

**HEARING DATE AND TIME: August 5, 2016 at 10:00 a.m. (Eastern Time)**  
**OBJECTION DEADLINE: July 29, 2016 at 4:00 p.m. (Eastern Time)**

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

Thomas Moers Mayer  
Robert T. Schmidt  
Jonathan M. Wagner  
Jennifer Sharret  
KRAMER LEVIN NAFTALIS & FRANKEL  
LLP  
1177 Avenue of the Americas  
New York, New York 10036  
(212) 715-9100

*Attorneys for the Motors Liquidation  
Company  
Avoidance Action Trust*

*Attorneys for Official Committee of  
Unsecured Creditors*

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

-----x

In re:

Chapter 11

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

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

Debtors.

Adversary Proceeding Case No. 11-  
09406 (MG)

-----x

**JOINT MOTION OF MOTORS LIQUIDATION COMPANY AVOIDANCE  
ACTION TRUST AND OFFICIAL COMMITTEE OF UNSECURED  
CREDITORS FOR ENTRY OF (A) STIPULATION AND AGREED ORDER  
(I) SETTTLING DISPUTED ENTITLEMENTS OF DEBTOR-IN-POSSESSION  
LENDERS AND OFFICIAL COMMITTEE OF UNSECURED CREDITORS  
TO POTENTIAL TERM LOAN AVOIDANCE ACTION PROCEEDS AND  
(II) MODIFYING AVOIDANCE ACTION TRUST AGREEMENT TO IMPLEMENT  
SETTLEMENT, AND (B) ORDER (I) APPROVING SETTLEMENT OF  
THE ALLOCATION DISPUTE, (II) APPROVING AMENDMENTS TO THE  
AVOIDANCE ACTION TRUST AGREEMENT, AND (III) AUTHORIZING THE  
AVOIDANCE ACTION TRUST TO GRANT A LIEN TO THE DIP LENDERS**

**TABLE OF CONTENTS**

	<u>Page</u>
TABLE OF AUTHORITIES .....	ii
PRELIMINARY STATEMENT .....	2
JURISDICTION AND VENUE .....	4
BACKGROUND .....	5
A. Old GM Files for Bankruptcy, the Term Loan Is Paid Off and the Committee Commences the Term Loan Avoidance Action.....	5
B. The Plan Is Confirmed and Dispute over Ownership of the Term Loan Avoidance Action Proceeds .....	7
C. Status of the Term Loan Avoidance Action .....	9
D. The Term Loan Avoidance Action May Not Be Fully and Finally Resolved For Years, and the Avoidance Action Trust Does Not Have Sufficient Funds to Prosecute the Litigation to Completion.....	10
E. The Avoidance Action Trust Undertook a Competitive Bidding Process to Obtain Required Funding.....	12
F. The Stipulation and the Litigation Cost Advance Agreement .....	14
BASIS FOR REQUESTED RELIEF.....	15
A. The Settlement is Fair and Reasonable.....	15
B. The Stipuation and Agreed Order, the Litigation Cost Advance and the Avoidance Action Trust Amendments Are Permitted under the Avoidance Action Trust Agreement, the Plan and the Bankruptcy Code.....	22
1. The Avoidance Action Trust Amendment Should Be Approved.....	24
2. The Avoidance Action Trust Should be Authorized to Grant a Lien.....	25
NOTICE.....	26
CONCLUSION.....	27

**TABLE OF AUTHORITIES**

	<b>Page(s)</b>
<b>Cases</b>	
<i>In re Chemtura Corp.</i> , 439 B.R. 561 (Bankr. S.D.N.Y. 2010).....	16
<i>Hosp. &amp; Univ. Prop. Damage Claimants v. Johns-Manville Corp. (In re Johns-Manville Corp.)</i> , 7 F.3d 32 (2d Cir. 1993).....	23
<i>In re Ionosphere Clubs, Inc.</i> , 156 B.R. 414 (S.D.N.Y. 1993), <i>aff'd</i> , 17 F.3d 600 (2d Cir. 1994).....	16
<i>In re Iridium Operation LLC</i> , 478 F.3d 452 (2d Cir. 2007).....	17
<i>LTV Corp. v. Back (In re Chateaugay Corp.)</i> , 201 B.R. 48 (Bankr. S.D.N.Y. 1996), <i>aff'd in part</i> , 213 B.R. 633 (S.D.N.Y. 1997).....	23
<i>Nellis v. Shugrue</i> , 165 B.R. 115 (S.D.N.Y. 1994).....	16
<i>Official Comm. of Unsecured Creditors of Motors Liquidation Co. v. JPMorgan Chase Bank, N.A. (In re Motors Liquidation Co.)</i> , 777 F.3d 100 (2d Cir. 2015).....	5, 6, 7
<i>Official Committee of Unsecured Creditors of Motors Liquidation Co. v. JPMorgan Chase Bank, N.A. (In re Motors Liquidation Co.)</i> , Adv. Pro. No. 09-00504 (Bankr. S.D.N.Y. July 31, 2009).....	<i>passim</i>
<i>Penthouse Media Grp. v. Guccione (In re Gen. Media, Inc.)</i> , 335 B.R. 66 (Bankr. S.D.N.Y. 2005).....	23
<i>In re Petition of Bd. of Dirs. of Hopewell Int’l Ins., Ltd.</i> , 272 B.R 396 (Bankr. S.D.N.Y. 2002).....	23
<i>In re Purofied Down Prods. Corp.</i> , 150 B.R. 519 (S.D.N.Y. 1993).....	16
<i>U.S. Dep’t of Treasury v. Official Comm. of Unsecured Creditors of Motors Liquidation Co.</i> , 475 B.R. 347 (S.D.N.Y. 2012).....	9

*In re W.T. Grant Co.*,  
699 F.2d 599 (2d Cir. 1982).....17

**Statutes**

11 U.S.C § 105.....1, 4, 16, 22  
11 U.S.C § 1129.....18  
11 U.S.C § 1142.....1, 4, 16, 22, 23  
28 U.S.C. § 157.....4  
28 U.S.C. § 1334.....4  
28 U.S.C. § 1409.....4

**Other Authorities**

Fed. R. Bankr. P. 3020.....1, 4, 16, 23  
Fed. R. Bankr. P. 9019.....1, 4, 16

**TO: THE HONORABLE MARTIN GLENN,  
UNITED STATES BANKRUPTCY JUDGE:**

Wilmington Trust Company, solely in its capacity as trust administrator and trustee (the “**Avoidance Action Trust Administrator**”) of the Motors Liquidation Company Avoidance Action Trust (the “**Avoidance Action Trust**”), as established under the Debtors’ Second Amended Joint Chapter 11 Plan dated as of March 18, 2011 [Bankr. Dkt. No. 9836] (as confirmed, the “**Plan**”) of the above-captioned post-effective date debtors (the “**Debtors**”) and the Official Committee of Unsecured Creditors of Motors Liquidation Company f/k/a General Motors Corporation (the “**Committee**”), jointly submit this motion (the “**Motion**”), pursuant to sections 105 and 1142 of title 11 of the United States Code (the “**Bankruptcy Code**”) and Rule 9019(a) and 3020(d) of the Federal Rules of Bankruptcy Procedure (the “**Bankruptcy Rules**”), seeking entry of the following:

- (i) So-Ordered Stipulation and Agreed Order (I) Settling Disputed Entitlements of Debtor-in-Possession Lenders and Official Committee of Unsecured Creditors to Potential Term Loan Avoidance Action Proceeds, and (II) Modifying Avoidance Action Trust Agreement to Implement Settlement executed by the Committee, the DIP Lenders (as defined below) and the Avoidance Action Trust, substantially in the form attached hereto as Exhibit A (the “**Stipulation and Agreed Order**”); and
- (ii) An Order substantially in the form attached hereto as Exhibit B: (1) approving settlement of the Allocation Dispute (as defined below) on the terms set forth in the Stipulation and Agreed Order; (2) approving amendments to the Avoidance Action Trust Agreement (as defined below), in the form attached hereto as Exhibit D (the “**Avoidance Action Trust Amendment**”) to implement the terms of the Stipulation and Agreed Order; (3) authorizing the Avoidance Action Trust to grant

a lien to the DIP Lenders on the proceeds of the Term Loan Avoidance Action (as defined below) and other specified property of the Avoidance Action Trust; and (4) granting such other and further relief as may be necessary to implement the terms of the Stipulation and Agreed Order and the Litigation Cost Advance Agreement (as defined below).

In support of the foregoing, the Avoidance Action Trust Administrator and the Committee respectfully state as follows:

### **PRELIMINARY STATEMENT**

1. The Stipulation and Agreed Order resolves two critical issues arising in connection with two adversary proceedings that remain open and pending from the Debtors' 2009 Bankruptcy Case:<sup>1</sup> (1) settlement of the Allocation Dispute between the Committee, on the one hand, and Treasury and EDC (each as defined below) on the other hand, about who is entitled to the proceeds of the Term Loan Avoidance Action, and (2) the Avoidance Action Trust's need for funding to continue to prosecute the Term Loan Avoidance Action.

2. While the Court is very familiar with the Term Loan Avoidance Action, the Allocation Dispute has received less attention in recent years. The Allocation Dispute relates to the DIP Lenders' assertion that they were entitled to the proceeds of the Term Loan Avoidance Action under the terms of the Wind-Down Order. The confirmed Plan left this dispute open to be either resolved by "mutual agreement" or upon a "Final Order." After lengthy and difficult arms' length negotiations, the proposed Stipulation and Agreed Order resolves the Allocation Dispute

---

<sup>1</sup> The two adversary proceeding are: *Official Comm. of Unsecured Creditors of Motors Liquidation Co. v. U.S. Dep't of Treasury (In re Motors Liquidation Co.)*, Adv. Pro. No. 11-09406, Dkt. No. 1 (Bankr. S.D.N.Y. June 6, 2011) (the "**Allocation Dispute**") and *Motors Liquidation Company Avoidance Action Trust v. JPMorgan Chase Bank, N.A. (In re Motors Liquidation Co.)*, Adv. Pro. No. 09-00504 (Bankr. S.D.N.Y. July 31, 2009) [Adv. Pro. Dkt. No. 1] (the "**Term Loan Avoidance Action**").

by establishing a mutually acceptable allocation of any proceeds ultimately received from the Term Loan Avoidance Action.

3. As the Court is aware, the Term Loan Avoidance Action has recently become very active on multiple fronts. However, absent a substantial infusion of funds, the Avoidance Action Trust will soon run out of money to prosecute the Term Loan Avoidance Action – putting in jeopardy the Avoidance Action Trust’s ability to realize distributable proceeds from this valuable litigation. To address its need for funding, the Avoidance Action Trust explored potential funding from the GUC Trust, private funders and the DIP Lenders, and on June 23, 2016, filed the motion to approve a funding agreement with the Private Funder (as defined below) [Bankr. Dkt. 13650].

4. In the course of discussions, the DIP Lenders stated that they would consider the possibility of making a litigation cost advance, but only if it were an integral part of a final and acceptable resolution of the Allocation Dispute. As described more fully below, a key element of the settlement of the Allocation Dispute is the agreement by the DIP Lenders to provide a litigation cost advance to the Avoidance Action Trust.

5. The negotiations between and among the Committee, the Avoidance Action Trust and the DIP Lenders have resulted in a settlement that resolves the Allocation Dispute while at the same time solving the Avoidance Action Trust’s need for an additional cost advance on favorable terms. The Stipulation and Agreed Order provides as follows: holders of Allowed General Unsecured Claims (as defined in the Plan) eligible to receive distributions from the Avoidance Action Trust will receive 70% of the distributable proceeds of the Term Loan Avoidance Action and the DIP Lenders will receive 30% of the distributable proceeds of the Term Loan Avoidance Action.<sup>2</sup> The Committee’s agreement to this settlement was expressly conditioned on the DIP

---

<sup>2</sup> The specifics of the settlement are set forth in the Stipulation and Agreed Order.

Lenders providing \$15 million as an interest-free litigation cost advance to the Avoidance Action Trust on terms acceptable to the Avoidance Action Trust. The Committee submits that the settlement of the Allocation Dispute is reasonable and appropriate in light of the potential risks on appeal and the costs associated with further litigation and delays in distribution that continuing to litigate the Allocation Dispute would cause.

6. By this Motion, the Avoidance Action Trust and the Committee seek approval of the Stipulation and Agreed Order, which settles the Allocation Dispute and incorporates the Litigation Cost Advance Agreement with the DIP Lenders. In addition, the Avoidance Action Trust seeks approval of amendments to the Avoidance Action Trust Agreement necessary to implement the Stipulation and Agreed Order and authorizing the Avoidance Action Trust to grant a lien to the DIP Lenders, consistent with the Stipulation and Agreed Order and the Litigation Cost Advance Agreement.

#### **JURISDICTION AND VENUE**

7. The Bankruptcy Court has jurisdiction to consider this matter under 28 U.S.C. §§ 157 and 1334, paragraph II of the order of the Bankruptcy Court dated as of March 29, 2011, confirming the Plan [Bankr. Dkt. No. 9941], Article XI of the Plan, and Sections 6.1(b), 8.1 and 13.13 of the Amended and Restated Avoidance Action Trust Agreement, dated as of May 11, 2012 (the “**Avoidance Action Trust Agreement**”) [Bankr. Dkt. No. 11704-1]. This is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue is proper before this Court pursuant to 28 U.S.C. § 1409. The statutory predicates for the relief requested are sections 105 and 1142 of the Bankruptcy Code and Bankruptcy Rules 9019 and 3020.



## BACKGROUND

### A. **Old GM Files for Bankruptcy, the Term Loan is Paid Off and the Committee Commences the Term Loan Avoidance Action**

8. On June 1, 2009 (the “**Petition Date**”), Motors Liquidation Company (“**Old GM**”) and its affiliated Debtors filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Southern District of New York (the “**Bankruptcy Court**”) which are jointly administered under Case No. 09-50026.

9. On the Petition Date, the Debtors also filed a motion (the “**DIP Motion**”) [Bankr. Dkt. No 64] seeking authority from the Bankruptcy Court to obtain \$33.3 billion in post-petition financing (the “**DIP Financing**”) from the United States Department of the Treasury (“**Treasury**”) and Export Development Canada (“**EDC**,” and collectively, the “**DIP Lenders**”). The Bankruptcy Court approved three DIP Orders: (1) the Interim DIP Financing Order, entered on June 2, 2009 (the “**Interim DIP Order**”) [Bankr. Dkt. No. 292], (2) the Final DIP Financing Order, entered on June 25, 2009 (the “**Final DIP Order**”) [Bankr. Dkt. No. 2529], and (3) the modified final DIP financing order, entered on July 5, 2009 (the “**Wind-Down Order**”) [Bankr. Dkt. No. 2969] and collectively with the Interim DIP Order and the Final DIP Order, the “**DIP Orders.**”)

10. Prior to the Petition Date, Old GM obtained a syndicated secured term loan (the “**Term Loan**”) of approximately \$1.5 billion pursuant to a term loan agreement, dated as of November 29, 2006, as amended on March 4, 2009 (the “**Term Loan Agreement**”). *Official Comm. of Unsecured Creditors of Motors Liquidation Co. v. JPMorgan Chase Bank, N.A. (In re Motors Liquidation Co.)*, 777 F.3d 100, 101 (2d Cir. 2015) (“**Second Circuit 2015 Decision**”).<sup>3</sup> To secure repayment of the Term Loan, the Term Loan Lenders took security interests in a large

---

<sup>3</sup> All references to the Bankruptcy Docket are to *In re: Motors Liquidation Company f/k/a General Motors Corporation*, Case No. 09-50026.

number of Old GM's assets, including all of the equipment and fixtures at Old GM's facilities throughout the United States (the "**Collateral**"). *Id.* JPMorgan, as administrative agent of the Term Loan, caused the filing of twenty-eight UCC-1 financing statements throughout the United States to perfect the Term Loan Lenders' security interests in the Collateral. *Id.* One of the twenty-eight UCC-1 financing statements covered all the equipment and fixtures at forty-two Old GM facilities and was filed with the Delaware Secretary of State and designated as file number 64168084 (the "**Main Lien**"). *Id.*

11. Through the DIP Motion, the Debtors requested authority to use a portion of the DIP financing to repay fully the approximately \$1.5 billion Term Loan to a syndicate of more than 400 lenders (the "**Term Loan Lenders**"), including JPMorgan as administrative agent and lender. DIP Motion ¶¶ 75-78. Old GM repaid the Term Loan Lenders in full, ahead of other creditors of Old GM, on the assumption that their claims arising under the Term Loan Agreement were fully secured. Final DIP Order ¶ 19.

12. However, days before entry of the Final DIP Order, the Committee learned that the Term Loan Lenders' security interests, in fact, may not all have been perfected as of the Petition Date on account of the filing of a termination statement relating to the Main Lien (the "**2008 Termination Statement**") months before the Petition Date. *Second Circuit 2015 Decision*, 777 F.3d at 102. Therefore, the Final DIP Order, while conditionally approving Old GM's repayment of the Term Loan, expressly preserved the right of the Committee to investigate and bring actions based upon, among other things, the purported perfection of the security interests related to the Term Loan. Final DIP Order ¶ 19(d).

13. Following its investigation, the Committee determined that JPMorgan had authorized the filing of the 2008 Termination Statement, and that as a result the Term Loan

Lenders' security interest with respect to the collateral secured by the Main Lien was not perfected as of the Petition Date, and, therefore, according to the Committee, the claims of the Term Loan Lenders arising under the Term Loan Agreement were substantially undersecured. *Second Circuit 2015 Decision*, 777 F.3d at 102-03. To recover amounts alleged to have been improperly paid by Old GM to the Term Loan Lenders after the Petition Date (and during the ninety-day prepetition preference period) (the "**Transfers**"), based on the erroneous assumption that the Term Loan Lenders' security interests were perfected and their claims fully secured, the Committee filed the Term Loan Avoidance Action [Adv. Pro. No. 09-00504, Dkt No. 1].

**B. The Plan Is Confirmed and Dispute over Ownership of the Term Loan Avoidance Action Proceeds**

14. On March 29, 2011, the Bankruptcy Court entered an order (the "**Confirmation Order**") confirming the Plan [Bankr. Dkt. No. 9941]. The effective date of the Plan (the "**Effective Date**") was March 31, 2011. The Plan provided for the creation of the Avoidance Action Trust, which was established to liquidate and distribute its non-administrative assets, which consist entirely of the proceeds, if any, of the Term Loan Avoidance Action. Plan § 6.5. On December 15, 2011, prosecution of the Term Loan Avoidance Action was transferred to the Avoidance Action Trust.

15. Prior to confirmation of the Plan, the DIP Lenders took the position that the Wind-Down Order provided them with a super-priority administrative expense claim for any amounts not otherwise paid back (subject to some carve-outs not relevant to the dispute), and, further, that the DIP Lenders had not waived the right to be repaid by the estate from whatever funds the estate recovered through the Term Loan Avoidance Action. The Committee, on the other hand, asserted that other provisions of the Wind-Down Order trumped the grant of the super-priority administrative expense claim, and that it was the parties' intent that the DIP Lenders not reach the

proceeds of the Term Loan Avoidance Action. Specifically, the Committee pointed to the provisions of the Wind-Down Order that provided that the DIP Lenders' collateral would not include the Term Loan Avoidance Action and that the DIP loan would be non-recourse to Old GM, such that the DIP Lenders' recourse would be only to the collateral securing the DIP loans.

16. In an effort to resolve the dispute, on October 4, 2010, the Committee filed a motion seeking to enforce the Final DIP Order and the Wind-Down Order, arguing that the DIP Lenders could not claim rights to any proceeds of the Term Loan Avoidance Action [Bankr. Dkt. No. 7226]. The DIP Lenders opposed that motion on the ground that no justiciable controversy existed. The Bankruptcy Court ruled that the Committee's motion was not yet ripe for judicial adjudication, but did not foreclose a further application for a ruling at a later time [Bankr. Dkt. No. 7642].

17. Both the Plan and the Avoidance Action Trust Agreement deferred the issue as to whether the DIP Lenders or unsecured creditors would be the beneficiary of the Term Loan Avoidance Action, providing that the Allocation Dispute would be resolved either by: (i) mutual agreement between the DIP Lenders and the Committee, or (ii) Final Order. Plan § 1.124. Under the Plan, the Committee was dissolved for most purposes, but specifically survived to continue prosecution or settlement of the Allocation Dispute.

18. On June 6, 2011, the Committee commenced the Allocation Dispute seeking a declaratory judgment that: (i) the DIP Lenders were not entitled to any proceeds of the Term Loan Avoidance Action and had no interests in the Avoidance Action Trust, and (ii) the holders of Allowed General Unsecured Claims had the exclusive right to receive any and all proceeds of the Term Loan Avoidance Action, and are the exclusive beneficiaries of the Avoidance Action Trust. [Adv. Pro. No. 11-09406, Dkt. No. 1]. On December 12, 2011, the Bankruptcy Court entered an order in favor of the Committee, denying the DIP Lenders' motion to dismiss and for summary

judgment (the “**Bench Decision in Allocation Dispute**”) [Adv. Pro. No. 11-09406, Dkt. No. 30]. On December 16, 2011, the DIP Lenders appealed the Bench Decision in Allocation Dispute [Adv. Pro. No. 11-09406, Dkt. No. 31]. On July 3, 2012, the District Court for the Southern District of New York vacated the Bench Decision in Allocation Dispute on the grounds that the dispute was not ripe and remanded the case to the Bankruptcy Court with instructions to dismiss the Committee’s complaint without prejudice. *U.S. Dep’t of the Treasury v. Official Comm. of Unsecured Creditors of Motors Liquidation Co.*, 475 B.R. 347, 367 (S.D.N.Y. 2012). If approved, the Stipulation and Agreed Order will fully resolve the Allocation Dispute.

**C. Status of the Term Loan Avoidance Action**

19. As noted above, on July 31, 2009, the Committee commenced the Term Loan Avoidance Action. JPMorgan, as Administrative Agent for the Term Loan Lenders, and the Committee agreed to litigate whether the 2008 Termination Statement terminated the security interest in the Collateral covered by the Main Lien (“**Phase I**”) before litigating any other issues in this case. The Bankruptcy Court approved this bifurcation and after several rulings and levels of appeals, ultimately granted summary judgment in favor of the Avoidance Action Trust. The Avoidance Action Trust then filed an amended complaint against most of the Term Loan Lenders. Several of the Term Loan Lenders filed motions to dismiss, which were denied by this Court on Order dated June 30, 2016. [Adv. Pro. No. 09-00504. Dkt. No. 643].

20. The next phase of the litigation, which is now underway, primarily involves classification and valuation of the remaining collateral related to the Term Loan that was secured and perfected by filings other than the Main Lien (the “**Surviving Collateral**”). The overall discovery schedule in place for the Term Loan Avoidance Action contemplates: July 31, 2016, as the deadline for fact discovery (including depositions and plant inspections); October 31, 2016, as the deadline for the completion of expert discovery; and November 15, 2016, as the deadline for

the filing of summary judgment motions (or letter requests for dispositive motions, if required). [Adv. Pro. No. 09-00504. Dkt. No. 153].

21. In addition, on May 4, 2016, the Court entered an *Order Amending the August 17, 2015 'Order Regarding Discovery and Scheduling' to Provide for Proceedings Concerning Characterization and Valuation of Representative Assets* (the “**May 4, 2016 Order**”), which provides for a schedule to streamline proceedings regarding fixture classification and valuation issues with regard to a total of forty representative assets to be selected by the parties. [Adv. Pro. No. 09-00504, Dkt. No. 547]. The May 4, 2016 Order provides for the filing of pre-trial briefs to the Court on November 18, 2016, with a trial on the representative assets to take place thereafter on a date to be set by the Court.

**D. The Term Loan Avoidance Action May Not Be Fully and Finally Resolved For Years, and the Avoidance Action Trust Does Not Have Sufficient Funds to Prosecute the Litigation to Completion**

22. The initial administrative assets of the Avoidance Action Trust consisted of approximately \$1.6 million in cash to be held and maintained by the Avoidance Action Trust Administrator for fees and expenses in connection with trust administration and prosecution of the Term Loan Avoidance Action (the “**Avoidance Action Trust Administrative Cash**”).<sup>4</sup>

23. The \$1.6 million of Avoidance Action Trust Administrative Cash set aside under the Plan proved to be insufficient to fund litigation costs related to the Term Loan Avoidance Action and to satisfy the Avoidance Action Trust’s general administrative costs. Accordingly, on January 20, 2012, the GUC Trust filed a motion seeking, among other things, to liquidate securities

---

<sup>4</sup> The Avoidance Action Trust also received \$500,000 of Avoidance Action Trust SEC Reporting Cash to be used solely for SEC Reporting Costs to the extent there is no other available source of funds to pay such costs. [Bankr. Dkt. No. 11330 ¶ 18]. Any unused portion of the Avoidance Action Trust SEC Reporting Cash will be returned to the GUC Trust. [Bankr. Dkt. No. 11704-1 (Avoidance Action Trust Agreement § 2.3(e))].

to fund additional Avoidance Action Trust fees, costs and expenses primarily related to the prosecution of the Term Loan Avoidance Action. [Bankr. Dkt No. 11330]. The Court granted the GUC Trust's motion and entered an order, which, among other things, allocated an additional \$13,714,000 to the Avoidance Action Trust to satisfy the Avoidance Action Trust's estimated fees, costs and expenses for 2012, 2013, and 2014 (the "**GUC Trust Supplemental Cash**"). [Bankr. Dkt. No. 11507]. Pursuant to the terms of the Avoidance Action Trust Agreement, when the proceeds, if any, of the Avoidance Action Trust are distributed, the GUC Trust Supplemental Cash is not repaid to the GUC Trust; rather, an amount equal to the GUC Trust Supplemental Cash is placed into a segregated account for distribution to the holders of Allowed General Unsecured Claims. [Bankr. Dkt. No. 11704-1 (Avoidance Action Trust Agreement § 5.1(d)(ii), (iv))].

24. The Avoidance Action Trust projects that, absent additional funding, the Avoidance Action Trust will not have sufficient cash to meet its accrued financial obligations, including the fees and costs associated with prosecution of the Term Loan Avoidance Action, the administrative expenses of the Avoidance Action Trust, and the fees of the Trust Administrator and trust monitor (the "**Avoidance Action Trust Monitor**"). Declaration of Arthur J. Gonzalez, dated July 15, 2016 (the "**Gonzalez Declaration**") ¶ 4.<sup>5</sup> In addition to litigating to final resolution the Term Loan Avoidance Action against the hundreds of defendants in the Term Loan Avoidance Action (the "**Term Loan Defendants**"), including any appeals, the Avoidance Action Trust has also commenced two proceedings in Delaware seeking to nullify certificates of cancellation of two entities named as Defendants in the Term Loan Avoidance Action based on their failure to wind

---

<sup>5</sup> Section 6.1(d)(ii) of the Avoidance Action Trust Agreement requires the filing of a declaration from the Trust Monitor in support of certain relief sought by this Motion and the Gonzalez Declaration is being filed contemporaneously with this Motion.

up and distribute their assets in accordance with Delaware law so that the Avoidance Action Trust can prosecute the Term Loan Avoidance Action against the reconstituted entities.

25. Accordingly, the final resolution of the Term Loan Avoidance Action could take years, and the Avoidance Action Trust does not have sufficient funds to prosecute the Term Loan Avoidance Action to completion absent additional funding.

**E. The Avoidance Action Trust Undertook a Competitive Bidding Process to Obtain Required Funding**

26. Pursuant to the Avoidance Action Trust Agreement, the Avoidance Action Trust Administrator “shall at all times, to the extent practicable, retain . . . sufficient Avoidance Action Trust Administrative Cash and Supplemental Avoidance Action Trust Cash as the Trust Administrator shall determine, with the approval of the Trust Monitor and subject to the Budget, is necessary (x) to pay the reasonable incurred or anticipated fees and expenses of the Trust . . . and (y) to satisfy other liabilities incurred or anticipated by the Trust in accordance with the Plan, the Confirmation Order and this Trust Agreement.” [Bankr. Dkt. No. 11704-1 (Avoidance Action Trust Agreement § 5.5(b))].

27. The Avoidance Action Trust Agreement specifically sets forth a mechanism for the Avoidance Action Trust to seek additional funding in the event that the Avoidance Action Trust Administrative Cash and the GUC Trust Supplemental Cash “is not reasonably likely to be adequate to satisfy the current and projected future fees, costs and expenses” of the Avoidance Action Trust. *Id.* § 6.1(c).

28. In accordance with its obligations under the Avoidance Action Trust Agreement, the Avoidance Action Trust Administrator, in consultation with the Avoidance Action Trust Monitor, made a determination that the cash available to the Avoidance Action Trust was not sufficient to meet its projected fees and expenses. *See* Gonzalez Decl. ¶4. After initially exploring



a potential transaction with the GUC Trust as a path to addressing the Trust's need for supplemental cash, the Avoidance Action Trust Administrator, through counsel, commenced a competitive bidding process to obtain private funding for the Avoidance Action Trust. *See id.* ¶ 5.

29. Throughout this competitive bidding process, the Avoidance Action Trust kept the DIP Lenders apprised of the negotiations with potential funders. *See id.* ¶ 6. The DIP Lenders expressed an interest in providing a litigation cost advance to the Avoidance Action Trust as a condition of a settlement with the Committee on the Allocation Dispute, if such a settlement could be reached.

30. On April 4, 2016, after a careful analysis of all the proposals submitted by potential third-party private funders, the Avoidance Action Trust reached an agreement in principle with the a private funder (the "**Private Funder**") for a \$15 million loan in exchange for a return that could be as high as the greater of 2.25 times the amount of the funds drawn or 4.75% of the aggregate proceeds of the Term Loan Avoidance Action. The Avoidance Action Trust shared a copy of the initial term sheet with the DIP Lenders. On May 19, 2016, the Avoidance Action Trust provided the DIP Lenders a copy of the executed litigation funding agreement with the Private Funder (the "**Private Litigation Funding Agreement**"). On June 23, 2016, the Avoidance Action Trust filed a motion seeking approval of the Private Litigation Funding Agreement [Bankr. Dkt. 13650].

31. The Avoidance Action Trust negotiated the following provision in the Private Litigation Funding Agreement permitting the Avoidance Action Trust to terminate the Private Litigation Funding Agreement within a certain period of time in the event that the DIP Lenders agreed to provide funding to the Avoidance Action Trust:

"Permitted Alternative Funding Event" means the occurrence, on or before the earlier of (x) July 20, 2016; and (y) the originally-scheduled hearing date

established by the Bankruptcy Court to consider the motion required pursuant to Section 5.1(f) (without regard to any adjournment thereof), of either: (i) any submission to the Bankruptcy Court of a motion seeking the approval of any agreement or arrangement, including, without limitation, the approval of any stipulation, with one or more DIP Lenders to provide funding for the Trust's prosecution of the Term Loan Avoidance Action, the Oaktree Action, and any other action brought by the Trust; or (ii) the Trust's entry into an agreement or arrangement with one or more DIP Lenders pursuant to which such DIP Lenders will provide funding for the Trust's prosecution of the Term Loan Avoidance Action, the Oaktree Action, and any other action brought by the Trust, in any such case on terms materially more favorable to the Trust than those provided by the Investors under this Agreement.

[Bankr. Dkt. No. 13650-2 (Private Litigation Funding Agreement § 1.1)].

**F. The Stipulation and the Litigation Cost Advance Agreement**

32. After extensive negotiations, the DIP Lenders, the Avoidance Action Trust and the Committee entered into the Stipulation and Agreed Order which settled, among other things, the Allocation Dispute. The Committee's entry into this Stipulation and Agreed Order was conditioned on the DIP Lenders providing \$15 million in litigation funding (the "**Litigation Cost Advance**") to the Avoidance Action Trust (instead of the Private Funder providing funding) on terms acceptable to the Avoidance Action Trust. Having reached an agreement with the DIP Lenders to provide the Litigation Cost Advance for the Trust's prosecution of the Term Loan Avoidance Action, contemporaneously with this Motion, the Avoidance Action Trust will terminate the Private Litigation Funding Agreement pursuant to its terms.

33. The Stipulation and Agreed Order provides that, after repayment of all DIP Lender Advances (including the Litigation Cost Advance) and the GUC Trust Advances, the DIP Lenders shall be entitled to receive 30% of the remaining net proceeds resulting from the Term Loan Avoidance Action and unsecured creditors shall be entitled to receive 70% of the remaining net proceeds resulting from the Term Loan Avoidance Action, with each such distribution to the DIP Lenders and unsecured creditors to be made on or about the same time and on a *pari passu* basis.

34. In addition, the Stipulation and Agreed Order approves the litigation cost advance agreement with the DIP Lenders (the “**Litigation Cost Advance Agreement**”), attached as Exhibit C,<sup>6</sup> under which the DIP Lenders will advance the \$15 million Litigation Cost Advance to the Avoidance Action Trust. The Stipulation and Agreed Order further grants the DIP Lenders a first priority lien on the Avoidance Action Proceeds and the Funding Account (as defined in the Litigation Cost Advance Agreement) up to the amount of the Litigation Cost Advance. The Litigation Cost Advance Agreement further provides that the Avoidance Action Trust Agreement shall be amended to reflect the terms of the Stipulation and Agreed Order, including to provide for the Litigation Cost Advance and the relative priority of the Avoidance Action Trust’s obligations to repay the DIP Lenders.

35. As required by Section 6.1(d)(ii) of the Avoidance Action Trust Agreement, the Avoidance Action Trust Monitor has submitted the Gonzalez Declaration herewith setting forth his approval of the Litigation Cost Advance Agreement and entry into the Stipulation and Agreed Order, to the extent such order relates to the Litigation Cost Advance Agreement. *See* Gonzalez Decl. ¶¶ 9-11.

#### **BASIS FOR REQUESTED RELIEF**

36. This Court has the authority to enter the proposed Stipulation and Agreed Order and approve the Litigation Cost Advance Agreement under the terms of the Plan and under sections 105 and 1142(b) of the Bankruptcy Code and Bankruptcy Rules 9019 and 3020.

##### **A. The Settlement Is Fair and Reasonable**

37. The Plan provides that the Committee survives post-Effective Date to litigate or settle the Allocation Dispute. Similarly, the Avoidance Action Trust Agreement provides that the

---

<sup>6</sup> The Litigation Cost Advance Agreement will also be an exhibit to the Stipulation and Agreed Order.

ultimate beneficiaries of the Avoidance Action Trust would be determined either by mutual agreement between the Committee and the DIP Lenders or by Final Order. After more than four months of negotiations with the DIP Lenders, the Committee agreed to the terms of the Stipulation and Agreed Order, which it believes reflects a settlement that is fair and reasonable and in the best interest of the ultimate beneficiaries of the Avoidance Action Trust.

38. A bankruptcy court may approve a proposed settlement when the settlement is fair and equitable and in the best interests of the estate. *See In re Ionosphere Clubs, Inc.*, 156 B.R. 414, 426 (S.D.N.Y. 1993), *aff'd*, 17 F.3d 600 (2d Cir. 1994). “[T]he general rule [is] that settlements are favored and, in fact, encouraged by the approval process outlined above.” *See Nellis v. Shugrue*, 165 B.R. 115, 123 (S.D.N.Y. 1994); *In re Purofied Down Prods. Corp.*, 150 B.R. 519, 523 (S.D.N.Y. 1993).

39. In determining whether the settlement is fair and reasonable, the court need not decide the numerous issues of law and fact raised by the settlement, but rather should “canvass the issues” to determine whether the settlement “fall[s] below the lowest point in the range of reasonableness.” *In re Chemtura Corp.*, 439 B.R. 561, 593 (Bankr. S.D.N.Y. 2010) (quoting *In re W.T. Grant Co.*, 699 F.2d 599, 608 (2d Cir. 1982) (internal citation omitted). *See also Purofied Down Prods.*, 150 B.R. at 522 (“[T]he court need not conduct a ‘mini-trial’ to determine the merits of the underlying litigation.”).

40. In deciding whether a particular settlement falls within the “range of reasonableness,” the Second Circuit Court of Appeals in *Iridium* set forth a list of factors,, including: (1) the balance between the probability of success in the litigation versus the concrete benefits of settlement; (2) the likelihood of complex and protracted litigation; (3) the paramount interests of creditors, including each affected class's relative benefits; (4) whether other parties in

interest support the settlement; (5) the competency and experience of counsel supporting the settlement; and (6) the extent to which the settlement is the product of arms' length bargaining. *In re Iridium Operation LLC*, 478 F.3d 452, 462 (2d. Cir. 2007).<sup>7</sup> The Committee respectfully submits that, based on the *Iridium* factors, the Stipulation and Agreed Order is fair and reasonable and should be approved.

41. The Allocation Dispute already has a long history of litigation and, absent settlement, there is a strong likelihood of future complex litigation. While the Committee continues to believe in the merits of the arguments and positions it has taken in the Allocation Dispute, the Committee understands there is a risk it may not ultimately prevail.

42. The extensive briefing before the Bankruptcy Court and the District Court, the earlier Bench Decision on Allocation Dispute and the questions raised in oral argument at the District Court underscore the complexity of the legal issues in interpreting the DIP Orders. The DIP Lenders contended that they were entitled to be repaid out of any available assets including the Term Loan Avoidance Action proceeds as a result of their superpriority administrative expense claim (which was only subject to a carve-out for professional fees). The Committee contended that a later paragraph in the Wind-Down Order, which limited the DIP Lender's recourse to the "Collateral" (as defined in the Wind-Down Order and which specifically excluded the proceeds of the Term Loan Avoidance Action) trumped the DIP Lenders' superpriority claim. The Committee and its counsel were intimately involved in the extensive negotiations of the Wind-Down Order in June and July 2009. While the Committee and its counsel continue to believe that their interpretation of the Wind-Down Order is correct and evidences the parties' intention, the DIP

---

<sup>7</sup> *Iridium* references an additional factor relating to release of directors and officers which is not applicable here.

Lenders have taken a contrary position which would need to be litigated to conclusion, absent a settlement.<sup>8</sup>

43. The DIP Lenders filed both a motion to dismiss the Committee's complaint in the Allocation Dispute because, they claimed, the controversy was not yet ripe, as well as a cross-motion for summary judgment. The DIP Lenders raised several arguments in their cross-motion for summary judgment, including: (i) plain meaning and canons of construction, (ii) the superpriority claim should not be surplusage, (iii) the superpriority claim excluded funds for the carve-out but not the proceeds of the avoidance action, (iv) the DIP Lenders would be entitled to payment of their administrative expense claim in full under Section 1129(a)(9) of the Bankruptcy Code, (v) "non-recourse" only limits right to prepetition claims, and (vi) the Committee was only given derivative standing to litigate the Term Loan Avoidance Action and any proceeds would have to be distributed in accordance with the Bankruptcy Code's priority scheme.

44. The Bankruptcy Court denied the motion to dismiss and granted summary judgment in favor of the Committee. However, in its 50+ page detailed opinion, the Bankruptcy Court acknowledged that while on the one hand the motion to dismiss did not present any difficult issues, "the issues on summary judgment are closer" and the DIP Lender's position (on the merits) was not frivolous. Bench Decision in Allocation Dispute pp. 3, 27. In finding in favor of the Committee, the Bankruptcy Court engaged in an extensive analysis of plain meaning, canons of construction, chronology of events when language appeared/disappeared in the DIP Orders, and analysis of statement of parties' intent, and addressed the DIP Lenders' other arguments (referenced above).

---

<sup>8</sup> The Committee was further concerned that because each of the DIP Lenders are governmental entities, they may not be subject to the same litigation concerns and timing constraints that private litigants are generally subject to.

45. On appeal, the DIP Lenders raised many of the same arguments as they did in the Bankruptcy Court and contested much of the Bench Decision in Allocation Dispute, including that its ruling conflicted with statutory provisions and that the Bankruptcy Court misapplied certain canons of construction, assigned improper weight to certain statements by parties and erroneously concluded that adopting the DIP Lenders' contentions would yield an absurd result. In addition, the DIP Lenders argued that questions of contract interpretation and the grant of summary judgment are subject to *de novo* review on appeal.

46. The District Court vacated the Bankruptcy Court's opinion on jurisdictional grounds. However, prior to issuing that decision, the District Court held oral argument, engaging in extensive debate with counsel to the Committee and the DIP Lenders on the merits of the Allocation Dispute, including additional issues not raised earlier in the proceeding such as the need for discovery and burden of proof. *See Transcript of Oral Argument, U.S. Dep't of Treasury v. Official Comm. of Unsecured Creditors of Motors Liquidation Co., No. 12-cv-00695-CM (S.D.N.Y. May 4, 2012), Dkt No. 12* (a copy of the transcript is attached hereto as Exhibit F). Following oral argument, the District Court issued an order directing the parties to submit responses to additional questions, several of which related to the merits of the Allocation Dispute, as opposed to pure jurisdictional issues. *U.S. Dep't of Treasury v. Official Comm. of Unsecured Creditors of Motors Liquidation Co., No. 12-cv-00695-CM, Dkt. Nos. 12, 13, 14, 15 (S.D.N.Y. June 6, 2012)*.

47. Particularly in light of this prior history, it is clear that absent a settlement, the Allocation Dispute would likely result in protracted litigation. The District Court vacated the Bankruptcy Court's opinion on ripeness grounds in 2012, at a time when the Bankruptcy Court had not yet ruled on Phase I of the underlying Term Loan Avoidance Action. While the

Bankruptcy Court has now denied the Term Loan Defendants' motion to dismiss and will now turn to the next phase of the litigation (identifying the surviving Collateral and valuing it), it is not clear if either the Bankruptcy Court or the District Court would entertain a revival of the Allocation Dispute until there are actual proceeds to be distributed.

48. Absent the settlement, it could take many more years for the Allocation Dispute to run its course through the Bankruptcy Court and on appeal. At the Bankruptcy Court level, it is not clear if the parties would stipulate to an expedited procedure (deeming the Bench Decision in Allocation Dispute to be a final decision and order to allow for an immediate appeal) or if there would need to be new briefing, hearing and a decision. Moreover, during oral argument, the District Court raised the possibility of the need for discovery, which would add even more cost and delay. The Committee believes that there is value to settling the dispute now, which would guarantee a distribution to holders of Allowed General Unsecured Claims immediately after the Avoidance Action Trust receives proceeds from the underlying litigation, and not potentially multiple years later.

49. As described above, in March, counsel for the Committee and the DIP Lenders reopened negotiations. In part because of the continued existence of litigable issues and the potential for significant further delay, the Committee decided to engage in settlement discussions with the DIP Lenders. The Committee submits that the ultimate settlement, which allocates 70% of the net proceeds of the Avoidance Action Trust in favor of holders of Allowed General Unsecured Claims, is an appropriate and fair compromise of the potential risks of prolonged, complicated litigation.

50. Moreover, the Committee submits that the "cost" of the settlement should be viewed as closer to 25%, as opposed to 30% because absent this settlement, the Avoidance Action Trust would have to obtain private funding, which, using the Private Litigation Funding Agreement



as the benchmark, would require payment of the greater of 2.25 times the amount of the funds drawn or 4.75% of the Avoidance Action Trust proceeds (to come ahead of whoever the ultimate Avoidance Action Trust Beneficiaries are) and payment of other fees and expenses. In that scenario, if the Committee litigated and successfully prevailed in the Allocation Dispute, unsecured creditors would still have only been able to receive approximately 95% of the Avoidance Action Trust proceeds (not 100%).

51. In addition to the agreement on allocation, another key element of the settlement is the requirement that the DIP Lenders provide the \$15 million (interest-free) Litigation Cost Advance, which is inextricably linked to (and conditioned on) resolution of the Allocation Dispute. The DIP Lenders would not have agreed to make the Litigation Cost Advance without approval of the settlement on the Allocation Dispute and the Committee would not have agreed to settlement of the Allocation Dispute without the DIP Lenders agreeing to the Litigation Cost Advance Agreement on terms that were acceptable to the Avoidance Action Trust. The Avoidance Action Trust, the DIP Lenders and holders of Allowed General Unsecured Claims all benefit from the Litigation Cost Advance, which will enable the Avoidance Action Trust to continue its litigation against the Term Loan Defendants.

52. In applying the *Iridium* factors, the benefit of settling the Allocation Dispute outweighs the risks inherent in litigating this issue. Here, the settlement offers the concrete benefit of assuring holders of Allowed General Unsecured Claims receive 70% of the net distributable Term Loan Avoidance Action proceeds and ensures adequate funding to the Avoidance Action Trust. As described above, the settlement avoids the potential for complex and protracted litigation. The settlement was the product of arms' length negotiations between and among the Committee, the Avoidance Action Trust and the DIP Lenders. Finally, counsel for the Committee,

the DIP Lenders and the Avoidance Action Trust are highly experienced practitioners who have been involved in the bankruptcy case since the beginning and are intimately familiar with the issues and disputes that are being resolved by this settlement. Accordingly, the Committee respectfully submits that the Stipulation and Agreed Order is in the best interest of all parties-in-interest and should therefore be approved.

**B. The Stipulation and Agreed Order, the Litigation Cost Advance and the Avoidance Action Trust Amendments Are Permitted under the Avoidance Action Trust Agreement, the Plan and the Bankruptcy Code**

53. The Plan specifies that the Bankruptcy Court retains exclusive jurisdiction “of all matters arising under, arising out of, or related to the Chapter 11 Cases and the Plan pursuant to, and for the purposes of, sections 105(a) and 1142 of the Bankruptcy Code” and for, *inter alia*, the following purposes: (1) “to determine any motion, adversary proceeding, application, contested matter, and other litigated matter pending on or commenced before or after the Confirmation Date . . .”; (2) to “ensure that distributions to holders of Allowed Claims are accomplished as provided herein”; (3) to “hear and determine disputes arising in connection with or related to the interpretation, implementation, or enforcement of the Plan, . . . the Avoidance Action Trust, . . . and the Avoidance Action Trust Agreement . . .”; and (4) to “take any action and issue such orders as may be necessary to construe, enforce, implement, execute, and consummate the Plan to maintain the integrity of the Plan following consummation.” [Bankr. Dkt. No. 9836 (Plan §§ 11.1 (b), (c), (i), (j))].

54. Furthermore, section 1142(b) of the Bankruptcy Code authorizes the Court to “direct the debtor and any other necessary party to execute or deliver or to join in the execution or delivery of any instrument required to effect a transfer of property dealt with by a confirmed plan, and to perform any other act . . . that is necessary for the consummation of the plan.” 11 U.S.C. § 1142(b); *see also Hosp. & Univ. Prop. Damage Claimants v. Johns-Manville Corp. (In re Johns-*

*Manville Corp.*), 7 F.3d 32, 34 (2d Cir. 1993) (finding that bankruptcy courts retain postconfirmation jurisdiction in chapter 11 proceedings to the extent provided by the plan); *Penthouse Media Grp. v. Guccione (In re Gen. Media, Inc.)*, 335 B.R. 66, 73 (Bankr. S.D.N.Y. 2005) (finding that bankruptcy courts retain post-confirmation jurisdiction to matters related to the implementation of a plan); *In re Petition of Bd. of Dirs. of Hopewell Int'l Ins., Ltd.*, 272 B.R. 396, 407 n.11 (Bankr. S.D.N.Y. 2002) (“[T]he Court may direct parties to perform any act necessary to consummate the plan.”) (citing 11 U.S.C. § 1142(b)); *LTV Corp. v. Back (In re Chateaugay Corp.)*, 201 B.R. 48, 66 (Bankr. S.D.N.Y. 1996), (“The clear intent of Section 1142(b) of the Bankruptcy Code is to assure that the terms and provisions of a confirmed chapter 11 plan are carried out until the plan is completed and the final decree is entered closing the case.”) *aff’d in part*, 213 B.R. 633 (S.D.N.Y. 1997). In addition, Bankruptcy Rule 3020(d) provides that “[n]otwithstanding the entry of the order of confirmation, the court may issue any other order necessary to administer the estate.” Fed. R. Bankr. P. 3020(d).

55. Here, the Stipulation and Agreed Order settles the Allocation Dispute, which is a pending adversary proceeding. In addition, the Stipulation and Agreed Order allows the Avoidance Action Trust to fulfill its basic purpose under the Plan. The Plan specifies that the “sole purpose” of the Avoidance Action Trust is to liquidate and distribute its assets, which consist of the proceeds of the Term Loan Avoidance Action. Plan §§ 1.23, 6.5. The Litigation Cost Advance Agreement promotes this goal. Approval of the Litigation Cost Advance Agreement will provide necessary funding to the Avoidance Action Trust to prosecute the Term Loan Avoidance Action to maximize its value for the Avoidance Action Trust’s beneficiaries.

**1. The Avoidance Action Trust Amendment Should Be Approved**

56. The amendments to the Avoidance Action Trust Agreement are intended to implement the terms of the Stipulation and Agreed Order and the Litigation Cost Advance Agreement. Because it was not anticipated that the DIP Lenders would provide additional funding to the Avoidance Action Trust, the Avoidance Action Trust Agreement needs to be amended to implement the mechanisms for the use of, and repayment of, the Litigation Cost Advance. In addition, the Avoidance Action Trust Agreement reflects the dispute between the Committee and the DIP Lenders over entitlement to the proceeds of the Term Loan Avoidance Action, which has now been resolved pursuant to the Stipulation and Agreed Order. Accordingly, the Avoidance Action Trust Agreement needs to be amended to reflect the agreed-upon allocation of proceeds and other settlement terms set forth in the Stipulation and Agreed Order and the Litigation Cost Advance Agreement.

57. The Avoidance Action Trust Agreement permits that:

The Trust Administrator may amend or supplement this Trust Agreement for any other purpose, but only on petition to, and with the approval of, the Bankruptcy Court; *provided* that (x) no amendment or supplement to this Trust Agreement shall be inconsistent with the purpose and intent of the Trust to dispose of in an expeditious but orderly manner the Avoidance Action Trust Assets in accordance with the terms of the Plan, the Confirmation Order and this Trust Agreement, and (y) this Trust Agreement shall not be amended in a manner that is inconsistent with the Plan in the form confirmed by the Bankruptcy Court, subject to any post-confirmation modifications to the Plan pursuant to Section 1127 of the Bankruptcy Code.

[Bankr. Dkt. No. 11704-1 (Avoidance Action Trust Agreement § 13.13(b))].

58. Pursuant to the Plan, the Avoidance Action Trust was established to liquidate and distribute its assets, which consist entirely of the proceeds, if any, of the Avoidance Action. Plan § 6.5. The additional funding provided to the Avoidance Action Trust through the Litigation Cost Advance is necessary to complete the recovery and liquidation of the “Avoidance Action

Trust Assets” – the Term Loan Avoidance Action. While the Avoidance Action Trust is working in good faith to prosecute the Term Loan Avoidance Action, the cash currently available to the Avoidance Action Trust is not sufficient to meet its projected fees and expenses to continue to prosecute the Term Loan Avoidance Action and/or to facilitate the successful resolution of the Term Loan Avoidance Action. Accordingly, the Avoidance Action Trust Amendment is consistent with the purpose and intent of the Avoidance Action Trust, as well as the Plan.

59. The Avoidance Action Trust Amendment also implements the details of the settlement of the Allocation Dispute. As required by the Avoidance Action Trust Agreement, through execution of the Stipulation and Agreed Order, the DIP Lenders have provided their written consent to the Avoidance Action Trust Amendment, including such provisions that “materially and adversely” affect their rights. [Bankr. Dkt. No. 11704-1 (Avoidance Action Trust Agreement § 13.13 (d))].

60. The amendments to the Avoidance Action Trust Agreement have been narrowly tailored to implement only the terms of the Stipulation and Agreed Order and the Litigation Cost Advance Agreement and, for all the reasons stated above, should be approved. A copy of the Avoidance Action Trust Amendments are attached hereto as Exhibit D and a copy of the Amended and Restated Avoidance Action Trust (incorporating the amendments) is attached hereto as Exhibit E.

## **2. The Avoidance Action Trust Should Be Authorized to Grant a Lien**

61. The Avoidance Action Trust Agreement permits, upon approval of the Bankruptcy Court, the granting of a lien on the Term Loan Avoidance Action or other property of the Avoidance Action Trust in exchange for proceeds that may be used to satisfy the fees, costs and expenses of the Avoidance Action Trust.

62. As a condition of providing the Litigation Cost Advance, and as provided in the Stipulation and Agreed Order and the Litigation Cost Advance Agreement, the DIP Lenders require the Avoidance Action Trust to grant a lien on proceeds of the Term Loan Avoidance Action and the Funding Account (as defined in the Litigation Cost Advance Agreement).

63. As required by the Avoidance Action Trust Agreement, the Trust Monitor has submitted the Gonzalez Declaration in support of granting the lien. *See* Gonzalez Decl. ¶¶ 9-10.

### **NOTICE**

64. The Avoidance Action Trust and the Committee have provided notice of this Motion to: (a) the Office of the United States Trustee for the Southern District of New York, 33 Whitehall Street, 21st Floor, New York, New York 10004; (b) the DIP Lenders; (c) the other parties in interest in accordance with the *Sixth Amended Order Pursuant to 11 U.S.C. § 105(a) and Fed. R. Bankr. P. 1015(c) and 9007 Establishing Notice and Case Management Procedures*, dated May 5, 2011 [Bankr. Dkt. No. 10183]; (d) JPMorgan and each of the Term Loan Defendants; and (e) any other required notice parties under Section 6.1(b)(ii) of the Avoidance Action Trust Agreement. The Avoidance Action Trust and the Committee submit that such notice is sufficient and no other or further notice need be provided.<sup>9</sup>

---

<sup>9</sup> The Avoidance Action Trust Agreement requires notice to “the Trust Monitor, the holders of Units and the holders of Disputed General Unsecured Claims.” [Bankr. Dkt. No. 11704-1 (Avoidance Action Trust Agreement § 6.1(d)(ii))]. Notice has been provided to all potential Unit holders and/or beneficiaries of the Avoidance Action Trust and other interested parties, including the DIP Lenders; the holders of Motors Liquidation Company (f/k/a General Motors Company) debentures and notes with the following CUSIP Nos.: 370ESCAN5; 370ESCAJ4; 370ESCAR6; 370ESCAG3; 370ESCAS7; 370ESCAT2; 370ESCAU9; 370ESCAV7; 370ESCAZ8; 370ESCBB0; 370ESCBQ7; 370ESCBT1; 370ESCBW4; 370ESCBS3; 370ESC816; 370ESC774; 370ESC766; 370ESC758; 370ESC741; 370ESC733; 370ESC725; 370ESC717; 370ESC121; 370ESC691; 616ESC AA2; 616ESC AB0; 349ESC AT1; 677ESC AU2; 677ESC BC2; 455ESC AB8; 594ESC AQ6; XS0171942757; XS0171943649; CH0008769264 (served through the Depository Trust Company (DTC)); the non-bondholder holders of Allowed General Unsecured Claims (as defined in the Avoidance Action Trust Agreement); and any holders of disputed General Unsecured Claims.

**CONCLUSION**

WHEREFORE, the Avoidance Action Trust and the Committee respectfully request that the Court (i) so-order the Stipulation and Agreed Order (attached hereto as Exhibit A), and (ii) enter the Order (substantially in the form attached hereto as Exhibit B: (1) approving settlement of the Allocation Dispute on the terms set forth in the Stipulation and Agreed Order; (2) approving amendments to the Avoidance Action Trust Agreement to implement the terms of the Stipulation and Agreed Order; (3) authorizing the Avoidance Action Trust to grant a lien to the DIP Lenders on the proceeds of the Term Loan Avoidance Action and other specified property of the Avoidance Action Trust pursuant to the Litigation Cost Advance Agreement; and (4) granting such other and further relief as may be necessary to implement the terms of the Stipulation and Agreed Order and the Litigation Cost Advance Agreement.

Dated: New York, New York  
July 15, 2016

Respectfully submitted,

**BINDER & SCHWARTZ LLP**

**KRAMER LEVIN  
NAFTALIS & FRANKEL 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  
Tel: (212) 510-7008

/s/ Robert T. Schmidt  
Thomas Moers Mayer  
Robert T. Schmidt  
Jonathan M. Wagner  
Jennifer Sharret  
1177 Avenue of the Americas  
New York, New York 10036  
(212) 715-9100

*Attorneys for the Motors Liquidation  
Company Avoidance Action Trust*

*Attorneys for Official Committee of  
Unsecured Creditors*

# **EXHIBIT A**



UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X  
In re:

MOTORS LIQUIDATION COMPANY, *et al.*,  
f/k/a General Motors Corp., *et al.*,

Debtors,

Chapter 11

Case No. 09-50026 (MG)

(Jointly Administered)

Adversary Proceeding Case No. 11-09406  
(MG)

-----X  
**STIPULATION AND AGREED ORDER (I) SETTLING DISPUTED  
ENTITLEMENTS OF DEBTOR-IN-POSSESSION LENDERS AND OFFICIAL  
COMMITTEE OF UNSECURED CREDITORS TO POTENTIAL TERM LOAN  
AVOIDANCE ACTION PROCEEDS, AND (II) MODIFYING AVOIDANCE ACTION  
TRUST AGREEMENT TO IMPLEMENT SETTLEMENT**

This Stipulation and Agreed Order (this “**Stipulation and Order**”) is made and entered into on the date hereof by and among (i) the United States Department of the Treasury and Export Development Canada (together, the “**DIP Lenders**”); (ii) the Official Committee of Unsecured Creditors of Motors Liquidation Company (the “**UCC**”); and (iii) the Motors Liquidation Company Avoidance Action Trust (the “**AAT**”), through Wilmington Trust Company, as Avoidance Action Trust Administrator and Trustee, and Arthur J. Gonzalez, as Avoidance Action Trust Monitor.

**RECITALS**

A. The DIP Lenders provided debtor-in-possession financing (“**DIP Financing**”) to the Motors Liquidation Company bankruptcy estate (the “**Estate**”), including, without limitation, a \$1.175 billion credit facility (the “**Wind-Down Facility**”) to fund the wind-down of the Estate after the sale of substantially all the Estate’s assets to an entity now known informally as New GM.

B. As part of the DIP Financing, the DIP Lenders were granted, among other things, a superpriority administrative expense claim on account of the Wind-Down Facility in a total amount of \$1.175 billion.

C. The DIP Lenders also received certain security interests on account of the Wind-Down Facility, but agreed to exempt solely from the collateral that secured the Wind-Down Facility any interest in, among other things, the future proceeds from a pending adversary proceeding styled *Official Committee of Unsecured Creditors of Motors Liquidation Co. v. JPMorgan Chase Bank, N.A., et al.*, Adv. Pro. No. 09-504 (Bankr. S.D.N.Y.) (the “**Term Loan Avoidance Action**”), which the UCC was then authorized to pursue on behalf of the Estate.

D. The Term Loan Avoidance Action remains pending and, pursuant to the Debtors’ Second Amended Joint Chapter 11 Plan dated March 18, 2011 (the “**Plan**”) and the Amended and Restated Avoidance Action Trust Agreement dated as of May 11, 2012 (the “**Avoidance Action Trust Agreement**”), is now being prosecuted by the AAT, with allocation of proceeds to be determined either by mutual agreement between the DIP Lenders and the UCC or by future order of this Court. *See* Notice of Amendment and Restatement of Motors Liquidation Company Avoidance Action Trust Agreement (ECF No. 11704).

