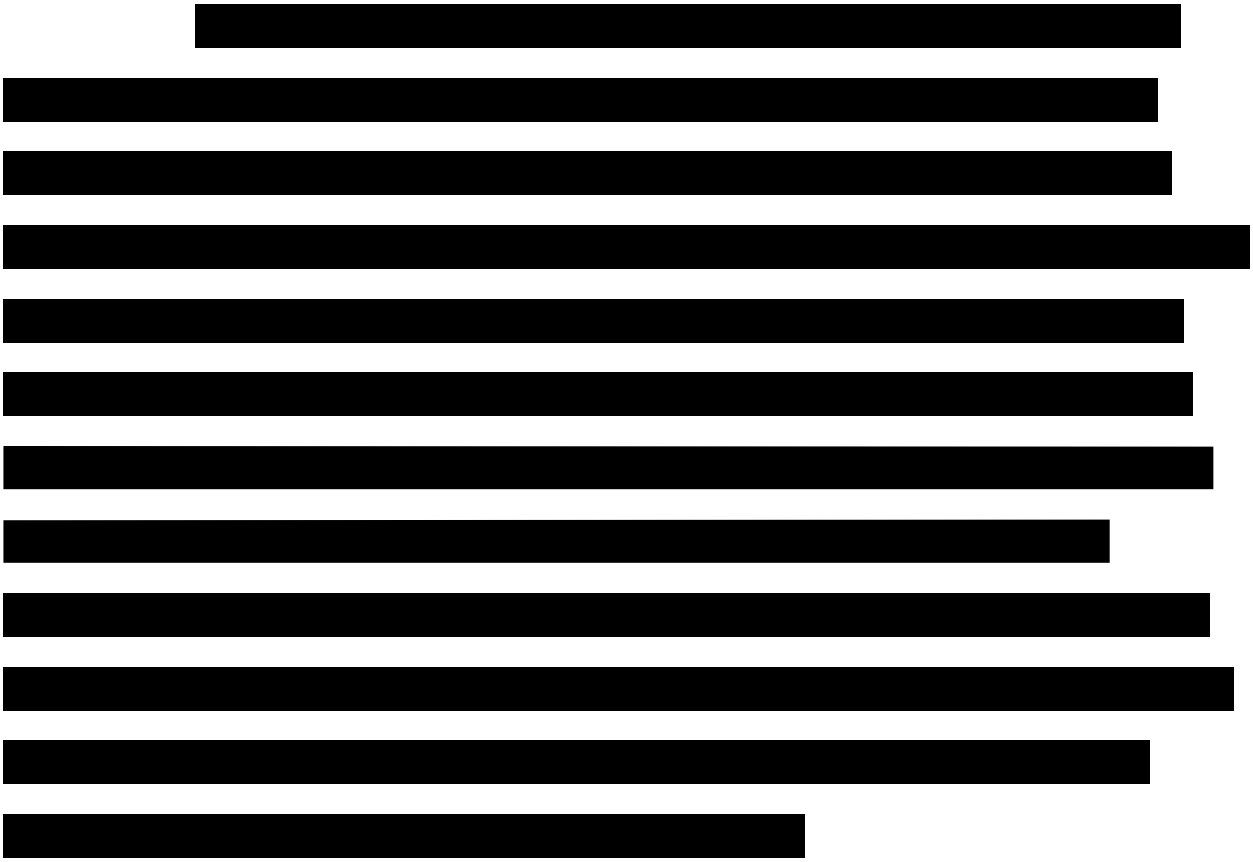
Although the Avoidance Trust does not dispute "that Treasury understood Old GM intended to use a portion of the DIP Financing to pay off the Term Loan," it nevertheless asserts that Old GM "was not required to use the funds for repayment of the Term Loan." AAT Br. 14. This assertion is inexplicable. As noted above and explained below, the record shows that Old GM was required to do just that. In these circumstances, "draw[ing] all reasonable inferences and resolv[ing] all ambiguities in favor of the non-moving party," *Ametex Fabrics, Inc.* v. *Just In Materials, Inc.*, 140 F.3d 101, 107 (2d Cir. 1998) (citation omitted), a reasonable fact-finder would determine that Old GM had a clear obligation to use the DIP funds to pay a preexisting debt. At the very least, a trial is required on that issue.

1. Old GM Was Required to Use a Portion of the DIP Proceeds to Repay the Term Loan

The case for earmarking is stronger here than in the typical case. In the typical case, the debtor's lack of control over funds is often shown by the parties' use of segregated accounts or direct payment to the earmarked creditor. But resort to this sort of circumstantial evidence is unnecessary here because Old GM was directly required to pay the earmarked funds by orders of the court presiding over its chapter 11 case.

As noted, both the DIP Motion and the Interim and Final DIP Orders reflected the DIP Lenders' requirement that Old GM repay the Term Loan to allow the 363 Sale to go

forward. First and most importantly, the Final DIP Order provided that "[u]pon entry of this Final Order, the Debtors . . . *shall* apply the proceeds of the DIP Credit Facility to repay amounts outstanding under the Prepetition Senior Facilities . . . within three business days of entry of this Final Order." Final DIP Or. ¶ 19(a) (emphasis added). The Interim DIP Order and DIP Motion reflect the same requirement. *See* Interim DIP Or. ¶ 18(a) ("On the date of entry of the Final Order, the Debtors shall be authorized to apply and *shall* . . . apply the proceeds of the DIP Credit Facility to repay amounts outstanding under the Prepetition Term and Revolving Facilities as of the repayment date . . . ." (emphasis added)); DIP Mot. ¶¶ 75–78 (requesting authority to repay the Term Loan in light of the DIP Lenders' "*agree[ment]* to provide sufficient postpetition financing to repay . . . the Term Loan in full" (emphasis added)).



Contemporaneous hearing testimony [redacted] also reflect this agreement. *See, e.g.*, Bankr. Dkt. 374 at 40:17–22 (June 1, 2009 Hr'g Tr.) ("[T]here is outstanding today secured debt of almost 6 billion dollars . . . . As part of this transaction, the U.S. Treasury will, in effect, refinance that debt and take over that debt. And that will be part of the 33.3 billion dollars of debtor-in-possession financing."); Celentino Decl. Ex. P (UST-AAT-030224) [redacted]

Despite the clear and overwhelming evidence that the DIP Lenders earmarked a portion of their loan for a mandatory repayment of the Term Loan, the Avoidance Trust argues that the DIP Lenders "did not restrict use of the funds," citing to Section 3.20 in the Representations and Warranties section of the DIP Credit Agreement and out-of-context deposition testimony from Mr. Feldman. AAT Br. 16. These citations do not undermine the overwhelming evidence that repayment of the Term Loan was required. And the Avoidance Trust has no answer to the plain terms of the Final DIP Order, which on its face imposed a specific obligation on Old GM to use the funds advanced to it to repay the Term Loan. Moreover, to the extent, if any, that the Credit Agreement is inconsistent with the DIP Order, the DIP Order Controls. Final DIP Or. ¶ 22.

In addition, even aside from the Final DIP Order and the multiple court submissions cited above, the evidence will show that from the beginning, Treasury's consistent requirement and understanding was that the Term Loan needed to be repaid in full and removed from the bankruptcy via the DIP Financing. [redacted]

[redacted]

[redacted]

7 [redacted]

[redacted]

The DIP Lenders' requirement that Old GM use the funds in accordance with the agreed-to budget is reflected in Section 5.5 of the DIP Credit Agreement. That section contains Old GM's "[a]ffirmative [c]ovenant[]" that "the Loan Parties [*i.e.*, Old GM] shall use the Loan proceeds only for the purposes set forth in Section 3.20 and in a manner *generally consistent with the Applicable Budget*." *See* Final DIP Or., Ex. 1 (DIP Credit Agreement) § 5.5 (emphasis added). Similarly, Section 6.18 of the DIP Credit Agreement required Old GM to obtain the DIP Lenders' approval for any modifications to the "Applicable Budget." *Id.*, Ex. 1 § 6.18. The "Applicable Budget" is the "Initial Budget" found in Annex 1 of the DIP Credit Agreement. *See id.*, Ex. 1 § 1.1. That Initial Budget set forth $5.224 billion of payments that GM was to make during the week of July 13 through July 19, 2009. [redacted]

The Avoidance Trust's position that "[t]he DIP Credit Agreement did not condition the provision of proceeds on payment of the Term Loan," AAT Br. 17, is premised on reading Section 3.20 of the DIP Credit Agreement (the representations and warranties section) in isolation from the rest of the DIP Credit Agreement — most notably the affirmative covenants of Section 5.5 and its express requirement that any expenditure of funds be generally consistent with the Applicable Budget. Final DIP Or., Ex. 1 (DIP Credit Agreement) § 5.5. Plainly, Old GM would not have been acting in a manner "generally consistent with the Applicable Budget" if it had failed to disburse [redacted] in the manner specified by that budget. The evidence thus shows that Old GM did not simply elect to pay off the Term Loan in its discretion; it was required to do so.

