Hearing Date and Time: To be determined by the Court
Objections Due (per Scheduling Order): January 20, 2016
Reply Due (per Scheduling Order): February 15, 2016

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Attorneys for Certain Term Loan Investor Defendants

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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

NOTICE OF JOINT MOTION TO DISMISS

PLEASE TAKE NOTICE that a hearing to consider the relief requested in the *Joint Motion to Dismiss Plaintiff's Amended Complaint* (the "**Joint Motion**") filed by Certain Term Loan Investor Defendants[1] shall be held before the Honorable United States Bankruptcy Judge, at the United States Bankruptcy Court for the Southern District of New York, Courtroom to be determined, One Bowling Green, New York, New York 10004 (the "**Court**") on a date and at a time to be determined by the Court.

PLEASE TAKE FURTHER NOTICE that objections, if any, to the Joint Motion and the relief requested therein shall be made in writing, shall state with particularity the grounds therefor, shall conform to the Federal Rules of Bankruptcy Procedure and the Local Bankruptcy Rules for the Southern District of New York, and shall be filed with the Court (a) electronically in accordance with General Order M-399 (which can be found at www.nysb.uscourts.gov) by registered users of the Court's case filing system and (b) by all other parties in interest, on a CD-ROM, in text-searchable portable document format (PDF), with a hard copy delivered directly to Chambers, in accordance with the customary practices of the Court and General Order M-399, to the extent applicable, and served in accordance with General Order M-399 on Hahn & Hessen LLP, attorneys for Certain Term Loan Investor Defendants, 488 Madison Avenue, New York, New York 10022 (Attn: Mark T. Power), so as to be received no later than January 20, 2016.

[1] As defined in the Joint Motion.

PLEASE TAKE FURTHER NOTICE that the relief requested in the Joint Motion may be granted without a hearing if no objection is timely filed and served as set forth above.

Dated: New York, New York
November 16, 2015

Respectfully submitted,

HAHN & HESSEN LLP

By: */s/ Mark T. Power*

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

CERTAIN TERM LOAN INVESTOR DEFENDANTS' JOINT MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT

Certain Defendants Bechtel Trust & Thrift Plan & Master Trust for Certain Tax Qualified Bechtel Retirement Plans; GoldenTree Loan Opportunities III, Ltd.; GoldenTree Loan Opportunities IV, Ltd.; Arch Reinsurance Ltd.; Coca-Cola Company Retirement & Master Trust; Caterpillar Master Retirement Trust; J.C. Penney Corporation, Inc. Pension Plan Trust; Stichting Pensioenfonds Hoogovens; Stichting Bewaarder Syntrus Achmea Global High Yield Pool f/k/a Stichting Bewaarder Interpolis Pensioenen Global High Yield Pool; DDJ High Yield Fund; Stichting Pensioenfonds Metaal en Techniek[1]; Shinnecock CLO II, Ltd.; Kynikos Opportunity Fund II LP; Kynikos Opportunity Fund International Limited; Kynikos Opportunity Fund LP; Debello Investors LLC; Wexford Catalyst Investors LLC; Wexford Spectrum Investors LLC; St. Luke's Health System Corporation, as successor to St. Luke's Episcopal Health System Foundation; Master Trust Pursuant to the Retirement Plans of APL LTD and Subsidiaries; Employees' Retirement System of Baltimore County; Board of Pensions of the Presbyterian Church (U.S.A.); Building Trades United Pension Trust Fund; Carpenters Pension Fund of Illinois; The Children's Hospital of Philadelphia Foundation; Connecticut General Life Insurance Company In Respect of Its Separate Account 4828CP; Retirement Board of the Park Employees' and Retirement Board Employees' Annuity and Benefit Fund of Chicago; Cummins Inc. and Affiliates Collective Investment Trust; The Duchossois Group Inc. Pension Trust; Emerson Electric Co. Retirement Master Trust; Inter-Local Pension Fund of the Graphic Communications Conference of the International Brotherhood of Teamsters; Taxable Fixed Income Managers: Portfolio 1 [Series] f/k/a Goldman Sachs GMS Core Plus Fixed Income Portfolio; Halliburton Company Employee Benefit Master Trust; Health

[1] Solely with respect to assets managed by DDJ Capital Management, LLC.

Care Foundation of Greater Kansas City; Eighth District Electrical Pension Fund; ILWU/PMA Pension Plan Trust; State of Indiana Major Moves Construction Fund; Indiana Public Retirement System; Indiana State Police Pension Trust; Kraft Foods Global, Inc. & Kraft Foods Master Retirement Trust; Board of Fire and Police Pension Commissioners of the City of Los Angeles; Louisiana Carpenters Regional Council Pension Trust; Municipal Employees' Retirement System of Michigan; City of Milwaukee Employes' Retirement System; Montana Board of Investments; Mather Foundation; Reams – Prudential Retirement Insurance & Annuity Company, on behalf of Separate Account SA-18; Purdue University; The Rotary Foundation; Columbus Unconstrained Bond Fund (formerly Reams Unconstrained Bond Fund); Santa Barbara County Employees' Retirement System; Sonoma County Employees' Retirement Association; Scout Core Plus Bond Fund (formerly Frontegra Columbus Core Plus Bond Fund); Seattle City Employees' Retirement System; Indiana University; University of Kentucky; Ventura County Employees' Retirement Association; Bill & Melinda Gates Foundation Trust; and Vulcan Ventures, Inc. (collectively, the "**Term Loan Investor Defendants**"), by their counsel Hahn & Hessen LLP, move the Court pursuant to Fed. R. Civ. P. 12(b)(2), 12(b)(5) and 12(b)(6), made applicable to this adversary proceeding by Fed. R. Bankr. P. 7012(b) (the "**Joint Motion**"), for an order dismissing with prejudice the *First Amended Adversary Complaint for (1) Avoidance of Unperfected Lien, (2) Avoidance and Recovery of Postpetition Transfers, (3) Avoidance and Recovery of Preferential Payments, and (4) Disallowance of Claims by Defendants* (the "**Amended Complaint**") filed by Plaintiff Motors Liquidation Company Avoidance Action Trust (the "**AAT**") on May 20, 2015 (ECF No. 91), and in support thereof respectfully represent as follows:

1. This Court has jurisdiction to hear the Motion under 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (B), (F), (K), and (O). The Term Loan Investor Defendants consent to the entry of final orders or judgment by the Court if it is determined that the Court, absent consent of the parties, cannot enter final orders or judgment consistent with Article III of the United States Constitution. Venue is proper before this Court pursuant to 28 U.S.C. § 1409(a).

2. The Amended Complaint's first, second, third and fourth claims for relief fail to state claims upon which relief can be granted pursuant to Bankruptcy Rule 7012(b) and Fed. R. Civ. P. 12(b)(2), 12(b)(5) and 12(b)(6), for the reasons set forth in the Term Loan Investor Defendants' Memorandum of Law filed in support of the Joint Motion, to which the Court is respectfully referred.

WHEREFORE, for the foregoing reasons, the Term Loan Investor Defendants respectfully request that the Court grant the Joint Motion and dismiss the Amended Complaint as against the Term Loan Investor Defendants with prejudice, and that the Court grant such other and further relief as may be just and proper.

Dated: New York, New York
November 16, 2015

Respectfully submitted,

HAHN & HESSEN LLP

By: */s/ Mark T. Power*

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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

MEMORANDUM OF LAW IN SUPPORT OF CERTAIN TERM LOAN INVESTOR DEFENDANTS' JOINT MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT

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GLOSSARY OF TERMS USED IN TERM LOAN INVESTOR DEFENDANTS' JOINT MOTION TO DISMISS

AAT	Plaintiff Motors Liquidation Company Avoidance Action Trust, as successor to the Committee.
Amended Complaint	*First Amended Adversary Complaint for (1) Avoidance of Unperfected Lien, (2) Avoidance and Recovery of Postpetition Transfers, (3) Avoidance and Recovery of Preferential Payments, and (4) Disallowance of Claims by Defendants* filed by the AAT on May 20, 2015 (ECF No. 91).[1]
Bank Lenders	JPMC, Credit Suisse, Cayman Islands Branch, ABN AMRO Bank N.V., Barclays Bank PLC, The Bank of New York and National City Bank, each of whom committed to fund a portion of the Term Loan to GM under the Term Loan Agreement.
Bankruptcy Code	Chapter 11 of title 11 of the United States Code, 11 U.S.C. §§ 101, *et seq*.
Committee	The Official Committee of Unsecured Creditors of the Debtors, appointed by the Office of the United States Trustee on June 3, 2009.
Court	The United States Bankruptcy Court for the Southern District of New York.
Debtors	GM, n/k/a Motors Liquidation Company, and certain of its subsidiaries, each of which filed a petition under the Bankruptcy Code with the Court.
Defendant Term Lenders	The defendants named in the Amended Complaint.
DIP Facility	The debtor-in-possession financing provided to the Debtors by the United States Department of Treasury and Export Development Canada pursuant to the Interim and DIP Orders.
DIP Motion	The Debtors' motion filed on the Petition Date seeking authority to obtain interim postpetition financing on a secured and superpriority basis up to a maximum aggregate interim amount of $15 billion and final postpetition financing on a secured and superpriority basis up to a maximum aggregate final amount of $33.3 billion from the United States Department of Treasury and Export Development Canada.
DIP Order	*Final Order Pursuant to Bankruptcy Code Sections 105(a), 361, 362, 363, 364 and 507 and Bankruptcy Rules 2002, 4001 and 6004 (A) Approving a DIP Credit Facility and Authorizing the Debtors to*

[1] All references to an "ECF" number shall be to documents filed in the adversary proceeding. All references to "Docket No." shall be to documents filed in GM's bankruptcy case.

	Obtain Post-Petition Financing Pursuant Thereto, (B) Granting Related Liens and Super-Priority Status, (C) Authorizing the Use of Cash Collateral and (D) Granting Adequate Protection to Certain Pre-Petition Secured Parties entered by the Court on June 25, 2009 (Docket No. 2529).
GM	General Motors Corporation.
Interim DIP Order	*Interim Order Pursuant to Bankruptcy Code Sections 105(a), 361, 362, 363, 364 and 507 and Bankruptcy Rules 2002, 4001 and 6004 (A) Approving a DIP Credit Facility and Authorizing the Debtors to Obtain Post-Petition Financing Pursuant Thereto, (B) Granting Related Liens and Super-Priority Status, (C) Authorizing the Use of Cash Collateral, (D) Granting Adequate Protection to Certain Pre-Petition Secured Parties and (E) Scheduling a Final Hearing* entered by the Court on June 2, 2009 (Docket No. 292).
JPMC	Defendant JPMorgan Chase Bank, N.A., in its capacity as administrative agent and lender under the Term Loan Agreement.
LSTA	The Loan Syndications and Trading Association.
Original Complaint	*Adversary Complaint for (1) Avoidance of Perfected Lien, (2) Avoidance and Recovery of Postpetition Transfers, (3) Avoidance and Recovery of Preferential Payments, and (4) Disallowance of Claims by Defendants* filed by the Committee on July 31, 2009 (ECF No. 1).
Payments	The payment made by GM to JPMC on May 27, 2009, which the AAT asserts in the Third Claim for Relief in the Amended Complaint is avoidable as a preferential transfer pursuant to section 547 of the Bankruptcy Code.
Petition Date	June 1, 2009.
Postpetition Transfers	The "Payment" as defined in the DIP Order, which the AAT asserts in the Second Claim for Relief in the Amended Complaint is an avoidable postpetition transfer pursuant to section 549 of the Bankruptcy Code.
Power Declaration	*Declaration of Mark T. Power in Support of Certain Term Loan Investor Defendants' Joint Motion to Dismiss Plaintiff's Amended Complaint* dated November 16, 2015, submitted in support of the Joint Motion.
Record Holder Date	June 30, 2009, the cutoff date that JPMC used to identify the individual holders of the Term Loan for the "Payment" pursuant to the DIP Order.
Saturn	Saturn Corporation.
Seller Conduit Defendants	Those Term Loan Investor Defendants that sold their interest in

	the Term Loan prior to, but settled with the buyer after, the Record Holder Date.
Service Extension Orders	The Service Extension Orders Nos. 1–5, inclusive.
Service Extension Order No. 1	*Stipulated Scheduling Order* between the Committee and JPMC entered by the Court on October 6, 2009 (ECF No. 10).
Service Extension Order No. 2	*Joint Stipulation Requesting Modification of Stipulated Scheduling Order* between the Committee and JPMC entered by the Court on January 20, 2010 (ECF No. 17).
Service Extension Order No. 3	*Order Further Extending Time to Serve Summons and Complaint* entered by the Court on April 10, 2013 (ECF No. 82).
Service Extension Order No. 4	*Stipulation and Order* between the AAT and JPMC entered by the Court on May 19, 2015 (ECF No. 90).
Service Extension Order No. 5	*Order Further Extending Time to Serve Summons and Amended Complaint* entered by the Court on August 13, 2015 (ECF No. 152).
Synthetic Lease	That certain synthetic lease financing arrangement entered into by GM on October 31, 2001, pursuant to which GM obtained up to approximately $300 million in financing from a syndicate of financial institutions.
Term Lenders	Holders of an interest in the Term Loan.
Term Loan	The $1.5 billion seven-year term loan obtained by GM from the Bank Lenders pursuant to the Term Loan Agreement.
Term Loan Agreement	The term loan agreement dated as of November 29, 2006, which was amended by that certain first amendment dated as of March 4, 2009, between GM, as borrower, JPMC, as agent, the Bank Lenders, various institutions as agents and Saturn as guarantor, pursuant to which GM obtained the Term Loan.
Term Loan Investor Defendants	Defendants Bechtel Trust & Thrift Plan & Master Trust for Certain Tax Qualified Bechtel Retirement Plans; GoldenTree Loan Opportunities III, Ltd.; GoldenTree Loan Opportunities IV, Ltd.; Arch Reinsurance Ltd.; Coca-Cola Company Retirement & Master Trust; Caterpillar Master Retirement Trust; J.C. Penney Corporation, Inc. Pension Plan Trust; Stichting Pensioenfonds Hoogovens; Stichting Bewaarder Syntrus Achmea Global High Yield Pool f/k/a Stichting Bewaarder Interpolis Pensioenen Global High Yield Pool; DDJ High Yield Fund; Stichting Pensioenfonds Metaal en Techniek[2]; Shinnecock CLO II, Ltd.; Kynikos Opportunity Fund II LP; Kynikos Opportunity Fund International Limited; Kynikos

[2] Solely with respect to assets managed by DDJ Capital Management, LLC.

	Opportunity Fund LP; Debello Investors LLC; Wexford Catalyst Investors LLC; Wexford Spectrum Investors LLC; St. Luke's Health System Corporation, as successor to St. Luke's Episcopal Health System Foundation; Master Trust Pursuant to the Retirement Plans of APL LTD and Subsidiaries; Employees' Retirement System of Baltimore County; Board of Pensions of the Presbyterian Church (U.S.A.); Building Trades United Pension Trust Fund; Carpenters Pension Fund of Illinois; The Children's Hospital of Philadelphia Foundation; Connecticut General Life Insurance Company In Respect of Its Separate Account 4828CP; Retirement Board of the Park Employees' and Retirement Board Employees' Annuity and Benefit Fund of Chicago; Cummins Inc. and Affiliates Collective Investment Trust; The Duchossois Group Inc. Pension Trust; Emerson Electric Co. Retirement Master Trust; Inter-Local Pension Fund of the Graphic Communications Conference of the International Brotherhood of Teamsters; Taxable Fixed Income Managers: Portfolio 1 [Series] f/k/a Goldman Sachs GMS Core Plus Fixed Income Portfolio; Halliburton Company Employee Benefit Master Trust; Health Care Foundation of Greater Kansas City; Eighth District Electrical Pension Fund; ILWU/PMA Pension Plan Trust; State of Indiana Major Moves Construction Fund; Indiana Public Retirement System; Indiana State Police Pension Trust; Kraft Foods Global, Inc. & Kraft Foods Master Retirement Trust; Board of Fire and Police Pension Commissioners of the City of Los Angeles; Louisiana Carpenters Regional Council Pension Trust; Municipal Employees' Retirement System of Michigan; City of Milwaukee Employes' Retirement System; Montana Board of Investments; Mather Foundation; Reams – Prudential Retirement Insurance & Annuity Company, on behalf of Separate Account SA-18; Purdue University; The Rotary Foundation; Columbus Unconstrained Bond Fund (formerly Reams Unconstrained Bond Fund); Santa Barbara County Employees' Retirement System; Sonoma County Employees' Retirement Association; Scout Core Plus Bond Fund (formerly Frontegra Columbus Core Plus Bond Fund); Seattle City Employees' Retirement System; Indiana University; University of Kentucky; Ventura County Employees' Retirement Association; Bill & Melinda Gates Foundation Trust; and Vulcan Ventures, Inc.

Pursuant to Fed. R. Civ. P. 12(b)(2), 12(b)(5) and 12(b)(6), made applicable to this adversary proceeding by Fed. R. Bankr. P. 7012(b), the Term Loan Investor Defendants, by and through their counsel, Hahn & Hessen LLP, respectfully submit this Memorandum of Law in support of their joint motion (the "**Joint Motion**") for an order dismissing with prejudice the AAT's Amended Complaint as against the Term Loan Investor Defendants.

PRELIMINARY STATEMENT

Six years after this adversary proceeding was filed and four years after the expiration of the two-year statute of limitations period applicable to avoidance claims, the AAT has finally attempted to provide the required notice, through service of process of a summons and the Amended Complaint, upon the Term Loan Investor Defendants. Prior to this belated-service effort, none of the Term Loan Investor Defendants were given notice of the Original Complaint filed in 2009 that sought to recover the Payments and/or the Postpetition Transfers from them. The Committee's and the AAT's failure to provide timely and proper notice severely prejudiced the Term Loan Investor Defendants.

Not only were they not served in the adversary proceeding in the timely manner to which they were entitled under the Federal Rules of Civil Procedure (made applicable through the Federal Rules of Bankruptcy Procedure), the Term Loan Investor Defendants were not even provided notice (or the opportunity to be heard) of the Service Extension Orders depriving them of their entitled notice.

The two-year limitations period, in effect, has been unilaterally extended nearly six years. The lack of required notice has also adversely affected the Term Loan Investor Defendants in other ways by potentially affecting their rights and ability to (i) participate in and shape the outcome of the litigation, (ii) assert potential cross-claims against parties, (iii)

obtain documents and information necessary to defend their interests, and (iv) establish appropriate reserves or take other steps designed to protect their investors and beneficiaries.

The Committee and the ATT not only failed to provide timely and proper notice of the adversary proceeding to the Term Loan Investor Defendants, they also took no steps during this extended time period to identify the correct parties who should be defendants in this adversary proceeding.

Further, the Committee and the AAT failed to obtain proper authority from the Court to bring prepetition avoidance claims beyond the narrowly-defined lien perfection claim carved-out in the DIP Order and are otherwise barred from asserting avoidance claims against the Defendant Term Lenders that did not hold an obligation under the Term Loan at the time of the transfer.

The Court should dismiss the claims asserted against the Term Loan Investor Defendants in the Amended Complaint on the following grounds:

(i) The *ex parte* Service Extension Orders entered without the requisite cause shown should be reconsidered and vacated because they involved an unsound exercise of discretion and the Committee's and the AAT's failure to timely and properly serve the Term Loan Investor Defendants with a summons and the Original Complaint for six years has severely prejudiced them in violation of their due process rights, and the Amended Complaint should be dismissed with prejudice as against them;

(ii) Neither the Committee, nor its successor, the AAT, were granted standing under the DIP Order to prosecute prepetition preferential transfer claims under sections 547 and 550 of the Bankruptcy Code, and all such claims have been released or are otherwise time-barred and should be dismissed with prejudice;

(iii) The Payments are protected from avoidance under section 547 of the Bankruptcy Code pursuant to the safe harbor provisions codified in section 546(e) of the Bankruptcy Code and applicable case law and the claim should be dismissed with prejudice; and

(iv) The AAT's right to seek disgorgement of the Postpetition Transfers against the Term Loan Investor Defendants pursuant to section 549 of the Bankruptcy Code is limited to the actual holders of the obligations under the Term Loan at the time of the

payoff and the Second Claim for Relief asserted against any "initial" or "mediate" transferee under section 550 of the Bankruptcy Code should be dismissed with prejudice.

Accordingly, for the foregoing reasons, as well as the reasons raised by other Defendant Term Lenders in their motions to dismiss, the Term Loan Investor Defendants' Joint Motion should be granted.

PERTINENT FACTUAL BACKGROUND[3]

A. The Term Loan Agreement[4]

Pursuant to the Term Loan Agreement, GM obtained the $1.5 billion seven-year Term Loan, evidenced by a note, in 2006 (Amended Complaint ¶¶ 571–572). To secure their obligations under the Term Loan, GM and Saturn granted to JPMC, as agent, pursuant to a November 29, 2006 collateral agreement, among GM, Saturn and JPMC, a first priority security interest in certain equipment, fixtures, documents, general intangibles, all books and records and their proceeds (Amended Complaint ¶ 572).

Unlike traditional bank debt held by a limited number of financial institutions, the Term Loan was a complex syndicated commercial financing, pursuant to which the six Bank Lenders committed upfront to fund the entire $1.5 billion Term Loan (*see* Term Loan Agreement ¶ 2.01, **Exhibit 1**). The Bank Lenders then had the right to sell, typically through assignments, interests in the Term Loan and the accompanying note in the secondary market to a variety of investors referred to as "Assignees," including any "Approved Fund" (*see* Term Loan Agreement ¶ 10.06). An "Approved Fund" is defined to include, with respect to any Term Lender, a "CLO" administered or managed by such Term

[3] The facts set forth below are derived from the Amended Complaint, the documents attached to or referenced therein, the Court and other filings or orders and the prior decisions of the Court and other courts, including this Court's prior decision reported at *Official Comm. of Unsecured Creditors of Motors Liquidation Co. v. JPMorgan Chase Bank, N.A. (In re Motors Liquidation Co.)*, 486 B.R. 596 (Bankr. S.D.N.Y. 2013), which provides a full description of the factual background.

[4] Citations to "**Exhibit** "__" refer to the exhibits attached to the accompanying Power Declaration.

Lender or an affiliate "engaged in making, purchasing, holding or otherwise investing in bank loans and similar extensions of credit in the ordinary course" (Term Loan Agreement ¶ 10.06). Similar to accredited investors in the securities industry, Assignees unaffiliated with the Bank Lenders were required to complete a questionnaire as a condition to their purchase (Term Loan Agreement ¶ 10.06(b)(v)). A purchaser's individual investments in the Term Loan were limited to "not less than "$1,000,000, unless [GM and JPMC] otherwise consent" (Term Loan Agreement ¶ 10.06(b)(ii)(A)). To facilitate trading in the secondary market, the Term Loan and accompanying note were registered and assigned CUSIP No. 37046GAF9.[5] Hundreds of investors purchased interests in the Term Loan and accompanying note, thereby technically becoming "Lenders" under the Term Loan Agreement (*See* Amended Complaint ¶¶ 15–568 naming in excess of 500 Defendant Term Lenders who allegedly held interests in the Term Loan and accompanying note).

B. The Term Loan Investor Defendants

Like many of the defendants in this adversary proceeding, the Term Loan Investor Defendants acquired their respective interests in the Term Loan and the note evidencing that debt in the secondary market. As is self-evident from their names, the Term Loan Investor Defendants are comprised of numerous pension and retirement funds for government employees, employees of private and public companies, and employee union members, as well as universities, government entities, charitable organizations, hospitals, insurance companies, feeder funds and other funds, which invested in the ordinary course in

[5] "**CUSIP**" stands for Committee on Uniform Securities Identification Procedures. According to the U.S. Securities and Exchange Commission, a "CUSIP number identifies most financial instruments, including: stocks of all registered U.S. and Canadian companies, commercial paper, and U.S. government and municipal bonds. The CUSIP system (formally known as CUSIP Global Services)—owned by the American Bankers Association and managed by Standard & Poor's—facilitates the clearance and settlement process of securities. CUSIP numbers consist of nine characters (including letters and numbers) that uniquely identify a company or issuer and the type of financial instrument." *See* http://www.sec.gov/answers/cusip.htm.

fixed income securities such as interests in the Term Loan and the accompanying note. Many of the Term Loan Investor Defendants invested through funds managed by their investment advisor, while others invested directly (*See* Amended Complaint ¶¶ 15–568) (referencing the various investment advisors utilized by the Defendant Term Lenders to make their investment).

A comparison of the exhibits to the Amended Complaint (currently filed under seal) reveals that many of the Term Loan Investor Defendants sold their interests in the Term Loan prior to the Record Holder Date, and are not alleged to have received the Postpetition Transfers. They are nonetheless named as defendants in the Amended Complaint because they are alleged to have received the Payments. Other Term Loan Investor Defendants are being sued for disgorgement of both the Payments and the Postpetition Transfers, even though they sold their respective interests in the Term Loan prior to the Record Holder Date. They were named as defendants with respect to the Postpetition Transfers because they did not settle on the sale with their buyer until after the Record Holder Date. In those situations, they are being sued for the full Postpetition Transfers even though they did not own an equitable interest in the Term Loan at the time of the transfers and were contractually obligated to forward the Postpetition Transfers to the buyers.