E. The DIP Lenders maintain that their superpriority administrative expense claim reaches any and all proceeds of the Term Loan Avoidance Action.

F. The UCC disputes the DIP Lenders’ entitlement to any of the funds recovered by the AAT through the Term Loan Avoidance Action. The UCC further asserts that the DIP Lenders agreed not to be repaid from Term Loan Avoidance Action proceeds and any such recovery should be distributed to unsecured creditors whose interests are represented by the UCC.

G. The UCC commenced an adversary proceeding in the Bankruptcy Court (the “**DIP/UCC Proceeding**”) against the DIP Lenders, by which the UCC sought a declaratory judgment on this issue, resulting in a ruling in favor of the UCC by this Court on November 28, 2011. *See Official Committee of Unsecured Creditors of Motors Liquidation Company v. United States Department of the Treasury (In re Motors Liquidation Company)*, 460 B.R. 603 (Bankr. S.D.N.Y. 2011)). The DIP Lenders appealed this ruling to the United States District Court for the Southern District of New York, which entered an opinion and order vacating the Bankruptcy Court’s decision, and remanded the matter. *See United States Department of the Treasury v. Official Committee of Unsecured Creditors of Motors Liquidation Company*, 475 B.R. 347 (S.D.N.Y. 2012). No further applications or proceedings have occurred since the matter was remanded.

H. The DIP Lenders and the UCC wish to resolve their dispute as to entitlements to proceeds of the Term Loan Avoidance Action based on the terms set forth herein and without the burden, expense, and uncertainty of further litigation. As a condition of such settlement, the DIP Lenders have agreed to provide certain additional funding to the AAT in respect of the Term Loan Avoidance Action expressly on terms provided herein.

I. The AAT previously received certain funding to prosecute the Term Loan Avoidance Action, including from the DIP Lenders, but now requires additional funding to further prosecute this action. The AAT consents to both (i) the terms of this Stipulation and Order and (ii) the terms of the Litigation Cost Advance (as defined therein) set forth in the agreement (the “**Agreement**”) annexed hereto as Exhibit A. Each of the AAT, the DIP Lenders and the UCC also consents to certain modifications to the Avoidance Action Trust Agreement as contemplated herein and in the Agreement, and as may be necessary to implement the provisions

of this Stipulation and Order and the Agreement, including but not limited to the financing arrangements, lien rights and allocation of litigation proceeds set forth herein.

It is therefore hereby STIPULATED, AGREED AND, UPON COURT APPROVAL HEREOF, IT SHALL BE ORDERED that:

1. The terms contained herein, including in the Agreement annexed hereto, are hereby approved in all respects and are incorporated herein and made a part hereof. The DIP Lenders and the AAT are authorized to implement such terms as they deem necessary, including, without limitation, through amendments to the Avoidance Action Trust Agreement, without further order of this Court.

2. Upon entry of this Stipulation and Order, the DIP Lenders shall advance \$15 million to the AAT (the "Litigation Cost Advance") on terms and conditions provided herein and in the Agreement. The AAT shall repay such \$15 million advance to the DIP Lenders consistent with the terms of the Agreement and those Avoidance Action Trust Agreement modifications implemented pursuant to the terms set forth herein and in the Agreement.

3. Notwithstanding the waterfall priorities set forth in the current version of Sections 5.1(d)(iii) and (iv) of the Avoidance Action Trust Agreement, if and when the AAT has Distributable Trust Assets,<sup>1</sup> and following the repayment of all DIP Lender Advances (including the Litigation Cost Advance) and GUC Trust Advances in accordance with Sections 5.1(d)(i) and 5.1(d)(ii) of the Avoidance Action Trust Agreement, the DIP Lenders shall be entitled to receive thirty (30%) percent of all remaining Distributable Trust Assets, and holders of Allowed General Unsecured Claims (or Units) shall be entitled to receive seventy (70%) percent of all remaining Distributable Trust Assets, with each such distribution to the DIP Lenders and holders of

---

<sup>1</sup> Capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the Avoidance Action Trust Agreement.

Allowed General Unsecured Claims (or Units) to be made on a pari passu basis. The parties shall work in good faith to amend the Avoidance Action Trust Agreement to incorporate the foregoing settlement.

4. This Stipulation and Order, the Agreement and the payments and obligations required thereby are in full satisfaction, settlement and release of the DIP Lenders' and UCC's (and their respective predecessors', successors', agents' and assigns') respective claims and defenses against one another in connection with the DIP/UCC Proceeding.

5. The DIP Lenders are hereby granted, consistent with the terms contained in the Agreement and without filing or further action required by the DIP Lenders, a first priority, perfected continuing security interest in and lien on the Avoidance Action Proceeds and the Funding Account (as defined in the Agreement), up to the amount of the Litigation Cost Advance. Notwithstanding anything herein, in any other order of this Court or any agreement of the AAT or any other person or entity, in each case, whether entered before or after the date hereof, by the approval of this Stipulation by this Court, this Court hereby orders that no person or entity shall be granted any liens or security interests of any type or nature against the Term Loan Avoidance Action and/or the Avoidance Action Proceeds unless the DIP Lenders have provided written consent (which consent shall not be unreasonably withheld) of such liens (and any liens and/or security interests granted without the express written consent of the DIP Lenders shall be null and void and of no power or effect).

6. Other than the rights of Avoidance Action Trust Beneficiaries under the terms of the Avoidance Action Trust Agreement (which shall be amended as set forth in paragraph 3 above), this Stipulation and Order does not grant third-party beneficiaries any additional rights to enforce the terms of this Stipulation and Order.

7. Except as provided herein, each party to this Stipulation and Order bears its own costs and fees in connection with any and all litigation, dispute, negotiation, or analysis concerning their respective entitlements to proceeds of the Term Loan Avoidance Action, and/or in connection with the provision of additional funding to the AAT as provided for herein.

8. This Stipulation and Order (with exhibits if any) represents the entire agreement of the parties hereto. No prior discussions or communications form any part of such agreement.

9. Each signatory to this Stipulation and Order represents that he or she is authorized to bind his or her client, and does so bind his or her client.

10. No party's agreement to this Stipulation and Order is or shall be construed as an admission of liability or culpability of any kind, nor of any fact alleged or argument asserted by any other party.

11. This Court shall have exclusive jurisdiction over any and all disputes arising out of or otherwise relating to this Stipulation and Order.

12. This Stipulation and Order is conditioned upon this Court's approval, and if not so approved, is null and void, with no force or effect.

13. In the event this Stipulation and Order is vacated by a court of competent jurisdiction, the AAT's obligation to repay any and all advances made pursuant to this Stipulation and Order shall mature, and the DIP Lenders shall be entitled to immediate, first priority repayment from the first to become available of either (a) replacement financing or (b) Distributable Trust Assets, excluding from Distributable Trust Assets the amount of cash on hand on the day this Stipulation and Order is entered. The AAT shall be obligated to promptly seek, and shall use its best efforts to obtain, replacement financing for the purpose of repaying the DIP Lenders. The obligation to repay the DIP Lenders in accordance with this paragraph


shall be secured by the lien granted pursuant to Paragraph 5 above. Further, this paragraph is severable from the rest of this Stipulation and Order.

14. Upon repayment by the AAT of all advances to the DIP Lenders that were made pursuant to this Stipulation and Order in accordance with Paragraph 13 above, the provisions of Paragraph 3 and 4 of this Stipulation and Order shall be null and void, with no force and effect.

15. The Avoidance Action Trust Agreement shall be amended to conform with this Stipulation and Order, specifically including with respect to the relative priority of the AAT's obligations to repay to the DIP Lenders any advances made pursuant to this Stipulation and Order. In the event the provisions in Paragraph 3 of this Order are vacated or deemed null and void, the Avoidance Action Trust Agreement shall be further amended to remove the allocation of the remaining Distributable Trust Assets between the DIP Lenders and holders of Allowed General Unsecured Claims (or Units) as set forth in Paragraph 3.

Dated: New York, New York  
July 14, 2016

**UNITED STATES DEPARTMENT OF THE TREASURY**  
**PREET BHARARA**  
United States Attorney for the Southern District of New York  
Counsel for United States Department of the Treasury

By:   
\_\_\_\_\_  
DAVID S. JONES  
JOSEPH CORDARO  
Assistant United States Attorneys  
86 Chambers Street, Third Floor  
New York, New York 10007  
Tel.: (212) 637-2739/2745  
Fax: (212) 637-2730  
Email: [David.Jones6@usdoj.gov](mailto:David.Jones6@usdoj.gov)  
[Joseph.Cordaro@usdoj.gov](mailto:Joseph.Cordaro@usdoj.gov)

**EXPORT DEVELOPMENT CANADA**

By:  \_\_\_\_\_

Title: **Sean Mitchell**  
**Principal** \_\_\_\_\_

By:  \_\_\_\_\_

Title: **Janet Boyd**  
**Loan Portfolio Manager** \_\_\_\_\_

With respect to the Litigation Cost Advance and modifications of the Avoidance Action Trust Agreement:

**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  
Tel: (212) 510-7008  
*Attorneys for the Motors Liquidation Company Avoidance Action Trust*

With respect to the settlement of the DIP/UCC Proceeding:

**THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF MOTORS  
LIQUIDATION COMPANY  
KRAMER LEVIN NAFTALIS & FRANKEL LLP**

\_\_\_\_\_  
Thomas Moers Mayer  
Robert T. Schmidt  
1177 Avenue of the Americas  
New York, New York 10036  
Tel.: (212) 715-9100  
Fax.: (212) 715-8000



**EXPORT DEVELOPMENT CANADA**

By: \_\_\_\_\_

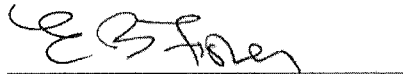
Title: \_\_\_\_\_

By: \_\_\_\_\_

Title: \_\_\_\_\_

With respect to the Litigation Cost Advance and modifications of the Avoidance Action Trust Agreement:

**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

Tel: (212) 510-7008

*Attorneys for the Motors Liquidation Company Avoidance Action Trust*

With respect to the settlement of the DIP/UCC Proceeding:

**THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF MOTORS  
LIQUIDATION COMPANY**

**KRAMER LEVIN NAFTALIS & FRANKEL LLP**

\_\_\_\_\_  
Thomas Moers Mayer

Robert T. Schmidt

1177 Avenue of the Americas

New York, New York 10036

Tel.: (212) 715-9100

Fax.: (212) 715-8000

**EXPORT DEVELOPMENT CANADA**

By: \_\_\_\_\_

Title: \_\_\_\_\_

By: \_\_\_\_\_

Title: \_\_\_\_\_


With respect to the Litigation Cost Advance and modifications of the Avoidance Action Trust Agreement:

**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  
Tel: (212) 510-7008  
*Attorneys for the Motors Liquidation Company Avoidance Action Trust*

With respect to the settlement of the DIP/UCC Proceeding:

**THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF MOTORS  
LIQUIDATION COMPANY**  
**KRAMER LEVIN NAFTALIS & FRANKEL LLP**

  
\_\_\_\_\_  
Thomas Moers Mayer  
Robert T. Schmidt  
1177 Avenue of the Americas  
New York, New York 10036  
Tel.: (212) 715-9100  
Fax.: (212) 715-8000

*Attorneys for the Official Committee of Unsecured Creditors*

SO ORDERED:

---

United States Bankruptcy Judge

## **EXHIBIT B**

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

-----x

In re:	Chapter 11
MOTORS LIQUIDATION COMPANY, f/k/a GENERAL MOTORS CORPORATION, <i>et al.</i> ,	Case No. 09-50026 (MG) (Jointly Administered)
Debtors.	Adversary Proceeding Case No. 11- 09406 (MG)

-----x

**ORDER (I) APPROVING SETTLEMENT OF  
THE DIP/UCC PROCEEDING, (II) APPROVING AMENDMENTS TO THE  
AVOIDANCE ACTION TRUST AGREEMENT, AND (III) AUTHORIZING THE  
AVOIDANCE ACTION TRUST TO GRANT A LIEN TO THE DIP LENDERS**

Upon the joint motion (the “**Motion**”)<sup>1</sup> of Motors Liquidation Company Avoidance Action Trust and the Official Committee of Unsecured Creditors of Motors Liquidation Company f/k/a General Motors Corporation for entry of an order, pursuant to sections 105 and 1142 of title 11 of the United States Code and Rule 9019(a) and 3020(d) of the Federal Rules of Bankruptcy Procedure: (1) approving the settlement of the DIP/UCC Proceeding on the terms set forth in the Stipulation and Agreed Order; (2) approving amendments to Avoidance Action Trust Agreement to implement the terms of the Stipulation and Agreed Order and the Litigation Cost Advance Agreement; and (3) authorizing the Avoidance Action Trust to grant a lien to the DIP Lenders in accordance with the Stipulation and Agreed Order and the Litigation Cost Advance Agreement; and upon the Declaration of Arthur J. Gonzalez in support of the Motion; and it appearing that the Court has jurisdiction to consider the Motion and relief requested therein pursuant to 28 U.S.C. §§ 157 and 1334 and the Amended Standing Order of Reference M-431, dated January 31, 2012 (Preska, C.J.), consideration of the Motion and the relief requested therein being a core proceeding

---

<sup>1</sup> Capitalized terms not otherwise defined herein shall have the meaning ascribed to them in the Motion.

pursuant to 28 U.S.C. § 157(b) and venue being proper before this Court pursuant to 28 U.S.C. § 1409; and any objections to the Motion having been settled, resolved, withdrawn or overruled; and it appearing that the relief requested in the Motion is in the best interest of the above-captioned post-effective date debtors' creditors and estates; and it appearing that due and appropriate notice of the Motion has been given under the circumstances in these Chapter 11 cases; and it appearing that no other or further notice need be provided; and upon the record in these Chapter 11 cases; and after due deliberation thereon; and good and sufficient cause appearing therefor; it is hereby

**ORDERED**, that the Motion is granted and the DIP/UCC Proceeding is settled on the terms set forth in the Stipulation and Agreed Order, attached hereto as Exhibit A; and it is further

**ORDERED**, that the Avoidance Action Trust Administrator and Trust Monitor are authorized to amend the Avoidance Action Trust Agreement, in substantially the form attached as Exhibit E to the Motion; and it is further

**ORDERED**, that the Avoidance Action Trust is authorized to grant a lien to the DIP Lenders as set forth in the Stipulation and Agreed Order and the Litigation Cost Advance Agreement; and it is further

**ORDERED**, that the Committee and the Avoidance Action Trust are authorized to take all necessary actions to carry out this Order; and it is further

**ORDERED**, that this Order shall be effective immediately upon entry; and it is further

**ORDERED**, that the Court shall retain jurisdiction to hear and determine any and all matters concerning this Order.

**IT IS SO ORDERED.**

Dated: \_\_\_\_\_, 2016  
New York, New York

\_\_\_\_\_  
MARTIN GLENN  
United States Bankruptcy Judge

## **EXHIBIT C**



## AGREEMENT

### Motors Liquidation Company Avoidance Action Trust \$15,000,000 Litigation-Related Advance

July 14, 2016

The signatory parties hereto agree as follows with respect to a proposed advance of fifteen million dollars (\$15,000,000.00) (the “**Litigation Cost Advance**”) to be provided by the Motors Liquidation Company (“**MLC**”) debtor-in-possession lenders (the “**DIP Lenders**”) to the MLC Avoidance Action Trust (the “**Trust**”) on conditions described herein. This agreement (this “**Agreement**”) arises in connection with, and is conditioned upon approval by the United States Bankruptcy Court for the Southern District of New York (the “**Bankruptcy Court**”) of, the settlement of litigation between the DIP Lenders, on the one hand, and the MLC Official Committee of Unsecured Creditors (the “**Committee**”), on the other hand. Finalization and Bankruptcy Court approval of that settlement is a condition precedent to the DIP Lenders’ obligation to provide the contemplated Litigation Cost Advance, which is a contemplated term of that settlement. Capitalized terms used but not defined herein shall have the meanings ascribed to such terms in the Amended and Restated Motors Liquidation Company Avoidance Action Trust Agreement (the “**Trust Agreement**”).

1. **DIP Lenders:** United States Department of the Treasury and Export Development Canada, in relative proportion
2. **AAT:** Motors Liquidation Company Avoidance Action Trust
3. **Litigation Cost Advance Amount:** \$15,000,000
4. **Permitted Uses:** Section 1.1(e) of the Trust Agreement shall be amended to include the Litigation Cost Advance proceeds as part of Avoidance Action Trust Administrative Cash and such funds may be used as provided in the Trust Agreement.
5. **Availability:** The Litigation Cost Advance shall be made available on the Closing Date through a single funding to a segregated account in the name of the Trust (the “**Funding Account**”). The Funding Account shall be established at a bank reasonably acceptable to the Trust and the DIP Lenders. The Litigation Cost Advance is one term of a proposed litigation settlement between the DIP Lenders and the Committee (“**Litigation Settlement**”), and the DIP Lenders’ agreement to provide the Litigation Cost Advance shall be expressly conditioned upon, and shall not precede or arise in the absence of, approval by the Bankruptcy Court of such Litigation Settlement that includes the terms contained in this Agreement.
6. **Security:** The Litigation Cost Advance shall be secured by a first priority lien over the Funding Account and the Avoidance Action Proceeds. The grant of such liens shall be included in the Bankruptcy Court order approving the Litigation Cost Advance. The Funding Account shall also be subject to a deposit account control agreement acceptable to the DIP Lenders and the AAT.
7. **Budgets:** The DIP Lenders shall receive annual Budgets and quarterly updates in accordance with Section 6.3 of the Trust Agreement. The quarterly updates shall reconcile actual expenditures with projections that had been included in the relevant Budget, and, if and when the

Trust identifies a need for or the occurrence of actual expenditures that materially differ from the relevant Budget, they will notify the DIP Lenders as promptly as practicable, and no later than 15 days after identifying the issue.

8. **Invoices:** Section 8.3(b) of the Trust Agreement shall be amended to provide that Trust Professionals and any other persons entitled to payment from the Trust (other than the Trust Administrator and the Trust Monitor) shall be required to submit reasonably detailed invoices on a monthly basis to the Trust Administrator, the Trust Monitor and the DIP Lenders, including in such invoices a description of the work performed, the individuals who performed such work, and the hourly rate of such person, plus an itemized statement of expenses for which payment is sought. Invoices submitted to the DIP Lenders may be in a form reasonably necessary to protect the attorney-client privilege. For the avoidance of doubt, any and all payments by the Trust from funds that originated from the Litigation Cost Advance or that are contained in the Funding Account shall be subject to this invoice disclosure requirement. No payment on account of such invoices shall be made until 15 days after presentation of the invoices to the DIP Lenders. The Trust Administrator shall timely pay all such invoices that are not disputed by the Trust Administrator or the Trust Monitor. If either or both of the DIP Lenders have questions or concerns about any invoice submitted to the Trust, or about any other issue relating to the Trust's finances or administration, they shall be entitled to discuss the matter with the Trust Monitor, as well as with the Trust Administrator and/or counsel for the Trust, as appropriate, and the Trust Monitor will consult with the DIP Lenders and give good faith consideration to any objection that the DIP Lenders raise before approval of payment by the Trust Administrator or non-objection by the Trust Monitor. The Trust Monitor, Trust Administrator, and/or counsel for the Trust, as appropriate, will engage in good faith discussions and attempt in good faith to provide information reasonably requested by either or both DIP Lenders.
9. **Funding Account Records; Reporting:** The bank administering the Funding Account shall be required to provide the DIP Lenders with account statements for the Funding Account, and shall be required to provide immediate access to any or all Funding Account records upon request by either or both of the DIP Lenders. Additionally, the Trust shall provide periodic and timely reporting to the DIP Lenders, on terms to be agreed upon, regarding the prosecution of the Term Loan Avoidance Litigation.
10. **Draws:** Prior to the Maturity Date (as defined below), and subject to the requirements of paragraph 8 hereof, the Trust shall be entitled to make withdrawals from the Funding Account at any time and in any amount determined by the Trust Administrator to be reasonable and appropriate to meet the needs of the Trust and not inconsistent with the terms and requirements of the Trust Agreement as amended hereby. Amounts not drawn shall remain in the Funding Account. Any amounts not withdrawn by the Maturity Date shall be returned to the DIP Lenders.
11. **Repayment:** As stated above, Section 1.1(e) of the Trust Agreement shall be amended to include the Litigation Cost Advance in the defined term "Avoidance Action Trust Administrative Cash," which will carry through to the definition of "DIP Lender Advances." An amount equal to the Litigation Cost Advance less any amounts returned to the DIP Lenders pursuant to paragraph 10 of this Agreement plus any other DIP Lender Advances, shall be repaid to the DIP Lenders first out of any Distributable Trust Assets in accordance with Section 5.1(d) of the Trust Agreement.
12. **No Additional Indebtedness or Liens:** Except as provided in this paragraph 12, the Trust may not incur additional indebtedness, whether unsecured or secured by any interest (including a security interest) in the Term Loan Avoidance Action or Avoidance Action Proceeds without the prior written consent of the DIP Lenders, except that the Trust may incur expenses in the ordinary

course of the Trust's business provided no lien or right of setoff is attached thereto. In the event that the Trust seeks other litigation funding, (a) the DIP Lenders shall be provided a right of first refusal to provide such funding, which right of first refusal must be exercised within thirty (30) days after being presented in writing the opportunity to provide such funding, and (b) such funding shall be junior and subordinate to the Litigation Cost Advance and to the amounts owed to the DIP Lenders on account of prior funding of the Trust, subject to a form of subordination that is acceptable to the DIP Lenders in all respects, such consent not to be unreasonably withheld.

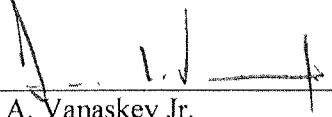
13. **Closing Date:** The earliest date on which all conditions, including Bankruptcy Court approval of a settlement agreement that includes as a term the DIP Lenders' provision of the Litigation Cost Advance, are met.
14. **Maturity Date:** The third anniversary of the Closing Date. The Maturity Date may be extended for three (3) additional one-year periods thereafter, each with the prior written consent of the DIP Lenders.
15. **Documentation:** Documentation shall include, without limitation, (i) amendments to certain sections of the Trust Agreement and a motion of the Trust Administrator to approve such amendments; (ii) a motion to approve (A) the settlement between the DIP Lenders and the Committee over the allocation of the Avoidance Action Proceeds, and (B) the additional funding provided by the DIP Lenders to the Trust in the form of the Litigation Cost Advance on the terms herein; and (iii) deposit account control agreement for the Funding Account to be established pursuant to the terms herein.
16. **Governing Law:** The Litigation Cost Advance and all agreements related to it shall be governed by the laws of the United States, and, to the extent the laws of any state apply, the State of New York (without regard to choice of law rules thereof).
17. **Jurisdiction:** Any disputes with respect to the Litigation Cost Advance, the parties submit to the exclusive jurisdiction of the Bankruptcy Court, and any appellate court thereto.
18. **Termination:** The Trust is currently seeking Bankruptcy Court approval of a proposed alternative financing (the "Proposed Financing") and the Trust will continue to seek such approval unless the following has occurred on or before July 18, 2016: either (i) a submission to the Bankruptcy Court of a motion seeking the approval of any agreement or arrangement, including, without limitation, the approval of any stipulation, with one or more DIP Lenders to provide funding for the Trust's prosecution of the Term Loan Avoidance Action and any other action brought by the Trust; or (ii) an agreement or arrangement between the Trust and one or more DIP Lenders pursuant to which such DIP Lenders will provide funding for the Trust's prosecution of the Term Loan Avoidance Action and any other action brought by the Trust. In the event of Bankruptcy Court approval of the Proposed Financing, this Agreement shall terminate and, in such event, the parties hereto shall have no further obligations or liabilities to each other under this Agreement.

\* \* \* \* \*

AGREED AND ACCEPTED:

**MOTORS LIQUIDATION COMPANY AVOIDANCE ACTION TRUST**


**By: Wilmington Trust Company, as Avoidance Action Trust Administrator and Trustee**

By:   
David A. Vanaskey Jr.  
Vice President

**By: Arthur J. Gonzalez, as Avoidance Action Trust Monitor**

By: \_\_\_\_\_  
Arthur J. Gonzalez

**UNITED STATES DEPARTMENT OF THE TREASURY**  
**PREET BHARARA**  
United States Attorney for the Southern District of New York  
Counsel for United States Department of the Treasury

By:   
DAVID S. JONES  
JOSEPH CORDARO  
Assistant United States Attorneys  
86 Chambers Street, Third Floor  
New York, New York 10007  
Tel.: (212) 637-2739/2745  
Fax: (212) 637-2730  
Email: [David.Jones6@usdoj.gov](mailto:David.Jones6@usdoj.gov)  
[Joseph.Cordaro@usdoj.gov](mailto:Joseph.Cordaro@usdoj.gov)

**EXPORT DEVELOPMENT CANADA**

By: \_\_\_\_\_

Title: \_\_\_\_\_

By: \_\_\_\_\_

Title: \_\_\_\_\_

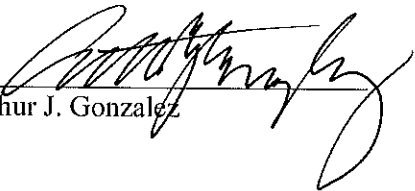
AGREED AND ACCEPTED:

**MOTORS LIQUIDATION COMPANY AVOIDANCE ACTION TRUST**

**By: Wilmington Trust Company, as Avoidance Action Trust Administrator and Trustee**

By: \_\_\_\_\_  
David A. Vanaskey Jr.  
Vice President

**By: Arthur J. Gonzalez, as Avoidance Action Trust Monitor**

By:   
Arthur J. Gonzalez

**UNITED STATES DEPARTMENT OF THE TREASURY**  
PREET BHARARA  
United States Attorney for the Southern District of New York  
Counsel for United States Department of the Treasury

By: \_\_\_\_\_  
DAVID S. JONES  
JOSEPH CORDARO  
Assistant United States Attorneys  
86 Chambers Street, Third Floor  
New York, New York 10007  
Tel.: (212) 637-2739/2745  
Fax: (212) 637-2730  
Email: [David.Jones6@usdoj.gov](mailto:David.Jones6@usdoj.gov)  
[Joseph.Cordaro@usdoj.gov](mailto:Joseph.Cordaro@usdoj.gov)

**EXPORT DEVELOPMENT CANADA**

By: \_\_\_\_\_

Title: \_\_\_\_\_

By: \_\_\_\_\_

Title: \_\_\_\_\_

AGREED AND ACCEPTED:

**MOTORS LIQUIDATION COMPANY AVOIDANCE ACTION TRUST**

**By: Wilmington Trust Company, as Avoidance Action Trust Administrator and Trustee**

By: \_\_\_\_\_  
David A. Vanaskey Jr.  
Vice President

**By: Arthur J. Gonzalez, as Avoidance Action Trust Monitor**

By: \_\_\_\_\_  
Arthur J. Gonzalez

**UNITED STATES DEPARTMENT OF THE TREASURY**

**PREET BHARARA**


United States Attorney for the Southern District of New York  
Counsel for United States Department of the Treasury

By: \_\_\_\_\_  
DAVID S. JONES  
JOSEPH CORDARO  
Assistant United States Attorneys  
86 Chambers Street, Third Floor  
New York, New York 10007  
Tel.: (212) 637-2739/2745  
Fax: (212) 637-2730  
Email: [David.Jones6@usdoj.gov](mailto:David.Jones6@usdoj.gov)  
[Joseph.Cordaro@usdoj.gov](mailto:Joseph.Cordaro@usdoj.gov)

**EXPORT DEVELOPMENT CANADA**

By:  \_\_\_\_\_

Title: **Sean Mitchell**  
**Principal** \_\_\_\_\_

By:  \_\_\_\_\_

Title: **Janet Boyd**  
**Loan Portfolio Manager** \_\_\_\_\_

## **EXHIBIT D**

EXECUTION VERSION

**SECOND AMENDED AND RESTATED MOTORS LIQUIDATION COMPANY  
AVOIDANCE ACTION TRUST AGREEMENT**

This SECOND AMENDED AND RESTATED MOTORS LIQUIDATION COMPANY AVOIDANCE ACTION TRUST AGREEMENT, dated as of May 11, 2012, 2016 (as it may be amended from time to time, this "Trust Agreement"), by and among Wilmington Trust Company, as trust administrator and trustee (together with any successor appointed under the terms hereof, the "Trust Administrator") of the Motors Liquidation Company Avoidance Action Trust (the "Trust") for the benefit of the Trust Beneficiaries (as defined below), and ~~FTI Consulting, Inc.~~ Arthur J. Gonzalez, as trust monitor (together with any predecessor or successor appointed under the terms hereof, the "Trust Monitor") of the Trust, amends and restates in its entirety the ~~Original~~ First Amended and Restated Trust Agreement (as defined below). Capitalized terms used herein and not otherwise defined herein shall have the meanings ascribed to such terms in the Debtors' Second Amended Joint Chapter 11 Plan of liquidation pursuant to chapter 11 of Title 11 of the United States Code, 11 U.S.C. §§ 101 et seq., as amended (the "Bankruptcy Code"), dated March 18, 2011, as confirmed (including all exhibits thereto, as the same may be further amended, modified, or supplemented from time to time, the "Plan").

WITNESSETH:

WHEREAS, the Trust Administrator and the Trust Monitor are party to the Motors Liquidation Company Avoidance Action Trust Agreement, dated as of March 30, 2011, by and among Motors Liquidation Company ("MLC"), MLC of Harlem, Inc., MLCS, LLC, MLCS Distribution Corporation, Remediation and Liability Management Company, Inc., and Environmental Corporate Remediation Company, Inc. (collectively, the "Debtors"), as debtors and debtors-in-possession, Wilmington Trust Company, as Trust Administrator, and FTI Consulting, Inc., as Trust Monitor (the "Original Trust Agreement"); and

WHEREAS, each of the Debtors has, prior to the date hereof, ceased to operate and dissolved; and

WHEREAS, the Original Trust Agreement was amended and restated in its entirety, with the approval of the Bankruptcy Court (defined below), pursuant to that certain Amended and Restated Motors Liquidation Company Avoidance Action Trust Agreement dated as of May 11, 2012 by and between the Trust Administrator and the Trust Monitor (the "First Amended and Restated Trust Agreement"); and

WHEREAS, there was a dispute between the Official Committee of Unsecured Creditors of Motors Liquidation Company (the "Committee") and the DIP Lenders (defined below) as to entitlements to Avoidance Action Proceeds, which dispute has been resolved by mutual agreement (the "Litigation Settlement") pursuant to which (a) the DIP Lenders will provide the Litigation Cost Advance (as defined below), (b) the DIP Lenders shall be entitled to be repaid the Litigation Cost Advance out of Distributable Trust Assets (as defined below) and (c) the DIP Lenders shall be entitled to receive thirty percent (30%) of all remaining Distributable Trust



Assets and the holders of Allowed General Unsecured Claims (or Units) shall be entitled to receive seventy percent (70%) of all remaining Distributable Trust Assets, with each such distribution to be made at or about the same time and on a *pari passu* basis, as set forth more fully in that certain Stipulation and Agreed Order (I) Settling Disputed Entitlements of Debtor-in-Possession Lenders and Official Committee of Unsecured Creditors to Potential Term Loan Avoidance Action Proceeds, and (II) Modifying Avoidance Action Trust Agreement to Implement Settlement, executed by the Committee, the DIP Lenders and the Trust and dated July 14, 2016 (the "Settlement Agreement"); and

WHEREAS, the Trust Administrator and the Trust Monitor believe that the Avoidance Action Trust Administrative Cash ~~(as and Supplemental Avoidance Action Trust Cash (each defined below) currently held by the Trust is insufficient to satisfy current and projected fees, costs and expenses of the Trust, and, as an integral part of the Litigation Settlement, the DIP Lenders have agreed to provide the Litigation Cost Advance to the Trust on the terms set forth in that certain agreement, dated July 14, 2016, executed by the Trust and the DIP Lenders (the "Litigation Cost Advance Agreement"); and~~

~~WHEREAS, to remedy this insufficiency of on July 15, 2016, the Avoidance Action Trust Administrative Cash, on January 20, 2012, the GUC Trust Administrator, jointly with the Official Committee of Unsecured Creditors (the "Committee"), filed a motion with the Bankruptcy Court (the "Sale and Transfer9019 Motion") seeking authority to, among other requests, liquidate certain New GM Securities and deliver the proceeds thereof to approval of the Trust for Settlement Agreement and the purposes of satisfying current and projected fees, costs and expenses of the Trust Litigation Cost Advance Agreement; and~~

WHEREAS, on ~~March 8, 2012~~ March 8, 2012, 2016, the Bankruptcy Court entered an order approving the ~~Sale and Transfer9019 Motion in relevant part (the "Sale and Transfer9019 Order"); and~~

~~WHEREAS, the Original Trust Agreement did not contemplate funding sources other than the Avoidance Action Trust Administrative Cash, and it is now necessary to amend the First Amended and Restated Trust Agreement to implement the Sale and Transfer9019 Order and to provide the necessary procedures for the allocation, administration and utilization of such funding sources; and~~

WHEREAS, it is the intent of the parties hereto that this Trust Agreement amends and restates in its entirety the ~~Original~~ First Amended and Restated Trust Agreement; and

WHEREAS, pursuant ~~section~~ Section 13.13(b) of the ~~Original~~ First Amended and Restated Trust Agreement, the ~~9019 Motion and the 9019 Order, the~~ Trust Administrator has petitioned ~~and received from~~ the Bankruptcy Court ~~for~~ approval of this amendment and restatement of the ~~Original~~ First Amended and Restated Trust Agreement; and

WHEREAS, this Trust Agreement, as it amends and restates the ~~Original~~ First Amended and Restated Trust Agreement, shall become effective upon ~~a Final Order of the Bankruptcy Court and the~~ execution by the appropriate signatories to this amended and restated Trust Agreement.

NOW, THEREFORE, in accordance with Section 13.13 of the ~~Original~~First Amended and Restated Trust Agreement, ~~and the Original Settlement Agreement.~~ the First Amended and Restated Trust Agreement is hereby amended and restated as follows:

### **Background**

A. Beginning on June 1, 2009, the Debtors filed in the United States Bankruptcy Court for the Southern District of New York (the "Bankruptcy Court") voluntary petitions for relief under chapter 11 of the Bankruptcy Code (the "Chapter 11 Cases").

B. On or about August 31, 2010, the Debtors filed their Plan and Disclosure Statement in the Bankruptcy Court. The Debtors filed an amended Plan and Disclosure Statement on December 7, 2010. The Debtors filed a second amended Plan on March 18, 2011.

C. The Disclosure Statement was approved by the Bankruptcy Court on December 8, 2010.

D. On or about March 29, 2011, the Bankruptcy Court entered an order (the "Confirmation Order") confirming the Plan.

E. The Plan provides for the creation of the Trust as a post-confirmation successor to MLC within the meaning of Section 1145(a) of the Bankruptcy Code, to hold and administer the Avoidance Action Trust Assets for the benefit of the Trust Beneficiaries and, to the extent received by the Trust, to distribute the Distributable Trust Assets to the Trust Beneficiaries in accordance with the terms of the Plan, the Confirmation Order and this Trust Agreement.

F. The Plan also provides that the Trust Administrator may determine to hold and administer Other Debtor Residual Trust Assets, if any, for the benefit of the DIP Lenders.

G. The Trust is being created, with respect to the Avoidance Action Trust Assets, on behalf of, and for the benefit of, the Trust Beneficiaries, and, with respect to the Other Debtor Residual Trust Assets, if any, on behalf of, and for the benefit of, the DIP Lenders.

H. The Trust Administrator shall have all powers necessary to implement the provisions of this Trust Agreement and administer the Trust in respect of the Avoidance Action Trust Assets, including the power to: (i) prosecute for the benefit of the Trust Beneficiaries, through counsel and other professionals selected by the Trust Administrator, the Term Loan Avoidance Action and any other causes of action that may from time to time be held by the Trust in respect thereof; (ii) preserve and maintain the Avoidance Action Trust Assets; (iii) distribute the Distributable Trust Assets, if any, to the Trust Beneficiaries in accordance with the Plan, the Confirmation Order and this Trust Agreement; (iv) expend the Avoidance Action Trust Administrative Cash, the Avoidance Action Trust SEC Reporting Cash (if applicable), and the Supplemental Avoidance Action Trust Cash to cover fees and expenses of the Trust, including payment of taxes and the fees and expenses of the Trust Professionals (other than in respect

thereof of the Other Debtor Residual Trust Assets); (v) enter into any contracts or agreements necessary or desirable to facilitate the implementation of the provisions of this Trust Agreement, including but not limited to loan agreements or sale agreements for the purposes of funding the fees and expenses of the Trust; and (vi) sell or grant liens on the Term Loan Avoidance Action or any other property of the Trust (other than the Other Debtor Residual Trust Assets) for the purposes of implementing the provisions of this Trust Agreement and the 9019 Order, including but not limited to funding the fees and expenses of the Trust.

I. The Trust Administrator shall also have all powers necessary to implement the provisions of this Trust Agreement and administer the Trust in respect of the Other Debtor Residual Trust Assets, if any, including the power to: (i) prosecute for the benefit of the DIP Lenders, through counsel and other professionals selected by the Trust Administrator, any causes of action that may from time to time be held by the Trust in respect thereof; (ii) preserve and maintain the Other Debtor Residual Trust Assets; (iii) distribute the Distributable Other Debtor Residual Trust Assets, if any, to the DIP Lenders in accordance with the Plan, the Confirmation Order and this Trust Agreement; and (iv) expend the Other Debtor Residual Trust Administrative Cash to cover fees and expenses of the Trust, including payment of the fees and expenses of the Trust Professionals, in respect thereof.

J. The Trust Administrator shall otherwise perform the functions and take the actions provided for in this Trust Agreement or permitted in the Plan and/or the Confirmation Order, or in any other agreement executed pursuant to the Plan, in each case subject to the provisions of Articles VI, VIII and XI hereof regarding the rights and powers of the Trust Monitor.

K. The Trust is subject to the continuing jurisdiction of the Bankruptcy Court, whose approval is required to pay or distribute money or property to, or on behalf of, a Trust Beneficiary, except as expressly provided in this Trust Agreement.

L. The Trust (other than the Avoidance Action Trust Claims Reserve) is intended to qualify as a liquidating trust under Treasury Regulation section 301.7701-4(d) that is treated as a “grantor trust” for federal and applicable state and local income tax purposes.

#### Agreement

**NOW, THEREFORE**, in consideration of the promises and the mutual covenants contained herein, the Trust Administrator and the Trust Monitor agree as follows:

#### **ARTICLE I** **DEFINED TERMS**

1.1. Definitions. Whenever used in this Trust Agreement, unless the context otherwise requires, the following words and phrases shall have the respective meanings ascribed to them as follows:

(a) “9019 Motion” has the meaning set forth in the preamble to this Trust Agreement.

(b) “9019 Order” has the meaning set forth in the preamble to this Trust Agreement.

(c) “Affiliates” means, with respect to any Person, any other Person which directly or indirectly controls, is controlled by or is under common control with such Person. For purposes of this definition “control” means, with respect to any Person, the possession, directly or indirectly, of the power to direct or cause the direction of the management or policies of such Person, whether through ownership of voting securities, by contract or otherwise.

(d) “Aggregate Maximum Amount” means the sum of the Maximum Amounts of all Disputed General Unsecured Claims, Unresolved Term Loan Avoidance Action Claims and Unresolved Other Avoidance Action Claims, as set forth in the applicable GUC Trust Report as the Aggregate Maximum Amount as of a given date.

(e) “Agreed Allocation” means the DIP Lenders shall be entitled to receive thirty percent (30%), and holders of Allowed General Unsecured Claims (or Units) shall be entitled to receive seventy percent (70%), with each such distribution to be made at or about the same time and on a *pari passu* basis.

(f) “Allowed General Unsecured Claims” means, collectively, (i) the Initial Allowed General Unsecured Claims and (ii) the Resolved Allowed General Unsecured Claims.

(g) “Avoidance Action Proceeds” means the proceeds of the Term Loan Avoidance Action.

(h) “Avoidance Action Trust Administrative Cash” means the Cash (other than the Supplemental Avoidance Action Trust Cash and the Avoidance Action Trust SEC Reporting Cash), including the fifteen million (\$15,000,000) Litigation Cost Advance and the \$1.6 million initially received from the DIP Lenders by the Debtors on the Avoidance Action Trust Transfer Date, held and maintained by the Trust Administrator for the purpose of paying the fees and expenses incurred by the Trust Administrator (including fees and expenses for Trust Professionals) in connection with the Trust and any obligations imposed on the Trust Administrator or the Trust, including fees and expenses relating to the performance of the Trust Administrator’s obligations under this Trust Agreement and the Plan, other than in respect of the Other Debtor Residual Trust Assets. ~~The Debtors shall reserve \$1.6 million for the Avoidance Action Trust Administrative Cash, which shall be transferred to the Trust, less any amounts expended by MLC from and after the Effective Date in respect of the prosecution of the Term Loan Avoidance Action, on the Avoidance Action Trust Transfer Date.~~

(i) “Avoidance Action Trust Assets” means, collectively, (i) the Term Loan Avoidance Action transferred to the Trust, (ii) the Avoidance Action Proceeds, (iii) the Avoidance Action Trust Administrative Cash, (iv) the Avoidance Action Trust SEC Reporting Cash; ~~and~~ (v) the Supplemental Avoidance Action Trust Cash; and (vi) the Litigation Cost Advance.

~~(g)~~(j) “Avoidance Action Trust SEC Reporting Costs” means any costs, fees or expenses incurred by the Trust that are directly or indirectly related to reports that may be required to be filed by the Trust with the SEC pursuant to applicable rules, regulations and interpretations of the SEC (including, without limitation, any legal, accounting or registration fees, costs and expenses incurred by the Trust with respect thereto).

~~(h)~~(k) “Avoidance Action Trust SEC Reporting Cash” has the meaning set forth in Section 2.3(e) of this Trust Agreement.

~~(i)~~(l) “Avoidance Action Trust Transfer Date” means the date selected by the Debtors on which the Avoidance Action Trust Assets (other than the Supplemental Avoidance Action Trust Cash and the Avoidance Action Proceeds) are transferred to the Trust, which transfer shall occur on or before December 15, 2011.

~~(j)~~(m) “Bankruptcy Code” has the meaning set forth in the preamble to this Trust Agreement.

~~(k)~~(n) “Bankruptcy Court” has the meaning set forth in Background paragraph A.

~~(l)~~(o) “Budget” has the meaning set forth in Section 6.3.

~~(m)~~(p) “calendar quarter” means the relevant three-month period ending on the last day of March, June, September or December, as applicable, of each calendar year; *provided, however*, that the calendar quarter that contains the Avoidance Action Trust Transfer Date shall be the period commencing on the Avoidance Action Trust Transfer Date and concluding on the date on which the relevant calendar quarter would naturally end in accordance with the foregoing.

~~(n)~~(q) “Certificate of Trust” means the certificate of trust of the Trust as required by Section 3810 of the Delaware Act.

~~(o)~~(r) “Chapter 11 Cases” has the meaning set forth in Background paragraph A.

~~(p)~~(s) “Claim Conflict Resolution” has the meaning set forth in Section 3.6.

~~(q)~~(t) “Confidential Party” has the meaning set forth in Section 13.12.

~~(r)~~(u) “Confirmation Order” has the meaning set forth in Background paragraph D.

~~(s)~~(v) “Current Total Amount” means as of a given date, the sum of (A) the Total Allowed Amount as of such date and (B) the Aggregate Maximum Amount as of such date, as set forth in the applicable GUC Trust Report as the Current Total Amount as of a given date.

~~(t)~~(w) “Debtors” has the meaning set forth in the preamble to this Trust Agreement.

~~(u)~~(x) “Delaware Act” means the Delaware Statutory Trust Act, 12 Del. C. § 3801 et seq.

~~(v)~~(y) “DIP Credit Agreement Claims” means all Claims arising under the DIP Credit Agreement and Orders approving the DIP Credit Agreement dated June 25, 2009 and July 5, 2009.

~~(w)~~(z) “DIP Lender Advances” means ~~the Distributable Trust Assets distributable to the DIP Lenders, in~~ an amount equal to (i) the amounts of Cash advanced directly or indirectly by MLC ~~and the DIP Lenders~~ to fund the costs and expenses associated with realizing the proceeds of the Term Loan Avoidance Action, including, without limitation, any such amounts expended to fund the costs and expenses of professionals retained by the defendants in the Term Loan Avoidance Action ~~and~~, (ii) without duplication, the amount of the Avoidance Action Trust Administrative Cash, ~~and (iii) without duplication, the Litigation Cost Advance.~~

~~(x)~~(aa) “DIP Lender Distributable Trust Assets” means the ~~Distributable Trust Assets~~ assets distributable to the DIP Lenders, in ~~an amount as determined either by (i) mutual agreement between~~ accordance with the U.S. Treasury ~~Agreed Allocation~~ and the ~~Creditor’s Committee or (ii) Final Order~~ Settlement Agreement.

~~(y)~~(bb) “DIP Lenders” means the U.S. Treasury and ~~EDC~~ Export Development Canada, as lenders under the DIP Credit Agreement.

~~(z)~~(cc) “Disputed General Unsecured Claims” means the General Unsecured Claims against the Debtors that are Disputed (as defined in the Plan) as of the Initial GUC Record Date, until a time when such claims become Resolved General Unsecured Claims or are otherwise resolved pursuant to the claims resolution procedures contained in the Plan.

~~(aa)~~(dd) “Distributable Other Debtor Residual Trust Assets” means the Other Debtor Residual Assets Proceeds, if any, together with any earnings (including interest) thereon.

~~(bb)~~(ee) “Distributable Other Debtor Residual Trust Cash” means any Cash or cash equivalents included in the Distributable Other Debtor Residual Trust Assets.

~~(cc)~~(ff) “Distributable Trust Assets” means the Avoidance Action Proceeds together with any earnings (including interest) thereon.

~~(dd)~~(gg) “Distributable Trust Cash” means any Cash or cash equivalents included in the Distributable Trust Assets.

~~(ee)~~(hh) “Distribution Date” means the date of any distribution made by the Trust Administrator to the Trust Beneficiaries pursuant to this Trust Agreement, whether to

the DIP Lenders pursuant to Section 5.1(d) or on account of Allowed General Unsecured Claims and/or Units.

~~(ff)~~(ii) “Distribution Threshold” means \$10,000,000.

~~(jj)~~ “Excess Distributable Trust Assets” means Distributable Trust Assets that the Trust Administrator, with the approval of the Trust Monitor, determines shall be distributed following the Initial GUC Distribution Date.

~~(gg)~~(kk) “Excess GUC Distributable Trust Assets Determination Date” has the meaning set forth in Section 5.4(a).

~~(hh)~~ “Excess GUC Distributable Trust Assets” means (i) the amount of the GUC Distributable Trust Assets held by the Trust (after providing for all distributions then required to be made in respect of Resolved Allowed General Unsecured Claims), minus (ii) the amount of the GUC Distributable Trust Assets necessary for the satisfaction of Claims in the amount of the Aggregate Maximum Amount pursuant to Section 5.3.

~~(ll)~~ “Excess GUC Distributable Trust Assets” has the meaning set forth in Section 5.4(c).

~~(jj)~~(mm) “Final Recovery Date” has the meaning set forth in Section 5.1(a).

~~(nn)~~ “First Amended and Restated Trust Agreement” has the meaning set forth in the preamble to this Trust Agreement.

~~(oo)~~ “Funding Account” means that segregated account, in the name of the Trust, established at a bank reasonably acceptable to the Trust and the DIP Lenders, in which the Trust shall hold the Litigation Cost Advance.

~~(pp)~~ “Litigation Cost Advance Agreement” has the meaning set forth in the preamble to this Trust Agreement.

~~(jj)~~(qq) “GUC Beneficiaries” means the holders of Allowed General Unsecured Claims or Units received in respect of such claims.

~~(kk)~~(rr) “GUC Distributable Trust Assets” ~~has means:~~ (i) the ~~meaning set forth~~ Segregated Account Assets; and (ii) the assets distributable to the holders of Allowed General Unsecured Claims in ~~Section 5.1(d)~~ accordance with the Agreed Allocation and the Settlement Agreement.

~~(ll)~~(ss) “GUC Trust Advances” means the Distributable Trust Assets distributable to the holders of Allowed General Unsecured Claims, in an amount equal to the aggregate amount of GUC Trust Supplemental Cash received from the GUC Trust pursuant to Section 2.3(f)(i) hereof, together with any earnings (including interest) thereon, minus the aggregate amount of Cash held in the Segregated Account on the date of measurement.

~~(mm)~~(tt) “GUC Trust Reports” means the reports prepared by the GUC Trust Administrator each quarter as provided in the GUC Trust Agreement, which shall be delivered to the Trust Administrator pursuant ~~to~~ the terms of the GUC Trust Agreement.

~~(nn)~~(uu) “GUC Trust Supplemental Cash” has the meaning set forth in Section 2.3(f)(i).

~~(oo)~~(vv) “Holdback” has the meaning set forth in Section 6.1(b).

~~(pp)~~(ww) “Incompetency” means, with respect to any Person, the incompetency of such Person if such Person is a natural person.

~~(qq)~~(xx) “Initial Allowed General Unsecured Claims” has the meaning set forth in Section 5.2(ba).

~~(rr)~~(yy) “Initial GUC Distribution Date” has the meaning set forth in Section 5.2(ba).

~~(ss)~~(zz) “Initial GUC Record Date” has the meaning set forth in Section 5.2(ba).

~~(tt)~~(aaa) “IRS” means the Internal Revenue Service.

~~(bbb)~~ “Litigation Cost Advance” means the fifteen million dollars (\$15,000,000) to be provided by the DIP Lenders pursuant to the Litigation Cost Advance Agreement and the Settlement Agreement and subject to a deposit account control agreement acceptable to the DIP Lenders and the Trust.

~~(ccc)~~ “Litigation Settlement” has the meaning set forth in the preamble to this Trust Agreement.

~~(ddd)~~(ddd) “Maximum Amount” means the maximum amount of any Disputed General Unsecured Claim, Unresolved Term Loan Avoidance Action Claim or Unresolved Other Avoidance Action Claim, calculated in accordance with the GUC Trust Agreement and as set forth in the applicable GUC Trust Report as the Maximum Amount of any Claim or group of Claims as of a given date.

~~(vvv)~~(eee) “MLC” has the meaning set forth in the preamble to this Trust Agreement.

~~(www)~~(fff) “Original Trust Agreement” has the meaning set forth in the preamble to this Trust Agreement.

~~(xxx)~~(ggg) “Other Avoidance Action Claims” means the additional General Unsecured Claims that have arisen as a result of recovery of proceeds of the Avoidance Actions other than the Term Loan Avoidance Action (and any related unsecured claims).



~~(yy)~~(hhh) “Other Debtor Residual Assets” means any assets of MLC remaining at such time as the Debtors shall be liquidated, other than the Term Loan Avoidance Action and the Term Loan Avoidance Action Administrative Cash and any other assets of MLC whose disposition is specifically provided for under the Plan or the Confirmation Order.

~~(zz)~~(iii) “Other Debtor Residual Accepted Assets” means Other Debtor Residual Assets accepted by the Trust Administrator for transfer to the Trust pursuant to Section 2.3(b).

~~(aaa)~~(jii) “Other Debtor Residual Assets Proceeds” means any proceeds realized in respect of the Other Debtor Residual Accepted Assets.

~~(bbb)~~(kkl) “Other Debtor Residual Trust Administrative Cash” means the Cash, if any, held and maintained by the Trust Administrator for the purpose of paying the fees and expenses incurred by the Trust Administrator (including fees and expenses for Trust Professionals) in connection with the Trust and any obligations imposed on the Trust Administrator or the Trust, including fees and expenses relating to the performance of the Trust Administrator’s obligations under this Trust Agreement and the Plan, but only in respect of the Other Debtor Residual Trust Assets, which Cash may be obtained by transfer to the Trust by the Debtors, from the DIP Lenders (in their sole discretion) or from the proceeds of the Other Debtor Residual Accepted Assets.

~~(eee)~~(lll) “Other Debtor Residual Trust Assets” means, if any, collectively, (i) the Other Debtor Residual Accepted Assets transferred to the Trust, (ii) the Other Debtor Residual Assets Proceeds and (iii) the Other Debtor Residual Trust Administrative Cash.

~~(ddd)~~(mmm) “Other Debtor Residual Assets Transfer Date” means the date selected by the Debtors on which the Other Debtor Residual Assets Transfer, if any, are transferred to the Trust, which transfer shall occur on or before December 15, 2011.

~~(eee)~~(nnn) “Other Supplemental Cash” means any Cash received by the Trust pursuant to Section 6.1(d) hereof from the sale of, or granting of liens on, all or a portion of the Term Loan Avoidance Action or any other property held by the Trust (other than the Other Debtor Residual Trust Assets), or from any source other than the GUC Trust.

~~(fff)~~(ooo) “Permissible Investments” means investments in any of the following:

(i) Marketable securities issued by the U.S. Government and supported by the full faith and credit of the U.S. Treasury, either by statute or an opinion of the Attorney General of the United States;

(ii) Marketable debt securities, rated Aaa by Moody’s and/ or AAA by S&P, issued by U. S. Government-sponsored enterprises, U. S. Federal agencies, U. S. Federal financing banks, and international institutions whose capital stock has been subscribed for by the United States;

(iii) Certificates of deposit, time deposits, and bankers acceptances of any bank or trust company incorporated under the laws of the United States or any state, provided that, at the date of acquisition, such investment, and/or the commercial paper or other short term debt obligation of such bank or trust company has a short-term credit rating or ratings from Moody's and/or S&P, each at least P-1 or A-1;

(iv) Commercial paper of any corporation incorporated under the laws of the United States or any state thereof which on the date of acquisition is rated by Moody's and/or S&P, provided each such credit rating is least P-1 and/or A-1;

(v) Money market mutual funds that are registered with the Securities and Exchange Commission under the Investment Company Act of 1940, as amended, and operated in accordance with Rule 2a-7 and that at the time of such investment are rated Aaa by Moody's and/or AAAM by S&P, including such funds for which the Trust Administrator or an Affiliate provides investment advice or other services;

(vi) Tax-exempt variable rate commercial paper, tax-exempt adjustable rate option tender bonds, and other tax-exempt bonds or notes issued by municipalities in the United States, having a short-term rating of "MIG-1" or "VMIG-1" or a long term rating of "AA" (Moody's), or a short-term rating of "A-1" or a long term rating of "AA" (S&P); and

(vii) Repurchase obligations with a term of not more than thirty days, 102 percent collateralized, for underlying securities of the types described in clauses (i) and (ii) above, entered into with any bank or trust company or its respective affiliate meeting the requirements specified in clause (iii) above.

~~(ggg)(ppp)~~ "Plan" has the meaning set forth in the preamble to this Trust Agreement.

~~(hhh)(qqq)~~ "Resolved Allowed General Unsecured Claims" means, collectively, (I) the Disputed General Unsecured Claims that are allowed after the Initial GUC Record Date in accordance with the claims resolution procedures administered under the Plan (to the extent so resolved); (II) the Term Loan Avoidance Action Claims, to the extent and in the amount collected by the Trust against the respective defendants in the underlying litigation (including by way of settlement); and (III) the Other Avoidance Action Claims, to the extent and in the amount collected against the respective defendants in the underlying litigations (including by way of settlement). For the avoidance of doubt, unless and until a Disputed General Unsecured Claim, Unresolved Term Loan Avoidance Action Claim or Unresolved Other Avoidance Action Claim becomes a Resolved Allowed General Unsecured Claim, the holders of such claim shall not receive any distribution from the Trust.

~~(iii)(rrr)~~ "Resolved Allowed General Unsecured Claims Determination Date" has the meaning set forth in Section 5.3(a).

~~(jjj)(sss)~~ "Sale and Transfer Motion" has the meaning set forth in the preamble to ~~this~~ the First Amended and Restated Trust Agreement.

Formatted: Outline numbered + Level: 3 + Numbering  
Style: a, b, c, ... + Start at: 1 + Alignment: Left + Aligned at:  
1.17" + Tab after: 0.17" + Indent at: 0.17"

~~(kkk)~~(ttt) “Sale and Transfer Order” has the meaning set forth in the preamble to ~~this~~the First Amended and Restated Trust Agreement.

~~(lll)~~(uuu) “SEC” means the Securities and Exchange Commission.

~~(mmm)~~(vvv) “Secretary of State” means the Office of the Secretary of State of the State of Delaware.

~~(nnn)~~(www) “Segregated Account” has the meaning set forth in Section 2.3(f)(i).

~~(xxx)~~ “Segregated Account Assets” means the Cash held in the Segregated Account.

~~(ooo)~~(yyy) “Settlement Agreement” has the meaning set forth in Section 5.1(d), the preamble to this Trust Agreement.

~~(ppp)~~(zzz) “Supplemental Avoidance Action Trust Cash” means the GUC Trust Supplemental Cash and the Other Supplemental Cash.

~~(qqq)~~(aaaa) “Tax Returns” means all tax returns, reports, certificates, forms or similar statements or documents.

~~(rrr)~~(bbbb) “Term Loan Avoidance Action” means the Avoidance Action commenced by the Creditors’ Committee against JPMorgan Chase Bank, N.A., individually and as Administrative Agent, and various lenders party to a term loan agreement, dated as of November 29, 2006, between General Motors Corporation, as borrower, JPMorgan Chase Bank, N.A., as agent, and various institutions as lenders and agents, styled *Official Committee of Unsecured Creditors of Motors Liquidation Co. v. JPMorgan Chase Bank, N.A. et al.*, Adv. Pro. No. 09-00504 (Bankr. S.D.N.Y. July 31, 2009).

~~(sss)~~(cccc) “Term Loan Avoidance Action Claims” means the additional General Unsecured Claims that have arisen as a result of recovery of proceeds of the Term Loan Avoidance Action (or any related unsecured claims).

~~(ttt)~~(dddd) “Total Allowed Amount” means the sum of the amount of all Initial Allowed General Unsecured Claims plus the amount of all Resolved Allowed General Unsecured Claims, as set forth in the applicable GUC Trust Report.

~~(uuu)~~(eeee) “Treasury Regulations” means the income tax regulations promulgated under the Tax Code, including any amended or successor income tax regulations thereto.

~~(vvv)~~(ffff) “Trust” has the meaning set forth in the preamble to this Trust Agreement.

~~(www)~~(gggg) “Trust Administrator” has the meaning set forth in the preamble to this Trust Agreement.

(xxx)(hhhh) “Trust Administrator Parties” means the Trust Administrator and its principals, directors, officers, employees, agents, representatives, attorneys, accountants, advisors and other professionals (including the Trust Professionals).

(yyy)(iiii) “Trust Agreement” has the meaning set forth in the preamble to this Trust Agreement.

(zzz)(jjjj) “Trust Beneficiaries” means the holders of the DIP Credit Agreement Claims and the holders of Allowed General Unsecured Claims (or Units received in respect of such claims).

(aaa)(kkkk) “Trust Cash” means the Cash or cash equivalents included in the Avoidance Action Trust Assets or the Other Debtor Residual Trust Assets, if any.

(bbb)(llll) “Trust Monitor” has the meaning set forth in the preamble to this Trust Agreement.