The Avoidance Trust likewise mischaracterizes Mr. Feldman's testimony [redacted]

In short, the DIP Orders, the DIP Credit Agreement, and all the evidence discussed above regarding the DIP Lenders' requirements and the parties' commercial understanding, is sufficient to establish the "clear obligation to use that money to pay off a

preexisting debt" required under the earmarking doctrine. *In re Flanagan*, 503 F.3d at 185. At the very least, this evidence would allow a reasonable fact-finder to find such an obligation.

2. The Deposit of the DIP Proceeds in Old GM's Bank Account Does Not Defeat Earmarking

In the face of all this, the Avoidance Trust asserts that the fact that the DIP Lenders allowed the funds to be deposited into Old GM's bank account means there was no earmarking of the funds required for the repayment of the Term Lenders. AAT Br. 17.

But that is simply not the law in the Second Circuit. "The proper application of the earmarking doctrine depends not on whether the debtor temporarily obtains possession of new loan funds, but instead on whether the debtor is obligated to use those funds to pay an antecedent debt." *In re Flanagan*, 503 F.3d at 185. In *Flanagan*, although the debtor "obtained possession of the funds temporarily," he "never obtained control of the funds in the sense of being able to control how they were ultimately distributed," and that resolved the control analysis.[8] *Id.*; *see also In re Superior Stamp & Coin Co.*, 223 F.3d 1004, 1009 (9th Cir. 2000) ("[T]he proper [earmarking] inquiry is not whether the funds entered the debtor's account, but whether the debtor had the right to disburse the funds to whomever it wished, or whether [the] disbursement was limited to a particular old creditor or creditors under the agreement with the new creditor.").

Nothing in the factual record suggests that Old GM had either the legal authority or the practical ability to decline to repay the Term Loan after receiving the DIP Proceeds. To

[8] The only post-*Flanagan* in-Circuit case cited by the Avoidance Trust merely held that "money in a bank account in the name of a debtor is presumed to be property of the bankruptcy estate," and distinguished the facts before it from a Fifth Circuit case where "the funds in question were held by the debtor subject to an 'earmarking' transaction and held for another party." *In re 1031 Tax Grp., LLC*, 439 B.R. 47, 70–71 (Bankr. S.D.N.Y. 2010) (citations omitted), *supplemented*, 439 B.R. 78 (Bankr. S.D.N.Y. 2010).

the contrary: Had Old GM failed to repay the Term Loan with the DIP Proceeds, it would have placed itself in contempt of the DIP Orders. Failure to repay the Term Loan also would have caused the Term Lenders to object to the 363 Sale Motion, thereby depriving Old GM and the DIP Lenders of the urgently needed, immediate approval of the 363 Sale. Had Old GM so much as delayed in repaying the Term Loan, the DIP Lenders would undoubtedly have sought to enforce the repayment requirement in the Final DIP Order. [redacted]

C. Repayment of the Term Loan with DIP Financing Did Not Diminish GM's Estate, it Augmented the Estate

The DIP Lenders' loan of $1.5 billion to pay off the Term Loan did not reduce the recoveries of Old GM's other creditors. It enhanced them. The transfer therefore certainly "did not diminish the debtor's estate," as the Avoidance Trust claims. *Flanagan*, 503 F.3d at 185.

[9] Despite the Avoidance Trust's suggestions, there is nothing special about the fact that the proceeds of the DIP Financing were deposited into what the Avoidance Trust calls Old GM's "general concentration bank account." AAT Br. 15. [redacted]

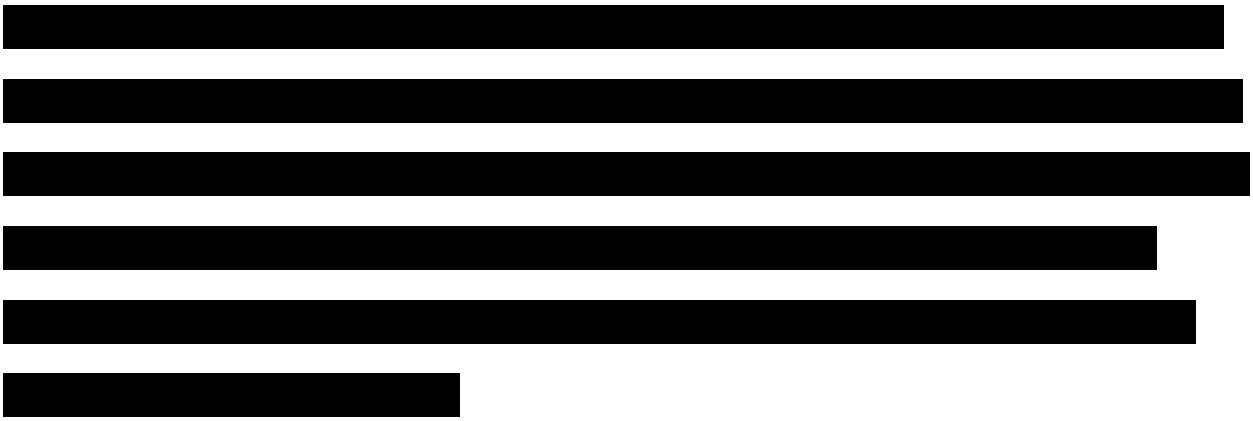
As shown, the DIP Lenders advanced the $1.5 billion and required the Term Loan to be repaid to ensure that the liens on Old GM's assets would be released, permitting the DIP Lenders in the first instance to obtain a first lien thereon, and then for the most valuable portion of the collateral to be sold to New GM, free and clear of liens, in the 363 Sale. *See* TL SOF ¶¶ 81–82. In other words, there would have been no 363 Sale absent the repayment of the Term Loan, and the benefits that flowed to the unsecured creditors from that favorable sale — the New GM Equity — would have been lost. Whatever might have eventuated thereafter if the 363 Sale had not closed, the gift to the unsecured creditors from the DIP Lenders of New GM Equity would almost certainly have been lost, and the unsecured creditors would have recovered less. *See* Bankr. Dkt. 435, at 7 (May 31, 2009 Declaration of A. Koch attaching AlixPartners liquidation analysis).

Notwithstanding this, the Avoidance Trust claims that the estate was diminished because "[the] payment to [the] Term Lenders in full, ahead of other unsecured creditors, diminished the estate by the amount which they were overpaid due to the Term Loan being undersecured." *See* AAT Br. 18. But the fact that the Term Lenders benefitted from the payoff of the Term Loan does not equate to diminution of the estate. If it did, there would be no earmarking defense, since every defendant that successfully invokes the defense has benefitted from a transfer that might otherwise be subject to avoidance. Obviously, it is not the benefit to the defendant that determines whether a transfer caused a diminution, it is the detriment to the unsecured creditors caused by a reduction in the assets available for distribution. Where, as here, the funds used to pay the defendant were made available to the debtor at no cost to the unsecured creditors, solely for the purpose of making a payment to the secured creditors, the unsecured creditors have been deprived of nothing.

Although all the evidence is to the contrary, the Avoidance Trust also premises diminution of the estate on its claim that "to the extent that the DIP loan proceeds had not been used to repay the Term Lenders, they would have been distributed ratably to unsecured creditors and a portion returned to the DIP Lenders." AAT Br. 3. But nothing in the record supports this assertion. Quite to the contrary, all of the evidence shows that [redacted] Based on that evidence, a reasonable fact-finder will readily conclude that, absent the need to repay the Term Loan, the DIP Loan to Old GM would have been $1.5 billion smaller. *See* TL SOF ¶ 85. And had the Term Lenders been treated as unsecured, they would have shared proportionately in the New GM Equity, and thus reduced every other unsecured creditors' recovery *pro rata*. The unsecured creditors therefore benefitted from the Term Loan being treated as fully secured and paid from the DIP Loan.

The evidence also shows that the unsecured creditors' receipt of any distribution at all was the result of [redacted]

10 [redacted]



In sum, rather than supporting any argument that unsecured creditors were harmed by the repayment of the Term Loan, the evidence shows that Treasury decided to allocate a certain amount of value to the unsecured creditors in the form of the New GM Equity, and agreed that their claims for repayment of the DIP Loan would not have recourse to the New GM Equity.[11] Ultimately, as a result of that effective subordination, approximately $11.2 billion of the funds lent by Treasury to Old GM through TARP and the DIP Loan (far more than the $1.5 billion that repaid the Term Loan) went unpaid. Old GM's borrowing of that amount, which was not repaid, could not have diminished the estate or the recoveries of unsecured creditors. *See* TL SOF ¶¶ 79–88.