C. The Unauthorized Termination Of The Term Loan's Security Interest Against Equipment

Prior to entering into the Term Loan Agreement, GM entered into the Synthetic Lease on October 31, 2001, by which GM obtained up to approximately $300 million in financing from a syndicate of financial institutions. *See In re Motors Liquidation Co.,* 486 B.R. at 606. The Synthetic Lease was documented by, *inter alia*, a Participation Agreement dated as of October 31, 2001, pursuant to which JPMC acted as administrative agent. *Id.* GM's

obligation to repay the financing under the Synthetic Lease was secured by liens on certain real properties. *Id.*

Outstanding amounts under the Synthetic Lease were paid off and the Synthetic Lease was terminated on October 30, 2008, which involved releasing liens on real estate and related assets. *Id.* at 609. At the time, Mayer Brown, LLP, GM's counsel with respect to the Synthetic Lease, caused the filing of UCC-3 termination statements with the Delaware Secretary of State. *Id.* at 614. As part of that filing, JPMC and its counsel erroneously authorized the filing of a UCC-3 termination statement terminating the UCC-1 financing statement securing the Term Loan. *Id.*

D. GM's Bankruptcy Filing

On the Petition Date, GM and certain of its subsidiaries filed voluntary petitions for relief under the Bankruptcy Code in the Court.

The Debtors also filed the DIP Motion seeking authority to obtain interim postpetition financing on a secured and superpriority basis up to a maximum aggregate interim amount of $15 billion and final postpetition financing on a secured and superpriority basis up to a maximum aggregate final amount of $33.3 billion under the DIP Facility from the United States Department of Treasury and Export Development Canada to pay, *inter alia*, certain prepetition claims and fund the Debtors' operations and administration costs (Amended Complaint ¶ 574). Pursuant to the Interim DIP Order and the DIP Order, the Court approved the DIP Facility on an interim and final basis, respectively. Among other things, the DIP Order authorized repayment in full of the Term Loan (Amended Complaint ¶ 578).

Paragraph 19(d) of the DIP Order provides for full general releases of any and all claims against, among others, the holders of the Term Loan,[6] except "that such release shall not apply to the Committee with respect only to the perfection of first priority liens of the Prepetition Senior Facilities Secured Parties (it being agreed that if the Prepetition Senior Facilities Secured Parties, after Payment, assert or seek to enforce any right or interest in respect of any junior liens, the Committee shall have the right to contest such right or interest in such junior lien on any grounds, including (without limitation) validity, enforceability, priority, perfection or value) (the "Reserved Claims")" (DIP Order ¶ 19(d))(**Exhibit 2**).

On July 31, 2009, the Committee filed the Original Complaint, which it elected to serve only on JPMC, and not on any other Defendant Term Lenders.

On October 6, 2009, the Court entered Service Extension Order No. 1 between the Committee and JPMC which granted the Committee 240 days to complete service on Defendant Term Lenders other than JPMC (Service Extension Order No. 1 ¶ 1).

On January 20, 2010, the Court entered Service Extension Order No. 2 between the Committee and JPMC, which gave the Committee "until thirty (30) days after the date of entry of the Court's decision on any dispositive motion made under this modified Stipulated Scheduling Order to serve the summons and complaint upon other defendants" (Service Extension Order No. 2 ¶ 4).

On April 10, 2013, the Court entered Service Extension Order No. 3, which extended the Committee's time to serve the summons and complaint on Defendant Term Lenders other than JPMC to thirty (30) days after the date of entry of a final order on the

[6] The holders of obligations under the Debtors' prepetition senior secured facilities, including the Term Loan, are defined in the DIP Order as the "Prepetition Senior Facilities Secured Parties" (DIP Order ¶ 19(b)).

Committee's and JPMC's cross-motions for summary judgment (Service Extension Order No. 3, at 2).

On January 21, 2015, following more than five years of litigation and appeals, the Second Circuit Court of Appeals issued a decision ruling that the Term Loan security interest had been terminated upon the filing of the erroneous UCC-3 termination statement and remanded the litigation back to the Court for further proceedings. *See generally Official Comm. of Unsecured Creditors of Motors Liquidation Co. v. JPMorgan Chase Bank, N.A. (In re Motors Liquidation Co.)*, 777 F.3d 100 (2d Cir. 2015).

On May 19, 2015, the Court entered Service Extension Order No. 4 between the AAT and JPMC, which extended the AAT's time to serve a summons and Amended Complaint on Defendant Term Lenders other than JPMC to sixty (60) days following the filing of the Amended Complaint (Service Extension Order No. 4 ¶ 2).

On May 20, 2015, the AAT filed the Amended Complaint. The AAT asserts four claims for relief against the Defendant Term Lenders: (1) avoidance of the Term Loan's lien as unperfected pursuant to section 544(a) of the Bankruptcy Code; (2) avoidance and disgorgement of the Postpetition Transfers the Defendant Term Lenders allegedly received improperly because the lien was not perfected, pursuant to sections 549 and 550 of the Bankruptcy Code; (3) avoidance and disgorgement of the Payments the Defendant Term Lenders allegedly received as preferential transfers pursuant to sections 547 and 550 of the Bankruptcy Code; and (4) disallowance of any claims the Defendant Term Lenders may have against the Debtors pursuant to section 502(d) unless and until they disgorge the avoidable transfers alleged in the second and third claims for relief.

On August 13, 2015, the Court entered Service Extension Order No. 5 extending the AAT's time to serve a summons and Amended Complaint on Defendant Term Lenders other than JPMC to September 30, 2015 (Service Extension Order No. 5, at 2).

ARGUMENT

I. The Applicable Pleading Standard

In determining whether a complaint should survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6), a court must determine whether the complaint contains "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (*citing Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)); *see also LaFaro v. New York Cardiothoracic Grp., PLLC*, 570 F.3d 471, 476 (2d Cir. 2009) ("Only a complaint that states a plausible claim for relief survives a motion to dismiss."). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. In deciding a motion to dismiss under Rule 12(b)(6), the Court must accept all well-pleaded facts alleged in a complaint as true and draw all reasonable inferences in favor of the plaintiff. *Pension Ben. Guar. Corp. ex rel. St. Vincent Catholic Med. Ctrs. Ret. Plan v. Morgan Stanley Inv. Mgmt. Inc.*, 712 F.3d 705, 732 (2d Cir. 2013). However, a "plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555 (internal citations/quotations omitted); *see also Iqbal*, 556 U.S. at 678 ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice ...."), and the Court is "not

bound to accept as true a legal conclusion couched as a factual allegation." *Twombly*, 550 U.S. at 555.

Determining whether a complaint states a plausible claim is a "context-specific task" and requires a court "to draw on its judicial experience and common sense." *Iqbal*, 556 U.S. at 679 (citation omitted). If the plaintiff has "not nudged [his] claims across the line from conceivable to plausible, [his] complaint must be dismissed." *Twombly*, 550 U.S. at 570.

In ruling on a motion to dismiss, in addition to evidence of which courts may take judicial notice, courts may also consider documents attached to the complaint as well as relied upon in the complaint but not attached. *See, e.g.*, *Cortec Indus., Inc. v. Sum Holding L.P.*, 949 F.2d 42, 48 (2d. Cir. 1991) (district court may consider exhibits attached to complaint and also those omitted from plaintiff's complaint but attached as exhibits to defendant's motion papers because "there was undisputed notice to plaintiffs of their content and they were integral to plaintiffs' claim"). The documents referred to in this Memorandum of Law were attached or referred to in the Amended Complaint, included as an exhibit to the Power Declaration or were documents filed in the GM bankruptcy case or this adversary proceeding, and are properly before the Court in consideration of the Joint Motion and this Memorandum of Law.

II. The Amended Complaint Should Be Dismissed For Insufficient Service Of Process And Because It Resulted In The Term Loan Investor Defendants' Due Process Rights Being Violated

The inordinate six-year delay in service of a summons and the Original Complaint on the Term Loan Investor Defendants violated their due process rights since they did not receive constitutionally adequate notice of the proceedings and have been prejudiced as a

result. Rule 12(b)(5), made applicable to this proceeding pursuant to Bankruptcy Rule 7012, provides that a defendant may move to dismiss a complaint when there is insufficient service of process. *See* FED. R. CIV. P. 12(b)(5); FED. R. BANKR. P. 7012. The Second Circuit has found that where a defendant moves to dismiss under Rule 12(b)(5), "the plaintiff bears the burden of proving adequate service." *Dickerson v. Napolitano*, 604 F.3d 732, 852 (2d Cir. 2010) (citing *Burda Media, Inc. v. Viertel*, 417 F.3d 292, 298 (2d Cir. 2005)).

A. The Court Has Discretion To Reconsider And Vacate The Service Extension Orders

Where, as here, orders extending the deadline for service of process without a showing of good cause and in violation of a defendant's due process rights were entered *ex parte*, such orders should be vacated.

"[E]very order short of a final decree is subject to reopening at the discretion of the . . . judge." *Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 12 (1983). Procedural orders, such as an order extending time, are considered interlocutory—as opposed to final—orders because they do not resolve all disputed substantive issues among the parties. *See, e.g.*, *First Fid. Bank, N.A. v. Hooker Invs., Inc. (In re Hooker Invs., Inc.)*, 937 F.2d 833, 836–37 (2d Cir. 1991). Courts have discretion to reconsider or modify interlocutory orders. *See, e.g.*, *U.S. v. Uccio*, 940 F.2d 753, 757–59 (2d Cir. 1991).

In Efaw, the Ninth Circuit vacated prior district court orders extending time to serve a complaint until seven years after it was filed given the extraordinary length of delay, there was no reasonable explanation given for the delay, plaintiff was represented by able counsel at the time, and the delay prejudiced the defendant as the statute of limitations had run. *Efaw v. Williams*, 473 F.3d 1038, 1041 (9th Cir. 2007).

Ex parte orders extending the service deadline are no exception. As the Third Circuit has held, "a district court that has extended the time for service [may] vacate that extension and dismiss the case for untimely service, if it concludes that the plaintiff in fact had not shown good cause for the extension." *McCrae v. KLLM Inc.*, 89 Fed. App'x 361, 363–64 (3d Cir. 2004) (affirming lower court's decision to vacate its extension orders and dismiss action for insufficient or improper service of process); *Tso v. Delaney*, 969 F.2d 373, 377 (7th Cir. 1992); *Putnam v. Morris*, 833 F.2d 903, 905 (10th Cir. 1987).

In *Paden v. Testor Corp.*, Case No. 03-cv-50057, 2004 WL 2491633 (N.D. Ill. Nov. 1, 2004), for example, although the plaintiff had sought and received "an extension of time prior to the 120-day period expiring" and had served the defendant within that extended period, the district court saw no barrier to entertaining a subsequent motion to dismiss for improper service under Rule 12(b)(5), which argued that "no . . . basis existed for a discretionary extension of the time limit." *Id.* at *1–3.

The case for taking such corrective action is "especially" strong "were [sic] (as here) the part[ies] to be served w[ere] initially not given notice of the motions to extend or given a formal opportunity to respond to them." *McRae*, 89 Fed. App'x at 363; *see also Forman v. Mentor Graphics Corp. (In re Worldspace, Inc.)*, Adv. Proc. No. 10-53286-PJW (Bankr. D. Del. June 5, 2014) [D.I. 94] (**Exhibit 3**) (the bankruptcy court declined to hold that newly asserted claims related back to the filing of the initial complaint because the defendant never got notice of the prior nine extension orders).

Accordingly, under settled law and by the terms of its own ruling, the Court has "absolute authority" to set aside the Service Extension Orders, *see, e.g.*, *Floyd v. City of New*

York, 813 F. Supp. 2d 457, 465 (S.D.N.Y. 2011), and this Joint Motion raising the defense of improper service gives it occasion to do so.

B. The Service Extension Orders Should Be Set Aside As Improper Because They Were Not Sound Exercises of Discretion

Two rules address when a court may and must extend a plaintiff's deadline for serving a summons and complaint on a defendant: Rule 4(m), made applicable to this proceeding by Fed. R. Bankr. P. 7004, and Rule 6(b), made applicable to this proceeding by Fed. R. Bankr. P. 9006. FED. R. CIV. P. 4(m), 6(b); FED. R. BANKR. P. 7004, 9006; *see also* 4B Wright & Miller, FED. PRAC. & PROC. § 1137, 385–86 (3d ed. 2002) (referring to trial court's "discretion under either Rule 4(m) or Rule 6(b)" to enlarge time). If a plaintiff shows "good cause," then a court "must extend" the time for service for "an appropriate period." FED. R. CIV. P. 4(m). If the plaintiff does not show good cause, then a court has discretion over extending time. "'Good cause is generally found only in exceptional circumstances beyond the plaintiff's control." *Savage & Assocs., P.C. v. 1201 Owner Corp. (In re Teligent Inc.)*, 485 B.R. 62, 70 (Bankr. S.D.N.Y. 2013). "Good cause is measured," in particular, "against the plaintiff's recognizable efforts to effect service and the prejudice to the defendant from the delay." *Moultry v. City of Poughkeepsie*, 154 F. Supp. 2d 809, 812 (S.D.N.Y. 2001).

A court considering a discretionary extension should generally consider "(1) whether any applicable statutes of limitation would bar the action once re-filed; (2) whether the defendant[s] had actual notice of the claims asserted in the complaint; (3) whether defendant[s] attempted to conceal the defect in service; and (4) whether defendant[s] would be prejudiced by" an extension. *Vaher v. Town of Orangetown*, 916 F. Supp. 2d 404, 420 (S.D.N.Y. 2013).

Extending the service deadline solely for the convenience of the Committee and JPMC would turn Rule 4(m) on its head and subvert other Federal Rules governing complex, multi-party litigation, because such an extension should, as a matter of law, never be a sound exercise of discretion (*See Transcript of First Status Conference on October 6, 2009*, at 10) (ECF No. 13) (**Exhibit 4**) (Counsel for the Committee: "[W]e've conferred extensively with counsel for JPMorgan and we have a plan to litigate this case quickly and without the involvement of the hundreds of other defendants aside from JPMorgan.").

Notwithstanding the Federal Rules' foundation in the principles of due process, there is a risk that the 120-day period for service, or further extensions of it, could be used to delay litigation in ways prejudicial to still-unserved defendants. Under the Federal Rules, "[a] civil action is commenced by filing a complaint," FED. R. CIV. P. 3; FED. R. BANKR. P. 7003, and "[i]n a suit on a right created by federal law," ordinarily such "commencement"—accomplished by filing alone, not service—"suffices to satisfy the statute of limitations." *Henderson v. U.S.*, 517 U.S. 654, 657 n.2 (1996). Thus, the interaction of Rule 4(m) with federal statutes of limitations creates the danger that a plaintiff will postpone service until after the limitations period on its (timely-filed) claim has run to encourage the defendant to materially rely on the assumption that the claim had expired, perhaps leading it to discard evidence relevant to a defense or to reinvest money set aside for litigation on that claim. To avoid this result, courts apply Rule 4(m) with a view to further the same "policy behind . . . statutes of limitations," which is to "encourage prompt movement of civil actions in the federal courts." *Gordon v. Hunt*, 116 F.R.D. 313, 320 (S.D.N.Y. 1987) (quoting from legislative history of 1982 amendment to Rule 4(m)). Like statutes of limitations, then, Rule 4(m) "require[s] plaintiffs to pursue diligent prosecution of

known claims" and serves to "prevent[ ] surprises through plaintiffs' revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2183 (2014) (internal quotations/citations/alternations omitted) (describing statutes of limitations).

Because responsibility for the "prompt movement" of a suit, before the defendant is served, rests on the plaintiff, the question whether sound discretion favors an extension of the service deadline necessarily centers on the plaintiff and its efforts. *See, e.g.*, *Efaw*, 473 F.3d at 1041 (dismissing suit for improper service because, among other reasons, "[p]laintiff offered no reasonable explanation for his seven-year failure to serve Defendant"); *Price v. McGlathery*, 792 F.2d 472, 475 (5th Cir. 1986) ("Although nothing in the record indicates that [the plaintiff] herself was at fault . . ., and nothing in the record shows that the delay prejudiced the defendant, the third aggravating factor, intentional conduct, was present here" and was sufficient to support "dismissal" for improper service.).

Indeed, the standard tellingly assumes that either the plaintiff did in fact make such efforts or that, by some mistake or because of exceptional circumstances beyond the plaintiff's control, it did not. *In re Teligent Inc.*, 485 B.R. at 70 (decision turns on whether the delay resulted from "inadvertence" or "exceptional circumstances beyond the plaintiff's control" or whether the plaintiff in fact made "a reasonable effort to effect service").

Here, the Committee and the AAT made no efforts for six years to serve the other Defendant Term Lenders because it would have been "inconvenient" and "costly." Inconvenience and expense to a plaintiff who initiated the action does not constitute good cause to extend the service deadline, and the entry of the Service Extension Orders on those grounds was an unsound exercise of discretion.

Further proof of the unsoundness of the Committee's and AAT's "rule of convenience" theory of Rule 4(m)—apart from its turning that rule on its head—is that it would render meaningless Rule 19 (joinder of parties) and would subvert Rule 23 (class actions). *See* FED. R. CIV. P. 19, 23. Just like any plaintiff in complex multi-party litigation, the Committee and the AAT had two options here: either (1) sue all of the Defendant Term Lenders as necessary parties under Rule 19, which would ensure their involvement in the litigation over the status of the Term Loan, or (2) sue only JPMC under Rule 23 as a representative party on behalf of a Term Lender class, creating for the Defendant Term Lenders an opportunity to involve themselves in the case. Neither option would have permitted the Committee and the AAT to litigate the status of the Term Loan while cutting out "the hundreds of other defendants aside from JP Morgan" (*Transcript of First Status Conference on October 6, 2009*, at 10).

If a plaintiff could sue (and thereby preserve claims against) hundreds of defendants to determine the priority of their interest in a debt, but serve and litigate that question against only one, then Rule 19's protections for indispensable defendants would have no meaning. *See* FED. R. CIV. P. 19. Under Rule 19, joinder of the other Defendant Term Lenders required not merely that they be named as defendants but also brought into the case, lest litigating the status of the Term Loan in their absence would have (1) impaired or impeded their ability to protect their security interest in the Term Loan and, (2) violated their right to due process. *Id.* If the Committee and the AAT preferred not to litigate against all the Defendant Term Lenders, then they should have attempted to sue JPMC only, as a representative party on behalf of the other (non-party) Term Lenders under Rule 23. *See* FED. R. CIV. P. 19(d) ("This rule is subject to Rule 23."). The Committee and the

AAT would have needed to satisfy the requirements of due process and Rule 23, including, among other things, showing that "the representative parties [would have] fairly and adequately protect[ed] the interests of the class." FED. R. CIV. P. 23(a)(4). This would have been an impossibly high hurdle given that the sole party participating in the defense of the litigation was the one responsible for it. In all events, some form of notice to the Term Lenders and the right of the class member to opt-out would have been required before their interests in the Term Loan were determined. *See, e.g.*, *Phillips Petroleum Co. vs. Shutts*, 472 U.S. 797, 811–14 (1985) (discussing the importance in a class action of the class members receiving notice and having the right to opt-out); *see also* Fed. R. Civ. P. 23(c)(2); Wright & Miller, FED. PRAC. & PROC. § 1786 (3d ed. 2002).

Here, the Committee and the AAT intentionally—not by mistake or because of circumstances beyond their control—made no effort whatsoever to serve the Defendant Term Lenders until after the Second Circuit's remand and the AAT's filing of its Amended Complaint and summons. Far from making a "reasonable effort to effect service," the Committee and the AAT pursued, for six years, a strategy of excluding the Defendant Term Lenders from litigation over the priority of debts owed to them under the Term Loan. From the very beginning, the Committee and the AAT made clear their goal to cut the other Defendant Term Lenders out of the main litigation, with an aim to bring them into the case only after their liability had been determined (*See* Transcript of First Status Conference on October 6, 2009, at 10). Later, the Committee and the AAT changed goals—it wanted to keep the Defendant Term Lenders out of the case during the pendency of the appeal to the Second Circuit to avoid "substantial expenses by the Plaintiff which ultimately may not have to be incurred" (Service Extension Order No. 3, at 2). In this case, the "substantial

expense" being referred to is not the cost of service, which was mostly postage stamps, but concern regarding the cost of having to litigate with hundreds of defendants. That is the cost of due process, and can and must not constitute cause for not properly serving the hundreds of defendants who have an economic stake in the outcome of this litigation. Again, an intentional plan—pursued not by mistake or because of circumstances beyond its control—to keep the Defendant Term Lenders out of the suit.

Accordingly, for the foregoing reasons, the Court should reconsider and vacate the Service Extension Orders because they involved unsound exercises of discretion.

C. The Service Extension Orders Violated The Term Loan Investor Defendants' Due Process Rights

"The fundamental requisite of due process of law is the opportunity to be heard." *Grannis v. Ordean*, 234 U.S. 385, 394 (1914). In *Mullane*, the Supreme Court held that "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). The Second Circuit held that "[t]he proper inquiry is whether the [noticing party] acted reasonably in selecting means likely to inform persons affected, not whether each property owner actually received notice." *Weigner v. City of New York*, 852 F.2d 646, 649 (2d Cir. 1988), *cert. denied*, 488 U.S. 1005 (1989). The objecting party must demonstrate prejudice as a result of inadequate notice. *See, e.g.*, *Pearl-Phil GMT (Far East) Ltd. v. Caldor Corp.*, 266 B.R. 575, 583 (S.D.N.Y. 2001).

As discussed above, the Committee and the AAT intentionally elected not to serve the summons and Original Complaint on any of the Defendant Term Lenders other than

JPMC for nearly six years. Absent the *ex parte* extensions granted here, the Committee was required to serve all of the Defendant Term Lenders by November 28, 2009. *See* FED. R. CIV. P. 4(m). Instead, the AAT first attempted to serve the Defendant Term Lenders, other than JPMC, with a copy of a summons and the Amended Complaint in late May 2015, nearly six years after the Original Complaint was filed and four years after the expiration of the two-year statute of limitations under section 546(a)(1)(A) and section 549(d)(1) of the Bankruptcy Code to bring avoidance claims.

In *Zapata*, the Second Circuit found that "[i]t is obvious that any defendant would be harmed by a generous extension of the service period beyond the limitations period for the action, especially if the defendant had no actual notice of the existence of the complaint until the service period had expired." *Zapata v. City of New York*, 502 F.3d 192, 198 (2d Cir. 2007). This holding was followed by this court (Bernstein, J.) in *Teligent*. In that decision, one of the defendants, 1737 North First Street Corporation ("**1737 Corp.**"), moved to vacate a default judgment obtained against it and dismiss the adversary proceeding due to insufficient service of process. *In re Teligent Inc.*, 485 B.R. at 65. The plaintiff commenced a preference action against eighteen defendants to recover preferential transfers. *Id.* However, the plaintiff mailed a single copy of the summons and complaint to only the first-named defendant. *Id.* at 66. Approximately two years later, following plaintiff's movement for the entry of a default judgment, the court entered a default judgment against 1737 Corp. *Id.* at 67. A little over seven years later, the plaintiff attempted to enforce the judgment against 1737 Corp. *Id.* The court ultimately dismissed the complaint and denied the plaintiff's request to extend its time to serve. *Id.* at 72. The court noted that "1737 Corp. will suffer prejudice if [plaintiff] is allowed to prosecute the adversary proceeding. The

lawsuit is approaching its tenth anniversary and concerns events that occurred nearly twelve years ago." *Id.* at 71.

Here, just like the defendants in *Teligent* and *Zapata*, the Term Loan Investor Defendants, who were never served until a few months ago, were undeniably harmed by the continued, *ex parte* extensions of the service period well beyond the two-year limitations period for bringing avoidance actions. That delay, by itself, is sufficient to find prejudice in violation of the Term Loan Investor Defendants' due process rights, warranting dismissal of the Amended Complaint as against them.

In fact, the potential prejudice to the Term Loan Investor Defendants goes well beyond the non-consensual, unnoticed extension to six years of the two-year avoidance action statute of limitations period. As a direct consequence of the unjustified delay in service, the rights of the Term Loan Investor Defendants to be able to assert cross-claims against third parties in order to better protect and preserve their rights is being challenged. Many defendants have destroyed or no longer have access to documents and other information needed to support their defenses. Further, because of the lack of proper service, the Term Loan Investor Defendants were unable to establish back in 2009 the appropriate reserves or take other steps designed to protect their investors and beneficiaries as a result of the potential liability from the avoidance claims.