(eee)(mmmm) “Trust Monitor Parties” means the Trust Monitor and its principals, directors, officers, employees, agents, representatives, attorneys, accountants, advisors and other professionals.

(ddd)(nnnn) “Trust Professionals” means, collectively, independent contractors, including attorneys, accountants, appraisers, disbursing agents or other parties deemed by the Trust Administrator to have the qualifications necessary or desirable to assist in the proper administration of the Trust and that are employed or retained by the Trust in such capacities.

(eee)(oooo) “Unit Issuance Ratio” means the ratio of one Unit for each \$1,000 in amount of Allowed General Unsecured Claims.

(fff)(pppp) “Units” means the units of beneficial interest issued by the Trust to holders of Allowed General Unsecured Claims.

(eee)(qqqq) “Unresolved Other Avoidance Action Claim” means an Other Avoidance Action Claim that has not or has not yet arisen because no determination (including by way of settlement) has been made in the respective Avoidance Action against the respective defendant who would be entitled to such claim in the event of such determination (or if a determination has been made against the defendant, the proceeds related to such resolution have not been recovered in full).

(hhh)(rrrr) “Unresolved Term Loan Avoidance Action Claim” means a Term Loan Avoidance Action Claim that has not or has not yet arisen because no determination (including by way of settlement) has been made in the Term Loan Avoidance Action against the respective defendant who would be entitled to such claim in the event of such determination (or if a determination has been made against the defendant, the proceeds related to such resolution have not been recovered in full).

~~(s)(s)(s)(s)~~ “Wind-Down Facility” means the \$1.175 billion wind-down facility provided to the Debtors pursuant to the DIP Credit Agreement.

**ARTICLE II**  
**DECLARATION OF TRUST**

2.1. Creation of Trust. The Debtors and the Trust Administrator, pursuant to the Plan and the Confirmation Order and in accordance with the applicable provisions of chapter 11 of the Bankruptcy Code, hereby constitute and create the Trust, in the form of a statutory trust under the Delaware Act, which shall bear the name “Motors Liquidation Company Avoidance Action Trust.” In connection with the exercise of the Trust Administrator’s power hereunder, the Trust Administrator may use this name or such variation thereof as the Trust Administrator sees fit. The Trust Administrator, as trustee of the Trust, is hereby authorized and directed to execute and file a Certificate of Trust for the Trust in the form attached hereto as Exhibit B.

2.2. Purpose of Trust. The sole purpose of the Trust is to liquidate and distribute its assets pursuant to the Plan in accordance with Treasury Regulation section 301.7701-4(d), with no objective to continue or engage in the conduct of a trade or business.

2.3. Transfer of Avoidance Action Trust Assets to the Trust.

(a) Effective upon the Avoidance Action Trust Transfer Date, the Debtors hereby transfer to the Trust, pursuant to Bankruptcy Code Sections 1123(a)(5)(B) and 1123(b)(3)(B), and in accordance with the Plan and the Confirmation Order, the Avoidance Action Trust Assets (other than the Avoidance Action Trust SEC Reporting Cash, and the Supplemental Avoidance Action Trust Cash), as they exist on the Avoidance Action Trust Transfer Date, free and clear of any and all liens, claims, encumbrances and interests (legal, beneficial or otherwise) of all other persons to the maximum extent contemplated by and permissible under Bankruptcy Code Section 1141(c); *provided, however* that notwithstanding anything to the contrary in the Plan, Disclosure Statement, Confirmation Order, this Trust Agreement or any other agreement, the DIP Lenders shall maintain their liens on the Avoidance Action Trust Administrative Cash, provided that for the avoidance of doubt, the DIP Lenders shall not demand acceleration of their liens on the Avoidance Action Trust Administrative Cash except in accordance with the provisions of section 7.2 of the DIP Credit Agreement. Such transfers shall be exempt from any stamp, real estate transfer, mortgage reporting, sales, use or other similar tax pursuant to Bankruptcy Code Section 1146. The Debtors and their successors and assigns shall be released from any and all liability with respect to the transfer of such Avoidance Action Trust Assets to the Trust as aforesaid. Nothing in this Trust Agreement is intended to, or shall be construed to, effect a release, extinguishment or compromise of any claim or cause of action transferred to the Trust pursuant to this Trust Agreement. The Avoidance Action Trust Assets and all other property held from time to time by the Trust under this Trust Agreement (other than the Other Debtor Residual Trust Assets) and any earnings (including interest) thereon are to be managed, applied and disposed of by the Trust Administrator in accordance with the terms hereof, the Plan and the Confirmation Order for the benefit of the Trust Beneficiaries, and for no other

party, subject to the further covenants, conditions and terms hereinafter set forth, including the provisions of Section 2.6.

(b) To the extent any Avoidance Action Trust Assets (other than the Supplemental Avoidance Action Trust Cash) cannot be transferred to the Trust, because of a restriction on transferability under applicable non-bankruptcy law that is not superseded by Bankruptcy Code Section 1123 or any other provision of the Bankruptcy Code, such assets shall be retained by the Debtors or any successor thereto including, without limitation, the GUC Trust. The proceeds of the sale of any such assets retained by the Debtors (or any successor thereto) shall be allocated to the Trust pursuant to the Plan as if such transfer had not been restricted under applicable non-bankruptcy law. The Trust Administrator may commence an action in the Bankruptcy Court to resolve any dispute regarding the allocation of the proceeds of any assets retained by the Debtors (or any successor thereto) pursuant to the Plan and Confirmation Order.

(c) On the Avoidance Action Trust Transfer Date, the Debtors shall also deliver, or cause to be delivered, to the Trust a complete list of all General Unsecured Claims, both Allowed and Disputed, reflected on the claims registry as of the Avoidance Action Trust Transfer Date, including the names and addresses of all holders of such General Unsecured Claims, whether such claims have been Allowed or are Disputed, and the details of all objections in respect of Disputed General Unsecured Claims.

(d) Effective upon the Other Debtor Residual Assets Transfer Date, the Debtors hereby transfer to the Trust, pursuant to Bankruptcy Code Sections 1123(a)(5)(B) and 1123(b)(3)(B), and in accordance with the Plan and the Confirmation Order, such of the Other Debtor Residual Assets, as they exist on the Other Debtor Residual Assets Transfer Date, as the Trust Administrator, in its sole discretion but with the approval of the Trust Monitor, shall determine to accept, free and clear of any and all liens, claims, encumbrances and interests of all other persons to the maximum extent contemplated by and permissible under Bankruptcy Code Section 1141(c); provided that, for the avoidance of doubt, the Trust Administrator may determine not to accept the transfer to the Trust of any or all of the Other Debtor Residual Assets for any reason or for no reason. Any such transfer shall be exempt from any stamp, real estate transfer, mortgage reporting, sales, use or other similar tax pursuant to Bankruptcy Code Section 1146. The Debtors and their successors and assigns shall be released from any and all liability with respect to the transfer of the Other Debtor Residual Accepted Assets to the Trust as aforesaid. Nothing in this Trust Agreement is intended to, or shall be construed to, effect a release, extinguishment or compromise of any claim or cause of action transferred to the Trust pursuant to this Trust Agreement, and notwithstanding anything to the contrary in the Plan, Disclosure Statement, Confirmation Order, this Trust Agreement or any other agreement, the DIP Lenders shall maintain their liens on the Other Debtor Residual Accepted Assets. The Other Debtor Residual Trust Assets and all other property held from time to time by the Trust under this Trust Agreement in respect thereof, and any earnings (including interest) thereon, are to be managed, applied and disposed of by the Trust Administrator in accordance with the terms hereof, the Plan and the Confirmation Order for the benefit of the DIP Lenders, and for no other party, subject to the further covenants, conditions and terms hereinafter set forth, including the provisions of Section 2.6.

(e) (i) On the Avoidance Action Trust Transfer Date, the Debtors shall, pursuant to Section 2.3(e) of the GUC Trust Agreement, transfer Cash to the Trust in an amount of \$500,000 (the “Avoidance Action Trust SEC Reporting Cash”). The Avoidance Action Trust SEC Reporting Cash shall be held by the Trust in a segregated account and shall be used solely for the satisfaction of Avoidance Action Trust SEC Reporting Costs. Any taxes imposed on the Trust in respect of the Avoidance Action Trust SEC Reporting Cash shall be satisfied from the income realized thereon.

(ii) The Trust Administrator shall only use Avoidance Action Trust SEC Reporting Cash to satisfy Avoidance Action Trust SEC Reporting Costs to extent there is no other available source of funds to satisfy such expenses (other than the Supplemental Avoidance Action Trust Cash), including, without limitation, any funds obtained through the reservation and application of all or a portion of the Holdback pursuant to Section 6.1(b) hereof.

(iii) If the Trust Administrator determines that (x) reports are not, and at no time will be, required to be filed by the Trust with the SEC pursuant to applicable rules, regulations and interpretations of the SEC or (y) the Trust has other available funds (as set forth in Section 2.3(e)(ii) hereof) which are sufficient to satisfy any current or future projected, fees, costs or expenses that are directly or indirectly related to reports that may be required to be filed by the Trust with the SEC pursuant to applicable rules, regulations and interpretations of the SEC (including, without limitation, any legal, accounting or registration fees, costs and expenses incurred by the Trust with respect thereto), then the Trust shall transfer to the GUC Trust any Avoidance Action Trust SEC Reporting Cash that has not been applied as provided in this Section 2.3(e).

(iv) Any income earned on the Avoidance Action Trust SEC Reporting Cash, net of taxes paid thereon, shall be Avoidance Action Trust Administrative Cash.

(f) (i) From time to time, in accordance with a Final Order of the Bankruptcy Court if so required, the GUC Trust may deliver Cash to the Trust to be used solely for the satisfaction of fees and expenses of the Trust (including for the payment of the fees and expenses of Trust Professionals) or the satisfaction of any federal, state or local taxes incurred by the Trust. Any Cash so delivered to the Trust shall be designated as “GUC Trust Supplemental Cash.” GUC Trust Supplemental Cash shall be held by the Trust in a segregated account (the “Segregated Account”), and shall be used solely for the satisfaction of fees and expenses of the Trust (including for the payment of the fees and expenses of Trust Professionals), for the satisfaction of taxes incurred by the Trust or for distribution to holders of Allowed General Unsecured Claims pursuant to Section 5.1(d)(iv) hereof.

(ii) The Trust Administrator shall only use the GUC Trust Supplemental Cash to satisfy fees and expenses of the Trust and tax liabilities of the Trust to the extent that there is no other source of funds to satisfy such expenses (other than the Avoidance Action Trust SEC Reporting Cash, and other than through the sale or encumbrance of the Term Loan Avoidance Action or any other property of the Trust pursuant to Section 6.1(d) hereof), including, without limitation, Avoidance Action Trust Administrative Cash, and any funds obtained through the reservation and application of all or a portion of the Holdback

pursuant to Section 6.1(b) hereof. Any income earned on the GUC Trust Supplemental Cash, net of taxes paid thereon, shall be GUC Trust Supplemental Cash.

2.4. Appointment and Acceptance of Trust Administrator. The Trust Administrator shall be deemed to be appointed pursuant to Bankruptcy Code Section 1123(b)(3)(B) and is hereby appointed trustee of the Trust under the Delaware Act. The Trust Administrator hereby accepts such appointments, including trusteeship of the Trust created by this Trust Agreement and the grant, assignment, transfer, conveyance and delivery by the Debtors to the Trust Administrator, (i) on behalf of the Trust, and for the benefit of the Trust Beneficiaries, of all of their respective right, title and interest in the Distributable Trust Assets, and (ii) on behalf of the Trust, and for the benefit of the DIP Lenders, of all of their respective right, title and interest in the Other Debtor Residual Trust Assets, upon and subject to the terms and conditions set forth in the Plan, the Confirmation Order and this Trust Agreement. The Trust Administrator's powers are exercisable solely in a fiduciary capacity consistent with, and in furtherance of, the purpose of the Trust and not otherwise, and in accordance with applicable law, including the Delaware Act. The Trust Administrator shall have the authority to bind the Trust within the limitations set forth herein, but shall for all purposes hereunder be acting in the capacity as Trust Administrator, and not individually.

2.5. Distribution of Distributable Trust Assets. The Trust Administrator shall, in an expeditious but orderly manner and subject to the provisions of the Plan, the Confirmation Order and this Trust Agreement, make timely distributions of the Distributable Trust Assets and the Distributable Other Debtor Residual Assets in accordance with the terms hereof and not unduly prolong the existence of the Trust. The Trust Administrator may incur and pay any reasonable and necessary expenses in connection with the administration of the Trust, including the fees and expenses of the Trust Professionals *provided, however*, that all such expenditures (other than in respect of the Other Debtor Residual Trust Assets) shall be made in accordance with the Budget.

2.6. No Reversion to Debtors.

(a) In no event shall any part of the Avoidance Action Trust Assets or the Other Debtor Residual Trust Assets revert to or be distributed to or for the benefit of any Debtor. All Distributable Trust Assets shall be applied as provided in Section 5.1(d), including to the satisfaction of Allowed General Unsecured Claims, including through distributions made in respect of the Units. All Distributable Other Debtor Residual Trust Assets shall be applied as provided in Article 5A.

(b) To the extent that after satisfaction in full of all of the costs and expenses of the administration of the Trust, after all Allowed General Unsecured Claims have been paid pursuant to the Plan, after satisfaction of all other obligations or liabilities of the Trust incurred or assumed in accordance with the Plan, Confirmation Order or this Trust Agreement (or to which the Avoidance Action Trust Assets are otherwise subject), and after the affairs of the Trust have been finally wound up and concluded in accordance with the provisions of Section 4.3 hereof and Section 3808 of the Delaware Act, there shall remain any Avoidance Action Trust Administrative Cash, the Trust Administrator is authorized to and shall distribute any



such remaining Avoidance Action Trust Administrative Cash to the DIP Lenders in accordance with the terms of the DIP Credit Agreement and the Plan. To the extent any portion of such residue is not accepted by the respective DIP Lenders, the Trust Administrator shall (i) be authorized to distribute up to \$100,000 of such remaining Avoidance Action Trust Administrative Cash to an organization described in Section 501(c)(3) of the Tax Code and exempt from U.S. federal income tax under section 501(a) of the Tax Code that is unrelated to the Debtors, the Trust, any Trust Administrator Parties or any Trust Monitor Parties, or (ii) request an order from the Bankruptcy Court authorizing the Trust Administrator to distribute any such remaining Avoidance Action Trust Administrative Cash to such an organization, or authorizing such other disposition as recommended by the Trust Administrator and approved by the Bankruptcy Court.

(c) To the extent that after satisfaction in full of all of the costs and expenses of the administration of the Trust, after all Allowed General Unsecured Claims have been paid pursuant to the Plan, after satisfaction of all other obligations or liabilities of the Trust incurred or assumed in accordance with the Plan, Confirmation Order or this Trust Agreement (or to which the Avoidance Action Trust Assets are otherwise subject), and after the affairs of the Trust have been finally wound up and concluded in accordance with the provisions of Section 4.3 hereof and Section 3808 of the Delaware Act, there shall remain any GUC Trust Supplemental Cash, the Trust Administrator is authorized to and shall distribute any such remaining GUC Trust Supplemental Cash to the holders of Allowed General Unsecured Claims (as defined in the GUC Trust Agreement), regardless of whether such amount of GUC Trust Supplemental Cash is less than the Distribution Threshold, provided that, if the remaining GUC Trust Supplemental Cash is less than \$100,000, the Trust Administrator shall (i) be authorized to distribute such remaining GUC Trust Supplemental Cash to an organization described in Section 501(c)(3) of the Tax Code and exempt from U.S. federal income tax under section 501(a) of the Tax Code that is unrelated to the Debtors, the Trust, any Trust Administrator Parties or any Trust Monitor Parties, or (ii) request an order from the Bankruptcy Court authorizing the Trust Administrator to distribute any such remaining GUC Trust Supplemental Cash to such an organization, or authorizing such other disposition as recommended by the Trust Administrator and approved by the Bankruptcy Court.

**ARTICLE III**  
**TRUST BENEFICIARIES; UNITS**

3.1. Rights of Beneficiaries.

(a) Except as provided in Section 2.6 hereof, the Trust Beneficiaries shall be the sole beneficiaries of the Trust (to the extent of the Avoidance Action Trust Assets) and the Distributable Trust Assets, and the Trust Administrator shall retain only such incidents of ownership as are necessary to undertake the actions and transactions authorized in the Plan, the Confirmation Order and this Trust Agreement, including those powers set forth in Articles VI and VIII hereof.

(b) The beneficial interest of a Trust Beneficiary in the Trust is hereby declared and shall be in all respects and for all purposes intangible personal property.

(c) Except as expressly provided herein, a Trust Beneficiary shall have no title or right to, or possession, management or control of, the Trust, or the Avoidance Action Trust Assets, or to any right to demand a partition or division of such assets or to require an accounting of the Trust Administrator or the Trust Monitor. The whole legal title to the Avoidance Action Trust Assets shall be vested in the Trust as a separate legal entity under the Delaware Act or, if necessary, in the Trust Administrator on behalf of the Trust and the sole beneficial interest of the Trust Beneficiaries shall be as set forth in this Trust Agreement.

3.2. Limited Liability. No provision of the Plan, the Confirmation Order or this Trust Agreement, and no mere enumeration herein of the rights or privileges of any Trust Beneficiary, shall give rise to any liability of such Trust Beneficiary solely in its capacity as such, whether such liability is asserted by any Debtor, by creditors or employees of any Debtor, or by any other Person. GUC Beneficiaries are deemed to receive the GUC Distributable Trust Assets in accordance with the provisions of the Plan, the Confirmation Order and this Trust Agreement in exchange for their Allowed General Unsecured Claims or on account of their Units, as applicable, without further obligation or liability of any kind, but subject to the provisions of this Trust Agreement.

3.3. No Control by Trust Beneficiaries. A Trust Beneficiary shall have no title to, or any right to possess, manage or control, the Avoidance Action Trust Assets, or any portion thereof or interest therein, except as expressly provided herein. No surviving spouse, heir or devisee of any deceased Trust Beneficiary shall have any right of dower, homestead or inheritance, or of partition, or any other right, statutory or otherwise, in the Avoidance Action Trust Assets, but the whole title to all the Avoidance Action Trust Assets shall be vested in the Trust Administrator and the sole interest of the Trust Beneficiaries shall be the rights and benefits provided to such persons under this Trust Agreement.

3.4. Issuance of Units.

(a) The Trust shall issue Units to holders of Allowed General Unsecured Claims as provided in this Trust Agreement. On the Initial GUC Distribution Date, holders of Initial Allowed General Unsecured Claims shall receive the number of Units equal to the amount of such Initial Allowed General Unsecured Claims multiplied by the Unit Issuance Ratio, rounded up or down to the nearest whole Unit. Following the Initial GUC Distribution Date, holders of Resolved Allowed General Unsecured Claims shall receive the number of Units equal to the amount of such Resolved Allowed General Unsecured Claims multiplied by the Unit Issuance Ratio, rounded up or down to the nearest whole Unit. Units will represent the contingent right to receive, on a pro rata basis as provided in the Plan, the Confirmation Order and this Trust Agreement, Excess GUC Distributable Trust Assets. The Units shall be issued subject to all the terms and conditions of the Plan, the Confirmation Order and this Trust Agreement. References in this Trust Agreement to holders of Units shall be to the record holders of such Units.

(b) As provided in Section 7.5 hereof, the Trust Administrator may retain Units otherwise issuable pursuant to this section with respect to Allowed General Unsecured Claims that are subject to withholding, and the Trust Administrator shall apply amounts distributed in respect of such retained Units to satisfy such withholding obligations.

(c) Notwithstanding the foregoing, if (i) as of the Initial GUC Distribution Date, the total amount of the Disputed General Unsecured Claims in the aggregate is less than 0.5% of the Current Total Amount, or (ii) the Initial GUC Distribution Date is determined by the Trust Administrator to also be the final Distribution Date, no Units shall be distributed and any GUC Distributable Trust Assets remaining after satisfaction of all Initial Allowed General Unsecured Claims and any other obligations of the Trust shall be disposed of as set forth in the last sentence of Section 2.6(c).

3.5. Ownership of Units; Transfers of Units.

(a) The interest of a Trust Beneficiary is in all respects personal property, and upon the death, insolvency or incapacity of an individual GUC Beneficiary, such GUC Beneficiary's Units shall pass to the legal representative of such GUC Beneficiary.

(b) The Units will be issued and evidenced by appropriate notation on the books and records of the Trust Administrator. The Units shall not be certificated and shall not be transferable, assignable, pledged or hypothecated in whole or in part, except by applicable laws of descent and distribution (in the case of a deceased individual GUC Beneficiary); by operation of law; in accordance with applicable Bankruptcy law; or as otherwise approved by the Bankruptcy Court. The Trust Administrator shall not be required to recognize any equitable or other claims to such interest by the transferee thereof, and the named GUC Beneficiary shall remain as such for all purposes hereunder.

3.6. Conflicting Claims to Units. If the Trust Administrator has actual knowledge of any conflicting claims or demands that have been made or asserted with respect to a Unit, or a beneficial interest therein, the Trust Administrator shall be entitled, at its sole election, to refuse to comply with any such conflicting claims or demands. In so refusing, the Trust Administrator may elect to make no payment or distribution with respect to the Unit subject to the claims or demands involved, or any part thereof, and the Trust Administrator shall be entitled to refer such conflicting claims or demands to the Bankruptcy Court, which shall have exclusive and continuing jurisdiction over resolution of such conflicting claims or demands. The Trust Administrator shall not be or become liable to any party for either (i) its election to continue making distributions pursuant to its books and records, without regard to the conflicting claims or demands; or (ii) its election to cease payments or distributions with respect to the subject Unit. In the event that the Trust Administrator elects to cease payments, it shall be entitled to refuse to act until either (x) the rights of the adverse claimants have been adjudicated by a Final Order of the Bankruptcy Court (or such other court of proper jurisdiction) or (y) all differences have been resolved by a written agreement among all of such parties and the Trust Administrator, which agreement shall include a complete release of the Trust, the Trust Administrator Parties and the Trust Monitor Parties in form and substance reasonably satisfactory to the Trust Administrator and Trust Monitor (the occurrence of either (x) or

(y), a “Claim Conflict Resolution”). Until a Claim Conflict Resolution is reached with respect to such conflicting claims or demands, the Trust Administrator shall hold in a segregated account any payments or distributions from the Trust to be made with respect to the Unit(s) at issue. Promptly after a Claim Conflict Resolution is reached, the Trust Administrator shall transfer the payments and distributions, if any, held in the segregated account, together with interest and income earned thereon, if any, in accordance with the terms of such Claim Conflict Resolution.

3.7. Distributions Relating to Note Claims and Eurobond Claims. The Trust shall distribute GUC Distributable Trust Assets and Units to the Indenture Trustees and Fiscal and Paying Agents, to the extent necessary to provide each beneficial holder of debt securities arising out of or relating to the Note Claims and Eurobond Claims with an amount of GUC Distributable Trust Assets and Units equal to the amount of GUC Distributable Trust Assets and Units such holder would receive had its claim been treated as an Initial Allowed General Unsecured Claim hereunder. For the avoidance of doubt, Units will be issued and evidenced by appropriate notation on the books and records of the Trust Administrator in the names of the Indenture Trustees and the Fiscal and Paying Agents, as applicable, and not in the individual names of the beneficial holders of debt securities arising out of or relating to the Note Claims and Eurobond Claims.

#### **ARTICLE IV DURATION AND TERMINATION OF THE TRUST**

4.1. Duration. The Trust shall become effective upon (x) the earlier to occur of (i) the Avoidance Action Trust Transfer Date and (ii) the Other Debtor Residual Assets Transfer Date, if any, and (y) the execution of this Trust Agreement and the filing of the Certificate of Trust with the Secretary of State and shall remain and continue in full force and effect until (a) all of the Distributable Trust Assets and all Distributable Other Debtor Residual Trust Assets, if any, have been distributed pursuant to the Plan and this Trust Agreement, (b) the Trust Administrator determines, in its discretion and with the approval of the Trust Monitor, that the administration of the Avoidance Action Trust Assets is not likely to yield sufficient additional Distributable Trust Assets or Distributable Other Debtor Residual Trust Assets to justify further pursuit, and (c) all other distributions required to be made by the Trust Administrator under the Plan and this Trust Agreement have been made, but in no event shall the Trust be dissolved later than three (3) years from the earlier of (i) the Avoidance Action Trust Transfer Date and (ii) the Other Debtor Residual Assets Transfer Date, unless the Bankruptcy Court, upon motion within the six (6) month period prior to the third (3rd) anniversary of the earlier of (i) the Avoidance Action Trust Transfer Date and (ii) the Other Debtor Residual Assets Transfer Date (or at least six (6) months prior to the end of an extension period), determines that a fixed period extension (such that, together with any prior extensions, the dissolution of the Trust shall occur no later than five (5) years from the date on which the Trust became effective, without a favorable private letter ruling from the IRS that any further extension would not adversely affect the status of the Trust as a liquidating trust for U.S. federal income tax purposes) is necessary to facilitate or complete the recovery and liquidation of the Avoidance Action Trust Assets or the Other Debtor Residual Trust Assets, as the case may be. If at any time the Trust Administrator determines, in reliance upon such professionals

as the Trust Administrator may retain and with the approval of the Trust Monitor, that (x) the expense of administering the Trust so as to make a final distribution to the Trust Beneficiaries is likely to exceed the value of the Avoidance Action Trust Assets remaining in the Trust and (y) the expense of administering the Trust so as to make a final distribution to the DIP Lenders is likely to exceed the value of the Other Debtor Residual Trust Assets, if any, remaining in the Trust, the Trust Administrator may apply to the Bankruptcy Court for authority to (i) reserve any amounts necessary to dissolve the Trust, (ii) transfer the balance to the DIP Lenders and ~~for~~ the holders of Allowed General Unsecured Claims (as defined in the GUC Trust Agreement) ~~as determined either by (A) mutual agreement between~~, in accordance with the U.S. Treasury Agreed Allocation and the Creditors' Committee or, if the Creditors' Committee shall have been disbanded, the Trust Monitor or (B) Final Order Settlement Agreement, or donate any balance to a charitable organization described in section 501(c)(3) of the Tax Code and exempt from U.S. federal income tax under section 501(a) of the Tax Code that is unrelated to the Debtors, the Trust, any Trust Administrator Parties or any Trust Monitor Parties, and (iii) dissolve the Trust.

4.2. Dissolution of the Trust. Notwithstanding anything to the contrary in this Trust Agreement, in no event shall the Trust Administrator unduly prolong the duration of the Trust, and the Trust Administrator shall, in the exercise of its reasonable business judgment and in the interests of all Trust Beneficiaries, at all times endeavor to terminate the Trust as soon as practicable in accordance with the purposes and provisions of this Trust Agreement and the Plan. Upon final dissolution and wind-up of the Trust, the Trust Administrator shall file a certificate of cancellation for the Trust with the Secretary of State.

4.3. Continuance of Trust for Purposes of Winding Up. After the dissolution of the Trust and solely for the purpose of liquidating and winding up its affairs, the Trust Administrator shall continue to act in such capacity until its duties hereunder have been fully performed. The Trust Administrator shall retain the books, records and files that shall have been delivered to or created by the Trust Administrator until distribution or resolution of all the Avoidance Action Trust Assets and Other Debtor Residual Trust Assets, if any. At the Trust Administrator's discretion, all of such books, records and files may be destroyed at any time following the later of (x) final distribution of the Avoidance Action Trust Assets and Other Debtor Residual Trust Assets, if any, unless such books, records and files are necessary to fulfill the Trust Administrator's obligations pursuant to Articles VI and VIII hereof and subject to any joint prosecution and common interests agreement(s) to which the Trust Administrator may be party, and (y) the date until which the Trust Administrator is required by applicable law to retain such books, records and files.

**ARTICLE V**  
**DISTRIBUTIONS TO TRUST BENEFICIARIES**

5.1. General.

(a) Until such date as the Term Loan Avoidance Action shall have been completely and finally resolved in full against all defendants (including by way of settlement) and the Trust Administrator determines that all Avoidance Action Proceeds have been collected in respect thereof (such date, the “Final Recovery Date”), the Trust Administrator shall establish Distribution Dates no less frequently than once each calendar year and no more frequently than once a calendar quarter for the distribution of Distributable Trust Assets as provided in this Article V; provided that distributions need not be made in any calendar year to the extent (A) there are no Distributable Trust Assets held by the Trust or (B) the Trust Administrator, with the approval of the Trust Monitor, determines (i) that it is reasonably necessary to retain the Distributable Trust Assets to meet contingent liabilities and maintain the value of the Avoidance Action Trust Assets (such as, for example, in the event that the Trust Administrator determines that the Distributable Trust Assets are so small in amount as not to justify making a distribution, taking into account the costs that would be incurred in making the distribution, the anticipated total amount of Distributable Trust Assets expected to be available for distribution over time and the timing of the distribution or distributions thereof), or (ii) that it is necessary to retain the Distributable Trust Assets to pay reasonable incurred and anticipated expenses (including any taxes imposed on the Trust or in respect of the Avoidance Action Trust Assets) or to satisfy liabilities incurred and anticipated by the Trust in accordance with the Plan, the Confirmation Order and this Trust Agreement. Following the Final Recovery Date, distributions shall be made on a quarterly basis, as provided in this Article V.

(b) Except as otherwise set forth herein, no distributions shall be made with respect to any portion of a Disputed General Unsecured Claim, Unresolved Term Loan Avoidance Action Claim or Unresolved Other Avoidance Action Claim unless and until such Disputed General Unsecured Claim, Unresolved Term Loan Avoidance Action Claim or Unresolved Other Avoidance Action Claim has become an Allowed General Unsecured Claim.

(c) To the extent that a Disputed General Unsecured Claim, Unresolved Term Loan Avoidance Action Claim or Unresolved Other Avoidance Action Claim has become an Allowed General Unsecured Claim, distributions (if any) shall be made to the holder of such Allowed General Unsecured Claim in accordance with the provisions of the Plan, the Confirmation Order and this Trust Agreement.

(d) The Distributable Trust Assets shall be distributed

(i) first, to the DIP Lenders, each in their relative proportion pursuant to the terms of the DIP Credit Agreement, in the amount of the DIP Lender Advances;

(ii) second, to the Segregated Account in the amount of the GUC Trust Advances; to be distributed to the holders of Allowed General Unsecured Claims; and

(iii) third, to the DIP Lenders, each in their relative proportion pursuant to the terms of the DIP Credit Agreement, ~~in the amount of the DIP Lender Distributable Trust Assets; and~~ and the holders of Allowed General Unsecured Claims, in accordance with the Agreed Allocation.

~~(iv) fourth, the remainder (if any), plus the Cash held in the Segregated Account (the "Segregated Account Assets"), to the holders of Allowed General Unsecured Claims (the "GUC Distributable Trust Assets").~~

(e) On any Distribution Date following the Final Recovery Date on which the Trust does not hold sufficient ~~GUC~~-Distributable Trust Assets, after taking into account any amounts necessary to satisfy the current and projected future fees and expenses of the Trust (including those of any Trust Professionals) pursuant to Section 6.1(b), to satisfy all Disputed General Unsecured Claims or other Claims that became Resolved Allowed General Unsecured Claims since the next preceding Resolved Allowed General Unsecured Claims Determination Date following which there was a distribution pursuant to Section 5.3(c), the Trust Administrator shall distribute all ~~GUC~~-Distributable Trust Assets that remain in the Trust to the DIP Lenders and the holders of such Resolved Allowed General Unsecured Claims pro rata by Claim amount, in accordance with the Agreed Allocation. Following such distribution, any remaining unsatisfied portion of such Resolved Allowed General Unsecured Claims, together with all remaining Disputed General Unsecured Claims and other Claims (including any Term Loan Avoidance Action Claims and any Other Avoidance Action Claims) shall be forever barred from assertion against the Trust.

(f) Anything to the contrary herein notwithstanding but subject to Section 5.1(a), the Trust Administrator shall not make a distribution of ~~GUC~~-Distributable Trust Assets on any Distribution Date pursuant to Sections 5.2 or 5.4, if the amount to be distributed pursuant thereto does not exceed the Distribution Threshold. In such case, any ~~GUC~~ Distributable Trust Assets then available for distribution shall be held by the Trust and distributed on a subsequent Distribution Date when the amount of the ~~GUC~~-Distributable Trust Assets to be distributed shall exceed the Distribution Threshold; provided that if on the date determined by the Trust Administrator to be the final Distribution Date the ~~GUC~~ Distributable Trust Assets do not exceed the Distribution Threshold, then such ~~GUC~~ Distributable Trust Assets shall be disposed of as provided in the final sentence of Section 2.6(b) and in Section 2.6(c).

(g) For the avoidance of doubt, if the Trust fails to recover any Avoidance Action Proceeds or if the Avoidance Action Proceeds recovered by the Trust through the Final Recovery Date do not exceed the amount of DIP Lender Advances then no distributions shall be made hereunder in respect of any Allowed General Unsecured Claims.

(h) For the avoidance of doubt, if the Avoidance Action Proceeds recovered by the Trust through the Final Recovery Date exceed the amount of DIP Lender Advances but do not exceed the amount of ~~DIP Lender Distributable Trust~~the Segregated Account Assets, the Segregated Account Assets shall be distributed as GUC Distributable Trust Assets pursuant to Section 5.2(ba) hereof.

**Formatted:** Outline numbered + Level: 3 + Numbering  
Style: a, b, c, ... + Start at: 1 + Alignment: Left + Aligned at:  
1.17" + Tab after: 0.17" + Indent at: 0.17"

5.2. Distribution to the DIP Lenders and to Holders of Initial Allowed General Unsecured Claims.

~~(a)~~—Once the DIP Lender Advances ~~and the GUC Trust Advances~~ have been satisfied in full, ~~the Trust Administrator shall make distributions and the Segregated Account repaid up to the DIP Lenders, from time to time in accordance with Section 5.1(a); amount of the DIP Lender Distributable Trust Assets until the DIP Lender Distributable Trust Assets shall have been distributed in full.~~

~~(b)~~(a) ~~Once the DIP Lender Distributable Trust Assets have been distributed in full~~GUC Trust Advances, the Trust Administrator shall make distributions of the ~~DIP Lender Distributable Trust Assets and the~~ GUC Distributable Trust Assets, from time to time in accordance with Section 5.1(a). ~~The~~Prior to the first such distribution, ~~the~~ Trust Administrator shall establish a record date (the “Initial GUC Record Date”) for the holders of the General Unsecured Claims that are allowed as of the Initial GUC Record Date (the “Initial Allowed General Unsecured Claims”) who shall be entitled to participate in the first distribution of GUC Distributable Trust Assets, which date shall be the last day of the calendar quarter next preceding the date of such distribution (such Distribution Date, the “Initial GUC Distribution Date”). On the Initial GUC Distribution Date, the Trust Administrator shall distribute to each holder of an Initial Allowed General Unsecured Claim a distribution consisting of:

(i) an amount of GUC Distributable Trust Assets at the time available for distribution, in proportion to the amount of such Initial Allowed General Unsecured Claim as prescribed in subsection (d) below; and

(ii) a number of Units as provided in Section 3.4.

~~(e)~~(b) During the period, if any, following the Initial GUC Distribution Date and prior to the Final Recovery Date, and as promptly as practicable following the Final Recovery Date, as and to the extent that additional GUC Distributable Trust Assets become available for distribution from time to time as a result of additional recoveries by the Trust in the Term Loan Avoidance Action, the Trust Administrator shall, from time to time in accordance with Section 5.1(a), make additional distributions to the holders of Initial Allowed General Unsecured Claims, on a Distribution Date or Dates designated by the Trust Administrator for such purpose, in the amount prescribed in subsection (d) below. Subject to the proviso in Section 5.1(a), the Trust Administrator shall make such distributions no less frequently than once each calendar year and no more frequently than once each calendar quarter.

~~(d)~~(c) The amount of GUC Distributable Trust Assets that the holder of an Initial Allowed General Unsecured Claim shall be entitled to receive pursuant to Section 5.2 (or, in the case of a holder of a Resolved Allowed General Unsecured Claim being treated as if it were a holder of an Initial Allowed General Unsecured Claim in the amount of its Resolved Allowed General Unsecured Claim pursuant to Section 5.3(c)) on any Distribution Date (including the Initial Distribution Date) shall be determined in accordance with the following formula:



$$D = \left( \frac{A}{C} \right) \times G$$

Where—

- D is the distribution that the holder of an Initial Allowed General Unsecured Claim (or the holder of a Resolved Allowed General Unsecured Claim pursuant to Section 5.3(c)) will be entitled to receive;
- A is the amount of the Initial Allowed General Unsecured Claim (or the holder of a Resolved Allowed General Unsecured Claim pursuant to Section 5.3(c));
- C is the Current Total Amount as of the last day of the calendar quarter next preceding the respective Distribution Date; and
- G is the amount available for distribution determined as of the last day of the calendar quarter next preceding the respective Distribution Date, after taking account of any Holdback, or the application of such Holdback, pursuant to Section 6.1(b).

5.3. Distributions to Holders of Resolved Allowed General Unsecured Claims.

(a) Following the Initial GUC Distribution Date, the Trust Administrator, with the approval of the Trust Monitor, shall periodically make a determination (the date of any such determination, which shall in all cases be made as of the last day of a calendar quarter, being a “Resolved Allowed General Unsecured Claims Determination Date”) whether any holders of Disputed General Unsecured Claims or other Claims have become holders of Resolved Allowed General Unsecured Claims since the next preceding Resolved Allowed General Unsecured Claims Determination Date or, in the case of the first such determination, since the Initial GUC Record Date. During the period, if any, following the Initial GUC Distribution Date and prior to the Final Recovery Date, the Trust Administrator shall make such determination no less frequently than once each calendar year and no more frequently than once each calendar quarter, and following the Final Recovery Date such determination shall be made once each calendar quarter.

(b) On a Distribution Date scheduled as soon as practicable following each Resolved Allowed General Unsecured Claims Determination Date, the Trust Administrator shall, subject to the proviso in Section 5.1(a), distribute to each holder of a Resolved Allowed General Unsecured Claim identified on such Resolved Allowed General Unsecured Claims Determination Date, if any:

(i) the pro rata amount of GUC Distributable Assets that the holder of such Resolved Allowed General Unsecured Claim would have received had such Resolved Allowed General Unsecured Claim been an Initial Allowed General Unsecured Claim, including the aggregate amount of Excess GUC Distributable Trust Assets that the holder would have received had it been the holder of Units referred to in clause (ii) below on each Excess GUC Distributable Trust Assets Determination Date occurring on or prior to the date of such distribution; provided that a holder of a Resolved Allowed General Unsecured Claim shall not receive pursuant to this clause (i) an amount of Excess GUC Distributable Assets distributed in respect of any prior Excess GUC Distributable Trust Assets Determination Date

to the extent that it will be receiving such Excess GUC Distributable Assets as a distribution on the Units to be received by such holder pursuant to clause (ii) below; and

(ii) a number of Units as provided in Section 3.4.

(c) Once a holder of a Resolved Allowed General Unsecured Claim has received the distribution prescribed in the preceding subsection (b), such holder shall be treated as if it were a holder of an Initial Allowed General Unsecured Claim in the amount of its Resolved Allowed General Unsecured Claim on all subsequent Distribution Dates established for purposes of Section 5.2(c).

(d) For the avoidance of doubt, it is intended that the distributions to be made to holders of Resolved Allowed General Unsecured Claims in accordance with this Section 5.3 shall provide such holders, as nearly as possible, with the exact same amount of distributions as if such holders had been holders of Initial Allowed General Unsecured Claims.

5.4. Distribution of Excess ~~GUC~~ Distributable Trust Assets.

(a) Following the Initial GUC Distribution Date, the Trust Administrator, with the approval of the Trust Monitor, shall periodically make a determination (the date of any such determination, which shall in all cases be as of the last day of a calendar quarter, being an “Excess ~~GUC~~ Distributable Trust Assets Determination Date”) of the Excess ~~GUC~~ Distributable Trust Assets as of such date, taking into account the extent to which Disputed General Unsecured Claims are disallowed or the Term Loan Avoidance Action or other Avoidance Actions are resolved in favor of the defendants therein. During the period, if any, following the Initial GUC Distribution Date and prior to the Final Recovery Date, the Trust Administrator shall make such determination no less frequently than once each calendar year and no more frequently than once each calendar quarter, and following the Final Recovery Date such determination shall be made once each calendar quarter.

(b) On a Distribution Date scheduled as soon as practicable following each Excess ~~GUC~~ Distributable Trust Assets Determination Date, the Trust Administrator shall, subject to the proviso of Section 5.1(a), distribute the Excess ~~GUC~~ Distributable Trust Assets, in each case determined as of the respective Excess ~~GUC~~ Distributable Trust Assets Determination Date, to the DIP Lenders and the holders of Units outstanding on such Excess ~~GUC~~ Distributable Trust Assets Determination Date (including Units distributed or to be distributed to holders of Resolved Allowed General Unsecured Claims pursuant to Section 5.3(b)(ii) on such Distribution Date~~);~~ in accordance with the Agreed Allocation.

~~(b)(c)~~ Any Excess Distributable Trust Assets allocable to the holders of Units outstanding on such Excess Distributable Trust Assets Determination Date (the “Excess GUC Distributable Trust Assets”), shall be distributed pro rata according to the following formula:

$$D_U = \left( \frac{U_H}{U_O} \right) \times (\Sigma G - H) \times \left[ \frac{T_U}{C_U} - \frac{T_U}{(C_U + L)} \right]$$

Where—

- $D_U$  is the distribution of Excess GUC Distributable Trust Assets that a holder of Units will be entitled to receive;
- $U_H$  is the number of Units held by the holder;
- $U_O$  is the total number of Units outstanding (including Units distributed to holders of Resolved Allowed General Unsecured Claims pursuant to Section 5.3(b)(ii) on such Distribution Date);
- $\Sigma G$  is the sum of the amounts that are or were available for distribution to holders of Initial Allowed General Unsecured Claims (and holders of Resolved Allowed General Unsecured Claims pursuant to Section 5.3(c)) on the relevant Distribution Date and each prior Distribution Date;
- $T_U$  is the Total Allowed Amount as of the Excess GUC Distributable Trust Assets Determination Date;
- $C_U$  is the Current Total Amount as of the Excess GUC Distributable Trust Assets Determination Date;
- $L$  is the aggregate amount of all (i) Disputed General Unsecured Claims disallowed since the next preceding Excess GUC Distributable Trust Assets Determination Date (or, in the case of the first Excess GUC Distributable Trust Assets Determination Date, since the Initial GUC Record Date), (ii) Unresolved Term Loan Avoidance Action Claims to the extent resolved (including by way of settlement) in favor of the respective defendants since the next preceding Excess GUC Distributable Trust Assets Determination Date (or, in the case of the first Excess GUC Distributable Trust Assets Determination Date, since the Initial GUC Record Date); and (iii) all Unresolved Other Avoidance Action Claims to the extent resolved (including by way of settlement) in favor of the respective defendants since the next preceding Excess GUC Distributable Trust Assets Determination Date (or, in the case of the first Excess GUC Distributable Trust Assets Determination Date, since the Initial GUC Record Date); and
- $H$  is the amount, if any, of any holdback pursuant to Section 6.1 that was not otherwise deducted from the amounts available for distribution on a Distribution Date.

~~(e)~~(d) Notwithstanding the foregoing, if the Trust Administrator becomes aware of previously unknown potential Allowed General Unsecured Claims, the Trust Administrator may, with the approval of the Trust Monitor, withhold distribution of Excess GUC Distributable Trust Assets to the holders of Units in an amount that the Trust Administrator, with the approval of the Trust Monitor, estimates to be the maximum amount reasonably allowable in respect of such previously unknown claims.

5.5. Retention of Avoidance Action Trust Assets. Notwithstanding anything in this Trust Agreement to the contrary, the Trust Administrator shall at all times, to the extent practicable, retain

(a) sufficient GUC Distributable Trust Assets as the Trust Administrator shall determine, with the approval of the Trust Monitor, as would be distributable (I) to all holders of Disputed General Unsecured Claims at the time outstanding as if all Disputed General

Unsecured Claims were allowed at the Maximum Amount, but only until such Disputed General Unsecured Claims are resolved, (II) to the holders of all Resolved Allowed General Unsecured Claims at the time outstanding, to the extent not previously distributed, (III) in respect of any Unresolved Term Loan Avoidance Action Claims at the Maximum Amount thereof but only until the Term Loan Avoidance Action is dismissed by Final Order or such claims become Resolved Allowed General Unsecured Claims, and (IV) in respect of any Unresolved Other Avoidance Action Claims at the Maximum Amount thereof but only until such claims become Resolved Allowed General Unsecured Claims or the related other Avoidance Actions are dismissed by Final Order; and

(b) sufficient Avoidance Action Trust Administrative Cash and Supplemental Avoidance Action Trust Cash as the Trust Administrator shall determine, with the approval of the Trust Monitor and subject to the Budget, is necessary (x) to pay the reasonable incurred or anticipated fees and expenses of the Trust (including any taxes imposed on the Trust or in respect of the Avoidance Action Trust Assets) and (y) to satisfy other liabilities incurred or anticipated by the Trust in accordance with the Plan, the Confirmation Order and this Trust Agreement.

5.6. Minimum Distributions. Notwithstanding anything to the contrary contained herein, no Cash payment in an amount less than \$25 shall be made by the Trust Administrator to any holder of an Allowed General Unsecured Claim or Unit under any circumstance; *provided* that the Trust Administrator shall carry the entitlement of such holder of an Allowed General Unsecured Claim or Unit to such amount on its books and records, shall aggregate such amount with any subsequent amount to which such holder shall become entitled and shall make payment of such amount to such holder at such time as the amounts due such holder in the aggregate shall equal \$25 or more; *provided further* that if any such amount shall be owing to a holder of an Allowed General Unsecured Claim or Unit as of the date determined by the Trust Administrator to be the final Distribution Date, such amount shall be disposed of as provided in the final sentence of Section 2.6(c).

5.7. Distributions Not in Compliance with this Article. Subject to Section 5.3(d), in the event that the Trust Administrator determines in good faith that it is necessary or desirable in order to carry out the intent and purposes of the Plan, the Confirmation Order and this Trust Agreement to receive any assets or make any distribution in a manner that is not in technical compliance with this Trust Agreement, the Trust Administrator shall be permitted to receive assets or make, or cause to be made, distributions in such manner, but only with the approval of the Trust Monitor; *provided, however,* that no such distribution shall result in any holder of an Allowed General Unsecured Claim receiving a distribution in excess of the distribution that such holder would have received had such claim been an Initial Allowed General Unsecured Claim or shall discriminate among the holders of Units. Except as aforesaid, no payment or distribution of Avoidance Action Trust Assets shall be made to, or on behalf of, a Trust Beneficiary or any other person except in strict accordance with the terms of this Trust Agreement, the Plan, and the Confirmation Order, unless such payment or distribution shall have been approved by the Bankruptcy Court.

5.8. No Accounting. Except as otherwise provided in the Plan, the Confirmation Order or this Trust Agreement, nothing shall require the Trust Administrator to file any accounting or seek approval of any court with respect to the administration of the Trust or as a condition for making any payment or distribution out of the Avoidance Action Trust Assets.

**ARTICLE VA**  
**DISTRIBUTIONS TO DIP LENDERS**

If any Other Debtor Residual Accepted Assets shall be transferred to the Trust, the Trust Administrator shall make distributions to the DIP Lenders of Distributable Other Debtor Residual Assets, if any, from time to time (but no less frequently than once each calendar year), pro rata as their interests appear, as the Trust Administrator shall determine with the approval of the Trust Monitor or as the Trust Administrator shall be directed by a majority in interest of the DIP Lenders; provided that distributions need not be made in any calendar year to the extent (A) there are no Distributable Other Debtor Residual Assets held by the Trust or (B) the Trust Administrator, with the approval of the Trust Monitor, determines that it is necessary to retain the Distributable Other Debtor Residual Assets to (i) meet any contingent liabilities of the Trust or maintain the value of the Other Debtor Residual Trust Assets (such as for example, in the event that the Trust Administrator determines that the Distributable Other Debtor Residual Assets are so small in amount as not to justify making a distribution, taking into account the costs that would be incurred in making the distribution, the anticipated total amount of Distributable Other Debtor Residual Assets expected to be available for distribution over time and the timing of the distribution or distributions thereof), or (ii) pay reasonable incurred and/or anticipated expenses of the Trust (including any taxes imposed on the Trust or in respect of the Other Debtor Residual Trust Assets) or to satisfy liabilities incurred and/or anticipated by the Trust in accordance with the Plan, the Confirmation Order and this Trust Agreement.

**ARTICLE VI**  
**ADMINISTRATION OF THE TRUST**

6.1. Payment of Costs, Expenses and Liabilities (other than in respect of the Other Debtor Residual Accepted Assets).

(a) Subject to the Budget, the Trust Administrator shall use the Avoidance Action Trust Administrative Cash:

(i) to pay reasonable costs and expenses of the Trust that are incurred in connection with the administration thereof (including any taxes imposed on the Trust, actual reasonable fees and out-of-pocket expenses incurred by Trust Professionals retained by the Trust Administrator in connection with the administration of the Avoidance Action Trust Assets and preservation of books and records);

(ii) to satisfy other obligations or other liabilities incurred or assumed by the Trust (or to which the Avoidance Action Trust Assets are otherwise subject) in accordance with the Plan, the Confirmation Order, or this Trust Agreement, including fees and expenses incurred and in connection with, the prosecution and resolution of the Term Loan

Avoidance Action the protection, preservation and distribution of the Avoidance Action Trust Assets; and

(iii) to satisfy any other obligations of the Trust expressly set forth in the Plan, the Confirmation Order or this Trust Agreement to be satisfied out of the Avoidance Action Trust Administrative Cash.

(b) (i) If, at any time, the Trust Administrator determines that the Avoidance Action Trust Administrative Cash is not reasonably likely to be adequate to satisfy the current and projected future taxes, fees, costs and expenses (including, without limitation any Avoidance Action Trust SEC Reporting Costs) of the Trust (other than in respect of the Other Debtor Residual Trust Assets), the Trust Administrator may, with the approval of the Trust Monitor, reserve an amount, or increase the amount previously reserved, of Distributable Trust Assets to satisfy such taxes, fees, costs and expenses (the “Holdback”). If at any time, the Trust Administrator determines that the Holdback is materially greater than the amount of the current and projected future taxes, fees, costs and expenses as aforesaid, the Trust Administrator shall, with the approval of the Trust Monitor, release from the Holdback the amount of such excess.

(i) To the extent necessary to satisfy the taxes, fees, costs and expenses on account of which the Holdback may be reserved, the Trust Administrator may, in consultation with the Trust Monitor, and upon approval by the Bankruptcy Court in accordance with the provisions of Section 6.1(b)(iii), apply all or a portion of the Holdback to the satisfaction of such taxes, fees, costs and expenses.

(ii) The application of the Trust Administrator seeking Bankruptcy Court approval to utilize Distributable Trust Assets shall include the position of the Trust Monitor in respect thereof. The Trust Administrator shall provide at least twenty (20) days notice to the Trust Monitor, the holders of Units and the holders of Disputed General Unsecured Claims prior to a hearing on a motion to use any Distributable Trust Assets.

(c) If, at any time, the Trust Administrator determines that the Avoidance Action Trust Administrative Cash, together with the Holdback (if Distributable Trust Assets are, at such time, available for the purposes of creating a Holdback), is not reasonably likely to be adequate to satisfy the current and projected future taxes, fees, costs and expenses (including, without limitation any Avoidance Action Trust SEC Reporting Costs and the fees and expenses of Trust Professionals) of the Trust (other than in respect of the Other Debtor Residual Trust Assets), the Trust Administrator may utilize the GUC Trust Supplemental Cash, without the need to seek or obtain approval of the Bankruptcy Court, to satisfy such fees and expenses.

(d) (i) If, at any time, the Trust Administrator determines that the Avoidance Action Trust Administrative Cash, together with the Holdback (if Distributable Trust Assets are, at such time, available for the purposes of creating a Holdback) and the GUC Trust Supplemental Cash, if any, is not reasonably likely to be adequate to satisfy the current and projected future fees, costs and expenses (including, without limitation any Avoidance Action Trust SEC Reporting Costs, the fees and expenses of Trust Professionals, and any tax liabilities), the Trust Administrator may, in consultation with the Trust Monitor, and upon

approval by the Bankruptcy Court in accordance with the provisions of Section 6.1(d)(ii), sell or grant liens on the Term Loan Avoidance Action or any other property of the Trust (other than the Other Debtor Residual Trust Assets) and apply all or a portion of the proceeds of such sale or grant to the satisfaction of such fees, costs and expenses; provided, that the Trust may not incur additional indebtedness, whether unsecured or secured by any interest (including a security interest) in the Term Loan Avoidance Action or Avoidance Action Proceeds without the prior written consent of the DIP Lenders, except that the Trust may incur expenses in the ordinary course of the Trust's business provided no lien or right of setoff is attached thereto. In the event that the Trust seeks other litigation funding, (A) the DIP Lenders shall be provided a right of first refusal to provide such funding, which right of first refusal must be exercised within thirty (30) days after being presented in writing the opportunity to provide such funding, and (B) such funding shall be junior and subordinate to the Litigation Cost Advance and to the amounts owed to the DIP Lenders on account of prior funding of the Trust, subject to a form of subordination that is acceptable to the DIP Lenders in all respects, with such consent not to be unreasonably withheld. Upon any such sale or grant of liens pursuant to this Section 6.1(d), the resulting proceeds shall be designated as Other Supplemental Cash. Any income earned on the Other Supplemental Cash, net of taxes paid thereon, shall be Other Supplemental Cash.

(ii) The application of the Trust Administrator seeking Bankruptcy Court approval to sell or grant liens pursuant to Section 6.1(d)(i) hereof shall include the position of the Trust Monitor in respect thereof. The Trust Administrator shall provide at least twenty (20) days' notice to the Trust Monitor, the DIP Lenders, the holders of Units and the holders of Disputed General Unsecured Claims prior to a hearing on a motion to sell or grant liens pursuant to Section 6.1(d)(i) hereof.

(e) Notwithstanding that as a result of the utilization of Distributable Trust Assets pursuant to Section 6.1(b) the amount of GUC Distributable Trust Assets shall be less than the assets required to satisfy Claims in the amount of the Current Total Amount then outstanding, the Trust Administrator shall continue to satisfy Disputed General Unsecured Claims, any Unresolved Term Loan Avoidance Action Claims and any Unresolved Other Avoidance Action Claims that become Allowed General Unsecured Claims in the order they are resolved as otherwise provided in this Trust Agreement.

6.2. Payment of Costs, Expenses and Liabilities in respect of the Other Debtor Residual Accepted Assets.

(a) The Trust Administrator shall not be required to undertake any activity in respect of the Other Debtor Residual Accepted Assets, including for purposes of realizing upon such assets in order to make distributions of Distributable Other Debtor Residual Trust Assets to the DIP Lenders, unless there shall be available to the Trust Administrator Other Debtor Residual Trust Administrative Cash sufficient for such purposes.

(b) If sufficient Other Debtor Residual Trust Administrative Cash shall be available to the Trust Administrator, then the Trust Administrator shall, as approved by the Trust Monitor or as directed by a majority in interest of the DIP Lenders:

(i) pay reasonable costs and expenses of the Trust that are incurred in connection with the Other Debtor Residual Accepted Assets (including any taxes imposed on the Trust, actual reasonable fees and out-of-pocket expenses incurred by Trust Professionals retained by the Trust Administrator in connection with the administration of the Other Debtor Residual Accepted Assets and preservation of books and records);

(ii) satisfy other obligations or other liabilities incurred or assumed by the Trust in respect of the Other Debtor Residual Accepted Assets (or to which the Other Debtor Residual Accepted Assets are otherwise subject) in accordance with the Plan, the Confirmation Order, or this Trust Agreement, including fees and expenses incurred and in connection with, the prosecution and resolution of any action to realize upon the Other Debtor Residual Accepted Assets and the protection, preservation and distribution of the Other Debtor Residual Accepted Assets; and

(iii) satisfy any other obligations of the Trust expressly set forth in the Plan, the Confirmation Order or this Trust Agreement to be satisfied out of the Other Debtor Residual Trust Administrative Cash.

6.3. Budget.

(a) The Trust Administrator shall prepare and submit to the Trust Monitor and the DIP Lenders for approval a reasonably detailed annual plan and budget (the “Budget”) at least thirty (30) days prior to the commencement of each calendar year; *provided, however,* that the first such Budget shall be agreed to as of the Avoidance Action Trust Transfer Date. Such annual plan and Budget shall set forth (on a quarterly basis) in reasonable detail: (A) the Trust Administrator’s anticipated actions to administer the Avoidance Action Trust Assets; and (B) the anticipated fees and expenses, including professional fees, associated with the administration of the Trust, a separate amount representing the anticipated fees and expenses of the Trust Monitor and detail as to how the Trust will budget and spend the Avoidance Action Trust Administrative Cash. Such Budget shall be updated and submitted to the Trust Monitor and the DIP Lenders for review on a quarterly basis, and each such quarterly update shall reflect the variances (with explanations) between (x) the Budget, (y) any updated Budget, and (z) the actual results for the same period. If the Trust identifies a need for or the occurrence of actual expenditures that materially differ from the relevant Budget, the Trust will notify the DIP Lenders as promptly as practicable, and no later than fifteen (15) days after identifying the issue. For the avoidance of doubt, the DIP Lenders may object in the Bankruptcy Court with respect to any quarterly update that materially changes the Budget and the Bankruptcy Court shall resolve such dispute. All actions by the Trust Administrator shall be consistent with the Budget (as updated). The Trust Administrator may obtain any required approval of the Budget on reasonable negative notice (which shall be not less than 15 days after receipt of the Budget) and approval of the Budget shall not be unreasonably withheld. In the event of any dispute concerning the Budget (or the taking of actions consistent with the Budget), the Trust Administrator or the Trust Monitor may petition the Bankruptcy Court to resolve such dispute.



(b) The Trust Administrator, with the approval of the Trust Monitor, and the DIP Lenders may agree on a budget for activities in respect of the Other Debtor Residual Accepted Assets.

(c) Notwithstanding any other provision of this Trust Agreement, the approval of the DIP Lenders shall not be required for any use of the Avoidance Action Trust SEC Reporting Cash, the GUC Trust Supplemental Cash or the Other Supplemental Cash.

6.4. [Intentionally omitted.]

6.5. Compliance with Laws. Any and all distributions of Avoidance Action Trust Assets shall be in compliance with applicable laws, including applicable federal and state tax and securities laws.

6.6. Fiscal Year. Except for the first and last years of the Trust, the fiscal year of the Trust shall be the calendar year. For the first and last years of the Trust, the fiscal year of the Trust shall be such portion of the calendar year that the Trust is in existence.

6.7. Books and Records.

(a) The Trust Administrator shall maintain and preserve the Debtors' books, records and files that shall have been delivered to or created by the Trust Administrator.

(b) The Trust Administrator shall maintain books and records relating to the assets, liabilities, income and expense of the Trust, all distributions made by the Trust and the payment of fees and expenses of, and satisfaction of claims against or assumed by, the Trust and the Trust Administrator, in such detail and for such period of time as may be necessary to enable it to make full and proper reports in respect thereof in accordance with the provisions of this Trust Agreement and otherwise to comply with applicable provisions of law, including tax law.