Lacking any substantive basis for a claim of diminution, the Avoidance Trust attempts to equate the reservation of rights in the DIP Order that allowed for a challenge to the perfection of the Term Loan collateral with "an implicit recognition that the transfer would

[11] In addition to subordinating their claims to the unsecured creditors' receipt of the entire equity distribution, the DIP Lenders also did not bargain to recover the DIP Loan proceeds paid to the Term Lenders if an avoidance action was successful. Years later, the former DIP Lenders negotiated to receive 30% of the net proceeds of this action in exchange for $15 million of interest-free litigation funding and giving up their claim to the proceeds, but that is not relevant to the deal that was actually reached in 2009, in which they clearly limited their recourse to their "Collateral," a term which excluded proceeds of this avoidance action. *See In re Motors Liquidation Co.*, 460 B.R. 603 (Bankr. S.D.N.Y. 2011), *vacated as unripe*, 475 B.R. 347 (S.D.N.Y. 2012).

diminish the bankruptcy estate in the event that it turned out that the Term Loan was not fully secured." AAT Br. 18. But nothing about the DIP Order's reservation of rights supports this assertion; it merely carved a potential perfection challenge out of the release granted to the secured creditors. *See* Final DIP Or. ¶ 19(d) (allowing actions "with respect only to the perfection of first priority liens of the Prepetition Senior Facilities Secured Parties"). Nor did the DIP Order purport to predetermine or waive any potential defense to such a challenge that a party might later assert. There is simply no evidence in the DIP Order or elsewhere that Judge Gerber considered the applicability of an earmarking defense with respect to the payments required by the DIP Lenders to be paid to the secured lenders.

The DIP Order, in sum, merely preserved a challenge to perfection of the Term Lenders' lien so as to allow the 363 Sale to go forward as expeditiously as possible. It did not prejudice or affect any defenses to the challenge, including earmarking.[12] Determination of whether the structure of the Term Loan supports an earmarking defense requires, as discussed above, a review of the factual record relating to GM's authority over the DIP Proceeds and whether the economic realities of the transaction caused any diminution of the bankruptcy estate. Those are precisely the kinds of questions that were appropriately delayed, when Treasury's priority was [redacted]

[12] Similarly, when Old GM's chapter 11 plan gave the right to pursue this action to the Avoidance Trust for the benefit of the unsecured creditors, it necessarily gave that right subject to any defenses that might be asserted, including those based on the merits of the avoidance claim, the value of the remaining collateral, and equitable defenses like earmarking.

Finally, the Avoidance Trust argues that the earmarking defense is inconsistent with its litigation funding settlement with the DIP Lenders and Old GM's chapter 11 plan, both of which treat this action and any potential proceeds therefrom as property of the estate. This is yet another false equation. While the cause of action and any proceeds therefrom do indeed belong to the estate, this has no bearing on the merits of (or defenses to) the cause of action, and specifically whether the funds which repaid the Term Loan were property of the estate that diminished the unsecured creditors' recovery.

CONCLUSION

In sum, the factual record supports the conclusion — and, at the very least, a reasonable fact-finder could conclude — that $1.5 billion of the DIP Loan was made for the express purpose of taking out the Term Loan, that those proceeds of the DIP Loan would never have been available for distribution to the unsecured creditors, and that the payment of those proceeds to the Term Lenders did not diminish the estate, thus requiring application of the earmarking doctrine. The Avoidance Trust's arguments for avoiding trial on the merits of earmarking are unfounded, and its motion should be denied.

Dated: November 30, 2018
New York, New York

Respectfully submitted,

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	Chapter 11 Case
MOTORS LIQUIDATION COMPANY, *et al.*,	Case No. 09-50026 (MG)
Debtors.	(Jointly Administered)
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,	
vs.	
JPMORGAN CHASE BANK, N.A., individually and as Administrative Agent for Various Lenders Party to the Term Loan Agreement described herein, *et al.*,	
Defendants.	

TERM LENDERS' COUNTERSTATEMENT OF FACTS REGARDING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT DISMISSING DEFENDANTS' EARMARKING DEFENSE

Pursuant to Rule 7056-1(c) of the Local Rules for the United States Bankruptcy Court, for purposes of deciding plaintiff's *Motion for Partial Summary Judgment Dismissing Defendants' Earmarking Defense* [Adv. Pro. Dkt. 1128], Defendant JPMorgan Chase Bank, N.A. ("JPMorgan") and the other signatory defendants (the "Term Lenders") respectfully submit the following responses to *Plaintiff's Statement of Undisputed Material Facts in Support of*

Plaintiff's Motion for Partial Summary Judgment Dismissing Defendant's Earmarking Defense

(the "Avoidance Trust's Rule 7056-1 Statement") [Adv. Pro. Dkt. 1129-3].[1]

OBJECTIONS AND RESPONSES

I. Old GM's Deteriorating Financial Condition

Statement No. 1: In 2008 and 2009, General Motors Corporation ("**Old GM**") suffered a steep erosion in revenues, significant operating losses, and a dramatic loss of liquidity, putting its future in grave jeopardy. *In re Gen. Motors Corp.*, 407 B.R. 463, 476 (Bankr. S.D.N.Y. 2009).

Response No. 1: Undisputed.

Statement No. 2: By early November 2008, Old GM was out of cash and was forced to seek the help of the U.S. Government (the "**Government**"). *Id.* at 477. *See also* Declaration of Eric B. Fisher in Support of Plaintiff's Motion for Partial Summary Judgment Dismissing Defendants' Earmarking Defense ("**Fisher Decl.**"), Ex. A (Feldman Deposition Tr. at 39:3–49:5).

Response No. 2: Undisputed.

Statement No. 3: The Government was concerned about the economy-wide consequences of Old GM and other automotive companies failing, and the Government expressed concerns about the impact of any such failure on auto dealers, and the states and municipalities who looked to those companies, their suppliers, and their employees for tax revenues. *See In re Gen. Motors Corp.*, 407 B.R. at 477.

Response No. 3: Undisputed.

Statement No. 4: In response to its concerns, the Government implemented programs to assist the automotive industry through the U.S. Treasury ("**Treasury**") and its Presidential Task Force on the Auto Industry. *Id.*

Response No. 4: Undisputed.

Statement No. 5: The Government first extended credit to Old GM under the Troubled Asset Relief Program ("TARP"). *Id.* at 477–78.

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[1] Capitalized terms not defined in the Term Lenders' Responses and Counterstatement of Material Facts shall have the meanings in the *Term Lenders' Opposition to Avoidance Trust's Motion for Partial Summary Judgment Regarding Earmarking Defense*, filed herewith.

Response No. 5: Undisputed.

Statement No. 6: On December 31, 2008, the Government agreed to provide Old GM with financing up to $13.4 billion on a senior secured basis. *Id.*

Response No. 6: Undisputed.

Statement No. 7: Old GM borrowed $2 billion more on April 24, 2009, and then $4 billion more on May 20, 2009. *Id.* By the end of May, 2009, Old GM had borrowed $19.4 billion total from the Government. *Id.* at 479.

Response No. 7: Undisputed.

II. Treasury and Old GM Explore a 363 Sale and DIP Financing

Statement No. 8: Despite the assistance of the Government, it became apparent that Old GM would have to file for bankruptcy protection. As part of the plan for this anticipated bankruptcy filing, the Government agreed that it would purchase substantially all of the operating assets of Old GM out of bankruptcy through a sale pursuant to Section 363 of the Bankruptcy Code (the "**363 Sale**") to a new entity ("**New GM**"). Fisher Decl. Ex. A (Feldman Deposition Tr. at 77:9–13); *see also In re Gen. Motors Corp.*, 407 B.R. at 480.

Response No. 8: Undisputed.

Statement No. 9: New GM was to be funded by the Government through the TARP loans and debtor-in-possession financing (the "**DIP Financing**") from the U.S. and Canadian Governments (the "**DIP Lenders**"). Fisher Decl. Ex. A. (Feldman Deposition Tr. at 77:14–78:9).

Response No. 9: The Term Lenders dispute that [redacted] Celentino Decl. Ex. A (Feldman Dep.), at 77:14–78:9; *see also In re Gen. Motors Corp.*, 407 B.R. at 482.

Statement No. 10: [redacted]

Response No. 10: Undisputed.

III. GM Files for Bankruptcy

Statement No. 11: On June 1, 2009, 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; Adv. Pro. Dkt. No. 962 (Joint Pretrial Order entered April 19, 2017) ¶ 31.[2]

Response No. 11: Undisputed.