Just one example of the potential prejudice to the Term Loan Investor Defendants is the recent position taken by JPMC that the applicable statutes of limitation under New York law for any claims the Defendant Term Lenders may have against it with respect to the erroneous termination of the Term Loan's security interest have expired since the UCC termination statement was filed in October 2008, over seven years ago (*See Stipulation and*

Order Regarding Extension of the Deadline for the Undersigned Defendants to File Cross-Claims Between and Among Themselves ¶ 3) ("For the avoidance of doubt, each Stipulating Defendant, including JPMCB, reserves any and all rights and arguments it had as of November 16, 2015 to assert that any cross-claim does or does not 'relate back' to the filing of the complaint in the above-captioned action and is or is not barred by the statute of limitations . . . .") (ECF No. 188). To be clear, the statute of limitations periods on the Term Loan Investor Defendants' claims have not expired. Many of the Term Loan Investor Defendants' claims have not yet accrued because no judgment has yet been entered against them. *See, e.g.*, N.Y. C.P.L.R. 206(b); *McDermott v. City of New York*, 406 N.E.2d 460, 463 (1980). Moreover, any cross-claims would relate back to the filing of the Committee's Original Complaint. *See* N.Y. C.P.L.R. 203(d); *Long v. Sowande,* 810 N.Y.S.2d 195, 197 (N.Y. App. Div. 2006) (CPLR 203(d) "applies to cross claims as well."). The critical issue, however, is that the Term Loan Investor Defendants never would have been put in this position had the Committee timely served the Original Complaint.

Even more inexcusable than the failure for six years to attempt to serve the other Defendant Term Lenders is the Committee's and the AAT's failure during those six years to at least identify the correct party defendants. Even a casual observer of the Amended Complaint can see that it misidentifies hundreds of Term Lenders, including most of the Term Loan Investor Defendants. Included as **Exhibit 5** is a table which shows the correct name of each Term Loan Investor Defendant and the names by which they are incorrectly identified and were served in the Amended Complaint. As is clear from a review of the table, it is difficult in many cases to ascertain which entities the AAT are intending to sue based on the defective names used in the Amended Complaint. Due to the Committee's

failure of service or to take any reasonable steps for six years to even identify the correct defendants, how can the Defendant Term Lenders be expected to have been on notice that they were being sued? The Committee and the AAT had six years to try to identify the correct parties, but instead elected to do nothing. The resulting prejudice to the Term Loan Investor Defendants from the lack of timely and proper notice is severe. The Court should find that, notwithstanding its prior approval of the service extensions, the Committee's and the AAT's unreasonable delay in identifying the correct defendants and providing them with timely and proper notice, denied the Term Loan Investor Defendants due process warranting dismissal of the Amended Complaint in its entirety as against them.

III. The Amended Complaint's Third Claim For Relief Fails As A Matter Of Law Because The AAT As Successor To The Committee Does Not Have Standing To Prosecute Claims Under Section 547 Of The Bankruptcy Code

It is well settled that the right to bring chapter 5 claims, including preference claims under section 547 of the Bankruptcy Code, resides with the trustee or debtor, and that absent an order of the Court granting a creditors' committee standing, the committee has no authority to bring avoidance actions. *See, e.g.*, *Official Comm. of Unsecured Creditors of Applied Theory Corp. v. Halifax Fund, L.P. (In re Applied Theory Corp.)*, 493 F.3d 82, 86 (2d Cir. 2007) (noting that a creditors' committee may only sue "with the debtor's consent and the bankruptcy court's approval").

In the seminal *STN Enterprises* case, the Second Circuit held that it is usually the trustee or debtor-in-possession who initiates proceedings to recover preferentially or fraudulently transferred assets, and that a creditors' committee may do so only when the court finds that "the trustee or debtor in possession unjustifiably failed to bring suit or abused its discretion in not suing to avoid a preferential transfer." *Unsecured Creditors Comm.*

of Debtor STN Enters., Inc. v. Noyes (In re STN Enters.), 779 F.2d 901, 904 (2d Cir. 1985). In making this determination, "the court must . . . examine, on affidavit and other submission, by evidentiary hearing or otherwise" whether the creditors' committee should have standing to bring the litigation. *Id.* at 905. The bankruptcy court should consider two factors in determining whether to allow a committee to bring litigation: (1) whether the claim is colorable; and (2) whether the claim is "likely to benefit the reorganization estate." *Id.* at 905; *see also Official Comm. of Unsecured Creditors of Applied Theory Corp. v. Halifax Fund, L.P. (In re Applied Theory Corp.)*, 345 B.R. 56, 58–59 (S.D.N.Y. 2006)(citing *STN*).

Here, the DIP Order contains a broadly-drafted, general release of any and all claims the Debtors may have against, among others, the Term Lenders, including a release of "any and all actual or potential demands, claims, actions, causes of actions . . . and all other forms of liability whatsoever, in law or equity, whether asserted or unasserted, known or unknown, foreseen or unforeseen, arising *under the Bankruptcy Code*, state law, or otherwise now existing or hereafter arising, directly or indirectly related to the Prepetition Senior Facilities . . ." (DIP Order ¶ 19(d)) (emphasis added).

A narrow, limited exception to this general release provides "that such release shall not apply to the Committee with respect *only* to the perfection of first priority liens of the Prepetition Senior Facilities Secured Parties (it being agreed that if the Prepetition Senior Facilities Secured Parties, after Payment, assert or seek to enforce any right or interest in respect of any junior liens, the Committee shall have the right to contest such right or interest in such junior lien on any grounds, including (without limitation) validity, enforceability, priority, perfection or value) (the "Reserved Claims")" (DIP Order ¶ 19(d)) (emphasis added). The DIP Order also gave the Committee "automatic standing and

authority to both investigate the Reserved Claims and *bring actions based upon the Reserved Claims* against the Prepetition Senior Facilities Secured Parties no later than July 31, 2009 . . ." (DIP Order ¶ 19(d)) (emphasis added).

Except for the Reserved Claims, all other claims against holders of the Term Loan were released. Although the plain language of the DIP Order gave the Committee the right to challenge "the perfection of first priority liens" of the Term Loan, it did not give the Committee the right to bring claims seeking disgorgement of prepetition preferential transfer payments under section 547 of the Bankruptcy Code.

The specific delineation of the type of claims that the Committee may bring further underscores that the Court's limitation was intentional. For example, the DIP Order specifically distinguishes between the claims the Committee may bring with respect to first priority liens and junior liens (*see generally* DIP Order ¶ 19(d)). The Committee may challenge "*only* . . . the perfection of first priority liens," whereas "the Committee shall have the right to contest such right or interest in such junior lien on any grounds, including (without limitation) validity, enforceability, priority, perfection or value." *Id.* (emphasis added). The fact that the DIP Order differentiates one type of avoidance claim the Committee may bring with respect to the first priority liens from multiple types of claims with respect to the junior liens supports the reading that the DIP Order gave the Committee only the right to challenge the perfection of the Term Loan and not go back to challenge quarterly payments made prior to the Petition Date.

Claims to avoid a lien as unperfected under section 544 of the Bankruptcy Code are wholly distinct from and have different elements than prepetition preferential transfer claims brought under section 547 of the Bankruptcy Code. *Compare* 11 U.S.C. § 544(a) (the

hypothetical lien creditor standard), *with* 11 U.S.C. § 547 (more than five elements that must be proved for a preferential transfer). The third claim for relief in the Amended Complaint is not seeking to challenge the "perfection of the first priority liens" of the Term Loan. Rather, it is seeking to compel disgorgement of a payment made prior to the Petition Date by GM to certain Defendant Term Lenders. A claim to avoid a prepetition payment as preferential under section 547 was not identified in the limited definition of "Reserved Claims" carved out from the general release. Under the general release, all claims, including those claims "arising under the Bankruptcy Code," were expressly released.[7]

The Supreme Court has held that when the plain language of the Bankruptcy Code is clear, there is no need "to inquire beyond the plain language of the statute." *See U.S. v. Ron Pair Enters., Inc.*, 489 U.S. 235, 240–41 (1989). This plain language requirement also applies to the wording of the DIP Order. *See, e.g.*, *In re Dynegy Inc.*, 486 B.R. 585, 591 (Bankr. S.D.N.Y. 2013) ("When interpreting orders, the Court should look first to the plain meaning of the language of the order."); *see also Regen Capital I, Inc. v. Halperin (In re U.S. Wireless Data, Inc.)*, 547 F.3d 484, 495 (2d Cir. 2008) (upholding the bankruptcy court's expungement of a claim as untimely because to do otherwise "would not only run counter to the plain language of the bankruptcy court's . . . Orders, it would also upset the finality and repose that such orders provide to reorganizing entities"); *Capital Tracing Co., Inc. v. Interstate Stores, Inc. (In re Interstate Stores, Inc.)*, 830 F.2d 16, 19 (2d Cir. 1987) (looking to the plain language of the final decree); *Burton v. Chrysler Grp., LLC (In re Old Carco LLC)*, 492

[7] Courts have held that release and/or challenge period provisions contained in DIP financing and cash collateral or comparable orders are enforceable and may preclude the commencement of barred avoidance actions. *See, e.g.*, *Hill v. Akamai Technologies, Inc. (In re M S55, Inc.)*, Adv. Pro. No. 04-01652-ABC, 2005 U.S. Dist. LEXIS 45659 at *19 (D. Co. Aug. 4, 2005), *aff'd*, 477 F.3d 1131 (10th Cir. 2007) (general proposition favoring equitable purpose behind avoidance actions "does not apply when a debtor releases a creditor from any and all claims with court approval, as the debtor did in this case").

B.R. 392, 405 (Bankr. S.D.N.Y. 2013) (holding that a "failure to warn" claim "is prohibited by the plain language of the bankruptcy court's Order").

The DIP Order is clear that the Committee only has standing to bring claims related to the "perfection of first priority liens" of the Term Loan, which textually only encompasses claims under section 544(a), and by extension, claims under section 549 of the Bankruptcy Code if it is determined the lien is unperfected (DIP Order ¶ 19(d)). The release provision is general; the exception for Reserved Claims is narrow and limited.

Courts narrowly view exceptions to general release provisions and require the parties to expressly identify the claims being carved out from the release. "A general release, in terms as broad as those now before us, is to be given effect, even if the parties did not have in mind all the wrongs which existed at the time of the release. . . . If exceptions were intended to the scope of the releases, they should have been stated." *Naukeag Inn, Inc. v. Rideout*, 220 N.E.2d 916, 918 (Mass. 1966). Under New York law, releases are viewed as contracts.[8] *See, e.g.*, *Rubycz-Boyar v. Mondragon*, 790 N.Y.S.2d 266, 267 (N.Y. App. Div. 2005) (noting that "[i]t is well settled that releases are contracts"); *see also Sodano v. Am. Stock Exch. LLC*, C.A. No. 3418-VCS, 2008 Del. Ch. LEXIS 92, at *32 (Del. Ch. July 15, 2008) (applying New York law and stating "[t]he general principles of contract interpretation apply to releases.").

In *In re Enron Corp.*, 300 B.R. 201 (Bankr. S.D.N.Y. 2003), the bankruptcy court was asked to decide whether a claimant had released claims relating to a retention bonus and a termination payment by signing a general release. The court found that the general release carved out certain claims, including the retention bonus, "thereby excepting it from the list

[8] The Term Loan Agreement is governed by New York law (*see* Term Loan Agreement ¶ 10.10).

of released claims," but not the termination payment, which was therefore released. *Id.* at 215. Here, the DIP Order provided for a general release, with one narrow exception—the issue of lien perfection (DIP Order ¶ 19(d)). All other bankruptcy claims were released more than six years ago, and the Committee did not have standing to assert them.

Moreover, this Court should not read into the DIP Order an implicit right of standing to file a claim under section 547 of the Bankruptcy Code where none exists, as such authority must be explicit. *See, e.g.*, *In re STN Enters.*, 779 F.2d at 904. The DIP Order specifically gave the Committee the right to challenge the perfection of the first priority liens of the Term Loan and, by extension, to seek disgorgement of the Postpetition Transfers under section 549 because such claim is "based upon" a finding that the lien is unperfected. In contrast, the DIP Order said nothing about the Committee's standing to bring claims under section 547 of the Bankruptcy Code. A preference claim is not "based" on the lien perfection issue. Further, the Committee never filed an *STN* motion requesting standing to do so, nor did the Committee make an *STN* showing that its claim under section 547 is "colorable" and "likely to benefit the reorganization estate."

Accordingly, the Amended Complaint's Third Claim for Relief should be dismissed due to (i) the AAT's lack of standing or authority to bring such claims; (ii) the fact that such claim was released under the express terms of the DIP Order; and (iii) in any event, such claim is now time-barred under section 546(a)(1)(A) and section 549(d)(1) of the Bankruptcy Code.[9]

[9] Section 546(a) of the Bankruptcy Code provides that an action or proceeding under section 547 of the Bankruptcy Code to recover prepetition preferential transfers must be brought no later than two years after the Petition Date. 11 U.S.C. § 546(a)(1)(A). Section 549 includes a similar provision with respect to claims under that provision. 11 U.S.C. § 549(d)(1). Accordingly, any actions or proceedings under section 547 and section 549 of the Bankruptcy Code had to be filed before June 1, 2011. Since the AAT filed the Amended Complaint in 2015, it did so well after the two-year statute of limitations had run on

IV. The Amended Complaint's Third Claim For Relief Fails As A Matter Of Law Because The Payments Are Protected By The Safe Harbor Under Section 546(e) Of The Bankruptcy Code

Section 546(e) provides, in relevant part, that a trustee may not avoid a transfer that either is (i) a "settlement payment" made by or to (or for the benefit of) a financial institution or (ii) made by or to (or for the benefit of) a financial institution in connection with a securities contract. 11 U.S.C. § 546(e). The Term Loan Investor Defendants submit that the Payments here qualify as both a "settlement payment" and a "transfer made by or to (or for the benefit of)" a financial institution "in connection with a securities contract." The Payments are therefore exempt from avoidance under either prong of section 546(e).

In so arguing, the Term Loan Investor Defendants acknowledge that while courts in the Second Circuit have recently broadly interpreted these safe harbor provisions to apply to all types of payments made concerning securities and debt instruments, they have yet to formally address the safe harbor protections to "tradeable bank debt." The Term Loan Investor Defendants submit, however, that the circumstances concerning interests in the Term Loan and accompanying note, which were identified in the market place as a security by its CUSIP number, and were widely held and traded by non-traditional bank investors, including pension and retirement funds, unions, universities, government entities, charitable organizations, and hospitals, mandates a finding in this case that the interests in the Term Loan acquired by the Term Lenders in the market place and the prepetition payments made in connection with those acquired interests should qualify for safe harbor treatment. Indeed, it is hard to justify distinguishing interests in the Term Loan from other publicly-traded notes or bonds issued by GM, which would clearly qualify under section 546(e).

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filing claims to recover prepetition preferential transfers under section 547 and postpetition transfers under section 549.

Moreover, a finding that the quarterly Payments made to the hundreds of market participants qualify for safe harbor treatment fits squarely into the purposes of the statute when Congress enacted it. *See Enron Creditors Rec. Corp. v. ALFA (In re Enron Creditors Rec. Corp.)*, 651 F.3d 329, 334 (2d Cir. 2011) ("Congress enacted § 546(e)'s safe harbor in 1982 as a means of minimizing the displacement caused in the commodities and securities markets in the event of a major bankruptcy affecting those industries.") (internal citations/quotations omitted).

The term "Financial institution" used in section 546(e) is defined as:

> (A) a Federal reserve bank, or an entity that is a commercial or savings bank, industrial savings bank, savings and loan association, trust company, federally-insured credit union, or receiver, liquidating agent, or conservator for such entity and, when any such Federal reserve bank, receiver, liquidating agent, conservator or entity is acting as agent or custodian for a customer . . . in connection with a securities contract (as defined in section 741) such customer; or (B) in connection with a securities contract . . . an investment company registered under the Investment Company Act of 1940.

11 U.S.C. § 101(22).

Here, the Debtors made the Payments to JPMC, which in turn disbursed those funds to the Defendant Term Lenders, including certain of the Term Loan Investor Defendants (Amended Complaint ¶ 606). JPMC, as well as many of the Defendant Term Lenders, qualify as "financial institutions" under the Bankruptcy Code's definition. In fact, this Court (Peck, J.) has already found that JPMC qualifies as a "Financial institution." *See Lehman Bros. Holdings Inc. v. JPMorgan Chase Bank, N.A. (In re Lehman Bros. Holdings Inc.)*, 469 B.R. 415, 437 (Bankr. S.D.N.Y. 2012) ("JPMC, as one of the leading financial institutions in the world, quite obviously is a member of the protected class and qualifies as both a

'financial institution' and a 'financial participant.' JPMC unquestionably fits the Bankruptcy Code's definition of 'financial institution.'").[10]

The Second Circuit explained in *Quebecor* "that a transfer may be either 'for the benefit of' a financial institution or 'to' a financial institution, but need not be both." *In re Quebecor World (USA) Inc.*, 719 F.3d at 100. In addition to being either "for the benefit of" a financial institution or "to" a financial institution, the transfer qualifies as either a "settlement payment" (*see infra* Section IV(A)) or was made in connection with a "securities contract" (*see infra* Section IV(B)). The Payments meet both these standards.

A. The Payments Qualify As A Settlement Payment

The Bankruptcy Code defines a "settlement payment," somewhat circularly, as "a preliminary settlement payment, a partial settlement payment, an interim settlement payment, a settlement payment on account, a final settlement payment, or any other similar payment commonly used in the securities trade." 11 U.S.C. § 741(8).

In *Quebecor*, the Second Circuit defined a settlement payment as a "transfer of cash made to complete a securities transaction." *In re Quebecor World (USA) Inc.*, 719 F.3d at 98 (internal citations omitted). In *Enron*, that same court held that the phrase "commonly used in the securities [trade]" "limits only the phrase immediately preceding it; it does not limit the other transactions that § 741(8) defines as settlement payments." *In re Enron Creditors Rec. Corp.*, 651 F.3d at 336. The court in *Enron* additionally declined to read any purchase or sale requirement into the definition of a settlement payment under section 741(8). *Id.* at

[10] Whether or not JPMC was acting here as a mere conduit (the Term Loan Investor Defendants do not consider JPMC to have been a mere conduit) is immaterial for purposes of the safe harbor under section 546(e). In *Quebecor*, the Second Circuit expressly held "that a transfer may qualify for the section 546(e) safe harbor even if the financial intermediary is merely a conduit." *Official Comm. of Unsecured Creditors of Quebecor World (USA) Inc. v. Am. Un. Life Ins. Co. (In re Quebecor World (USA) Inc.)*, 719 F.3d 94, 99 (2d Cir. 2013).

338; *see also Crescent Res. Litig. Trust v. Duke Energy Corp.*, 500 B.R. 464, 472 (W.D. Tex. 2013) ("[M]ost courts agree that the Code's understanding of a settlement payment is extremely broad and encompasses most transfers of money or securities made to complete a securities transaction.") (internal citations/quotations omitted).

In *Enron*, Enron's commercial paper was redeemed at the accrued par value, which was calculated as the price originally paid *plus accrued interest*. *In re Enron Creditors Rec. Corp.*, 651 F.3d at 331. The Second Circuit ultimately held that the payments, including the portion attributable to payment of accrued interest, were "settlement payments" within the meaning of section 741(8) of the Bankruptcy Code. *Id.* at 339 ("The payments at issue were made to redeem commercial paper, which the Bankruptcy Code defines as a security. They thus constitute the transfer of cash . . . made to complete [a] securities transaction and are settlement payments within the meaning of § 741(8).") (internal citations/quotations omitted).

The Payments were a mandatory quarterly interest payment, which were a necessary part of the completion of the securities transactions whereby the Term Loan Investor Defendants acquired an interest in the Term Loan and accompanying note. As a result, interest payments, such as the Payments, qualify as settlement payments under Second Circuit precedent and are exempt from avoidance under the safe harbor provisions enumerated in section 546(e) of the Bankruptcy Code.

B. The Payments Also Qualify As A Transfer Made In Connection With A Securities Contract

Section 741(7) of the Bankruptcy Code defines "securities contract" as "a contract for the purchase, sale, or loan of a security . . . including any repurchase or reverse repurchase transaction on any such security." 11 U.S.C. § 741(7)(A)(i). A "security" is

defined in section 101(49) of the Bankruptcy Code to include, *inter alia*, a "note," "bond," "debenture" and "other claim or interest commonly known as 'security.'" 11 U.S.C. § 101(49)(A). The definition goes on to provide that a "security" specifically "does not include . . . debt or evidence of indebtedness for goods sold and delivered or services rendered." 11 U.S.C. § 101(49)(B). Traditional trade debt owed to vendors or service providers then does not qualify under the safe harbor of section 546(e). Here, the Term Loan is evidenced by a "Note," interests in which were extensively traded in the secondary market (*see* Term Loan Agreement ¶ 1.01).

Courts across the circuits, including the Second Circuit, have issued rulings that articulate the broad and sweeping breadth with which the language "in connection with a securities contract" is to be construed. In *Madoff*, the Second Circuit noted "the term 'securities contract' expansively includes contracts for the purchase or sale of securities, as well as any agreements that are *similar* or *related* to contracts for the purchase or sale of securities. . . . This concept is broadened even farther because § 546(e) also protects a transfer that is 'in connection' with a securities contract." *Picard v. Ida Fishman Rev. Trust (In re Bernard L. Madoff Inv. Sec. LLC)*, 773 F.3d 411, 418 (2d Cir. 2014) (emphasis in original) (internal citations omitted). The court went on to state that "[y]et another indication that Congress intended § 546(e) to sweep broadly is supplied by the text of § 741(7)(A)(vii) which expands the definition of 'securities contract' to include '*any* other *agreement* or transaction that is *similar to*' a 'contract for the purchase, sale or loan of a security[.]' Few words in the English language are as expansive as 'any' and 'similar.'" *Id.* at 419 (emphasis in original).

In *Lehman Brothers*, the court construed the plain meaning of section 546(e) in determining whether a prepetition transfer was made "in connection with a securities

contract." *Id.* at 436–37. The court's analysis reveals a broad interpretation of that language to include extensions of credit, credit enhancements, guarantees and reimbursement obligations even where such transactions constituted merely "derivatives transactions" to a securities agreement. *Id.* at 438–39. The court noted that the words "in connection with" "are to be interpreted liberally," which would include transactions that "relate to" a securities contract. *Id.* at 442.

In *Madoff*, the Second Circuit found that section 741(7) of the Bankruptcy Code does not contain a purchase or sale requirement. *In re Bernard L. Madoff Inv. Sec. LLC*, 773 F.3d at 420. In doing so, the court noted that accepting the trustee's interpretation that there would be no market disruption because there are no securities contracts to unwind:

> risks the very sort of significant market disruption that Congress was concerned with. The magnitude of BLMIS's scheme, which included thousands of customers and billions of dollars under management, is unprecedented. Permitting the clawback of millions, if not billions of dollars from BLMIS clients—many of whom are institutional investors and feeder funds—would likely cause the very 'displacement' that Congress hoped to minimize in enacting § 546(e).

Id.

Here, the tradeable interests in the Term Loan are far more akin to publicly-traded notes or bonds issued by a public company than non-tradeable traditional bank debt; a real distinction can be made. The Term Loan and accompany note were registered, assigned a CUSIP number and interests in the Term Loan and accompanying note were widely held and traded by hundreds of different non-bank investors, including many pension and retirement funds, for the benefit of thousands of individual beneficiaries. The Term Loan and accompanying note, therefore, qualify as a "security" under section 101(49) of the Bankruptcy Code. One of Congress' primary goals in enacting the safe harbor provisions

was to avoid disruption in the markets in the event of a major issuer's bankruptcy. *See, e.g.*, *In re Enron Creditors Rec. Corp.*, 651 at 334. Yet, that is what is happening here. The AAT is seeking to compel hundreds of investors in the secondary market to disgorge the payment they received on their holdings of GM debt many years after the fact. This is a prime example of the type of market disruption Congress intended to avoid in enacting the safe harbor provisions. The Payments were made "in connection with a securities contract" (*i.e.*, the interests that the Term Loan Investor Defendants acquired in the Term Loan and accompanying note) and are protected from avoidance under section 546(e).

V. The Amended Complaint's Second Claim For Relief Fails As A Matter Of Law Because Certain Of The Term Loan Investor Defendants Were Not Term Lenders At The Time The Postpetition Transfers Were Made Or Were Otherwise Acting As A Conduit[11]

Several Term Loan Investor Defendants sold their interest in the Term Loan to other Defendant Term Lenders prior to the Record Holder Date, but the settlement dates on the sales occurred after the Record Holder Date.[12] Since such Term Loan Investor Defendants were still listed as the holder of record as of the Record Holder Date, they are being sued for the full amount of the Postpetition Transfers even though they did not hold an equitable interest in the Term Loan at the time the Postpetition Transfers were made. In every case, to the extent they received the Postpetition Transfers, each Seller Conduit Defendant either (i) remitted it to its buyer in its entirety or (ii) netted out the Postpetition Transfers against the amount it was owed from the sale, thus satisfying the buyer's obligation, and remitted

[11] This ground for dismissing the Second Claim for Relief in the Amended Complaint is being asserted solely on behalf of the Seller Conduit Defendants.