(c) The Trust Administrator shall maintain, or cause to be maintained, a register of holders of Units, from time to time outstanding, to the extent any Units are issued hereunder, in customary form.

6.8. Cash Payments. All distributions of Distributable Trust Cash required to be made by the Trust Administrator may be made in Cash denominated in U.S. dollars by checks drawn on a United States domestic bank selected by the Trust Administrator or, at the option of the Trust Administrator, by wire transfer from a United States domestic bank selected by the Trust Administrator or as otherwise required or provided in applicable agreements; *provided, however*, that cash payments to foreign persons may be made, at the option of the Trust Administrator, in such funds as and by such means as are necessary or customary in a particular foreign jurisdiction.

6.9. Insurance. The Trust shall maintain customary insurance coverage for the protection of the Trust Administrator Parties and the Trust Monitor Parties and any such other persons serving as administrators and overseers of the Trust, on and after the Avoidance Action Trust Transfer Date, in all cases in accordance with the Budget. The

Trust Administrator may also obtain such insurance coverage as it deems necessary and appropriate with respect to real and personal property which may become Avoidance Action Trust Assets, if any, in accordance with such Budget. To the extent that there is any incremental cost for customary insurance coverage covering the activities of the Trust Administrator Parties and the Trust Monitor Parties in respect of the Other Debtor Residual Accepted Assets, the Trust Administrator and the Trust Monitor shall not be required to undertake any such activities unless there is available sufficient Other Debtor Residual Trust Administrative Cash to fund such incremental cost.

**ARTICLE VII**  
**TAX MATTERS**

7.1. Tax Treatment.

(a) For all U.S. federal and applicable state and local income tax purposes, all parties (including the Debtors, the Trust Administrator, the holders of the DIP Credit Agreement Claims, and the holders of Allowed General Unsecured Claims) shall treat the Trust and the transfer of the Avoidance Action Trust Assets and the Other Debtor Residual Assets to the Trust in a manner consistent with the remainder of this Section 7.1.

(b) If no Other Debtor Residual Assets are transferred to the Trust upon the dissolution of MLC and the DIP Lender Distributable Trust Assets have not been determined (either as a percentage or as a fixed amount of Distributable Trust Assets or on some other basis) on or prior to the Avoidance Action Trust Transfer Date, then (subject to clause (c) below) the Trust Administrator shall treat the Trust as (A) a “disputed ownership fund” governed by Treasury Regulation section 1.468B-9 (including, if required, timely so electing), (B) if permitted under applicable law and at the election of the Trust Administrator, as a “complex trust,” or (C) as otherwise permitted pursuant to a private letter ruling from the IRS.

(c) If Other Debtor Residual Assets are transferred to the Trust upon the dissolution of MLC or the DIP Lender Distributable Trust Assets have been determined (either as a percentage or as a fixed amount of Distributable Trust Assets or on some other basis) on or prior to the Avoidance Action Trust Transfer Date, or otherwise upon determination of the DIP Lender Distributable Trust Assets (either as a percentage or as a fixed amount of Distributable Trust Assets or on some other basis) after the Avoidance Action Trust Transfer Date, the Trust (other than the Avoidance Action Trust Claims Reserve) shall be treated as a liquidating trust that is treated as a grantor trust and the Avoidance Action Trust Assets (upon the determination of the DIP Lender Distributable Trust Assets) and Other Debtor Residual Trust Assets (upon the transfer of Other Debtor Residual Assets to the Trust) shall be treated as (i) being transferred directly to the Trust Beneficiaries; provided, however, that to the extent Avoidance Action Trust Assets are allocable to Disputed General Unsecured Claims, Unresolved Term Loan Avoidance Action Claims or Unresolved Other Avoidance Action Claims, such Avoidance Action Trust Assets shall be treated as being transferred to the Avoidance Action Trust Claims Reserve, followed by (ii) the transfer by such Trust Beneficiaries of the Avoidance Action Trust Assets (other than the Avoidance Action Trust Assets allocable to the Avoidance Action Trust Claims Reserve) and the Other Debtor Residual Trust Assets, as applicable, to the Trust in exchange for beneficial interests in the

Trust. Accordingly, Trust Beneficiaries receiving beneficial interests in the Trust shall be treated as the grantors and owners of their respective share of the Avoidance Action Trust Assets (other than any Avoidance Action Trust Assets allocable to the Avoidance Action Trust Claims Reserve) and Other Debtor Residual Trust Assets, as applicable.

(d) Any determination made pursuant to this Section 7.1 shall be conclusive and binding on all parties (including the Debtors, the Trust Administrator, the holders of the DIP Credit Agreement Claims, and the holders of Allowed General Unsecured Claims) for U.S. federal, and (to the extent permitted by applicable law) state and local, income tax purposes. Accordingly, to the extent permitted by applicable law, all parties shall report consistently with the U.S. federal income tax treatment of the Trust by the Trust Administrator for state and local income tax purposes.

7.2. Valuation of Assets. As soon as practicable after the Avoidance Action Trust Transfer Date, the Trust Administrator shall make a good-faith valuation of the Avoidance Action Trust Assets and Other Debtor Residual Trust Assets, and such valuation shall be made available from time to time, to the extent relevant, and shall be used consistently by all parties (including the Debtors, the Trust Administrator, the holders of the DIP Credit Agreement Claims, and the holders of Allowed General Unsecured Claims) for all U.S. federal and applicable state and local income tax purposes.

7.3. Payment of Taxes. The Trust Administrator shall be responsible for payment, out of the Avoidance Action Trust Assets, of any taxes imposed on the Trust (other than in respect of the Other Debtor Residual Assets) or the Avoidance Action Trust Assets, including the Avoidance Action Trust Claims Reserve. The Trust Administrator shall be responsible for payment, out of the Other Debtor Residual Assets of any taxes imposed on the Trust in respect of the Other Debtor Residual Assets or on the Other Debtor Residual Assets. In the event, and to the extent, any Cash retained on account of Disputed General Unsecured Claims, Unresolved Term Loan Avoidance Action Claims or Unresolved Other Avoidance Action Claims in the Avoidance Action Trust Claims Reserve is insufficient to pay the portion of any such taxes attributable to the taxable income arising from the assets allocable to, or retained on account of, Disputed General Unsecured Claims, Unresolved Term Loan Avoidance Action Claims or Unresolved Other Avoidance Action Claims, such taxes shall be (i) reimbursed from any subsequent Cash amounts retained on account of Disputed General Unsecured Claims, Unresolved Term Loan Avoidance Action Claims or Unresolved Other Avoidance Action Claims, or (ii) to the extent such Disputed General Unsecured Claims, Unresolved Term Loan Avoidance Action Claims or Unresolved Other Avoidance Action Claims subsequently have been resolved, deducted from any amounts otherwise distributable by the Trust Administrator as a result of the resolution of such Disputed General Unsecured Claims, Unresolved Term Loan Avoidance Action Claims or Unresolved Other Avoidance Action Claims.

7.4. Tax Reporting.

(a) The Trust Administrator shall file (or cause to be filed) Tax Returns for the Trust treating the Trust (except the Avoidance Action Trust Claims Reserve or as otherwise provided in Section 7.1(b) above) as a grantor trust pursuant to Treasury Regulation

section 1.671-4(a) and in accordance with the applicable provisions of this Section 7.4. The Trust Administrator also shall annually send to each Trust Beneficiary a separate statement setting forth such Trust Beneficiary's share of items of income, gain, loss, deduction, or credit of the Trust (including, for the avoidance of doubt, earnings on the Avoidance Action Trust Administrative Cash, the Avoidance Action Trust SEC Reporting Cash, the GUC Trust Supplemental Cash and the Other Supplemental Cash) and shall instruct all Trust Beneficiaries to report such items on their respective U.S. federal income Tax Returns or to forward the appropriate information to their respective beneficial holders with instructions to report such items on their U.S. federal income Tax Returns. The Trust Administrator also shall file (or cause to be filed) any other statements, returns, or disclosures relating to the Trust that are required by any governmental unit.

(b) Allocations of the Trust's taxable income among the Trust Beneficiaries shall be determined by reference to the manner in which an amount of Cash equal to such taxable income would be distributed (without regard to any restrictions on distributions described herein) if, immediately prior to such deemed distribution, the Trust had distributed all of its other assets (valued at their tax book value and other than assets attributable to the Avoidance Action Trust Claims Reserve) to the Trust Beneficiaries, in each case up to the tax book value of the assets treated as contributed by such Trust Beneficiaries, adjusted for prior taxable income and loss and taking into account all prior and concurrent distributions from the Trust. Similarly, taxable loss of the Trust shall be allocated by reference to the manner in which an economic loss would be borne immediately after a liquidating distribution of the remaining Avoidance Action Trust Assets and Other Debtor Residual Trust Assets. The tax book value of the Avoidance Action Trust Assets and Other Debtor Residual Trust Assets for this purpose shall equal their fair market value on the Avoidance Action Trust Transfer Date and Other Debtor Residual Trust Assets Transfer Date, as applicable, adjusted in accordance with tax accounting principles prescribed by the Tax Code, applicable Treasury Regulations, and other applicable administrative and judicial authorities and pronouncements.

(c) The Trust Administrator shall (x) treat the Avoidance Action Trust Claims Reserve for U.S. federal income tax purposes as either (i) a "disputed ownership fund" governed by Treasury Regulation section 1.468B-9 by timely so electing or (ii) a "complex trust," provided, however, that if the Trust is treated as a "disputed ownership fund" or as a "complex trust" pursuant to Section 7.1(b) above, then the Avoidance Action Trust Claims Reserve shall be treated in the same manner, and (y) to the extent permitted by applicable law, report consistently with the foregoing for state and local income tax purposes. Any determination made pursuant to this Section 7.4 shall be conclusive and binding on all parties (including the Debtors, the Trust Administrator, the holders of the DIP Credit Agreement Claims, and the holders of Allowed General Unsecured Claims) for U.S. federal, state, and local income tax purposes.

7.5. Tax Withholdings. The Trust Administrator shall withhold and pay to the appropriate taxing authority all amounts required to be withheld pursuant to the Tax Code, Treasury Regulations or other applicable requirements, including any provision of any foreign, state or local tax law, with respect to any payment or distribution to the Trust Beneficiaries. All such amounts withheld, and paid to the appropriate taxing authority, shall be treated as amounts distributed to such Trust Beneficiaries for all purposes of this

Trust Agreement. The Trust Administrator shall be authorized to collect such tax information from the Trust Beneficiaries (including social security numbers or other tax identification numbers) as it in its sole discretion deems necessary to effectuate the Plan, the Confirmation Order and this Trust Agreement, or to comply with any applicable withholding or reporting requirement. The Trust Administrator may refuse to make a distribution to any Trust Beneficiary that fails to furnish such information in a timely fashion, until such information is furnished; *provided, however*, that upon a Trust Beneficiary furnishing such information, the Trust Administrator shall make such distribution to which such Trust Beneficiary is entitled, without interest.

7.6. Expedited Determination of Taxes. The Trust Administrator may request an expedited determination of taxes of the Trust, including the Avoidance Action Trust Claims Reserve, under Section 505(b) of the Bankruptcy Code for any or all Tax Returns filed for, or on behalf of, the Trust for any or all taxable periods (or part thereof) through the dissolution of the Trust.

7.7. [Intentionally omitted.]

7.8. Delivery of Statement of Transfers. If the Trust Administrator elects to treat (i) the Trust, pursuant to and to the extent provided in Section 7.1 above and/or (ii) the Avoidance Action Trust Claims Reserve as a disputed ownership fund within the meaning of Treasury Regulation section 1.468B-9, then following the Avoidance Action Trust Transfer Date (but in no event later than February 15th of the calendar year following the Avoidance Action Trust Transfer Date), MLC shall provide a “§ 1.468B-9 Statement” to the Trust Administrator in accordance with Treasury Regulation section 1.468B-9(g).

7.9. Allocation of Distributions Between Principal and Interest. All deemed distributions (including deemed transfers pursuant to Section 7.1(b)(i)) in connection with the allowance of any Allowed General Unsecured Claim shall be allocated first to the principal amount of such Allowed General Unsecured Claim, as determined for federal income tax purposes, and thereafter, to the remaining portion of such Allowed General Unsecured Claim, if any.

#### **ARTICLE VIII**

#### **POWERS OF AND LIMITATIONS ON THE TRUST ADMINISTRATOR**

8.1. Powers of the Trust Administrator.

(1) Other Than in Respect of the Other Debtor Residual Accepted Assets

(a) Pursuant to the terms of the Plan and the Confirmation Order, the Trust Administrator shall have various powers, duties and responsibilities concerning the prosecution of and resolution of the Term Loan Avoidance Action, maximizing the property of the Trust, the disposition of the Avoidance Action Trust Assets and the administration of the Trust. In addition, the Trust Administrator shall coordinate with the GUC Trust Administrator to maximize efficiency in distributions to general unsecured creditors in any situation where such coordination would be beneficial.

(b) The Trust Administrator shall have only such rights, powers and privileges expressly set forth in the Plan, the Confirmation Order or this Trust Agreement and as otherwise provided by applicable law. Subject to the Plan, the Confirmation Order and other provisions herein, including the provisions relating to approvals of the Trust Monitor, the Trust Administrator shall be expressly authorized to undertake the following actions, in the Trust Administrator's good faith judgment, in the best interests of the Trust Beneficiaries and in furtherance of the purpose of the Trust:

(i) hold and manage the Avoidance Action Trust Assets;

(ii) hold legal title to any and all rights of the Trust Beneficiaries in, to or arising from the Avoidance Action Trust Assets, for the benefit of the Trust Beneficiaries that are entitled to distributions therefrom under the Plan, whether, in the case of GUC Beneficiaries, their General Unsecured Claims are Allowed on or after the Avoidance Action Trust Transfer Date;

(iii) prosecute and, if appropriate, sell, grant liens upon, ~~(subject to~~ Section 6.1(d) hereof, settle and resolve, abandon and/or dismiss the Term Loan Avoidance Action;

(iv) execute all agreements, instruments and other documents (including, without limitation, any loan agreements or sale agreements for the purposes of funding the fees and expenses of the Trust), and effect all other actions necessary or appropriate to dispose of the Avoidance Action Trust Assets;

(v) monitor and enforce the implementation of the Plan insofar as relating to this Trust Agreement, the Avoidance Action Trust Assets or the Trust;

(vi) calculate and implement distributions of the GUC Distributable Trust Assets obtained through the exercise of its power and authority as contemplated by the Plan, the Confirmation Order and this Trust Agreement and in accordance with the interests of the holders of Allowed General Unsecured Claims;

(vii) retain, pay, oversee and direct the services of, and terminate Trust Professionals in accordance with Section 8.3 hereof to carry out its duties and obligations hereunder, in all cases in accordance with the Budget;

(viii) pay the reasonable fees and expenses of the Trust Administrator and Trust Monitor, in all cases in accordance with the Budget;

(ix) incur and pay all reasonable expenses, satisfy ordinary course liabilities and make all other payments reasonable and necessary to administer and dispose of the Avoidance Action Trust Assets, in all cases in accordance with the Budget;

(x) invest monies received by the Trust, the Trust Administrator or otherwise held by the Trust or the Trust Administrator in accordance with Section 8.4 hereof;

(xi) protect and enforce the rights to the Avoidance Action Trust Assets vested in the Trust Administrator by this Trust Agreement by any method deemed reasonably appropriate, including by judicial proceedings or pursuant to any applicable bankruptcy, insolvency, moratorium or similar law and general principles of equity;

(xii) vote any claim or interest held by the Trust in a case under the Bankruptcy Code and receive any distribution therefrom for the benefit of the Trust;

(xiii) make all necessary filings in accordance with any applicable law, statute or regulation;

(xiv) purchase customary insurance coverage in accordance with Section 6.9 hereof;

(xv) assert and/or waive any applicable privileges (legal or otherwise) on behalf of the Trust, or with respect to the Avoidance Action Trust Assets held by the Debtors at any time (prepetition or postpetition);

(xvi) maintain the books and records of the Trust;

(xvii) open, maintain and close any bank, securities or other accounts that are necessary and appropriate to manage the Avoidance Action Trust Assets, including but not limited to the accounts listed on Exhibit A hereto;

(xviii) receive from the Debtors and administer the Avoidance Action Trust SEC Reporting Cash in accordance with Section 2.3(e) hereof and file such reports as may be required pursuant to the applicable rules, regulations and interpretations of the SEC;

(xix) receive from the GUC Trust and administer and utilize the GUC Trust Supplemental Cash in accordance with Section 2.3(f) hereof; and

(xx) perform such functions and take such actions as are provided for or permitted in the Plan, the Confirmation Order, this Trust Agreement, the Settlement Agreement, the Litigation Cost Advance Agreement, or any other agreement executed pursuant to the Plan and take any other actions as it may deem to be reasonably necessary or appropriate to realize, preserve and dispose of the Avoidance Action Trust Assets.

(c) [Intentionally omitted.]

(d) In all circumstances, the Trust Administrator shall act in the best interests of all Trust Beneficiaries and in furtherance of the purpose of the Trust, and in a manner not inconsistent with the best interests of the Trust Beneficiaries and consistent with the Budget. The Trust Administrator shall not take any action inconsistent with the purpose of the Trust, or take (or fail to take) any action that would cause the Trust (other than the Avoidance Action Trust Claims Reserve) to fail to qualify as a liquidating trust within the meaning of Treasury Regulation section 301.7701-4(d) that is treated as a grantor trust.

(e) Notwithstanding any provision herein to the contrary, the Trust Administrator shall not serve on the board of directors, management committee or any similar governing body of any non-Debtor subsidiary of MLC, where the charter, limited liability company agreement, partnership agreement or other similar constituent document of such subsidiary does not provide for a liquidating purpose for such subsidiary. Except as otherwise provided in this Trust Agreement, the Trust Administrator will not be required to obtain the order or approval of the Bankruptcy Court, or any other court of competent jurisdiction in, or account to the Bankruptcy Court or any other court of competent jurisdiction for, the exercise of any right, power or privilege conferred hereunder. Notwithstanding the foregoing, where the Trust Administrator determines, in its reasonable discretion, that it is necessary, appropriate or desirable, the Trust Administrator will have the right to submit to the Bankruptcy Court or any other court of competent jurisdiction any question or questions regarding any specific action proposed to be taken by the Trust Administrator with respect to this Trust Agreement, the Trust, or the Avoidance Action Trust Assets, including the administration and distribution of the Avoidance Action Trust Assets and the termination of the Trust. Pursuant to the Plan, the Bankruptcy Court has retained jurisdiction for such purposes and may approve or disapprove any such proposed action upon motion by the Trust Administrator.

(II) In Respect of the Other Debtor Residual Accepted Assets

The Trust Administrator shall have the rights, powers and privileges to act in respect of the Other Debtor Residual Accepted Assets, if any, in the manner set forth in Section 8.1(I), *mutatis mutandis*. In all such circumstances, the Trust Administrator shall act in the best interests of DIP Lenders and in furtherance of the purpose of the Trust, and in a manner not inconsistent with the best interests of the DIP Lenders. For the avoidance of doubt, the Trust Administrator shall not be obligated to undertake any activities in respect of the Other Debtor Residual Trust Assets unless there shall be available sufficient Other Debtor Residual Trust Administrative Cash to pay in full its fees, costs and expenses in respect thereof.

8.2. Limitations on the Trust Administrator. The Trust Administrator shall not be authorized to engage, in its capacity as Trust Administrator, in any trade or business with respect to the Avoidance Action Trust Assets or to take (or fail to take) any action that would cause the Trust (other than the Avoidance Action Trust Claims Reserve) to fail to qualify as a liquidating trust within the meaning of Treasury Regulation section 301.7701-4(d) that is treated as a grantor trust. The Trust Administrator shall take such actions consistent with the prompt orderly disposition of the Avoidance Action Trust Assets and the Other Debtor Residual Accepted Assets, if any, as required by applicable law and consistent with the treatment of the Trust (other than the Avoidance Action Trust Claims Reserve) as a liquidating trust within the meaning of Treasury Regulation section 301.7701-4(d) that is treated as a grantor trust, to the extent such actions are permitted by this Trust Agreement. The Trust Administrator shall, in its capacity as Trust Administrator, be restricted to (x) the liquidation of the Trust on behalf, and for the benefit, of the Trust Beneficiaries and the distribution and application of Avoidance Action Trust Assets for the purposes set forth in, and the conservation and protection of the Avoidance Action Trust Assets and the administration thereof, and (y) the liquidation of the Trust on behalf, and for the benefit, of the DIP Lenders and the distribution and



application of Other Debtor Residual Trust Assets for the purposes set forth in, and the conservation and protection of the Other Debtor Residual Trust Assets and the administration thereof, in each case in accordance with, the provisions of the Plan, the Confirmation Order and this Trust Agreement.

8.3. Agents and Professionals.

(a) The Trust Administrator on behalf of the Trust may, but shall not be required to, from time to time enter into contracts with, consult with and retain Trust Professionals, on such terms as the Trust Administrator deems appropriate in accordance with the terms hereof and (other than in respect of the Other Debtor Residual Accepted Assets) in accordance with the Budget. None of the professionals that represented parties-in-interest in the Chapter 11 Cases shall be precluded from being engaged by the Trust Administrator solely on account of their service as a professional for such parties-in-interest prior to the Avoidance Action Trust Transfer Date or the Other Debtor Residual Assets Transfer Date, as the case may be.

(b) After the Avoidance Action Trust Transfer Date, Trust Professionals shall be required to submit reasonably detailed invoices on a monthly basis to the Trust Administrator ~~and~~ the Trust Monitor ~~and the DIP Lenders~~, including in such invoices a description of the work performed, the individuals who performed such work, ~~and, if billing on an hourly basis, the hourly rate of such person, plus an itemized statement of expenses. the hourly rate of such person, plus an itemized statement of expenses for which payment is sought. Invoices submitted to the DIP Lenders may be in a form reasonably necessary to protect the attorney-client privilege. For the avoidance of doubt, any and all payments by the Trust from funds that originated from the Litigation Cost Advance or that are contained in the Funding Account shall be subject to this invoice disclosure requirement. No payment on account of such invoices shall be made until 15 days after presentation of the invoices to the DIP Lenders.~~ The Trust Administrator shall timely pay all such invoices that are not disputed by the Trust Administrator ~~and as to which the Trust Monitor does not object within fifteen (15) days after their receipt thereof, and shall not require approval of the Bankruptcy Court in order to do so or the Trust Monitor.~~ ~~If either or both of the DIP Lenders have questions or concerns about any invoice submitted to the Trust, or about any other issue relating to the Trust's finances or administration, they shall be entitled to discuss the matter with the Trust Monitor, as well as with the Trust Administrator and/or counsel for the Trust, as appropriate, and the Trust Monitor will consult with the DIP Lenders and give good faith consideration to any objection that the DIP Lenders raise before approval of payment by the Trust Administrator or non-objection by the Trust Monitor. The Trust Monitor, Trust Administrator, and/or counsel for the Trust, as appropriate, will engage in good faith discussions and attempt in good faith to provide information reasonably requested by either or both DIP Lenders.~~ In the event of any dispute concerning the entitlement to, or the reasonableness of any compensation and/or expenses of any Trust Professionals, either the Trust Administrator or the affected Trust Professional may petition the Bankruptcy Court to resolve the dispute.

(c) Except as permitted by Section 6.1(b), (c), and (d), and Section 2.3(e) and (f), all payments to Trust Professionals (other than in respect of Other Debtor Residual Trust

Assets) shall be paid out of the Avoidance Action Trust Administrative Cash. Payments to Trust Professionals for activities in respect of the Other Debtor Residual Trust Assets shall be paid out of the Other Debtor Residual Trust Administrative Cash.

8.4. Investment of Trust Cash.

(a) The Trust Administrator shall establish segregated accounts for the Trust Cash as follows: (i) Distributable Trust Cash which shall be held in trust for the benefit of the Trust Beneficiaries; (ii) Distributable Other Debtor Residual Cash, which shall be held in trust for the benefit of the DIP Lenders and on which the DIP Lenders shall have a lien; (iii) Avoidance Action Trust Administrative Cash (excluding the Litigation Cost Advance) and Other Debtor Residual Trust Administrative Cash which shall be used to pay the administrative expenses of the Trust, on which the DIP Lenders shall have a lien; (iv) Avoidance Action Trust SEC Reporting Cash which shall be used to satisfy Avoidance Action Trust SEC Reporting Costs in accordance with Section 2.3(e) hereof; (v) GUC Trust Supplemental Cash which shall be used to satisfy current and projected fees and expenses of the Trust (including for the payment of Trust Professionals and any tax liabilities) in accordance with Section 2.3(f) hereof; ~~and~~ (vi) Other Supplemental Cash, which shall be used to satisfy the current and projected future fees, costs and expenses (including, without limitation any Avoidance Action Trust SEC Reporting Costs, the fees and expenses of Trust Professionals, and any tax liabilities) in accordance with Section 6.1(d) hereof; and (v) Litigation Cost Advance, which shall be held in the Funding Account, which Funding Account shall be subject to a deposit account control agreement acceptable to the DIP Lenders and the Trust and on which the DIP Lenders shall have a first priority lien.

(b) The Trust Administrator shall invest the Trust Cash (including any earnings thereon or proceeds thereof) in the manner set forth in this Section 8.4, but shall otherwise be under no liability for interest or income on any monies received by the Trust hereunder and held for distribution or payment to the Trust Beneficiaries, except as such interest shall actually be received. Investment of any Trust Cash shall be administered in accordance with the general duties and obligations hereunder. The right and power of the Trust Administrator to invest the Trust Cash and the proceeds thereof, or any income earned by the Trust, shall be limited to investing such Trust Cash (pending distribution or disbursement in accordance with the Plan or this Trust Agreement) in Permissible Investments; provided, however, that such Permissible Investments shall be limited to include only those investments that a liquidating trust, within the meaning of Treasury Regulations section 301.7701-4(d), may be permitted to hold, pursuant to the Treasury Regulations, or any modification in the IRS guidelines, whether set forth in IRS rulings, other IRS pronouncements or otherwise.

(c) For the avoidance of doubt, the Trust is not, and will not hold itself out as, an "investment company" as such term is understood under the Investment Company Act of 1940, and is prohibited from investing, reinvesting or trading in securities (other than making any Permissible Investments as contemplated by the Plan, the Confirmation Order and this Trust Agreement) or conducting any trade or business other than implementing the Plan and distributing Distributable Trust Assets under the Plan and this Trust Agreement.

8.5. Communication with the GUC Trust Administrator. The Trust Administrator shall communicate with the GUC Trust Administrator to obtain such information regarding, as of a given date, (A) the holders and amounts of General Unsecured Claims, Disputed General Unsecured Claims, Unresolved Term Loan Avoidance Action Claims, Unresolved Other Avoidance Action Claims and Resolved Allowed General Unsecured Claims, (B) the respective Maximum Amounts of all Disputed General Unsecured Claims, Unresolved Term Loan Avoidance Action Claims and Unresolved Other Avoidance Action Claims, (C) the Current Total Amount, (D) the Aggregate Maximum Amount, (E) any components of the foregoing and (E) any other information within the custody or control of the GUC Trust Administrator which shall be necessary or desirable in order for the Trust Administrator to timely make any calculation or determination hereunder to identify and make distributions to the GUC Beneficiaries and to maintain any books and records required to be maintained, or necessary or desirable for the Trust Administrator or the Trust Monitor to fulfill their respective functions, hereunder; provided, however, that the provision of such information shall be under appropriate arrangements of confidentiality to the extent such information has at the time not been publicly disclosed.

8.6. Termination. The duties, responsibilities and powers of the Trust Administrator will terminate when the Trust is dissolved and terminated pursuant to Article IV hereof and the Trust Administrator has performed all of its obligations under Section 4.3, by an order of the Bankruptcy Court or by entry of a final decree closing the Debtors' cases before the Bankruptcy Court; *provided, however,* that Sections 9.4, 9.5 and 9.6 hereof shall survive such termination, dissolution and entry.

#### **ARTICLE IX** **ADDITIONAL MATTERS CONCERNING THE TRUST ADMINISTRATOR**

9.1. Reliance by Trust Administrator. Except as otherwise provided in the Plan, the Confirmation Order or this Trust Agreement, the Trust Administrator may rely and shall be protected in acting upon any resolution, statement, instrument, opinion, report, notice, request, consent, order or other paper or document reasonably believed by the Trust Administrator to be genuine and to have been signed or presented by the proper party or parties.

9.2. Liability to Third Persons. To the fullest extent permitted by applicable law, the Trust Administrator Parties shall not be subject to any personal liability whatsoever, in tort, contract or otherwise, to any person (including, in the case of the Trust Administrator, to any Trust Professionals retained by the Trust Administrator in accordance with this Trust Agreement) in connection with the Avoidance Action Trust Assets, the Other Debtor Residual Trust Assets or the affairs of the Trust and shall not be liable with respect to any action taken or omitted to be taken in good faith, except for actions and omissions determined by a Final Order of the Bankruptcy Court to be due to their respective willful misconduct (including, but not limited to, conduct that results in a personal profit at the expense of the Trust), gross negligence, fraud, malpractice, criminal conduct, unauthorized use of confidential information that causes damages, breach of fiduciary duty (to the extent applicable), or *ultra vires* acts, and all such persons shall look

solely to the Avoidance Action Trust Assets (other than in respect of the Other Debtor Residual Accepted Assets and activities related thereto) or the Other Debtor Residual Trust Assets (in respect of the Other Debtor Residual Accepted Assets and activities related thereto) for satisfaction of claims of any nature arising in connection with affairs of the Trust.

9.3. Non-liability of Trust Administrator for Acts of Others. Except as provided herein, nothing contained in the Plan, the Confirmation Order or this Trust Agreement shall be deemed to be an assumption by the Trust Administrator of any of the liabilities, obligations or duties of the Debtors or shall be deemed to be or contain a covenant or agreement by the Trust Administrator to assume or accept any such liability, obligation or duty. Any successor Trust Administrator may accept and rely upon any accounting made by or on behalf of any predecessor Trust Administrator hereunder, and any statement or representation made as to the assets comprising the Avoidance Action Trust Assets or the Other Debtor Residual Trust Assets, or as to any other fact bearing upon the prior administration of the Trust, so long as it has a good faith basis to do so. The Trust Administrator shall not be liable for having accepted and relied in good faith upon any such accounting, statement or representation if it is later proved to be incomplete, inaccurate or untrue. Neither the Trust Administrator nor any successor Trust Administrator shall be liable for any act or omission of any predecessor Trust Administrator, nor have a duty to enforce any claims against any predecessor Trust Administrator on account of any such act or omission, unless directed in good faith to do so by the Trust Monitor.

9.4. Exculpation. As of the earlier of the Avoidance Action Trust Transfer Date and the Other Debtor Residual Assets Transfer Date, to the fullest extent permitted by applicable law, the Trust Administrator Parties shall be and hereby are exculpated by all Persons, including holders of DIP Credit Agreement Claims, General Unsecured Claims and Units and other parties-in-interest, from any and all claims, causes of action and other assertions of liability arising out of the discharge of their respective powers and duties conferred by the Plan, the Confirmation Order, this Trust Agreement or any Order of the Bankruptcy Court entered pursuant to or in furtherance of the Plan, or applicable law or otherwise, except for actions or omissions to act that are determined by Final Order of the Bankruptcy Court to have arisen out of each such Trust Administrator Party's own respective willful misconduct (including, but not limited to, conduct that results in a personal profit at the expense of the Trust), gross negligence, fraud, malpractice, criminal conduct, unauthorized use of confidential information that causes damages, breach of fiduciary duty (to the extent applicable), or *ultra vires* acts. No holder of a DIP Credit Agreement Claim, General Unsecured Claim or other party-in-interest will have or be permitted to pursue any claim or cause of action against the Trust Administrator Parties or the Trust, for making payments and distributions in accordance with the Plan, the Confirmation Order or the this Trust Agreement or for implementing the provisions thereof. Any action taken or omitted to be taken with the express approval of the Bankruptcy Court and, in the case of action taken in respect of the Other Debtor Residual Accepted Assets, with the approval or at the direction of the DIP Lenders will conclusively be deemed not to constitute willful misconduct, gross negligence, fraud, malpractice, criminal conduct, unauthorized use of confidential information that causes damages,

breach of fiduciary duty, or *ultra vires* acts; *provided, however*, that notwithstanding any provision herein to the contrary, the Trust Administrator shall not be obligated to comply with a direction of the Trust Monitor, whether or not express, which would result in a change to the distribution provisions of the Plan, the Confirmation Order or this Trust Agreement.

9.5. Limitation of Liability. In no event shall the Trust Administrator Parties be liable for punitive, exemplary, consequential, special or other damages for a breach of, or otherwise in connection with, this Trust Agreement under any circumstances.

9.6. Indemnity.

(a) To the fullest extent permitted by applicable law, the Trust Administrator Parties shall be indemnified by the Trust from the Avoidance Action Trust Assets (other than in respect of the Other Debtor Residual Accepted Assets and activities related thereto) or the Other Debtor Residual Trust Assets (in respect of the Other Debtor Residual Accepted Assets and activities related thereto) for any losses, claims, damages, liabilities and expenses occurring after the earlier of the Avoidance Action Trust Transfer Date and the Other Debtor Residual Assets Transfer Date, including reasonable attorneys' fees, disbursements and related expenses which the Trust Administrator Parties may incur or to which the Trust Administrator Parties may become subject in connection with any action, suit, proceeding or investigation brought by or threatened against one or more of the Trust Administrator Parties on account of the acts or omissions in their capacity as, or on behalf of, the Trust Administrator; *provided, however*, that the Trust shall not be liable to indemnify any Trust Administrator Party for any act or omission arising out of such Trust Administrator Party's respective actions that are determined by a Final Order of the Bankruptcy Court to be willful misconduct (including, but not limited to, conduct that results in a personal profit at the expense of the Trust), gross negligence, fraud, malpractice, criminal conduct, unauthorized use of confidential information that causes damages, breach of fiduciary duty (to the extent applicable), or *ultra vires* acts. Notwithstanding any provision herein to the contrary, the Trust Administrator Parties shall be entitled to obtain advances from the Trust to cover their reasonable expenses of defending themselves in any action brought against them as a result of the acts or omissions, actual or alleged, of an Trust Administrator Party in its capacity as such; *provided, however*, that the Trust Administrator Parties receiving such advances shall repay the amounts so advanced to the Trust immediately upon the entry of a final, non-appealable judgment or order finding that such Trust Administrator Parties were not entitled to any indemnity under the provisions of this Section 9.6. Any amounts payable to any Trust Administrator Party pursuant to this Section 9.6 (other than in respect of the Other Debtor Residual Accepted Assets and activities related thereto) shall be satisfied as follows: (i) first from the Avoidance Action Trust Administrative Cash, (ii) second from the Distributable Trust Cash, if any; *provided, however*, that the use of Distributable Trust Cash as contemplated in clause (ii) of the foregoing shall be subject to the prior approval by the Bankruptcy Court, as provided in Section 6.1(b); (iii) third from the GUC Trust Supplemental Cash, if any; and (iv) fourth from the Other Supplemental Cash, if any. Any amounts payable to any Trust Administrator Party pursuant to this Section 9.6 in respect of the Other Debtor Residual Accepted Assets and activities related thereto shall be satisfied as follows: (i) first from the Other Debtor Residual Trust Administrative Cash, and (ii) second from the Distributable Other Debtor Residual Trust Cash, if any.

(b) Anything to the contrary in this Trust Agreement or in any other agreement notwithstanding, to the extent that the Avoidance Action Trust Administrative Cash, Distributable Trust Cash, GUC Trust Supplemental Cash or Other Supplemental Cash, or the Other Debtor Residual Trust Administrative Cash or Distributable Other Debtor Residual Trust Cash, as the case may be, shall be insufficient to fully indemnify the Trust Administrator Parties or to provide advances to the Trust Administrator Parties in accordance with Section 9.6(a), the Trust Administrator Parties shall be indemnified and shall be entitled to obtain advances, first from the Other GUC Trust Administrative Cash (as defined in the GUC Trust Agreement), and second from the GUC Trust Distributable Assets (as defined in the GUC Trust Agreement), to the same extent as the GUC Trust Administrator Parties under Section 9.6 of the GUC Trust Agreement or any successor provision thereunder, as provided in Section 9.6 of the GUC Trust Agreement in effect on the date hereof.

(c) The foregoing indemnities in respect of any Trust Administrator Party shall survive the termination of such Trust Administrator Party from the capacity for which they are indemnified.

9.7. Compensation and Expenses.

(a) The Trust Administrator shall receive fair and reasonable compensation for its services (other than in respect of the Other Debtor Residual Accepted Assets and activities related thereto), to be paid out of the Avoidance Action Trust Administrative Cash in accordance with the approved Budget (or from the Avoidance Action Trust SEC Reporting Cash in accordance with Section 2.3(e) hereof, the GUC Trust Supplemental Cash in accordance with Section 2.3(f) hereof, or the Other Supplemental Cash in accordance with Section 6.1(d) hereof). The Trust Administrator shall be entitled, without the need for approval of the Bankruptcy Court, to reimburse itself on a monthly basis (i) from the Avoidance Action Trust Administrative Cash, the GUC Trust Supplemental Cash or the Other Supplemental Cash, as applicable, for such compensation and all reasonable out-of-pocket expenses actually incurred in the performance of duties in accordance with this Trust Agreement and the Budget and (ii) from the Avoidance Action Trust SEC Reporting Cash for such compensation and all reasonable out-of-pocket expenses actually incurred in the performance of duties in accordance with this Trust Agreement and with the approval of the Trust Monitor.

(b) The Trust Administrator shall receive compensation for its services in respect of the Other Debtor Residual Accepted Assets and activities related thereto, to be paid out of the Other Debtor Residual Trust Administrative Cash, as the Trust Administrator and a majority in interest of the DIP lenders shall agree; provided that the Trust Administrator shall not be obligated to undertake any activities in respect of the Other Debtor Residual Accepted Assets unless such compensation arrangements shall be acceptable to the Trust Administrator in its sole discretion.

9.8. No Personal Financial Liability. No provision of the Plan, Confirmation Order or this Trust Agreement shall be construed as requiring the Trust Administrator to expend or risk its own funds or otherwise to incur any personal financial liability (x) in the performance of any of its duties thereunder or hereunder, including any situation where the

Avoidance Action Trust Assets are insufficient to permit the administration of the Trust or distributions as contemplated herein or the payment of fees and expenses of the Trust Professionals, or (y) in the exercise of any of its rights or powers afforded hereunder or thereunder.

**ARTICLE X**  
**SUCCESSOR TRUST ADMINISTRATORS**

10.1. Resignation. The Trust Administrator may resign from the Trust by giving at least sixty (60) days' prior written notice thereof to the Trust Monitor. Such resignation shall become effective on the later to occur of (x) the date specified in such written notice and (y) the effective date of the appointment of a successor Trust Administrator in accordance with Section 10.4 hereof and such successor's acceptance of such appointment in accordance with Section 10.5 hereof.

10.2. Removal. The holders of a majority of the Units or the DIP Lenders may at any time petition the Bankruptcy Court for the removal of the Trust Administrator, but only for good cause shown. Such removal shall become effective on the date ordered by the Bankruptcy Court, provided that such removal shall not become effective until the appointment of a successor Trust Administrator in accordance with Section 10.4 hereof and such successor's acceptance of such appointment in accordance with Section 10.5 hereof. The services of the Trust Administrator shall also terminate upon its bankruptcy, provided that such termination shall not become effective until the appointment of a successor Trust Administrator in accordance with Section 10.4 hereof and such successor's acceptance of such appointment in accordance with Section 10.5 hereof.

10.3. Effect of Resignation or Removal. The resignation, removal or bankruptcy of the Trust Administrator shall not operate to terminate the Trust or to revoke any existing agency created pursuant to the terms of the Plan, the Confirmation Order or this Trust Agreement or invalidate any action theretofore taken by the Trust Administrator. The exculpation, indemnity and limitation of liability provisions of Article X of this Trust Agreement shall survive the resignation, removal or bankruptcy of the Trust Administrator. All fees and expenses properly incurred by the Trust Administrator prior to the resignation, Incompetency, removal or bankruptcy of the Trust Administrator shall be paid from the Avoidance Action Trust Administrative Cash, the GUC Trust Supplemental Cash or the Other Supplemental Cash (other than in respect of the Other Debtor Residual Accepted Assets and activities related thereto), from the Other Debtor Residual Trust Administrative Cash (in respect of the Other Debtor Residual Accepted Assets and activities related thereto) or from Avoidance Action Trust SEC Reporting Cash (in respect of Avoidance Action Trust SEC Reporting Costs in accordance with Section 2.3(e) hereof), unless such fees and expenses are disputed by (x) the Trust Monitor or (y) the successor Trust Administrator, in which case the Bankruptcy Court shall resolve the dispute and any disputed fees and expenses of the predecessor Trust Administrator that are subsequently allowed by the Bankruptcy Court shall be paid from the Avoidance Action Trust Administrative Cash, the GUC Trust Supplemental Cash or the Other Supplemental Cash (other than in respect of the Other Debtor Residual Accepted Assets and activities related thereto), from the Other Debtor Residual Trust Administrative Cash (in respect of

the Other Debtor Residual Accepted Assets and activities related thereto) or from Avoidance Action Trust SEC Reporting Cash (in respect of Avoidance Action Trust SEC Reporting Costs in accordance with Section 2.3(e) hereof). In the event of the resignation, removal or bankruptcy of the Trust Administrator, such Trust Administrator shall:

(a) promptly execute and deliver such documents, instruments and other writings as may be reasonably requested by the successor Trust Administrator or directed by the Bankruptcy Court to effect the termination of such Trust Administrator's capacity under this Trust Agreement;

(b) promptly deliver to the successor Trust Administrator all documents, instruments, records and other writings related to the Trust as may be in the possession of such Trust Administrator; and

(c) otherwise assist and cooperate in effecting the assumption of its obligations and functions by such successor Trust Administrator.

10.4. Appointment of Successor. In the event of the resignation, removal, Incompetency or bankruptcy of the Trust Administrator, the Trust Monitor shall promptly appoint a successor Trust Administrator, *provided that* such appointment shall not take effect unless approved by the Bankruptcy Court upon the petition of the Trust Monitor and until the successor Trust Administrator shall have delivered written acceptance of its appointment as described Section 10.5 below. If a successor Trust Administrator does not take office within thirty (30) days after the resignation, removal, Incompetency or bankruptcy of the retiring Trust Administrator, the Bankruptcy Court, upon its own motion or the motion of the retiring Trust Administrator or any Trust Beneficiary, shall appoint a successor Trust Administrator.

10.5. Acceptance of Appointment by Successor Trust Administrator. Any successor Trust Administrator appointed hereunder shall execute an instrument accepting its appointment and shall deliver one counterpart thereof to the Bankruptcy Court for filing and to the Trust Monitor and, in case of the Trust Administrator's resignation, to the resigning Trust Administrator. Thereupon, such successor Trust Administrator shall, without any further act, become vested with all the duties, powers, rights, obligations, title, discretion and privileges of its predecessor in the Trust with like effect as if originally named Trust Administrator and shall be deemed appointed pursuant to Bankruptcy Code Section 1123(b)(3)(B); *provided, however,* such successor Trust Administrator shall file an amendment to the Certificate of Trust with the Secretary of State as required by the Delaware Act. The predecessor Trust Administrator shall duly assign, transfer and deliver to such successor Trust Administrator all Avoidance Action Trust Assets held by such predecessor Trust Administrator hereunder and shall, as directed by the Bankruptcy Court or reasonably requested by such successor Trust Administrator, execute and deliver an instrument or instruments conveying and transferring to such successor Trust Administrator upon the trusts herein expressed, all the duties, powers, rights, obligations, title, discretion and privileges of the predecessor Trust Administrator.



10.6. Successor Entity to Trust Administrator. Any business entity into which the Trust Administrator may be merged or converted or with which it may be consolidated, or any entity resulting from any merger, conversion or consolidation to which the Trust Administrator shall be a party, or any entity succeeding to all or substantially all of the corporate trust business of the Trust Administrator, shall be the successor of the Trust Administrator hereunder, without the execution or filing of any paper or any further act on the part of any of the parties hereto; *provided, however*, such successor Trust Administrator shall file an amendment to the Certificate of Trust with the Secretary of State as required by the Delaware Act.

**ARTICLE XI**  
**TRUST MONITOR**

11.1. General.

(a) The Trust Monitor shall oversee the activities of the Trust Administrator as set forth in this Trust Agreement. In all circumstances, the Trust Monitor shall act in the best interests of all Trust Beneficiaries, in furtherance of the purpose of the Trust, and in accordance with this Trust Agreement.

(b) In furtherance of its rights and responsibilities under this Trust Agreement, the Trust Monitor shall have access, on reasonable advance notice and during regular business hours, to all such books and records of the Trust and the Trust Administrator, shall have the right to consult with all such professionals engaged by the Trust Administrator and shall participate in all such meetings of the Trust Administrator and the Trust Professionals as the Trust Monitor deems reasonably necessary or appropriate. Any documents shared between the Trust Administrator and the Trust Monitor shall be subject to joint privilege, and such sharing shall not be deemed to waive any attorney-client or work product privilege in respect of such documents.

(c) [Intentionally omitted.]

(d) Notwithstanding anything in this Section 11.1 or Section 11.2 hereof, the Trust Monitor shall not take (or fail to take) any action which will cause the Trust (other than the Avoidance Action Trust Claims Reserve) to fail to qualify as a liquidating trust within the meaning of Treasury Regulation section 301.7701-4(d) that is treated as a grantor trust.

11.2. Appointment and Removal of the Trust Monitor.

(a) Subject to Section 11.2(d), the Trust Monitor shall serve until the earlier of (w) the final distribution of all Distributable Trust Assets and the Distributable Other Debtor Residual Trust Assets, if any, (x) its resignation pursuant to subsection (b) of this Section 11.2, (y) its removal pursuant to subsection (c) of this Section 11.2 or (z) its bankruptcy or insolvency.

(b) The Trust Monitor may resign at any time by written notice of resignation to the Trust Administrator, a copy of which shall also be filed by the Trust Monitor with the Bankruptcy Court. Such resignation shall be effective no earlier than sixty (60) days from the

date of such notice or such earlier time as a successor is appointed in accordance with the provisions of subsection (d) of this Section 11.2.

(c) The holders of a majority of the Units or the DIP Lenders may at any time petition the Bankruptcy Court for the removal of the Trust Monitor, but only for good cause shown. Such removal shall become effective on the date ordered by the Bankruptcy Court.

(d) In the event of the resignation, removal, bankruptcy or insolvency of the Trust Monitor, the Trust Administrator shall promptly appoint a successor Trust Monitor, provided that such appointment shall not take effect unless approved by the Bankruptcy Court upon the petition of the Trust Administrator and until the successor Trust Monitor shall have delivered written acceptance of its appointment as described in clause (e) of this Section 11.2 below; and provided further that until a new Trust Monitor's appointment is effective, the resigning Trust Monitor's appointment shall remain in effect, and the resigning Trust Monitor shall fulfill all obligations and duties of the Trust Monitor. If a successor Trust Monitor does not take office within thirty (30) days after the resignation, removal, incompetency, bankruptcy or insolvency of the retiring Trust Monitor, the Bankruptcy Court, upon its own motion or the motion of the retiring Trust Monitor or any Trust Beneficiary, shall appoint a successor Trust Monitor.

(e) All fees and expenses properly incurred by the Trust Monitor prior to the resignation, incompetency, removal or bankruptcy of the Trust Monitor shall be paid from the Avoidance Action Trust Administrative Cash, the GUC Trust Supplemental Cash or the Other Supplemental Cash (other than in respect of the Other Debtor Residual Accepted Assets and activities related thereto), from the Other Debtor Residual Trust Administrative Cash (in respect of the Other Debtor Residual Accepted Assets and activities related thereto) or from Avoidance Action Trust SEC Reporting Cash (in respect of Avoidance Action Trust SEC Reporting Costs in accordance with Section 2.3(e) hereof), unless such fees and expenses are disputed by (x) the Trust Administrator or (y) the successor Trust Monitor, in which case the Bankruptcy Court shall resolve the dispute and any disputed fees and expenses of the predecessor Trust Monitor that are subsequently allowed by the Bankruptcy Court shall be paid from the Avoidance Action Trust Administrative Cash, the GUC Trust Supplemental Cash or the Other Supplemental Cash (other than in respect of the Other Debtor Residual Accepted Assets and activities related thereto) from the Other Debtor Residual Trust Administrative Cash (in respect of the Other Debtor Residual Accepted Assets and activities related thereto) or from Avoidance Action Trust SEC Reporting Cash (in respect of Avoidance Action Trust SEC Reporting Costs in accordance with Section 2.3(e) hereof).

(f) Any successor Trust Monitor appointed hereunder shall execute an instrument accepting its appointment and shall deliver one counterpart thereof to the Bankruptcy Court for filing and to the Trust Administrator.

(g) Immediately upon effectiveness of the appointment of a successor Trust Monitor, all rights, powers, duties, authority, and privileges of the predecessor Trust Monitor hereunder will be vested in and undertaken by the successor Trust Monitor without any further act. The successor Trust Monitor shall not be liable personally for any act or omission of the predecessor Trust Monitor.

11.3. Approval of and Consultation with the Trust Monitor.

(I) Other Than in Respect of the Other Debtor Residual Accepted Assets

(a) Notwithstanding anything in this Trust Agreement to the contrary, the Trust Administrator shall submit to the Trust Monitor for its review and prior approval the following matters, in addition to any other matters that expressly require the approval of the Trust Monitor pursuant to the terms of the Plan, the Confirmation Order or this Trust Agreement:

- (i) Any decision to settle or otherwise resolve the Term Loan Avoidance Action;
  - (ii) Any decision to refrain from making any distributions to the holders of Allowed General Unsecured Claims or Units, as the case may be, in accordance with this Trust Agreement, except as expressly permitted herein;
  - (iii) Any decision to retain and/or to terminate the retention of Trust Professionals (other than legal counsel retained to represent the Trust Administrator in connection with its role as Trust Administrator, which shall be in the Trust Administrator's sole discretion);
  - (iv) The incurrence of any cost or expense of the Trust in excess of 10% of any individual line item therefor in the approved Budget, measured on a quarterly basis; *provided, however*, that approval of the Trust Monitor shall not be required in the case of any cost or expense authorized by further order of the Bankruptcy Court;
  - (v) The Budget described in Section 6.3 hereof and any changes thereto;
  - (vi) Any amendment of this Trust Agreement as provided in Section 13.13 hereof; and
  - (vii) Any distribution that is not made in accordance with the provisions of Article V as contemplated by Section 5.7; *provided, however*, that any deviation from the provisions of Article V other than as contemplated by Section 5.7 shall also require approval of the Bankruptcy Court.
- (b) In addition to any other matters that expressly require consultation with the Trust Monitor pursuant to the terms of the Plan, the Confirmation Order or this Trust Agreement, the Trust Administrator shall consult with the Trust Monitor in advance of an application to the Bankruptcy Court to use, or to sell or borrow against, the Term Loan Avoidance Action or the Distributable Trust Assets in order to satisfy expenses of the Trust, as contemplated by Section 6.1(b) and Section 6.1(d) hereof.
- (c) In the event of any disagreement between the Trust Administrator and the Trust Monitor regarding any matter requiring the approval or direction of the Trust Monitor under this Trust Agreement, the Trust Administrator and the Trust Monitor shall consult and

negotiate diligently and in good faith to resolve such disagreement. If despite their good faith efforts, the Trust Administrator and the Trust Monitor are unable to resolve any disagreement, or the Trust Administrator cannot otherwise obtain approval or direction from the Trust Monitor as required by this Trust Agreement, the Trust Administrator may petition the Bankruptcy Court, with a copy to the Trust Monitor, requesting such approval or direction.

(II) In Respect of the Other Debtor Residual Accepted Assets

The Trust Monitor shall have the rights, powers and privileges to act in respect of the Other Debtor Residual Accepted Assets, if any, in the manner set forth in Section 11.3 (I), *mutatis mutandis* and to the extent applicable. For the avoidance of doubt, the Trust Monitor shall not be obligated to undertake any activities in respect of the Other Debtor Residual Trust Assets unless there shall be available sufficient Other Debtor Residual Trust Administrative Cash to pay in full its fees, costs and expenses in respect thereof.

11.4. Exculpation and Indemnification; Limitation of Liability. To the fullest extent permitted by applicable law, the Trust Monitor Parties shall not be subject to personal liability, and shall be exculpated and indemnified, and shall have the right to obtain advances to cover reasonable expenses of defense, to the same extent as the Trust Administrator Parties pursuant to Section 9.2, Section 9.4, Section 9.5, Section 9.6 and Section 10.3. In no event will the Trust Monitor Parties be liable for punitive, exemplary, consequential, special or other damages for a breach of, or otherwise in connection with, this Trust Agreement under any circumstances.

11.5. Compensation and Expenses.

(a) The Trust Monitor shall receive fair and reasonable compensation for its services (other than in respect of the Other Debtor Residual Accepted Assets and activities related thereto), to be paid out of the Avoidance Action Trust Administrative Cash, in accordance with the approved Budget (or from the Avoidance Action Trust SEC Reporting Cash in accordance with Section 2.3(e) hereof, the GUC Trust Supplemental Cash in accordance with Section 2.3(f) hereof, or the Other Supplemental Cash in accordance with Section 6.1(d) hereof). The Trust Monitor shall be entitled on a monthly basis, without the need for approval of the Bankruptcy Court, to direct the Trust Administrator to reimburse the Trust Monitor (i) from the Avoidance Action Trust Administrative Cash, the GUC Trust Supplemental Cash or the Other Supplemental Cash, as applicable, for all reasonable out-of-pocket expenses actually incurred in the performance of duties in accordance with this Trust Agreement, consistent with the Budget prepared pursuant to Section 6.3 hereof and (ii) from the Avoidance Action Trust SEC Reporting Cash for such compensation and all reasonable out-of-pocket expenses actually incurred in the performance of duties in accordance with this Trust Agreement.

(b) The Trust Monitor shall receive compensation for its services than in respect of the Other Debtor Residual Accepted Assets and activities related thereto, to be paid out of the Other Debtor Residual Trust Administrative Cash, as the Trust Monitor and a majority in interest of the DIP lenders shall agree; provided that the Trust Monitor shall not be obligated to undertake any activities in respect of the Other Debtor Residual Accepted Assets

unless such compensation arrangements shall be acceptable to the Trust Monitor in its sole discretion.

**ARTICLE XII**  
**ACTION BY MAJORITY OF HOLDERS OF UNITS**

Holders of a majority of the Units or the DIP Lenders from time to time outstanding may petition the Bankruptcy Court to remove the Trust Administrator in accordance with Section 10.2 or to remove the Trust Monitor in accordance with Section 11.1, but in each case only for good cause shown. In determining whether the holders of a majority of the Units have concurred in any such petition, Units held by the Trust Administrator or the Trust Monitor or any of their respective Affiliates shall be disregarded.

**ARTICLE XIII**  
**MISCELLANEOUS PROVISIONS**

13.1. Actions Taken on Other Than Business Day. In the event that any payment or act under the Plan, the Confirmation Order or this Trust Agreement is required to be made or performed on a date that is not a Business Day, then the making of such payment or the performance of such act may be completed on the next succeeding Business Day, but shall be deemed to have been completed as of the required date.

13.2. Governing Law. This Trust Agreement shall be governed by and construed in accordance with the laws of the State of Delaware without giving effect to rules governing conflicts of law.

13.3. Jurisdiction. Subject to the proviso below, the parties agree that the Bankruptcy Court shall have exclusive and continuing jurisdiction over the Trust and the Trust Administrator, including the administration and activities of the Trust and the Trust Administrator; *provided, however*, that notwithstanding the foregoing, the Trust Administrator shall have power and authority to bring any action in any court of competent jurisdiction to prosecute any claims or Causes of Action assigned to the Trust, including the Delaware Chancery Court, the Delaware Superior Court and the Delaware Supreme Court.

13.4. Third Party Beneficiary. Trust Beneficiaries (including the DIP Lenders in their capacities as such) are third party beneficiaries of this Trust Agreement. The Trust Administrator Parties (other than the Trust Administrator) are third party beneficiaries of the provisions of Section 9.2, Section 9.4 and Section 9.6 of this Trust Agreement. The Trust Monitor Parties (other than the Trust Monitor) are third party beneficiaries of the provisions of Section 11.4 of this Trust Agreement, and, to the extent incorporated therein, Section 9.2, Section 9.4, Section 9.5 and Section 9.6 of this Trust Agreement. Except as aforesaid, there are no other third party beneficiaries of this Trust Agreement.

13.5. Severability. In the event any provision of this Trust Agreement or the application thereof to any person or circumstances shall be determined by a final, non-appealable judgment or order to be invalid or unenforceable to any extent, the remainder of this Trust Agreement or the application of such provision to persons or circumstances or

in jurisdictions other than those as to or in which it is held invalid or unenforceable, shall not be affected thereby, and each provision of this Trust Agreement shall be valid and enforceable to the fullest extent permitted by law.

13.6. Notices. Any notice or other communication required or permitted to be made under this Trust Agreement shall be in writing and shall be deemed to have been sufficiently given, for all purposes, if delivered personally, by email, facsimile, sent by nationally recognized overnight delivery service or mailed by first-class mail:

(A) if to the Trust Administrator, to:

Wilmington Trust Company  
Rodney Square North  
1100 North Market Street  
Wilmington, Delaware, 19890-1615  
Phone: (302) 636-6000  
Fax: (302) 636-4140  
Attn: Corporate Trust Administration

With a copy to:

~~Gibson, Dunn & Crutcher~~Binder & Schwartz LLP  
~~200 Park~~366 Madison Avenue, 6th Floor  
New York, NY ~~10166-0193~~10017  
Phone: (212) ~~351-3991~~510-7008  
~~———— Fax: (212) 351-6391~~  
Attn: ~~Matthew Williams and Keith Martorana~~Eric B. Fisher

(B) if to the Trust Monitor, to:

~~———— FTI Consulting, Inc.~~  
~~———— 1201 W. Peachtree St., Suite 600~~  
~~———— Atlanta, GA 30309~~

Arthur J. Gonzalez  
New York University School of Law  
40 Washington Square South  
New York, NY 10012

(C) if to any Trust Beneficiary, to:

(1) in the case of a DIP Lender,

a. if to the U.S. Treasury, to:

United States Department of the Treasury  
1500 Pennsylvania Avenue, NW

Formatted: Indent: Left: 3.5", Space After: 0 pt

Washington, D.C. 20220  
Attn: Chief Counsel, Office of Financial Stability  
Telecopier: (202) 927-9225

with a copy to:

Formatted: Indent: Left: 3.5", Space After: 0 pt

OFSCchiefCounselNotices@treasury.gov

- b. if to ~~EDC~~Export Development Canada, to:

Export Development Canada  
151 ~~O'Connor~~Slater Street  
Ottawa, Ontario  
Canada K1A 1K3  
Attention: Loans Services  
Telecopy: 613-598-2514;

with a copy to:

Formatted: Indent: Left: 3.5", Space After: 0 pt

with a copy to:

Export Development Canada  
151 ~~O'Connor~~Slater Street  
Ottawa, Ontario  
Canada K1A 1K3  
Attention: Asset Management/Covenants Officer  
Telecopy: 613-598-3186

- (2) in the case of a holder of an Allowed General Unsecured Claim, to the last known address of such holder according to the Debtors' Schedules and/or such holder's proof of claim; and
- (3) in the case of holder of Units, to such address as appears on the books and records of the Trust Administrator, or such other address as may be designated from time to time by notice given in accordance with the provisions of this Section 13.6.

