

BINDER & SCHWARTZ LLP

Eric B. Fisher
Neil S. Binder
Lindsay A. Bush
Lauren K. Handelsman
366 Madison Avenue, 6th Floor
New York, New York 10017
Telephone: (212) 510-7008
Facsimile: (212) 510-7299

*Attorneys for the Motors Liquidation
Company Avoidance Action Trust*

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

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In re:

MOTORS LIQUIDATION COMPANY, f/k/a
GENERAL MOTORS CORPORATION, *et al.*,

Chapter 11
Case No. 09-50026 (MG)
(Jointly Administered)

Debtors.

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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,

against

JPMORGAN CHASE BANK, N.A., *et al.*,

Defendants.

-----X

**PLAINTIFF'S MOTION SEEKING TO FILE UNDER SEAL
PLAINTIFF'S RESPONSE TO THE TERM LENDERS' COUNTERSTATEMENT OF
FACTS REGARDING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY
JUDGMENT DISMISSING DEFENDANTS' 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. No. 489 (the "**Protective Order**"), and as permitted by Judge Glenn's Chambers' Rules for Sealing Orders, Plaintiff Motors Liquidation Company Avoidance Action Trust ("**Plaintiff**") files this motion (the "**Motion to Seal**") for an order granting it leave to file under seal portions of Plaintiff's Response to the Term Lenders' Counterstatement of Facts Regarding Plaintiff's Motion for Partial Summary Judgment Dismissing Defendants' Earmarking Defense ("**Plaintiff's Response to Defendants' Counterstatement**"). In support of the Motion to Seal, Plaintiff respectfully states as follows:

BACKGROUND

1. On April 18, 2016, the Court approved the Protective Order in the above-captioned adversary proceeding. Adv. Pro. Dkt. No. 489.
2. Paragraph 12 of the Protective Order entered by the Court provides:

12. 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, Plaintiff filed its motion for partial summary judgment seeking dismissal of Defendants' earmarking defense (the "**Motion for Partial Summary Judgment**"). Adv. Pro. Dkt. No. 1128.
4. On November 30, 2018, JPMorgan Chase Bank N.A. and other signatory defendants (the "**Defendants**") filed their opposition to the Motion for Partial Summary Judgment and filed a motion to seal ("**Defendants' Motion to Seal**"), Adv. Pro. Dkt. No. 1143, for an order granting leave to file under seal, *inter alia*, (i) portions of the Term Lenders' counterstatement of facts regarding the Motion for Partial Summary Judgment and (ii) related

materials relied on in connection therewith (together, the “**Defendants’ Counterstatement Materials**”) on the basis that they contained discussion of confidential documents and information produced in this matter that have been marked “Confidential” pursuant to the terms of the Protective Order.

BASIS FOR RELIEF REQUESTED

5. Portions of Plaintiff’s Response to Defendants’ Counterstatement contain portions of Defendants’ Counterstatement Materials that were the subject of Defendants’ Motion to Seal and include discussion of confidential documents and information produced in this matter that have been marked “Confidential” pursuant to the terms of the Protective Order.

6. As of the date of the filing of the instant Motion to Seal, no order has yet been entered with respect to Defendants’ Motion to Seal.

7. Therefore, in accordance with the terms of the Protective Order, Plaintiff requests the Court’s permission to file under seal Plaintiff’s Response to Defendants’ Counterstatement.

8. An unredacted version of Plaintiff’s Response to Defendants’ Counterstatement will be shared with the Court in hard copy and with the parties to the above-captioned action by electronic mail.

9. Enclosed herewith as Appendix B is a redacted copy of Plaintiff’s Response to Defendants’ Counterstatement for filing on the Court’s electronic docket.

10. Enclosed herewith as Appendix C is an unredacted copy of Plaintiff’s Response to Defendants’ Counterstatement 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 in the above-captioned action.