Statement No. 12: The debtors also filed a motion seeking authority from the Bankruptcy Court to obtain in excess of $33 billion in post-petition DIP Financing from the DIP Lenders. Bankr. Dkt. No. 64.

Response No. 12: Undisputed.

Statement No. 13: The motion further requested authority to use a portion of the DIP Financing to repay the Term Loan in full, as it was generally assumed that all claims under the Term Loan Agreement were fully secured, first-priority liens. *Id.* ¶¶ 83-84.

Response No. 13: The Term Lenders do not dispute that the DIP Motion[3] requested authority to use a portion of the DIP Financing to repay the Term Loan in full (and also required the repayment of the Term Loan in full) but dispute the Avoidance Trust's characterization of the reason for this request. Leading up to the Petition Date, [redacted]

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[2] [From AAT's Rule 7056-1 Statement: "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 Co. f/k/a General Motors Corporation*, Case No. 09-50026."]

[3] References to the "DIP Motion" in the Term Lenders' Responses and Counterstatement of Material Facts are to the *Motion of Debtors for Entry of an Order Pursuant to 11 U.S.C. §§ 361, 362, 363, and 364 (i) Authorizing the Debtors to Obtain Postpetition Financing, Including on an Immediate, Interim Basis; (ii) Granting Superpriority Claims and Liens; (iii) Authorizing the Debtors to Use Cash Collateral; (iv) Granting Adequate Protection to Certain Prepetition Secured Parties; (v) Authorizing the Debtors to Prepay Certain Secured Obligations in Full within 45 Days; and (vi) Scheduling a Final Hearing Pursuant to Bankruptcy Rule 4001* [Bankr. Dkt. 64].

[redacted]

Celentino Decl. Ex. A (Feldman Dep.), at 41:16–22; 42:20–43:2; 52:23–53:14; 56:3–11; 57:11–24; 59:8–19; 74:13–15; 82:11–83:13; 106:7–12; 153:22–154:4; 163:21–25.

Statement No. 14: On June 3, 2009, the Office of the United States Trustee for the Southern District of New York appointed the Official Committee of Unsecured Creditors of Motors Liquidation Company f/k/a General Motors Corporation (the "**Committee**"). Bankr. Dkt. No. 356.

Response No. 14: Undisputed.

IV. GM and the Government Enter into the DIP Credit Agreement

Statement No. 15: On June 3, 2009, Old GM entered into the Debtor in Possession Credit Agreement (the "**DIP Credit Agreement**"). Bankr. Dkt. No. 2529-1; attached as Fisher Decl. Ex. B.

Response No. 15: Undisputed.

Statement No. 16: The DIP Credit Agreement provided that the proceeds of the DIP Financing shall be:

> used to finance working capital needs, capital expenditures, the payment of warranty claims and other general corporate purposes of the North American Group Members, including the payment of expenses associated with the administration of the Cases, in each case, subject to Section 6.21, and in the case of the Tranche C Term Loans, the Wind-Down; provided that, the North American Group Members may not prepay Indebtedness (other than the Canadian Facility in accordance with this Agreement) without the prior written consent of the Required Lenders.

Id. (DIP Credit Agreement at § 3.20).

Response No. 16: The Term Lenders respond that the DIP Credit Agreement speaks for itself and should be read in its entirety, but do not dispute that the quoted language appears in the DIP Credit Agreement. However, the Term Lenders dispute that the language

quoted from the DIP Credit Agreement standing alone accurately reflects the terms on which Old GM could use the proceeds of the DIP Financing. The Term Lenders further state that Section 3.20 of the DIP Credit Agreement is Old GM's representation and warranty about how it intended to use the proceeds of the DIP Financing. The Term Lenders further refer to Section 5.5 of the DIP Credit Agreement for Old GM's covenant regarding its use of the proceeds of the DIP Financing, including to use the funds consistent with the budget in Annex I of the DIP Credit Agreement, which required repayment of the Term Loan. The Term Lenders further state that the Final DIP Order[4] required Old GM to use the proceeds of the DIP Financing to repay the Term Loan, *see* Final DIP Or. ¶ 19(a) ("Upon entry of this Final Order, the Debtors . . . *shall* apply the proceeds of the DIP Credit Facility to repay amounts outstanding under the Prepetition Senior Facilities . . . within three business days of entry of this Final Order."), and further provided that the Final DIP Order controls over the DIP Credit Agreement, *id.* ¶ 22 ("In the event of any inconsistency between the terms and conditions of the DIP Credit Facility or the Interim Order and this Final Order, the terms and conditions of this Final Order shall control.").

Statement No. 17: The DIP Credit Agreement [redacted] Fisher Decl. Ex. A (Feldman Deposition Tr. at

[4] References to the "DIP Order" or the "Final DIP Order" in the Term Lenders' Responses and Counterstatement of Material Facts are to 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* [Bankr. Dkt. 2529]. References to the "Interim DIP Order" in the Term Lenders' Responses and Counterstatement of Material Facts are to the *Interim 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, (D) Granting Adequate Protection to Certain Pre-Petition Secured Parties and (E) Scheduling a Final Hearing* [Bankr. Dkt. 292].

104:21–105:6; 163:21–164:6); *see also id.* Ex. B (DIP Credit Agreement at § 3.20).

Response No. 17: The Term Lenders respond that the DIP Credit Agreement speaks for itself and should be read in its entirety. In addition, the Term Lenders dispute that [redacted] Section 5.5 of the DIP Credit Agreement required Old GM to use the DIP Proceeds "in a manner generally consistent with the Applicable Budget." The Applicable Budget at the time the Term Loan was repaid was the "Initial Budget" contained in Annex 1. *See* Final DIP Or., Ex. 1 (DIP Credit Agreement) § 1.1. Annex 1 contemplated that GM would make $5.224 billion of "Non-Operating Disbursements" during the week of July 13 through July 19. *Id.* at Annex 1. [redacted] *See* Celentino Decl. Ex. D (UST-AAT-035772), at UST-AAT-035790 [redacted] The Term Lenders further state that the Final DIP Order required Old GM to use the proceeds of the DIP Financing to repay the Term Loan, *see* Final DIP Or. ¶ 19(a) ("Upon entry of this Final Order, the Debtors . . . *shall* apply the proceeds of the DIP Credit Facility to repay amounts outstanding under the Prepetition Senior Facilities . . . within three business days of entry of this Final Order."), and further provided that the Final DIP Order controls over the DIP Credit Agreement, *id.* ¶ 22 ("In the event of any inconsistency between the terms and conditions of the DIP Credit Facility or the Interim Order and this Final Order, the terms and conditions of this Final Order shall control.").

Statement No. 18: The DIP Credit Agreement further provided that the borrowers (*i.e.*, the debtors) "are the ultimate beneficiaries of this Agreement and the Loans to be received hereunder." *Id.* Ex. B (DIP Credit Agreement at § 3.20(c)).

Response No. 18: The Term Lenders respond that the DIP Credit Agreement speaks for itself and should be read in its entirety, but do not dispute that the quoted language

appears in the DIP Credit Agreement. The Term Lenders further state that the Final DIP Order required Old GM to use the proceeds of the DIP Financing to repay the Term Loan, *see* Final DIP Or. ¶ 19(a) ("Upon entry of this Final Order, the Debtors . . . *shall* apply the proceeds of the DIP Credit Facility to repay amounts outstanding under the Prepetition Senior Facilities . . . within three business days of entry of this Final Order."), and provided that it controls over the DIP Credit Agreement, *id.* ¶ 22 ("In the event of any inconsistency between the terms and conditions of the DIP Credit Facility or the Interim Order and this Final Order, the terms and conditions of this Final Order shall control.").

Statement No. 19: In order to draw on the DIP Credit Agreement, Old GM submitted borrowing notices to the DIP Lenders. *E.g.*, Fisher Decl. Ex. D (Mistry Deposition Tr. at 221:22–222:15); Fisher Decl. Ex. H (Second Borrowing Notice, AAT00088657).

Response No. 19: Undisputed.

Statement No. 20: The borrowing notices indicated the amount requested, and certified that the proceeds would be [redacted] and instructed the DIP Lenders to wire the proceeds to Old GM's Account No. 910-200-2095 at JPMorgan. *E.g.*, Fisher Decl. Ex. H (Second Borrowing Notice at AAT00088658, 88662); Fisher Decl. Ex. D (Mistry Deposition Tr. at 220:16–221:18; 239:23–240:24).

Response No. 20: The Term Lenders respond that the borrowing notices speak for themselves and should be read in their entirety, but do not dispute that the quoted language appears in the cited borrowing notices. The Term Lenders do not dispute that Old GM was required to use the proceeds of the DIP Financing in accordance with the Applicable Budget, as required by Section 5.5 of the DIP Credit Agreement.