13.7. Headings. The headings contained in this Trust Agreement are solely for convenience of reference and shall not affect the meaning or interpretation of this Trust Agreement or of any term or provision hereof.

13.8. Plan. The terms of this Trust Agreement are intended to supplement the terms provided by the Plan and the Confirmation Order. To the extent that the terms of sections 5.6 and 6.5 of the Plan are inconsistent with the terms set forth in this Trust Agreement with respect to the Trust, then the terms of the Trust Agreement shall govern. All other provisions of the Plan shall supersede the provisions of this Trust Agreement, including section 6.15 of the Plan, which provides that the restrictions set forth in

paragraph 20 of the Final Order approving the DIP Credit Agreement (ECF No. 2529) shall continue to apply.

13.9. Ambiguities and Construction.

(a) The Trust created by this Trust Agreement (other than the Avoidance Action Trust Claims Reserve) is intended to qualify as a liquidating trust under Treasury Regulation section 301.7701-4(d) for U.S. federal and applicable state and local income tax purposes and, to the extent provided by law, shall be governed and construed in all respects as such a trust and any ambiguity herein shall be construed consistent herewith and, if necessary, this Trust Agreement may be amended to comply with such U.S. federal and applicable state and local income tax laws, which amendments may apply retroactively.

(b) Unless the context otherwise requires:

(i) a term has the meaning assigned to it;

(ii) “or” is not exclusive;

(iii) words in the singular include the plural, and in the plural include the singular;

(iv) all references herein to Articles, Sections and other subsections, unless referring specifically to the Plan or provisions of the Bankruptcy Code, the Bankruptcy Rules, or other law, statute or regulation, refer to the corresponding Articles, Sections and other subsections of this Trust Agreement;

(v) the words “hereof,” “herein,” “hereunder” and similar words refer to this Trust Agreement as a whole and not to any particular provision, Article, Section or subsection of this Trust Agreement unless otherwise specified;

(vi) words importing persons shall include firms, associations, corporations and other entities;

(vii) any pronoun shall include the corresponding masculine, feminine and neuter forms; and

(viii) “including” means including without limitation.

13.10. Entire Trust Agreement. This Trust Agreement contains the entire agreement between the parties and supersedes all prior and contemporaneous agreements or understandings between the parties with respect to the subject matter hereof.

13.11. Cooperation. The Debtors shall turn over or otherwise make available to the Trust Administrator at no cost to the Trust or the Trust Administrator, all books and records reasonably required by the Trust Administrator to carry out its duties hereunder,



and agree to otherwise reasonably cooperate with the Trust Administrator in carrying out its duties hereunder, subject to the obligation to preserve the confidential nature of the Debtors' books and records, as provided in Section 13.12.

13.12. Confidentiality. The Trust Administrator and the Trust Monitor, and their respective employees, members, agents, professionals and advisors, including the Trust Professionals (each a "Confidential Party" and collectively the "Confidential Parties") shall hold strictly confidential and not use for personal gain any material, non-public information of which they have become aware in their capacity as a Confidential Party, of or pertaining to any Debtor to which any of the Avoidance Action Trust Assets relates or which is otherwise received from the Debtors by the Trust; provided, however, that such information may be disclosed if

- (i) it is now or in the future becomes generally available to the public other than as a result of a disclosure by the Confidential Parties; or
- (ii) such disclosure is required of the Confidential Parties pursuant to legal process, including subpoena or other court order or other applicable laws or regulations.

In the event that any Confidential Party is requested to divulge confidential information pursuant to clause (ii), such Confidential Party shall promptly, in advance of making such disclosure, provide reasonable notice of such required disclosure to the Trust Administrator (or the Trust Monitor in case the Trust Administrator is the disclosing party) to allow sufficient time to object to or prevent such disclosure through judicial or other means and shall cooperate reasonably with the Trust Administrator (or the Trust Monitor, as applicable) in making any such objection, including appearing in any judicial or administrative proceeding in support of any objection to such disclosure.

13.13. Amendment and Waiver.

(a) The Trust Administrator, with the approval of the Trust Monitor, may amend or supplement this Trust Agreement without notice to or consent of the Bankruptcy Court or any Trust Beneficiary for the purpose of (x) curing any ambiguity, omission, inconsistency or correcting or supplementing any defective provision; (y) evidencing and providing for the acceptance of the appointment of a successor Trust Administrator or Trust Monitor; or (z) making any other changes to this Trust Agreement that does not adversely affect the interests of the Trust Beneficiaries in any material respect.

(b) The Trust Administrator may amend or supplement this Trust Agreement for any other purpose, but only on petition to, and with the approval of, the Bankruptcy Court; provided that (x) no amendment or supplement to this Trust Agreement shall be inconsistent with the purpose and intent of the Trust to dispose of in an expeditious but orderly manner the Avoidance Action Trust Assets in accordance with the terms of the Plan, the Confirmation Order and this Trust Agreement, and (y) this Trust Agreement shall not be amended in a manner that is inconsistent with the Plan in the form confirmed by the Bankruptcy Court, subject to any post-confirmation modifications to the Plan pursuant to Section 1127 of the Bankruptcy Code.

(c) Any amendment to this Trust Agreement shall be filed with the Bankruptcy Court.

(d) No amendment shall be made to any provision of this Trust Agreement that materially and adversely affects the rights of the DIP Lenders without the written consent of the DIP Lenders.

(e) The Trust Administrator shall file any amendment to the Certificate of Trust with the Secretary of State as may be required or permitted by the Delaware Act.

13.14. Counterparts. This Trust Agreement may be executed in any number of counterparts, each of which shall be deemed an original, but all such counterparts shall together constitute but one and the same instrument. A facsimile or portable document file (PDF) signature of any party shall be considered to have the same binding legal effect as an original signature.

~~{Remainder of Page Blank — Signature Pages Follows}~~

**IN WITNESS WHEREOF**, the parties hereto have executed this Trust Agreement or caused this Trust Agreement to be duly executed by their respective officers, representatives or agents, effective as of the date first above written.

**WILMINGTON TRUST COMPANY, as Trust  
Administrator and trustee**

By: \_\_\_\_\_  
Name:  
Title:

– and –

**~~FTI CONSULTING, INC., ARTHUR J. GONZALEZ, as  
Trust Monitor~~**

By: \_\_\_\_\_  
Name:  
Title:

**Exhibit A**

Cash Accounts:

AAT Distributable Trust Assets Account

Avoidance Action Budget Sub Account

Avoidance Action Assets Sub Account

Avoidance Action Trust SEC Reporting Costs Account

GUC Trust Supplemental Cash Account

Litigation Cost Advance Funding Account

Other Supplemental Cash Account

Segregated Account

**Exhibit B**

**FORM OF**  
**CERTIFICATE OF TRUST**  
**OF**

**MOTORS LIQUIDATION COMPANY AVOIDANCE ACTION TRUST**

THIS Certificate of Trust of Motors Liquidation Company Avoidance Action Trust (the "Trust") is being duly executed and filed on behalf of the Trust by the undersigned, as trustee, to form a statutory trust under the Delaware Statutory Trust Act (12 Del. C. § 3801 et seq.) (the "Act").

1. Name. The name of the statutory trust formed by this Certificate of Trust is Motors Liquidation Company Avoidance Action Trust.

2. Delaware Trustee. The name and business address of the trustee of the Trust with a principal place of business in the State of Delaware are Wilmington Trust Company, 1100 North Market Street, Wilmington, Delaware 19890, Attn: Corporate Trust Administration.

3. Effective Date. This Certificate of Trust shall be effective upon filing.

IN WITNESS WHEREOF, the undersigned has duly executed this Certificate of Trust in accordance with Section 3811(a)(1) of the Act.

WILMINGTON TRUST COMPANY, not in its individual capacity but solely as Trust administrator and trustee

By: \_\_\_\_\_  
Name:  
Title:

## **EXHIBIT E**

**EXECUTION VERSION**

**SECOND AMENDED AND RESTATED MOTORS LIQUIDATION COMPANY  
AVOIDANCE ACTION TRUST AGREEMENT**

This SECOND AMENDED AND RESTATED MOTORS LIQUIDATION COMPANY AVOIDANCE ACTION TRUST AGREEMENT, dated as of \_\_\_\_\_, 2016 (as it may be amended from time to time, this "Trust Agreement"), by and among Wilmington Trust Company, as trust administrator and trustee (together with any successor appointed under the terms hereof, the "Trust Administrator") of the Motors Liquidation Company Avoidance Action Trust (the "Trust") for the benefit of the Trust Beneficiaries (as defined below), and Arthur J. Gonzalez, as trust monitor (together with any predecessor or successor appointed under the terms hereof, the "Trust Monitor") of the Trust, amends and restates in its entirety the First Amended and Restated Trust Agreement (as defined below). Capitalized terms used herein and not otherwise defined herein shall have the meanings ascribed to such terms in the Debtors' Second Amended Joint Chapter 11 Plan of liquidation pursuant to chapter 11 of Title 11 of the United States Code, 11 U.S.C. §§ 101 et seq., as amended (the "Bankruptcy Code"), dated March 18, 2011, as confirmed (including all exhibits thereto, as the same may be further amended, modified, or supplemented from time to time, the "Plan").

W I T N E S S E T H:

WHEREAS, the Trust Administrator and the Trust Monitor are party to the Motors Liquidation Company Avoidance Action Trust Agreement, dated as of March 30, 2011, by and among Motors Liquidation Company ("MLC"), MLC of Harlem, Inc., MLCS, LLC, MLCS Distribution Corporation, Remediation and Liability Management Company, Inc., and Environmental Corporate Remediation Company, Inc. (collectively, the "Debtors"), as debtors and debtors-in-possession, Wilmington Trust Company, as Trust Administrator, and FTI Consulting, Inc., as Trust Monitor (the "Original Trust Agreement"); and

WHEREAS, each of the Debtors has, prior to the date hereof, ceased to operate and dissolved; and

WHEREAS, the Original Trust Agreement was amended and restated in its entirety, with the approval of the Bankruptcy Court (defined below), pursuant to that certain Amended and Restated Motors Liquidation Company Avoidance Action Trust Agreement dated as of May 11, 2012 by and between the Trust Administrator and the Trust Monitor (the "First Amended and Restated Trust Agreement"); and

WHEREAS, there was a dispute between the Official Committee of Unsecured Creditors of Motors Liquidation Company (the "Committee") and the DIP Lenders (defined below) as to entitlements to Avoidance Action Proceeds, which dispute has been resolved by mutual agreement (the "Litigation Settlement") pursuant to which (a) the DIP Lenders will provide the Litigation Cost Advance (as defined below), (b) the DIP Lenders shall be entitled to be repaid the Litigation Cost Advance out of Distributable Trust Assets (as defined below) and (c) the DIP Lenders shall be entitled to receive thirty percent (30%) of all remaining Distributable Trust

Assets and the holders of Allowed General Unsecured Claims (or Units) shall be entitled to receive seventy percent (70%) of all remaining Distributable Trust Assets, with each such distribution to be made at or about the same time and on a *pari passu* basis, as set forth more fully in that certain Stipulation and Agreed Order (I) Settling Disputed Entitlements of Debtor-in-Possession Lenders and Official Committee of Unsecured Creditors to Potential Term Loan Avoidance Action Proceeds, and (II) Modifying Avoidance Action Trust Agreement to Implement Settlement, executed by the Committee, the DIP Lenders and the Trust and dated July 14, 2016 (the "Settlement Agreement"); and

WHEREAS, the Trust Administrator and the Trust Monitor believe that the Avoidance Action Trust Administrative Cash and Supplemental Avoidance Action Trust Cash (each defined below) currently held by the Trust is insufficient to satisfy projected fees, costs and expenses of the Trust, and, as an integral part of the Litigation Settlement, the DIP Lenders have agreed to provide the Litigation Cost Advance to the Trust on the terms set forth in that certain agreement, dated July 14, 2016, executed by the Trust and the DIP Lenders (the "Litigation Cost Advance Agreement"); and

WHEREAS, on July 15, 2016, the Trust, jointly with the Official Committee of Unsecured Creditors (the "Committee"), filed a motion with the Bankruptcy Court (the "9019 Motion") seeking approval of the Settlement Agreement and the Litigation Cost Advance Agreement; and

WHEREAS, on \_\_\_\_\_, 2016, the Bankruptcy Court entered an order approving the 9019 Motion (the "9019 Order"); and

WHEREAS, it is now necessary to amend the First Amended and Restated Trust Agreement to implement the 9019 Order; and

WHEREAS, it is the intent of the parties hereto that this Trust Agreement amends and restates in its entirety the First Amended and Restated Trust Agreement; and

WHEREAS, pursuant Section 13.13(b) of the First Amended and Restated Trust Agreement, the 9019 Motion and the 9019 Order, the Trust Administrator has petitioned and received from the Bankruptcy Court approval of this amendment and restatement of the First Amended and Restated Trust Agreement; and

WHEREAS, this Trust Agreement, as it amends and restates the First Amended and Restated Trust Agreement, shall become effective upon the execution by the appropriate signatories to this amended and restated Trust Agreement.

NOW, THEREFORE, in accordance with Section 13.13 of the First Amended and Restated Trust Agreement and the Settlement Agreement, the First Amended and Restated Trust Agreement is hereby amended and restated as follows:



### **Background**

A. Beginning on June 1, 2009, the Debtors filed in the United States Bankruptcy Court for the Southern District of New York (the “Bankruptcy Court”) voluntary petitions for relief under chapter 11 of the Bankruptcy Code (the “Chapter 11 Cases”).

B. On or about August 31, 2010, the Debtors filed their Plan and Disclosure Statement in the Bankruptcy Court. The Debtors filed an amended Plan and Disclosure Statement on December 7, 2010. The Debtors filed a second amended Plan on March 18, 2011.

C. The Disclosure Statement was approved by the Bankruptcy Court on December 8, 2010.

D. On or about March 29, 2011, the Bankruptcy Court entered an order (the “Confirmation Order”) confirming the Plan.

E. The Plan provides for the creation of the Trust as a post-confirmation successor to MLC within the meaning of Section 1145(a) of the Bankruptcy Code, to hold and administer the Avoidance Action Trust Assets for the benefit of the Trust Beneficiaries and, to the extent received by the Trust, to distribute the Distributable Trust Assets to the Trust Beneficiaries in accordance with the terms of the Plan, the Confirmation Order and this Trust Agreement.

F. The Plan also provides that the Trust Administrator may determine to hold and administer Other Debtor Residual Trust Assets, if any, for the benefit of the DIP Lenders.

G. The Trust is being created, with respect to the Avoidance Action Trust Assets, on behalf of, and for the benefit of, the Trust Beneficiaries, and, with respect to the Other Debtor Residual Trust Assets, if any, on behalf of, and for the benefit of, the DIP Lenders.

H. The Trust Administrator shall have all powers necessary to implement the provisions of this Trust Agreement and administer the Trust in respect of the Avoidance Action Trust Assets, including the power to: (i) prosecute for the benefit of the Trust Beneficiaries, through counsel and other professionals selected by the Trust Administrator, the Term Loan Avoidance Action and any other causes of action that may from time to time be held by the Trust in respect thereof; (ii) preserve and maintain the Avoidance Action Trust Assets; (iii) distribute the Distributable Trust Assets, if any, to the Trust Beneficiaries in accordance with the Plan, the Confirmation Order and this Trust Agreement; (iv) expend the Avoidance Action Trust Administrative Cash, the Avoidance Action Trust SEC Reporting Cash (if applicable), and the Supplemental Avoidance Action Trust Cash to cover fees and expenses of the Trust, including payment of taxes and the fees and expenses of the Trust Professionals (other than in respect thereof of the Other Debtor Residual Trust Assets); (v) enter into any contracts or agreements necessary or desirable to facilitate the implementation of the provisions of this Trust Agreement, including but not limited to loan agreements or sale agreements for the purposes of funding the fees and expenses of the Trust; and (vi) sell or grant liens on the Term Loan Avoidance Action or any other property of the Trust (other than the Other Debtor Residual Trust Assets) for the purposes of implementing the provisions of this Trust Agreement and the 9019 Order, including but not limited to funding the fees and expenses of the Trust.

I. The Trust Administrator shall also have all powers necessary to implement the provisions of this Trust Agreement and administer the Trust in respect of the Other Debtor Residual Trust Assets, if any, including the power to: (i) prosecute for the benefit of the DIP Lenders, through counsel and other professionals selected by the Trust Administrator, any causes of action that may from time to time be held by the Trust in respect thereof; (ii) preserve and maintain the Other Debtor Residual Trust Assets; (iii) distribute the Distributable Other Debtor Residual Trust Assets, if any, to the DIP Lenders in accordance with the Plan, the Confirmation Order and this Trust Agreement; and (iv) expend the Other Debtor Residual Trust Administrative Cash to cover fees and expenses of the Trust, including payment of the fees and expenses of the Trust Professionals, in respect thereof.

J. The Trust Administrator shall otherwise perform the functions and take the actions provided for in this Trust Agreement or permitted in the Plan and/or the Confirmation Order, or in any other agreement executed pursuant to the Plan, in each case subject to the provisions of Articles VI, VIII and XI hereof regarding the rights and powers of the Trust Monitor.

K. The Trust is subject to the continuing jurisdiction of the Bankruptcy Court, whose approval is required to pay or distribute money or property to, or on behalf of, a Trust Beneficiary, except as expressly provided in this Trust Agreement.

L. The Trust (other than the Avoidance Action Trust Claims Reserve) is intended to qualify as a liquidating trust under Treasury Regulation section 301.7701-4(d) that is treated as a “grantor trust” for federal and applicable state and local income tax purposes.

### **Agreement**

**NOW, THEREFORE**, in consideration of the promises and the mutual covenants contained herein, the Trust Administrator and the Trust Monitor agree as follows:

### **ARTICLE I** **DEFINED TERMS**

1.1. Definitions. Whenever used in this Trust Agreement, unless the context otherwise requires, the following words and phrases shall have the respective meanings ascribed to them as follows:

(a) “9019 Motion” has the meaning set forth in the preamble to this Trust Agreement.

(b) “9019 Order” has the meaning set forth in the preamble to this Trust Agreement.

(c) “Affiliates” means, with respect to any Person, any other Person which directly or indirectly controls, is controlled by or is under common control with such Person. For purposes of this definition “control” means, with respect to any Person, the possession, directly or indirectly, of the power to direct or cause the direction of the management or

policies of such Person, whether through ownership of voting securities, by contract or otherwise.

(d) “Aggregate Maximum Amount” means the sum of the Maximum Amounts of all Disputed General Unsecured Claims, Unresolved Term Loan Avoidance Action Claims and Unresolved Other Avoidance Action Claims, as set forth in the applicable GUC Trust Report as the Aggregate Maximum Amount as of a given date.

(e) “Agreed Allocation” means the DIP Lenders shall be entitled to receive thirty percent (30%), and holders of Allowed General Unsecured Claims (or Units) shall be entitled to receive seventy percent (70%), with each such distribution to be made at or about the same time and on a *pari passu* basis.

(f) “Allowed General Unsecured Claims” means, collectively, (i) the Initial Allowed General Unsecured Claims and (ii) the Resolved Allowed General Unsecured Claims.

(g) “Avoidance Action Proceeds” means the proceeds of the Term Loan Avoidance Action.

(h) “Avoidance Action Trust Administrative Cash” means the Cash (other than the Supplemental Avoidance Action Trust Cash and the Avoidance Action Trust SEC Reporting Cash), including the fifteen million (\$15,000,000) Litigation Cost Advance and the \$1.6 million initially received from the DIP Lenders by the Debtors on the Avoidance Action Trust Transfer Date, held and maintained by the Trust Administrator for the purpose of paying the fees and expenses incurred by the Trust Administrator (including fees and expenses for Trust Professionals) in connection with the Trust and any obligations imposed on the Trust Administrator or the Trust, including fees and expenses relating to the performance of the Trust Administrator’s obligations under this Trust Agreement and the Plan, other than in respect of the Other Debtor Residual Trust Assets.

(i) “Avoidance Action Trust Assets” means, collectively, (i) the Term Loan Avoidance Action transferred to the Trust, (ii) the Avoidance Action Proceeds, (iii) the Avoidance Action Trust Administrative Cash, (iv) the Avoidance Action Trust SEC Reporting Cash; (v) the Supplemental Avoidance Action Trust Cash; and (vi) the Litigation Cost Advance.

(j) “Avoidance Action Trust SEC Reporting Costs” means any costs, fees or expenses incurred by the Trust that are directly or indirectly related to reports that may be required to be filed by the Trust with the SEC pursuant to applicable rules, regulations and interpretations of the SEC (including, without limitation, any legal, accounting or registration fees, costs and expenses incurred by the Trust with respect thereto).

(k) “Avoidance Action Trust SEC Reporting Cash” has the meaning set forth in Section 2.3(e) of this Trust Agreement.

(l) “Avoidance Action Trust Transfer Date” means the date selected by the Debtors on which the Avoidance Action Trust Assets (other than the Supplemental Avoidance

Action Trust Cash and the Avoidance Action Proceeds) are transferred to the Trust, which transfer shall occur on or before December 15, 2011.

(m) “Bankruptcy Code” has the meaning set forth in the preamble to this Trust Agreement.

(n) “Bankruptcy Court” has the meaning set forth in Background paragraph A.

(o) “Budget” has the meaning set forth in Section 6.3.

(p) “calendar quarter” means the relevant three-month period ending on the last day of March, June, September or December, as applicable, of each calendar year; *provided, however*, that the calendar quarter that contains the Avoidance Action Trust Transfer Date shall be the period commencing on the Avoidance Action Trust Transfer Date and concluding on the date on which the relevant calendar quarter would naturally end in accordance with the foregoing.

(q) “Certificate of Trust” means the certificate of trust of the Trust as required by Section 3810 of the Delaware Act.

(r) “Chapter 11 Cases” has the meaning set forth in Background paragraph A.

(s) “Claim Conflict Resolution” has the meaning set forth in Section 3.6.

(t) “Confidential Party” has the meaning set forth in Section 13.12.

(u) “Confirmation Order” has the meaning set forth in Background paragraph D.

(v) “Current Total Amount” means as of a given date, the sum of (A) the Total Allowed Amount as of such date and (B) the Aggregate Maximum Amount as of such date, as set forth in the applicable GUC Trust Report as the Current Total Amount as of a given date.

(w) “Debtors” has the meaning set forth in the preamble to this Trust Agreement.

(x) “Delaware Act” means the Delaware Statutory Trust Act, 12 Del. C. § 3801 *et seq.*

(y) “DIP Credit Agreement Claims” means all Claims arising under the DIP Credit Agreement and Orders approving the DIP Credit Agreement dated June 25, 2009 and July 5, 2009.

(z) “DIP Lender Advances” means an amount equal to (i) the amounts of Cash advanced directly or indirectly by MLC and the DIP Lenders to fund the costs and

expenses associated with realizing the proceeds of the Term Loan Avoidance Action, including, without limitation, any such amounts expended to fund the costs and expenses of professionals retained by the defendants in the Term Loan Avoidance Action, (ii) without duplication, the amount of the Avoidance Action Trust Administrative Cash, and (iii) without duplication, the Litigation Cost Advance.

(aa) “DIP Lender Distributable Trust Assets” means the assets distributable to the DIP Lenders, in accordance with the Agreed Allocation and the Settlement Agreement.

(bb) “DIP Lenders” means the U.S. Treasury and Export Development Canada, as lenders under the DIP Credit Agreement.

(cc) “Disputed General Unsecured Claims” means the General Unsecured Claims against the Debtors that are Disputed (as defined in the Plan) as of the Initial GUC Record Date, until a time when such claims become Resolved General Unsecured Claims or are otherwise resolved pursuant to the claims resolution procedures contained in the Plan.

(dd) “Distributable Other Debtor Residual Trust Assets” means the Other Debtor Residual Assets Proceeds, if any, together with any earnings (including interest) thereon.

(ee) “Distributable Other Debtor Residual Trust Cash” means any Cash or cash equivalents included in the Distributable Other Debtor Residual Trust Assets.

(ff) “Distributable Trust Assets” means the Avoidance Action Proceeds together with any earnings (including interest) thereon.

(gg) “Distributable Trust Cash” means any Cash or cash equivalents included in the Distributable Trust Assets.

(hh) “Distribution Date” means the date of any distribution made by the Trust Administrator to the Trust Beneficiaries pursuant to this Trust Agreement, whether to the DIP Lenders pursuant to Section 5.1(d) or on account of Allowed General Unsecured Claims and/or Units.

(ii) “Distribution Threshold” means \$10,000,000.

(jj) “Excess Distributable Trust Assets” means Distributable Trust Assets that the Trust Administrator, with the approval of the Trust Monitor, determines shall be distributed following the Initial GUC Distribution Date.

(kk) “Excess GUC Distributable Trust Assets Determination Date” has the meaning set forth in Section 5.4(a).

(ll) “Excess GUC Distributable Trust Assets” has the meaning set forth in Section 5.4(c).

(mm) “Final Recovery Date” has the meaning set forth in Section 5.1(a).

(nn) “First Amended and Restated Trust Agreement” has the meaning set forth in the preamble to this Trust Agreement.

(oo) “Funding Account” means that segregated account, in the name of the Trust, established at a bank reasonably acceptable to the Trust and the DIP Lenders, in which the Trust shall hold the Litigation Cost Advance.

(pp) “Litigation Cost Advance Agreement” has the meaning set forth in the preamble to this Trust Agreement.

(qq) “GUC Beneficiaries” means the holders of Allowed General Unsecured Claims or Units received in respect of such claims.

(rr) “GUC Distributable Trust Assets” means: (i) the Segregated Account Assets; and (ii) the assets distributable to the holders of Allowed General Unsecured Claims in accordance with the Agreed Allocation and the Settlement Agreement.

(ss) “GUC Trust Advances” means the Distributable Trust Assets distributable to the holders of Allowed General Unsecured Claims, in an amount equal to the aggregate amount of GUC Trust Supplemental Cash received from the GUC Trust pursuant to Section 2.3(f)(i) hereof, together with any earnings (including interest) thereon, minus the aggregate amount of Cash held in the Segregated Account on the date of measurement.

(tt) “GUC Trust Reports” means the reports prepared by the GUC Trust Administrator each quarter as provided in the GUC Trust Agreement, which shall be delivered to the Trust Administrator pursuant to the terms of the GUC Trust Agreement.

(uu) “GUC Trust Supplemental Cash” has the meaning set forth in Section 2.3(f)(i).

(vv) “Holdback” has the meaning set forth in Section 6.1(b).

(ww) “Incompetency” means, with respect to any Person, the incompetency of such Person if such Person is a natural person.

(xx) “Initial Allowed General Unsecured Claims” has the meaning set forth in Section 5.2(a).

(yy) “Initial GUC Distribution Date” has the meaning set forth in Section 5.2(a).

(zz) “Initial GUC Record Date” has the meaning set forth in Section 5.2(a).

(aaa) “IRS” means the Internal Revenue Service.

(bbb) “Litigation Cost Advance” means the fifteen million dollars (\$15,000,000) to be provided by the DIP Lenders pursuant to the Litigation Cost Advance

Agreement and the Settlement Agreement and subject to a deposit account control agreement acceptable to the DIP Lenders and the Trust.

(ccc) “Litigation Settlement” has the meaning set forth in the preamble to this Trust Agreement.

(ddd) “Maximum Amount” means the maximum amount of any Disputed General Unsecured Claim, Unresolved Term Loan Avoidance Action Claim or Unresolved Other Avoidance Action Claim, calculated in accordance with the GUC Trust Agreement and as set forth in the applicable GUC Trust Report as the Maximum Amount of any Claim or group of Claims as of a given date.

(eee) “MLC” has the meaning set forth in the preamble to this Trust Agreement.

(fff) “Original Trust Agreement” has the meaning set forth in the preamble to this Trust Agreement.

(ggg) “Other Avoidance Action Claims” means the additional General Unsecured Claims that have arisen as a result of recovery of proceeds of the Avoidance Actions other than the Term Loan Avoidance Action (and any related unsecured claims).

(hhh) “Other Debtor Residual Assets” means any assets of MLC remaining at such time as the Debtors shall be liquidated, other than the Term Loan Avoidance Action and the Term Loan Avoidance Action Administrative Cash and any other assets of MLC whose disposition is specifically provided for under the Plan or the Confirmation Order.

(iii) “Other Debtor Residual Accepted Assets” means Other Debtor Residual Assets accepted by the Trust Administrator for transfer to the Trust pursuant to Section 2.3(b).

(jjj) “Other Debtor Residual Assets Proceeds” means any proceeds realized in respect of the Other Debtor Residual Accepted Assets.

(kkk) “Other Debtor Residual Trust Administrative Cash” means the Cash, if any, held and maintained by the Trust Administrator for the purpose of paying the fees and expenses incurred by the Trust Administrator (including fees and expenses for Trust Professionals) in connection with the Trust and any obligations imposed on the Trust Administrator or the Trust, including fees and expenses relating to the performance of the Trust Administrator’s obligations under this Trust Agreement and the Plan, but only in respect of the Other Debtor Residual Trust Assets, which Cash may be obtained by transfer to the Trust by the Debtors, from the DIP Lenders (in their sole discretion) or from the proceeds of the Other Debtor Residual Accepted Assets.

(lll) “Other Debtor Residual Trust Assets” means, if any, collectively, (i) the Other Debtor Residual Accepted Assets transferred to the Trust, (ii) the Other Debtor Residual Assets Proceeds and (iii) the Other Debtor Residual Trust Administrative Cash.

(mmm) “Other Debtor Residual Assets Transfer Date” means the date selected by the Debtors on which the Other Debtor Residual Assets Transfer, if any, are transferred to the Trust, which transfer shall occur on or before December 15, 2011.

(nnn) “Other Supplemental Cash” means any Cash received by the Trust pursuant to Section 6.1(d) hereof from the sale of, or granting of liens on, all or a portion of the Term Loan Avoidance Action or any other property held by the Trust (other than the Other Debtor Residual Trust Assets), or from any source other than the GUC Trust.

(ooo) “Permissible Investments” means investments in any of the following:

(i) Marketable securities issued by the U.S. Government and supported by the full faith and credit of the U.S. Treasury, either by statute or an opinion of the Attorney General of the United States;

(ii) Marketable debt securities, rated Aaa by Moody’s and/ or AAA by S&P, issued by U. S. Government-sponsored enterprises, U. S. Federal agencies, U. S. Federal financing banks, and international institutions whose capital stock has been subscribed for by the United States;

(iii) Certificates of deposit, time deposits, and bankers acceptances of any bank or trust company incorporated under the laws of the United States or any state, provided that, at the date of acquisition, such investment, and/or the commercial paper or other short term debt obligation of such bank or trust company has a short-term credit rating or ratings from Moody’s and/or S&P, each at least P-1 or A-1;

(iv) Commercial paper of any corporation incorporated under the laws of the United States or any state thereof which on the date of acquisition is rated by Moody’s and/or S&P, provided each such credit rating is least P-1 and/or A-1;

(v) Money market mutual funds that are registered with the Securities and Exchange Commission under the Investment Company Act of 1940, as amended, and operated in accordance with Rule 2a-7 and that at the time of such investment are rated Aaa by Moody’s and/or AAAM by S&P, including such funds for which the Trust Administrator or an Affiliate provides investment advice or other services;

(vi) Tax-exempt variable rate commercial paper, tax-exempt adjustable rate option tender bonds, and other tax-exempt bonds or notes issued by municipalities in the United States, having a short-term rating of “MIG-1” or “VMIG-1” or a long term rating of “AA” (Moody’s), or a short-term rating of “A-1” or a long term rating of “AA” (S&P); and

(vii) Repurchase obligations with a term of not more than thirty days, 102 percent collateralized, for underlying securities of the types described in clauses (i) and (ii) above, entered into with any bank or trust company or its respective affiliate meeting the requirements specified in clause (iii) above.

(ppp) “Plan” has the meaning set forth in the preamble to this Trust Agreement.



(qqq) “Resolved Allowed General Unsecured Claims” means, collectively, (I) the Disputed General Unsecured Claims that are allowed after the Initial GUC Record Date in accordance with the claims resolution procedures administered under the Plan (to the extent so resolved); (II) the Term Loan Avoidance Action Claims, to the extent and in the amount collected by the Trust against the respective defendants in the underlying litigation (including by way of settlement); and (III) the Other Avoidance Action Claims, to the extent and in the amount collected against the respective defendants in the underlying litigations (including by way of settlement). For the avoidance of doubt, unless and until a Disputed General Unsecured Claim, Unresolved Term Loan Avoidance Action Claim or Unresolved Other Avoidance Action Claim becomes a Resolved Allowed General Unsecured Claim, the holders of such claim shall not receive any distribution from the Trust.

(rrr) “Resolved Allowed General Unsecured Claims Determination Date” has the meaning set forth in Section 5.3(a).

(sss) “Sale and Transfer Motion” has the meaning set forth in the preamble to the First Amended and Restated Trust Agreement.

(ttt) “Sale and Transfer Order” has the meaning set forth in the preamble to the First Amended and Restated Trust Agreement.

(uuu) “SEC” means the Securities and Exchange Commission.

(vvv) “Secretary of State” means the Office of the Secretary of State of the State of Delaware.

(www) “Segregated Account” has the meaning set forth in Section 2.3(f)(i).

(xxx) “Segregated Account Assets” means the Cash held in the Segregated Account.

(yyy) “Settlement Agreement” has the meaning set forth in the preamble to this Trust Agreement.

(zzz) “Supplemental Avoidance Action Trust Cash” means the GUC Trust Supplemental Cash and the Other Supplemental Cash.

(aaaa) “Tax Returns” means all tax returns, reports, certificates, forms or similar statements or documents.

(bbbb) “Term Loan Avoidance Action” means the Avoidance Action commenced by the Creditors’ Committee against JPMorgan Chase Bank, N.A., individually and as Administrative Agent, and various lenders party to a term loan agreement, dated as of November 29, 2006, between General Motors Corporation, as borrower, JPMorgan Chase Bank, N.A., as agent, and various institutions as lenders and agents, styled *Official Committee of Unsecured Creditors of Motors Liquidation Co. v. JPMorgan Chase Bank, N.A. et al.*, Adv. Pro. No. 09-00504 (Bankr. S.D.N.Y. July 31, 2009).

(cccc) “Term Loan Avoidance Action Claims” means the additional General Unsecured Claims that have arisen as a result of recovery of proceeds of the Term Loan Avoidance Action (or any related unsecured claims).

(dddd) “Total Allowed Amount” means the sum of the amount of all Initial Allowed General Unsecured Claims plus the amount of all Resolved Allowed General Unsecured Claims, as set forth in the applicable GUC Trust Report.

(eeee) “Treasury Regulations” means the income tax regulations promulgated under the Tax Code, including any amended or successor income tax regulations thereto.

(ffff) “Trust” has the meaning set forth in the preamble to this Trust Agreement.

(gggg) “Trust Administrator” has the meaning set forth in the preamble to this Trust Agreement.

(hhhh) “Trust Administrator Parties” means the Trust Administrator and its principals, directors, officers, employees, agents, representatives, attorneys, accountants, advisors and other professionals (including the Trust Professionals).

(iiii) “Trust Agreement” has the meaning set forth in the preamble to this Trust Agreement.

(jjjj) “Trust Beneficiaries” means the holders of the DIP Credit Agreement Claims and the holders of Allowed General Unsecured Claims (or Units received in respect of such claims).

(kkkk) “Trust Cash” means the Cash or cash equivalents included in the Avoidance Action Trust Assets or the Other Debtor Residual Trust Assets, if any.

(llll) “Trust Monitor” has the meaning set forth in the preamble to this Trust Agreement.

(mmmm) “Trust Monitor Parties” means the Trust Monitor and its principals, directors, officers, employees, agents, representatives, attorneys, accountants, advisors and other professionals.

(nnnn) “Trust Professionals” means, collectively, independent contractors, including attorneys, accountants, appraisers, disbursing agents or other parties deemed by the Trust Administrator to have the qualifications necessary or desirable to assist in the proper administration of the Trust and that are employed or retained by the Trust in such capacities.

(oooo) “Unit Issuance Ratio” means the ratio of one Unit for each \$1,000 in amount of Allowed General Unsecured Claims.

(pppp) “Units” means the units of beneficial interest issued by the Trust to holders of Allowed General Unsecured Claims.

(qqqq) “Unresolved Other Avoidance Action Claim” means an Other Avoidance Action Claim that has not or has not yet arisen because no determination (including by way of settlement) has been made in the respective Avoidance Action against the respective defendant who would be entitled to such claim in the event of such determination (or if a determination has been made against the defendant, the proceeds related to such resolution have not been recovered in full).

(rrrr) “Unresolved Term Loan Avoidance Action Claim” means a Term Loan Avoidance Action Claim that has not or has not yet arisen because no determination (including by way of settlement) has been made in the Term Loan Avoidance Action against the respective defendant who would be entitled to such claim in the event of such determination (or if a determination has been made against the defendant, the proceeds related to such resolution have not been recovered in full).

(ssss) “Wind-Down Facility” means the \$1.175 billion wind-down facility provided to the Debtors pursuant to the DIP Credit Agreement.

## **ARTICLE II** **DECLARATION OF TRUST**

2.1. Creation of Trust. The Debtors and the Trust Administrator, pursuant to the Plan and the Confirmation Order and in accordance with the applicable provisions of chapter 11 of the Bankruptcy Code, hereby constitute and create the Trust, in the form of a statutory trust under the Delaware Act, which shall bear the name “Moters Liquidation Company Avoidance Action Trust.” In connection with the exercise of the Trust Administrator’s power hereunder, the Trust Administrator may use this name or such variation thereof as the Trust Administrator sees fit. The Trust Administrator, as trustee of the Trust, is hereby authorized and directed to execute and file a Certificate of Trust for the Trust in the form attached hereto as Exhibit B.

2.2. Purpose of Trust. The sole purpose of the Trust is to liquidate and distribute its assets pursuant to the Plan in accordance with Treasury Regulation section 301.7701-4(d), with no objective to continue or engage in the conduct of a trade or business.

2.3. Transfer of Avoidance Action Trust Assets to the Trust.

(a) Effective upon the Avoidance Action Trust Transfer Date, the Debtors hereby transfer to the Trust, pursuant to Bankruptcy Code Sections 1123(a)(5)(B) and 1123(b)(3)(B), and in accordance with the Plan and the Confirmation Order, the Avoidance Action Trust Assets (other than the Avoidance Action Trust SEC Reporting Cash, and the Supplemental Avoidance Action Trust Cash), as they exist on the Avoidance Action Trust Transfer Date, free and clear of any and all liens, claims, encumbrances and interests (legal, beneficial or otherwise) of all other persons to the maximum extent contemplated by and permissible under Bankruptcy Code Section 1141(c); *provided, however* that notwithstanding anything to the contrary in the Plan, Disclosure Statement, Confirmation Order, this Trust Agreement or any other agreement, the DIP Lenders shall maintain their liens on the

Avoidance Action Trust Administrative Cash, provided that for the avoidance of doubt, the DIP Lenders shall not demand acceleration of their liens on the Avoidance Action Trust Administrative Cash except in accordance with the provisions of section 7.2 of the DIP Credit Agreement. Such transfers shall be exempt from any stamp, real estate transfer, mortgage reporting, sales, use or other similar tax pursuant to Bankruptcy Code Section 1146. The Debtors and their successors and assigns shall be released from any and all liability with respect to the transfer of such Avoidance Action Trust Assets to the Trust as aforesaid. Nothing in this Trust Agreement is intended to, or shall be construed to, effect a release, extinguishment or compromise of any claim or cause of action transferred to the Trust pursuant to this Trust Agreement. The Avoidance Action Trust Assets and all other property held from time to time by the Trust under this Trust Agreement (other than the Other Debtor Residual Trust Assets) and any earnings (including interest) thereon are to be managed, applied and disposed of by the Trust Administrator in accordance with the terms hereof, the Plan and the Confirmation Order for the benefit of the Trust Beneficiaries, and for no other party, subject to the further covenants, conditions and terms hereinafter set forth, including the provisions of Section 2.6.

(b) To the extent any Avoidance Action Trust Assets (other than the Supplemental Avoidance Action Trust Cash) cannot be transferred to the Trust, because of a restriction on transferability under applicable non-bankruptcy law that is not superseded by Bankruptcy Code Section 1123 or any other provision of the Bankruptcy Code, such assets shall be retained by the Debtors or any successor thereto including, without limitation, the GUC Trust. The proceeds of the sale of any such assets retained by the Debtors (or any successor thereto) shall be allocated to the Trust pursuant to the Plan as if such transfer had not been restricted under applicable non-bankruptcy law. The Trust Administrator may commence an action in the Bankruptcy Court to resolve any dispute regarding the allocation of the proceeds of any assets retained by the Debtors (or any successor thereto) pursuant to the Plan and Confirmation Order.

(c) On the Avoidance Action Trust Transfer Date, the Debtors shall also deliver, or cause to be delivered, to the Trust a complete list of all General Unsecured Claims, both Allowed and Disputed, reflected on the claims registry as of the Avoidance Action Trust Transfer Date, including the names and addresses of all holders of such General Unsecured Claims, whether such claims have been Allowed or are Disputed, and the details of all objections in respect of Disputed General Unsecured Claims.

(d) Effective upon the Other Debtor Residual Assets Transfer Date, the Debtors hereby transfer to the Trust, pursuant to Bankruptcy Code Sections 1123(a)(5)(B) and 1123(b)(3)(B), and in accordance with the Plan and the Confirmation Order, such of the Other Debtor Residual Assets, as they exist on the Other Debtor Residual Assets Transfer Date, as the Trust Administrator, in its sole discretion but with the approval of the Trust Monitor, shall determine to accept, free and clear of any and all liens, claims, encumbrances and interests of all other persons to the maximum extent contemplated by and permissible under Bankruptcy Code Section 1141(c); provided that, for the avoidance of doubt, the Trust Administrator may determine not to accept the transfer to the Trust of any or all of the Other Debtor Residual Assets for any reason or for no reason. Any such transfer shall be exempt from any stamp, real estate transfer, mortgage reporting, sales, use or other similar tax pursuant to Bankruptcy

Code Section 1146. The Debtors and their successors and assigns shall be released from any and all liability with respect to the transfer of the Other Debtor Residual Accepted Assets to the Trust as aforesaid. Nothing in this Trust Agreement is intended to, or shall be construed to, effect a release, extinguishment or compromise of any claim or cause of action transferred to the Trust pursuant to this Trust Agreement, and notwithstanding anything to the contrary in the Plan, Disclosure Statement, Confirmation Order, this Trust Agreement or any other agreement, the DIP Lenders shall maintain their liens on the Other Debtor Residual Accepted Assets. The Other Debtor Residual Trust Assets and all other property held from time to time by the Trust under this Trust Agreement in respect thereof, and any earnings (including interest) thereon, are to be managed, applied and disposed of by the Trust Administrator in accordance with the terms hereof, the Plan and the Confirmation Order for the benefit of the DIP Lenders, and for no other party, subject to the further covenants, conditions and terms hereinafter set forth, including the provisions of Section 2.6.

(e) (i) On the Avoidance Action Trust Transfer Date, the Debtors shall, pursuant to Section 2.3(e) of the GUC Trust Agreement, transfer Cash to the Trust in an amount of \$500,000 (the "Avoidance Action Trust SEC Reporting Cash"). The Avoidance Action Trust SEC Reporting Cash shall be held by the Trust in a segregated account and shall be used solely for the satisfaction of Avoidance Action Trust SEC Reporting Costs. Any taxes imposed on the Trust in respect of the Avoidance Action Trust SEC Reporting Cash shall be satisfied from the income realized thereon.

(ii) The Trust Administrator shall only use Avoidance Action Trust SEC Reporting Cash to satisfy Avoidance Action Trust SEC Reporting Costs to extent there is no other available source of funds to satisfy such expenses (other than the Supplemental Avoidance Action Trust Cash), including, without limitation, any funds obtained through the reservation and application of all or a portion of the Holdback pursuant to Section 6.1(b) hereof.

(iii) If the Trust Administrator determines that (x) reports are not, and at no time will be, required to be filed by the Trust with the SEC pursuant to applicable rules, regulations and interpretations of the SEC or (y) the Trust has other available funds (as set forth in Section 2.3(e)(ii) hereof) which are sufficient to satisfy any current or future projected, fees, costs or expenses that are directly or indirectly related to reports that may be required to be filed by the Trust with the SEC pursuant to applicable rules, regulations and interpretations of the SEC (including, without limitation, any legal, accounting or registration fees, costs and expenses incurred by the Trust with respect thereto), then the Trust shall transfer to the GUC Trust any Avoidance Action Trust SEC Reporting Cash that has not been applied as provided in this Section 2.3(e).

(iv) Any income earned on the Avoidance Action Trust SEC Reporting Cash, net of taxes paid thereon, shall be Avoidance Action Trust Administrative Cash.

(f) (i) From time to time, in accordance with a Final Order of the Bankruptcy Court if so required, the GUC Trust may deliver Cash to the Trust to be used solely for the satisfaction of fees and expenses of the Trust (including for the payment of the fees and expenses of Trust Professionals) or the satisfaction of any federal, state or local taxes incurred

by the Trust. Any Cash so delivered to the Trust shall be designated as “GUC Trust Supplemental Cash.” GUC Trust Supplemental Cash shall be held by the Trust in a segregated account (the “Segregated Account”), and shall be used solely for the satisfaction of fees and expenses of the Trust (including for the payment of the fees and expenses of Trust Professionals), for the satisfaction of taxes incurred by the Trust or for distribution to holders of Allowed General Unsecured Claims pursuant to Section 5.1(d)(iv) hereof.

(ii) The Trust Administrator shall only use the GUC Trust Supplemental Cash to satisfy fees and expenses of the Trust and tax liabilities of the Trust to the extent that there is no other source of funds to satisfy such expenses (other than the Avoidance Action Trust SEC Reporting Cash, and other than through the sale or encumbrance of the Term Loan Avoidance Action or any other property of the Trust pursuant to Section 6.1(d) hereof), including, without limitation, Avoidance Action Trust Administrative Cash, and any funds obtained through the reservation and application of all or a portion of the Holdback pursuant to Section 6.1(b) hereof. Any income earned on the GUC Trust Supplemental Cash, net of taxes paid thereon, shall be GUC Trust Supplemental Cash.

2.4. Appointment and Acceptance of Trust Administrator. The Trust Administrator shall be deemed to be appointed pursuant to Bankruptcy Code Section 1123(b)(3)(B) and is hereby appointed trustee of the Trust under the Delaware Act. The Trust Administrator hereby accepts such appointments, including trusteeship of the Trust created by this Trust Agreement and the grant, assignment, transfer, conveyance and delivery by the Debtors to the Trust Administrator, (i) on behalf of the Trust, and for the benefit of the Trust Beneficiaries, of all of their respective right, title and interest in the Distributable Trust Assets, and (ii) on behalf of the Trust, and for the benefit of the DIP Lenders, of all of their respective right, title and interest in the Other Debtor Residual Trust Assets, upon and subject to the terms and conditions set forth in the Plan, the Confirmation Order and this Trust Agreement. The Trust Administrator’s powers are exercisable solely in a fiduciary capacity consistent with, and in furtherance of, the purpose of the Trust and not otherwise, and in accordance with applicable law, including the Delaware Act. The Trust Administrator shall have the authority to bind the Trust within the limitations set forth herein, but shall for all purposes hereunder be acting in the capacity as Trust Administrator, and not individually.

2.5. Distribution of Distributable Trust Assets. The Trust Administrator shall, in an expeditious but orderly manner and subject to the provisions of the Plan, the Confirmation Order and this Trust Agreement, make timely distributions of the Distributable Trust Assets and the Distributable Other Debtor Residual Assets in accordance with the terms hereof and not unduly prolong the existence of the Trust. The Trust Administrator may incur and pay any reasonable and necessary expenses in connection with the administration of the Trust, including the fees and expenses of the Trust Professionals *provided, however*, that all such expenditures (other than in respect of the Other Debtor Residual Trust Assets) shall be made in accordance with the Budget.

2.6. No Reversion to Debtors.

(a) In no event shall any part of the Avoidance Action Trust Assets or the Other Debtor Residual Trust Assets revert to or be distributed to or for the benefit of any Debtor. All Distributable Trust Assets shall be applied as provided in Section 5.1(d), including to the satisfaction of Allowed General Unsecured Claims, including through distributions made in respect of the Units. All Distributable Other Debtor Residual Trust Assets shall be applied as provided in Article 5A.

(b) To the extent that after satisfaction in full of all of the costs and expenses of the administration of the Trust, after all Allowed General Unsecured Claims have been paid pursuant to the Plan, after satisfaction of all other obligations or liabilities of the Trust incurred or assumed in accordance with the Plan, Confirmation Order or this Trust Agreement (or to which the Avoidance Action Trust Assets are otherwise subject), and after the affairs of the Trust have been finally wound up and concluded in accordance with the provisions of Section 4.3 hereof and Section 3808 of the Delaware Act, there shall remain any Avoidance Action Trust Administrative Cash, the Trust Administrator is authorized to and shall distribute any such remaining Avoidance Action Trust Administrative Cash to the DIP Lenders in accordance with the terms of the DIP Credit Agreement and the Plan. To the extent any portion of such residue is not accepted by the respective DIP Lenders, the Trust Administrator shall (i) be authorized to distribute up to \$100,000 of such remaining Avoidance Action Trust Administrative Cash to an organization described in Section 501(c)(3) of the Tax Code and exempt from U.S. federal income tax under section 501(a) of the Tax Code that is unrelated to the Debtors, the Trust, any Trust Administrator Parties or any Trust Monitor Parties, or (ii) request an order from the Bankruptcy Court authorizing the Trust Administrator to distribute any such remaining Avoidance Action Trust Administrative Cash to such an organization, or authorizing such other disposition as recommended by the Trust Administrator and approved by the Bankruptcy Court.

(c) To the extent that after satisfaction in full of all of the costs and expenses of the administration of the Trust, after all Allowed General Unsecured Claims have been paid pursuant to the Plan, after satisfaction of all other obligations or liabilities of the Trust incurred or assumed in accordance with the Plan, Confirmation Order or this Trust Agreement (or to which the Avoidance Action Trust Assets are otherwise subject), and after the affairs of the Trust have been finally wound up and concluded in accordance with the provisions of Section 4.3 hereof and Section 3808 of the Delaware Act, there shall remain any GUC Trust Supplemental Cash, the Trust Administrator is authorized to and shall distribute any such remaining GUC Trust Supplemental Cash to the holders of Allowed General Unsecured Claims (as defined in the GUC Trust Agreement), regardless of whether such amount of GUC Trust Supplemental Cash is less than the Distribution Threshold, provided that, if the remaining GUC Trust Supplemental Cash is less than \$100,000, the Trust Administrator shall (i) be authorized to distribute such remaining GUC Trust Supplemental Cash to an organization described in Section 501(c)(3) of the Tax Code and exempt from U.S. federal income tax under section 501(a) of the Tax Code that is unrelated to the Debtors, the Trust, any Trust Administrator Parties or any Trust Monitor Parties, or (ii) request an order from the Bankruptcy Court authorizing the Trust Administrator to distribute any such remaining GUC

Trust Supplemental Cash to such an organization, or authorizing such other disposition as recommended by the Trust Administrator and approved by the Bankruptcy Court.

**ARTICLE III**  
**TRUST BENEFICIARIES; UNITS**

3.1. Rights of Beneficiaries.

(a) Except as provided in Section 2.6 hereof, the Trust Beneficiaries shall be the sole beneficiaries of the Trust (to the extent of the Avoidance Action Trust Assets) and the Distributable Trust Assets, and the Trust Administrator shall retain only such incidents of ownership as are necessary to undertake the actions and transactions authorized in the Plan, the Confirmation Order and this Trust Agreement, including those powers set forth in Articles VI and VIII hereof.

(b) The beneficial interest of a Trust Beneficiary in the Trust is hereby declared and shall be in all respects and for all purposes intangible personal property.

(c) Except as expressly provided herein, a Trust Beneficiary shall have no title or right to, or possession, management or control of, the Trust, or the Avoidance Action Trust Assets, or to any right to demand a partition or division of such assets or to require an accounting of the Trust Administrator or the Trust Monitor. The whole legal title to the Avoidance Action Trust Assets shall be vested in the Trust as a separate legal entity under the Delaware Act or, if necessary, in the Trust Administrator on behalf of the Trust and the sole beneficial interest of the Trust Beneficiaries shall be as set forth in this Trust Agreement.

3.2. Limited Liability. No provision of the Plan, the Confirmation Order or this Trust Agreement, and no mere enumeration herein of the rights or privileges of any Trust Beneficiary, shall give rise to any liability of such Trust Beneficiary solely in its capacity as such, whether such liability is asserted by any Debtor, by creditors or employees of any Debtor, or by any other Person. GUC Beneficiaries are deemed to receive the GUC Distributable Trust Assets in accordance with the provisions of the Plan, the Confirmation Order and this Trust Agreement in exchange for their Allowed General Unsecured Claims or on account of their Units, as applicable, without further obligation or liability of any kind, but subject to the provisions of this Trust Agreement.

3.3. No Control by Trust Beneficiaries. A Trust Beneficiary shall have no title to, or any right to possess, manage or control, the Avoidance Action Trust Assets, or any portion thereof or interest therein, except as expressly provided herein. No surviving spouse, heir or devisee of any deceased Trust Beneficiary shall have any right of dower, homestead or inheritance, or of partition, or any other right, statutory or otherwise, in the Avoidance Action Trust Assets, but the whole title to all the Avoidance Action Trust Assets shall be vested in the Trust Administrator and the sole interest of the Trust Beneficiaries shall be the rights and benefits provided to such persons under this Trust Agreement.



3.4. Issuance of Units.

(a) The Trust shall issue Units to holders of Allowed General Unsecured Claims as provided in this Trust Agreement. On the Initial GUC Distribution Date, holders of Initial Allowed General Unsecured Claims shall receive the number of Units equal to the amount of such Initial Allowed General Unsecured Claims multiplied by the Unit Issuance Ratio, rounded up or down to the nearest whole Unit. Following the Initial GUC Distribution Date, holders of Resolved Allowed General Unsecured Claims shall receive the number of Units equal to the amount of such Resolved Allowed General Unsecured Claims multiplied by the Unit Issuance Ratio, rounded up or down to the nearest whole Unit. Units will represent the contingent right to receive, on a pro rata basis as provided in the Plan, the Confirmation Order and this Trust Agreement, Excess GUC Distributable Trust Assets. The Units shall be issued subject to all the terms and conditions of the Plan, the Confirmation Order and this Trust Agreement. References in this Trust Agreement to holders of Units shall be to the record holders of such Units.

(b) As provided in Section 7.5 hereof, the Trust Administrator may retain Units otherwise issuable pursuant to this section with respect to Allowed General Unsecured Claims that are subject to withholding, and the Trust Administrator shall apply amounts distributed in respect of such retained Units to satisfy such withholding obligations.

(c) Notwithstanding the foregoing, if (i) as of the Initial GUC Distribution Date, the total amount of the Disputed General Unsecured Claims in the aggregate is less than 0.5% of the Current Total Amount, or (ii) the Initial GUC Distribution Date is determined by the Trust Administrator to also be the final Distribution Date, no Units shall be distributed and any GUC Distributable Trust Assets remaining after satisfaction of all Initial Allowed General Unsecured Claims and any other obligations of the Trust shall be disposed of as set forth in the last sentence of Section 2.6(c).

3.5. Ownership of Units; Transfers of Units.

(a) The interest of a Trust Beneficiary is in all respects personal property, and upon the death, insolvency or incapacity of an individual GUC Beneficiary, such GUC Beneficiary's Units shall pass to the legal representative of such GUC Beneficiary.

(b) The Units will be issued and evidenced by appropriate notation on the books and records of the Trust Administrator. The Units shall not be certificated and shall not be transferable, assignable, pledged or hypothecated in whole or in part, except by applicable laws of descent and distribution (in the case of a deceased individual GUC Beneficiary); by operation of law; in accordance with applicable Bankruptcy law; or as otherwise approved by the Bankruptcy Court. The Trust Administrator shall not be required to recognize any equitable or other claims to such interest by the transferee thereof, and the named GUC Beneficiary shall remain as such for all purposes hereunder.

3.6. Conflicting Claims to Units. If the Trust Administrator has actual knowledge of any conflicting claims or demands that have been made or asserted with respect to a Unit, or a beneficial interest therein, the Trust Administrator shall be entitled,

at its sole election, to refuse to comply with any such conflicting claims or demands. In so refusing, the Trust Administrator may elect to make no payment or distribution with respect to the Unit subject to the claims or demands involved, or any part thereof, and the Trust Administrator shall be entitled to refer such conflicting claims or demands to the Bankruptcy Court, which shall have exclusive and continuing jurisdiction over resolution of such conflicting claims or demands. The Trust Administrator shall not be or become liable to any party for either (i) its election to continue making distributions pursuant to its books and records, without regard to the conflicting claims or demands; or (ii) its election to cease payments or distributions with respect to the subject Unit. In the event that the Trust Administrator elects to cease payments, it shall be entitled to refuse to act until either (x) the rights of the adverse claimants have been adjudicated by a Final Order of the Bankruptcy Court (or such other court of proper jurisdiction) or (y) all differences have been resolved by a written agreement among all of such parties and the Trust Administrator, which agreement shall include a complete release of the Trust, the Trust Administrator Parties and the Trust Monitor Parties in form and substance reasonably satisfactory to the Trust Administrator and Trust Monitor (the occurrence of either (x) or (y), a "Claim Conflict Resolution"). Until a Claim Conflict Resolution is reached with respect to such conflicting claims or demands, the Trust Administrator shall hold in a segregated account any payments or distributions from the Trust to be made with respect to the Unit(s) at issue. Promptly after a Claim Conflict Resolution is reached, the Trust Administrator shall transfer the payments and distributions, if any, held in the segregated account, together with interest and income earned thereon, if any, in accordance with the terms of such Claim Conflict Resolution.

3.7. Distributions Relating to Note Claims and Eurobond Claims. The Trust shall distribute GUC Distributable Trust Assets and Units to the Indenture Trustees and Fiscal and Paying Agents, to the extent necessary to provide each beneficial holder of debt securities arising out of or relating to the Note Claims and Eurobond Claims with an amount of GUC Distributable Trust Assets and Units equal to the amount of GUC Distributable Trust Assets and Units such holder would receive had its claim been treated as an Initial Allowed General Unsecured Claim hereunder. For the avoidance of doubt, Units will be issued and evidenced by appropriate notation on the books and records of the Trust Administrator in the names of the Indenture Trustees and the Fiscal and Paying Agents, as applicable, and not in the individual names of the beneficial holders of debt securities arising out of or relating to the Note Claims and Eurobond Claims.