NO PRIOR REQUEST

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

WHEREFORE, Plaintiff respectfully requests 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: New York, New York.
December 14, 2018

Respectfully submitted,

BINDER & SCHWARTZ LLP

/s/ Eric B. Fisher

Eric B. Fisher

Neil S. Binder

Lindsay A. Bush

Lauren K. Handelsman

Michael M. Hodgson

366 Madison Avenue, 6th Floor

New York, New York 10017

Tel: (212) 510-7008

Facsimile: (212) 510-7299

*Attorneys for the Motors Liquidation Company
Avoidance Action Trust*

APPENDIX A

Proposed Order

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

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Defendants.
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**[PROPOSED] ORDER AUTHORIZING PLAINTIFF TO FILE UNDER
SEAL PLAINTIFF'S RESPONSE TO DEFENDANTS' COUNTERSTATEMENT**

UPON CONSIDERATION of the December 14, 2018 motion (the "**Motion to Seal**") of Plaintiff Motors Liquidation Company Avoidance Action Trust ("**Plaintiff**") to file under seal Plaintiff's Response to the Term Lenders' Counterstatement of Facts Regarding Plaintiff's Motion for Partial Summary Judgment Dismissing Defendants' Earmarking Defense ("**Plaintiff's Response to Defendants' Counterstatement**"); and

WHEREAS it appears that 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 it appears that the Motion to Seal 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 Plaintiff's Response to Defendants' Counterstatement contains discussion of documents and 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") (ECF Doc. # 489) in the above-captioned action, and Plaintiff's Response to Defendants' Counterstatement is 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 to Seal 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 Plaintiff is authorized to file the Plaintiff's Response to Defendants' Counterstatement under seal and the United States Bankruptcy Clerk for the Southern District of New York is directed to accept for filing and seal Plaintiff's Response to Defendants' Counterstatement; and it is further
3. ORDERED that any other party to the above-captioned adversary proceeding may obtain an unredacted copy of the Exhibits on a CONFIDENTIAL basis under the terms of the Protective Order by contacting Plaintiff's counsel and requesting such a copy; and it is further
4. ORDERED that, upon the conclusion of the above-captioned adversary proceeding, Plaintiff will either move to unseal or dispose of Plaintiff's Response to Defendants' Counterstatement; 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 Plaintiff's Response to Defendants' Counterstatement; and it is further

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

IT IS SO ORDERED.

Dated: December __, 2018
New York, New York

Honorable Martin Glenn
United States Bankruptcy Judge

APPENDIX B

Redacted Plaintiff's Response to the Term Lenders' Counterstatement of Facts Regarding Plaintiff's Motion for Partial Summary Judgment Dismissing Defendants' Earmarking Defense

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Chapter 11

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Case No. 09-00504 (MG)

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

Pursuant to Federal Rule of Civil Procedure 56 and Local Bankruptcy Rule 7056-1, Motors Liquidation Company Avoidance Action Trust (“Trust” or “Plaintiff”) respectfully responds to the Term Lenders’ Counterstatement of Facts Regarding Plaintiff’s Motion for Partial Summary Judgment Dismissing Defendants’ Earmarking Defense as follows:¹

Statement No. 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.

Response to No. 48: Plaintiff does not dispute that [REDACTED]

[REDACTED] With regard to the remainder of Statement No. 48, although not material, Plaintiff also does not dispute that among the reasons the DIP Lenders were interested in accomplishing those objectives included to: “(i) preserve the value of the business; (ii) restore (or at least minimize further loss of) consumer confidence; (iii) mitigate the increasing damage that GM itself, and the industry, would suffer if GM’s major business operations were to remain in bankruptcy; and (iv) avoid the enormous cost of financing a lengthy chapter 11 case.” *In re Gen. Motors Corp.*, 407 B.R. 463, 480 (Bankr. S.D.N.Y. 2009). Plaintiff also does not dispute that [REDACTED]

Statement No. 49: Leading up to the Petition Date [REDACTED]

[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.

¹ Capitalized terms not otherwise defined have the meaning set forth in Plaintiff’s Memorandum of Law in Support of Its Motion for Partial Summary Judgment on the Defendants’ Earmarking Defense, Adv. Pro. Dkt. 1129-2.

Response to No. 49: Plaintiff does not dispute that [REDACTED]

[REDACTED]. Plaintiff further does not dispute that [REDACTED]

[REDACTED]. Whether [REDACTED] is not material to the issues raised by Plaintiff's summary judgment motion, and in any event, the cited material supports Statement No. 48 only to the extent [REDACTED]

[REDACTED] See e.g., Celentino Decl. Ex. A (Feldman Dep.), at 52:23–53:14; 56:3-11; 57:11–24; 59:8–19.