[12] In the case of the Seller Conduit Defendants, the trades of their interests in the Term Loan were documented utilizing the standard form of Purchase and Sale Agreement for Distressed Trades, published by the LSTA as of February 6, 2009, and subject to the LSTA's Standard Terms and Conditions for Distressed Trade Confirmations. *See* http:/www.lsta.org/legal-and-documentation/secondary-trading.

the balance to its buyer. In all events, the buyer held the equitable interests in the Term Loan and was the ultimate beneficiary of the Postpetition Transfers.

As an initial matter, the Second Claim for Relief should be dismissed, based on the express language in the DIP Order, as against any Term Loan Investor Defendant who sold its interest in the Term Loan prior to the Postpetition Transfers. Under the DIP Order, the Committee only preserved claims against "holders of . . . obligations" under the Debtors' prepetition senior facilities, including the Term Loan (*see* DIP Order ¶¶ (v), 19(b)). Paragraph 19(d) of the DIP Order provides, in pertinent part, that "Any Prepetition Senior Facilities Secured Party accepting Payment shall submit to the jurisdiction of the Court, it being understood that the respective administrative and collateral agents for the Prepetition Senior Facilities shall have no responsibility or liability for amounts paid to any Prepetition Senior Facilities Secured Parties and such agents shall be exculpated for any and all such liabilities, excluding only such funds as are retained by each such agent solely in its respective role as a lender" (DIP Order ¶ 19(d)). "Payment" is defined as payment "of all obligations under the Prepetition Senior Facilities" (DIP Order ¶ 19(b)). Under the language of paragraph 19(d), the Committee waived the right to sue JPMC, which was the "initial" transferee of the Postpetition Transfers. The plain language of the DIP Order further limits the Committee's ability to recover the Postpetition Transfers to those parties that held obligations under the Term Loan and received the Payment (*i.e.*, "the entity for whose benefit such transfer was made" under section 550(a) of the Bankruptcy Code). 11 U.S.C. § 550(a)(1). At the time of the Postpetition Transfers, the Seller Conduit Defendants had sold their interests in the Term Loan and did not hold the obligations under the Term Loan. The AAT, therefore, had no right to sue them under the terms of the DIP Order.

Moreover, even in the unlikely event that this Court were to find that the terms of the DIP Order do not limit the AAT's ability to assert its Postpetition Transfers avoidance claim only to the entities that held the equitable interest in the Term Loan and were the beneficiaries of the Postpetition Transfers, the Court should nevertheless dismiss the claim as against the Seller Conduit Defendants under the "mere conduit" theory since they were merely acting as conduits for their buyers, the true equitable holders of the Term Loan. The Seller Conduit Defendants did not own any equitable interest in the Term Loan when the Postpetition Transfers were made and were contractually obligated to remit any payments received to their respective buyers.

The Seller Conduit Defendants recognize that the conduit defense is by its very nature fact specific and does not readily lend itself to a motion to dismiss. However, rather than force these blameless defendants to endure a year or more of intensive fact and expert discovery involving over $1.4 billion in Postpetition Transfers, the Court should establish a streamlined procedure for granting dismissal of the Second Claim for Relief as to any Seller Conduit Defendant who can demonstrate to the AAT or, if necessary, the Court, that it sold its interest in the Term Loan prior to the Postpetition Transfers being made.

Section 550 of the Bankruptcy Code provides that a trustee may recover property from the "initial transferee," "immediate transferee" or a "mediate transferee" of such transfer or "the entity for whose benefit such transfer was made." 11 U.S.C. § 550(a)(1). The Bankruptcy Code does not define the term "initial transferee" or "mediate transferee." As the Second Circuit noted in *Finley*, "[t]he statutory term is 'transferee'—not 'recipient'—and is not self-defining." *Christy v. Alexander & Alexander of NY Inc. (In re Finley, Kumble, Wagner, Heine, Underberg, Manley, Myerson & Casey)*, 130 F.3d 52, 56 (2d Cir. 1997). In

Finley, the Second Circuit adopted the "mere conduit" test for determining who is an initial or mediate transferee under section 550(a)(1). *See id.* at 58. Under this test, to the extent that an entity serves as a mere conduit of funds, the initial transferee is deemed to be the recipient of funds from that conduit. *See id*. at 57–58.

One of the factors that courts in the Second Circuit analyze when making this determination is whether the party asserting the conduit defense had "discretion or authority to do anything else but transmit the money." *Id.* at 59.

> Thus, an initial transferee is the person who has dominion and control over the subject of the initial transfer to the extent that he or she may dispose of it as he or she pleases . . . . On the other hand, the person whose hands touch the money or property simply to forward it to the initial transferee is but a mere conduit or intermediary if he or she does not receive any benefit from the initial transfer. . . . Because an initial transferee has dominion and control over the *res* of the initial transfer, whereas a conduit has but a fleeting possessory interest therein, initial transferees can never be conduits and vice versa respecting a single transfer.

SIPC v. Stratton Oakmont, Inc., 234 B.R. 293, 313 (Bankr. S.D.N.Y. 1999) (internal citations/quotations omitted). As the bankruptcy court noted in *SIPC*, "[t]he key to pegging the entity for whose benefit the initial transfer was made has two sides: (1) the entity must be the intended beneficiary and (2) the intended benefit must originate from the initial transfer." *Id.* at 314 (noting that the quintessential example of an entity who benefits from an initial transfer is a guarantor of the debtor).

Here, the Court should find that the Seller Conduit Defendants, to the extent that they prove that they sold their interests in the Term Loan, were mere conduits and are not liable for the Postpetition Transfers. To the extent that a Seller Conduit Defendant received the Postpetition Transfers solely because it was the record holder on the Record Holder Date, and subsequently transferred the Postpetition Transfers it received to its buyer

pursuant to its contractual obligation under the LSTA trading agreement, such Seller Conduit Defendant was a mere conduit and is not the correct party to be sued for return of the Postpetition Transfers. In such circumstances, the Seller Conduit Defendants did not have dominion or control over the Postpetition Transfers and were merely passing along funds to the buyer as required under the applicable LSTA trading agreement. As a result, the Seller Conduit Defendants should not be liable for return of the Postpetition Transfers, and the Second Claim for Relief should be dismissed as to such Seller Conduit Defendants.

CONCLUSION

For the foregoing reasons, the Term Loan Investor Defendants respectfully request that the Court grant the Joint Motion and dismiss the Amended Complaint as against the Term Loan Investor Defendants with prejudice, and that the Court grant such other and further relief as may be just and proper.

Dated: New York, New York
November 16, 2015

Respectfully submitted,

HAHN & HESSEN LLP

By: */s/ Mark T. Power*

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Hearing Date and Time: To be determined by the Court
Objections Due (per Scheduling Order): January 20, 2016
Reply Due (per Scheduling Order): February 15, 2016

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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

DECLARATION OF MARK T. POWER IN SUPPORT OF CERTAIN TERM LOAN INVESTOR DEFENDANTS' JOINT MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT

MARK T. POWER, hereby declares as follows:[1]

1. I am an attorney at law duly admitted to practice before the United States Bankruptcy Court for the Southern, Eastern and Western Districts of New York, the Court of Appeals for the Second Circuit and the Courts of the State of New York, and a member of the firm Hahn & Hessen LLP. My firm maintains offices for the practice of law at 488 Madison Avenue, New York, New York 10022.

2. My firm is counsel to the Term Loan Investor Defendants identified in the accompanying Memorandum of Law in support of their joint motion (the "**Joint Motion**") for an order dismissing with prejudice the AAT's Amended Complaint as against the Term Loan Investor Defendants. I respectfully submit this declaration in connection with the Joint Motion, and to place before the Court true and correct copies of certain documents referenced in the Memorandum of Law. Specifically, attached hereto for the Court's review and consideration are:

> Exhibit 1: Term Loan Agreement dated as of November 29, 2006, which was amended by that certain first amendment dated as of March 4, 2009 between GM, as borrower, JPMC, as agent, the Term Loan Lenders, and Saturn.
>
> Exhibit 2: *Final Order Pursuant to Bankruptcy Code Sections 105(a), 361, 362, 363, 364 and 507 and Bankruptcy Rules 2002, 4001 and 6004 (A) Approving a DIP Credit Facility and Authorizing the Debtors to Obtain Post-Petition Financing Pursuant Thereto, (B) Granting Related Liens and Super-Priority Status, (C) Authorizing the Use of Cash Collateral and (D) Granting Adequate Protection to Certain Pre-Petition Secured Parties* entered by the Court on June 25, 2009 (Docket No. 2529) (without exhibits).
>
> Exhibit 3: *Forman v. Mentor Graphics Corp. (In re Worldspace, Inc.)*, Adv. Proc. No. 10-53286-PJW (Bankr. D. Del. June 5, 2014) [Docket No. 94].

[1] Capitalized terms not defined herein shall have meanings ascribed to them in the accompanying *Memorandum of Law in Support of Certain Term Loan Investor Defendants' Joint Motion to Dismiss Plaintiff's Amended Complaint* dated November 16, 2015.

Exhibit 4: *Transcript of First Status Conference on October 6, 2009* (ECF No. 13).

Exhibit 5: Table of each Term Loan Investor Defendant and the names by which they are supposedly identified and served in the Amended Complaint.

Dated: New York, New York
November 16, 2015

/s/ *Mark T. Power*
MARK T. POWER

Exhibit 1

EXECUTION COPY

TERM LOAN AGREEMENT

among

GENERAL MOTORS CORPORATION,
as the Borrower

SATURN CORPORATION,
as a Guarantor

THE SEVERAL LENDERS
from Time to Time Party Hereto,

CREDIT SUISSE SECURITIES (USA) LLC,
as Syndication Agent,

BARCLAYS BANK PLC,
CITIGROUP GLOBAL MARKETS INC.,
DEUTSCHE BANK SECURITIES INC.,
MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED,
and
MORGAN STANLEY SENIOR FUNDING, INC.,
as Co-Documentation Agents,

and

JPMORGAN CHASE BANK, N.A.,
as Administrative Agent

Dated as of November 29, 2006

J.P. MORGAN SECURITIES INC.
and
CREDIT SUISSE SECURITIES (USA) LLC
as Joint Lead Arrangers and Joint Bookrunners

[CS&M No. 6701-619]

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EXHIBITS

TERM LOAN AGREEMENT, dated as of November 29, 2006, among GENERAL MOTORS CORPORATION, a Delaware corporation (the "Borrower"); SATURN CORPORATION, a Delaware corporation, as a Guarantor; the LENDERS party hereto (the "Lenders"); CREDIT SUISSE SECURITIES (USA) LLC, as Syndication Agent (the "Syndication Agent"); BARCLAYS BANK PLC, CITIGROUP GLOBAL MARKETS INC., DEUTSCHE BANK SECURITIES INC., MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED, and MORGAN STANLEY SENIOR FUNDING, INC., as Co-Documentation Agents (the "Co-Documentation Agents"); and JPMORGAN CHASE BANK, N.A., as Administrative Agent (in such capacity, the "Agent").

The Borrower has requested the Lenders to extend credit in the form of Loans (such term and each other capitalized term used and not otherwise defined herein having the meaning assigned to it in Article I) to the Borrower on the Funding Date in Dollars in an aggregate principal amount of $1,500,000,000. The proceeds of the Loans are to be used for general corporate purposes of the Borrower and its Subsidiaries.

The Lenders are willing to extend such credit on the terms and subject to the conditions set forth herein. Accordingly, the parties hereto agree as follows:

ARTICLE I

Definitions

SECTION 1.01. Defined Terms. As used in this Agreement, the following terms shall have the following meanings:

"ABR": for any day, a rate per annum (rounded upwards, if necessary, to the next 1/16 of 1%) equal to the greater of (a) the Prime Rate in effect on such day and (b) the Federal Funds Effective Rate in effect on such day plus 1/2 of 1%. If for any reason the Agent shall have determined (which determination shall be conclusive absent manifest error) that it is unable to ascertain the Federal Funds Effective Rate for any reason, the ABR shall be determined without regard to clause (b) of the first sentence of this definition until the circumstances giving rise to such inability no longer exist. Any change in the ABR due to a change in the Prime Rate or the Federal Funds Effective Rate shall be effective as of the opening of business on the effective day of such change in the Prime Rate or the Federal Funds Effective Rate, respectively.

"ABR Loans": Loans bearing interest at a rate determined by reference to the ABR.

"Affiliate": with respect to any Person, any other Person directly or indirectly controlling or that is controlled by or is under common control with such Person, each officer, director, general partner or joint-venturer of such Person, and each Person that is the beneficial owner of 10% or more of any class of voting stock of such Person. For the purposes of this

definition, "control" means the possession of the power to direct or cause the direction of the management and policies of such Person, whether through the ownership of voting securities, by contract or otherwise.

"Agent": as defined in the preamble to this Agreement.

"Agreement": this Term Loan Agreement, as amended, supplemented or otherwise modified from time to time.

"Applicable Lending Office": for any Lender, such Lender's office, branch or Affiliate designated for Eurodollar Loans or ABR Loans, as applicable, as notified to the Agent and the Borrower or as otherwise specified in the Assignment and Acceptance applicable to such Lender, any of which offices may, subject to Section 2.15, be changed by such Lender upon 10 days' prior written notice to the Agent and the Borrower.

"Applicable Margin": with respect to any ABR Loan, 1.375% per annum, and, with respect to any Eurodollar Loan, 2.375% per annum.

"Applicable Percentage": as to any Lender at any time, the percentage which such Lender's Commitment then constitutes of the aggregate Commitments or, at any time after the Funding Date, the percentage that the principal amount of such Lender's Loans then outstanding constitutes of the aggregate principal amount of the Loans of all Lenders then outstanding.

"Arrangers": J.P. Morgan Securities Inc. and Credit Suisse Securities (USA) LLC.

"Assignee": as defined in Section 10.06.

"Assignment and Acceptance": as defined in Section 10.06.

"Attributable Indebtedness": at the time of determination as to any lease, the present value (discounted at the actual rate, if stated, or, if no rate is stated, the implicit rate of interest of such lease transaction as determined by a Financial Officer of the Borrower), calculated using the interval of scheduled rental payments under such lease, of the obligation of the lessee for net rental payments during the remaining term of such lease (excluding any subsequent renewal or other extension options held by the lessee). The term "net rental payments" means, with respect to any lease for any period, the sum of the rental and other payments required to be paid in such period by the lessee thereunder, but not including, however, any amounts required to be paid by such lessee (whether or not designated as rental or additional rental) on account of maintenance and repairs, insurance, taxes, assessments, water rates, indemnities or similar charges required to be paid by such lessee thereunder or any amounts required to be paid by such lessee thereunder contingent upon the amount of sales, earnings or profits or of maintenance and repairs, insurance, taxes, assessments, water rates, indemnities or similar charges; provided that in the case of any lease which is terminable by the lessee upon the payment of a penalty in an amount which is less than the total discounted net rental payments required to be paid from the later of the first date upon which such lease may be so terminated and the date of the determination of net rental payments, "net rental payments" shall include the

then current amount of such penalty from the later of such two dates and shall exclude the rental payments relating to the remaining period of the lease commencing with the later of such two dates.

"Borrower": as defined in the preamble to this Agreement.

"Business Day": any day that (i) is not a Saturday or Sunday and (ii) is (A) when used in connection with any ABR Loan, any day on which banks are open for business in New York and (B) when used in connection with any Eurodollar Loan, any day on which dealings in Dollars can occur in the London interbank market and on which banks are open for business in New York.

"Capital Lease Obligations": as to any Person, the obligations of such Person to pay rent or other amounts under any lease of (or other arrangement conveying the right to use) real or personal property, or a combination thereof, which obligations are required to be classified and accounted for as capital leases on a balance sheet of such Person under GAAP and, for the purposes of this Agreement, the amount of such obligations at any time shall be the capitalized amount thereof at such time determined in accordance with GAAP.

"Code": the Internal Revenue Code of 1986, as amended from time to time.

"Co-Documentation Agents": as defined in the preamble to this Agreement.

"Collateral": all property of the Loan Parties, now owned or hereafter acquired, upon which a Lien is created in favor of the Agent for the benefit of the Secured Parties by any Security Document.

"Collateral Agreement": the Collateral Agreement, substantially in the form of Exhibit C, to be executed and delivered by the Loan Parties and the Agent, as such agreement may be amended, restated, supplemented or otherwise modified from time to time.

"Collateral Value": as of any date of determination, the aggregate net book value of the Collateral located in the United States of America as of the end of the most recent fiscal quarter of the Borrower, excluding (i) any Collateral Disposed of since the last day of such fiscal quarter, (ii) any Collateral subject to third-party Liens securing Indebtedness (or securing other monetary obligations, if all such third-party Liens securing other monetary obligations, in the aggregate, would materially reduce the value of the Collateral taken as a whole), (iii) all Collateral owned by any Guarantor if any of the events described in paragraph (e) of Article VII shall have occurred and be continuing as of such date with respect to such Guarantor (with references in such paragraph (e) to the Borrower being deemed for purposes of this clause (iii) to be references to such Guarantor), and (iv) any Collateral installed or located on or at any facility or other real property not owned by a Loan Party or subject to any Lien securing Indebtedness (other than Obligations) or any sale and lease-back arrangement, unless (x) the Agent shall have received a landlord waiver, bailee letter or other access agreement reasonably satisfactory to it, executed by each applicable owner of or holder of such Lien on such facility or other real property (or a representative authorized to act on its behalf) on customary terms or (y) the Agent shall have agreed with the Borrower in writing that such a waiver, letter or agreement is not required with respect to such Collateral. Notwithstanding the foregoing, for purposes of

determining Collateral Value, Collateral shall not be excluded pursuant to subclause (iv)(x) of the preceding sentence prior to February 1, 2007 (or, as to the Collateral installed or located on or at any particular facilities or other real properties, such later date or dates as the Agent shall agree) so long as the Borrower shall be endeavoring in good faith to obtain the required landlord waivers, bailee letters or other access agreements.

"Collateral Value Certificate": a certificate in substantially the form of, and containing the information called for by, Exhibit F-1, signed by a Financial Officer of the Borrower and setting forth the Collateral Value as of the last day of the fiscal period covered by the financial statements to which such certificate relates.

"Commitment": as to any Lender, the commitment of such Lender to make a Loan hereunder on the Funding Date, expressed as an amount representing the maximum principal amount of the Loan to be made by such Lender hereunder, as such commitment may be reduced or increased from time to time in accordance with the provisions of this Agreement. The initial amount of each Lender's Commitment is set forth on Schedule 2.01, or in the Assignment and Acceptance pursuant to which such Lender shall have assumed its Commitment, as applicable.

"Conduit Lender": any special purpose funding vehicle that (i) is organized under the laws of the United States or any state thereof and (ii) is engaged in making, purchasing or otherwise investing in commercial loans in the ordinary course of its business.

"Contractual Obligation": as to any Person, any provision of any security issued by such Person or of any agreement, instrument or other undertaking to which such Person is a party or by which it or any of its property is bound.

"Default": any of the events specified in Article VII, whether or not any requirement for the giving of notice, the lapse of time, or both, or any other condition, has been satisfied.

"Designated Refinancing": (a) any prepayment of all or a substantial portion of the Loans with the proceeds of a replacement loan or credit facility of the Borrower or any of its Subsidiaries or (b) any amendment to this Agreement that reduces the Applicable Margin, in the case of each of clause (a) or (b), made or effective on or prior to the first anniversary of the Funding Date.

"Disposition": with respect to any property, any sale, lease, sale and lease-back, assignment, conveyance, transfer or other disposition thereof. The terms "Dispose" and "Disposed of" shall have correlative meanings.

"Dollars" and "$": dollars in lawful currency of the United States of America.

"Environmental Activity": any past, present or future activity, event or circumstance in respect of a Hazardous Substance, including its presence, storage, use, holding, collection, purchase, accumulation, assessment, generation, manufacture, construction, processing, treatment, stabilization, disposition, handling, disposal or transportation, or its spill,

discharge, leak, release, leaching, dispersal or migration into the environment, including the movement through or in the air, soil, surface water or groundwater.

"Environmental Laws": all applicable laws regulating, relating to or imposing liability or standards of conduct concerning protection or quality of the environment, human health, employee health and safety or Hazardous Substances.

"Equipment": as defined in the Collateral Agreement.

"ERISA": the Employee Retirement Income Security Act of 1974, as amended from time to time.

"Eurodollar Loan Group": a Loan Group comprised of Eurodollar Loans.

"Eurodollar Loan": any Loan bearing interest at a rate determined by reference to the Eurodollar Rate.

"Eurodollar Rate": with respect to an Interest Period pertaining to any Eurodollar Loan, the rate of interest determined on the basis of the rate for deposits in Dollars for a period equal to such Interest Period commencing on the first day of such Interest Period appearing on Page 3750 of the Telerate Screen as of 11:00 a.m., London time, two Business Days prior to the beginning of such Interest Period. In the event that such rate does not appear on such page of the Telerate Screen (or otherwise on the Telerate Service), the "Eurodollar Rate" shall instead be the interest rate per annum (rounded upwards, if necessary, to the next 1/16 of 1%) equal to the rate at which deposits in Dollars approximately equal to $10,000,000, and for a maturity comparable to such Interest Period, are offered by the principal London office of the Reference Lender (or, if the Reference Lender does not at the time maintain a London office, the principal London office of any Affiliate of the Reference Lender) for immediately available funds in the London interbank market at approximately 11:00 a.m., London time, two Business Days prior to the commencement of such Interest Period.

"Eurodollar Reserve Rate": with respect to each day during each Interest Period pertaining to a Eurodollar Loan, a rate per annum determined for such day in accordance with the following formula (rounded upward to the nearest 1/100th of 1%):

$$\text{Eurodollar Reserve Rate} = \frac{\text{(Eurodollar Rate)}}{\text{(1.00 - Eurodollar Reserve Requirements)}}$$

"Eurodollar Reserve Requirements": for any day as applied to a Eurodollar Loan, the aggregate (without duplication) of the maximum rates (expressed as a decimal fraction) of reserve requirements in effect on such day (including, without limitation, basic, supplemental, marginal and emergency reserves under any regulations of the Board of Governors of the Federal Reserve System or other Governmental Authority having jurisdiction with respect thereto) dealing with reserve requirements prescribed for eurodollar funding (currently referred to as "Eurocurrency liabilities" in Regulation D of such Board) maintained by a member bank of such System.

"Event of Default": any of the events specified in Article VII; provided that any requirement for the giving of notice, the lapse of time, or both, or any other condition, has been satisfied.

"Existing Credit Agreement": the Amended and Restated Credit Agreement dated as of July 20, 2006, among the Borrower, General Motors of Canada Limited, Saturn Corporation, the lenders party thereto and Citicorp USA, Inc. as administrative agent, as amended, restated, supplemented, replaced or otherwise modified from time to time.

"Federal Funds Effective Rate": for any day, the weighted average of the rates (rounded upward, if necessary, to the next 1/100 of 1%) on overnight Federal funds transactions with members of the Federal Reserve System arranged by Federal funds brokers, as published on the next succeeding Business Day by the Federal Reserve Bank of New York, or, if such rate is not so published for any day which is a Business Day, the average (rounded upward, if necessary, to the next 1/100 of 1%) of the quotations for such day of such rates on such transactions received by the Agent from three Federal funds brokers of recognized standing selected by it.

"Fee Letter": the fee letter among the Borrower, the Arrangers and the Agent, dated the date of this Agreement.

"Financial Officer": with respect to any Person, the chief financial officer, principal accounting officer, a financial vice president, treasurer, assistant treasurer or controller of such Person.

"Fixture": as defined in the Collateral Agreement.

"Fixture Filing Financing Statement": as defined in the Collateral Agreement.

"Funding Date": a date on or before December 15, 2006, selected by the Borrower in accordance with Section 2.02 as the date on which the Loans will be made hereunder.

"GAAP": generally accepted accounting principles in the United States of America as in effect from time to time and as applied by the Borrower in the preparation of its public financial statements.

"GMAC": GMAC LLC (or any successor thereto) and its Subsidiaries.

"Governmental Authority": any nation or government, any state, province, municipality or other political subdivision thereof and any entity exercising executive, legislative, judicial, regulatory, taxing or administrative functions of government including the European Central Bank.

"Guarantee Obligations": as to any Person (the "guaranteeing Person"), if the primary purpose or intent thereof is to provide assurance that the Indebtedness of another Person will be paid or discharged, any obligation of the guaranteeing Person that guarantees or in effect guarantees, or which is given to induce the creation of a separate obligation by another Person

(including any bank under any letter of credit) that guarantees or in effect guarantees, any Indebtedness (the "primary obligations") of any other third Person (the "primary obligor") in any manner, whether directly or indirectly, including any obligation of the guaranteeing Person, whether or not contingent, (i) to advance or supply funds for the purchase or payment of any such primary obligation, (ii) to purchase property, securities or services primarily for the purpose of assuring the owner of any such primary obligation of the ability of the primary obligor to make payment of such primary obligation or (iii) otherwise to assure or hold harmless the owner of any such primary obligation against loss in respect thereof; provided, however, that the term Guarantee Obligation shall not include endorsements of instruments for deposit or collection in the ordinary course of business. The amount of any Guarantee Obligation of any guaranteeing Person shall be deemed to be the lower of (a) an amount equal to the stated or determinable amount of the primary obligation in respect of which such Guarantee Obligation is made and (b) the maximum amount for which such guaranteeing Person may be liable pursuant to the terms of the instrument embodying such Guarantee Obligation, unless such primary obligation and the maximum amount for which such guaranteeing Person may be liable are not stated or determinable, in which case the amount of such Guarantee Obligation shall be such guaranteeing Person's maximum reasonably anticipated liability in respect thereof as determined by the Borrower in good faith.