#### **ARTICLE IV** **DURATION AND TERMINATION OF THE TRUST**

4.1. Duration. The Trust shall become effective upon (x) the earlier to occur of (i) the Avoidance Action Trust Transfer Date and (ii) the Other Debtor Residual Assets Transfer Date, if any, and (y) the execution of this Trust Agreement and the filing of the Certificate of Trust with the Secretary of State and shall remain and continue in full force and effect until (a) all of the Distributable Trust Assets and all Distributable Other Debtor Residual Trust Assets, if any, have been distributed pursuant to the Plan and this Trust Agreement, (b) the Trust Administrator determines, in its discretion and with the approval of the Trust Monitor, that the administration of the Avoidance Action Trust Assets is not

likely to yield sufficient additional Distributable Trust Assets or Distributable Other Debtor Residual Trust Assets to justify further pursuit, and (c) all other distributions required to be made by the Trust Administrator under the Plan and this Trust Agreement have been made, but in no event shall the Trust be dissolved later than three (3) years from the earlier of (i) the Avoidance Action Trust Transfer Date and (ii) the Other Debtor Residual Assets Transfer Date, unless the Bankruptcy Court, upon motion within the six (6) month period prior to the third (3rd) anniversary of the earlier of (i) the Avoidance Action Trust Transfer Date and (ii) the Other Debtor Residual Assets Transfer Date (or at least six (6) months prior to the end of an extension period), determines that a fixed period extension (such that, together with any prior extensions, the dissolution of the Trust shall occur no later than five (5) years from the date on which the Trust became effective, without a favorable private letter ruling from the IRS that any further extension would not adversely affect the status of the Trust as a liquidating trust for U.S. federal income tax purposes) is necessary to facilitate or complete the recovery and liquidation of the Avoidance Action Trust Assets or the Other Debtor Residual Trust Assets, as the case may be. If at any time the Trust Administrator determines, in reliance upon such professionals as the Trust Administrator may retain and with the approval of the Trust Monitor, that (x) the expense of administering the Trust so as to make a final distribution to the Trust Beneficiaries is likely to exceed the value of the Avoidance Action Trust Assets remaining in the Trust and (y) the expense of administering the Trust so as to make a final distribution to the DIP Lenders is likely to exceed the value of the Other Debtor Residual Trust Assets, if any, remaining in the Trust, the Trust Administrator may apply to the Bankruptcy Court for authority to (i) reserve any amounts necessary to dissolve the Trust, (ii) transfer the balance to the DIP Lenders and the holders of Allowed General Unsecured Claims (as defined in the GUC Trust Agreement), in accordance with the Agreed Allocation and the Settlement Agreement, or donate any balance to a charitable organization described in section 501(c)(3) of the Tax Code and exempt from U.S. federal income tax under section 501(a) of the Tax Code that is unrelated to the Debtors, the Trust, any Trust Administrator Parties or any Trust Monitor Parties, and (iii) dissolve the Trust.

4.2. Dissolution of the Trust. Notwithstanding anything to the contrary in this Trust Agreement, in no event shall the Trust Administrator unduly prolong the duration of the Trust, and the Trust Administrator shall, in the exercise of its reasonable business judgment and in the interests of all Trust Beneficiaries, at all times endeavor to terminate the Trust as soon as practicable in accordance with the purposes and provisions of this Trust Agreement and the Plan. Upon final dissolution and wind-up of the Trust, the Trust Administrator shall file a certificate of cancellation for the Trust with the Secretary of State.

4.3. Continuance of Trust for Purposes of Winding Up. After the dissolution of the Trust and solely for the purpose of liquidating and winding up its affairs, the Trust Administrator shall continue to act in such capacity until its duties hereunder have been fully performed. The Trust Administrator shall retain the books, records and files that shall have been delivered to or created by the Trust Administrator until distribution or resolution of all the Avoidance Action Trust Assets and Other Debtor Residual Trust Assets, if any. At the Trust Administrator's discretion, all of such books, records and files may be destroyed at any time following the later of (x) final distribution of the Avoidance

Action Trust Assets and Other Debtor Residual Trust Assets, if any, unless such books, records and files are necessary to fulfill the Trust Administrator's obligations pursuant to Articles VI and VIII hereof and subject to any joint prosecution and common interests agreement(s) to which the Trust Administrator may be party, and (y) the date until which the Trust Administrator is required by applicable law to retain such books, records and files.

**ARTICLE V**  
**DISTRIBUTIONS TO TRUST BENEFICIARIES**

5.1. General.

(a) Until such date as the Term Loan Avoidance Action shall have been completely and finally resolved in full against all defendants (including by way of settlement) and the Trust Administrator determines that all Avoidance Action Proceeds have been collected in respect thereof (such date, the "Final Recovery Date"), the Trust Administrator shall establish Distribution Dates no less frequently than once each calendar year and no more frequently than once a calendar quarter for the distribution of Distributable Trust Assets as provided in this Article V; provided that distributions need not be made in any calendar year to the extent (A) there are no Distributable Trust Assets held by the Trust or (B) the Trust Administrator, with the approval of the Trust Monitor, determines (i) that it is reasonably necessary to retain the Distributable Trust Assets to meet contingent liabilities and maintain the value of the Avoidance Action Trust Assets (such as, for example, in the event that the Trust Administrator determines that the Distributable Trust Assets are so small in amount as not to justify making a distribution, taking into account the costs that would be incurred in making the distribution, the anticipated total amount of Distributable Trust Assets expected to be available for distribution over time and the timing of the distribution or distributions thereof), or (ii) that it is necessary to retain the Distributable Trust Assets to pay reasonable incurred and anticipated expenses (including any taxes imposed on the Trust or in respect of the Avoidance Action Trust Assets) or to satisfy liabilities incurred and anticipated by the Trust in accordance with the Plan, the Confirmation Order and this Trust Agreement. Following the Final Recovery Date, distributions shall be made on a quarterly basis, as provided in this Article V.

(b) Except as otherwise set forth herein, no distributions shall be made with respect to any portion of a Disputed General Unsecured Claim, Unresolved Term Loan Avoidance Action Claim or Unresolved Other Avoidance Action Claim unless and until such Disputed General Unsecured Claim, Unresolved Term Loan Avoidance Action Claim or Unresolved Other Avoidance Action Claim has become an Allowed General Unsecured Claim.

(c) To the extent that a Disputed General Unsecured Claim, Unresolved Term Loan Avoidance Action Claim or Unresolved Other Avoidance Action Claim has become an Allowed General Unsecured Claim, distributions (if any) shall be made to the holder of such Allowed General Unsecured Claim in accordance with the provisions of the Plan, the Confirmation Order and this Trust Agreement.

(d) The Distributable Trust Assets shall be distributed

(i) first, to the DIP Lenders, each in their relative proportion pursuant to the terms of the DIP Credit Agreement, in the amount of the DIP Lender Advances;

(ii) second, to the Segregated Account in the amount of the GUC Trust Advances to be distributed to the holders of Allowed General Unsecured Claims; and

(iii) third, to: the DIP Lenders, each in their relative proportion pursuant to the terms of the DIP Credit Agreement, and the holders of Allowed General Unsecured Claims, in accordance with the Agreed Allocation.

(e) On any Distribution Date following the Final Recovery Date on which the Trust does not hold sufficient Distributable Trust Assets, after taking into account any amounts necessary to satisfy the current and projected future fees and expenses of the Trust (including those of any Trust Professionals) pursuant to Section 6.1(b), to satisfy all Disputed General Unsecured Claims or other Claims that became Resolved Allowed General Unsecured Claims since the next preceding Resolved Allowed General Unsecured Claims Determination Date following which there was a distribution pursuant to Section 5.3(c), the Trust Administrator shall distribute all Distributable Trust Assets that remain in the Trust to the DIP Lenders and the holders of such Resolved Allowed General Unsecured Claims pro rata by Claim amount, in accordance with the Agreed Allocation. Following such distribution, any remaining unsatisfied portion of such Resolved Allowed General Unsecured Claims, together with all remaining Disputed General Unsecured Claims and other Claims (including any Term Loan Avoidance Action Claims and any Other Avoidance Action Claims) shall be forever barred from assertion against the Trust.

(f) Anything to the contrary herein notwithstanding but subject to Section 5.1(a), the Trust Administrator shall not make a distribution of Distributable Trust Assets on any Distribution Date pursuant to Sections 5.2 or 5.4, if the amount to be distributed pursuant thereto does not exceed the Distribution Threshold. In such case, any Distributable Trust Assets then available for distribution shall be held by the Trust and distributed on a subsequent Distribution Date when the amount of the Distributable Trust Assets to be distributed shall exceed the Distribution Threshold; *provided* that if on the date determined by the Trust Administrator to be the final Distribution Date the Distributable Trust Assets do not exceed the Distribution Threshold, then such Distributable Trust Assets shall be disposed of as provided in the final sentence of Section 2.6(b) and in Section 2.6(c).

(g) For the avoidance of doubt, if the Trust fails to recover any Avoidance Action Proceeds or if the Avoidance Action Proceeds recovered by the Trust through the Final Recovery Date do not exceed the amount of DIP Lender Advances then no distributions shall be made hereunder in respect of any Allowed General Unsecured Claims.

(h) For the avoidance of doubt, if the Avoidance Action Proceeds recovered by the Trust through the Final Recovery Date exceed the amount of DIP Lender Advances but do not exceed the amount of the Segregated Account Assets, the Segregated Account Assets shall be distributed as GUC Distributable Trust Assets pursuant to Section 5.2(a) hereof.

5.2. Distribution to the DIP Lenders and to Holders of Initial Allowed General Unsecured Claims.

(a) Once the DIP Lender Advances have been satisfied in full, and the Segregated Account repaid up to the amount of the GUC Trust Advances, the Trust Administrator shall make distributions of the DIP Lender Distributable Trust Assets and the GUC Distributable Trust Assets, from time to time in accordance with Section 5.1(a). Prior to the first such distribution, the Trust Administrator shall establish a record date (the “Initial GUC Record Date”) for the holders of the General Unsecured Claims that are allowed as of the Initial GUC Record Date (the “Initial Allowed General Unsecured Claims”) who shall be entitled to participate in the first distribution of GUC Distributable Trust Assets, which date shall be the last day of the calendar quarter next preceding the date of such distribution (such Distribution Date, the “Initial GUC Distribution Date”). On the Initial GUC Distribution Date, the Trust Administrator shall distribute to each holder of an Initial Allowed General Unsecured Claim a distribution consisting of:

(i) an amount of GUC Distributable Trust Assets at the time available for distribution, in proportion to the amount of such Initial Allowed General Unsecured Claim as prescribed in subsection (d) below; and

(ii) a number of Units as provided in Section 3.4.

(b) During the period, if any, following the Initial GUC Distribution Date and prior to the Final Recovery Date, and as promptly as practicable following the Final Recovery Date, as and to the extent that additional GUC Distributable Trust Assets become available for distribution from time to time as a result of additional recoveries by the Trust in the Term Loan Avoidance Action, the Trust Administrator shall, from time to time in accordance with Section 5.1(a), make additional distributions to the holders of Initial Allowed General Unsecured Claims, on a Distribution Date or Dates designated by the Trust Administrator for such purpose, in the amount prescribed in subsection (d) below. Subject to the proviso in Section 5.1(a), the Trust Administrator shall make such distributions no less frequently than once each calendar year and no more frequently than once each calendar quarter.

(c) The amount of GUC Distributable Trust Assets that the holder of an Initial Allowed General Unsecured Claim shall be entitled to receive pursuant to Section 5.2 (or, in the case of a holder of a Resolved Allowed General Unsecured Claim being treated as if it were a holder of an Initial Allowed General Unsecured Claim in the amount of its Resolved Allowed General Unsecured Claim pursuant to Section 5.3(c)) on any Distribution Date (including the Initial Distribution Date) shall be determined in accordance with the following formula:

$$D = \left( \frac{A}{C} \right) \times G$$

Where—

D is the distribution that the holder of an Initial Allowed General Unsecured Claim (or the holder of a Resolved Allowed General Unsecured Claim pursuant to Section 5.3(c)) will be entitled to receive;

- A is the amount of the Initial Allowed General Unsecured Claim (or the holder of a Resolved Allowed General Unsecured Claim pursuant to Section 5.3(c));
- C is the Current Total Amount as of the last day of the calendar quarter next preceding the respective Distribution Date; and
- G is the amount available for distribution determined as of the last day of the calendar quarter next preceding the respective Distribution Date, after taking account of any Holdback, or the application of such Holdback, pursuant to Section 6.1(b).

5.3. Distributions to Holders of Resolved Allowed General Unsecured Claims.

(a) Following the Initial GUC Distribution Date, the Trust Administrator, with the approval of the Trust Monitor, shall periodically make a determination (the date of any such determination, which shall in all cases be made as of the last day of a calendar quarter, being a “Resolved Allowed General Unsecured Claims Determination Date”) whether any holders of Disputed General Unsecured Claims or other Claims have become holders of Resolved Allowed General Unsecured Claims since the next preceding Resolved Allowed General Unsecured Claims Determination Date or, in the case of the first such determination, since the Initial GUC Record Date. During the period, if any, following the Initial GUC Distribution Date and prior to the Final Recovery Date, the Trust Administrator shall make such determination no less frequently than once each calendar year and no more frequently than once each calendar quarter, and following the Final Recovery Date such determination shall be made once each calendar quarter.

(b) On a Distribution Date scheduled as soon as practicable following each Resolved Allowed General Unsecured Claims Determination Date, the Trust Administrator shall, subject to the proviso in Section 5.1(a), distribute to each holder of a Resolved Allowed General Unsecured Claim identified on such Resolved Allowed General Unsecured Claims Determination Date, if any:

(i) the pro rata amount of GUC Distributable Assets that the holder of such Resolved Allowed General Unsecured Claim would have received had such Resolved Allowed General Unsecured Claim been an Initial Allowed General Unsecured Claim, including the aggregate amount of Excess GUC Distributable Trust Assets that the holder would have received had it been the holder of Units referred to in clause (ii) below on each Excess GUC Distributable Trust Assets Determination Date occurring on or prior to the date of such distribution; provided that a holder of a Resolved Allowed General Unsecured Claim shall not receive pursuant to this clause (i) an amount of Excess GUC Distributable Assets distributed in respect of any prior Excess GUC Distributable Trust Assets Determination Date to the extent that it will be receiving such Excess GUC Distributable Assets as a distribution on the Units to be received by such holder pursuant to clause (ii) below; and

(ii) a number of Units as provided in Section 3.4.

(c) Once a holder of a Resolved Allowed General Unsecured Claim has received the distribution prescribed in the preceding subsection (b), such holder shall be treated as if it were a holder of an Initial Allowed General Unsecured Claim in the amount of

its Resolved Allowed General Unsecured Claim on all subsequent Distribution Dates established for purposes of Section 5.2(c).

(d) For the avoidance of doubt, it is intended that the distributions to be made to holders of Resolved Allowed General Unsecured Claims in accordance with this Section 5.3 shall provide such holders, as nearly as possible, with the exact same amount of distributions as if such holders had been holders of Initial Allowed General Unsecured Claims.

5.4. Distribution of Excess Distributable Trust Assets.

(a) Following the Initial GUC Distribution Date, the Trust Administrator, with the approval of the Trust Monitor, shall periodically make a determination (the date of any such determination, which shall in all cases be as of the last day of a calendar quarter, being an “Excess Distributable Trust Assets Determination Date”) of the Excess Distributable Trust Assets as of such date, taking into account the extent to which Disputed General Unsecured Claims are disallowed or the Term Loan Avoidance Action or other Avoidance Actions are resolved in favor of the defendants therein. During the period, if any, following the Initial GUC Distribution Date and prior to the Final Recovery Date, the Trust Administrator shall make such determination no less frequently than once each calendar year and no more frequently than once each calendar quarter, and following the Final Recovery Date such determination shall be made once each calendar quarter.

(b) On a Distribution Date scheduled as soon as practicable following each Excess Distributable Trust Assets Determination Date, the Trust Administrator shall, subject to the proviso of Section 5.1(a), distribute the Excess Distributable Trust Assets, in each case determined as of the respective Excess Distributable Trust Assets Determination Date, to the DIP Lenders and the holders of Units outstanding on such Excess Distributable Trust Assets Determination Date (including Units distributed or to be distributed to holders of Resolved Allowed General Unsecured Claims pursuant to Section 5.3(b)(ii) on such Distribution Date) in accordance with the Agreed Allocation.

(c) Any Excess Distributable Trust Assets allocable to the holders of Units outstanding on such Excess Distributable Trust Assets Determination Date (the “Excess GUC Distributable Trust Assets”), shall be distributed pro rata according to the following formula:

$$D_U = \left( \frac{U_H}{U_O} \right) \times (\Sigma G - H) \times \left[ \frac{T_U}{C_U} - \frac{T_U}{(C_U + L)} \right]$$

Where—

- $D_U$  is the distribution of Excess GUC Distributable Trust Assets that a holder of Units will be entitled to receive;
- $U_H$  is the number of Units held by the holder;
- $U_O$  is the total number of Units outstanding (including Units distributed to holders of Resolved Allowed General Unsecured Claims pursuant to Section 5.3(b)(ii) on such Distribution Date);



- $\Sigma G$  is the sum of the amounts that are or were available for distribution to holders of Initial Allowed General Unsecured Claims (and holders of Resolved Allowed General Unsecured Claims pursuant to Section 5.3(c)) on the relevant Distribution Date and each prior Distribution Date;
- $T_U$  is the Total Allowed Amount as of the Excess GUC Distributable Trust Assets Determination Date;
- $C_U$  is the Current Total Amount as of the Excess GUC Distributable Trust Assets Determination Date;
- $L$  is the aggregate amount of all (i) Disputed General Unsecured Claims disallowed since the next preceding Excess GUC Distributable Trust Assets Determination Date (or, in the case of the first Excess GUC Distributable Trust Assets Determination Date, since the Initial GUC Record Date), (ii) Unresolved Term Loan Avoidance Action Claims to the extent resolved (including by way of settlement) in favor of the respective defendants since the next preceding Excess GUC Distributable Trust Assets Determination Date (or, in the case of the first Excess GUC Distributable Trust Assets Determination Date, since the Initial GUC Record Date); and (iii) all Unresolved Other Avoidance Action Claims to the extent resolved (including by way of settlement) in favor of the respective defendants since the next preceding Excess GUC Distributable Trust Assets Determination Date (or, in the case of the first Excess GUC Distributable Trust Assets Determination Date, since the Initial GUC Record Date); and
- $H$  is the amount, if any, of any holdback pursuant to Section 6.1 that was not otherwise deducted from the amounts available for distribution on a Distribution Date.

(d) Notwithstanding the foregoing, if the Trust Administrator becomes aware of previously unknown potential Allowed General Unsecured Claims, the Trust Administrator may, with the approval of the Trust Monitor, withhold distribution of Excess GUC Distributable Trust Assets to the holders of Units in an amount that the Trust Administrator, with the approval of the Trust Monitor, estimates to be the maximum amount reasonably allowable in respect of such previously unknown claims.

5.5. Retention of Avoidance Action Trust Assets. Notwithstanding anything in this Trust Agreement to the contrary, the Trust Administrator shall at all times, to the extent practicable, retain

(a) sufficient GUC Distributable Trust Assets as the Trust Administrator shall determine, with the approval of the Trust Monitor, as would be distributable (I) to all holders of Disputed General Unsecured Claims at the time outstanding as if all Disputed General Unsecured Claims were allowed at the Maximum Amount, but only until such Disputed General Unsecured Claims are resolved, (II) to the holders of all Resolved Allowed General Unsecured Claims at the time outstanding, to the extent not previously distributed, (III) in respect of any Unresolved Term Loan Avoidance Action Claims at the Maximum Amount thereof but only until the Term Loan Avoidance Action is dismissed by Final Order or such claims become Resolved Allowed General Unsecured Claims, and (IV) in respect of any Unresolved Other Avoidance Action Claims at the Maximum Amount thereof but only until

such claims become Resolved Allowed General Unsecured Claims or the related other Avoidance Actions are dismissed by Final Order; and

(b) sufficient Avoidance Action Trust Administrative Cash and Supplemental Avoidance Action Trust Cash as the Trust Administrator shall determine, with the approval of the Trust Monitor and subject to the Budget, is necessary (x) to pay the reasonable incurred or anticipated fees and expenses of the Trust (including any taxes imposed on the Trust or in respect of the Avoidance Action Trust Assets) and (y) to satisfy other liabilities incurred or anticipated by the Trust in accordance with the Plan, the Confirmation Order and this Trust Agreement.

5.6. Minimum Distributions. Notwithstanding anything to the contrary contained herein, no Cash payment in an amount less than \$25 shall be made by the Trust Administrator to any holder of an Allowed General Unsecured Claim or Unit under any circumstance; *provided* that the Trust Administrator shall carry the entitlement of such holder of an Allowed General Unsecured Claim or Unit to such amount on its books and records, shall aggregate such amount with any subsequent amount to which such holder shall become entitled and shall make payment of such amount to such holder at such time as the amounts due such holder in the aggregate shall equal \$25 or more; *provided further* that if any such amount shall be owing to a holder of an Allowed General Unsecured Claim or Unit as of the date determined by the Trust Administrator to be the final Distribution Date, such amount shall be disposed of as provided in the final sentence of Section 2.6(c).

5.7. Distributions Not in Compliance with this Article. Subject to Section 5.3(d), in the event that the Trust Administrator determines in good faith that it is necessary or desirable in order to carry out the intent and purposes of the Plan, the Confirmation Order and this Trust Agreement to receive any assets or make any distribution in a manner that is not in technical compliance with this Trust Agreement, the Trust Administrator shall be permitted to receive assets or make, or cause to be made, distributions in such manner, but only with the approval of the Trust Monitor; *provided, however*, that no such distribution shall result in any holder of an Allowed General Unsecured Claim receiving a distribution in excess of the distribution that such holder would have received had such claim been an Initial Allowed General Unsecured Claim or shall discriminate among the holders of Units. Except as aforesaid, no payment or distribution of Avoidance Action Trust Assets shall be made to, or on behalf of, a Trust Beneficiary or any other person except in strict accordance with the terms of this Trust Agreement, the Plan, and the Confirmation Order, unless such payment or distribution shall have been approved by the Bankruptcy Court.

5.8. No Accounting. Except as otherwise provided in the Plan, the Confirmation Order or this Trust Agreement, nothing shall require the Trust Administrator to file any accounting or seek approval of any court with respect to the administration of the Trust or as a condition for making any payment or distribution out of the Avoidance Action Trust Assets.

**ARTICLE VA**  
**DISTRIBUTIONS TO DIP LENDERS**

If any Other Debtor Residual Accepted Assets shall be transferred to the Trust, the Trust Administrator shall make distributions to the DIP Lenders of Distributable Other Debtor Residual Assets, if any, from time to time (but no less frequently than once each calendar year), pro rata as their interests appear, as the Trust Administrator shall determine with the approval of the Trust Monitor or as the Trust Administrator shall be directed by a majority in interest of the DIP Lenders; provided that distributions need not be made in any calendar year to the extent (A) there are no Distributable Other Debtor Residual Assets held by the Trust or (B) the Trust Administrator, with the approval of the Trust Monitor, determines that it is necessary to retain the Distributable Other Debtor Residual Assets to (i) meet any contingent liabilities of the Trust or maintain the value of the Other Debtor Residual Trust Assets (such as for example, in the event that the Trust Administrator determines that the Distributable Other Debtor Residual Assets are so small in amount as not to justify making a distribution, taking into account the costs that would be incurred in making the distribution, the anticipated total amount of Distributable Other Debtor Residual Assets expected to be available for distribution over time and the timing of the distribution or distributions thereof), or (ii) pay reasonable incurred and/or anticipated expenses of the Trust (including any taxes imposed on the Trust or in respect of the Other Debtor Residual Trust Assets) or to satisfy liabilities incurred and/or anticipated by the Trust in accordance with the Plan, the Confirmation Order and this Trust Agreement.

**ARTICLE VI**  
**ADMINISTRATION OF THE TRUST**

6.1. Payment of Costs, Expenses and Liabilities (other than in respect of the Other Debtor Residual Accepted Assets).

(a) Subject to the Budget, the Trust Administrator shall use the Avoidance Action Trust Administrative Cash:

(i) to pay reasonable costs and expenses of the Trust that are incurred in connection with the administration thereof (including any taxes imposed on the Trust, actual reasonable fees and out-of-pocket expenses incurred by Trust Professionals retained by the Trust Administrator in connection with the administration of the Avoidance Action Trust Assets and preservation of books and records);

(ii) to satisfy other obligations or other liabilities incurred or assumed by the Trust (or to which the Avoidance Action Trust Assets are otherwise subject) in accordance with the Plan, the Confirmation Order, or this Trust Agreement, including fees and expenses incurred and in connection with, the prosecution and resolution of the Term Loan Avoidance Action the protection, preservation and distribution of the Avoidance Action Trust Assets; and

(iii) to satisfy any other obligations of the Trust expressly set forth in the Plan, the Confirmation Order or this Trust Agreement to be satisfied out of the Avoidance Action Trust Administrative Cash.

(b) (i) If, at any time, the Trust Administrator determines that the Avoidance Action Trust Administrative Cash is not reasonably likely to be adequate to satisfy the current and projected future taxes, fees, costs and expenses (including, without limitation any Avoidance Action Trust SEC Reporting Costs) of the Trust (other than in respect of the Other Debtor Residual Trust Assets), the Trust Administrator may, with the approval of the Trust Monitor, reserve an amount, or increase the amount previously reserved, of Distributable Trust Assets to satisfy such taxes, fees, costs and expenses (the “Holdback”). If at any time, the Trust Administrator determines that the Holdback is materially greater than the amount of the current and projected future taxes, fees, costs and expenses as aforesaid, the Trust Administrator shall, with the approval of the Trust Monitor, release from the Holdback the amount of such excess.

(i) To the extent necessary to satisfy the taxes, fees, costs and expenses on account of which the Holdback may be reserved, the Trust Administrator may, in consultation with the Trust Monitor, and upon approval by the Bankruptcy Court in accordance with the provisions of Section 6.1(b)(iii), apply all or a portion of the Holdback to the satisfaction of such taxes, fees, costs and expenses.

(ii) The application of the Trust Administrator seeking Bankruptcy Court approval to utilize Distributable Trust Assets shall include the position of the Trust Monitor in respect thereof. The Trust Administrator shall provide at least twenty (20) days notice to the Trust Monitor, the holders of Units and the holders of Disputed General Unsecured Claims prior to a hearing on a motion to use any Distributable Trust Assets.

(c) If, at any time, the Trust Administrator determines that the Avoidance Action Trust Administrative Cash, together with the Holdback (if Distributable Trust Assets are, at such time, available for the purposes of creating a Holdback), is not reasonably likely to be adequate to satisfy the current and projected future taxes, fees, costs and expenses (including, without limitation any Avoidance Action Trust SEC Reporting Costs and the fees and expenses of Trust Professionals) of the Trust (other than in respect of the Other Debtor Residual Trust Assets), the Trust Administrator may utilize the GUC Trust Supplemental Cash, without the need to seek or obtain approval of the Bankruptcy Court, to satisfy such fees and expenses.

(d) (i) If, at any time, the Trust Administrator determines that the Avoidance Action Trust Administrative Cash, together with the Holdback (if Distributable Trust Assets are, at such time, available for the purposes of creating a Holdback) and the GUC Trust Supplemental Cash, if any, is not reasonably likely to be adequate to satisfy the current and projected future fees, costs and expenses (including, without limitation any Avoidance Action Trust SEC Reporting Costs, the fees and expenses of Trust Professionals, and any tax liabilities), the Trust Administrator may, in consultation with the Trust Monitor, and upon approval by the Bankruptcy Court in accordance with the provisions of Section 6.1(d)(ii), sell or grant liens on the Term Loan Avoidance Action or any other property of the Trust (other than the Other Debtor Residual Trust Assets) and apply all or a portion of the proceeds of such sale or grant to the satisfaction of such fees, costs and expenses; provided, that the Trust may not incur additional indebtedness, whether unsecured or secured by any interest (including a security interest) in the Term Loan Avoidance Action or Avoidance Action Proceeds without the prior written consent of the DIP Lenders, except that the Trust may incur expenses in the

ordinary course of the Trust's business provided no lien or right of setoff is attached thereto. In the event that the Trust seeks other litigation funding, (A) the DIP Lenders shall be provided a right of first refusal to provide such funding, which right of first refusal must be exercised within thirty (30) days after being presented in writing the opportunity to provide such funding, and (B) such funding shall be junior and subordinate to the Litigation Cost Advance and to the amounts owed to the DIP Lenders on account of prior funding of the Trust, subject to a form of subordination that is acceptable to the DIP Lenders in all respects, with such consent not to be unreasonably withheld. Upon any such sale or grant of liens pursuant to this Section 6.1(d), the resulting proceeds shall be designated as Other Supplemental Cash. Any income earned on the Other Supplemental Cash, net of taxes paid thereon, shall be Other Supplemental Cash.

(ii) The application of the Trust Administrator seeking Bankruptcy Court approval to sell or grant liens pursuant to Section 6.1(d)(i) hereof shall include the position of the Trust Monitor in respect thereof. The Trust Administrator shall provide at least twenty (20) days' notice to the Trust Monitor, the DIP Lenders, the holders of Units and the holders of Disputed General Unsecured Claims prior to a hearing on a motion to sell or grant liens pursuant to Section 6.1(d)(i) hereof.

(e) Notwithstanding that as a result of the utilization of Distributable Trust Assets pursuant to Section 6.1(b) the amount of GUC Distributable Trust Assets shall be less than the assets required to satisfy Claims in the amount of the Current Total Amount then outstanding, the Trust Administrator shall continue to satisfy Disputed General Unsecured Claims, any Unresolved Term Loan Avoidance Action Claims and any Unresolved Other Avoidance Action Claims that become Allowed General Unsecured Claims in the order they are resolved as otherwise provided in this Trust Agreement.

6.2. Payment of Costs, Expenses and Liabilities in respect of the Other Debtor Residual Accepted Assets.

(a) The Trust Administrator shall not be required to undertake any activity in respect of the Other Debtor Residual Accepted Assets, including for purposes of realizing upon such assets in order to make distributions of Distributable Other Debtor Residual Trust Assets to the DIP Lenders, unless there shall be available to the Trust Administrator Other Debtor Residual Trust Administrative Cash sufficient for such purposes.

(b) If sufficient Other Debtor Residual Trust Administrative Cash shall be available to the Trust Administrator, then the Trust Administrator shall, as approved by the Trust Monitor or as directed by a majority in interest of the DIP Lenders:

(i) pay reasonable costs and expenses of the Trust that are incurred in connection with the Other Debtor Residual Accepted Assets (including any taxes imposed on the Trust, actual reasonable fees and out-of-pocket expenses incurred by Trust Professionals retained by the Trust Administrator in connection with the administration of the Other Debtor Residual Accepted Assets and preservation of books and records);

(ii) satisfy other obligations or other liabilities incurred or assumed by the Trust in respect of the Other Debtor Residual Accepted Assets (or to which the Other Debtor Residual Accepted Assets are otherwise subject) in accordance with the Plan, the Confirmation Order, or this Trust Agreement, including fees and expenses incurred and in connection with, the prosecution and resolution of any action to realize upon the Other Debtor Residual Accepted Assets and the protection, preservation and distribution of the Other Debtor Residual Accepted Assets; and

(iii) satisfy any other obligations of the Trust expressly set forth in the Plan, the Confirmation Order or this Trust Agreement to be satisfied out of the Other Debtor Residual Trust Administrative Cash.

### 6.3. Budget.

(a) The Trust Administrator shall prepare and submit to the Trust Monitor and the DIP Lenders for approval a reasonably detailed annual plan and budget (the "Budget") at least thirty (30) days prior to the commencement of each calendar year; *provided, however*, that the first such Budget shall be agreed to as of the Avoidance Action Trust Transfer Date. Such annual plan and Budget shall set forth (on a quarterly basis) in reasonable detail: (A) the Trust Administrator's anticipated actions to administer the Avoidance Action Trust Assets; and (B) the anticipated fees and expenses, including professional fees, associated with the administration of the Trust, a separate amount representing the anticipated fees and expenses of the Trust Monitor and detail as to how the Trust will budget and spend the Avoidance Action Trust Administrative Cash. Such Budget shall be updated and submitted to the Trust Monitor and the DIP Lenders for review on a quarterly basis, and each such quarterly update shall reflect the variances (with explanations) between (x) the Budget, (y) any updated Budget, and (z) the actual results for the same period. If the Trust identifies a need for or the occurrence of actual expenditures that materially differ from the relevant Budget, the Trust will notify the DIP Lenders as promptly as practicable, and no later than fifteen (15) days after identifying the issue. For the avoidance of doubt, the DIP Lenders may object in the Bankruptcy Court with respect to any quarterly update that materially changes the Budget and the Bankruptcy Court shall resolve such dispute. All actions by the Trust Administrator shall be consistent with the Budget (as updated). The Trust Administrator may obtain any required approval of the Budget on reasonable negative notice (which shall be not less than 15 days after receipt of the Budget) and approval of the Budget shall not be unreasonably withheld. In the event of any dispute concerning the Budget (or the taking of actions consistent with the Budget), the Trust Administrator or the Trust Monitor may petition the Bankruptcy Court to resolve such dispute.

(b) The Trust Administrator, with the approval of the Trust Monitor, and the DIP Lenders may agree on a budget for activities in respect of the Other Debtor Residual Accepted Assets.

(c) Notwithstanding any other provision of this Trust Agreement, the approval of the DIP Lenders shall not be required for any use of the Avoidance Action Trust SEC Reporting Cash, the GUC Trust Supplemental Cash or the Other Supplemental Cash.

6.4. [Intentionally omitted.]

6.5. Compliance with Laws. Any and all distributions of Avoidance Action Trust Assets shall be in compliance with applicable laws, including applicable federal and state tax and securities laws.

6.6. Fiscal Year. Except for the first and last years of the Trust, the fiscal year of the Trust shall be the calendar year. For the first and last years of the Trust, the fiscal year of the Trust shall be such portion of the calendar year that the Trust is in existence.

6.7. Books and Records.

(a) The Trust Administrator shall maintain and preserve the Debtors' books, records and files that shall have been delivered to or created by the Trust Administrator.

(b) The Trust Administrator shall maintain books and records relating to the assets, liabilities, income and expense of the Trust, all distributions made by the Trust and the payment of fees and expenses of, and satisfaction of claims against or assumed by, the Trust and the Trust Administrator, in such detail and for such period of time as may be necessary to enable it to make full and proper reports in respect thereof in accordance with the provisions of this Trust Agreement and otherwise to comply with applicable provisions of law, including tax law.

(c) The Trust Administrator shall maintain, or cause to be maintained, a register of holders of Units, from time to time outstanding, to the extent any Units are issued hereunder, in customary form.

6.8. Cash Payments. All distributions of Distributable Trust Cash required to be made by the Trust Administrator may be made in Cash denominated in U.S. dollars by checks drawn on a United States domestic bank selected by the Trust Administrator or, at the option of the Trust Administrator, by wire transfer from a United States domestic bank selected by the Trust Administrator or as otherwise required or provided in applicable agreements; *provided, however*, that cash payments to foreign persons may be made, at the option of the Trust Administrator, in such funds as and by such means as are necessary or customary in a particular foreign jurisdiction.

6.9. Insurance. The Trust shall maintain customary insurance coverage for the protection of the Trust Administrator Parties and the Trust Monitor Parties and any such other persons serving as administrators and overseers of the Trust, on and after the Avoidance Action Trust Transfer Date, in all cases in accordance with the Budget. The Trust Administrator may also obtain such insurance coverage as it deems necessary and appropriate with respect to real and personal property which may become Avoidance Action Trust Assets, if any, in accordance with such Budget. To the extent that there is any incremental cost for customary insurance coverage covering the activities of the Trust Administrator Parties and the Trust Monitor Parties in respect of the Other Debtor Residual Accepted Assets, the Trust Administrator and the Trust Monitor shall not be required to undertake any such activities unless there is available sufficient Other Debtor Residual Trust Administrative Cash to fund such incremental cost.

**ARTICLE VII**  
**TAX MATTERS**

7.1. Tax Treatment.

(a) For all U.S. federal and applicable state and local income tax purposes, all parties (including the Debtors, the Trust Administrator, the holders of the DIP Credit Agreement Claims, and the holders of Allowed General Unsecured Claims) shall treat the Trust and the transfer of the Avoidance Action Trust Assets and the Other Debtor Residual Assets to the Trust in a manner consistent with the remainder of this Section 7.1.

(b) If no Other Debtor Residual Assets are transferred to the Trust upon the dissolution of MLC and the DIP Lender Distributable Trust Assets have not been determined (either as a percentage or as a fixed amount of Distributable Trust Assets or on some other basis) on or prior to the Avoidance Action Trust Transfer Date, then (subject to clause (c) below) the Trust Administrator shall treat the Trust as (A) a “disputed ownership fund” governed by Treasury Regulation section 1.468B-9 (including, if required, timely so electing), (B) if permitted under applicable law and at the election of the Trust Administrator, as a “complex trust,” or (C) as otherwise permitted pursuant to a private letter ruling from the IRS.

(c) If Other Debtor Residual Assets are transferred to the Trust upon the dissolution of MLC or the DIP Lender Distributable Trust Assets have been determined (either as a percentage or as a fixed amount of Distributable Trust Assets or on some other basis) on or prior to the Avoidance Action Trust Transfer Date, or otherwise upon determination of the DIP Lender Distributable Trust Assets (either as a percentage or as a fixed amount of Distributable Trust Assets or on some other basis) after the Avoidance Action Trust Transfer Date, the Trust (other than the Avoidance Action Trust Claims Reserve) shall be treated as a liquidating trust that is treated as a grantor trust and the Avoidance Action Trust Assets (upon the determination of the DIP Lender Distributable Trust Assets) and Other Debtor Residual Trust Assets (upon the transfer of Other Debtor Residual Assets to the Trust) shall be treated as (i) being transferred directly to the Trust Beneficiaries; provided, however, that to the extent Avoidance Action Trust Assets are allocable to Disputed General Unsecured Claims, Unresolved Term Loan Avoidance Action Claims or Unresolved Other Avoidance Action Claims, such Avoidance Action Trust Assets shall be treated as being transferred to the Avoidance Action Trust Claims Reserve, followed by (ii) the transfer by such Trust Beneficiaries of the Avoidance Action Trust Assets (other than the Avoidance Action Trust Assets allocable to the Avoidance Action Trust Claims Reserve) and the Other Debtor Residual Trust Assets, as applicable, to the Trust in exchange for beneficial interests in the Trust. Accordingly, Trust Beneficiaries receiving beneficial interests in the Trust shall be treated as the grantors and owners of their respective share of the Avoidance Action Trust Assets (other than any Avoidance Action Trust Assets allocable to the Avoidance Action Trust Claims Reserve) and Other Debtor Residual Trust Assets, as applicable.

(d) Any determination made pursuant to this Section 7.1 shall be conclusive and binding on all parties (including the Debtors, the Trust Administrator, the holders of the DIP Credit Agreement Claims, and the holders of Allowed General Unsecured Claims) for U.S. federal, and (to the extent permitted by applicable law) state and local, income tax



purposes. Accordingly, to the extent permitted by applicable law, all parties shall report consistently with the U.S. federal income tax treatment of the Trust by the Trust Administrator for state and local income tax purposes.

7.2. Valuation of Assets. As soon as practicable after the Avoidance Action Trust Transfer Date, the Trust Administrator shall make a good-faith valuation of the Avoidance Action Trust Assets and Other Debtor Residual Trust Assets, and such valuation shall be made available from time to time, to the extent relevant, and shall be used consistently by all parties (including the Debtors, the Trust Administrator, the holders of the DIP Credit Agreement Claims, and the holders of Allowed General Unsecured Claims) for all U.S. federal and applicable state and local income tax purposes.

7.3. Payment of Taxes. The Trust Administrator shall be responsible for payment, out of the Avoidance Action Trust Assets, of any taxes imposed on the Trust (other than in respect of the Other Debtor Residual Assets) or the Avoidance Action Trust Assets, including the Avoidance Action Trust Claims Reserve. The Trust Administrator shall be responsible for payment, out of the Other Debtor Residual Assets of any taxes imposed on the Trust in respect of the Other Debtor Residual Assets or on the Other Debtor Residual Assets. In the event, and to the extent, any Cash retained on account of Disputed General Unsecured Claims, Unresolved Term Loan Avoidance Action Claims or Unresolved Other Avoidance Action Claims in the Avoidance Action Trust Claims Reserve is insufficient to pay the portion of any such taxes attributable to the taxable income arising from the assets allocable to, or retained on account of, Disputed General Unsecured Claims, Unresolved Term Loan Avoidance Action Claims or Unresolved Other Avoidance Action Claims, such taxes shall be (i) reimbursed from any subsequent Cash amounts retained on account of Disputed General Unsecured Claims, Unresolved Term Loan Avoidance Action Claims or Unresolved Other Avoidance Action Claims, or (ii) to the extent such Disputed General Unsecured Claims, Unresolved Term Loan Avoidance Action Claims or Unresolved Other Avoidance Action Claims subsequently have been resolved, deducted from any amounts otherwise distributable by the Trust Administrator as a result of the resolution of such Disputed General Unsecured Claims, Unresolved Term Loan Avoidance Action Claims or Unresolved Other Avoidance Action Claims.

7.4. Tax Reporting.

(a) The Trust Administrator shall file (or cause to be filed) Tax Returns for the Trust treating the Trust (except the Avoidance Action Trust Claims Reserve or as otherwise provided in Section 7.1(b) above) as a grantor trust pursuant to Treasury Regulation section 1.671-4(a) and in accordance with the applicable provisions of this Section 7.4. The Trust Administrator also shall annually send to each Trust Beneficiary a separate statement setting forth such Trust Beneficiary's share of items of income, gain, loss, deduction, or credit of the Trust (including, for the avoidance of doubt, earnings on the Avoidance Action Trust Administrative Cash, the Avoidance Action Trust SEC Reporting Cash, the GUC Trust Supplemental Cash and the Other Supplemental Cash) and shall instruct all Trust Beneficiaries to report such items on their respective U.S. federal income Tax Returns or to forward the appropriate information to their respective beneficial holders with instructions to report such items on their U.S. federal income Tax Returns. The Trust Administrator also shall file (or

cause to be filed) any other statements, returns, or disclosures relating to the Trust that are required by any governmental unit.

(b) Allocations of the Trust's taxable income among the Trust Beneficiaries shall be determined by reference to the manner in which an amount of Cash equal to such taxable income would be distributed (without regard to any restrictions on distributions described herein) if, immediately prior to such deemed distribution, the Trust had distributed all of its other assets (valued at their tax book value and other than assets attributable to the Avoidance Action Trust Claims Reserve) to the Trust Beneficiaries, in each case up to the tax book value of the assets treated as contributed by such Trust Beneficiaries, adjusted for prior taxable income and loss and taking into account all prior and concurrent distributions from the Trust. Similarly, taxable loss of the Trust shall be allocated by reference to the manner in which an economic loss would be borne immediately after a liquidating distribution of the remaining Avoidance Action Trust Assets and Other Debtor Residual Trust Assets. The tax book value of the Avoidance Action Trust Assets and Other Debtor Residual Trust Assets for this purpose shall equal their fair market value on the Avoidance Action Trust Transfer Date and Other Debtor Residual Trust Assets Transfer Date, as applicable, adjusted in accordance with tax accounting principles prescribed by the Tax Code, applicable Treasury Regulations, and other applicable administrative and judicial authorities and pronouncements.

(c) The Trust Administrator shall (x) treat the Avoidance Action Trust Claims Reserve for U.S. federal income tax purposes as either (i) a "disputed ownership fund" governed by Treasury Regulation section 1.468B-9 by timely so electing or (ii) a "complex trust," provided, however, that if the Trust is treated as a "disputed ownership fund" or as a "complex trust" pursuant to Section 7.1(b) above, then the Avoidance Action Trust Claims Reserve shall be treated in the same manner, and (y) to the extent permitted by applicable law, report consistently with the foregoing for state and local income tax purposes. Any determination made pursuant to this Section 7.4 shall be conclusive and binding on all parties (including the Debtors, the Trust Administrator, the holders of the DIP Credit Agreement Claims, and the holders of Allowed General Unsecured Claims) for U.S. federal, state, and local income tax purposes.

7.5. Tax Withholdings. The Trust Administrator shall withhold and pay to the appropriate taxing authority all amounts required to be withheld pursuant to the Tax Code, Treasury Regulations or other applicable requirements, including any provision of any foreign, state or local tax law, with respect to any payment or distribution to the Trust Beneficiaries. All such amounts withheld, and paid to the appropriate taxing authority, shall be treated as amounts distributed to such Trust Beneficiaries for all purposes of this Trust Agreement. The Trust Administrator shall be authorized to collect such tax information from the Trust Beneficiaries (including social security numbers or other tax identification numbers) as it in its sole discretion deems necessary to effectuate the Plan, the Confirmation Order and this Trust Agreement, or to comply with any applicable withholding or reporting requirement. The Trust Administrator may refuse to make a distribution to any Trust Beneficiary that fails to furnish such information in a timely fashion, until such information is furnished; *provided, however*, that upon a Trust Beneficiary furnishing such information, the Trust Administrator shall make such distribution to which such Trust Beneficiary is entitled, without interest.

7.6. Expedited Determination of Taxes. The Trust Administrator may request an expedited determination of taxes of the Trust, including the Avoidance Action Trust Claims Reserve, under Section 505(b) of the Bankruptcy Code for any or all Tax Returns filed for, or on behalf of, the Trust for any or all taxable periods (or part thereof) through the dissolution of the Trust.

7.7. [Intentionally omitted.]

7.8. Delivery of Statement of Transfers. If the Trust Administrator elects to treat (i) the Trust, pursuant to and to the extent provided in Section 7.1 above and/or (ii) the Avoidance Action Trust Claims Reserve as a disputed ownership fund within the meaning of Treasury Regulation section 1.468B-9, then following the Avoidance Action Trust Transfer Date (but in no event later than February 15th of the calendar year following the Avoidance Action Trust Transfer Date), MLC shall provide a “§ 1.468B-9 Statement” to the Trust Administrator in accordance with Treasury Regulation section 1.468B-9(g).

7.9. Allocation of Distributions Between Principal and Interest. All deemed distributions (including deemed transfers pursuant to Section 7.1(b)(i)) in connection with the allowance of any Allowed General Unsecured Claim shall be allocated first to the principal amount of such Allowed General Unsecured Claim, as determined for federal income tax purposes, and thereafter, to the remaining portion of such Allowed General Unsecured Claim, if any.

## **ARTICLE VIII** **POWERS OF AND LIMITATIONS ON THE TRUST ADMINISTRATOR**

8.1. Powers of the Trust Administrator.

(I) Other Than in Respect of the Other Debtor Residual Accepted Assets

(a) Pursuant to the terms of the Plan and the Confirmation Order, the Trust Administrator shall have various powers, duties and responsibilities concerning the prosecution of and resolution of the Term Loan Avoidance Action, maximizing the property of the Trust, the disposition of the Avoidance Action Trust Assets and the administration of the Trust. In addition, the Trust Administrator shall coordinate with the GUC Trust Administrator to maximize efficiency in distributions to general unsecured creditors in any situation where such coordination would be beneficial.

(b) The Trust Administrator shall have only such rights, powers and privileges expressly set forth in the Plan, the Confirmation Order or this Trust Agreement and as otherwise provided by applicable law. Subject to the Plan, the Confirmation Order and other provisions herein, including the provisions relating to approvals of the Trust Monitor, the Trust Administrator shall be expressly authorized to undertake the following actions, in the Trust Administrator’s good faith judgment, in the best interests of the Trust Beneficiaries and in furtherance of the purpose of the Trust:

(i) hold and manage the Avoidance Action Trust Assets;

(ii) hold legal title to any and all rights of the Trust Beneficiaries in, to or arising from the Avoidance Action Trust Assets, for the benefit of the Trust Beneficiaries that are entitled to distributions therefrom under the Plan, whether, in the case of GUC Beneficiaries, their General Unsecured Claims are Allowed on or after the Avoidance Action Trust Transfer Date;

(iii) prosecute and, if appropriate, sell, grant liens upon (subject to Section 6.1(d) hereof), settle and resolve, abandon and/or dismiss the Term Loan Avoidance Action;

(iv) execute all agreements, instruments and other documents (including, without limitation, any loan agreements or sale agreements for the purposes of funding the fees and expenses of the Trust), and effect all other actions necessary or appropriate to dispose of the Avoidance Action Trust Assets;

(v) monitor and enforce the implementation of the Plan insofar as relating to this Trust Agreement, the Avoidance Action Trust Assets or the Trust;

(vi) calculate and implement distributions of the GUC Distributable Trust Assets obtained through the exercise of its power and authority as contemplated by the Plan, the Confirmation Order and this Trust Agreement and in accordance with the interests of the holders of Allowed General Unsecured Claims;

(vii) retain, pay, oversee and direct the services of, and terminate Trust Professionals in accordance with Section 8.3 hereof to carry out its duties and obligations hereunder, in all cases in accordance with the Budget;

(viii) pay the reasonable fees and expenses of the Trust Administrator and Trust Monitor, in all cases in accordance with the Budget;

(ix) incur and pay all reasonable expenses, satisfy ordinary course liabilities and make all other payments reasonable and necessary to administer and dispose of the Avoidance Action Trust Assets, in all cases in accordance with the Budget;

(x) invest monies received by the Trust, the Trust Administrator or otherwise held by the Trust or the Trust Administrator in accordance with Section 8.4 hereof;

(xi) protect and enforce the rights to the Avoidance Action Trust Assets vested in the Trust Administrator by this Trust Agreement by any method deemed reasonably appropriate, including by judicial proceedings or pursuant to any applicable bankruptcy, insolvency, moratorium or similar law and general principles of equity;

(xii) vote any claim or interest held by the Trust in a case under the Bankruptcy Code and receive any distribution therefrom for the benefit of the Trust;

(xiii) make all necessary filings in accordance with any applicable law, statute or regulation;

(xiv) purchase customary insurance coverage in accordance with Section 6.9 hereof;

(xv) assert and/or waive any applicable privileges (legal or otherwise) on behalf of the Trust, or with respect to the Avoidance Action Trust Assets held by the Debtors at any time (prepetition or postpetition);

(xvi) maintain the books and records of the Trust;

(xvii) open, maintain and close any bank, securities or other accounts that are necessary and appropriate to manage the Avoidance Action Trust Assets, including but not limited to the accounts listed on Exhibit A hereto;

(xviii) receive from the Debtors and administer the Avoidance Action Trust SEC Reporting Cash in accordance with Section 2.3(e) hereof and file such reports as may be required pursuant to the applicable rules, regulations and interpretations of the SEC;

(xix) receive from the GUC Trust and administer and utilize the GUC Trust Supplemental Cash in accordance with Section 2.3(f) hereof; and

(xx) perform such functions and take such actions as are provided for or permitted in the Plan, the Confirmation Order, this Trust Agreement, the Settlement Agreement, the Litigation Cost Advance Agreement, or any other agreement executed pursuant to the Plan and take any other actions as it may deem to be reasonably necessary or appropriate to realize, preserve and dispose of the Avoidance Action Trust Assets.

(c) [Intentionally omitted.]

(d) In all circumstances, the Trust Administrator shall act in the best interests of all Trust Beneficiaries and in furtherance of the purpose of the Trust, and in a manner not inconsistent with the best interests of the Trust Beneficiaries and consistent with the Budget. The Trust Administrator shall not take any action inconsistent with the purpose of the Trust, or take (or fail to take) any action that would cause the Trust (other than the Avoidance Action Trust Claims Reserve) to fail to qualify as a liquidating trust within the meaning of Treasury Regulation section 301.7701-4(d) that is treated as a grantor trust.

(e) Notwithstanding any provision herein to the contrary, the Trust Administrator shall not serve on the board of directors, management committee or any similar governing body of any non-Debtor subsidiary of MLC, where the charter, limited liability company agreement, partnership agreement or other similar constituent document of such subsidiary does not provide for a liquidating purpose for such subsidiary. Except as otherwise provided in this Trust Agreement, the Trust Administrator will not be required to obtain the order or approval of the Bankruptcy Court, or any other court of competent jurisdiction in, or account to the Bankruptcy Court or any other court of competent jurisdiction for, the exercise of any right, power or privilege conferred hereunder. Notwithstanding the foregoing, where the Trust Administrator determines, in its reasonable discretion, that it is necessary, appropriate or desirable, the Trust Administrator will have the right to submit to the Bankruptcy Court or any other court of competent jurisdiction any question or questions

regarding any specific action proposed to be taken by the Trust Administrator with respect to this Trust Agreement, the Trust, or the Avoidance Action Trust Assets, including the administration and distribution of the Avoidance Action Trust Assets and the termination of the Trust. Pursuant to the Plan, the Bankruptcy Court has retained jurisdiction for such purposes and may approve or disapprove any such proposed action upon motion by the Trust Administrator.

(II) In Respect of the Other Debtor Residual Accepted Assets

The Trust Administrator shall have the rights, powers and privileges to act in respect of the Other Debtor Residual Accepted Assets, if any, in the manner set forth in Section 8.1(I), *mutatis mutandis*. In all such circumstances, the Trust Administrator shall act in the best interests of DIP Lenders and in furtherance of the purpose of the Trust, and in a manner not inconsistent with the best interests of the DIP Lenders. For the avoidance of doubt, the Trust Administrator shall not be obligated to undertake any activities in respect of the Other Debtor Residual Trust Assets unless there shall be available sufficient Other Debtor Residual Trust Administrative Cash to pay in full its fees, costs and expenses in respect thereof.

8.2. Limitations on the Trust Administrator. The Trust Administrator shall not be authorized to engage, in its capacity as Trust Administrator, in any trade or business with respect to the Avoidance Action Trust Assets or to take (or fail to take) any action that would cause the Trust (other than the Avoidance Action Trust Claims Reserve) to fail to qualify as a liquidating trust within the meaning of Treasury Regulation section 301.7701-4(d) that is treated as a grantor trust. The Trust Administrator shall take such actions consistent with the prompt orderly disposition of the Avoidance Action Trust Assets and the Other Debtor Residual Accepted Assets, if any, as required by applicable law and consistent with the treatment of the Trust (other than the Avoidance Action Trust Claims Reserve) as a liquidating trust within the meaning of Treasury Regulation section 301.7701-4(d) that is treated as a grantor trust, to the extent such actions are permitted by this Trust Agreement. The Trust Administrator shall, in its capacity as Trust Administrator, be restricted to (x) the liquidation of the Trust on behalf, and for the benefit, of the Trust Beneficiaries and the distribution and application of Avoidance Action Trust Assets for the purposes set forth in, and the conservation and protection of the Avoidance Action Trust Assets and the administration thereof, and (y) the liquidation of the Trust on behalf, and for the benefit, of the DIP Lenders and the distribution and application of Other Debtor Residual Trust Assets for the purposes set forth in, and the conservation and protection of the Other Debtor Residual Trust Assets and the administration thereof, in each case in accordance with, the provisions of the Plan, the Confirmation Order and this Trust Agreement.

8.3. Agents and Professionals.

(a) The Trust Administrator on behalf of the Trust may, but shall not be required to, from time to time enter into contracts with, consult with and retain Trust Professionals, on such terms as the Trust Administrator deems appropriate in accordance with the terms hereof and (other than in respect of the Other Debtor Residual Accepted Assets) in accordance with the Budget. None of the professionals that represented parties-in-interest in

the Chapter 11 Cases shall be precluded from being engaged by the Trust Administrator solely on account of their service as a professional for such parties-in-interest prior to the Avoidance Action Trust Transfer Date or the Other Debtor Residual Assets Transfer Date, as the case may be.

(b) After the Avoidance Action Trust Transfer Date, Trust Professionals shall be required to submit reasonably detailed invoices on a monthly basis to the Trust Administrator, the Trust Monitor and the DIP Lenders, including in such invoices a description of the work performed, the individuals who performed such work, the hourly rate of such person, plus an itemized statement of expenses for which payment is sought. Invoices submitted to the DIP Lenders may be in a form reasonably necessary to protect the attorney-client privilege. For the avoidance of doubt, any and all payments by the Trust from funds that originated from the Litigation Cost Advance or that are contained in the Funding Account shall be subject to this invoice disclosure requirement. No payment on account of such invoices shall be made until 15 days after presentation of the invoices to the DIP Lenders. The Trust Administrator shall timely pay all such invoices that are not disputed by the Trust Administrator or the Trust Monitor. If either or both of the DIP Lenders have questions or concerns about any invoice submitted to the Trust, or about any other issue relating to the Trust's finances or administration, they shall be entitled to discuss the matter with the Trust Monitor, as well as with the Trust Administrator and/or counsel for the Trust, as appropriate, and the Trust Monitor will consult with the DIP Lenders and give good faith consideration to any objection that the DIP Lenders raise before approval of payment by the Trust Administrator or non-objection by the Trust Monitor. The Trust Monitor, Trust Administrator, and/or counsel for the Trust, as appropriate, will engage in good faith discussions and attempt in good faith to provide information reasonably requested by either or both DIP Lenders. In the event of any dispute concerning the entitlement to, or the reasonableness of any compensation and/or expenses of any Trust Professionals, either the Trust Administrator or the affected Trust Professional may petition the Bankruptcy Court to resolve the dispute.

(c) Except as permitted by Section 6.1(b), (c), and (d), and Section 2.3(e) and (f), all payments to Trust Professionals (other than in respect of Other Debtor Residual Trust Assets) shall be paid out of the Avoidance Action Trust Administrative Cash. Payments to Trust Professionals for activities in respect of the Other Debtor Residual Trust Assets shall be paid out of the Other Debtor Residual Trust Administrative Cash.

#### 8.4. Investment of Trust Cash.

(a) The Trust Administrator shall establish segregated accounts for the Trust Cash as follows: (i) Distributable Trust Cash which shall be held in trust for the benefit of the Trust Beneficiaries; (ii) Distributable Other Debtor Residual Cash, which shall be held in trust for the benefit of the DIP Lenders and on which the DIP Lenders shall have a lien; (iii) Avoidance Action Trust Administrative Cash (excluding the Litigation Cost Advance) and Other Debtor Residual Trust Administrative Cash which shall be used to pay the administrative expenses of the Trust, on which the DIP Lenders shall have a lien; (iv) Avoidance Action Trust SEC Reporting Cash which shall be used to satisfy Avoidance Action Trust SEC Reporting Costs in accordance with Section 2.3(e) hereof; (v) GUC Trust

Supplemental Cash which shall be used to satisfy current and projected fees and expenses of the Trust (including for the payment of Trust Professionals and any tax liabilities) in accordance with Section 2.3(f) hereof; (vi) Other Supplemental Cash, which shall be used to satisfy the current and projected future fees, costs and expenses (including, without limitation any Avoidance Action Trust SEC Reporting Costs, the fees and expenses of Trust Professionals, and any tax liabilities) in accordance with Section 6.1(d) hereof; and (v) Litigation Cost Advance, which shall be held in the Funding Account, which Funding Account shall be subject to a deposit account control agreement acceptable to the DIP Lenders and the Trust and on which the DIP Lenders shall have a first priority lien.