Statement No. 50: [REDACTED]

Celentino Decl. Ex. G [REDACTED]

See

Response to No. 50: Plaintiff does not dispute that [REDACTED]

[REDACTED] See Celentino Decl.

Ex. G at UST-AAT-028891. Plaintiff also does not dispute that [REDACTED]

² 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-029819 (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).

[REDACTED] *Id.* at UST-AAT-029500.

Statement No. 51: [REDACTED] Celentino Decl. Ex. C (Worth Dep.), at 86:2–87:22.

Response to No. 51: Plaintiff does not dispute that [REDACTED]

[REDACTED]

[REDACTED] Celentino Decl. Ex. C (Worth Dep.), at 87:20–87:22. [REDACTED]

[REDACTED] is a characterization, not a fact; but in any event, it is not material to the issues raised by Plaintiff’s summary judgment motion.

Statement No. 52: [REDACTED] Celentino Decl. Ex. A (Feldman Dep.), at 96:3–6.

Response to No. 52: Plaintiff does not dispute that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Plaintiff further states tha [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Celentino Decl. Ex. A (Feldman Dep.), at 93:22-94:3 & 95:18-24.

Statement No. 53: [REDACTED] Celentino Decl. Ex. B (Mistry Dep.), at 266:22–267:6.

Response No. 53: Plaintiff does not dispute this statement.

Statement No. 54: [REDACTED] Celentino Decl. Ex. A (Feldman Dep.), at 96:8–9.

Response to No. 54: Plaintiff does not dispute that the quoted phrases appear in Mr. Feldman’s testimony. Plaintiff respectfully refers the Court to the deposition transcript for the context for the phrase.

Statement No. 55: [REDACTED] Celentino Decl. Ex. A (Feldman Dep.), at 102:13-24.

Response to No. 55: Plaintiff does not dispute that [REDACTED]
[REDACTED] See Plaintiff’s
Statement of Undisputed Material Facts in Support of Plaintiff’s Motion for Partial Summary
Judgment Dismissing Defendants’ Earmarking Defense (“SUMF”) ¶ 29. Plaintiff states that [REDACTED]
[REDACTED]
[REDACTED] Celentino Decl. Ex. A (Feldman Dep.), at 102:13-24.

Plaintiff respectfully refers the Court to the deposition transcript for its contents.

Statement No. 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.

Response to No. 56: Plaintiff does not dispute that [REDACTED]
[REDACTED]
[REDACTED] Plaintiff clarifies that [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Statement No. 57: [REDACTED]
[REDACTED]

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

Response to No. 57: Plaintiff does not dispute that [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED] Celentino Decl. Ex. I
(NEWGM000133417), at NEWGM000133421. Plaintiff disputes Statement No. 57 to the extent
that it contains characterizations and [REDACTED]

[REDACTED] *Id.*

Statement No. 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 Order, Ex. 1 (DIP Credit Agreement) § 5.5 (emphasis added).

Response to No. 58: Plaintiff does not dispute this statement.

Statement No. 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.

Response to No. 59: Plaintiff does not dispute this statement.

Statement No. 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.

Response to No. 60: Plaintiff disputes the Term Lenders' characterization of what the Initial Budget "stated that GM would" take the referenced action, but does not dispute that the Initial Budget contains an entry for a Non-Operating Disbursement in the amount of 5,224 million for the period July 13 to July 19, 2009.

Statement No. 61: [REDACTED]

See Celentino Decl. Ex. D (UST-AAT-035772), at UST-AAT-035790 [REDACTED]

Id.

Response No. 61: Plaintiff does not dispute that [REDACTED]

[REDACTED] Celentino Decl.

Ex. D (UST-AAT-035572), at UST-AAT-035773 and UST-AAT-035787. Plaintiff disputes [REDACTED]

Id. at UST-AAT-035790.



Statement No. 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 Order, Ex. 1 (DIP Credit Agreement) § 6.18.

Response to No. 62: Plaintiff does not dispute that section 6.18 of the DIP Credit Agreement provides that Old GM will not "amend, supplement or otherwise modify (pursuant to a waiver of otherwise) the Applicable Budget without the consent of the Required Lenders in accordance with Section 8.1." Final DIP Order, Ex. 1 (DIP Credit Agreement) § 6.18. Plaintiff also states that the DIP Credit Agreement provided that GM would provide a "Weekly Variance Report" for the immediately preceding week, containing "explanations for all material variances against the Applicable Budget." *Id.* §§ 5.2(j) & 1.1.