"Guarantor": Saturn Corporation and each other direct or indirect wholly-owned domestic Subsidiary of the Borrower that at the option of the Borrower becomes a party to this Agreement, the Collateral Agreement and each other relevant Loan Document, in each case by executing a joinder agreement in form and substance reasonably acceptable to the Agent.

"Hazardous Substance": (a) all chemicals, materials, contaminants, wastes and substances defined as or included in the definition of "contaminants", "wastes", "hazardous wastes", "hazardous materials", "hazardous substances", "extremely hazardous wastes", "extremely hazardous substances", "restricted hazardous waste", "toxic substances", "toxic pollutants", or "pollutants" or words of similar import under any applicable Environmental Laws and (b) all other chemicals, materials and substances, exposure to which is prohibited, limited or regulated by any Governmental Authority pursuant to any applicable Environmental Laws.

"Indebtedness": (a) for purposes of Sections 6.02(a) and 6.03 and paragraph (d) of Article VII, of any Person at any date, the amount outstanding on such date under notes, bonds, debentures or other similar evidences of indebtedness for money borrowed (including, without limitation, indebtedness for borrowed money evidenced by a loan account) and (b) for all other purposes, of any Person at any date, without duplication, (i) all indebtedness of such Person for borrowed money, (ii) all obligations of such Person evidenced by notes, bonds, debentures or other similar instruments, (iii) all Capital Lease Obligations of such Person, (iv) all obligations of such Person, contingent or otherwise, as an account party or applicant under or in respect of acceptances, letters of credit and similar arrangements, (v) all obligations of such Person in respect of securitizations of receivables, (vi) all net obligations of such Person under swap agreements, (vii) all purchase money indebtedness of such Person and (viii) all Guarantee Obligations of such Person in respect of any of the foregoing.

"Indenture": the Indenture dated as of December 7, 1995 between the Borrower and Citibank, N.A., as Trustee, all supplemental indentures related thereto and any resolutions that have added any covenants to, or modified the covenants contained in, the Indenture.

"Interest Payment Date": (a) as to any ABR Loan, the third Business Day after the last day of each March, June, September and December to occur while such Loan is outstanding and the date such Loan is paid in full, (b) as to any Eurodollar Loan, the last day of each Interest Period applicable thereto and (c) as to any Eurodollar Loan having an Interest Period longer than three months, each day which is three months after the first day of such Interest Period; provided that, in addition to the foregoing, each of (i) the date upon which the Loans have been paid in full and (ii) the Maturity Date shall be deemed to be an "Interest Payment Date" with respect to any interest which is then accrued hereunder.

"Interest Period": with respect to any Eurodollar Loan:

(a) initially, the period commencing on the borrowing or conversion date, as the case may be, with respect to such Eurodollar Loan and ending one, two, three or six months thereafter, as selected by the Borrower in its notice of borrowing or notice of conversion, as the case may be, given with respect thereto; and

(b) thereafter, each period commencing on the last day of the next preceding Interest Period applicable to such Eurodollar Loan and ending one, two, three or six months thereafter, as selected by the Borrower by irrevocable notice to the Agent not less than three Business Days prior to the last day of the then current Interest Period with respect thereto;

provided that all of the foregoing provisions relating to Interest Periods are subject to the following:

(i) if any Interest Period would otherwise end on a day that is not a Business Day, such Interest Period shall be extended to the next succeeding Business Day unless, in the case of an Interest Period pertaining to a Eurodollar Loan, the result of such extension would be to carry such Interest Period into another calendar month in which event such Interest Period shall end on the immediately preceding Business Day; and

(ii) any Interest Period that begins on the last Business Day of a calendar month (or on a day for which there is no numerically corresponding day in the calendar month at the end of such Interest Period) shall end on the last Business Day of a calendar month.

Notwithstanding anything to the contrary contained in this Agreement, no Interest Period shall be selected by the Borrower which ends on a date after the Maturity Date.

"Lender": as defined in the preamble to this Agreement; collectively, the "Lenders"; provided that unless the context otherwise requires, each reference herein to the Lenders shall be deemed to include any Conduit Lender.

"Lien": any mortgage, pledge, lien, security interest, charge, statutory deemed trust, conditional sale or other title retention agreement or other similar encumbrance.

"Loan": a loan made by a Lender to the Borrower pursuant to this Agreement.

"Loan Documents": this Agreement, the Security Documents, the Notes and any amendment, waiver, supplement or other modification to any of the foregoing.

"Loan Group": a group of Loans of a single Type as to which a single Interest Period is in effect.

"Loan Parties": each of the Borrower and each Guarantor.

"Majority Lenders": (a) at any time prior to the Funding Date, Lenders holding more than 50% of the Commitments and (b) at any time following the Funding Date, Lenders holding more than 50% of the outstanding Loans at such time.

"Manufacturing Subsidiary": any Subsidiary of the Borrower (i) substantially all the property of which is located within the continental United States of America, (ii) which owns a Principal Domestic Manufacturing Property and (iii) in which the Borrower's investment, direct or indirect and whether in the form of equity, debt, advances or otherwise, is in excess of $2,500,000,000 as shown on the books of the Borrower as of the end of the fiscal year immediately preceding the date of determination; provided that "Manufacturing Subsidiary" shall not include GMAC or any other Subsidiary which is principally engaged in leasing or in financing installment receivables or otherwise providing financial or insurance services to the Borrower or others or which is principally engaged in financing the Borrower's operations outside the continental United States of America.

"Material Adverse Effect": a material adverse effect on (a) the financial condition of the Borrower and its Subsidiaries taken as a whole or (b) the validity or enforceability of this Agreement and any of the other Loan Documents or the rights or remedies of the Agent and the Lenders under the Loan Documents.

"Material Facility": as of any date, any U.S. Manufacturing Facility (as defined in the Collateral Agreement) upon which Collateral having a net book value (as determined as of the end of the most recent fiscal period of the Borrower for which a Collateral Value Certificate or Summary Collateral Value Certificate has been delivered hereunder or, prior to the delivery of the first Collateral Value Certificate or Summary Collateral Value Certificate, as of June 30, 2006) of at least $100,000,000 in the aggregate shall be installed or located.

"Maturity Date": the seventh anniversary of the Funding Date (or, if such seventh anniversary does not fall on a Business Day, the next succeeding Business Day).

"Non-US Lender": as defined in Section 2.15.

"Note": a promissory note, executed and delivered by the Borrower with respect to the Loans, substantially in the form of Exhibit B.

"Obligations": all obligations of any Loan Party in respect of any unpaid Loans and any interest thereon (including interest accruing after the maturity of any Loan and interest accruing after the filing of any petition in bankruptcy, or the commencement of any insolvency,

reorganization or like proceeding, relating to any Loan Party, whether or not a claim for post-filing or post-petition interest is allowed in such proceeding) and all other obligations and liabilities of any Loan Party to the Agent or to any Lender, whether direct or indirect, absolute or contingent, due or to become due, or now existing or hereafter incurred, which may arise under, out of, or in connection with this Agreement, any other Loan Document or any other document made, delivered or given in connection herewith or therewith, whether on account of principal, interest, reimbursement obligations, fees, indemnities, costs, expenses or otherwise.

"Participant": as defined in Section 10.06.

"Permitted Transfer": with respect to any Collateral, any sale or other transfer of such Collateral that is not prohibited by this Agreement (and would not result in a default under Section 6.04 of this Agreement) and that is made (a) to a Person other than the Borrower or an Affiliate of the Borrower or (b) to an Affiliate of the Borrower that is not a Loan Party (i) in the ordinary course of business or (ii) for a business purpose of the Borrower (as determined in good faith by the Borrower) and not primarily for the purpose of (A) reducing the security for the Obligations or (B) making such Collateral available to other creditors.

"Person": an individual, partnership, corporation, business trust, joint stock company, trust, unincorporated association, joint venture, Governmental Authority or other entity of whatever nature.

"Prime Rate": the rate of interest per annum equal to the prime rate publicly announced by the majority (or, if there is not a majority, the plurality) of the eleven largest commercial banks chartered under United States Federal or State banking laws as their prime rates (or similar base rates) in effect at their principal offices. The determination of such eleven largest commercial banks shall be based upon deposits as of the prior year-end, as reported in the American Banker or such other source as may be mutually agreed upon by the Agent and the Borrower.

"Principal Domestic Manufacturing Property": any manufacturing plant or facility owned by the Borrower or any Manufacturing Subsidiary of the Borrower which is located within the continental United States of America and, in the opinion of the Borrower's Board of Directors, is of material importance to the total business conducted by the Borrower and its consolidated affiliates as an entity.

"Quarterly Collateral Reporting Period": a period commencing on any date on which the Collateral Value is less than 300% of the Total Exposure and continuing until the Borrower shall have delivered to the Agent Collateral Value Certificates for two successive fiscal quarters of the Borrower ending after such date showing that the Collateral Value is equal to or greater than 300% of the Total Exposure as of the end of each such fiscal quarter.

"Reference Lender": the Agent.

"Register": as defined in Section 10.06.

"Requirement of Law": as to any Person, any law, treaty, rule or regulation or determination of an arbitrator or a court or other Governmental Authority, in each case

applicable to or binding upon such Person or any of its property or to which such Person or any of its property is subject.

"Secured Parties": the collective reference to the Agent, each Lender and each other Person to which any Obligations are owed.

"Security Documents": the Collateral Agreement and all other security documents delivered to the Agent granting or purporting to grant a Lien on any property of any Person to secure the Obligations, including financing statements or financing change statements under the applicable Uniform Commercial Code.

"Significant Subsidiary": at any time, any Subsidiary of the Borrower which has at least 10% of the consolidated assets of the Borrower and its Subsidiaries at such time as reflected in the most recent annual audited consolidated financial statements of the Borrower.

"Subsidiary": as to any Person (the "parent"), any other Person of which at least a majority of the outstanding stock or other equity interests having by the terms thereof ordinary voting power to elect a majority of the board of directors or comparable governing body of such Person (irrespective of whether or not at the time stock or other equity interests of any other class or classes of such Person shall have or might have voting power by reason of the happening of any contingency) is at the time owned by the parent, or by one or more Subsidiaries, or by the parent and one or more Subsidiaries. Unless otherwise qualified, all references to a "Subsidiary" or to "Subsidiaries" in this Agreement shall refer to a Subsidiary or Subsidiaries of the Borrower. For the purposes of this Agreement (other than Sections 3.01, 5.01 and 5.02) and the other Loan Documents, GMAC shall not be deemed to be a Subsidiary or an Affiliate of the Borrower, and any references herein or therein to the subsidiaries or affiliates of the Borrower shall be to the Borrower's Subsidiaries or Affiliates, as applicable, other than GMAC.

"Summary Collateral Value Certificate": a certificate substantially the form of Exhibit F-2 signed by a Financial Officer of the Borrower and certifying that, as of the last day of the fiscal quarter of the Borrower covered by the financial statements to which such certificate relates, (a) the Borrower is in compliance with Section 6.04 and (b) the Collateral Value is equal to or greater than 300% of the Total Exposure as of such date.

"Syndication Agent": as defined in the preamble to this Agreement.

"Total Exposure": as of any date of determination, the aggregate unpaid principal amount of the Loans.

"Transferee": as defined in Section 10.06.

"Type": as to any Loan, its nature as an ABR Loan or a Eurodollar Loan.

SECTION 1.02. Other Definitional Provisions. (a) Unless otherwise specified therein, all terms defined in this Agreement shall have the defined meanings when used in the other Loan Documents or any certificate or other document made or delivered pursuant hereto.

(b) As used herein, and any certificate or other document made or delivered pursuant hereto, accounting terms relating to the Borrower and its Subsidiaries not defined in Section 1.01 and accounting terms partly defined in Section 1.01, to the extent not defined, shall have the respective meanings given to them under GAAP.

(c) The words "hereof", "herein" and "hereunder" and words of similar import when used in this Agreement shall refer to this Agreement as a whole and not to any particular provision of this Agreement, and Article, Section, Schedule and Exhibit references are to the Articles, Sections, Schedules and Exhibits of this Agreement, unless otherwise specified.

(d) The meanings given to terms defined herein shall be equally applicable to both the singular and plural forms of such terms.

ARTICLE II

Amount and Terms of Commitments

SECTION 2.01. Commitments. (a) Subject to the terms and conditions set forth herein, each Lender agrees to make a Loan or Loans to the Borrower on the Funding Date in an aggregate principal amount not greater than its Commitment. Loans made on the Funding Date may be converted and continued as provided in Section 2.05, but no new Loans will be made after the Funding Date. Amounts repaid or prepaid in respect of Loans may not be reborrowed. All Loans shall be made and repaid or prepaid in Dollars.

(b) The Loans, together with all accrued and unpaid interest thereon, shall mature and be due and payable in full on the Maturity Date.

(c) Subject to Sections 2.11 and 2.13, the Loans may from time to time be (i) Eurodollar Loans, (ii) ABR Loans or (iii) any combination thereof, as determined by the Borrower and notified to the Agent in accordance with Sections 2.02 and 2.05. Each Lender may make or maintain its Loans for the account of the Borrower by or through such Lender's Applicable Lending Office.

SECTION 2.02. Procedure for Borrowing Loans. The Borrower shall give the Agent an irrevocable notice (which notice must be received by the Agent prior to 1:00 p.m., New York City time, (i) three Business Days (or such shorter period as may be agreed to by the Agent) prior to the Funding Date, if all or any part of the requested Loans are to be Eurodollar Loans, or (ii) one Business Day prior to the Funding Date, otherwise, specifying (A) the amount to be borrowed, (B) the requested Funding Date, which shall be a Business Day, (C) whether the requested Loans are to be Eurodollar Loans, ABR Loans or a combination thereof and (D) if the requested Loans are to be entirely or partly comprised of Eurodollar Loans, the respective amounts of each such Type of Loan and the respective lengths of the initial Interest Periods therefor. Each Loan Group shall be in an amount equal to $50,000,000 or a whole multiple of $5,000,000 in excess thereof. Upon receipt of any such notice from the Borrower, the Agent shall promptly notify each Lender thereof. Each Lender will make its Applicable Percentage of each Loan Group available to the Agent for the account of the Borrower at the office of the

Agent specified in Section 10.02 prior to 12:00 noon, New York City time, on the Funding Date in funds immediately available to the Agent. Such Loans will then immediately be made available to the Borrower by the Agent crediting the account of the Borrower on the books of such office with the aggregate of the amounts made available to the Agent by the Lenders and in like funds as received by the Agent.

SECTION 2.03. Termination of Commitments. The Commitments shall terminate upon the making of the Loans on the Funding Date; provided, that if the Loans shall not have been made by December 15, 2006, the Commitments shall terminate at 5:00 p.m., New York City time, on such date.

SECTION 2.04. Prepayments. (a) The Borrower may, at any time and from time to time, prepay Loans, in whole or in part, without premium or penalty (except as set forth in paragraph (c) of this Section and subject to the provisions of Section 2.16), upon at least one Business Day's irrevocable notice to the Agent (which notice must be received by the Agent prior to 12:00 Noon, New York City time, on the date upon which such notice is due), specifying (i) the date and amount of prepayment and (ii) the Loan Group or Loan Groups being prepaid. Upon receipt of any such notice, the Agent shall promptly notify each Lender. If any such notice is given, the amount specified in such notice shall be due and payable on the date specified therein, together with any amounts payable pursuant to paragraph (c) of this Section and Section 2.16, if applicable. Partial prepayments of any Loan Group shall be in an aggregate principal amount of $10,000,000 or a multiple of $5,000,000 in excess thereof.

(b) If, on any date of determination, the Borrower shall not be in compliance with the covenant set forth in Section 6.04, the Borrower shall promptly, and in any event within five Business Days of such date, prepay Loans in an amount necessary to cause the Borrower to be in compliance with such covenant.

(c) Any prepayment of Loans made in connection with any Designated Refinancing shall be subject to a 1% prepayment premium on the principal amount of the Loans so prepaid.

SECTION 2.05. Conversion and Continuation Options. (a) The Borrower may elect from time to time to convert any Eurodollar Loans to ABR Loans, by giving the Agent at least one Business Day's prior irrevocable notice of such election; provided that any such conversion of Eurodollar Loans may only be made on the last day of an Interest Period with respect thereto. The Borrower may elect from time to time to convert ABR Loans to Eurodollar Loans by giving the Agent at least three Business Days' prior irrevocable notice of such election. Any such notice of conversion to Eurodollar Loans shall specify the length of the initial Interest Period or Interest Periods therefor. Upon receipt of any such notice the Agent shall promptly notify each Lender. Notwithstanding the foregoing, (i) no ABR Loan may be converted into a Eurodollar Loan when any Event of Default has occurred and is continuing and the Agent has or the Majority Lenders have determined that such conversion is not appropriate and (ii) no ABR Loan may be converted into a Eurodollar Loan after the date that is one month prior to the Maturity Date.

(b) Any Eurodollar Loan may be continued as such upon the expiration of the then current Interest Period with respect thereto by the Borrower giving notice to the Agent, in accordance with the applicable provisions of the term "Interest Period" set forth in Section 1.01, specifying the length of the next Interest Period to be applicable to such Loan; provided that no Eurodollar Loan may be continued as such (i) when any Event of Default has occurred and is continuing and the Agent has or the Majority Lenders have determined that such continuation is not appropriate or (ii) after the date that is one month prior to the Maturity Date; provided, further, that (A) if such continuation is not permitted pursuant to the preceding proviso, such Eurodollar Loan shall be automatically converted to an ABR Loan on the last day of the then expiring Interest Period and (B) if the Borrower shall fail to give any notice required by this paragraph, such Eurodollar Loan shall, subject to clause (A), automatically continue as a Eurodollar Loan having a new Interest Period of the same duration as the Interest Period then expired.

SECTION 2.06. Minimum Amounts of Eurodollar Loan Groups. All conversions and continuations of Loans hereunder and all selections of Interest Periods hereunder shall be in such amounts and be made pursuant to such elections so that, after giving effect thereto, the aggregate principal amount of each Eurodollar Loan Group shall be equal to $50,000,000 or a whole multiple of $5,000,000 in excess thereof. In no event shall there be more than 10 Eurodollar Loan Groups outstanding at any time.

SECTION 2.07. Repayment of Loans; Evidence of Debt. (a) The Borrower hereby unconditionally promises to pay to the Agent for the account of each Lender the then unpaid principal amount of each Loan of such Lender as provided in Section 2.08.

(b) The Borrower hereby further agrees to pay interest in immediately available funds at the office of the Agent on the unpaid principal amount of the Loans owing by the Borrower from time to time from the date hereof until payment in full thereof at the rates per annum, and on the dates, set forth in Section 2.09.

(c) Each Lender shall maintain an account or accounts evidencing the Indebtedness of the Borrower to the Applicable Lending Office of such Lender resulting from each Loan made by such lending office of such Lender from time to time, including the amounts of principal and interest payable and paid to such lending office of such Lender from time to time under this Agreement.

(d) The Agent shall maintain the Register pursuant to Section 10.06, and a subaccount for each Lender, in which Register and subaccounts (taken together) shall be recorded (i) the amount of each Loan made hereunder, the Type of each Loan and the Interest Period applicable thereto (if such Loan shall be a Eurodollar Loan), (ii) the amount of any principal or interest due and payable or to become due and payable from the Borrower to each Lender hereunder and (iii) the amount of any sum received by the Agent hereunder from the Borrower and each Lender's share thereof.

(e) The entries made in the Register and accounts maintained pursuant to this Section shall, to the extent permitted by applicable law, be prima facie evidence of the existence and amounts of the obligations of the Borrower therein recorded; provided, however, that the

failure of any Lender or the Agent to maintain such account, such Register or such subaccount, as applicable, or any error therein, shall not in any manner affect the obligation of the Borrower to repay (with applicable interest) the Loans made to the Borrower in accordance with the terms of this Agreement.

SECTION 2.08. Amortization of Loans. (a) Subject to adjustment pursuant to paragraph (b) of this Section, on the third Business Day following the last day of each March, June, September and December, commencing on the third Business Day following March 31, 2007, and continuing to the Maturity Date, the Borrower shall repay Loans in a principal amount equal to 0.25% of the aggregate principal amount of the Loans made on the Funding Date.

(b) Any prepayment of Loans pursuant to Section 2.04 shall be applied to reduce the subsequent scheduled repayments of the Loans to be made pursuant to this Section in the direct order of their maturity, or as otherwise directed by the Borrower.

(c) Prior to any repayment of Loans, the Borrower shall select the Loan Group or Loan Groups to be repaid and shall notify the Agent of such selection not later than 12:00 noon, New York City time, one Business Day before the scheduled date of such repayment. Each repayment of a Loan Group shall be applied ratably to the Loans included in the repaid Loan Group. Repayments of Loans shall be accompanied by accrued interest on the principal amount of Loans repaid.

SECTION 2.09. Interest Rates for Loans. (a) Each ABR Loan shall bear interest at a rate per annum equal to the ABR plus the Applicable Margin.

(b) Each Eurodollar Loan shall bear interest at a rate per annum equal to the Eurodollar Rate for the Interest Period in effect for such Loan plus the Applicable Margin.

(c) Interest on the Loans shall be payable in arrears on each Interest Payment Date and on the date of any required repayment under Section 2.08 with respect to the amounts so repaid; provided that interest accruing pursuant to paragraph (d) of this Section shall be payable from time to time on demand.

(d) If all or a portion of (i) the principal amount of any Loan, (ii) any interest payable thereon or (iii) any other amount payable hereunder shall not be paid when due (whether at the stated maturity, by acceleration or otherwise), such overdue amount shall bear interest at a rate per annum which is (x) in the case of overdue principal, the rate that would otherwise be applicable thereto pursuant to the foregoing provisions of this Section plus 2% or (y) in the case of overdue interest or other amounts, the rate described in paragraph (a) of this Section plus 2%, in each case from the date of such non-payment until such amount is paid in full (after as well as before judgment).

SECTION 2.10. Computation of Interest. (a) Interest on all Loans shall be computed on the basis of the actual number of days elapsed over a year of 360 days or, in the case of ABR Loans on any date when the ABR is determined by reference to the Prime Rate, a year of 365 or 366 days as appropriate (in each case including the first day but excluding the last day). Each determination of an interest rate by the Agent pursuant to any provision of this

Agreement shall be conclusive and binding on the Borrower and the Lenders in the absence of manifest error. The Agent shall, at any time and from time to time upon the request of the Borrower, deliver to the Borrower a statement showing the quotations used by the Agent in determining any interest rate applicable to any Loan pursuant to this Agreement.

(b) Any change in the interest rate on a Loan resulting from a change in the ABR or the Eurodollar Reserve Requirements shall become effective as of the opening of business on the day on which such change in the ABR is announced or such change in the Eurodollar Reserve Requirements becomes effective, as the case may be. The Agent shall as soon as practicable notify the Borrower and the Lenders of the effective date and the amount of each such change in interest rate.

SECTION 2.11. Inability to Determine Interest Rate. If the Eurodollar Rate cannot be determined by the Agent in the manner specified in the definition of "Eurodollar Rate" contained in Section 1.01, the Agent shall give telecopy or telephonic notice thereof to the Borrower and the Lenders as soon as practicable thereafter. Until such time as the Eurodollar Rate can be determined by the Agent in the manner specified in the definition of "Eurodollar Rate" contained in Section 1.01, no further Eurodollar Loans shall be continued as such at the end of the then current Interest Period (other than any Eurodollar Loans previously requested and with respect to which the Eurodollar Rate was previously determined), nor shall the Borrower have the right to convert ABR Loans to Eurodollar Loans, and any affected Loans shall be converted on the last day of the then current Interest Period to ABR Loans in accordance with Section 2.05.

SECTION 2.12. Pro Rata Treatment and Payments. (a) The borrowing of Loans of each Loan Group hereunder on the Funding Date, and each conversion or continuation of Loans of any Loan Group, shall be made pro rata among the Lenders.

(b) Each payment (including each prepayment) on account of principal of and interest on the Loans of any Loan Group shall be made pro rata as among the Lenders according to the respective outstanding principal amounts of their Loans comprising such Loan Group and (ii) any proceeds of the Collateral shall be distributed in accordance with paragraph (c) of this Section.

(c) Any proceeds of the Collateral during the continuance of an Event of Default shall be applied in the following order:

(i) first, to pay incurred and unpaid fees and expenses of the Agent under the Loan Documents;

(ii) second, to the Agent, for application by it towards payment of interest then due and owing and remaining unpaid in respect of the Obligations, pro rata among the Secured Parties according to the amount of interest then due and owing and remaining unpaid to such Secured Parties;

(iii) third, to the Agent, for application by it towards payment of all other amounts then due and owing and remaining unpaid in respect of the Obligations, pro rata among the Secured Parties according to the amounts of the

Obligations then due and owing and remaining unpaid to such Secured Parties; and

(iv) fourth, any balance remaining after the Obligations shall have been paid in full shall be paid over to the Borrower or to whomsoever may be lawfully entitled to receive the same;

provided that, if sufficient funds are not available to fund all payments to be made in respect of any Obligations described in any of clause (i), (ii) or (iii) above, the available funds being applied with respect to any such Obligations shall be allocated to the payment of such Obligations ratably, based on the proportion of the Agent's and each other Secured Party's interest in such aggregate outstanding Obligations.