(b) The Trust Administrator shall invest the Trust Cash (including any earnings thereon or proceeds thereof) in the manner set forth in this Section 8.4, but shall otherwise be under no liability for interest or income on any monies received by the Trust hereunder and held for distribution or payment to the Trust Beneficiaries, except as such interest shall actually be received. Investment of any Trust Cash shall be administered in accordance with the general duties and obligations hereunder. The right and power of the Trust Administrator to invest the Trust Cash and the proceeds thereof, or any income earned by the Trust, shall be limited to investing such Trust Cash (pending distribution or disbursement in accordance with the Plan or this Trust Agreement) in Permissible Investments; *provided, however*, that such Permissible Investments shall be limited to include only those investments that a liquidating trust, within the meaning of Treasury Regulations section 301.7701-4(d), may be permitted to hold, pursuant to the Treasury Regulations, or any modification in the IRS guidelines, whether set forth in IRS rulings, other IRS pronouncements or otherwise.

(c) For the avoidance of doubt, the Trust is not, and will not hold itself out as, an “investment company” as such term is understood under the Investment Company Act of 1940, and is prohibited from investing, reinvesting or trading in securities (other than making any Permissible Investments as contemplated by the Plan, the Confirmation Order and this Trust Agreement) or conducting any trade or business other than implementing the Plan and distributing Distributable Trust Assets under the Plan and this Trust Agreement.

8.5. Communication with the GUC Trust Administrator. The Trust Administrator shall communicate with the GUC Trust Administrator to obtain such information regarding, as of a given date, (A) the holders and amounts of General Unsecured Claims, Disputed General Unsecured Claims, Unresolved Term Loan Avoidance Action Claims, Unresolved Other Avoidance Action Claims and Resolved Allowed General Unsecured Claims, (B) the respective Maximum Amounts of all Disputed General Unsecured Claims, Unresolved Term Loan Avoidance Action Claims and Unresolved Other Avoidance Action Claims, (C) the Current Total Amount, (D) the Aggregate Maximum Amount, (E) any components of the foregoing and (E) any other information within the custody or control of the GUC Trust Administrator which shall be necessary or desirable in order for the Trust Administrator to timely make any calculation or determination hereunder to identify and make distributions to the GUC Beneficiaries and to maintain any books and records required to be maintained, or necessary or desirable for the Trust Administrator or the Trust Monitor to fulfill their respective functions, hereunder; provided, however, that the provision of such information shall be under



appropriate arrangements of confidentiality to the extent such information has at the time not been publicly disclosed.

8.6. Termination. The duties, responsibilities and powers of the Trust Administrator will terminate when the Trust is dissolved and terminated pursuant to Article IV hereof and the Trust Administrator has performed all of its obligations under Section 4.3, by an order of the Bankruptcy Court or by entry of a final decree closing the Debtors' cases before the Bankruptcy Court; *provided, however*, that Sections 9.4, 9.5 and 9.6 hereof shall survive such termination, dissolution and entry.

## **ARTICLE IX**

### **ADDITIONAL MATTERS CONCERNING THE TRUST ADMINISTRATOR**

9.1. Reliance by Trust Administrator. Except as otherwise provided in the Plan, the Confirmation Order or this Trust Agreement, the Trust Administrator may rely and shall be protected in acting upon any resolution, statement, instrument, opinion, report, notice, request, consent, order or other paper or document reasonably believed by the Trust Administrator to be genuine and to have been signed or presented by the proper party or parties.

9.2. Liability to Third Persons. To the fullest extent permitted by applicable law, the Trust Administrator Parties shall not be subject to any personal liability whatsoever, in tort, contract or otherwise, to any person (including, in the case of the Trust Administrator, to any Trust Professionals retained by the Trust Administrator in accordance with this Trust Agreement) in connection with the Avoidance Action Trust Assets, the Other Debtor Residual Trust Assets or the affairs of the Trust and shall not be liable with respect to any action taken or omitted to be taken in good faith, except for actions and omissions determined by a Final Order of the Bankruptcy Court to be due to their respective willful misconduct (including, but not limited to, conduct that results in a personal profit at the expense of the Trust), gross negligence, fraud, malpractice, criminal conduct, unauthorized use of confidential information that causes damages, breach of fiduciary duty (to the extent applicable), or *ultra vires* acts, and all such persons shall look solely to the Avoidance Action Trust Assets (other than in respect of the Other Debtor Residual Accepted Assets and activities related thereto) or the Other Debtor Residual Trust Assets (in respect of the Other Debtor Residual Accepted Assets and activities related thereto) for satisfaction of claims of any nature arising in connection with affairs of the Trust.

9.3. Non-liability of Trust Administrator for Acts of Others. Except as provided herein, nothing contained in the Plan, the Confirmation Order or this Trust Agreement shall be deemed to be an assumption by the Trust Administrator of any of the liabilities, obligations or duties of the Debtors or shall be deemed to be or contain a covenant or agreement by the Trust Administrator to assume or accept any such liability, obligation or duty. Any successor Trust Administrator may accept and rely upon any accounting made by or on behalf of any predecessor Trust Administrator hereunder, and any statement or representation made as to the assets comprising the Avoidance Action Trust Assets or the Other Debtor Residual Trust Assets, or as to any other fact bearing

upon the prior administration of the Trust, so long as it has a good faith basis to do so. The Trust Administrator shall not be liable for having accepted and relied in good faith upon any such accounting, statement or representation if it is later proved to be incomplete, inaccurate or untrue. Neither the Trust Administrator nor any successor Trust Administrator shall be liable for any act or omission of any predecessor Trust Administrator, nor have a duty to enforce any claims against any predecessor Trust Administrator on account of any such act or omission, unless directed in good faith to do so by the Trust Monitor.

9.4. Exculpation. As of the earlier of the Avoidance Action Trust Transfer Date and the Other Debtor Residual Assets Transfer Date, to the fullest extent permitted by applicable law, the Trust Administrator Parties shall be and hereby are exculpated by all Persons, including holders of DIP Credit Agreement Claims, General Unsecured Claims and Units and other parties-in-interest, from any and all claims, causes of action and other assertions of liability arising out of the discharge of their respective powers and duties conferred by the Plan, the Confirmation Order, this Trust Agreement or any Order of the Bankruptcy Court entered pursuant to or in furtherance of the Plan, or applicable law or otherwise, except for actions or omissions to act that are determined by Final Order of the Bankruptcy Court to have arisen out of each such Trust Administrator Party's own respective willful misconduct (including, but not limited to, conduct that results in a personal profit at the expense of the Trust), gross negligence, fraud, malpractice, criminal conduct, unauthorized use of confidential information that causes damages, breach of fiduciary duty (to the extent applicable), or *ultra vires* acts. No holder of a DIP Credit Agreement Claim, General Unsecured Claim or other party-in-interest will have or be permitted to pursue any claim or cause of action against the Trust Administrator Parties or the Trust, for making payments and distributions in accordance with the Plan, the Confirmation Order or the this Trust Agreement or for implementing the provisions thereof. Any action taken or omitted to be taken with the express approval of the Bankruptcy Court and, in the case of action taken in respect of the Other Debtor Residual Accepted Assets, with the approval or at the direction of the DIP Lenders will conclusively be deemed not to constitute willful misconduct, gross negligence, fraud, malpractice, criminal conduct, unauthorized use of confidential information that causes damages, breach of fiduciary duty, or *ultra vires* acts; *provided, however*, that notwithstanding any provision herein to the contrary, the Trust Administrator shall not be obligated to comply with a direction of the Trust Monitor, whether or not express, which would result in a change to the distribution provisions of the Plan, the Confirmation Order or this Trust Agreement.

9.5. Limitation of Liability. In no event shall the Trust Administrator Parties be liable for punitive, exemplary, consequential, special or other damages for a breach of, or otherwise in connection with, this Trust Agreement under any circumstances.

9.6. Indemnity.

(a) To the fullest extent permitted by applicable law, the Trust Administrator Parties shall be indemnified by the Trust from the Avoidance Action Trust Assets (other than in respect of the Other Debtor Residual Accepted Assets and activities related thereto) or the

Other Debtor Residual Trust Assets (in respect of the Other Debtor Residual Accepted Assets and activities related thereto) for any losses, claims, damages, liabilities and expenses occurring after the earlier of the Avoidance Action Trust Transfer Date and the Other Debtor Residual Assets Transfer Date, including reasonable attorneys' fees, disbursements and related expenses which the Trust Administrator Parties may incur or to which the Trust Administrator Parties may become subject in connection with any action, suit, proceeding or investigation brought by or threatened against one or more of the Trust Administrator Parties on account of the acts or omissions in their capacity as, or on behalf of, the Trust Administrator; *provided, however*, that the Trust shall not be liable to indemnify any Trust Administrator Party for any act or omission arising out of such Trust Administrator Party's respective actions that are determined by a Final Order of the Bankruptcy Court to be willful misconduct (including, but not limited to, conduct that results in a personal profit at the expense of the Trust), gross negligence, fraud, malpractice, criminal conduct, unauthorized use of confidential information that causes damages, breach of fiduciary duty (to the extent applicable), or *ultra vires* acts. Notwithstanding any provision herein to the contrary, the Trust Administrator Parties shall be entitled to obtain advances from the Trust to cover their reasonable expenses of defending themselves in any action brought against them as a result of the acts or omissions, actual or alleged, of an Trust Administrator Party in its capacity as such; *provided, however*, that the Trust Administrator Parties receiving such advances shall repay the amounts so advanced to the Trust immediately upon the entry of a final, non-appealable judgment or order finding that such Trust Administrator Parties were not entitled to any indemnity under the provisions of this Section 9.6. Any amounts payable to any Trust Administrator Party pursuant to this Section 9.6 (other than in respect of the Other Debtor Residual Accepted Assets and activities related thereto) shall be satisfied as follows: (i) first from the Avoidance Action Trust Administrative Cash, (ii) second from the Distributable Trust Cash, if any; *provided, however*, that the use of Distributable Trust Cash as contemplated in clause (ii) of the foregoing shall be subject to the prior approval by the Bankruptcy Court, as provided in Section 6.1(b); (iii) third from the GUC Trust Supplemental Cash, if any; and (iv) fourth from the Other Supplemental Cash, if any. Any amounts payable to any Trust Administrator Party pursuant to this Section 9.6 in respect of the Other Debtor Residual Accepted Assets and activities related thereto shall be satisfied as follows: (i) first from the Other Debtor Residual Trust Administrative Cash, and (ii) second from the Distributable Other Debtor Residual Trust Cash, if any.

(b) Anything to the contrary in this Trust Agreement or in any other agreement notwithstanding, to the extent that the Avoidance Action Trust Administrative Cash, Distributable Trust Cash, GUC Trust Supplemental Cash or Other Supplemental Cash, or the Other Debtor Residual Trust Administrative Cash or Distributable Other Debtor Residual Trust Cash, as the case may be, shall be insufficient to fully indemnify the Trust Administrator Parties or to provide advances to the Trust Administrator Parties in accordance with Section 9.6(a), the Trust Administrator Parties shall be indemnified and shall be entitled to obtain advances, first from the Other GUC Trust Administrative Cash (as defined in the GUC Trust Agreement), and second from the GUC Trust Distributable Assets (as defined in the GUC Trust Agreement), to the same extent as the GUC Trust Administrator Parties under Section 9.6 of the GUC Trust Agreement or any successor provision thereunder, as provided in Section 9.6 of the GUC Trust Agreement in effect on the date hereof.

(c) The foregoing indemnities in respect of any Trust Administrator Party shall survive the termination of such Trust Administrator Party from the capacity for which they are indemnified.

9.7. Compensation and Expenses.

(a) The Trust Administrator shall receive fair and reasonable compensation for its services (other than in respect of the Other Debtor Residual Accepted Assets and activities related thereto), to be paid out of the Avoidance Action Trust Administrative Cash in accordance with the approved Budget (or from the Avoidance Action Trust SEC Reporting Cash in accordance with Section 2.3(e) hereof, the GUC Trust Supplemental Cash in accordance with Section 2.3(f) hereof, or the Other Supplemental Cash in accordance with Section 6.1(d) hereof). The Trust Administrator shall be entitled, without the need for approval of the Bankruptcy Court, to reimburse itself on a monthly basis (i) from the Avoidance Action Trust Administrative Cash, the GUC Trust Supplemental Cash or the Other Supplemental Cash, as applicable, for such compensation and all reasonable out-of-pocket expenses actually incurred in the performance of duties in accordance with this Trust Agreement and the Budget and (ii) from the Avoidance Action Trust SEC Reporting Cash for such compensation and all reasonable out-of-pocket expenses actually incurred in the performance of duties in accordance with this Trust Agreement and with the approval of the Trust Monitor.

(b) The Trust Administrator shall receive compensation for its services in respect of the Other Debtor Residual Accepted Assets and activities related thereto, to be paid out of the Other Debtor Residual Trust Administrative Cash, as the Trust Administrator and a majority in interest of the DIP lenders shall agree; provided that the Trust Administrator shall not be obligated to undertake any activities in respect of the Other Debtor Residual Accepted Assets unless such compensation arrangements shall be acceptable to the Trust Administrator in its sole discretion.

9.8. No Personal Financial Liability. No provision of the Plan, Confirmation Order or this Trust Agreement shall be construed as requiring the Trust Administrator to expend or risk its own funds or otherwise to incur any personal financial liability (x) in the performance of any of its duties thereunder or hereunder, including any situation where the Avoidance Action Trust Assets are insufficient to permit the administration of the Trust or distributions as contemplated herein or the payment of fees and expenses of the Trust Professionals, or (y) in the exercise of any of its rights or powers afforded hereunder or thereunder.

**ARTICLE X**  
**SUCCESSOR TRUST ADMINISTRATORS**

10.1. Resignation. The Trust Administrator may resign from the Trust by giving at least sixty (60) days' prior written notice thereof to the Trust Monitor. Such resignation shall become effective on the later to occur of (x) the date specified in such written notice and (y) the effective date of the appointment of a successor Trust

Administrator in accordance with Section 10.4 hereof and such successor's acceptance of such appointment in accordance with Section 10.5 hereof.

10.2. Removal. The holders of a majority of the Units or the DIP Lenders may at any time petition the Bankruptcy Court for the removal of the Trust Administrator, but only for good cause shown. Such removal shall become effective on the date ordered by the Bankruptcy Court, provided that such removal shall not become effective until the appointment of a successor Trust Administrator in accordance with Section 10.4 hereof and such successor's acceptance of such appointment in accordance with Section 10.5 hereof. The services of the Trust Administrator shall also terminate upon its bankruptcy, provided that such termination shall not become effective until the appointment of a successor Trust Administrator in accordance with Section 10.4 hereof and such successor's acceptance of such appointment in accordance with Section 10.5 hereof.

10.3. Effect of Resignation or Removal. The resignation, removal or bankruptcy of the Trust Administrator shall not operate to terminate the Trust or to revoke any existing agency created pursuant to the terms of the Plan, the Confirmation Order or this Trust Agreement or invalidate any action theretofore taken by the Trust Administrator. The exculpation, indemnity and limitation of liability provisions of Article X of this Trust Agreement shall survive the resignation, removal or bankruptcy of the Trust Administrator. All fees and expenses properly incurred by the Trust Administrator prior to the resignation, Incompetency, removal or bankruptcy of the Trust Administrator shall be paid from the Avoidance Action Trust Administrative Cash, the GUC Trust Supplemental Cash or the Other Supplemental Cash (other than in respect of the Other Debtor Residual Accepted Assets and activities related thereto), from the Other Debtor Residual Trust Administrative Cash (in respect of the Other Debtor Residual Accepted Assets and activities related thereto) or from Avoidance Action Trust SEC Reporting Cash (in respect of Avoidance Action Trust SEC Reporting Costs in accordance with Section 2.3(e) hereof), unless such fees and expenses are disputed by (x) the Trust Monitor or (y) the successor Trust Administrator, in which case the Bankruptcy Court shall resolve the dispute and any disputed fees and expenses of the predecessor Trust Administrator that are subsequently allowed by the Bankruptcy Court shall be paid from the Avoidance Action Trust Administrative Cash, the GUC Trust Supplemental Cash or the Other Supplemental Cash (other than in respect of the Other Debtor Residual Accepted Assets and activities related thereto), from the Other Debtor Residual Trust Administrative Cash (in respect of the Other Debtor Residual Accepted Assets and activities related thereto) or from Avoidance Action Trust SEC Reporting Cash (in respect of Avoidance Action Trust SEC Reporting Costs in accordance with Section 2.3(e) hereof). In the event of the resignation, removal or bankruptcy of the Trust Administrator, such Trust Administrator shall:

(a) promptly execute and deliver such documents, instruments and other writings as may be reasonably requested by the successor Trust Administrator or directed by the Bankruptcy Court to effect the termination of such Trust Administrator's capacity under this Trust Agreement;

(b) promptly deliver to the successor Trust Administrator all documents, instruments, records and other writings related to the Trust as may be in the possession of such Trust Administrator; and

(c) otherwise assist and cooperate in effecting the assumption of its obligations and functions by such successor Trust Administrator.

10.4. Appointment of Successor. In the event of the resignation, removal, Incompetency or bankruptcy of the Trust Administrator, the Trust Monitor shall promptly appoint a successor Trust Administrator, *provided that* such appointment shall not take effect unless approved by the Bankruptcy Court upon the petition of the Trust Monitor and until the successor Trust Administrator shall have delivered written acceptance of its appointment as described Section 10.5 below. If a successor Trust Administrator does not take office within thirty (30) days after the resignation, removal, Incompetency or bankruptcy of the retiring Trust Administrator, the Bankruptcy Court, upon its own motion or the motion of the retiring Trust Administrator or any Trust Beneficiary, shall appoint a successor Trust Administrator.

10.5. Acceptance of Appointment by Successor Trust Administrator. Any successor Trust Administrator appointed hereunder shall execute an instrument accepting its appointment and shall deliver one counterpart thereof to the Bankruptcy Court for filing and to the Trust Monitor and, in case of the Trust Administrator's resignation, to the resigning Trust Administrator. Thereupon, such successor Trust Administrator shall, without any further act, become vested with all the duties, powers, rights, obligations, title, discretion and privileges of its predecessor in the Trust with like effect as if originally named Trust Administrator and shall be deemed appointed pursuant to Bankruptcy Code Section 1123(b)(3)(B); *provided, however,* such successor Trust Administrator shall file an amendment to the Certificate of Trust with the Secretary of State as required by the Delaware Act. The predecessor Trust Administrator shall duly assign, transfer and deliver to such successor Trust Administrator all Avoidance Action Trust Assets held by such predecessor Trust Administrator hereunder and shall, as directed by the Bankruptcy Court or reasonably requested by such successor Trust Administrator, execute and deliver an instrument or instruments conveying and transferring to such successor Trust Administrator upon the trusts herein expressed, all the duties, powers, rights, obligations, title, discretion and privileges of the predecessor Trust Administrator.

10.6. Successor Entity to Trust Administrator. Any business entity into which the Trust Administrator may be merged or converted or with which it may be consolidated, or any entity resulting from any merger, conversion or consolidation to which the Trust Administrator shall be a party, or any entity succeeding to all or substantially all of the corporate trust business of the Trust Administrator, shall be the successor of the Trust Administrator hereunder, without the execution or filing of any paper or any further act on the part of any of the parties hereto; *provided, however,* such successor Trust Administrator shall file an amendment to the Certificate of Trust with the Secretary of State as required by the Delaware Act.

**ARTICLE XI**  
**TRUST MONITOR**

11.1. General.

(a) The Trust Monitor shall oversee the activities of the Trust Administrator as set forth in this Trust Agreement. In all circumstances, the Trust Monitor shall act in the best interests of all Trust Beneficiaries, in furtherance of the purpose of the Trust, and in accordance with this Trust Agreement.

(b) In furtherance of its rights and responsibilities under this Trust Agreement, the Trust Monitor shall have access, on reasonable advance notice and during regular business hours, to all such books and records of the Trust and the Trust Administrator, shall have the right to consult with all such professionals engaged by the Trust Administrator and shall participate in all such meetings of the Trust Administrator and the Trust Professionals as the Trust Monitor deems reasonably necessary or appropriate. Any documents shared between the Trust Administrator and the Trust Monitor shall be subject to joint privilege, and such sharing shall not be deemed to waive any attorney-client or work product privilege in respect of such documents.

(c) [Intentionally omitted.]

(d) Notwithstanding anything in this Section 11.1 or Section 11.2 hereof, the Trust Monitor shall not take (or fail to take) any action which will cause the Trust (other than the Avoidance Action Trust Claims Reserve) to fail to qualify as a liquidating trust within the meaning of Treasury Regulation section 301.7701-4(d) that is treated as a grantor trust.

11.2. Appointment and Removal of the Trust Monitor.

(a) Subject to Section 11.2(d), the Trust Monitor shall serve until the earlier of (w) the final distribution of all Distributable Trust Assets and the Distributable Other Debtor Residual Trust Assets, if any, (x) its resignation pursuant to subsection (b) of this Section 11.2, (y) its removal pursuant to subsection (c) of this Section 11.2 or (z) its bankruptcy or insolvency.

(b) The Trust Monitor may resign at any time by written notice of resignation to the Trust Administrator, a copy of which shall also be filed by the Trust Monitor with the Bankruptcy Court. Such resignation shall be effective no earlier than sixty (60) days from the date of such notice or such earlier time as a successor is appointed in accordance with the provisions of subsection (d) of this Section 11.2.

(c) The holders of a majority of the Units or the DIP Lenders may at any time petition the Bankruptcy Court for the removal of the Trust Monitor, but only for good cause shown. Such removal shall become effective on the date ordered by the Bankruptcy Court.

(d) In the event of the resignation, removal, bankruptcy or insolvency of the Trust Monitor, the Trust Administrator shall promptly appoint a successor Trust Monitor, provided that such appointment shall not take effect unless approved by the Bankruptcy Court

upon the petition of the Trust Administrator and until the successor Trust Monitor shall have delivered written acceptance of its appointment as described in clause (e) of this Section 11.2 below; and provided further that until a new Trust Monitor's appointment is effective, the resigning Trust Monitor's appointment shall remain in effect, and the resigning Trust Monitor shall fulfill all obligations and duties of the Trust Monitor. If a successor Trust Monitor does not take office within thirty (30) days after the resignation, removal, incompetency, bankruptcy or insolvency of the retiring Trust Monitor, the Bankruptcy Court, upon its own motion or the motion of the retiring Trust Monitor or any Trust Beneficiary, shall appoint a successor Trust Monitor.

(e) All fees and expenses properly incurred by the Trust Monitor prior to the resignation, Incompetency, removal or bankruptcy of the Trust Monitor shall be paid from the Avoidance Action Trust Administrative Cash, the GUC Trust Supplemental Cash or the Other Supplemental Cash (other than in respect of the Other Debtor Residual Accepted Assets and activities related thereto), from the Other Debtor Residual Trust Administrative Cash (in respect of the Other Debtor Residual Accepted Assets and activities related thereto) or from Avoidance Action Trust SEC Reporting Cash (in respect of Avoidance Action Trust SEC Reporting Costs in accordance with Section 2.3(e) hereof), unless such fees and expenses are disputed by (x) the Trust Administrator or (y) the successor Trust Monitor, in which case the Bankruptcy Court shall resolve the dispute and any disputed fees and expenses of the predecessor Trust Monitor that are subsequently allowed by the Bankruptcy Court shall be paid from the Avoidance Action Trust Administrative Cash, the GUC Trust Supplemental Cash or the Other Supplemental Cash (other than in respect of the Other Debtor Residual Accepted Assets and activities related thereto) from the Other Debtor Residual Trust Administrative Cash (in respect of the Other Debtor Residual Accepted Assets and activities related thereto) or from Avoidance Action Trust SEC Reporting Cash (in respect of Avoidance Action Trust SEC Reporting Costs in accordance with Section 2.3(e) hereof).

(f) Any successor Trust Monitor appointed hereunder shall execute an instrument accepting its appointment and shall deliver one counterpart thereof to the Bankruptcy Court for filing and to the Trust Administrator.

(g) Immediately upon effectiveness of the appointment of a successor Trust Monitor, all rights, powers, duties, authority, and privileges of the predecessor Trust Monitor hereunder will be vested in and undertaken by the successor Trust Monitor without any further act. The successor Trust Monitor shall not be liable personally for any act or omission of the predecessor Trust Monitor.

11.3. Approval of and Consultation with the Trust Monitor.

(I) Other Than in Respect of the Other Debtor Residual Accepted Assets

(a) Notwithstanding anything in this Trust Agreement to the contrary, the Trust Administrator shall submit to the Trust Monitor for its review and prior approval the following matters, in addition to any other matters that expressly require the approval of the Trust Monitor pursuant to the terms of the Plan, the Confirmation Order or this Trust Agreement:



(i) Any decision to settle or otherwise resolve the Term Loan Avoidance Action;

(ii) Any decision to refrain from making any distributions to the holders of Allowed General Unsecured Claims or Units, as the case may be, in accordance with this Trust Agreement, except as expressly permitted herein;

(iii) Any decision to retain and/or to terminate the retention of Trust Professionals (other than legal counsel retained to represent the Trust Administrator in connection with its role as Trust Administrator, which shall be in the Trust Administrator's sole discretion);

(iv) The incurrence of any cost or expense of the Trust in excess of 10% of any individual line item therefor in the approved Budget, measured on a quarterly basis; *provided, however*, that approval of the Trust Monitor shall not be required in the case of any cost or expense authorized by further order of the Bankruptcy Court;

(v) The Budget described in Section 6.3 hereof and any changes thereto;

(vi) Any amendment of this Trust Agreement as provided in Section 13.13 hereof; and

(vii) Any distribution that is not made in accordance with the provisions of Article V as contemplated by Section 5.7; *provided, however*, that any deviation from the provisions of Article V other than as contemplated by Section 5.7 shall also require approval of the Bankruptcy Court.

(b) In addition to any other matters that expressly require consultation with the Trust Monitor pursuant to the terms of the Plan, the Confirmation Order or this Trust Agreement, the Trust Administrator shall consult with the Trust Monitor in advance of an application to the Bankruptcy Court to use, or to sell or borrow against, the Term Loan Avoidance Action or the Distributable Trust Assets in order to satisfy expenses of the Trust, as contemplated by Section 6.1(b) and Section 6.1(d) hereof.

(c) In the event of any disagreement between the Trust Administrator and the Trust Monitor regarding any matter requiring the approval or direction of the Trust Monitor under this Trust Agreement, the Trust Administrator and the Trust Monitor shall consult and negotiate diligently and in good faith to resolve such disagreement. If despite their good faith efforts, the Trust Administrator and the Trust Monitor are unable to resolve any disagreement, or the Trust Administrator cannot otherwise obtain approval or direction from the Trust Monitor as required by this Trust Agreement, the Trust Administrator may petition the Bankruptcy Court, with a copy to the Trust Monitor, requesting such approval or direction.

(II) In Respect of the Other Debtor Residual Accepted Assets

The Trust Monitor shall have the rights, powers and privileges to act in respect of the Other Debtor Residual Accepted Assets, if any, in the manner set forth in Section 11.3 (I),

*mutatis mutandis* and to the extent applicable. For the avoidance of doubt, the Trust Monitor shall not be obligated to undertake any activities in respect of the Other Debtor Residual Trust Assets unless there shall be available sufficient Other Debtor Residual Trust Administrative Cash to pay in full its fees, costs and expenses in respect thereof.

11.4. Exculpation and Indemnification; Limitation of Liability. To the fullest extent permitted by applicable law, the Trust Monitor Parties shall not be subject to personal liability, and shall be exculpated and indemnified, and shall have the right to obtain advances to cover reasonable expenses of defense, to the same extent as the Trust Administrator Parties pursuant to Section 9.2, Section 9.4, Section 9.5, Section 9.6 and Section 10.3. In no event will the Trust Monitor Parties be liable for punitive, exemplary, consequential, special or other damages for a breach of, or otherwise in connection with, this Trust Agreement under any circumstances.

11.5. Compensation and Expenses.

(a) The Trust Monitor shall receive fair and reasonable compensation for its services (other than in respect of the Other Debtor Residual Accepted Assets and activities related thereto), to be paid out of the Avoidance Action Trust Administrative Cash, in accordance with the approved Budget (or from the Avoidance Action Trust SEC Reporting Cash in accordance with Section 2.3(e) hereof, the GUC Trust Supplemental Cash in accordance with Section 2.3(f) hereof, or the Other Supplemental Cash in accordance with Section 6.1(d) hereof). The Trust Monitor shall be entitled on a monthly basis, without the need for approval of the Bankruptcy Court, to direct the Trust Administrator to reimburse the Trust Monitor (i) from the Avoidance Action Trust Administrative Cash, the GUC Trust Supplemental Cash or the Other Supplemental Cash, as applicable, for all reasonable out-of-pocket expenses actually incurred in the performance of duties in accordance with this Trust Agreement, consistent with the Budget prepared pursuant to Section 6.3 hereof and (ii) from the Avoidance Action Trust SEC Reporting Cash for such compensation and all reasonable out-of-pocket expenses actually incurred in the performance of duties in accordance with this Trust Agreement.

(b) The Trust Monitor shall receive compensation for its services than in respect of the Other Debtor Residual Accepted Assets and activities related thereto, to be paid out of the Other Debtor Residual Trust Administrative Cash, as the Trust Monitor and a majority in interest of the DIP lenders shall agree; provided that the Trust Monitor shall not be obligated to undertake any activities in respect of the Other Debtor Residual Accepted Assets unless such compensation arrangements shall be acceptable to the Trust Monitor in its sole discretion.

## **ARTICLE XII**

### **ACTION BY MAJORITY OF HOLDERS OF UNITS**

Holders of a majority of the Units or the DIP Lenders from time to time outstanding may petition the Bankruptcy Court to remove the Trust Administrator in accordance with Section 10.2 or to remove the Trust Monitor in accordance with Section 11.1, but in each case only for good cause shown. In determining whether the holders of a majority of the Units have concurred in

any such petition, Units held by the Trust Administrator or the Trust Monitor or any of their respective Affiliates shall be disregarded.

**ARTICLE XIII**  
**MISCELLANEOUS PROVISIONS**

13.1. Actions Taken on Other Than Business Day. In the event that any payment or act under the Plan, the Confirmation Order or this Trust Agreement is required to be made or performed on a date that is not a Business Day, then the making of such payment or the performance of such act may be completed on the next succeeding Business Day, but shall be deemed to have been completed as of the required date.

13.2. Governing Law. This Trust Agreement shall be governed by and construed in accordance with the laws of the State of Delaware without giving effect to rules governing conflicts of law.

13.3. Jurisdiction. Subject to the proviso below, the parties agree that the Bankruptcy Court shall have exclusive and continuing jurisdiction over the Trust and the Trust Administrator, including the administration and activities of the Trust and the Trust Administrator; *provided, however,* that notwithstanding the foregoing, the Trust Administrator shall have power and authority to bring any action in any court of competent jurisdiction to prosecute any claims or Causes of Action assigned to the Trust, including the Delaware Chancery Court, the Delaware Superior Court and the Delaware Supreme Court.

13.4. Third Party Beneficiary. Trust Beneficiaries (including the DIP Lenders in their capacities as such) are third party beneficiaries of this Trust Agreement. The Trust Administrator Parties (other than the Trust Administrator) are third party beneficiaries of the provisions of Section 9.2, Section 9.4 and Section 9.6 of this Trust Agreement. The Trust Monitor Parties (other than the Trust Monitor) are third party beneficiaries of the provisions of Section 11.4 of this Trust Agreement, and, to the extent incorporated therein, Section 9.2, Section 9.4, Section 9.5 and Section 9.6 of this Trust Agreement. Except as aforesaid, there are no other third party beneficiaries of this Trust Agreement.

13.5. Severability. In the event any provision of this Trust Agreement or the application thereof to any person or circumstances shall be determined by a final, non-appealable judgment or order to be invalid or unenforceable to any extent, the remainder of this Trust Agreement or the application of such provision to persons or circumstances or in jurisdictions other than those as to or in which it is held invalid or unenforceable, shall not be affected thereby, and each provision of this Trust Agreement shall be valid and enforceable to the fullest extent permitted by law.

13.6. Notices. Any notice or other communication required or permitted to be made under this Trust Agreement shall be in writing and shall be deemed to have been sufficiently given, for all purposes, if delivered personally, by email, facsimile, sent by nationally recognized overnight delivery service or mailed by first-class mail:

(A) if to the Trust Administrator, to:

Wilmington Trust Company  
Rodney Square North  
1100 North Market Street  
Wilmington, Delaware, 19890-1615  
Phone: (302) 636-6000  
Fax: (302) 636-4140  
Attn: Corporate Trust Administration

With a copy to:

Binder & Schwartz LLP  
366 Madison Avenue, 6th Floor  
New York, NY 10017  
Phone: (212) 510-7008  
Attn: Eric B. Fisher

(B) if to the Trust Monitor, to:

Arthur J. Gonzalez  
New York University School of Law  
40 Washington Square South  
New York, NY 10012

(C) if to any Trust Beneficiary, to:

(1) in the case of a DIP Lender,

a. if to the U.S. Treasury, to:

United States Department of the Treasury  
1500 Pennsylvania Avenue, NW  
Washington, D.C. 20220  
Attn: Chief Counsel, Office of Financial Stability  
Telecopier: (202) 927-9225

with a copy to:

[OFSCchiefCounselNotices@treasury.gov](mailto:OFSCchiefCounselNotices@treasury.gov)

b. if to Export Development Canada, to:

Export Development Canada  
151 Slater Street  
Ottawa, Ontario  
Canada K1A 1K3

Attention: Loans Services  
Telecopy: 613-598-2514;

with a copy to:

Export Development Canada  
151 Slater Street  
Ottawa, Ontario  
Canada K1A 1K3  
Attention: Asset Management/Covenants Officer  
Telecopy: 613-598-3186

- (2) in the case of a holder of an Allowed General Unsecured Claim, to the last known address of such holder according to the Debtors' Schedules and/or such holder's proof of claim; and
- (3) in the case of holder of Units, to such address as appears on the books and records of the Trust Administrator, or such other address as may be designated from time to time by notice given in accordance with the provisions of this Section 13.6.

13.7. Headings. The headings contained in this Trust Agreement are solely for convenience of reference and shall not affect the meaning or interpretation of this Trust Agreement or of any term or provision hereof.

13.8. Plan. The terms of this Trust Agreement are intended to supplement the terms provided by the Plan and the Confirmation Order. To the extent that the terms of sections 5.6 and 6.5 of the Plan are inconsistent with the terms set forth in this Trust Agreement with respect to the Trust, then the terms of the Trust Agreement shall govern. All other provisions of the Plan shall supersede the provisions of this Trust Agreement, including section 6.15 of the Plan, which provides that the restrictions set forth in paragraph 20 of the Final Order approving the DIP Credit Agreement (ECF No. 2529) shall continue to apply.

13.9. Ambiguities and Construction.

(a) The Trust created by this Trust Agreement (other than the Avoidance Action Trust Claims Reserve) is intended to qualify as a liquidating trust under Treasury Regulation section 301.7701-4(d) for U.S. federal and applicable state and local income tax purposes and, to the extent provided by law, shall be governed and construed in all respects as such a trust and any ambiguity herein shall be construed consistent herewith and, if necessary, this Trust Agreement may be amended to comply with such U.S. federal and applicable state and local income tax laws, which amendments may apply retroactively.

(b) Unless the context otherwise requires:

- (i) a term has the meaning assigned to it;
- (ii) “or” is not exclusive;
- (iii) words in the singular include the plural, and in the plural include the singular;
- (iv) all references herein to Articles, Sections and other subsections, unless referring specifically to the Plan or provisions of the Bankruptcy Code, the Bankruptcy Rules, or other law, statute or regulation, refer to the corresponding Articles, Sections and other subsections of this Trust Agreement;
- (v) the words “hereof,” “herein,” “hereunder” and similar words refer to this Trust Agreement as a whole and not to any particular provision, Article, Section or subsection of this Trust Agreement unless otherwise specified;
- (vi) words importing persons shall include firms, associations, corporations and other entities;
- (vii) any pronoun shall include the corresponding masculine, feminine and neuter forms; and
- (viii) “including” means including without limitation.

13.10. Entire Trust Agreement. This Trust Agreement contains the entire agreement between the parties and supersedes all prior and contemporaneous agreements or understandings between the parties with respect to the subject matter hereof.

13.11. Cooperation. The Debtors shall turn over or otherwise make available to the Trust Administrator at no cost to the Trust or the Trust Administrator, all books and records reasonably required by the Trust Administrator to carry out its duties hereunder, and agree to otherwise reasonably cooperate with the Trust Administrator in carrying out its duties hereunder, subject to the obligation to preserve the confidential nature of the Debtors’ books and records, as provided in Section 13.12.

13.12. Confidentiality. The Trust Administrator and the Trust Monitor, and their respective employees, members, agents, professionals and advisors, including the Trust Professionals (each a “Confidential Party” and collectively the “Confidential Parties”) shall hold strictly confidential and not use for personal gain any material, non-public information of which they have become aware in their capacity as a Confidential Party, of or pertaining to any Debtor to which any of the Avoidance Action Trust Assets relates or which is otherwise received from the Debtors by the Trust; *provided, however*, that such information may be disclosed if

- (i) it is now or in the future becomes generally available to the public other than as a result of a disclosure by the Confidential Parties; or

(ii) such disclosure is required of the Confidential Parties pursuant to legal process, including subpoena or other court order or other applicable laws or regulations.

In the event that any Confidential Party is requested to divulge confidential information pursuant to clause (ii), such Confidential Party shall promptly, in advance of making such disclosure, provide reasonable notice of such required disclosure to the Trust Administrator (or the Trust Monitor in case the Trust Administrator is the disclosing party) to allow sufficient time to object to or prevent such disclosure through judicial or other means and shall cooperate reasonably with the Trust Administrator (or the Trust Monitor, as applicable) in making any such objection, including appearing in any judicial or administrative proceeding in support of any objection to such disclosure.

13.13. Amendment and Waiver.

(a) The Trust Administrator, with the approval of the Trust Monitor, may amend or supplement this Trust Agreement without notice to or consent of the Bankruptcy Court or any Trust Beneficiary for the purpose of (x) curing any ambiguity, omission, inconsistency or correcting or supplementing any defective provision; (y) evidencing and providing for the acceptance of the appointment of a successor Trust Administrator or Trust Monitor; or (z) making any other changes to this Trust Agreement that does not adversely affect the interests of the Trust Beneficiaries in any material respect.

(b) The Trust Administrator may amend or supplement this Trust Agreement for any other purpose, but only on petition to, and with the approval of, the Bankruptcy Court; *provided* that (x) no amendment or supplement to this Trust Agreement shall be inconsistent with the purpose and intent of the Trust to dispose of in an expeditious but orderly manner the Avoidance Action Trust Assets in accordance with the terms of the Plan, the Confirmation Order and this Trust Agreement, and (y) this Trust Agreement shall not be amended in a manner that is inconsistent with the Plan in the form confirmed by the Bankruptcy Court, subject to any post-confirmation modifications to the Plan pursuant to Section 1127 of the Bankruptcy Code.

(c) Any amendment to this Trust Agreement shall be filed with the Bankruptcy Court.

(d) No amendment shall be made to any provision of this Trust Agreement that materially and adversely affects the rights of the DIP Lenders without the written consent of the DIP Lenders.

(e) The Trust Administrator shall file any amendment to the Certificate of Trust with the Secretary of State as may be required or permitted by the Delaware Act.

13.14. Counterparts. This Trust Agreement may be executed in any number of counterparts, each of which shall be deemed an original, but all such counterparts shall together constitute but one and the same instrument. A facsimile or portable document file (PDF) signature of any party shall be considered to have the same binding legal effect as an original signature.

**IN WITNESS WHEREOF**, the parties hereto have executed this Trust Agreement or caused this Trust Agreement to be duly executed by their respective officers, representatives or agents, effective as of the date first above written.

**WILMINGTON TRUST COMPANY, as Trust  
Administrator and trustee**

By: \_\_\_\_\_  
Name:  
Title:

– and –

**ARTHUR J. GONZALEZ, as Trust Monitor**

By: \_\_\_\_\_  
Name:  
Title:



**Exhibit A**

Cash Accounts:

AAT Distributable Trust Assets Account  
Avoidance Action Budget Sub Account  
Avoidance Action Assets Sub Account  
Avoidance Action Trust SEC Reporting Costs Account  
GUC Trust Supplemental Cash Account  
Litigation Cost Advance Funding Account  
Other Supplemental Cash Account  
Segregated Account

**Exhibit B**

**FORM OF**  
**CERTIFICATE OF TRUST**  
**OF**  
**MOTORS LIQUIDATION COMPANY AVOIDANCE ACTION TRUST**

THIS Certificate of Trust of Motors Liquidation Company Avoidance Action Trust (the "Trust") is being duly executed and filed on behalf of the Trust by the undersigned, as trustee, to form a statutory trust under the Delaware Statutory Trust Act (12 Del. C. § 3801 et seq.) (the "Act").

1. Name. The name of the statutory trust formed by this Certificate of Trust is Motors Liquidation Company Avoidance Action Trust.

2. Delaware Trustee. The name and business address of the trustee of the Trust with a principal place of business in the State of Delaware are Wilmington Trust Company, 1100 North Market Street, Wilmington, Delaware 19890, Attn: Corporate Trust Administration.

3. Effective Date. This Certificate of Trust shall be effective upon filing.

IN WITNESS WHEREOF, the undersigned has duly executed this Certificate of Trust in accordance with Section 3811(a)(1) of the Act.

WILMINGTON TRUST COMPANY, not in its individual capacity but solely as Trust administrator and trustee

By: \_\_\_\_\_  
Name:  
Title:

## **EXHIBIT F**

C549mota

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

3 UNITED STATES DEPARTMENT OF  
4 TREASURY,

5 Appellant,

6 v.

12 CV 00561 (CM)

7 OFFICIAL COMMITTEE OF  
8 UNSECURED CREDITORS OF MOTORS  
9 LIQUIDATED COMPANY, ET AL.,

10 Appellees.

11 EXPORT DEVELOPMENT CANADA,

12 Appellant,

13 v.

12 CV 00695 (CM)

14 OFFICIAL COMMITTEE OF  
15 UNSECURED CREDITORS OF MOTORS  
16 LIQUIDATED COMPANY, ET AL.,

17 Appellees.

18 New York, N.Y.  
19 May 4, 2012  
20 11:34 a.m.

21 Before:

22 HON. COLLEEN MCMAHON

23 District Judge

C549mota

APPEARANCES

PREET BHARARA

United States Attorney for the  
Southern District of New York

DAVID S. JONES

NATALIE KUEHLER

Assistant United States Attorneys

VEDDER PRICE

Attorneys for Appellant Export Development Canada

BY: MICHAEL J. EDELMAN

MICHAEL L. SCHEIN

KRAMER LEVIN NAFTALIS & FRANKEL LLP

Attorneys for Appellee Official Committee of Unsecured  
Creditors of Motors Liquidation Company

BY: THOMAS MOERS MAYER

CRAIG L. SIEGEL

JONATHAN M. WAGNER

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

1 (In open court; case called)

2 THE COURT: Okay. Have a seat.

3 Now, I have been playing with this case off and on all  
4 week. And I would like to run a kind of unorthodox argument,  
5 at least at first, because I think it will help me to  
6 crystallize some thinking that I've been doing and to give you  
7 opportunities to, as you see this developing, poke holes in my  
8 reasoning. So rather than have you all do an argument -- and  
9 I'll let you say whatever you want I would love it if you  
10 would -- if you could just try something a little different.

11 Mr. Jones you're speaking for the government?

12 MR. JONES: Yes, your Honor.

13 THE COURT: And who is going to speak for Canada?

14 MR. EDELMAN: Michael Edelman, your Honor.

15 THE COURT: And Mr. Mayer, you're speaking for --

16 MR. MAYER: Yes, your Honor.

17 THE COURT: Okay. Here's what I want to do. I'm  
18 going to throw out a thought or a proposition or a question.  
19 And I'd like you one, two, three, to respond, either to agree  
20 with me or to disagree with me. And if you disagree with me  
21 tell me why. Okay. But part of this is because I am not, as  
22 you all are, an expert in bankruptcy law. I'm pretty good at  
23 contract interpretation. But I am not an expert in bankruptcy  
24 law. And I don't claim to be. And I want to be sure I'm not  
25 in my thinking running afoul of some bankruptcy stuff that I

1 don't know about. Okay.

2 So, here goes. I am the governments of the United  
3 States and Canada. I give the bankruptcy estate of General  
4 Motors a hundred million dollar loan postpetition.

5 That, as I understand it, that postpetition loan,  
6 gives rise to an administrative claim against the estate, which  
7 means that my loan has to be repaid in full ahead of a whole  
8 bunch of other types of claims, including the claims of the  
9 unsecured creditor. Forget about the SuperPri.

10 I've got an administrative claim. Administrative  
11 claims come ahead of unsecured creditors.

12 Any problem so far with my thinking?

13 Great. Okay.

14 I have just done something entirely unprecedented for  
15 the governments of the United States and Canada because I have  
16 gotten involved in this too-big-to-fail bankruptcy and I've  
17 become the DIP lender.

18 So I am not going to be just another administrative  
19 claimant. I'm not willing to go forward on that basis. I want  
20 to be not just in a group of people who are the first guys in  
21 line, I want to be the first guy in line.

22 So I get something that's called super-priority, which  
23 except for something called the carve-out -- and I understand  
24 about the carve-out, the U.S. trustee always comes first --  
25 puts me ahead of all the other administrative claimants in the

1 sense that I'm going to get every dime that I'm owed before any  
2 other administrative claimant get anything else.

3 Am I right? That's what it means to have  
4 super-priority?

5 MR. JONES: Your Honor --

6 THE COURT: Yes or no?

7 MR. JONES: Yes but.

8 Yes. That is absolutely correct. It's the way it  
9 usually works. It is the way it worked for the treasury in  
10 Canada advancing money to fund the initial rescue and  
11 turnaround and sale process.

12 As to the slice that is the funding of the wind-down,  
13 once that sale occurred, the DIP lenders, meaning treasury and  
14 Canada, did agree to allow one set of people to come in ahead  
15 of them.

16 THE COURT: The carve-out people.

17 MR. JONES: In addition to the carve-out people, they  
18 agreed that administrative expenses of the estate could come  
19 first.

20 THE COURT: Thank you.

21 MR. JONES: Environmental clean up. Other  
22 professional fees.

23 Other than that, you're absolutely correct.

24 THE COURT: You mean the lawyers got to come in ahead  
25 of the government?



1 MR. JONES: Yes.

2 THE COURT: As a taxpayer I am outraged. As a lawyer  
3 I am thrilled.

4 But I just want to be clear because I literally never  
5 heard the word super-priority before this week.

6 So super-priority defines my place in line. That's  
7 what it defines, correct?

8 Priority. I mean I understand bankruptcy priority. I  
9 remember that from the bar review course. I still do remember  
10 the bar review course.

11 But super-priority, I'm really first in line because  
12 I'm going to get all my money before other people get theirs,  
13 who I would normally share, right?

14 MR. JONES: Correct.

15 THE COURT: That's the superness of my priority.

16 Okay. And my super-priority relates to my right to be  
17 repaid for my loan. And the right to be repaid for my loan  
18 gives me something called a claim. I'm right?

19 And it's the claim that enjoys super-priority status.

20 MR. JONES: That's correct.

21 And there's different varieties of claims. So this is  
22 a long-winded term, super-priority administrative expense  
23 claim.

24 THE COURT: Right. Allowed super-priority  
25 administrative expense. It's a claim. Because everything in

1 bankruptcy, as I understand it, is a claim against the estate.  
2 Okay.

3 Now, as a general matter, as I understand how  
4 bankruptcy works, administrative claims are paid in accordance  
5 with their priority status among the members of the class out  
6 of all the assets of the estate.

7 MR. JONES: Correct.

8 THE COURT: In the ordinary course, right? Unless  
9 there's an agreement otherwise.

10 MR. JONES: Correct.

11 THE COURT: It will be out of less than all the assets  
12 of the case.

13 Is there any reason in the bankruptcy law that I don't  
14 know about why an administrative claimant can't say: I will --  
15 ordinarily I could look to the whole pot of assets that's left  
16 when it's my turn, when we get to my place in line, but I'll  
17 agree that we won't look to the farm, Black Acre.

18 Is there any reason in the bankruptcy law why an  
19 administrative claimant can't say that? Can't agree to that?

20 MR. EDELMAN: If they expressly agree.

21 THE COURT: As long as it's expressed, they can agree.  
22 That's all I want to know. Okay.

23 Now because I am who I am, the governments of the  
24 United States and Canada, I am in a position not just to say I  
25 want to be first in line. I can extract, what looks to me like

1 belt-and-suspenders protection, by securing the estate's  
2 obligation to repay my postpetition loan with collateral which  
3 creates a lien in my favor, right?

4 And the assets on which I obtain a lien in this case,  
5 which assures that nobody is going to get a dime of those  
6 assets until I've been paid in full, consists of everything in  
7 the GM bankruptcy estate except a few things; is that right?

8 MR. JONES: Yes.

9 THE COURT: Okay. So it's the whole pot minus a few  
10 things.

11 One of those few things is the equity interest in new  
12 GM that is going to the unsecured creditors?

13 Correct?

14 MR. JONES: Correct.

15 MR. EDELMAN: That's correct.

16 THE COURT: And one of those things is the proceeds of  
17 this avoidance action against the prepetition lenders. That's  
18 one of the things that's not part of the collateral.

19 MR. EDELMAN: That's not part of the collateral.  
20 That's correct.

21 THE COURT: That's not part of the collateral. Okay.

22 And that's the action that should have been decided a  
23 long time ago. No offense. I mean two years is an awful long  
24 time to wait. Anybody want to withdraw the reference on that?  
25 Happy to decide that for you.

1           There was a point at which I wanted to know what was  
2 going to happen with that motion just because it's like why am  
3 I doing this? Now, whether there's jurisdiction or not,  
4 whether there's a 12(b)(1) motion or not, why am I doing this  
5 now? Why don't I just say I'll wait? I don't have to think  
6 this through. But. Okay. So, I've been thinking it through.  
7 Maybe some day you'll get a decision on that.

8           So now let's turn to the language that I have to  
9 construe, which is the language in the wind-down order.

10           The sixth decretal paragraph of the wind-down order,  
11 subsection (a), provides that the government lenders have  
12 super-priority status.

13           That's what it provides for, correct?

14           It confirms something that happened earlier in the  
15 negotiations but it -- this is the last and final order. This  
16 is the order I'm going to construe. And it says the DIP  
17 lenders have super-priority status for their claim.

18           MR. JONES: Your Honor, I think that's right in  
19 substance. In case it's helpful, I'm just going --

20           THE COURT: I have the language. I want to put the  
21 language into plain English.

22           The plain English -- I don't care about anything  
23 prior. I don't want to hear anything prior. Do it my way and  
24 then I'll let you say anything you want.

25           MR. JONES: I do have a narrow correction of what you

1 said, which is that paragraph, I don't read it -- it's  
2 self-conferring the super-priority status. It confirms it  
3 exists. The prior paragraph on the same page carries over that  
4 super-priority status.

5 THE COURT: I don't care whether it's conferred, it's  
6 carried over, or what. But it says the claims -- it talks  
7 about the claims -- the claims of the DIP lenders. And we all  
8 agreed the claims of the DIP lenders are the claims to  
9 repayment of the postpetition loans. There are no other claims  
10 of the DIP lenders, are there?

11 MR. JONES: No. You've got it right, your Honor.

12 THE COURT: So the claims of the DIP lenders that  
13 arise from the amended DIP facility shall be and are accorded a  
14 super-priority administrative expense status. And subject to  
15 the carve -- only to the carve-out shall have priority over any  
16 and all other administrative expenses, with a little "provided"  
17 that you corrected me about earlier. Okay.

18 So paragraph 6(a) describes the priority status of the  
19 DIP lenders' claim for repayment of the loan.

20 And paragraph (b) -- so let me ask a question. Is  
21 there anything in paragraph (a) that I don't understand that  
22 says a word about what will be in the pot that the  
23 super-priority claimant can look to for repayment of its loan?

24 I don't see anything that says: And this is what is  
25 in the pot at the time that you exercise your super-priority

1 status.

2 Am I right about that?

3 MR. JONES: Yes.

4 THE COURT: Okay. Then there is paragraph (b) of the  
5 sixth decretal paragraph, and that paragraph provides that the  
6 liens on the collateral that are being used to super-duper  
7 secure my super-priority loan -- claim -- I want to be very  
8 precise about this -- my super-priority claim, consists of  
9 everything that's in the estate except the equity interest in  
10 new GM and the proceeds, if there are any, of this avoidance  
11 action.

12 That's excluded from the collateral, right?

13 MR. EDELMAN: That's correct.

14 THE COURT: So all that paragraph six does is describe  
15 what my collateral consists of, what I have a lien on,  
16 paragraph 6(b).

17 MR. EDELMAN: Yes.

18 THE COURT: Now let's go to the tenth decretal  
19 paragraph.

20 The tenth decretal paragraph does not talk about  
21 claims. And the tenth decretal paragraph does not talk about  
22 liens.

23 The tenth decretal paragraph talks about loans.

24 A loan is not a claim. A claim is for repayment of  
25 the loan. So the loan is something different than the claim.

1           A loan is not a lien. A lien is something that you  
2 have to secure repayment of a loan.

3           The tenth decretal paragraph talks about the actual  
4 loans that give rise to my super-priority claim and that are  
5 collateralized with the property on which I have liens. And  
6 that paragraph says those loans are nonrecourse loans.

7           Right?

8           Well, I know what a nonrecourse loan is, folks. And I  
9 did not have to go to law school to know what a nonrecourse  
10 loan is. A nonrecourse loan is a loan in which the lender says  
11 I've loaned you money and I agree that I will not look to  
12 something or other. I will not have recourse to something or  
13 other to repay that loan.

14           And as far as I can see, the tenth decretal paragraph  
15 says that the loans that give rise to my super-priority  
16 administrative claim will be nonrecourse loans such that the  
17 DIP lenders', me, recourse shall be only to the collateral.

18           And the only way I, the nonbankruptcy  
19 contract-construer, can see to make sense out of every word in  
20 this wind-down order, giving effect to its language and meaning  
21 to every clause, is that the DIP lenders have a super-priority  
22 claim for repayment of a nonrecourse loan. And they have  
23 explicitly agreed that it's a nonrecourse loan. And therefore,  
24 they have explicitly agreed that they will look only to the  
25 collateral for repayment of that loan.

1           And you've already told me that super-priority status  
2 doesn't have anything to do with what's in the pot.

3           So paragraph 10, it looks to me like, defines what's  
4 in the pot. Paragraph 6(b) is almost irrelevant but it does  
5 say what the collateral is.

6           Paragraph 10 says the characteristics of this loan are  
7 it's a nonrecourse loan and we agree it's secured only by  
8 collateral. And we're only going to look to the collateral.  
9 We may be first in line, but this is what's in the pot.

10           What's wrong with this? What's wrong with my  
11 reasoning? What am I missing?

12           I don't look at your past negotiations. I don't have  
13 to send this back for a trial, which I thought I did. I don't  
14 have to construe anything crazy. There is no ambiguity.

15           The tenth decretal paragraph says I, the governments of  
16 the United States and Canada, have agreed this will be a  
17 nonrecourse loan and that I will only look to the collateral  
18 for repayment. I insist on being first in line and I can have  
19 every dime of that collateral before anybody else gets  
20 anything. But, okay, these two things won't be in the pot.

21           It took me a long time to get there, probably because  
22 you guys never got there in that way. But that's real simple.  
23 That's really easy contract construction.

24           So tell me where my flaw is. I can't see a flaw in my  
25 reasoning, but I probably don't know something



1 MR. EDELMAN: I think your reasoning would create a --  
2 would violate the rule of surplusage.

3 THE COURT: No. It doesn't. It's the only thing that  
4 doesn't make anything surplusage. Nothing is surplus.

5 Ten and 6(a) are talking about completely different  
6 things. A loan is not a claim. It was -- the thing that  
7 bugged me when I read this wind-down order was that you guys  
8 were conflating what was in six and what was in ten. And so  
9 was Judge Gerber. And I kept saying but six is talking about  
10 claims and liens. And ten is talking about loans. And claims  
11 are not loans. And liens aren't loans. They're three  
12 different things. So how do we make those three different  
13 things work together?

14 Well the governments have a claim for a nonrecourse  
15 loan which a collateralized by that on which they have liens.

16 MR. JONES: Your Honor, if I may, if you're reading  
17 the tenth decretal paragraph --

18 THE COURT: I am.

19 MR. JONES: Right.

20 -- to say that the super-priority, likewise, is  
21 limited to the extent of the assets --

22 THE COURT: Priority is only where you stand in line.  
23 I keep asking this question.

24 If there's something about priority that defines  
25 what's in the pot, you show me in the bankruptcy code where

1 that is. My understanding is priority is only about where you  
2 stand in line.

3 You're saying I'm SuperPri, therefore, I can put back  
4 in the pot that which I have said is not in the pot.

5 All you have as the government of the United States is  
6 a claim for repayment of the loan in accordance with the terms  
7 of the loan. And in the tenth decretal paragraph you have  
8 agreed that the terms of the loan are that it's a nonrecourse  
9 loan. It's nonrecourse to anything except the collateral.

10 Isn't that what the document says?

11 MR. JONES: No.

12 THE COURT: Fine.

13 MR. JONES: Because.

14 THE COURT: Show me where it says something else.

15 MR. JONES: First, the term -- the very terms of the  
16 tenth decretal paragraph -- as your Honor says, a loan does not  
17 equal a claim, first off.

18 So I think there's an error in saying that the  
19 exclusions which are worded in terms of what the government's  
20 recourse is about --

21 THE COURT: No. You have a claim. The nature of your  
22 claim is for repayment of the loan.

23 So what are the terms of the loan?

24 Paragraph 10 says the terms of this loan include the  
25 following. The loan is not nonrecourse as against the assets

1 of the borrower and the guarantor other than the collateral.  
2 We agree that we can only look to the collateral. It's the  
3 only way to make paragraph 10 make sense.

4 MR. JONES: I don't think that's right, your Honor.  
5 And I have a negative answer and a positive answer.

6 THE COURT: No. I want answers that come out of  
7 language in the order.

8 MR. JONES: I'm going to give you that, your Honor.

9 THE COURT: Or in the bankruptcy code.

10 MR. JONES: Right. Okay.

11 Page R85 of the record, which is the final DIP order,  
12 which I pointed out earlier, is incorporated into the terms of  
13 the wind-down order unless expressly modified at page 85,  
14 paragraph five. This is what defines what the super-priority  
15 claim is for.

16 And it says, "The DIP lenders are hereby granted and  
17 allowed a super-priority administrative expense claim for all  
18 loans, reimbursement obligations, and any other indebtedness or  
19 obligations, contingent or absolute, which may now or from time  
20 to time be owing by any of the debtors."

21 THE COURT: Right.

22 MR. JONES: My point, your Honor, if you look --

23 THE COURT: That's right. And you said in the other  
24 document that's part of this, which is the wind-down order,  
25 that the loans, your DIP loans under the amended DIP facility,

1 would be nonrecourse loans. That's a term of the loan.