Statement No. 21: Old GM's Account No. 910-200-2095 was a concentration account. *Id.* (Mistry Deposition Tr. at 246:2–247:8).

Response No. 21: The Term Lenders do not dispute that Account No. 910-200-2095 was sometimes labeled a "concentration account." The Term Lenders further state that [redacted] *See* Celentino Decl. Ex. E (compilation of funds transfer transaction detail reports).[5]

Statement No. 22: Adil Mistry, who was then an assistant treasurer at Old GM, testified that the account was a "master account where funds are transferred from all other subsidiary accounts into the master account for consolidation purposes" and "could also be the main and significant bank account." *Id.* (Mistry Deposition Tr. at 223:9 – 224:24).

Response No. 22: The Term Lenders dispute that Mr. Mistry made these statements about Account No. 910-200-2095. Mr. Mistry testified that he did not recognize Account No. 910-200-2095 and "wouldn't be able to tell at this time" whether Account No. 910-200-2095 was a concentration account. Celentino Decl. Ex. B (Mistry Dep.), at 223:2–23.

Statement No. 23: As part of the 363 Sale, [redacted] Fisher Decl. Ex. A (Feldman Deposition Tr. at 52:14 – 53:14).

Response No. 23: The Term Lenders dispute that Treasury insisted upon a first-priority lien on all available collateral at New GM as part of the 363 Sale. Treasury insisted on a first-priority lien on all available collateral at Old GM in connection with the DIP Financing. Celentino Decl. Ex. A (Feldman Dep.), at 52:14–53:14.

Statement No. 24: [redacted] *d.* (Feldman Deposition Tr. at 42:9 – 43:2;.153:6 – 154:4); 407 B.R. 463, 480.

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[5] JPMCB-2-00012777 (October 30, 2008 Funds Transfer Transaction Detail Report); NEWGM000036242 (April 3, 2009 Funds Transfer Transaction Detail Report); NEWGM000036243 (May 27, 2009 Funds Transfer Transaction Detail Report); UST-AAT-2028918 (June 1, 2009 Old GM Borrowing Notice); NEWGM000036244 (June 30, 2009 Funds Transfer Transaction Detail Reports).

Response No. 24: Undisputed.

Statement No. 25: [redacted] isher Decl. Ex. A (Feldman Dep. Tr. at 52:14–53:14; 149:11–18).

Response No. 25: Undisputed.

Statement No. 26: [redacted] *Id.* Ex. A (Feldman Deposition Tr. at 82:11–24).

Response No. 26: Undisputed.

Statement No. 27: [redacted] Fisher Decl. Ex. A (Feldman Deposition Tr. at 94:20–95:24).

Response No. 27: The Term Lenders dispute that [redacted]

Celentino Decl. Ex. A (Feldman Dep.), at 54:17–25; 82:15–24; 94:20–95:24.

Statement No. 28: [redacted] *Id.* Ex. A (Feldman Deposition Tr. at 94:20 – 95:24); *Id.* Ex. C. (Worth Deposition Tr. at 89:18 – 90:2).

Response No. 28: The Term Lenders respond that the Avoidance Trust's references to "GM" are ambiguous as to whether they refer to Old GM or New GM. The Term Lenders do not dispute that [redacted]

Statement No. 29: [redacted] *Id.* Ex. A (Feldman Deposition Tr. at 102:13–103:11); *Id.* Ex. C (Worth Deposition Tr. at 219:4–16).

Response No. 29: The Term Lenders do not dispute that [redacted] The Term Lenders do dispute that [redacted] *See, e.g.*, Celentino Decl. Ex. F (UST-AAT-020042), at UST-AAT-020044. [redacted] Celentino Decl. Ex. A (Feldman Dep.), at 95:25–96:9. In their depositions, Mr. Feldman and Mr. Worth [redacted] *See* Celentino Decl. Ex. A (Feldman Dep.), at 102:13–103:11; Celentino Decl. Ex. C (Worth Dep.), at 219:4–16.

Statement No. 30: [redacted] *Id.* Ex. A (Feldman Deposition Tr. at 168:5 – 169:7; 170:13 – 171:7).

Response No. 30: The Term Lenders dispute that [redacted] *See* Final DIP Or., Ex. 1 (DIP Credit Agreement) § 5.5 & Annex 1; Interim DIP Or. ¶ 18(a); Final

DIP Or. ¶ 19(a). [redacted]

[redacted] Final DIP Or. ¶ 22. The Term Lenders also dispute that [redacted]

[redacted] Celentino Decl. Ex. A (Feldman Dep.), at 168:5–169:7. [redacted]

[redacted] *Id.* at 170:5–12. Moreover, the DIP Credit Agreement and the DIP Orders did impose conditions on how Old GM used the proceeds of the DIP Financing.

Statement No. 31: [redacted] *Id.* (Feldman Deposition Tr. at 104:21–05:6; 163:21–164:19); *id.* Ex. C (Worth Deposition Tr. at 93:4-12; 96:21–97:3).

Response No. 31: [redacted]

V. Old GM Provisionally Pays Off the Term Loan Subject to Potential Clawback in this Avoidance Action

Statement No. 32: After Old GM filed its bankruptcy petition, JPMorgan Chase Bank, N.A. ("**JPMorgan**"), the administrative agent for the Term Loan, informed the Committee that an erroneous UCC-3 termination statement relating to the Term Loan's main lien (the "**2008 Termination Statement**"), had been filed in 2008, calling into question whether the main lien remained perfected. *Official Comm. of Unsecured Creditors of Motors Liquidation Co. v. JPMorgan Chase Bank, N.A. (In re Motors Liquidation Co.)*, 777 F.3d 100, 102 (2d Cir. 2015).

Response No. 32: The Term Lenders dispute the Avoidance Trust's characterization of the referenced UCC-1 filed with the Delaware Secretary of State as "the Term Loan's main lien." The Term Lenders do not dispute the remainder of Statement No. 32.

Statement No. 33: On June 25, 2009, the Court entered 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**"). Bankr. Dkt. No. 2529.

Response No. 33: Undisputed.

Statement No. 34: Among other things, the DIP Order authorized repayment in full of the Term Loan. DIP Order at ¶ 19(a).

Response No. 34: The Term Lenders respond that the DIP Order not only authorized repayment in full of the Term Loan but also obligated Old GM to repay the Term Loan. *See* Final DIP Or. ¶ 19(a).

Statement No. 35: The DIP Order expressly preserved the Committee's right to both investigate and bring actions with respect to the perfection of the Term Lenders' first priority liens. *Id.* at ¶ 19(d).

Response No. 35: The Term Lenders respond that the DIP Order speaks for itself and should be read in its entirety.

Statement No. 36: The DIP Order "provided for the payment of Old GM's prepetition secured debt with proceeds from the DIP Financing, subject to recapture, if necessary, if it later turned out that any of the prepetition secured lenders did not in fact have duly perfected and existing liens." *See Official Comm. of Unsecured Creditors of Motors Liquidation Co. v. U.S. Dep't. of Treasury et al*., 460 B.R. 603, 612 (Bankr. S.D.N.Y. 2011) (Gerber, J.) (citing DIP Order ¶ 19(d)), *vacated and remanded on other grounds* 475 B.R. 347 (S.D.N.Y. 2012).

Response No. 36: The Term Lenders respond that the DIP Order speaks for itself and should be read in its entirety, and dispute that the quoted language appears in the DIP Order. The Term Lenders do not dispute that the quoted language appears in *Official Comm. of*

Unsecured Creditors of Motors Liquidation Co. v. *U.S. Dep't. of Treasury*, 460 B.R. 603, 612 (Bankr. S.D.N.Y. 2011) (Gerber, J.), *vacated and remanded*, 475 B.R. 347 (S.D.N.Y. 2012).

Statement No. 37: This Court previously recognized that the AAT's claims "fall squarely within the carve-out of the DIP Order" and that the DIP Order only provided "provisional authorization" of the post-petition transfer to JPMorgan for the benefit of the Term Lenders, subject to the AAT's challenge rights which, if successful, would render the transfer "unauthorized because the transferees would have been unsecured creditors." *In re Motors Liquidation Co*., 552 B.R. 253, 276-277 (Bankr. S.D.N.Y. 2016) (Glenn, J.)).

Response No. 37: The Term Lenders respond that the Court's opinion speaks for itself and should be read in its entirety, but do not dispute that the quoted language appears in the opinion.

Statement No. 38: As of June 30, 2009, when the Term Loan was paid by the estate, [redacted] Fisher Decl. Ex. G (First Borrowing Notice dated June 1, 2009); Ex. H (Second Borrowing Notice dated June 19, 2009).