Statement No. 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.

Response to No. 63: Plaintiff disputes Statement No. 63 because the citation does not support the specific statement. Plaintiff does not dispute that § 5.5 of the DIP Credit Agreement provides that the Loan Proceeds shall be used only for the purposes set forth in § 3.20 and in a manner generally consistent with the Applicable Budget. Final DIP Order, Ex. 1 § 5.5. Plaintiff further does not dispute that § 3.20 provides that the Loan Proceeds 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.* § 3.20. Plaintiff also does not dispute that § 6.18 provides that GM will not “amend, supplement or otherwise modify (pursuant to a waiver of otherwise) the Applicable Budget without the consent of the Required Lenders in accordance with Section 8.1.” *Id.* § 6.18. Plaintiff also states that the DIP Credit Agreement required GM to provide a “Weekly Variance Report” for the immediately preceding week, containing “explanations for all material variances against the Applicable Budget.” *Id.* §§ 5.2(j) & 1.1.

Statement No. 64:

 *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) 

Response to No. 64: Plaintiff disputes Statement No. 64 on the grounds that the it is based on speculation, does not state a material fact, and is not supported by any citation to evidence as required by Fed. R. Civ. P. 56(c)(1) and Local Rule 7056-1(e). *See also Woodman v. WWOR-TV, Inc.*, 411 F.3d 69, 85 (2d Cir. 2005) (“The law is ‘well established that conclusory statements, conjecture, or speculation’ are inadequate to defeat a motion for summary judgment.”). The cited evidence does not support [REDACTED]

[REDACTED]. Plaintiff does not dispute that [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] Celentino Decl. Ex. A (Feldman Dep.), at 85:15–86:15.

Plaintiff also states that [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] *Id.* at 59:4-19.

Statement No. 65: Treasury was not opposed to restricting GM’s use of DIP Proceeds. [REDACTED]
[REDACTED]
[REDACTED] *See* Celentino Decl. Ex. A (Feldman Dep.), at 168:5–169:7.

Response to No. 65: Plaintiff disputes Statement No. 65 on the grounds that it mischaracterizes Mr. Feldman’s deposition testimony and is not supported by any citation to evidence as required by Fed. R. Civ. P. 56(c)(1) and Local Rule 7056-1(e). Plaintiff further states that [REDACTED]

[REDACTED]
[REDACTED]

██████████ Celentino Decl. Ex. A (Feldman Dep.), at 169:8-169:24; *see also* 170:5-171:07.

Statement No. 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.

Response to No. 66: Plaintiff does not dispute that the DIP Motion requested authority to use a portion of the DIP Financing to repay the Term Loan in full, as it was generally assumed at that time that all claims under the Term Loan Agreement were fully secured, first-priority liens. SUMF ¶ 13. Plaintiff does not dispute that the statements quoted in relevant part from the June 1, 2009 Hearing Transcript are accurate. Plaintiff avers, however, that it is also undisputed that after June 1, 2009, JPMorgan Chase informed the Committee that an erroneous UCC-3 termination statement relating to the Term Loan’s main lien had been filed in 2008, calling into question whether the main lien remained perfected. SUMF ¶ 32; Term Lenders’ Response to SUMF ¶ 32.

Statement No. 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).

Response to No. 67: Plaintiff does not dispute that the quoted language is included in the Interim DIP Order. Plaintiff states that the Interim DIP Order should be considered in its entirety and together with the entirety of the Final DIP Order, and that “[i]n the event of any inconsistency between the terms and conditions of . . . the Interim Order and [the] Final Order, the terms and conditions of this Final Order shall control.” Final DIP Order ¶ 22.

Statement No. 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).

Response to No. 68: Plaintiff does not dispute that the quoted language is included in the Final DIP Order. Plaintiff states that the Final DIP Order should be considered in its entirety, particularly insofar as it preserved the Committee’s right to both investigate and bring actions with respect to the perfection of the Term Lenders’ first priority liens. SUMF ¶ 35; Term Lenders’ Response to SUMF ¶ 35; Final DIP Order ¶ 19(d).