2 All this says is any money I lend you, I have -- I'm  
3 first in line to get paid. I have a super-priority  
4 administrative claim. But that doesn't set out the terms of  
5 the loans. You still are subject to any limitations to which  
6 you have agreed that constitute a term of the loan.

7 And in the tenth decretal paragraph of the wind-down  
8 order you say those loans, the loans that are referred to in  
9 paragraph five of the final DIP order are nonrecourse except to  
10 the collateral. You say that.

11 You agreed to it. And Judge Gerber so ordered it.  
12 That's an express agreement.

13 MR. JONES: It's an express agreement to what it says.

14 But what it says --

15 THE COURT: It says the loans are nonrecourse except  
16 as to the collateral.

17 And your claim is only a claim to have the loans  
18 repaid.

19 MR. JONES: But, your Honor, let me answer it this  
20 way. My point is that the word recourse and the limitation on  
21 recourse operates independently from whatever amount is owed,  
22 whatever amount was lent --

23 THE COURT: That's not true. Look, the word recourse  
24 refers to a type of loan.

25 MR. JONES: Correct.

1 THE COURT: Recourse is a type of -- a loan is either  
2 a recourse loan or a nonrecourse loan. That is Black's Law  
3 Dictionary. That is common understanding. It's not even  
4 really a legal term. Any banker can tell you that there's --  
5 there are recourse loans and there are nonrecourse loans.

6 And it has no greater meaning than that unless you  
7 point me to a provision of the bankruptcy code that says in the  
8 context of a bankruptcy recourse means something different than  
9 what it means in the ordinary course of commercial affairs.

10 MR. JONES: Your Honor, we talk about this in our --

11 THE COURT: Point me to a provision of the bankruptcy  
12 code that says that.

13 MR. JONES: If I can say two things, your Honor.

14 One is that this order at 85 and incorporated through  
15 the wind-down and the underlying debt set forth a payment  
16 schedule and a payment obligation and amount owed that is  
17 independent and exists independently of the collateral, the  
18 value of the collateral, and the nonrecourse.

19 THE COURT: The fact that the loan is nonrecourse  
20 exists independently of the collateral.

21 MR. JONES: So if some stupid bank lent me \$10 million  
22 on account of my, I promise, quite modest home on a nonrecourse  
23 basis, and I failed to pay, there would still exist a debt of  
24 \$10 million.

25 THE COURT: Indeed, and there would be a deficiency

1 proceeding after they took your house, your \$250,000 house.

2 MR. JONES: If they had a nonrecourse limitation, that  
3 is saying: Too bad for you, you can have my house but all that  
4 other debt.

5 THE COURT: Well if some stupid government -- don't  
6 make me do this -- if some government said: I'll loan you \$117  
7 million to wind-down the estate of GM, and I'll look to all the  
8 assets of GM except not this stock and not the proceeds of this  
9 lawsuit, that's no different than the stupid banker who lends  
10 \$10 million against the proceeds of my house.

11 I'm sure the government had a good -- the governments,  
12 I apologize to the Canadians -- had a good and valid reason in  
13 July of 2009 for agreeing to put a provision in an order that  
14 said the loans we are giving you, the DIP loans that we are  
15 giving you are nonrecourse except as to the collateral. But  
16 if -- I must tell you, if a government lawyer or someone  
17 retained to represent the government thought that  
18 super-priority status -- which has nothing to do with recourse  
19 or nonrecourse, it has nothing to do with what's in the pot.  
20 It just means where you stand in line.

21 MR. EDELMAN: I disagree, your Honor.

22 THE COURT: Tell me where in the bankruptcy code.  
23 Show me in the bankruptcy code.

24 MR. EDELMAN: Claims are against the estate.

25 THE COURT: I understand.

1 MR. EDELMAN: Liens are against the borrower and the  
2 borrower's property.

3 THE COURT: Right.

4 MR. EDELMAN: And this paragraph talks about  
5 nonrecourse to the borrower and the guarantors. Super-priority  
6 claims --

7 THE COURT: So what you're saying -- this is what I  
8 want to know -- what you're saying is the flaw in my reasoning  
9 is that the borrower and the guarantor are not the same thing  
10 as the estate; just as the loan is not the same thing as the  
11 claim.

12 MR. EDELMAN: That's correct.

13 THE COURT: That's what you're saying.

14 MR. EDELMAN: The estate is a creation under  
15 bankruptcy law. And claims of all types are claims against the  
16 estate. And they have to be dealt with under the bankruptcy  
17 code.

18 So you're conflating -- the two paragraphs have  
19 different terms for a purpose.

20 THE COURT: I figured they did.

21 But it can't be the purpose that's described in your  
22 briefs because your briefs don't make any sense. At least what  
23 I said makes sense, but I may be wrong because I don't  
24 understand -- you've now, for the first time, suggested to me  
25 the flaw in my reasoning. The flaw in my reasoning is the

1 claim for repayment of the loan is against the estate.

2 MR. EDELMAN: That's correct.

3 THE COURT: Whereas the --

4 MR. EDELMAN: Property that was collateral belonged to  
5 the specific entity.

6 THE COURT: So you say that, at one and the same time,  
7 the borrower can say: I'm limited to the collateral, but I'm  
8 not.

9 Because there is no -- there's nothing other than a  
10 claim for repayment of the loans. There is no other way to get  
11 the loans repaid, except by making a claim against the  
12 bankruptcy estate, right? This is a bankruptcy, after all.

13 MR. EDELMAN: That is true. But I think claims and  
14 loans are a slightly different term.

15 THE COURT: Claims and loans are completely different  
16 terms.

17 MR. EDELMAN: Claims are dealt with under the  
18 bankruptcy code, have to be paid and dealt with under the  
19 bankruptcy code.

20 THE COURT: And is it not the case that you can say --  
21 well let me go back one step.

22 Do we agree that the claim in this case, that the DIP  
23 lenders have against the estate, is for repayment of the loans?  
24 The nature of the claim is for repayment of the DIP loans?

25 Right?



1 MR. JONES: No, your Honor.

2 THE COURT: It's not? It's not for repayment of the  
3 DIP loans? What is it?

4 MR. JONES: It's for the amount lent, provided to the  
5 borrowers.

6 THE COURT: Excuse me. What is the difference between  
7 repayment of the loans and repayment of the amount lent?

8 The amount lent is what's loaned. That's sophistry.

9 MR. JONES: Your Honor's reading of paragraph ten  
10 talks about the loans as being nonrecourse and causing to exist  
11 no obligation other than the extent of the pot as defined by  
12 collateral.

13 I'm saying that the amount loaned has independent  
14 force, as my colleague says, by function of the bankruptcy law  
15 and by function of the fact that it's a claim. It has an  
16 independent existence. And these documents tell you that that  
17 amount -- the amount that that's for is not limited by the  
18 extent of collateral. It operates independently. And it's in  
19 the full amount advanced.

20 If that amount exceeds the value of the collateral,  
21 then what the committee bargained for and got is that there  
22 won't be any grab or foreclosure on it. We cannot takeover the  
23 litigation of the suit. They can negotiate it as they see fit.

24 But at the end of the day, after they've gotten the  
25 full benefit of the government's services of funding the

1 wind-down of this entire estate as well as causing the  
2 rejuvenation of General Motors to occur, conferring big value  
3 on them, the government gets paid back in the amount that's  
4 outstanding if there's any asset available that isn't  
5 explicitly excluded not from the collateral but from the claim.  
6 The claim has independent existence. And as we talk in our  
7 briefs that collateral concepts and super-priority claim  
8 concepts operate differently. There are different statutory  
9 provisions 364(c)(1), etc.?

10 THE COURT: Read them.

11 MR. JONES: And that even as Judge Gerber recognizes,  
12 when the security is insufficient in that Ocean Power case we  
13 cite in our reply brief, security interests completely have  
14 gone poof. The debtor -- excuse me. The DIP lenders would be  
15 totally out of luck. But they are saved by their independently  
16 operating super-priority claim status.

17 So really the same is what exists here. It's by  
18 virtue of the fact that what we have is a claim. The claim  
19 itself is not limited by the amount of the collateral. And it  
20 has independent existence both under the code and under the  
21 terms of these documents as negotiated.

22 MR. EDELMAN: Also, your Honor, under your  
23 interpretation --

24 THE COURT: Don't call it my interpretation. I  
25 haven't interpreted it yet. I'm trying to see my way clear to

1 not finding an ambiguity and not sending you back through  
2 trial, a trial at which Judge Gerber will not be a witness for  
3 80 pages. Because that's what I've got now. I've got Judge  
4 Gerber as a witness recreating the negotiations for 80 pages.  
5 And that's no good. That's not a trial. If this thing has to  
6 be tried, all your lawyers got to get on the stand. You've got  
7 to come up with all the drafts. And you've got to testify  
8 about the course of the negotiations.

9 So if we're not going to go there, which is where I  
10 thought we were going to go 24 hours ago, we're going to go --  
11 it's going to be because I can find no ambiguity among these  
12 provisions. Me, last night, at 5:30 in my office with no  
13 particular bankruptcy expertise, just looking at this as a  
14 contract lawyer, I thought I found something.

15 I'm waiting. I want you to shoot me down. I want you  
16 to shoot me down.

17 MR. EDELMAN: I think there's different concepts  
18 between loans against the borrower and claims against the  
19 estate, first of all.

20 Second under your supposition that would render the  
21 super-priority provisions superfluous which was the same  
22 mistake that the bankruptcy court made. There would be no  
23 purpose. We could have just been granted rights against the  
24 collateral and there would be no --

25 THE COURT: Well, I have to tell you from where I sit

1 one or the other provision is superfluous. Either your  
2 super-priority status protects you so you didn't need the liens  
3 or the liens, because you agreed to look away to the  
4 collateral, the liens are the limit of your protection and you  
5 don't need the SuperPri. Except the SuperPri status gives you  
6 something else. It puts you first in line. People have liens  
7 on property and they still have to take with other people who  
8 have liens. Super-priority status says no, no, I'm first in  
9 line.

10 MR. EDELMAN: That's the same thing with the first in  
11 line DIP collateral. Under bankruptcy law, if we have the  
12 first priority lien, we're entitled to be the first and only  
13 people to look to that property, unless under strange  
14 circumstances --

15 THE COURT: If there's more than your loan, which  
16 never happens.

17 MR. EDELMAN: Bankruptcy says that the estate did  
18 something for your benefit and there's a surcharge, but that's  
19 not really an issue here.

20 THE COURT: That's not here.

21 MR. EDELMAN: So the two concepts are very different  
22 under bankruptcy. There's super-priority administrative  
23 expense, which does allow you to look to the free cash. You  
24 don't have to go exercise remedies against your collateral or  
25 even assert what's in your collateral.

1           There's a collateral package which gives you the  
2 rights. And you're the only person who is entitled to that  
3 right if you're a DIP lender.

4           THE COURT: And I understand everything that you're  
5 saying. The issue is whether, by virtue of the tenth decretal  
6 paragraph, you did not agree, which you tell me you are allowed  
7 to do, you did not agree that it would be otherwise than it  
8 usually is.

9           MR. EDELMAN: Under your supposition, if the tenth  
10 paragraph really controlled, which is what you're saying, then  
11 there would be --

12           THE COURT: The tenth paragraph tells you what the  
13 terms of the loan are. It describes the loan.

14           MR. EDELMAN: So does the super-priority.

15           The super-priority tells you which claims and what  
16 priority they're entitled to get paid from.

17           THE COURT: The super-priority describes a claim. It  
18 doesn't describe the loan.

19           The loan and the claim, you and I agree, are two  
20 different things.

21           And my understanding of the nature of the claim is  
22 that it's for repayment of the loan. If I'm wrong about that,  
23 then I'm wrong about everything that I've been thinking for the  
24 last 18 hours.

25           MR. EDELMAN: But the loans are a specific obligation

1 under the contracts. There's also broader terms such as, you  
2 know, obligations. And so this is a limitation --

3 THE COURT: What obligations are there in this case as  
4 a practical matter other than the DIP loans?

5 MR. EDELMAN: Repayment of all our claims.

6 THE COURT: What other claims do you have?

7 Tell me what other claims the government of Canada has  
8 besides repayment of monies advanced as a DIP lender. What  
9 other claim do you have against the GM estate?

10 MR. EDELMAN: You're trying to shoehorn everything.

11 THE COURT: You're not answering my question, which  
12 tells me I'm right.

13 Your claim, your super-priority administrative claim  
14 is for repayment of your loan and nothing else. Repayment of  
15 the money that you've lent to GM and nothing else. Which makes  
16 sense because that's an administrative claim.

17 If the government of Canada has a claim against GM for  
18 some violation of an environmental regulation in a plant in  
19 Canada, that's a different thing.

20 MR. EDELMAN: It would be for loans and other  
21 obligations arising under the --

22 THE COURT: What other obligations have arisen as a  
23 practical matter. Identify for me one other obligation that  
24 has arisen under the DIP wind-down facility. In your favor.

25 What other obligation has arisen in your favor under

1 the DIP wind-down facility?

2 MR. EDELMAN: The funding of the wind-down.

3 THE COURT: So your claim is for repayment of the  
4 loan.

5 MR. EDELMAN: But the nonrecourse --

6 THE COURT: Can't you agree, as long as you do it  
7 explicitly, that the loans can only be repaid out of certain  
8 monies? Contrary to what would otherwise be the case with your  
9 SuperPri.

10 MR. EDELMAN: What we have agreed is that the  
11 collateral would be limited. That's what that provision,  
12 decretal paragraph ten provides.

13 THE COURT: No. Decretal paragraph ten provides that  
14 the loans shall be nonrecourse except against the collateral.

15 MR. EDELMAN: To the borrower. It doesn't say the  
16 claims against the estate.

17 THE COURT: So your argument depends on drawing a  
18 distinction between the borrower and the estate.

19 MR. EDELMAN: It's more than that.

20 THE COURT: What's the distinction between the  
21 borrower and the estate? I'm prepared to be told that there is  
22 one. I told you I don't know better.

23 MR. EDELMAN: The estate is a creation that's exists  
24 while the bankruptcy case is pending.

25 THE COURT: What's the difference between -- I haven't

1 even heard from the creditors committee. Maybe I should let  
2 the creditors committee say something.

3 Is there a distinction between the borrower and the  
4 estate?

5 MR. MAYER: In this case, your Honor, the answer is  
6 no. It does require you to look at the actual wind-down loan  
7 agreement itself.

8 THE COURT: Okay. What should I look at?

9 MR. MAYER: If you look at, I believe it's the first  
10 page.

11 THE COURT: Where is it in the record?

12 MR. MAYER: This is in our supplemental exhibits. And  
13 I also have a binder which may help. The tab is the  
14 cross-reference. It's attached to the wind-down order, your  
15 Honor. It's an exhibit to the wind-down order.

16 THE COURT: Just give me the whole thing.

17 MR. MAYER: May I approach?

18 THE COURT: We've got it. We just have to find it.

19 MR. MAYER: In our supplemental submission to the  
20 Court there is a large binder which is tab -- item eight. And  
21 it's at tab --

22 THE COURT: Is it tab (b)?

23 MR. MAYER: VII.

24 THE COURT: I have a tab (b) followed by Roman  
25 Numerals one, two, three, four, five, six, seven, eight.



1 MR. MAYER: I believe that's correct. It's VII.

2 THE COURT: There's the order and attached to it is  
3 the amended and restated secured super-priority debtor in  
4 possession credit agreement.

5 MR. MAYER: Yes, your Honor.

6 If you go to the first page, past the table of  
7 contents.

8 THE COURT: I think that is this document.

9 This is a draft of it from --

10 MR. MAYER: This was the agreement that was approved  
11 by the bankruptcy court on June 29.

12 MR. JONES: Your Honor, really quickly. I don't mean  
13 to interrupt. I want to say it's also, in our Bates stamp set,  
14 it's our 204.

15 THE COURT: It's dated as of July 10, 2009.

16 Is that correct date on this document?

17 Amended and restated.

18 MR. MAYER: Actually, what was approved by the  
19 bankruptcy court has a blank date; as of July blank 2009.

20 The actual signed document is dated July 10.

21 We have a copy of that too.

22 THE COURT: Well I'm looking at a copy -- I want to  
23 give you back your binder so I don't write on it because I  
24 have -- this is a very dangerous implement and I'll write all  
25 over your thing.

1           What do you want me to look at in this document?

2           MR. MAYER: I want you to look at the first page of  
3 text after the table of contents.

4           THE COURT: Witnesseth? Whereas?

5           MR. MAYER: Right above the witnesseth, your Honor.  
6 That first paragraph.

7           THE COURT: Yes. Okay.

8           Debtor in possession agreement.

9           Dated as of July 10, 2009.

10           By and among, Motors Liquidation Company, formerly  
11 known as General Motors, a Delaware Corporation, and a debtor  
12 and debtor in possession, in a case under Chapter 11 of the  
13 Bankruptcy Code, the borrower. The guarantors as defined  
14 below, whoever they are, and several lenders, from time to time  
15 parties to this agreement, and we can agree that those are the  
16 governments of the United States and Canada.

17           MR. MAYER: Yes. The point is the phrase "the  
18 borrower" here is all encompassing it includes the debtor. It  
19 includes the debtor in possession. And, therefore, under the  
20 terms of this loan document --

21           THE COURT: Does it, therefore, include the estate?

22           MR. MAYER: Yes, your Honor.

23           It includes the debtor and the debtor in possession.  
24 There is nothing else that the estate -- that is the estate.

25           MR. EDELMAN: Your Honor, this is answered under the

1 bankruptcy code.

2 THE COURT: Good.

3 MR. EDELMAN: The debtor, if you look at the  
4 definition of what a debtor is, under Section 11 U.S.C. 101, I  
5 think it's subclause 13, says a debtor means the person or  
6 municipality concerning which a case under this title has been  
7 commenced.

8 So that is just the entity.

9 THE COURT: Correct.

10 MR. EDELMAN: Bankruptcy code also defines what an  
11 estate is. An estate is defined under Section 541 of the  
12 bankruptcy code and it provides that the commencement of a case  
13 under this title creates an estate. Such estate is comprised  
14 of the following property, wherever located and by whomever  
15 held. And it lists.

16 THE COURT: All kinds of property.

17 MR. EDELMAN: All types of property.

18 What's interesting to know is that it's not the same  
19 thing as a debtor because then if you look at (b). Property of  
20 the estate does not include any power the debtor may exercise  
21 solely for the benefit of another entity.

22 So there's a distinction, if you look at 541, it's  
23 clearly a distinction between the estate and what a debtor is.  
24 The debtor is the entity that falls into bankruptcy.

25 THE COURT: Right.

1 MR. EDELMAN: The estate deals with how to deal with  
2 all the property of the estate and dealing with the claims  
3 administration process. So if you -- there's is a distinction  
4 between the estate, which deals with claims; and the debtor,  
5 which deals with the actual entity itself.

6 So when you're dealing with the entity itself, the DIP  
7 lenders agreed that the collateral, the specific collateral  
8 held by the borrower will be limited. And they limited it in  
9 certain circumstances. They limited it to exclude the new GM  
10 equity interest.

11 And that was the primary focus that the DIP lenders  
12 did. And there are numerous statements on the record, in  
13 pleadings, in oral testimony, that said that the nonrecourse  
14 provision was meant to apply solely to the new GM equity  
15 interest.

16 THE COURT: Except that you agreed to and allowed  
17 Judge Gerber to sign an order that didn't just apply it to  
18 that. That the nonrecourse doesn't just apply to that.  
19 Otherwise I would have to read words out of the document.

20 MR. EDELMAN: We don't think you do. It deals with  
21 the loans --

22 THE COURT: Explain to me why. I have the provisions,  
23 relevant provisions of the wind-down order in front of me.  
24 Explain to me why.

25 MR. EDELMAN: As we just said, that the nonrecourse

1 deals with the property of the borrower. Not the claims  
2 against the estate.

3 THE COURT: I understand that. But explain to me what  
4 you just said -- what you just said and what you said in your  
5 brief that made no sense to me is that the exclusion applied  
6 only to the new GM stock and yet it quite clearly refers --  
7 talks about the avoidance actions as well, so --

8 MR. EDELMAN: No, it doesn't. Not with respect to  
9 collateral. No, it doesn't --

10 THE COURT: Show me where.

11 MR. EDELMAN: Solely refers to --

12 THE COURT: Show me where.

13 MR. EDELMAN: The super-priority provision under 6(a)  
14 talks about --

15 THE COURT: Can I have --

16 MR. EDELMAN: Under 6 (a) there is a broad  
17 super-priority grant. It's not -- there's only a few  
18 carve-outs to it. There is express carve-outs to the  
19 super-priority for the carve out --

20 THE COURT: I hear that. I hear that.

21 MR. EDELMAN: And there is also under section 8.20 of  
22 the DIP loan agreement, it expressly carves out the proceeds of  
23 the avoidance action from the collateral -- sorry. I just  
24 misspoke. Section 8.20 protects the new GM equity interest  
25 from the DIP lenders' super-priority. It does no such thing

1 with respect to the avoidance action proceeds.

2 MR. MAYER: Your Honor, if I may offer a --

3 THE COURT: I want to look at -- the document I have  
4 to construe is the wind-down order, right?

5 MR. MAYER: Can I go back to the wind-down order, your  
6 Honor?

7 THE COURT: Yes.

8 MR. MAYER: Let's go back to the tenth decretal  
9 paragraph. If you read the tenth decretal paragraph, it says  
10 two things.

11 It says that the loans shall be nonrecourse for the  
12 borrower and guarantors. And then it says such that the DIP  
13 lenders' recourse, that's the recourse held by these gentlemen.

14 THE COURT: Yes.

15 MR. MAYER: Shall be only to the collateral.

16 THE COURT: Which looks to me like an agreement.

17 MR. MAYER: Exactly, your Honor.

18 THE COURT: That recourse on the loans, the loan --  
19 the loans which are -- which give rise to the claim that must  
20 be repaid shall be only to the collateral and not against the  
21 rest of the estate. That's what it looks like to me.

22 MR. MAYER: Yes, your Honor.

23 I think that the distinction that is being drawn out  
24 in argument today because we have not -- the papers don't focus  
25 on it -- between the borrower and the estate is, frankly, a, I

1 would call it a piece of sophistry.

2 This document, the estate is limited -- is a different  
3 entity from the debtor and the debtor in possession than the  
4 borrower -- than the loan agreement has no recourse to the  
5 estate at all because the estate is not a signatory to the loan  
6 agreement.

7 To the extent the tenth decretal paragraph means  
8 anything, it means that these lenders don't -- only have  
9 recourse to this pot. And if it turns out that there is --  
10 that the estate exists in some other universe -- this is like I  
11 have recourse to the partnership but not to the partners. If  
12 there are really two different entities, paragraph ten deals  
13 with this problem by saying: You have recourse only to that.  
14 It doesn't make any difference which entity we're talking  
15 about. You have recourse only to the collateral.

16 MR. EDELMAN: That interpretation, your Honor, it  
17 reads out the second portion of the paragraph, which would also  
18 have no purpose if it has an expanded meaning as counsel just  
19 stated.

20 THE COURT: Well it would certainly would suggest that  
21 the creditors committee was particularly interested in making  
22 sure it got to keep that stock.

23 MR. EDELMAN: That's all it was interested in.

24 MR. MAYER: No, no, your Honor. That's not true.

25 MR. EDELMAN: We have numerous express --

1 MR. MAYER: That's not true.

2 MR. EDELMAN: The numerous express statements --

3 THE COURT: Can I hear from him. One at a time.

4 MR. MAYER: You've already expressed your concern  
5 about Judge Gerber's account of the record.

6 THE COURT: It's not that I have a concern. He was  
7 there. He was present at the creation.

8 But it's clear that he resolved a number of disputed  
9 issues of fact in the course of writing that opinion.

10 MR. MAYER: Your Honor, the following is not -- there  
11 are no -- frankly, your Honor, there are no disputed issues of  
12 fact because there isn't a dispute as to the documents and the  
13 statements and what's in the record before you.

14 What's in the record before you is that we asked for  
15 the collateral to exclude the litigation. We asked for  
16 recourse to be limited to the collateral with reference to the  
17 litigation. We got the limitation of recourse because we  
18 wanted the litigation to be ours. What is in the record is  
19 that --

20 THE COURT: Now where is that in the record?

21 Because I have to tell you, I can't pick that up from  
22 the documents. That's not in the four corners of the  
23 documents.

24 MR. MAYER: It's not in the four corners of the  
25 orders.



1 THE COURT: Right.

2 MR. MAYER: That is correct. I will grant that. If  
3 the Court wishes to stick to the three orders and the  
4 agreements attached to them, we continue to believe that they  
5 are, as your Honor's questions seem to indicate to us,  
6 certainly that is the way we read them, completely unambiguous.  
7 I don't think -- I think both Mr. Edelman and I should probably  
8 refrain from referring to statements in the record.

9 THE COURT: I think you should because once you get  
10 beyond the four corners of these documents into a history that  
11 has not been developed in proper record form through testimony  
12 that an appeals court can review but that's known only to those  
13 of you who were in the backroom, then you got to go back and  
14 have a trial. And it may be that the trial judge knows  
15 everything that went on because he was in the backroom too, but  
16 I don't.

17 MR. MAYER: Let me put it another way, your Honor.  
18 If, in fact, there was this distinction between the estate and  
19 the borrower, as Mr. Edelman would like to Court to believe,  
20 under the bankruptcy code, a super-priority claim is supposed  
21 to be paid in cash and in full out of the estate, as he would  
22 put it, before you exit the bankruptcy case.

23 THE COURT: Right.

24 MR. MAYER: The agreement that says we're not going to  
25 do that, we're going to wait until the last share of stock is

1 distributed to the last unsecured creditor in order for our  
2 loan to mature, that agreement is in the loan agreement which  
3 applies only to the loans to the borrower, defines main debtor  
4 and debtor in possession.

5 In this case there is no difference between a  
6 limitation of recourse against the borrower and a limitation of  
7 recourse against the estate.

8 THE COURT: There would be none because I understand  
9 that the estate is the property of the borrower that goes into  
10 bankruptcy and that is available for the creditors to collect  
11 against. But so it's for the most part prepetition property,  
12 and then there's postpetition property, and then it gives rise  
13 to administrative claims.

14 But is there any property of General Motors that's not  
15 part of the bankruptcy estate that could be looked to by  
16 someone who was looking to a borrower but not an estate?

17 MR. MAYER: Not that I know of, your Honor.

18 MR. EDELMAN: And there's potentially under section  
19 541 defines what property of the debtor.

20 THE COURT: I'm asking as a practical matter.

21 Does General Motors own anything that's not part of  
22 the estate in bankruptcy, that if -- such that if there really  
23 were a meaningful distinction between the borrower and the  
24 borrower's property it would mean something to have recourse  
25 against the borrower? Because the borrower had other property

1 out there that you could collect against. That was not part of  
2 the bankruptcy estate. That's what would make recourse against  
3 the borrower meaningful.

4 MR. EDELMAN: Yes, your Honor. The estate does  
5 include property other than what the borrower gives to it. And  
6 that -- the primary other than -- and I know some of these  
7 apply but they are probably not meaningful under 541, but the  
8 primary piece of asset, created in the bankruptcy that comes  
9 from the estate, are the avoidance actions. The avoidance  
10 actions are not part of the borrower. It's a creation of a  
11 bankruptcy estate.

12 So that by itself is a vast distinction between the  
13 borrower, the debtor, and its estate. The estate has property  
14 that is greater than the specific assets because they also have  
15 the bankruptcy causes of action.

16 And there's case law, numerous case law in this  
17 circuit that says that avoidance actions are not the property  
18 of the borrower; it's the property of the estate. So there is  
19 a distinction between the two.

20 MR. MAYER: Your Honor, this is confusing two  
21 different strains of law. There are cases where there is an  
22 individual debtor and he retains certain or she retains certain  
23 assets. And there are cases where there is a distinction  
24 between a borrower and his estate which is administered by a  
25 trustee. Where a lawsuit is brought under the avoidance

1 action, it's brought in the name of the debtor. Sometimes it's  
2 brought in the name of the debtor and the debtor in possession  
3 when there is one. And that's why it's referred to that way in  
4 the loan agreement as well as in the order.

5 That's how the creditors committee brought the  
6 lawsuit. They brought the lawsuit in the name instead of the  
7 debtor and the debtor in possession. The debtor is the named  
8 plaintiff. That's because the debtor owns the estate. And a  
9 limitation of recourse against the debtor is a limitation of  
10 recourse against the debtor's property. The debtor's property  
11 is the estate.

12 THE COURT: Well as a logical matter that makes sense  
13 to me and I just want to be sure -- but he's suggesting that  
14 that's not true.

15 MR. EDELMAN: I disagree with the characterization of  
16 what the cases say because they don't just deal with  
17 individuals. The estate is a different entity than a debtor  
18 and it's replete with -- in every aspect of the law, you know,  
19 whether certain exclusions from insurance policies apply to the  
20 estate. And many of the cases say no because it's not -- the  
21 estate is different than the debtor. The property is  
22 different. Avoidance actions are not the property of the  
23 debtor. It's created because of the bankruptcy filing.

24 Now, what committee counsel is stating is who controls  
25 the litigation. It's true in a Chapter 11 the debtor in

1 possession controls these assets or if it essentially agrees it  
2 can agree that the committee can control. But it's a very  
3 different question as to who manages and if there's a  
4 difference between the debtor and the estate. And there is --  
5 there is a difference between those two things.

6 MR. MAYER: But at the end of the day, your Honor, you  
7 come back to paragraph ten. Recourse is limited to the  
8 collateral. It's limited to a defined pot of assets. And that  
9 pot of assets doesn't include this lawsuit.

10 THE COURT: I will say I think you all did a lousy job  
11 of drafting.

12 MR. MAYER: We were somewhat rushed, your Honor.

13 THE COURT: I understand.

14 MR. JONES: Your Honor.

15 MR. EDELMAN: Under that interpretation, you would be  
16 rendering the second part of decretal paragraph ten  
17 superfluous.

18 MR. MAYER: Your Honor, just because a buyer --

19 THE COURT: Excuse me. Let me see.

20 No. It doesn't render it surplusage. It just  
21 emphasizes it.

22 MR. MAYER: Thank you, your Honor.

23 THE COURT: It just emphatically says: And don't you  
24 touch that stock.

25 MR. EDELMAN: It would also render -- there would be

1 no difference between the super-priority rights and the  
2 collateral rights. So you'd be --

3 THE COURT: It may be that you agreed in effect to  
4 drafting or wording that has that effect.

5 MR. EDELMAN: If that was the case, then the  
6 carve-outs from both should have been the same. And they were  
7 not. There were express carve-outs to one that were not  
8 included in the other.

9 THE COURT: I understand that except there is -- then  
10 there's an ambiguity. Then there's an inconsistency. And then  
11 you're coming back for trial.

12 MR. EDELMAN: Then that may be, in fact, what you do.  
13 The specific -- we believe that you have to look at the  
14 specific terms that govern the super-priority rights are  
15 contained in that paragraph. And if you were to look at the  
16 nonrecourse paragraph as -- there's definitely an inconsistency  
17 or an ambiguity between those two provisions. It's one or the  
18 other.

19 We're trying to argue that the nonrecourse provisions  
20 only -- are not affected -- do not affect the super-priority  
21 rights. Committee is taking the opposite.

22 But there's definitely a tension between those two  
23 provisions. And it doesn't make sense for decretal paragraph  
24 ten to control because you'd be rendering numerous provisions  
25 superfluous.

1 THE COURT: One way or another, unless you do it my  
2 way -- and if I'm wrong, and I'll admit it's possible that I'm  
3 wrong as a matter of bankruptcy law. But any other way, some  
4 provision is superfluous. Any other way I slice this salami,  
5 some other provision is superfluous.

6 MR. EDELMAN: We don't think it's superfluous. We  
7 think that the nonrecourse --

8 THE COURT: I know you don't think it.

9 I think that every way I read this that you guys  
10 suggest that I should read it renders something superfluous.

11 MR. EDELMAN: There's two ways we think you can read  
12 the nonrecourse provision, which is either that nonrecourse  
13 only relates to the collateral provision or that nonrecourse  
14 was meant to apply to the new GM equity.

15 THE COURT: Well if it was meant to apply to the new  
16 GM equity it should have said so. But it doesn't say recourse  
17 shall be only to the assets of the estate other than the new GM  
18 equity. It says recourse shall be only to the collateral. And  
19 the new GM equity is not coterminous with the collateral. With  
20 what's excluded from the collateral. Other things are excluded  
21 from the collateral too. The avoidance actions are excluded  
22 from the collateral. They're excluded from the collateral.

23 So if it was your intent that recourse should be only  
24 to everything except the new GM equity, you should have said  
25 so. But that's not what you said. And you're bound by what

1 you said. You said recourse shall be only to the collateral  
2 and the collateral does not include the avoidance actions  
3 proceeds. Of course, there may not be any avoidance actions  
4 proceeds, which gets me back to where I was on Monday morning:  
5 Why am I doing this?

6 MR. JONES: Your Honor, if I -- I have nothing to say  
7 about whether or not there's an identity of the entity that's  
8 subject to these agreements. I wanted to raise another point,  
9 if I may.

10 But it circles back to, again, what I think is really  
11 a fundamental misreading that I think the bankruptcy court made  
12 and that your Honor's comments are also giving voice to.  
13 Paragraph ten, decretal paragraph ten.

14 And I've said this previously but I'm going to circle  
15 back. To the government, the core of this case is that it  
16 advanced money on a super-priority basis and that it had an  
17 entitlement set forth at R85 of the record to be repaid the  
18 amount it lent on a super-priority basis at the end of the day.  
19 Recourse -- that recourse provision in paragraph ten is not  
20 rendered surplusage by that.

21 THE COURT: Because you say that super-priority status  
22 means something more than just I'm first in line? You say it  
23 means I'm first in line and.

24 MR. JONES: Your Honor, as a bankruptcy law concept,  
25 it places you in line. Paragraph five at page R85 says --



1 THE COURT: I don't have R85.

2 MR. JONES: I'll just tell you. It's the passage I  
3 read before in the final DIP order. And it talks about what  
4 the DIP act lenders have a super-priority expense claim for.  
5 It doesn't just say --

6 THE COURT: Okay. Is there anything other than the  
7 proceeds that you loan that as a particular matter falls within  
8 that language? No. There isn't anything.

9 MR. JONES: No. I don't think so. We lent money.  
10 The money sat in the estate and to step back to the real world  
11 the government agreed to pay for whatever needed to be done to  
12 wrap this case up as part of its turnaround effort.

13 THE COURT: Right.

14 MR. JONES: And the quid pro quo for that was we get  
15 paid back at the end of the day unless we agreed otherwise.

16 One point I want to make is, your Honor --

17 THE COURT: You certainly agreed that you would get  
18 paid back and that you would get paid back first. The only  
19 question is whether you said but we won't look to certain  
20 assets for that payment.

21 MR. JONES: Right.

22 THE COURT: That's the only -- the only issue is  
23 whether the tenth decretal paragraph constitutes an express  
24 agreement by you, the government of the United States, that you  
25 would not look to the avoidance action proceeds for repayment

1 because they're not part of the collateral.

2 MR. JONES: Right.

3 THE COURT: That's all this is about.

4 MR. JONES: And here is a reason to think that the  
5 tenth paragraph and the nonrecourse language does not do that  
6 work of saying that the super-priority claim at the end of the  
7 day will be diminished and limited by that nonrecourse language  
8 and by the extent of the available collateral. The reason for  
9 that is the parties, when they wanted to limit the  
10 super-priority, did so explicitly, both as to the carve-out and  
11 as to the GM equity interests.

12 THE COURT: Yes. But if I'm right that the only way  
13 to give effect to paragraph ten, to give it some independent  
14 meaning, is to say it doesn't relate to the claims and it  
15 doesn't relate to liens, it relates to the loan and it's the  
16 repayment of the loan that is the release of the claim and the  
17 loan has terms, like all loans have terms.

18 MR. JONES: Right, your Honor --

19 THE COURT: And super-priority status doesn't override  
20 the terms of the loan. And one of the terms to which you  
21 agreed is that you would only look to certain assets and not to  
22 others for repayment. All those assets have to be made  
23 available to you before anybody else gets a dime of them.  
24 That's what super-priority gives you.

25 MR. JONES: Your Honor, our reading does not render

1 that paragraph surplusage. It has meaning that's not --

2 THE COURT: I don't understand the meaning.

3 MR. JONES: Sure. Well let me --

4 THE COURT: I've tried and tried and tried.

5 MR. JONES: Let me try, your Honor.

6 We don't -- first off, we don't dispute. We don't  
7 pretend there weren't negotiations about the avoidance action  
8 proceeds. Of course there were. There's specific provisions.  
9 So I want to be upfront and acknowledge that.

10 THE COURT: Come on. You guys are very good at what  
11 you do. Of course there were.

12 MR. JONES: So I'm not putting my head in the sand  
13 about that.

14 But -- now I've diverted myself from my train of  
15 thought.

16 Paragraph ten's meaning is talking about remedies in  
17 the event of nonpayment on the loans.

18 And it is complimentary to paragraph 6(b). I'm sure  
19 your Honor knows that lawyers say complimentary or even  
20 identical things at different points in instruments.

21 THE COURT: They do.

22 MR. JONES: And what it does is say what happens in  
23 the event of some default. If early on in the case there was a  
24 terrible default or a meltdown, could the government come  
25 grabbing assets? No, we couldn't grab this.

1 I mean I know your Honor doesn't want to hear intent  
2 and I'm not going to testify. But it does have logical purpose  
3 to say that the government can't come in and grab this at an  
4 early stage. It's for the committee to run this litigation.  
5 They can try to settle. They talk about how it's  
6 disadvantageous to them. But they can control the outcome  
7 through negotiations to some extent and steer it in a way that  
8 won't bite them. They're doing so, by the way, paid for by DIP  
9 lender dollars. So they're not being caused to spend their own  
10 money in this pursuit.

11 But all of that operates quite independently, are  
12 remedies as secured lenders under 364(c) (2) and (3), operate  
13 totally independently from our super-priority claim which says,  
14 okay, at the end of the day we come first. And as to what?  
15 Well, as to the amount we lent. Again, you see that at R85.

16 THE COURT: I agree. You come first as to the amount  
17 that you've lent. But that doesn't say that if you agree that  
18 you won't look to a particular pot of assets for repayment that  
19 somehow super-priority status pulls those assets back into the  
20 pot that you've agreed you will look to.

21 MR. JONES: Your Honor, if we --

22 THE COURT: That's what I keep asking. If there's  
23 something about super-priority status that you say: I won't  
24 look to Black Acre for repayment of this loan, but I get repaid  
25 on a super-priority basis, therefore, I can look to Black Acre.

1 That logic makes no sense. Explain to me what I'm missing.

2 MR. JONES: Your Honor, the difference is we're owed  
3 what we lent. If we don't --

4 THE COURT: You're always owed what you lent. You're  
5 owed what you lent whether it's super-priority or not. You're  
6 owed what you lent whether it's secured or not.

7 MR. JONES: That fact has legal significance, your  
8 Honor. And the fact that we have a super-priority claim in the  
9 amount we lent has independent meaning. Recourse is a concept.  
10 All the cases talk about recourse in the context of: What is  
11 the secured lenders' remedy? What good does that collateral  
12 get that secured lender? That concept is simply inapplicable  
13 to the super-priority context.

14 Your Honor, I want to note -- I'm going to stick to  
15 the code because I think your Honor is steering us there  
16 repeatedly. 1129 -- this of the bankruptcy code 11 U.S.C.  
17 1129(a)(9). That section in general talks about what has to  
18 exist for a plan to be confirmed. And (a)(9) says except to  
19 the extent that the holder of a particular claim, that's us,  
20 has agreed to a different treatment, then (a) under that says  
21 we have to be paid in full.

22 Now our super-priority claim itself tells you what  
23 we're supposed to be paid. The amount we lent. If the  
24 government is going to give away the right to be repaid, it  
25 will do so explicitly. And it did so explicitly as to the GM

1 equity interest and as to the carve-out. It didn't do that  
2 here.

3 THE COURT: But then what does it mean that the loan,  
4 which is what you're entitled to be repaid -- and there isn't  
5 anything else but the loan -- that the loan shall be  
6 nonrecourse. What does that mean?

7 MR. JONES: Your Honor, I think you're --

8 THE COURT: Please tell me what it means. Just tell  
9 me what it means. Under your reasoning, under your reasoning  
10 the recourse is inapplicable to super-priority. What does it  
11 mean that the loan shall be nonrecourse because super-priority  
12 applies only to where you stand in line to get the loan that is  
13 nonrecourse repaid.

14 MR. JONES: Loan --

15 THE COURT: The loan that is nonrecourse.

16 MR. JONES: What we have is a super-priority claim,  
17 not conflated with the terms of the capital L Loan in this  
18 document.

19 Our claim is for the amount we lent. Plain and  
20 simple. This talks about how does this loan operate. At  
21 stages earlier than the end of this case, do we have secured  
22 lender rights to grab that asset, to foreclose on our liens and  
23 seize it. Now that has independent real world significance,  
24 your Honor.

25 THE COURT: So what you're saying is the tenth

1       decretal paragraph applies only in certain circumstances that  
2       are not articulated in the tenth decretal paragraph.

3               The tenth decretal paragraph doesn't say that at early  
4       stages in this bankruptcy before the bankruptcy is finally  
5       wound up, the last share of stock is distributed, and we get  
6       our money back, the loan shall be nonrecourse against the  
7       borrower.

8               It just says the loans are nonrecourse. Now maybe you  
9       bankruptcy people understand that to have some specific  
10       meaning. But I the nonbankruptcy district court judge don't  
11       know that.

12              MR. JONES: Let me --

13              THE COURT: And there's nothing in the record to  
14       explain that to me. And if there's something in the bankruptcy  
15       code or the four corners of the documents that explains that to  
16       me that's great. Otherwise, you got to go back and have a  
17       trial.

18              MR. JONES: Your Honor, I want to say three things on  
19       that.

20              One is by its own terms, by its own language that  
21       tenth paragraph is talking about remedies, and remedies as a  
22       secured lender. An as I've said, super-priority is  
23       conceptualized as not even being a secured loan. So by its  
24       terms it is illogical to read paragraph ten as modifying the  
25       super-priority. We've briefed that. And that's stated in

1 Colliers and elsewhere.

2 Your Honor, you're right, there is not an evidentiary  
3 record about what the timing effect would be and what the  
4 parties' intentions were.

5 THE COURT: There isn't even an evidentiary record who  
6 drafted this such that I would know who to construe it against.

7 MR. JONES: I don't want to lose my thread.

8 The reason I'm telling you this, when I start to talk  
9 about timing and the consequences, that is a response to a  
10 claim that either I render this language surplusage, which is  
11 wrong; or that it would be irrational and therefore it  
12 shouldn't be construed that way. So it is purely my explaining  
13 why that's not so. It's not a record-based argument, an  
14 evidentiary argument.

15 The other thing I want to point out, because there's  
16 been repeated reference to remand and a trial, and this is just  
17 a practical answer. Judge Gerber asked us explicitly this, at  
18 argument. All parties agreed. There simply is no parole  
19 evidence that will shed light on this. They were given the  
20 opportunity.

21 THE COURT: Excuse me. The testimony of the lawyers  
22 who negotiated this deal.

23 MR. JONES: As to --

24 THE COURT: That's the parole evidence that sheds  
25 light.



1 MR. JONES: Your Honor we could do voluminous -- we  
2 could depose people until the cows come home. Nobody believes  
3 that discovery would actually provide an answer to the very  
4 specific question here, which is what's this deal means and is  
5 the super-priority limited by the nonrecourse language.

6 I will point out in our brief we cite.

7 THE COURT: What's a girl to do? I wasn't there. You  
8 all were there. Judge Gerber was there. I wasn't there.

9 MR. JONES: Actually I think it should be an easy task  
10 and that you should rule for us. If you disagree, the Second  
11 Circuit in the Compagnie Financiere case cited at page ten of  
12 our brief tells you when no one comes forward with parol  
13 evidence it can be decided as a matter of law by the court.  
14 And of course this is de novo review. So you have the record  
15 that the parties, for better or worse, have identified. And  
16 that is -- so that's where we are.

17 Your Honor, I guess I'm going to save an oration, but  
18 the guts of my position, and you can agree or disagree, that  
19 the nonrecourse concept in that paragraph relates to the liens  
20 in the collateral by the nature of the concepts and the  
21 description in paragraph ten. It just says the loan shall be  
22 nonrecourse. It doesn't say anything about: Oh, but there's  
23 this accompanying super-priority in here so that will work.  
24 It's talking about remedy characteristics that accompany the  
25 loan on account of the government's secured lender status.

1 That's it. To use that to modify or limit the separate  
2 independent super-priority rights that exist under the code and  
3 that were negotiated is error. It was error below and it would  
4 be error at this time. That's the guts of our position, your  
5 Honor.

6 THE COURT: Canada.

7 MR. EDELMAN: Your Honor, a couple things, in no  
8 particular order.

9 You asked how to make sense of decretal paragraph ten.  
10 We think there are two interpretations would allow you to  
11 reconcile all these various provisions. First, as I think  
12 argued by U.S. treasury, you could limit this as a collateral  
13 and collateral remedy concept. We think that would allow you  
14 to reconcile all the provisions and give effect to everything.

15 We also think there's an alternative interpretation  
16 that would apply which is that this provision, the nonrecourse  
17 and their restatement about nonrecourse was meant to apply. It  
18 was nonrecourse to the GM equity interest. And that was the  
19 purpose of the nonrecourse statement.

20 THE COURT: But my problem with that, I already told  
21 you. That's not what it says. That's not what the literal  
22 words of -- then there's a big drafting error.

23 MR. EDELMAN: It's in the second part.

24 And we also think that's supported by some of the  
25 statements that were -- are part of the record before the

1 bankruptcy court including the statement of committee at the  
2 DIP hearing which it said that the DIP is nonrecourse that new  
3 GM --

4 THE COURT: I know. I have seen all that. The  
5 problem is there's contradictory language in the actual  
6 document and I'm stuck with the contradictory language in the  
7 actual document.

8 MR. EDELMAN: There's also a statement in the final  
9 order that says the super-priority claim shall be subject and  
10 subordinate only to the carve-out and the claims set forth in  
11 the preceding order. That's in the final order. But that's  
12 brought into the wind-down order.

13 One other -- I would also like to make reference to a  
14 statement by the committee which is part, I think this court  
15 can take judicial notice, if I can hand up another motion that  
16 was filed in bankruptcy court which talked about the scope of  
17 the nonrecourse provision. In the committee's fee application  
18 and I'll hand out copies to my colleagues. And that -- this  
19 was in their final fee application. This was done several  
20 months after the fact. And it talked about what they said they  
21 had done as part of the DIP negotiations. And in paragraph 35  
22 of their fee application which was filed in November, so  
23 several months after all this was done.

24 THE COURT: November of 2009.

25 MR. EDELMAN: November of 2009. And this is docket

1 number 4459. And it was filed November 16, 2009.

2 And paragraph 35, it says the applicant, which is  
3 Kramer Levin, counsel for the committee, was very active in  
4 negotiations over the final DIP order and the amended DIP  
5 credit agreement governing the wind-down facility. So the  
6 amended DIP facility is the thing that governs the wind-down  
7 facility. In particular, the applicant negotiated certain  
8 modifications to the final DIP order to provide that the DIP  
9 loans would not extend to the avoidance actions against the  
10 prepetition lender or to the ten percent stock and --

11 THE COURT: DIP loans would not extend to the  
12 avoidance actions.

13 MR. EDELMAN: The liens. It says the DIP liens.

14 THE COURT: Yes. I said would not extend.

15 MR. EDELMAN: -- would not extend to the avoidance  
16 actions or what we call the new GM equity interest.

17 THE COURT: Right.

18 MR. EDELMAN: There's also a final sentence in that  
19 provision says. The amended DIP agreement provided that the  
20 loans would be nonrecourse to the GM equity interest.

21 We think that's significant because it showed the  
22 intent of what the nonrecourse would be. In the prior sentence  
23 it just said the liens didn't apply to both the new GM equity  
24 interest and the avoidance loans. But then it says the  
25 nonrecourse only applied to the new --

1 THE COURT: Wouldn't that be written into the order.  
2 That would have made this very easy.

3 MR. EDELMAN: We think that there are numerous reasons  
4 why it was.

5 THE COURT: Well it says -- sadly, it says the DIP  
6 lenders' recourse under the amended DIP facility shall be only  
7 to the collateral. That's what it says.

8 MR. EDELMAN: It also says further on so that --

9 THE COURT: But that's -- see that's a very clear  
10 statement. Recourse shall be only to the collateral. I know  
11 what that means. I knew what that meant before I went to law  
12 school. Recourse shall be only to the collateral. The rest of  
13 it.

14 MR. EDELMAN: We think that the interpretation that I  
15 just posited before would give effect to that paragraph if you  
16 limit it to the collateral or the new GM equity --

17 THE COURT: But the collateral is not -- the  
18 exclusions from collateral are not coterminous with the new GM  
19 equity interest. Therefore, there's a mistake somewhere.  
20 Somebody made a mistake somewhere. All right. Because those  
21 two things are inconsistent. Recourse to the collateral. And  
22 it only protects the new GM equity interest. The collateral  
23 does not just consist of the assets other than the new GM  
24 equity interest.

25 MR. EDELMAN: We think that recourse is a lien

1 concept. And no other reading of this document --

2 THE COURT: Recourse is a loan concept.

3 MR. EDELMAN: In this context we think it's a lien  
4 concept. But also no other interpretation would give effect to  
5 all provisions of the agreement because otherwise you read out  
6 6(a) and 6(b) because if we're --

7 THE COURT: You're just telling me what you've already  
8 said. You're telling me what you've already said.

9 Creditors attorney, I'm happy to hear something else.

10 MR. MAYER: I just want to offer one additional  
11 comment. Otherwise, I think we'll rest on our papers.

12 One of the issues that didn't get talked about at all  
13 before Judge Gerber, in anyone's papers was raised by my  
14 partner, Jonathan Wagner, who is a civil litigator and  
15 therefore focuses on such things, is who has the burden of  
16 proving.

17 If you take a look at Judge Sotomayor's opinion in  
18 Bethlehem Steel Corp. The cite is 479 F.3d 167 at page 172. I  
19 have copies if people want it, but the reports are open to  
20 everyone.

21 THE COURT: I'll be happy to take a copy.

22 We're all getting paid for by the government anyway.

23 MR. MAYER: Your Honor, as an aside, whatever treasury  
24 and Canada lent to pay for administrative expenses in  
25 connection with this exercise was long ago exhausted. It is

1 now coming out of the unsecured creditors' pockets, not that  
2 that is relevant to anything.

3 If you look at page 172, your Honor. And this is  
4 under the heading that says discussion. It's on the left-hand  
5 column. I think it's page five of the printout on the  
6 right-hand side.

7 THE COURT: Right.

8 MR. MAYER: If you go down to the bottom of the middle  
9 paragraph, it says, "The burden of proving entitlement to  
10 priority payment," this is right before the cite.

11 THE COURT: "Rests with the party requesting it."

12 MR. MAYER: "The burden of proving entitlement to  
13 priority payment as an administrative expense rests with the  
14 party requesting it."

15 THE COURT: But nobody doubts that it's an  
16 administrative expense. Nobody questions that it's a  
17 super-priority administrative expense.

18 MR. MAYER: That is correct.

19 What is at issue is does the super-priority extend to  
20 this asset notwithstanding the waiver of recourse.

21 THE COURT: Okay. Right. Because as far as I  
22 understand the question presented, it would plainly extend to  
23 this asset unless the parties have explicitly agreed that it  
24 did not extend to this asset. And the question is whether the  
25 tenth decretal paragraph constitutes such an express

1 disclaimer. That's all this is about.

2 MR. MAYER: That's correct, your Honor. What we have  
3 here in effect is an asset that the creditors committee was the  
4 only party to bring this lawsuit. We brought this lawsuit.  
5 And a year later the government asserted -- the governments  
6 asserted a cloud on title. That's what this is about. They  
7 filed a reservation of rights and the summary judgment motion,  
8 first time we ever heard of it. They showed up and said wait a  
9 minute that action you're bringing, it really belongs to us.  
10 And this litigation followed.

11 In Judge Rakoff's decision in the Schoeps case, which  
12 again, I'm happy to hand up copies of.

13 THE COURT: It says what.

14 MR. MAYER: It's Julius H. Schoeps v. Museum of Modern  
15 Art. Has to do with title of a painting. It's a Holocaust  
16 case, actually.

17 THE COURT: I've had a number of them. Should have  
18 cited one of mine.

19 MR. MAYER: Well, your Honor. I'm not sure the  
20 particular procedural point was at issue in your cases.

21 But the issue here, and it's one I want to address.  
22 We brought this action for declaratory judgment. And in a  
23 situation where we are the plaintiff the issue of burden of  
24 proof becomes an important one. We think we carry that burden  
25 no matter whether we have it or whether they have it. We don't



1 think they've come close to carrying it if it lies with them.

2 I want to direct the Court at the bottom of what --  
3 it's the page number is four of nine at top right-hand corner.  
4 It's at the very bottom of the page. "In an action for  
5 declaratory judgment, the burden of proof rests on the party  
6 who would bear it if the action were brought in due course as a  
7 claim for nondeclaratory relief."

8 The governments are asserting a claim to this lawsuit.  
9 If the governments had never shown up, this lawsuit would have  
10 been -- if it ever ends up being decided and there are  
11 proceeds, would end up being distributed to unsecured  
12 creditors. The only reason that didn't happen is because the  
13 government put cloud on title.

14 THE COURT: I understand that.

15 MR. MAYER: We move to remove -- we have acted to  
16 remove that cloud in that circumstance. And that's why we  
17 found the Schoeps case so relevant, because it is a  
18 cloud-on-title case.

19 And what Judge Rakoff held was that when someone  
20 asserts a cloud on title, it is the person asserting the cloud  
21 that has the burden of proof. That's what we have here. We  
22 have the governments asserting a cloud on title.

23 THE COURT: Well, folks, apparently, or so I'm told,  
24 you all agreed at one point in time that the record was the  
25 record, and the proof was the proof, and that there was nothing

1 else that could possibly be introduced that would shed any  
2 light on the subject.

3 MR. MAYER: We agreed there were no issues, disputed  
4 issues of fact. That's correct, your Honor.

5 THE COURT: Fine. Then the burden of proof is just  
6 dropped out of the case. The question is who prevails on a  
7 legal argument.

8 MR. MAYER: In that case, your Honor, we rest on our  
9 papers. We think that you have it right.

10 THE COURT: Well I don't know that I have it. That  
11 was where I was in trying to -- is there something else that we  
12 have to say?

13 MR. EDELMAN: Yes, your Honor. I actually disagree.

14 THE COURT: Burden of proof is not in this case. Can  
15 we not talk about the burden of proof.

16 MR. EDELMAN: I won't. But I think it just raises  
17 another issue, which is we were granted a super-priority right  
18 for everything including the avoidance action proceeds at least  
19 some point in time. There are allegations that we waived our  
20 right. And in order under New York law for a waiver to be  
21 found the waiver cannot be inferred but it must be clear.

22 THE COURT: I agree. The issue is: Is the tenth  
23 decretal paragraph a clear waiver of your right?

24 MR. EDELMAN: And we don't think --

25 THE COURT: And you say no and they say yes.

1 MR. EDELMAN: And we think that like, such as the fee  
2 application, we do think there could be extrinsic evidence that  
3 would shine light on this. And so we think the papers can  
4 be -- the only way to read the papers in a consistent fashion  
5 would be for the DIP lenders. But if not, then we do not think  
6 that the intent of EDC and, I think the federal government  
7 would also agree that their intent -- we never intended --

8 THE COURT: Their unexpressed intent is of no  
9 relevance. You can't -- parol evidence of unexpressed intent  
10 is not admissible. Parol evidence is admissible to show intent  
11 as expressed during the course of negotiations.

12 MR. EDELMAN: I agree.

13 THE COURT: The fact that you were secretly thinking  
14 something is not parol evidence that overcomes the expressed  
15 statements of the parties, which is why I said there was a  
16 point in time at which I thought this had to be remanded for a  
17 trial to reconstruct those negotiations in order to know who  
18 said what to whom, not to have someone talk about what he was  
19 thinking in the back of his mind, because what he was thinking  
20 in the back of his mind has no relevance at all.

21 MR. EDELMAN: We agree with that. But the only way to  
22 construe these documents without rendering portions of them  
23 pure --

24 THE COURT: You've said that fifteen times.

25 MR. EDELMAN: Yes, I have. But there is no other way.

1 THE COURT: Except my way.

2 Nothing is superfluous my way. It may be wrong, but  
3 nothing is superfluous.

4 MR. EDELMAN: Your Honor, I think that your  
5 interpretation would render the super-priority superfluous and  
6 without any meaning. We could have just had paragraph 6(b).  
7 And the only reason posited by the bankruptcy court was that it  
8 protected -- the bankruptcy court probably found the same  
9 problem that we're here about, and didn't know how --

10 THE COURT: Well certainly not cramdown. Certainly  
11 not cramdown. You guys aren't cramdown lenders. And that  
12 whole statement about cramdown in the bankruptcy court is just  
13 plain wrong.

14 MR. EDELMAN: We agree with that.

15 THE COURT: All right. I have to do a criminal  
16 matter. One last word from the United States.

17 MR. JONES: Your Honor, I'm going to resoundingly end  
18 on two small points, one just raised by Mr. Mayer, and not  
19 repeat.

20 He objects that the governments came forward after a  
21 year's delay and imposed a cloud on title. And my point is  
22 this action was brought from the very outset on behalf of the  
23 estate and we understood ourselves to be an entity holding  
24 entitlements against the estate and therefore there was no  
25 reason for us to --

1 THE COURT: It is a fair statement, given my reading  
2 of what Judge Gerber did, it's a fair statement that you didn't  
3 make your position expressly known.

4 MR. JONES: True.

5 THE COURT: For a year. That's all. That's all he's  
6 saying.

7 MR. JONES: Right. When we first perceived a claim --  
8 an assertion that it shouldn't be for us, we came forward and  
9 said wait a minute, not so fast. Until then we perceived no  
10 need.

11 I won't spell it out but, your Honor, there's one  
12 thing, factor that Judge Gerber deemed significant that simply  
13 results from a misreading of a debtor motion, and we point that  
14 out in our reply brief at five. He reads parties to this case  
15 as having understood nonrecourse to apply to super-priority.  
16 That's a misreading. I explain that at page five of the reply.  
17 I won't drone on. But I want to make sure that that doesn't  
18 escape one's attention.

19 THE COURT: I don't want to get into that. Because if  
20 we have to get into that you are going to go back. And whether  
21 you think you can't reconstruct this or not, you are going to  
22 have to reconstruct it. If we have to get into people's  
23 intent, then there will have to be evidence about who said what  
24 to whom in the heated month of July 2009.

25 MR. JONES: He understood that to be a factor helping

1 him decide how to read these documents.

2 THE COURT: I'm trying not to get there.

3 MR. JONES: That's great, your Honor.

4 THE COURT: Trying not to get there. Because I know  
5 you don't want to go have a trial.

6 MR. JONES: I don't even know which way that cuts for  
7 the government. I just feel obliged to point it out because we  
8 did say that to Judge Gerber.

9 THE COURT: Thank you, folks. Thank you very much.

10 (Adjourned)

11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25