Response No. 38: The Term Lenders do not dispute that [redacted]

Statement No. 39: On June 30, 2009, Old GM paid $1,481,656,507.70 of proceeds drawn under the DIP Credit Agreement to the Term Lenders in full satisfaction of all claims arising under the Term Loan Agreement. Adv. Pro. Dkt. No. 1015 (Op.) at 12; Bankr. Dkt. No. 2529; *see also* Fisher Decl. Ex. E (Payoff Instructions Letter from JPMorgan to GM dated June 30, 2009, JPMCB-1-00000287)).

Response No. 39: Undisputed.

Statement No. 40: The payments by Old GM to JPMorgan were made by a series of wire transfers from Old GM's general concentration Account No. 910-200-2095. Fisher Decl. Ex. F (Funds Transfer Initiation Transaction Detail Report, NEWGM000036245-48); *Id.* Ex. D (Mistry Deposition Tr. at 235:20–239:13).

Response No. 40: The Term Lenders do not dispute that the payments by Old GM to JPMorgan were made by a series of wire transfers from Account No. 910-200-2095.

Statement No. 41: A month after repayment of the Term Loan and following its investigation, the Committee filed its complaint in this action (the "Avoidance Action"). Adv. Pro. Dkt. No. 1.

Response No. 41: The Term Lenders do not dispute that the Avoidance Trust filed its complaint in the Avoidance Action on July 31, 2009.

VI. Transfer of Standing to the Trust

Statement No. 42: On March 29, 2011, the Bankruptcy Court entered an order (the "**Confirmation Order**") confirming the Plan. Bankr. Dkt. No. 9941.

Response No. 42: Undisputed.

Statement No. 43: The effective date of the Plan was March 31, 2011. The Plan provided for, among other things, the creation of the Avoidance Action Trust. Bankr. Dkt. No. 9836 at § 6.5 (Plan).

Response No. 43: Undisputed.

Statement No. 44: Thereafter, the Committee was dissolved, and on December 15, 2011, while the cross-motions for summary judgment relating to Phase I of this case were pending, prosecution of this action was transferred to the Avoidance Action Trust. The Trust's asset is this action. *See* Bankr. Dkt. No. 9836 at § 6.5 (Plan); Ex. G (Avoidance Action Trust Agreement).

Response No. 44: The Term Lenders dispute the characterization of any part of the Avoidance Action as "Phase I," but otherwise do not dispute Statement No. 44.

Statement No. 45: Following the Second Circuit's decision in Phase I in favor of the Avoidance Action Trust, Plaintiff filed an Amended Complaint on May 20, 2015. Adv. Pro. Dkt. No. 91.

Response No. 45: The Term Lenders dispute the characterization of any part of the Avoidance Action as "Phase I," but otherwise do not dispute Statement No. 45.

VII. The Unsecured Creditors and DIP Lenders Are Potential Beneficiaries of the Trust

Statement No. 46: Prior to and following entry of the Confirmation Order, the unsecured creditors and DIP Lenders both maintained that they were entitled to the proceeds of the

Avoidance Action, and each disputed the other's entitlement. That dispute was resolved when on July 14, 2016, the DIP Lenders and the Avoidance Action Trust entered into the Stipulation and Agreed Order settling the dispute, which provided that the DIP Lenders will be entitled to receive 30% of any net proceeds resulting from the Avoidance Action and that the unsecured creditors will be entitled to receive 70% of those net proceeds, with each distribution to be made at or about the same time and on a *pari passu* basis. Bankr., Dkt. No. 13688, Ex. A (Stipulation and Agreed Order).

Response No. 46: The Term Lenders do not dispute that, throughout the chapter 11 case, the Creditors Committee and the Avoidance Trust disputed that the DIP Lenders are entitled to the proceeds of the Avoidance Action. The Term Lenders do not dispute that, on July 14, 2016, the DIP Lenders and the Avoidance Trust entered into a Stipulation and Agreed Order which provided that the DIP Lenders would provide up to $15 million in interest-free financing to the Avoidance Trust, will be entitled to receive 30% of any net proceeds resulting from the Avoidance Action, and that the unsecured creditors will be entitled to receive 70% of those net proceeds. Bankr. Dkt. 13688, Ex. A (Stipulation and Agreed Order), at ¶¶ 2–3.

Statement No. 47: On August 30, 2016, this Court approved the settlement. Bankr. Dkt. No. 13748.

Response No. 47: Undisputed.

TERM LENDERS' COUNTERSTATEMENT OF MATERIAL FACTS

A. The DIP Lenders Extended an Incremental $1.5 Billion of Credit to Ensure Repayment of the Term Loan

48. [redacted] Celentino Decl. Ex. A (Feldman Dep.), at 42:9–43:2;153:6–154:4; *In re Gen. Motors Corp.*, 407 B.R. 463, 480 (Bankr. S.D.N.Y. 2009); *see also* Avoidance Trust's Rule 7056-1 Statement ¶ 24.

49. Leading up to the Petition Date, [redacted] Celentino Decl. Ex. A (Feldman Dep.), at 41:16–22; 42:20–43:2; 52:23–53:14; 56:3–11; 57:11–24; 59:8–19; 74:13–15; 82:11–83:13; 106:7–12; 153:22–154:4; 163:21–25.

B. The Pre-Bankruptcy DIP Sizing Process Consistently Factored in Repayment of the Term Loan

50. [redacted] *See* Celentino Decl. Ex. G (compilation of DIP sizing analyses).[6]

51. [redacted] Celentino Decl. Ex. C (Worth Dep.), at 86:2–87:22.

[6] UST-AAT-029677 (May 9, 2009 DIP Sizing Analysis) (factoring into Chapter 11 funding requirements the repayment of the Term Loan); UST-AAT-028891 (May 12, 2009 DIP Sizing Analysis) (reflecting full repayment of the Term Loan in July 2009); UST-AAT-029751 (May 19, 2009 DIP Sizing Analysis) (same); UST-AAT-029500 (May 22, 2009 DIP Sizing Analysis) (same); UST-AAT-025892 (May 24, 2009 DIP Sizing Analysis) (same); UST-AAT-029785 (May 25, 2009 DIP Sizing Analysis) (same); UST-AAT-02989 (May 27, 2009 List of GM Cash Funding Needs) (showing $1.5 billion for Term Loan collateral adjustment/acceleration); UST-AAT-029615 (June 4, 2009 Nets Disbursements Covenants Calculation) (reflecting full repayment of the Term Loan in mid-July 2009); EVR-E-000209927 (June 10, 2009 13-Week Forecast) (assuming $1.5 billion Term Loan repayment made in the week starting July 13, 2009); UST-AAT-025855 (June 17, 2009 Section 363 Sale Timeline) (indicating June 26, 2009 as the deadline for paydown of the Term Loan).

52. [redacted] Celentino Decl. Ex. A (Feldman Dep.), at 96:3–6.

53. [redacted] Celentino Decl. Ex. B (Mistry Dep.), at 266:22–267:6.

54. [redacted] Celentino Decl. Ex. A (Feldman Dep.), at 96:8–9.

55. [redacted] Celentino Decl. Ex. A (Feldman Dep.), at 102:13–24.

56. [redacted] *See* Celentino Decl. Ex. G (compilation of DIP sizing analyses); Celentino Decl. Ex. H (UST-AAT-029783) (April 26, 2009 GM Cash Funding Needs Spreadsheet created by the Auto Team); Celentino Decl. Ex. A (Feldman Dep.), at 102:2–24; 105:16–20.

C. The DIP Credit Agreement Between Old GM and the DIP Lenders Required Old GM to Repay the Term Loan as a Condition of the DIP Financing

57. [redacted] Celentino Decl. Ex. I (NEWGM000133417), at NEWGM000133421.

58. Section 5.5 of the DIP Credit Agreement provides that "[t]he Loan Parties [*i.e.*, Old GM] shall use the Loan proceeds only for the purposes set forth in Section 3.20 and *in a manner generally consistent with the Applicable Budget*." Final DIP Or., Ex. 1 (DIP Credit Agreement) § 5.5 (emphasis added).

59. The "Applicable Budget" referred to in Section 5.5 of the DIP Credit Agreement is the "Initial Budget" found in Annex 1 of the DIP Credit Agreement. *Id.* § 1.1.

60. The Initial Budget in Annex 1 of the DIP Credit Agreement stated that GM would make $5.224 billion of "Non-Operating Disbursements" during the week of July 13 through July 19, 2009. *Id.* at Annex 1.

61. [redacted] *See* Celentino Decl. Ex. D (UST-AAT-035772), at UST-AAT-035790 [redacted] *Id.*

62. Section 6.18 of the DIP Credit Agreement required Old GM to obtain the DIP Lenders' approval for any modifications to the Applicable Budget. Final DIP Or., Ex. 1 (DIP Credit Agreement) § 6.18.