Statement No. 69:



Response to No. 69: Plaintiff disputes the statements made in this Paragraph on the grounds they are not supported by admissible evidence as required by Fed. R. Civ. P. 56(c)(1) and Local Rule 7056-1(e). Plaintiff avers that extrinsic evidence of negotiations over prior versions of the Interim DIP Order and Final DIP Orders are irrelevant and inadmissible to the extent that they are being offered to interpret the meaning of the Interim DIP Order and Final DIP Orders, both of which are unambiguous. Plaintiff further states that the statements are not material to the issues raised by Plaintiff’s summary judgment motion.

Statement No. 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.

Response to No. 70: Plaintiff does not dispute the statement in this Paragraph.

Statement No. 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.*

Response to No. 71: Plaintiff does not dispute the first sentence in Statement No. 71. Plaintiff disputes the second sentence because it is an argument, not a statement of fact.

Statement No. 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).

Response to No. 72: Plaintiff does not dispute that the DIP Proceeds were deposited into an Old GM general concentration account used to pay numerous business obligations of Old GM, including but not limited to prepetition payments made to JPMorgan on account of the Term Loan.

Statement No. 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).

Response to No. 73: Plaintiff does not dispute that Old GM made a series of wire transfers totaling \$1,481,656,507.70 from Account No. 910-200-2095 to JPMorgan in full satisfaction of all claims arising under the Term Loan Agreement within three business days of entry of the Final DIP Order.

Statement No. 74:

Celentino Decl. Ex. N (NEWGM000142191), at NEWGM000142198

(NEWGM000137081)

Celentino Decl. Ex. O

Decl. Ex. P (UST-AAT-030224)

Celentino

Response to No. 74: Plaintiff does not dispute that pursuant to the Final DIP Order, Old GM was obligated to make payment to the Term Lenders, but states that this obligation was expressly contingent on the Committee's right to both investigate and bring actions with respect to the perfection of the Term Lenders' first priority liens pursuant to the express language of Paragraph 19(d) of the Final DIP Order. Plaintiff avers that extrinsic evidence regarding the intent of the parties to the Final DIP Orders is irrelevant and inadmissible to the extent that it is being offered to interpret the meaning of the Interim DIP Order and Final DIP Orders, both of which are unambiguous.

Statement No. 75: [REDACTED]
Celentino Decl. Ex. Q (UST-AAT-019708), at UST-AAT-019713 [REDACTED]
[REDACTED]
Celentino Decl. Ex. A (Feldman Dep.), at 104:21–105:3; 105:21–25.

Response to No. 75: Plaintiff does not dispute that [REDACTED]
[REDACTED]
[REDACTED]

Statement No. 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.

Response to No. 76: Plaintiff does not dispute that Old GM's unsecured creditors received the specified consideration as part of the 363 Sale. In addition, Old GM's unsecured creditors are entitled to receive 70% of the net proceeds resulting from the Avoidance Action. SUMF ¶ 46; Bankr. Dkt. No. 13688, Ex. A. Plaintiff disputes the statement that the consideration was "substantial" as it reflects opinion and not fact.

Statement No. 77:

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

Response to No. 77: Statement No. 77 is not material to the issues raised by Plaintiff's summary judgment motion. Nevertheless, Plaintiff does not dispute [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED] Celentino Decl. Ex. A (Feldman Dep.), at 115:12-117:2; *see also* Celentino Decl. Ex. R [REDACTED] at PW 00000120. Plaintiff disputes this statement because it contains unsupported characterizations and inferences and is not otherwise supported by the cited testimony.

Statement No. 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]
[REDACTED]

Response to No. 78: Plaintiff does not dispute that [REDACTED]
[REDACTED]

[REDACTED] Plaintiff otherwise disputes this statement because it contains unsupported characterizations and inferences.

Statement No. 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.”).

Response to No. 79: Statement No. 79 is not material to the issues raised by Plaintiff’s summary judgment motion. Plaintiff does not dispute that the DIP Lenders did not have recourse against the New GM Equity Interests.

Statement No. 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.sig tarp.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.

Response to No. 80: Plaintiff does not dispute that the Office of the Special Inspector General Report states that “the auto manufacturers General Motors and Chrysler exited TARP with an \$11.2 billion loss for taxpayers”; however, Statement No. 80 is not material to the issues raised by Plaintiff’s summary judgment motion. Plaintiff disputes the characterization of the DIP Loan as “effectively subordinated” and to the counter-factual speculation about whether unsecured creditors would have kept their New GM Equity in circumstances that never occurred.