(d) All payments (including prepayments) to be made by the Borrower hereunder, whether on account of principal, interest, fees or otherwise, shall be made without set-off or counterclaim and shall be made prior to 1:00 p.m., New York City time, on the due date thereof to the Agent, for the account of the Lenders, at the Agent's office specified in Section 10.02. Payments of principal and interest on any Loan and all other amounts payable hereunder shall be made in Dollars; and all payments hereunder shall be made in immediately available funds. The Agent shall distribute such payments to the Lenders promptly upon receipt in like funds as received. If any payment hereunder (other than payments on the Eurodollar Loans) becomes due and payable on a day other than a Business Day, such payment shall be extended to the next succeeding Business Day, and, with respect to payments of principal, interest thereon shall be payable at the then applicable rate during such extension. If any payment on a Eurodollar Loan becomes due and payable on a day other than a Business Day, the maturity thereof shall be extended to the next succeeding Business Day unless the result of such extension would be to extend such payment into another calendar month, in which event such payment shall be made on the immediately preceding Business Day.

(e) Unless the Agent shall have been notified in writing by any Lender prior to the Funding Date that such Lender will not make the amount that would constitute its relevant Applicable Percentage of the Loans requested to be made on the Funding Date available to the Agent, the Agent may assume that such Lender is making such amount available to the Agent, and the Agent may, in reliance upon such assumption, make available to the Borrower a corresponding amount. If such amount is not made available to the Agent by the required time on the Funding Date, such Lender shall pay to the Agent, on demand, such amount with interest thereon at a rate equal to the daily average Federal Funds Effective Rate for the period until such Lender makes such amount immediately available to the Agent. A certificate of the Agent submitted to any Lender with respect to any amounts owing under this Section shall be conclusive in the absence of manifest error. If such Lender's relevant Applicable Percentage of such requested Loans is not made available to the Agent by such Lender within three Business Days of the Funding Date, the Agent shall be entitled to recover such amount with interest thereon at the rate described above, on demand, from the Borrower.

(f) The Agent agrees to provide the Borrower with a written invoice of the amount of (x) any interest payable on any Interest Payment Date and (y) any expense payable by the Borrower under this Agreement or any other Loan Document. Such invoice shall be

provided (i) three Business Days in advance of any Interest Payment Date in the case of Loans bearing interest based on the Eurodollar Rate, (ii) on the Interest Payment Date in the case of Loans based on the ABR and (iii) three Business Days in advance of any date any expense is due. Failure to deliver any such invoice shall not affect the Borrower's payment obligations hereunder; provided that, with respect to any interest payable on any Interest Payment Date or any expense payable by the Borrower on any date as provided in any Loan Document, in the event that (A) any invoice is later determined to have understated the amount of interest or expense, as applicable, due on such date or (B) the Borrower makes a good faith payment of the interest or expense, as applicable, due on such date prior to receipt of an invoice as provided above, and, in each case, the amount paid is later determined to have been less that the amount or interest or expense, as the case may be, actually due on such date pursuant to this Agreement or any other Loan Document, the failure by the Borrower to have paid the full amount of interest or expense, as the case may be, on such date shall not constitute a Default or an Event of Default unless the Borrower fails to pay the amount of such shortfall within five Business Days after written notice from the Agent of the amount thereof.

SECTION 2.13. Illegality. (a) Notwithstanding any other provision herein, if the adoption of or any change in any Requirement of Law or in the interpretation or application thereof shall make it unlawful for any Lender to make or maintain Eurodollar Loans as contemplated by this Agreement, such Lender shall give notice thereof to the Agent and the Borrower describing the relevant provisions of such Requirement of Law (and, if the Borrower shall so request, provide the Borrower with a memorandum or opinion of counsel of recognized standing (as selected by such Lender) as to such illegality), following which (a) the commitment of such Lender hereunder to make Eurodollar Loans, continue such Eurodollar Loans as such and convert ABR Loans to Eurodollar Loans shall forthwith be canceled and (b) such Lender's outstanding Eurodollar Loans shall be converted automatically on the respective last days of the then current Interest Periods with respect to such Loans (or within such earlier period as shall be required by law) to ABR Loans.

(b) If any such conversion or prepayment of a Eurodollar Loan occurs on a day which is not the last day of the then current Interest Period with respect thereto, the Borrower shall pay to such Lender such amounts, if any, as may be required pursuant to Section 2.16.

SECTION 2.14. Increased Costs. (a) If (i) there shall be any increase in the cost to any Lender of agreeing to make or making, funding or maintaining any Loans or (ii) any reduction in any amount receivable in respect thereof, and such increased cost or reduced amount receivable is due to either (x) the introduction of or any change in or in the interpretation of any law or regulation after the date hereof or (y) the compliance with any guideline or request made after the date hereof from any central bank or other Governmental Authority (whether or not having the force of law), then (subject to the provisions of Section 2.17) the Borrower shall from time to time, upon demand by such Lender, pay such Lender additional amounts sufficient to compensate such Lender for such increased cost or reduced amount receivable; provided that no such additional amounts shall be payable by the Borrower with respect to, and this paragraph (a) shall not apply to, any increased cost or reduced amount due to the imposition or change in the rate of any tax, which shall be governed exclusively by Section 2.15.

(b) If any Lender shall have reasonably determined that (i) the applicability of any law, rule, regulation or guideline adopted after the date hereof pursuant to or arising out of the July 1988 paper of the Basle Committee on Banking Regulations and Supervisory Practices entitled "International Convergence of Capital Measurement and Capital Standards", (ii) the adoption after the date hereof of any other law, rule, regulation or guideline regarding capital adequacy affecting such Lender, (iii) any change arising after the date hereof in the foregoing or in the interpretation or administration of any of the foregoing by any Governmental Authority, central bank or comparable agency charged with the interpretation or administration thereof, or (iv) compliance by such Lender (or any lending office of such Lender), or any holding company for such Lender which is subject to any of the capital requirements described above, with any request or directive of general application issued after the date hereof regarding capital adequacy (whether or not having the force of law) of any such authority, central bank or comparable agency, has or would have the effect of reducing the rate of return on such Lender's capital or on the capital of any such holding company as a direct consequence of such Lender's obligations hereunder to a level below that which such Lender or any such holding company could have achieved but for such adoption, change or compliance (taking into consideration such Lender's policies and the policies of such holding company with respect to capital adequacy) by an amount deemed by such Lender to be material, then (subject to the provisions of Section 2.17) from time to time the Borrower shall pay to such Lender (at such Lender's request) such additional amounts as will compensate such Lender or any such holding company for any such reduction suffered, net of the savings (if any) which may be reasonably projected to be associated with such increased capital requirement; provided that no such additional amounts shall be payable by the Borrower with respect to, and this Section shall not apply to, any increased cost or reduced amount due to the imposition or change in the rate of any tax, which shall be governed exclusively by Section 2.15. Any certificate as to such amounts which is delivered pursuant to Section 2.17(a) shall, in addition to any items required by Section 2.17(a), include the calculation of the savings (if any) which may be reasonably projected to be associated with such increased capital requirement; provided that in no event shall any Lender be obligated to pay or refund any amounts to the Borrower on account of such savings.

(c) In the event that any Governmental Authority shall impose any Eurodollar Reserve Requirements which increase the cost to any Lender of making or maintaining Eurodollar Loans, then (subject to the provisions of Section 2.17) the Borrower shall thereafter pay in respect of the Eurodollar Loans of such Lender a rate of interest based upon the Eurodollar Reserve Rate (rather than upon the Eurodollar Rate). From and after the delivery to the Borrower of the certificate required by Section 2.17(a), all references contained in this Agreement to the Eurodollar Rate shall be deemed to be references to the Eurodollar Reserve Rate with respect to each such affected Lender.

SECTION 2.15. Taxes. (a) All payments made by each Loan Party under this Agreement shall be made free and clear of, and without deduction or withholding for or on account of, any present or future income, stamp or other taxes, levies, imposts, duties, charges, fees, deductions or withholdings, now or hereafter imposed, levied, collected, withheld or assessed by any Governmental Authority, excluding, in the case of each Lender, each Affiliate of a Lender and the Agent (each a "Tax Indemnified Party"):

(i) income taxes (other than withholding taxes) and franchise taxes, branch profits taxes and any other tax based upon net income imposed on such Tax Indemnified Party as a result of a present or former connection between such Tax Indemnified Party and the jurisdiction of the Governmental Authority imposing such tax or any political subdivision or taxing authority thereof or therein (other than any such connection arising solely from such Tax Indemnified Party having executed, delivered or performed its obligations or received a payment under, or enforced, this Agreement or any other Loan Document); and

(ii) any withholding taxes imposed by the United States on payments made by any Loan Party to any Tax Indemnified Party under laws (including for all purposes of this Section, any statute, treaty or regulation), in effect on the Funding Date (or, in the case of (A) an Assignee, the date of the Assignment and Acceptance, (B) a successor Agent, the date of the appointment of such Agent or (C) a Lender that changes its Applicable Lending Office, the date of such change) (all such taxes, levies, imposts, duties, charges, fees, deductions and withholdings, other than those excluded under clause (i) or this clause (ii), being referred to as "Non-Excluded Taxes"); provided, however, that this clause (ii) shall not apply in the case of any Tax Indemnified Party that is an Assignee, successor to the Agent or Lender that has changed its Applicable Lending Office to the extent that the Person making such assignment, successor appointment or change in Applicable Lending Office would have been entitled to receive indemnity payments or additional amounts under this Section in the absence of such assignment, successor appointment or change in Applicable Lending Office; provided, further, however, that this clause (ii) shall not apply to the extent that any Non-Excluded Tax is imposed on a Tax Indemnified Party in connection with an interest in any Loan or other obligation that such Tax Indemnified Party acquired pursuant to Section 2.17(c) or 2.18.

If any Non-Excluded Taxes are required to be withheld from any amounts payable to, or for the account of, any Tax Indemnified Party hereunder, then such Loan Party shall make all such deductions and pay the full amount so deducted to the relevant Governmental Authority in accordance with applicable law and the amounts so payable to, or for the account of, the Tax Indemnified Party shall be increased to the extent necessary to yield to the Tax Indemnified Party (after payment of all Non-Excluded Taxes) a net amount equal to the amount it would have received had no such deduction or withholding been made. Notwithstanding the foregoing, the Loan Parties shall not be required to increase any such amounts payable to any Tax Indemnified Party if such Tax Indemnified Party fails to comply with the requirements of paragraph (b) of this Section. Whenever any Non-Excluded Taxes are payable by any Loan Party, as promptly as possible thereafter such Loan Party shall send to the Agent for its own account or for the account of the relevant Tax Indemnified Party, as the case may be, a certified copy of an original official receipt, if any, received by such Loan Party showing payment thereof. If any Loan Party fails to pay any Non-Excluded Taxes when due to the appropriate Governmental Authority or fails to remit to the Agent or the relevant Tax Indemnified Party the required receipts or other required documentary evidence, such Loan Party shall indemnify the Agent and the Tax Indemnified Parties for any taxes, interest or penalties that may become payable by the Agent or any Tax Indemnified Party solely as a result of any such failure. The agreements in this Section shall

survive the termination of this Agreement and the payment of all other amounts payable hereunder.

(b) Each Lender that is not incorporated under the laws of the United States of America or any state thereof (a "Non-US Lender") shall:

(i) (A) on or before the date such Non-US Lender becomes a Lender under this Agreement, deliver to the Borrower and the Agent two duly completed originals of United States Internal Revenue Service Form W-8BEN or Form W-8ECI, or successor applicable forms, as the case may be, certifying that such Lender is entitled to a complete exemption from deduction or withholding of United States Federal income taxes with respect to payments under this Agreement and the other Loan Documents; and

(B) thereafter, (I) deliver to the Borrower and the Agent two duly completed originals of any such form on or before the date that any such form previously provided expires or becomes obsolete, (II) after the occurrence of any event requiring a change in the most recent form previously delivered to the Borrower or the Agent, deliver to the Borrower and the Agent two duly completed originals of any such form reflecting such change (if and to the extent such Non-US Lender is then legally able to provide any such form), and (III) obtain such extensions of time for filing and completing any such form as may reasonably be requested by the Borrower or the Agent (if and to the extent such Non-US Lender is then legally able to do so); and

(ii) in the case of any such Non-US Lender that is not a "bank" within the meaning of Section 881(c)(3)(A) of the Code and cannot comply with the requirements of paragraph (b)(i) above, on or before the date such Non-US Lender becomes a Lender under this Agreement, such Non-US Lender shall:

(A) represent to the Borrower (for the benefit of the Borrower and the Agent) that it is not a bank within the meaning of Section 871(h) or Section 881(c)(3)(A) of the Code;

(B) furnish to the Borrower on or before the date of any payment by the Borrower made hereunder, with a copy to the Agent, (I) a certificate substantially in the form of Exhibit D and (II) two accurate and complete original signed copies of Internal Revenue Service Form W-8BEN, or a successor applicable form, certifying to such Lender's legal entitlement at the date of such certificate to a complete exemption from US withholding tax under the provisions of Section 871(h) or 881(c) of the Code with respect to payments to be made under this Agreement and any Notes;

(C) furnish to the Borrower, with a copy to the Agent, (I) two duly completed originals of such form W-8BEN or successor

applicable form before the date that any such form previously provided expires or becomes obsolete and (II) after the occurrence of any event requiring a change in the most recent form previously delivered to the Borrower or the Agent, two duly completed originals of such form reflecting such change (if and to the extent such Non-US Lender is then legally able to provide any such form);

(D) obtain such extensions of time for filing and completing any such form W-8BEN or successor applicable form as may reasonably be requested by the Borrower or the Agent (if and to the extent such Non-US Lender is then legally able to do so); and

(E) provide the Borrower and the Agent upon reasonable request by the Borrower or the Agent, if and to the extent such Non-US Lender is then legally entitled to do so, such other forms as may be reasonably required in order to establish the legal entitlement of such Lender to a complete exemption from withholding with respect to payments under this Agreement and any Notes.

Notwithstanding the foregoing provisions of this paragraph (b), if a change in any applicable treaty, law or regulation, or any change in the interpretation, administration or application relating thereto, has occurred prior to the date on which any delivery to the Borrower or Agent would otherwise be required by this paragraph (b), and such change (i) with respect to any prospective Lender or with respect to any Lender already a party hereto, renders all such deliveries inapplicable or (ii) with respect to any Lender already a party hereto, would prevent such Lender from duly completing and delivering any such form with respect to it, such prospective Lender or Lender shall not deliver any such forms and shall advise the Borrower and the Agent of such occurrence. Each Assignee, Participant or Conduit Lender hereunder pursuant to Section 10.06 shall, upon the effectiveness of the transfer pursuant to which it becomes an Assignee, Participant or Conduit Lender, be required to provide all of the forms, statements and documentation required pursuant to this Section; provided that in the case of a Participant such Participant shall furnish all such required forms, statements and documentation to the Lender from which the related participation shall have been purchased, and such Lender shall in turn furnish all such required forms (including Internal Revenue Service Form W-8IMY), statements and documentation to the Borrower and the Agent. Any Lender that is a "United States person" (within the meaning of Code section 7701(a)(30)) shall furnish the Borrower and the Agent with a Form W-9 or successor form thereto, certifying an exemption from backup withholding in respect of payments hereunder, if it is legally entitled to do so.

(c) If and to the extent that a Tax Indemnified Party, in its sole discretion (exercised in good faith), determines that it has received or been granted a credit against, a relief from, a refund or remission of, or a repayment of, any Non-Excluded Tax in respect of which it has received additional payments under paragraph (a) of this Section, then such Tax Indemnified Party shall return to the Borrower such additional payments (or the portion thereof) paid by the Borrower which are determined by such Tax Indemnified Party (in its sole discretion, exercised in good faith) to be attributable to the Non-Excluded Tax to which such credit, relief, refund, remission or repayment relates; provided that such Tax Indemnified Party shall not be obligated

to make any payment under this paragraph in respect of any such credit, relief, refund, remission or repayment until such Tax Indemnified Party, in its sole judgment (exercised in good faith) is satisfied that its tax affairs for the tax year in respect of which such credit, relief, remission or repayment was obtained have been finally settled.

(d) If any Lender fails to provide the Borrower or the Agent with the appropriate form, certificate or other document required by this Section (other than if such failure is due to a change in law, treaty or regulation or in the interpretation, administration, or application thereof, occurring after the date on which a form, certificate or other document originally was required to be provided), such Lender shall not be entitled to indemnification under clause (a) of this Section.

SECTION 2.16. Indemnity. Subject to the provisions of Section 2.17(a), the Borrower agrees to indemnify each Lender and to hold each Lender harmless from any actual loss or reasonable expense which such Lender sustains or incurs as a consequence of (a) a failure by the Borrower in making a borrowing of, conversion into or continuation of any Loan after the Borrower has given a notice requesting the same in accordance with the provisions of this Agreement, (b) a default by the Borrower in making any prepayment of a Loan after the Borrower has given a notice thereof in accordance with the provisions of this Agreement, (c) the making by the Borrower of a prepayment of any Eurodollar Loan on a day which is not the last day of an Interest Period with respect thereto or (d) the making by the Borrower of a prepayment of any Eurodollar Loan, or the conversion of any Eurodollar Loan to an ABR Loan, on the last day of the Interest Period with respect thereto, if the Borrower shall not have notified the Agent of its election to prepay, convert or continue such Loan at least three Business Days prior to such prepayment or conversion. In the case of an event described in any of preceding clause (a), (c) or (d) with regard to a Eurodollar Loan, such actual loss or reasonable expense shall be deemed to include an amount equal to the excess, if any, of (i) the amount of interest which would have accrued on the principal amount of such Eurodollar Loan for the period from the date of the default to borrow, convert or continue to the last day of the Interest Period that would have been the Interest Period for such Eurodollar Loan (or, in the case of a prepayment, from the date of such prepayment to the last day of the then current (or, in the case of clause (d), the newly initiated) Interest Period for such Eurodollar Loan), in each case at the applicable rate of interest for such Eurodollar Loan provided for herein (excluding the Applicable Margin applicable thereto) over (ii) the amount of interest (as determined by such Lender) which would have accrued to such Lender by placing the principal amount of such Eurodollar Loan on deposit for a comparable period with leading banks in the interbank Eurodollar market. This covenant shall survive the termination of this Agreement and the payment of all other amounts payable hereunder.

SECTION 2.17. Notice of Amounts Payable; Relocation of Lending Office; Mandatory Assignment. (a) In the event that any Lender becomes aware that any amounts are or will be owed to it pursuant to Section 2.13, 2.14, 2.15(a) or 2.16, then it shall promptly notify the Borrower thereof and, as soon as possible thereafter, such Lender shall submit to the Borrower a certificate describing in reasonable detail the events or circumstances causing such amounts to be owed to such Lender, indicating the amount owing to it and the calculation thereof. The amounts set forth in such certificate shall be prima facie evidence of the obligations of the Borrower hereunder; provided, however, that the failure of the Borrower to pay any

amount owing to any Lender pursuant to Section 2.13, 2.14, 2.15(a) or 2.16 shall not be deemed to constitute a Default or an Event of Default hereunder to the extent that the Borrower is contesting in good faith its obligation to pay such amount by ongoing discussions diligently pursued with such Lender or by appropriate proceedings.

(b) If a Lender claims any additional amounts payable pursuant to Section 2.13, 2.14 or 2.15(a), it shall use its reasonable efforts (consistent with legal and regulatory restrictions) to avoid the need for paying such additional amounts, including changing the jurisdiction of its Applicable Lending Office, provided that the taking of any such action would not, in the reasonable judgment of such Lender, be disadvantageous to such Lender.

(c) In the event that any Lender delivers to the Borrower a certificate in accordance with paragraph (a) of this Section (other than a certificate as to amounts payable pursuant to Section 2.16), or the Borrower is required to pay any additional amounts or other payments in accordance with Section 2.13, 2.14 or 2.15(a), the Borrower may, at its own expense and in its sole discretion, (i) require such Lender to transfer or assign, in whole or in part, without recourse and in accordance with Section 10.06, all or part of its interests, rights and obligations under this Agreement to another Person (provided that the Borrower, with the full cooperation of such Lender, can identify a Person who is ready, willing and able to be an Assignee with respect to thereto) which shall assume such assigned obligations (which Assignee may be another Lender, if such Assignee Lender accepts such assignment) or (ii) during such time as no Default or Event of Default has occurred and is continuing, terminate the Commitment of such Lender and prepay all outstanding Loans of such Lender; provided that (x) the Borrower or the Assignee, as the case may be, shall have paid to such Lender being replaced or terminated in immediately available funds the principal of and interest accrued to the date of such payment on the Loans made by such Lender hereunder and (subject to Section 2.16) all other amounts owed to it hereunder and (y) such assignment or termination of the Commitment of such Lender and prepayment of Loans is not prohibited by any law, rule or regulation or order of any court or Governmental Authority.

SECTION 2.18. Replacement of Lenders. The Borrower shall be permitted to replace any Lender that (a) requests reimbursement for amounts owing pursuant to Section 2.13, 2.14 or 2.15(a), (b) defaults in its obligation to make Loans hereunder or (c) fails to consent to any amendment to this Agreement requested by the Borrower which requires the consent of all of the Lenders (or all of the Lenders affected thereby) and which is consented to by the Majority Lenders, in each case, subject to the following terms and conditions: (i) such replacement does not conflict with any Requirement of Law, (ii) the replacement Lender shall purchase, at par, all Loans and other amounts owing to the replaced Lender on or prior to the date of replacement, (iii) if the replacement is being made pursuant to clause (c) of this Section, the replacement Lender shall consent to the requested amendment, (iv) the Borrower shall be liable to the replaced Lender under Section 2.16 if any Eurodollar Loan owing to such replaced Lender shall be purchased other than on the last day of the Interest Period relating thereto, (v) the replacement Lender shall be reasonably satisfactory to the Agent, (vi) the replacement shall be made in accordance with the provisions of Section 10.06, (vii) until such time as such replacement shall be consummated, the Borrower shall pay all additional amounts (if any) required pursuant to Sections 2.13, 2.14 or 2.15(a), as the case may be, to the replaced Lender and (viii) upon compliance with the provisions of Section 10.06 and the payment of the amounts referred to in

clause (ii) above, the replacement Lender shall become a Lender hereunder and the replaced Lender shall cease to be a Lender hereunder and shall be released from all its obligations as a Lender, except with respect to indemnification provisions applicable to such replaced Lender under this Agreement during the period in which such replaced Lender was a Lender hereunder, which shall survive as to such replaced Lender. Each Lender agrees that, if it becomes a replaced Lender, it shall comply with Section 10.06, including by executing and delivering to the Agent an Assignment and Acceptance to evidence such sale and purchase; provided, however, that the failure of any Lender to be replaced in accordance with this Section to execute an Assignment and Acceptance shall not render such sale and purchase (and corresponding assignment) invalid and such assignment shall be recorded in the Register.

ARTICLE III

Representations and Warranties

To induce the Agent and the Lenders to enter into this Agreement and to make Loans on the Funding Date, each Loan Party hereby represents and warrants to the Agent and each Lender that:

SECTION 3.01. Financial Condition. The Borrower has heretofore furnished to each Lender a copy of its consolidated financial statements for its fiscal year ended December 31, 2005, and the Borrower has heretofore furnished to the Agent for distribution to each Lender a copy of its consolidated financial statements for its fiscal quarter and the nine-month period ended September 30, 2006, which were included in the Form 10-K or the Form 10-Q, as the case may be, of the Borrower filed with the Securities and Exchange Commission under the Securities Exchange Act of 1934, as amended. Such financial statements present fairly in all material respects the financial condition and results of operations of the Borrower and its Subsidiaries as of such date in accordance with GAAP. Between September 30, 2006 and the Funding Date, there has been no development or event which has had a Material Adverse Effect.

SECTION 3.02. Corporate Existence. Such Loan Party (a) is duly organized, validly existing and in good standing under the laws of the jurisdiction of its organization, (b) has the corporate power and authority, and the legal right, to own and operate its property, to lease the property it operates as lessee and to conduct the business in which it is currently engaged and (c) is duly qualified as a foreign corporation and in good standing under the laws of each jurisdiction where its ownership, lease or operation of property or the conduct of its business requires such qualification, except to the extent that all failures to be duly qualified and in good standing could not, in the aggregate, have a Material Adverse Effect.