63. If Old GM failed to repay the Term Loan with the DIP Proceeds, its use of funds would not have been "generally consistent" with the Initial Budget and would therefore have required the DIP Lenders' prior consent. *Id.* §§ 5.5, 6.18.

64. [redacted] *See* Celentino Decl. Ex. A (Feldman

Dep.), at 85:15–86:15; 106:1–6; 157:23–158:2; Celentino Decl. Ex. J (UST-AAT-030094)

[redacted]

65. Treasury was not opposed to restricting GM's use of DIP Proceeds. [redacted] *See* Celentino Decl. Ex. A (Feldman Dep.), at 168:5–169:7.

D. The Interim and Final DIP Orders Required Old GM to Repay the Term Loan as a Condition of the DIP Financing

66. The DIP Motion requested authority to use a portion of the DIP Financing to repay the Term Loan, in light of Treasury's "agree[ment] to provide sufficient postpetition financing to repay . . . the Term Loan in full." DIP Mot. ¶¶ 75–78; *see also* Bankr. Dkt. 374 at 40:17–22 (June 1, 2009 Hr'g Tr.) ("[T]here is outstanding today secured debt of almost 6 billion dollars . . . . As part of this transaction, the U.S. Treasury will, in effect, refinance that debt and take over that debt. And that will be part of the 33.3 billion dollars of debtor-in-possession financing."); *see also* Avoidance Trust's Rule 7056-1 Statement ¶ 13.

67. The Interim DIP Order provided that "[o]n the date of entry of the Final Order, the Debtors shall be authorized to apply *and shall, within one business day thereof, apply* the proceeds of the DIP Credit Facility to repay amounts outstanding under the Prepetition Term and Revolving Facilities as of the repayment date . . . ." Interim DIP Or. ¶ 18(a) (emphasis added).

68. The Final DIP Order provided that "[u]pon entry of this Final Order, the Debtors shall be authorized to apply and *shall apply* the proceeds of the DIP Credit Facility to repay

amounts outstanding under the Prepetition Senior Facilities . . . within three business days of entry of this Final Order." Final DIP Or. ¶ 19(a) (emphasis added).

69. [redacted]

70. The Final DIP Order provided that, "[i]n the event of any inconsistency between the terms and conditions of the DIP Credit Facility or the Interim Order and this Final Order, the terms and conditions of this Final Order shall control." Final DIP Or. ¶ 22.

71. The Final DIP Order authorized the Committee to investigate the perfection of first priority liens and, if appropriate, bring an action to challenge the perfection of those liens by July 31, 2009. Final DIP Or. ¶ 19(d). The Final DIP Order did not waive any defenses to such an action that might be asserted by the Term Lenders or other secured parties. *See id.*

E. Old GM Lacked Dispositive Control Over the Portion of the DIP Proceeds Earmarked for the Term Loan

72. The DIP Proceeds were deposited into the same account from which Old GM remitted to JPMorgan Term Loan payments both before and after the Petition Date. *See* Celentino Decl. Ex. E (compilation of funds transfer transaction detail reports).

73. Old GM repaid the Term Loan within three business days of entry of the Final DIP Order, as required by the Final DIP Order. *See* Final DIP Or. (dated Thursday, June 25, 2009); Celentino Decl. Ex. M (JPMCB-1-00000287) (Payoff Instructions Letter from JPMorgan to Old GM dated Tuesday, June 30, 2009).

74. [redacted] Celentino Decl. Ex. N (NEWGM000142191), at NEWGM000142198 [redacted]; Celentino Decl. Ex. O (NEWGM000137081) [redacted]; Celentino Decl. Ex. P (UST-AAT-030224) [redacted]

75. [redacted] Celentino Decl. Ex. Q (UST-AAT-019708), at UST-AAT-019713 [redacted] Celentino Decl. Ex. A (Feldman Dep.), at 104:21–105:3; 105:21–25.

F. Even if the Term Loan Was Unsecured in Whole or in Part, Repayment of the Term Loan with a Portion of the Secured DIP Financing Did Not Diminish GM's Estate

76. Old GM's unsecured creditors received substantial consideration as part of the 363 Sale. Specifically, the unsecured creditors received 10% of New GM's common stock along with warrants entitling them to purchase up to 15% more of New GM's common stock (the "New GM Equity"). Celentino Decl. Ex. R (PW00000113), at PW00000117 (Summary Term Sheet); Bankr. Dkt. 425, at 96, 106 (May 31, 2009 Declaration of S. Worth attaching Evercore fairness opinion). The value of the New GM Equity was estimated to be between $7.4 and $9.8 billion. Bankr. Dkt. 425, at 106.

77. [redacted] Celentino Decl. Ex. A (Feldman Dep.), at 115:12–15 [redacted] *id.* at 119:2–5 [redacted]; *id.* at 126:3–8 [redacted]

78. Treasury simply decided on an amount of New GM Equity to allocate to Old GM's unsecured creditors [redacted] *See* Celentino Decl. Ex. A (Feldman Dep.), at 120:9–15 [redacted]

79. The DIP Loan was nonrecourse to the New GM Equity to be distributed to the unsecured creditors. Celentino Decl. Ex. R (PW00000113), at PW00000117 (Summary Term Sheet); Bankr. Dkt. 425, at 96, 106 (May 31, 2009 Declaration of S. Worth attaching Evercore fairness opinion); DIP Or. ¶ 6 ("[N]othing in this Final Order, the Interim Order or the DIP Credit Facility shall in any way be construed to permit or authorize the DIP Lenders to seek recourse against the New GM Equity Interests at any time.").

80. Over $11.2 billion of the amounts Treasury loaned to Old GM through TARP and the DIP Loan was not repaid. *See* Office of the Special Inspector General for the Troubled Asset Relief Program, *SIGTARP Quarterly Report to Congress* 109 n.i (July 27, 2016), https://www.sigtarp.gov/Quarterly%20Reports/July_27_2016_Report_To_Congress.pdf. Unsecured creditors would not have kept their New GM Equity, therefore, but for Treasury's effective subordination of its DIP claims.

81. [redacted] *See* Celentino Decl. Ex. A (Feldman Dep.), at 52:1–53:1.

82. If Old GM had not used $1.5 billion of the DIP Proceeds to repay the Term Loan, the Term Lenders would have objected, and the 363 Sale would not have occurred. *See* Celentino Decl. Ex. A (Feldman Dep.), at 85:15–86:15; 106:1–6; 157:23–158:2; Celentino Decl. Ex. H (UST-AAT-029783) [redacted]; Celentino Decl. Ex. S (NEWGM000137092) [redacted]

[redacted]

83. Treasury's willingness to provide DIP Financing to Old GM was contingent on consummation of the 363 Sale. Bankr. Dkt. 425, at ¶ 24 (May 31, 2009 Declaration of S. Worth) (Treasury would provide DIP Financing "only in connection with GM's pursuit of the proposed 363 Sale" (emphasis in original)). [redacted] *See* Celentino Decl. Ex. A (Feldman Dep.), at 56:3–11; 53:7–14; 82:20–24; *cf.* Celentino Decl. Ex. T (UST-AAT-019670), at UST-AAT-019677 [redacted]

84. Thus, the amount necessary to repay the Term Loan was included in determining the size of the DIP Financing. *See* Celentino Decl. Ex. A (Feldman Dep.), at 102:13–24.

85. [redacted] *See* Celentino Decl. Ex. A (Feldman Dep.), at 95:25–96:9 [redacted] *id.* at 127:7–15 [redacted]

86. [redacted] Celentino Decl. Ex. A (Feldman Dep.), at 127:7–15.

87. Whatever might have eventuated thereafter if the favorable 363 Sale had not closed, the New GM Equity allocated to the unsecured creditors by the DIP Lenders would almost certainly have been lost, and the unsecured creditors would have recovered less. *See Motors Liquidation Co. Avoidance Action Tr.* v. *JPMorgan Chase Bank, N.A. (In re Motors Liquidation Co.)*, 576 B.R. 325, 443 (Bankr. S.D.N.Y. 2017) (Glenn, J.) (describing how to correct for the "windfall" to creditors caused by the U.S. Government's "Public Policy Subsidy"); Bankr. Dkt. 435, at 7 (May 31, 2009 Declaration of A. Koch attaching AlixPartners liquidation analysis).

88. If the Term Loan had been treated as unsecured, the Term Lenders would have received a *pro rata* share of the New GM Equity. The unsecured creditors therefore benefitted from the Term Loan being treated as fully secured because their recovery was not diluted by the Term Lenders. Celentino Decl. Ex. R (PW00000113), at PW00000117 (Summary Term Sheet); Bankr. Dkt. 425, at 96, 106 (May 31, 2009 Declaration of S. Worth attaching Evercore fairness opinion).