Statement No. 81: [REDACTED]
[REDACTED]

See Celentino Decl. Ex. A (Feldman Dep.), at 52:1–53:1.

Response to No. 81: Statement No. 81 is not material to the issues raised by Plaintiff’s summary judgment motion. Nevertheless, Plaintiff disputes the statement on the grounds that it purports to state conclusions of law and is not supported by the cited testimony.

Statement No. 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]

[REDACTED] elentino Decl. Ex. S
(NEWGM000137092) [REDACTED]

[REDACTED]

Response to No. 82: Statement No. 82 is not a fact, nor is it material to the issues raised in Plaintiff's summary judgment motion. Plaintiff disputes the statement on the grounds that it is speculation about what would have happened had the Term Loan not been paid and is not supported by the cited documents and testimony. The cited documents and testimony do not support the statement that "the 363 Sale would not have occurred."

Statement No. 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]

[REDACTED] See Celentino Decl. Ex. A (Feldman Dep.), at 56:3–11; 53:7–14; 82:20–24; cf. Celentino Decl. Ex. T (USTAAT-019670), at UST-AAT-019677 [REDACTED]

Response to No. 83: Plaintiff does not dispute the first sentence in Statement No. 83. Plaintiff disputes the second sentence in Statement No. 83 because it is counter-factual and speculative and not supported by the cited testimony and documents.

Statement No. 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.

Response to No. 84: Plaintiff does not dispute that the Term Loan was one of many components included in determining the size of the DIP Financing. See Response to No. 55, *supra*; SUMF ¶ 29. Plaintiff states that [REDACTED]

[REDACTED]

Celentino Decl. Ex. A (Feldman Dep.), at 102:18-20.

Statement No. 85: [REDACTED]

See Celentino

Decl. Ex. A (Feldman Dep.), at 95:25–96:9
id. at 127:7–15

Response to No. 85: Statement No. 85 is not a fact, nor material to the issues raised in Plaintiff’s summary judgment motion. Plaintiff disputes the statement on the grounds that it is based on speculation and is irrelevant because 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.” SUMF ¶ 36. With respect to Mr. Feldman’s testimony at Celentino Decl. Ex. A (Feldman Dep.), 127:7–15, Mr. Feldman testified that

Mr. Feldman was asked
Id.

Indeed, immediately prior to the cited excerpt,
Id. 126:20-127:5.

Statement No. 86: Celentino Decl. Ex. A (Feldman Dep.), at 127:7–15.

Response to No. 86: Statement No. 86 is not a fact nor material to the issues raised in Plaintiff’s summary judgment motion. Plaintiff disputes the statement on the grounds that it is speculation about events that did not occur and is not supported by any citation to evidence as required by Fed. R. Civ. P. 56(c)(1) and Local Rule 7056-1(e).

Statement No. 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).

Response to No. 87: Statement No. 87 is not a fact, nor material to the issues raised in Plaintiff’s summary judgment motion. Plaintiff disputes the statement on the grounds that it is speculation about events that did not occur and is not supported by any citation to evidence as required by Fed. R. Civ. P. 56(c)(1) and Local Rule 7056-1(e).

Statement No. 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).

Response to No. 88: Statements in this Paragraph are not facts, nor material to the issues raised in Plaintiff’s summary judgment motion. Plaintiff disputes the statements on the grounds they are speculation about what would have happened and are not supported by any citation to evidence as required by Fed. R. Civ. P. 56(c)(1) and Local Rule 7056-1(e).

Dated: New York, New York
December 14, 2018

Respectfully submitted,

BINDER & SCHWARTZ LLP

/s/ Eric B. Fisher

Eric B. Fisher

Neil S. Binder

Lindsay A. Bush

Lauren K. Handelsman

366 Madison Avenue, 6th Floor

New York, New York 10017

Telephone: (212) 510-7008

Facsimile: (212) 510-7299

*Attorneys for the Motors Liquidation Company
Avoidance Action Trust*

APPENDIX C

Plaintiff's Response to the Term Lenders' Counterstatement of Facts Regarding Plaintiff's Motion for Partial Summary Judgment Dismissing Defendants' Earmarking Defense

FILED UNDER SEAL

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