SECTION 3.03. Corporate Power; Authorization; Enforceable Obligations. Such Loan Party has the corporate power and authority, and the legal right, to make, deliver and perform the Loan Documents to which it is a party and, in the case of the Borrower, to borrow hereunder, and has taken all necessary corporate action to authorize the borrowings on the terms and conditions of this Agreement and to authorize the execution, delivery and performance of the Loan Documents. No consent or authorization of any Governmental Authority or any other

Person is required in connection with the borrowings hereunder or with the execution, delivery, performance, validity or enforceability of this Agreement or any of the other Loan Documents, except filing required to perfect the Liens created thereunder. Each Loan Document has been duly executed and delivered on behalf of each Loan Party party thereto. This Agreement constitutes, and each other Loan Document upon execution will constitute, a legal, valid and binding obligation of each Loan Party party thereto enforceable against each such Loan Party in accordance with its terms, except as enforceability may be limited by applicable bankruptcy, insolvency, reorganization, moratorium or similar laws affecting the enforcement of creditors' rights generally and by general equitable principles (whether enforcement is sought by proceedings in equity or at law).

SECTION 3.04. No Legal or Contractual Bar. The execution, delivery and performance of this Agreement and the other Loan Documents, the borrowings hereunder and the use of the proceeds thereof will not violate any Requirement of Law or Contractual Obligation of such Loan Party and will not result in, or require, the creation or imposition of any Lien on any of its properties or revenues pursuant to any such Requirement of Law or Contractual Obligation (other than the Liens created by the Security Documents), except to the extent that all such violations and creation or imposition of Liens could not, in the aggregate, have a Material Adverse Effect. The available exceptions under the covenants restricting secured Indebtedness in the Indenture and the Existing Credit Agreement permit the Obligations to be secured by the Collateral as contemplated hereby without the Borrower being required to ratably secure the Indebtedness under the Indenture or the Existing Credit Agreement. Immediately following the borrowing of the Loans hereunder, the Borrower will be able to incur on the Funding Date at least $1.00 of additional Indebtedness that is secured by Liens on Principal Domestic Manufacturing Properties without being required to ratably secure the Indebtedness under the Indenture or the Existing Credit Agreement.

SECTION 3.05. No Material Litigation. Except as set forth in the Form 10-K of the Borrower for its fiscal year ended December 31, 2005, or the Form 10-Q of the Borrower for the fiscal quarter ended September 30, 2006, or in any Form 10-K/A, Form 10-Q/A or Form 8-K of the Borrower filed with the Securities and Exchange Commission not later than the third Business Day prior to the date of this Agreement, no litigation, investigation or proceeding of or before any arbitrator or Governmental Authority is pending or, to the knowledge of the Borrower, threatened by or against the Borrower or any of its Subsidiaries or against any of its or their respective properties or revenues as of the Funding Date (a) with respect to this Agreement or any other Loan Document or any of the actions contemplated hereby or thereby, or (b) which involves a probable risk of an adverse decision which would materially restrict any Loan Party's ability to comply with its obligations under this Agreement or any other Loan Document.

SECTION 3.06. Federal Regulations. No part of the proceeds of any Loan will be used for "buying", "purchasing" or "carrying" any "margin stock" within the meaning of Regulation U of the Board of Governors of the Federal Reserve System as now in effect or for any purpose which violates the provisions of the Regulations of such Board of Governors.

SECTION 3.07. Investment Company Act. Such Loan Party is not an "investment company", or a company "controlled" by an "investment company", within the meaning of the Investment Company Act of 1940, as amended.

SECTION 3.08. ERISA. The Borrower is in compliance with all material provisions of ERISA, except to the extent that all failures to be in compliance could not, in the aggregate, reasonably be expected to have a Material Adverse Effect.

SECTION 3.09. No Material Misstatements. No report, financial statement or other written information furnished by or on behalf of any Loan Party to the Agent or any Lender as described in Section 3.01 or pursuant to Section 5.01(a) of this Agreement or pursuant to any other Loan Document contains or will contain any material misstatement of fact or omits or will omit to state any material fact necessary to make the statements therein, in light of the circumstances under which they were, are or will be made, not misleading, except to the extent that such facts (whether misstated or omitted) do not result in a Material Adverse Effect.

SECTION 3.10. Purpose of Loans. The proceeds of the Loans shall be used by the Borrower for its general corporate purposes.

SECTION 3.11. Pari Passu. The claims of the Agent and the Lenders against the Borrower under this Agreement rank at least *pari passu* with the claims of all its unsecured creditors, save those whose claims are preferred solely by any laws of general application having effect in relation to bankruptcy, insolvency, liquidation or other similar events.

SECTION 3.12. Security Documents. The Collateral Agreement is effective to create in favor of the Agent, for the benefit of the Secured Parties, a legal, valid and enforceable security interest in the Collateral described therein and proceeds thereof. When financing statements in appropriate form are filed in the offices specified on Schedule 3.12, the Collateral Agreement will constitute a fully perfected Lien on and security interest in all right, title and interest of the Loan Parties in the Collateral described therein to the extent perfection can be obtained by filing Uniform Commercial Code financing statements, prior to the rights of any other Person, except for (a) rights secured by Liens expressly permitted by Section 6.02 and (b) in the case of any Collateral that is a Fixture that is installed or located at any real property that is not a Material Facility, rights of any holder (other than a Loan Party) of a recorded interest in such real property.

SECTION 3.13. Title to Assets. Each Loan Party has good and marketable title to, or valid leasehold interests in, all of its personal property and assets, except to the extent that failure to have good and marketable title to, or valid leasehold interests in, such property or assets could not reasonably be expected to have a Material Adverse Effect.

SECTION 3.14. Environmental Matters. (a) Each Loan Party and each real property on or at which any Collateral is installed or located and the operations thereon comply in all respects with all applicable Environmental Laws and each Loan Party does not have any liability (whether contingent or otherwise) in connection with any Environmental Activity, except in each case to the extent it would not reasonably be expected to have a Material Adverse Effect.

(b) Each Loan Party (i) has not received any written notice of any claim against or affecting it or any real property on or at which any Collateral is installed or located or the operations thereon relating to Environmental Laws, (ii) has not received any written notice of

and is not aware of any judicial or administrative proceeding pending or, to its knowledge, threatened against or affecting it or any real property on or at which any Collateral is installed or located or the operations thereon alleging any material violation of any Environmental Laws and (iii) to the best of its knowledge, is not the subject of any investigation, evaluation, audit or review by any Governmental Authority to determine whether any violation of any Environmental Laws has occurred or is occurring or whether any remediation action is needed in connection with an Environmental Activity, except, in the case of clauses (i), (ii) and (iii), to the extent such claim, proceeding, investigation, evaluation, audit or review would not reasonably be expected to have a Material Adverse Effect.

(c) Each Loan Party does not store any Hazardous Substance on any real property on or at which any Collateral is installed or located nor has it disposed of any Hazardous Substance on any real property on or at which any Collateral is installed or located, in each case, except (i) in compliance with all applicable Environmental Laws or (ii) where such storage or disposal would not reasonably be expected to have a Material Adverse Effect.

ARTICLE IV

Conditions Precedent

SECTION 4.01. Conditions to Loans. The obligation of each Lender to make the Loans requested to be made by it is subject to the satisfaction on the Funding Date of the following conditions precedent:

(a) Credit Agreement; Collateral Agreement. The Agent shall have received (i) this Agreement, executed and delivered (including by way of a telecopier or electronic image scan) by a duly authorized officer of each Loan Party and each Lender and (ii) the Collateral Agreement, executed and delivered (including by way of a telecopier or electronic image scan) by each Loan Party.

(b) Lien Searches. The Agent shall have received the results of recent lien searches (limited by such parameters relating to filing dates and amounts as the Agent and the Borrower may agree upon) in the appropriate filing or recording offices in each Loan Party's jurisdiction of organization and in the jurisdictions in which facilities containing Equipment and Fixtures accounting for at least 85% of the Collateral Value set forth in the certificate referred to in clause (l) below are located, and such searches shall reveal no Liens on any of the Collateral except for Liens permitted by Section 6.02 or those that are discharged on or prior to the Funding Date pursuant to documentation reasonably satisfactory to the Agent.

(c) Secretary's Certificates of Loan Parties. The Agent shall have received a certificate of the Secretary or Assistant Secretary of each of the Loan Parties, in form and substance satisfactory to the Agent, which certificate shall (i) certify as to the incumbency and signature of the officers of such Loan Party executing any Loan Document (with the President, any Vice President or any Financial Officer of such Loan Party attesting to the incumbency and signature of the Secretary or Assistant Secretary

providing such certificate), (ii) have attached to it a true, complete and correct copy of each of the certificate of incorporation and by-laws or equivalent constitutional documents of such Loan Party, (iii) have attached to it a true and correct copy of appropriate resolutions of such Loan Party, which resolutions shall authorize the execution, delivery and performance of this Agreement and the other Loan Documents and the incurrence of the Obligations of such Loan Party by such Loan Party and (iv) certify that, as of the date of such certificate (which shall not be earlier than the date hereof), none of such certificate of incorporation or by-laws (or equivalent constitutional documents) or resolutions shall have been amended, supplemented, modified, revoked or rescinded.

(d) Fees. The Arrangers and the Agent shall have received all fees required to be paid in accordance with the Fee Letter.

(e) Legal Opinions. The Agent shall have received, (i) the executed legal opinion of Weil, Gotshal & Manges LLP, counsel to each of the Loan Parties, substantially in the form of Exhibit E-1 and (ii) the executed legal opinion of Martin I. Darvick, Esq. substantially in the form of Exhibit E-2. Each Loan Party hereby instructs such counsel to deliver its opinion for the benefit of the Agent and each of the Lenders.

(f) Filings, Registrations and Recordings. Each document (including any Uniform Commercial Code financing statement, but excluding Fixture Filing Financing Statements, which will be filed as provided in Section 5.05(c)) required by the Security Documents or under law or reasonably requested by the Agent to be filed, registered or recorded in order to create in favor of the Agent, for the benefit of the Secured Parties, a perfected Lien on the Collateral described therein, shall have been delivered to the Agent and shall be in proper form for filing, registration or recordation.

(g) Insurance. The Agent shall have received evidence of satisfactory insurance coverage or self-insurance for the Collateral and an insurance certificate reflecting the Agent as an additional loss payee thereunder.

(h) Notice of Borrowing. The Agent shall have received a notice of borrowing executed by the Borrower in compliance with Section 2.02.

(i) Representations and Warranties. Each of the representations and warranties made by any Loan Party in or pursuant to the Loan Documents shall be true and correct in all material respects on and as of the Funding Date as if made on and as of such date, except to the extent such representations and warranties expressly relate to an earlier date, in which case such representations and warranties shall have been true and correct in all material respects as of such earlier date.

(j) No Default. No Default or Event of Default shall have occurred and be continuing on the Funding Date and after giving effect to the extensions of credit requested to be made on such date.

(k) Officer's Certificate. The Agent shall have received a certificate from a Financial Officer of the Borrower dated the Funding Date confirming compliance with the conditions set forth in paragraphs (i) and (j) of this Section.

(l) Collateral Value. The Agent shall have received a certificate of a Financial Officer of the Borrower dated the Funding Date certifying that the Collateral Value is approximately $6,500,000,000 (subject to adjustments that may be required due to lien search results on real properties on which Collateral is installed or located for which no lien searches shall have been received as of the Funding Date), based on the net book values of the assets constituting Collateral as of June 30, 2006.

ARTICLE V

Affirmative Covenants

Each Loan Party as to itself hereby agrees that, so long as any amount is owing to any Lender or the Agent hereunder, the Borrower shall:

SECTION 5.01. Financial Statements. Furnish to the Agent for prompt delivery to each Lender:

(a) as soon as available, but in any event within 110 days after the end of the Borrower's fiscal year, a copy of the consolidated balance sheet of the Borrower and its consolidated Subsidiaries as at the end of such year and the related consolidated statements of income and retained earnings and of cash flows for such year, setting forth in each case in comparative form the figures for the previous year, and reported on by Deloitte & Touche LLP or other independent public accountants of nationally recognized standing (without a "going concern" or like qualification or exception and without any qualification as to the scope of such audit) to the effect that such consolidated financial statements present fairly in all material respects the financial condition and results of operations of the Borrower and its consolidated Subsidiaries on a consolidated basis in accordance with GAAP consistently applied; and

(b) as soon as available, but in any event not later than 60 days after the end of each of the first three quarterly periods of each fiscal year of the Borrower, the unaudited consolidated balance sheet of the Borrower and its consolidated Subsidiaries as at the end of such quarter and the related unaudited consolidated statements of income and retained earnings and of cash flows of the Borrower and its consolidated Subsidiaries for such quarter and the portion of the fiscal year through the end of such quarter, setting forth in each case in comparative form the figures for the previous year, in each case prepared in accordance with GAAP applied consistently throughout the periods reflected therein and with prior periods (except as disclosed therein).

Notwithstanding the foregoing, the Borrower shall not be required to furnish or deliver to the Agent any financial statements or reports that the Borrower has filed with the Securities and Exchange Commission or any successor or analogous Governmental Authority, and any such

financial statements or reports so filed shall be deemed to have been furnished or delivered to the Agent in accordance with the terms of this Section if such financial statements or reports are filed within the time periods for delivery required by this Section.

SECTION 5.02. Certificates; Other Information. (a) Furnish to the Agent, for delivery to each Lender, concurrently with the delivery of the financial statements referred to in Section 5.01, a certificate of a Financial Officer of the Borrower stating that, to the best of such Financial Officer's knowledge, (i) such financial statements present fairly in all material respects the financial condition and results of operations of the Borrower and its Subsidiaries for the period referred to therein (subject, in the case of interim statements, to normal year-end audit adjustments) and (ii) during such period each Loan Party has performed in all material respects all of its covenants and other agreements contained in this Agreement and the other Loan Documents to be performed by it, and that no Default or Event of Default has occurred and is continuing, except as specified in such certificate.

(b) Furnish to the Agent, for delivery to each Lender, within 15 Business Days after the date on which the Borrower is required to file Form 10–K with the Securities Exchange Commission (after giving effect to any grace periods or extensions available under applicable Securities and Exchange Commission regulations, but in any event within 110 days after the end of the Borrower's fiscal year), a Collateral Value Certificate as of the last day of the fiscal year covered by the financial statements so delivered.

(c) During the continuance of any Quarterly Collateral Reporting Period, furnish to the Agent, for delivery to each Lender, within 15 Business Days after the date on which the Borrower is required to file Form 10–Q with the Securities Exchange Commission (after giving effect to any grace periods or extensions available under applicable Securities and Exchange Commission regulations, but in any event within 110 days after the end of the Borrower's applicable fiscal quarter), a Collateral Value Certificate as of the last day of the fiscal quarter covered by the financial statements so delivered.

(d) At any time when a Quarterly Collateral Reporting Period is not in effect, furnish to the Agent, for delivery to each Lender, within 15 Business Days after the date on which the Borrower is required to file Form 10–Q with the Securities Exchange Commission (after giving effect to any grace periods or extensions available under applicable Securities and Exchange Commission regulations, but in any event within 110 days after the end of the Borrower's applicable fiscal quarter), a Summary Collateral Value Certificate as of the last day of the fiscal quarter covered by the financial statements so delivered.

SECTION 5.03. Notices. Promptly give notice to the Agent for delivery to each Lender of the occurrence of any Default or Event of Default, accompanied by a statement of a Financial Officer setting forth details of the occurrence referred to therein and stating what action the Borrower proposes to take with respect thereto.

SECTION 5.04. Conduct of Business and Maintenance of Existence. Continue to engage in its principal line of business as now conducted by it and preserve, renew and keep in full force and effect its corporate existence and take all reasonable action to maintain all rights, privileges and franchises necessary or desirable in the normal conduct of its principal line of

business, except as otherwise permitted pursuant to Section 6.01 or to the extent that failure to do so would not have a Material Adverse Effect.

SECTION 5.05. Additional Collateral, Fixture Filings, etc. (a) Except as set forth in clause (b) below, with respect to any property of the types included in the description of the Collateral under any Security Document executed by such Loan Party which is acquired after the Funding Date by such Loan Party, or which is owned by a Loan Party that becomes a Loan Party after the Funding Date, promptly (i) execute and deliver to the Agent such amendments to the applicable Security Document or such other documents as the Agent reasonably deems necessary to grant to the Agent, for the benefit of the Secured Parties, a security interest in such property and (ii) take all actions necessary to grant to the Agent, for the benefit of the Secured Parties, a perfected security interest in such property with the priority specified in such Security Document (subject to the Liens permitted by Section 6.02), including the filing of Uniform Commercial Code and other financing statements in such jurisdictions as may be required by the Security Documents or by applicable law or as may be reasonably requested by the Agent (other than any Fixture Filing Financing Statement with regard to any real property that is not a Material Facility).

(b) Notwithstanding anything to the contrary in this Section, there shall be excluded from the property referred to in clause (a) to be pledged as Collateral such assets as to which the Agent shall reasonably determine that the cost of obtaining a security interest therein is excessive in relation to the value of the security to be afforded thereby.

(c) With respect to any Material Facility upon which a Fixture Filing Financing Statement shall not have been previously delivered to the Agent in proper form for filing, deliver to the Agent such a Fixture Filing Financing Statement in proper form for filing with regard to such Material Facility, (i) with respect to Material Facilities in existence on the Funding Date, no later than December 31, 2006 or such later date as may be agreed to by the Agent and (ii) with respect to Material Facilities that are acquired or determined to be Material Facilities after the Funding Date, or augmented or changed in such a fashion so that a previously delivered Fixture Filing Financing Statement with respect thereto shall no longer be in proper form, promptly (but in any event, within 45 days or such later date as may be agreed to by the Agent) after the date of such acquisition, determination, augmentation or change.

SECTION 5.06. Environmental Matters. (a) Promptly notify the Agent of any environmental matter, occurrence or other event relating to any real property on or at which any Collateral is installed or located arising after the Funding Date of which it is aware, or any breach or violation of an Environmental Law applicable to any real property on or at which any Collateral is installed or located, which would reasonably be expected to have a Material Adverse Effect, and take all necessary action required by any applicable Environmental Law to rectify such environmental matter, occurrence or event or cure the breach or violation of such Environmental Law, in each case, if failure to take such action would reasonably be expected to have a Material Adverse Effect.

(b) Promptly provide the Agent with a copy of: (i) any written notice it receives that a violation of any Environmental Law has been committed with respect to any real property on or at which any Collateral is installed or located or there is the reasonable likelihood of

liability arising from the condition of any real property on or at which any Collateral is installed or located, (ii) any written notice it receives that a demand, claim, or administrative or judicial complaint has been filed against such Loan Party alleging a violation of any Environmental Law or liability related to the condition of any real property on or at which any Collateral is installed or located or requiring such Loan Party to take any action in connection with any Environmental Activity in respect of any real property on or at which any Collateral is installed or located, (iii) any written notice it receives from a third party or Governmental Authority alleging that such Loan Party is or may be liable or responsible for matters associated with any Environmental Activity in respect of any real property on or at which any Collateral is installed or located, including all matters associated with a response to or a cleanup of the presence or discharge of a Hazardous Substance in, at, through or into the environment, and (iv) any environmental site assessment or audit report required to be submitted by such Loan Party to any Governmental Authority, in the case of each of clauses (i) through (iv), to the extent that the matters described in any such notice, assessment or report could reasonably be expected to have a Material Adverse Effect.

ARTICLE VI

Negative Covenants

Each Loan Party hereby agrees that so long as any amount is owing to any Lender or the Agent hereunder:

SECTION 6.01. Merger, Consolidation, etc. Such Loan Party agrees not to merge or consolidate with any other Person or sell or convey all or substantially all of its assets to any Person unless, in the case of mergers and consolidations, (a) such Loan Party shall be the continuing corporation, (b) immediately before and immediately after giving effect to such merger or consolidation, no Default or Event of Default shall have occurred and be continuing and (c) in the case of a merger, consolidation or conveyance involving any Guarantor, the guarantee provided in Article IX shall be in full force and effect immediately after giving effect to such merger or consolidation, except in the case of a merger of such Guarantor into the Borrower, to the extent such merger is otherwise permitted hereunder.

SECTION 6.02. Limitations on Liens. (a) The Borrower shall not permit any Manufacturing Subsidiary to issue or assume any Indebtedness secured by a Lien upon any Principal Domestic Manufacturing Property of the Borrower or any Manufacturing Subsidiary or upon any shares of stock or obligations of any Manufacturing Subsidiary (whether such Principal Domestic Manufacturing Property, shares of stock or obligations are now owned or hereafter acquired) without in any such case effectively providing concurrently with the issuance or assumption of any such Indebtedness that all principal, interest and other obligations owing hereunder (together with, if the Borrower shall so determine, any other obligations of the Borrower or such Manufacturing Subsidiary ranking equally with the amounts owing hereunder and then existing or thereafter created) shall be secured equally and ratably with such Indebtedness, unless the aggregate amount of Indebtedness issued or assumed and so secured by Liens, together with all other secured Indebtedness of the Borrower and its Manufacturing

Subsidiaries which (if originally issued or assumed at such time) would otherwise be subject to the foregoing restrictions, but not including Indebtedness permitted to be secured under clauses (i) through (vi) of the immediately following paragraph, does not at the time exceed 20% of the stockholders' equity of the Borrower and its consolidated subsidiaries, as determined in accordance with GAAP and shown on the audited consolidated balance sheet contained in the latest published annual report to the stockholders of the Borrower.

The above restrictions shall not apply to Indebtedness secured by:

(i) Liens on property, shares of stock or Indebtedness of any corporation existing at the time such corporation becomes a Manufacturing Subsidiary;

(ii) Liens on property existing at the time of acquisition of such property by the Borrower or a Manufacturing Subsidiary, or Liens to secure the payment of all or any part of the purchase price of such property upon the acquisition of such property by the Borrower or a Manufacturing Subsidiary or to secure any Indebtedness incurred prior to, at the time of, or within 180 days after, the later of the date of acquisition of such property and the date such property is placed in service, for the purpose of financing all or any part of the purchase price thereof, or Liens to secure any Indebtedness incurred for the purpose of financing the cost to the Borrower or a Manufacturing Subsidiary of improvements to such acquired property;

(iii) Liens securing Indebtedness of a Manufacturing Subsidiary owing to the Borrower or any of its subsidiaries;

(iv) Liens on property of a corporation existing at the time such corporation is merged or consolidated with the Borrower or a Manufacturing Subsidiary or at the time of a sale, lease or other disposition of the properties of a corporation as an entirety or substantially as an entirety to the Borrower or a Manufacturing Subsidiary;

(v) Liens on property of the Borrower or a Manufacturing Subsidiary in favor of the United States of America or any state thereof, or any department, agency or instrumentality or political subdivision of the United States of America or any state thereof, or in favor of any other country, or any political subdivision thereof, to secure partial, progress, advance or other payments pursuant to any contract or statute or to secure any obligations incurred for the purpose of financing all or any part of the purchase price or the cost of construction of the property subject to such Liens; or

(vi) any extension, renewal or replacement (or successive extensions, renewals or replacements) in whole or in part of any Lien securing Indebtedness permitted to be secured by the first sentence of this Section 6.02(a) or any Lien referred to in the foregoing clauses (i) to (v); provided, however, that the principal amount of Indebtedness secured thereby shall not exceed by more

than 115% the principal amount of Indebtedness so secured at the time of such extension, renewal or replacement and that such extension, renewal or replacement shall be limited to all or a part of the property which secured the Lien so extended, renewed or replaced (plus improvements on such property).

(b) Notwithstanding the foregoing, each Loan Party agrees not to, directly or indirectly, create, incur, assume or suffer to exist any Lien upon any of the Collateral or upon any facility or other real property on or at which any Collateral is installed or located, except:

(i) Liens for taxes, assessments, governmental charges and utility charges, in each case that are not yet due or that are being contested in good faith by appropriate proceedings; provided that adequate reserves with respect thereto are maintained on the books of such Loan Party, as the case may be, in conformity with GAAP;

(ii) carriers', warehousemen's, mechanics', materialmen's, repairmen's or other like Liens arising in the ordinary course of business that are not overdue for a period of more than 30 days or that are being contested in good faith by appropriate proceedings;

(iii) permits, licenses, easements, rights-of-way, restrictions and other similar encumbrances incurred in the ordinary course of business that, in the aggregate, are not substantial in amount and that do not in any case materially detract from the value of the property subject thereto or materially interfere with the ordinary conduct of the business of either Loan Party or any of their respective Subsidiaries;

(iv) encumbrances arising under leases or subleases of real property that do not, in the aggregate, materially detract from the value of such real property or interfere with the ordinary conduct of business conducted or proposed to be conducted with respect to such real property;

(v) deposits made in the ordinary course of business in connection with worker's compensation, unemployment insurance or other types of social security benefits or to secure the performance of bids, tenders, sales or contracts (other than for the repayment of borrowed money) or surety, appeal, customs or performance bonds;

(vi) Liens arising from precautionary Uniform Commercial Code financing statement filings (or similar filings) regarding leases entered into by any Loan Party or any of their respective Subsidiaries in the ordinary course of business;

(vii) Liens on property existing at the time of acquisition of such property by any Loan Party, or Liens to secure the payment of all or any part of the purchase price of such property upon the acquisition of such property by a Loan Party or to secure any Indebtedness incurred prior to, at the time of, or within 180 days after, the later of the date of acquisition of such property and the

date such property is placed in service, for the purpose of financing all or any part of the purchase price thereof, or Liens on such acquired property to secure any Indebtedness incurred for the purpose of financing the cost to a Loan Party of improvements to such acquired property;

(viii) Liens in existence on the date hereof listed on Schedule 6.02(b); provided that no such Lien is spread to cover any additional property after the date hereof and that the amount of indebtedness secured thereby is not increased;

(ix) any Lien securing the renewal, extension, refinancing or refunding of any indebtedness secured by any Lien permitted by clause (vii) or (viii) above or this clause (ix) without any change in the assets subject to such Lien;

(x) any Lien arising out of claims under a judgment rendered or claim filed so long as (A) such judgments or claims do not constitute a Default or Event of Default under this Agreement and (B) such judgments or claims are being contested in good faith and in respect of which there shall have been adequate reserves with respect thereto maintained on the books of such Loan Party in conformity with GAAP;

(xi) any Lien consisting of rights reserved to or vested in any Governmental Authority by any statutory provision;

(xii) Liens created pursuant to the Security Documents;

(xiii) Liens in favor of lessors pursuant to sale and leaseback transactions to the extent the Disposition of the assets subject to any such sale and leaseback transaction is permitted under Section 6.03 and 10.12;

(xiv) Liens in favor of lessors to secure Capital Lease Obligations limited to the property subject to such Capital Lease Obligations; and

(xv) Liens not otherwise permitted by the foregoing clauses of this Section 6.02(b) securing obligations or other liabilities (other than Indebtedness) of any Loan Party; provided that the aggregate outstanding amount of all such obligations and liabilities shall not exceed $150,000,000 at any time.