Dated: November 30, 2018
New York, New York

Respectfully submitted,

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re: MOTORS LIQUIDATION COMPANY, *et al.*, Debtors.	Chapter 11 Case Case No. 09-50026 (MG) (Jointly Administered)
MOTORS LIQUIDATION COMPANY AVOIDANCE ACTION TRUST, by and through the Wilmington Trust Company, solely in its capacity as Trust Administrator and Trustee, Plaintiff, vs. JPMORGAN CHASE BANK, N.A., individually and as Administrative Agent for Various Lenders Party to the Term Loan Agreement described herein, *et al.*, Defendants.	Adversary Proceeding Case No. 09-00504 (MG)

DECLARATION OF JOSEPH C. CELENTINO REGARDING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT DISMISSING DEFENDANTS' EARMARKING DEFENSE

I, Joseph C. Celentino, declare as follows:

1. I am an associate at the law firm of Wachtell, Lipton, Rosen & Katz, attorneys for Defendant JPMorgan Chase Bank, N.A. I respectfully submit this declaration in connection with the *Term Lenders' Opposition to AAT's Motion for Partial Summary Judgment Regarding Earmarking Defense*.

2. I declare under penalty of perjury that submitted herewith are true and

correct copies of the following:

Exhibit	**Description**
A.	Excerpts from the transcript of the deposition of Matthew Feldman that was taken on November 3, 2016
B.	Excerpts from the transcript of the deposition of Adil Mistry that was taken on October 24, 2018
C.	Excerpts from the transcript of the deposition of Stephen Worth that was taken on September 27, 2016
D.	[UST-AAT-035772] [redacted]
E.	Pre-petition transaction detail reports of funds transfers: JPMCB-2-00012777 (October 30, 2008), NEWGM000036242 (April 1, 2009), NEWGM000036243 (May 19, 2009), UST-AAT-028918 (June 1, 2009 Old GM Borrowing Notice), NEWGM000036244 (June 30, 2009)
F.	[UST-AAT-020042] [redacted]

Exhibit	Description
G.	Compilation of DIP sizing analyses containing the following documents from discovery: UST-AAT-029677 (May 9, 2009 DIP Sizing Analysis); UST-AAT-028891 (May 12, 2009 DIP Sizing Analysis); UST-AAT-029751 (May 19, 2009 DIP Sizing Analysis); UST-AAT-029500 (May 22, 2009 DIP Sizing Analysis); UST-AAT-025892 (May 24, 2009 DIP Sizing Analysis); UST-AAT-029785 (May 25, 2009 DIP Sizing Analysis); UST-AAT-029819 (May 27, 2009 List of GM Cash Funding Needs); UST-AAT-029615 (June 4, 2009 Nets Disbursements Covenants Calculation); EVR-E-000209927 (June 10, 2009 13-Week Forecast); UST-AAT-025855 (June 17, 2009 Section 363 Sale Timeline)
H.	[UST-AAT-029783] [redacted]
I.	[NEWGM000133417] Draft Term Sheet dated April 21, 2009, with cover email
J.	[UST-AAT-030094] June 20, 2009 email correspondence [redacted]
K.	[NEWGM000135434] May 28, 2009 email attaching [redacted]
L.	[NEWGM000135466] May 31, 2009 email [redacted]

Exhibit	Description
M.	[JPMCB-1-00000287] Payoff Instructions Letter from JPMorgan to Old GM dated Monday, June 30, 2009
N.	[NEWGM000142191] Email chain from June 19–21, 2009 [redacted]
O.	[NEWGM000137081] Email correspondence dated June 20, 2009 [redacted]
P.	[UST-AAT-030224] Email correspondence dated June 26, 2009 [redacted]
Q.	[UST-AAT-019708] [redacted]
R.	[PW00000113] [redacted]
S.	[NEWGM000137092] Email correspondence dated June 20, 2009 [redacted]
T.	[UST-AAT-019670] [redacted]

Dated: November 30, 2018
New York, New York

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Exhibit A

FILED UNDER SEAL

Unredacted copies of these material, marked as "CONFIDENTIAL" and "FILED UNDER SEAL" for the Court's consideration in connection with the Motion to Seal will be provided to the Court and any party to this Adversary Proceeding.

Exhibit B

FILED UNDER SEAL

Unredacted copies of these material, marked as "CONFIDENTIAL" and "FILED UNDER SEAL" for the Court's consideration in connection with the Motion to Seal will be provided to the Court and any party to this Adversary Proceeding.

Exhibit C

FILED UNDER SEAL

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Exhibit D

FILED UNDER SEAL

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Exhibit E

FILED UNDER SEAL

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Exhibit F

FILED UNDER SEAL

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Exhibit G

FILED UNDER SEAL

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Exhibit H

FILED UNDER SEAL

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Exhibit I

FILED UNDER SEAL

Unredacted copies of these material, marked as "CONFIDENTIAL" and "FILED UNDER SEAL" for the Court's consideration in connection with the Motion to Seal will be provided to the Court and any party to this Adversary Proceeding.

Exhibit J

FILED UNDER SEAL

Unredacted copies of these material, marked as "CONFIDENTIAL" and "FILED UNDER SEAL" for the Court's consideration in connection with the Motion to Seal will be provided to the Court and any party to this Adversary Proceeding.

Exhibit K

FILED UNDER SEAL

Unredacted copies of these material, marked as "CONFIDENTIAL" and "FILED UNDER SEAL" for the Court's consideration in connection with the Motion to Seal will be provided to the Court and any party to this Adversary Proceeding.

Exhibit L

FILED UNDER SEAL

Unredacted copies of these material, marked as "CONFIDENTIAL" and "FILED UNDER SEAL" for the Court's consideration in connection with the Motion to Seal will be provided to the Court and any party to this Adversary Proceeding.

Exhibit M

FILED UNDER SEAL

Unredacted copies of these material, marked as "CONFIDENTIAL" and "FILED UNDER SEAL" for the Court's consideration in connection with the Motion to Seal will be provided to the Court and any party to this Adversary Proceeding.

Exhibit N

FILED UNDER SEAL

Unredacted copies of these material, marked as "CONFIDENTIAL" and "FILED UNDER SEAL" for the Court's consideration in connection with the Motion to Seal will be provided to the Court and any party to this Adversary Proceeding.

Exhibit O

FILED UNDER SEAL

Unredacted copies of these material, marked as "CONFIDENTIAL" and "FILED UNDER SEAL" for the Court's consideration in connection with the Motion to Seal will be provided to the Court and any party to this Adversary Proceeding.

Exhibit P

FILED UNDER SEAL

Unredacted copies of these material, marked as "CONFIDENTIAL" and "FILED UNDER SEAL" for the Court's consideration in connection with the Motion to Seal will be provided to the Court and any party to this Adversary Proceeding.

Exhibit Q

FILED UNDER SEAL

Unredacted copies of these material, marked as "CONFIDENTIAL" and "FILED UNDER SEAL" for the Court's consideration in connection with the Motion to Seal will be provided to the Court and any party to this Adversary Proceeding.

Exhibit R

FILED UNDER SEAL

Unredacted copies of these material, marked as "CONFIDENTIAL" and "FILED UNDER SEAL" for the Court's consideration in connection with the Motion to Seal will be provided to the Court and any party to this Adversary Proceeding.

Exhibit S

FILED UNDER SEAL

Unredacted copies of these material, marked as "CONFIDENTIAL" and "FILED UNDER SEAL" for the Court's consideration in connection with the Motion to Seal will be provided to the Court and any party to this Adversary Proceeding.

Exhibit T

FILED UNDER SEAL

Unredacted copies of these material, marked as "CONFIDENTIAL" and "FILED UNDER SEAL" for the Court's consideration in connection with the Motion to Seal will be provided to the Court and any party to this Adversary Proceeding.

Appendix E

Earmarking Opposition Brief (Unredacted)

FILED UNDER SEAL

Unredacted copies of these materials, marked "CONFIDENTIAL" and "FILED UNDER SEAL" for the Court's consideration in connection with the Motion to Seal will be provided to the Court and any party to this Adversary Proceeding.

Appendix F

Term Lenders' Counterstatement (Unredacted)

FILED UNDER SEAL

Unredacted copies of these materials, marked "CONFIDENTIAL" and "FILED UNDER SEAL" for the Court's consideration in connection with the Motion to Seal will be provided to the Court and any party to this Adversary Proceeding.

Appendix G

Celentino Declaration and Exhibits (Unredacted)

FILED UNDER SEAL

Unredacted copies of these materials, marked "CONFIDENTIAL" and "FILED UNDER SEAL" for the Court's consideration in connection with the Motion to Seal will be provided to the Court and any party to this Adversary Proceeding.