SECTION 6.03. Limitation on Sale and Lease-Back. The Borrower will not, nor will it permit any Manufacturing Subsidiary to, enter into any arrangement with any Person providing for the leasing by the Borrower or any Manufacturing Subsidiary of any Principal Domestic Manufacturing Property owned by the Borrower or any Manufacturing Subsidiary on the date hereof (except for temporary leases for a term of not more than five years and except for leases between the Borrower and a Manufacturing Subsidiary or between Manufacturing Subsidiaries), which property has been or is to be sold or transferred by the Borrower or such Manufacturing Subsidiary to such Person, unless either:

(a) the Borrower or such Manufacturing Subsidiary would be entitled, pursuant to the provisions of Section 6.02(a), to issue, assume, extend, renew or replace Indebtedness secured by a Lien upon such property equal in amount to the Attributable Indebtedness in respect of such arrangement without equally and ratably securing the amount owing hereunder pursuant to Section 6.02(a); provided, however, that from and after the date on which such arrangement becomes effective the Attributable Indebtedness in respect of such arrangement shall be deemed for all purposes under Section 6.02(a) and this Section to be Indebtedness subject to the provisions of Section 6.02(a) (which provisions include the exceptions set forth in clauses (i) through (vi) thereof); or

(b) the Borrower shall apply an amount in cash equal to the Attributable Indebtedness in respect of such arrangement to the retirement (other than any mandatory retirement or by way of payment at maturity), within 180 days of the effective date of any such arrangement, of Indebtedness of the Borrower or any Manufacturing Subsidiary (other than Indebtedness owned by the Borrower or any Manufacturing Subsidiary) which by its terms matures at or is extendible or renewable at the option of the obligor to a date more than twelve months after the date of the creation of such Indebtedness.

SECTION 6.04. Collateral Value. The Loan Parties shall not permit the ratio of the Collateral Value to the Total Exposure at any time, including after giving effect to any Dispositions of Collateral, to be less than 2.50 to 1.00.

ARTICLE VII

Events of Default

If any of the following events shall occur and be continuing (each, an "Event of Default"):

(a) the Borrower shall (i) fail to pay any principal of any Loan when due in accordance with the terms hereof or (ii) fail to pay any interest on any Loan or any other amount which is payable hereunder or under any other Loan Document and (in the case of this clause (ii) only) such failure shall continue unremedied for more than five Business Days after written notice thereof has been given to the Borrower by the Agent or the Majority Lenders; or

(b) any representation or warranty made or deemed made by any Loan Party in Article III or in any other Loan Document or any certified statement furnished pursuant to Section 5.02(b), 5.02(c) or 5.02(d) shall prove to have been incorrect on or as of the date made or deemed made or certified, if the facts or circumstances incorrectly represented or certified result in or constitute a Material Adverse Effect; or

(c) any Loan Party shall default in the observance or performance of any other agreement contained in this Agreement or any Security Document (other than as provided in paragraphs (a) or (b) of this Article) and (i) in the case of any default in the observance or performance of the covenants in Section 6.04 of this Agreement, such default shall

continue unremedied for a period of five Business Days, and (ii) in the case of any default in the observance or performance of any other agreement contained in this Agreement or any other Loan Document, such default shall continue unremedied for a period of 30 days after written notice thereof shall have been given to such Loan Party by the Agent or the Majority Lenders; or

(d) any Loan Party shall default in any payment of $50,000,000 (or the foreign currency equivalent thereof) or more of principal of or interest on any Indebtedness or on account of any guarantee in respect of Indebtedness, beyond the period of grace, if any, provided in the instrument or agreement under which such Indebtedness or guarantee was created; or

(e) (i) the Borrower or any of its Significant Subsidiaries shall commence any case, proceeding or other action (A) under any existing or future law of any jurisdiction, domestic or foreign, relating to bankruptcy, insolvency, reorganization or relief of debtors, seeking to have an order for relief entered with respect to it, or seeking to adjudicate it bankrupt or insolvent, or seeking reorganization, arrangement, adjustment, winding up, liquidation, dissolution, composition or other relief with respect to it or its debts, or (B) seeking appointment of a receiver, trustee, custodian, conservator or other similar official for it or for all or any substantial part of its assets, or the Borrower or any of its Significant Subsidiaries shall make a general assignment for the benefit of its creditors; or (ii) there shall be commenced against the Borrower or any of its Significant Subsidiaries any case, proceeding or other action of a nature referred to in clause (i) above which (A) results in the entry of an order for relief or any such adjudication or appointment or (B) remains undismissed, undischarged or unbonded for a period of 90 days; or (iii) there shall be commenced against the Borrower or any of its Significant Subsidiaries any case, proceeding or other action seeking issuance of a warrant of attachment, execution, distraint or similar process against all or any substantial part of its assets which results in the entry of an order for any such relief which shall not have been vacated, discharged, or stayed or bonded pending appeal within 90 days from the entry thereof; or

(f) one or more judgments or decrees shall (i) be entered against any Loan Party, (ii) not have been vacated, discharged, satisfied, stayed or bonded pending appeal within 60 days from the entry thereof and (iii) involve a liability (not paid or fully covered by insurance) of either $100,000,000 (or the foreign currency equivalent thereof) or more, in the case of any single judgment or decree, or $200,000,000 (or the foreign currency equivalent thereof) or more in the aggregate; or

(g) any of the Security Documents shall cease, for any reason, to be in full force and effect with respect to Collateral with a book value in excess of $25,000,000 in the aggregate, or any Loan Party or any Affiliate of any Loan Party shall so assert, or any Lien created by any of the Security Documents shall cease to be enforceable and of the same effect and priority purported to be created thereby; or

(h) the guarantee contained in Article IX hereof shall cease, for any reason, to be in full force and effect (other than as a result of a transaction permitted by Section 6.01) or any Loan Party or any Subsidiary of any Loan Party shall so assert;

then, (A) if such event is an Event of Default specified in clause (i) or (ii) of paragraph (e) above, all Commitments hereunder shall automatically and immediately terminate and the Loans (with accrued interest thereon) and all other amounts owing under this Agreement and the other Loan Documents shall immediately become due and payable without presentment, protest, demand or other notice of any kind, each of which is expressly waived by the Loan Parties; and (B) if such event is any Event of Default which is not described in clause (A) above, with the consent of the Majority Lenders, the Agent may, or upon the request of the Majority Lenders, the Agent shall, by notice to the Borrower declare the Loans with accrued interest thereon and all other amounts owing under this Agreement to be due and payable forthwith, whereupon the same shall immediately become due and payable. Except as expressly provided in the preceding clause (B) and in paragraphs (a) and (c) of this Article, presentment, protest, demand and all other notices of any kind are hereby expressly waived by the Loan Parties.

ARTICLE VIII

The Agent

SECTION 8.01. Appointment. Each Lender hereby irrevocably designates and appoints the Agent as the agent of such Lender and each such Lender irrevocably authorizes the Agent, as the agent for such Lender, to take such action on its behalf under the provisions of this Agreement and the other Loan Documents and to exercise such powers and perform such duties as are expressly delegated to the Agent by the terms of this Agreement and the other Loan Documents, together with such other powers as are reasonably incidental thereto. Notwithstanding any provision to the contrary elsewhere in this Agreement or in any other Loan Document, the Agent shall not have any duties or responsibilities, except those expressly set forth herein or therein, or any fiduciary relationship with any Lender or any Affiliate of such Lender, and no implied covenants, functions, responsibilities, duties, obligations or liabilities shall be read into this Agreement or any other Loan Document or otherwise exist against the Agent. Each party to this Agreement acknowledges that the Syndication Agent and the Co-Documentation Agents shall not have any duties, responsibilities, obligations or authority under this Agreement in such capacity.

SECTION 8.02. Delegation of Duties. The Agent may execute any of its duties under this Agreement and any other Loan Document by or through agents or attorneys–in–fact and shall be entitled to advice of counsel concerning all matters pertaining to such duties. The Agent shall not be responsible for the negligence or misconduct of any agents or attorneys-in-fact selected by it with reasonable care.

SECTION 8.03. Exculpatory Provisions. Neither the Agent nor any of its officers, directors, employees or affiliates shall be (i) liable for any action lawfully taken or omitted to be taken by it or such Person under or in connection with this Agreement or any other

Loan Document (except for its or such Person's own gross negligence or willful misconduct) or (ii) responsible in any manner to any of the Lenders or any Affiliates of such Lenders, for any recitals, statements, representations or warranties made by any Loan Party or any officer thereof contained in this Agreement or any other Loan Document or in any certificate, report, statement or other document referred to or provided for in, or received by the Agent under or in connection with, this Agreement or any other Loan Document or for the value, validity, effectiveness, genuineness, enforceability or sufficiency of this Agreement or any other Loan Document or for any failure of any Loan Party to perform its obligations hereunder. The Agent shall not be under any obligation to any Lender or any Affiliate of such Lender to ascertain or to inquire as to the observance or performance of any of the agreements contained in, or conditions of, this Agreement or any other Loan Document, or to inspect the properties, books or records of any Loan Party.

SECTION 8.04. Reliance by Agent. The Agent shall be entitled to rely, and shall be fully protected in relying, upon any writing, resolution, notice, consent, certificate, affidavit, letter, telecopy, electronic image scan transmission, telex or teletype message, statement, order or other document or conversation believed by it in good faith to be genuine and correct and to have been signed, sent or made by the proper Person or Persons and upon advice and statements of legal counsel (including, without limitation, any counsel to the Borrower), independent accountants and other experts selected by the Agent. The Agent may deem and treat the Lender specified in the Register with respect to any amount owing hereunder as the owner thereof for all purposes unless a written notice of assignment, negotiation or transfer thereof shall have been filed with the Agent. The Agent shall be fully justified in failing or refusing to take any action under this Agreement or any other Loan Document unless it shall first receive such advice or concurrence of the Majority Lenders as it deems appropriate or it shall first be indemnified to its satisfaction by the Lenders against any and all liability and expense which may be incurred by it by reason of taking or continuing to take any such action. The Agent shall in all cases be fully protected in acting, or in refraining from acting, under this Agreement or any other Loan Document in accordance with a request of the Majority Lenders (or to the extent that this Agreement expressly requires a higher percentage of Lenders, such higher percentage) and such request and any action taken or failure to act pursuant thereto shall be binding upon all the Lenders and all future holders of the obligations owing by the Borrower hereunder.

SECTION 8.05. Notice of Default. The Agent shall not be deemed to have knowledge or notice of the occurrence of any Default or Event of Default hereunder (other than a Default or Event of Default under Article VII(a)) unless the Agent has received written notice from a Lender or the Borrower referring to this Agreement or any other Loan Document, describing such Default or Event of Default and stating that such notice is a "notice of default". In the event that the Agent receives such a notice, the Agent shall promptly notify the Borrower (if the Borrower shall not have delivered such notice to the Agent) and then give notice thereof to the Lenders; provided that, except in the case of any notice required to be provided under Article VII prior to the occurrence of an Event of Default, the failure to notify the Borrower shall not impair any of the rights of the Agent and the Lenders with respect to the events and circumstances specified in such notice. The Agent shall take such action with respect to such Default or Event of Default as shall be reasonably directed by the Majority Lenders; provided that unless and until the Agent shall have received such directions, the Agent may (but shall not

be obligated to) take such action, or refrain from taking such action, with respect to such Default or Event of Default as it shall deem advisable in the best interests of the Lenders.

SECTION 8.06. Non-Reliance on Agent and Other Lenders. Each Lender expressly acknowledges that neither the Agent nor any of its officers, directors, employees, agents, attorneys-in-fact or affiliates has made any representations or warranties to it and that no act by the Agent hereinafter taken, including any review of the affairs of the Borrower, shall be deemed to constitute any representation or warranty by the Agent to any Lender. Each Lender represents to the Agent that it has, independently and without reliance upon the Agent or any other Lender, and based on such documents and information as it has deemed appropriate, made its own appraisal of and investigation into the business, operations, property, financial and other condition and creditworthiness of the Borrower and made its own decision to make its Loans hereunder and enter into this Agreement. Each Lender also represents that it will, independently and without reliance upon the Agent or any other Lender, and based on such documents and information as it shall deem appropriate at the time, continue to make its own credit analysis, appraisals and decisions in taking or not taking action under this Agreement or any other Loan Document, and to make such investigation as it deems necessary to inform itself as to the business, operations, property, financial and other condition and creditworthiness of the Borrower. Except for notices, reports and other documents expressly required to be furnished to the Lenders by the Agent hereunder, the Agent shall not have any duty or responsibility to provide any Lender or any Affiliate of such Lender with any credit or other information concerning the business, operations, property, condition (financial or otherwise), prospects or creditworthiness of the Borrower which may come into the possession of the Agent or any of its officers, directors, employees, agents, attorneys-in-fact or affiliates.

SECTION 8.07. Indemnification. The Lenders agree to indemnify the Agent in its capacity as such (to the extent not reimbursed by the Borrower and without limiting the obligation of the Borrower to do so), ratably according to their respective relevant Applicable Percentages in effect on the date on which indemnification is sought under this Section (or, if indemnification is sought after the date upon which the Commitments shall have terminated and the Loans shall have been paid in full, ratably in accordance with their relevant Applicable Percentages immediately prior to such date of the later of termination or payment in full, but giving effect to any subsequent assignments), from and against any and all liabilities, obligations, losses, damages, penalties, actions, judgments, suits, costs, expenses or disbursements of any kind whatsoever which may at any time (including at any time following satisfaction of the Obligations) be imposed on, incurred by or asserted against the Agent in any way relating to or arising out of this Agreement, any other Loan Document or any documents contemplated by or referred to herein or therein or the transactions contemplated hereby or thereby or any action taken or omitted by the Agent under or in connection with any of the foregoing; provided that no Lender shall be liable for the payment of any portion of such liabilities, obligations, losses, damages, penalties, actions, judgments, suits, costs, expenses or disbursements resulting from the Agent's gross negligence or willful misconduct. The agreements in this Section shall survive the payment of the Loans and all other amounts payable hereunder.

SECTION 8.08. Agent in Its Individual Capacity. The Agent and its Affiliates may make loans to, accept deposits from and generally engage in any kind of business with the Borrower as though the Agent were not the Agent hereunder. With respect to Loans made or

renewed by it, the Agent shall have the same rights and powers under this Agreement as any Lender and may exercise the same as though it were not the Agent, and the terms "Lender" and "Lenders" shall include the Agent in its individual capacity.

SECTION 8.09. Successor Agent. The Agent may resign as Agent upon 30 days' notice to the Lenders and the Borrower and following the appointment of a successor Agent in accordance with the provisions of this Section. If the Agent shall resign as Agent under this Agreement, then the Majority Lenders shall appoint from among the Lenders willing to serve as Agent a successor agent for the Lenders, which successor agent shall be approved by the Borrower (which approval shall not be unreasonably withheld), whereupon such successor agent shall succeed to the rights, powers and duties of the Agent, and the term "Agent" shall mean such successor agent effective upon such appointment and approval, and the former Agent's rights, powers and duties as Agent shall be terminated, without any other or further act or deed on the part of such former Agent or any of the parties to this Agreement or any holders of the obligations owing hereunder. After any retiring Agent's resignation as Agent, the provisions of this Article shall inure to its benefit as to any actions taken or omitted to be taken by it while it was Agent under this Agreement and the other Loan Documents.

ARTICLE IX

The Guarantee

SECTION 9.01. Guarantee. In order to induce the Agent and the Lenders to execute and deliver this Agreement and to make and maintain the Loans:

(a) Each Guarantor hereby unconditionally and irrevocably guarantees to the Secured Parties, jointly with the other Guarantors and severally, as a primary obligation, the prompt and complete payment and performance by the Borrower when due (whether at the stated maturity, by acceleration or otherwise) of the Obligations. Each Guarantor further agrees to pay any and all reasonable expenses (including all reasonable fees and disbursements of counsel) which may be paid or incurred by the Agent or by the Secured Parties in enforcing any of their rights under the guarantee contained in this Article. The guarantee contained in this Article shall remain in full force and effect until the Obligations have been indefeasibly paid in full.

(b) Each Guarantor agrees that whenever, at any time or from time to time, it shall make any payment to the Agent or any Secured Party on account of its liability under this Article, it will notify the Agent or such Secured Party, as the case may be, in writing that such payment is made under the guarantee contained in this Article. No payment or payments made by any Guarantor or any other Person or received or collected by the Agent or any Secured Party from such Guarantor or any other Person by virtue of any action or proceeding or any set-off or appropriation or application, at any time or from time to time, in reduction of or in payment of the Obligations shall be deemed to modify, reduce, release or otherwise affect the liability of such Guarantor under this Article and such Guarantor shall, notwithstanding any such payment or payments, remain

liable for the amount of the Obligations until the Obligations have been indefeasibly paid in full.

(c) Anything herein or in any other Loan Document to the contrary notwithstanding, the maximum liability of each Guarantor hereunder and under the other Loan Documents shall in no event exceed the amount which can be guaranteed by such Guarantor under applicable Federal and state laws relating to the insolvency of debtors.

SECTION 9.02. No Subrogation. Notwithstanding any payment or payments made by any Guarantor hereunder, or any set-off or application of funds of any Guarantor by the Agent or any Secured Party, no Guarantor shall be entitled to be subrogated to any of the rights of the Agent or any Secured Party against the Borrower or against any collateral security or guarantee or right of offset held by the Agent or any Secured Party for the payment of the Obligations, nor shall any Guarantor seek or be entitled to seek any contribution or reimbursement from the Borrower in respect of payments made by such Guarantor hereunder, until all amounts owing to the Agent and the Secured Parties on account of the Obligations are indefeasibly paid in full. If any amount shall be paid to any Guarantor on account of such subrogation rights in violation of the foregoing sentence, such amount shall be held by such Guarantor in trust for the Agent and the Secured Parties, segregated from other funds of such Guarantor, and shall, forthwith upon receipt by such Guarantor, be turned over to the Agent in the exact form received by such Guarantor (duly indorsed by such Guarantor to the Agent, if required), to be applied against the Obligations, whether matured or unmatured, in such order as the Agent may determine.

SECTION 9.03. Amendments, etc. with Respect to the Obligations. Each Guarantor shall remain obligated under this Article notwithstanding that, without any reservation of rights against such Guarantor, and without notice to or further assent by such Guarantor, any demand for payment of any of the Obligations made by the Agent or any Secured Party may be rescinded by the Agent or such Secured Party, and any of such Obligations continued, and any such Obligations, or the liability of any other party upon or for any part thereof, or any collateral security or guarantee therefor or right of offset with respect thereto, may, from time to time, in whole or in part, be renewed, extended, amended, modified, accelerated, compromised, waived, surrendered or released by the Agent or the Secured Parties, and this Agreement may be amended, modified, supplemented or terminated, in whole or in part, as the Agent or the Secured Parties may deem advisable from time to time, and any collateral security, guarantee or right of offset at any time held by the Agent or the Secured Parties for the payment of any of the Obligations may be sold, exchanged, waived, surrendered or released. Subject to any applicable law, neither the Agent nor any Secured Party shall have any obligation to protect, secure, perfect or insure any Lien at any time held by it as security for any of the Obligations or for the guarantee contained in this Article or any property subject thereto.

SECTION 9.04. Guarantee Absolute and Unconditional. Each Guarantor waives any and all notice of the creation, renewal, extension or accrual of any of the Obligations and notice of or proof of reliance by the Agent or any Secured Party upon the guarantee contained in this Article or acceptance of the guarantee contained in this Article; the Obligations, and any part thereof, shall conclusively be deemed to have been created, contracted or incurred in reliance upon the guarantee contained in this Article; and all dealings between the Borrower and any

Guarantor, on the one hand, and the Agent and the Secured Parties, on the other, shall likewise be conclusively presumed to have been had or consummated in reliance upon the guarantee contained in this Article. Each Guarantor waives diligence, presentment, protest, demand for payment and notice of default or nonpayment to or upon the Borrower with respect to the Obligations, it being understood that such Guarantor shall not be required to make any payment under this Article until demand therefor shall have been made by the Agent in accordance with Section 10.02. The guarantee contained in this Article shall be construed as a continuing, absolute and unconditional guarantee of payment without regard to (a) the validity or enforceability of any other provision of this Agreement, any of the Obligations or any collateral security therefor or guarantee or right of offset with respect thereto at any time or from time to time held by the Agent or any Secured Party, (b) any defense, set-off or counterclaim (other than a defense of payment or performance) which may at any time be available to or be asserted by the Borrower against the Agent or any Secured Party, or (c) any other circumstance whatsoever (with or without notice to or knowledge of the Borrower or any Guarantor) which constitutes, or might be construed to constitute, an equitable or legal discharge of the Borrower for the Obligations, or of any Guarantor under this Article, in bankruptcy or in any other instance. When the Agent or any Secured Party is pursuing its rights and remedies under this Article against any Guarantor, the Agent or any Secured Party may, but shall be under no obligation to, pursue such rights and remedies as it may have against the Borrower or any other Person or against any collateral security or guarantee for the Obligations or any right of offset with respect thereto, and any failure by the Agent or any Secured Party to pursue such other rights or remedies or to collect any payments from the Borrower or any such other Person or to realize upon any such collateral security or guarantee or to exercise any such right of offset, or any release of the Borrower or any such other Person or of any such collateral security, guarantee or right of offset, shall not relieve such Guarantor of any liability under this Article, and shall not impair or affect the rights and remedies, whether express, implied or available as a matter of law, of the Agent and the Secured Parties against such Guarantor.

SECTION 9.05. Reinstatement. The guarantee contained in this Article shall continue to be effective, or be reinstated, as the case may be, if at any time payment, or any part thereof, of any of the Obligations is rescinded or must otherwise be restored or returned by the Agent or any Secured Party upon the insolvency, bankruptcy, dissolution, liquidation or reorganization of any Loan Party or upon or as a result of the appointment of a receiver, intervenor or conservator of, or trustee or similar officer for, any Loan Party or any substantial part of its property, or otherwise, all as though such payments had not been made.

ARTICLE X

Miscellaneous

SECTION 10.01. Amendments and Waivers. Neither this Agreement nor any other Loan Document nor any terms hereof or thereof may be amended, supplemented or modified except pursuant to an agreement in writing entered into by the Borrower and the Majority Lenders or pursuant to an agreement or agreements in writing entered into by the Agent and the Loan Party or Loan Parties party thereto, in each case, with the consent of the Majority

Lenders. The Majority Lenders may, or, with the written consent of the Majority Lenders, the Agent may, from time to time, (a) enter into with the Loan Parties written amendments, supplements or modifications hereto for the purpose of adding any provisions to this Agreement or changing in any manner the rights of the Lenders or the Loan Parties hereunder or (b) waive, on such terms and conditions as the Majority Lenders or the Agent, as the case may be, may specify in such instrument, any of the requirements of this Agreement or any other Loan Document or any Default or Event of Default and its consequences. Any such waiver and any such amendment, supplement or modification shall apply equally to each of the Lenders and shall be binding upon the Loan Parties, the Lenders, the Agent and all future holders of the obligations owing hereunder; provided, however, that no such waiver and no such amendment, supplement or modification shall (i) increase the Commitment of any Lender without the written consent of such Lender, (ii) reduce the principal amount of any Loan or reduce the rate of interest thereon without the written consent of each Lender affected thereby, (iii) postpone the maturity of any Loan, or any scheduled date of payment of the principal amount of any Loan or any date for the payment of any interest payable hereunder, or reduce the amount of, waive or excuse any such payment, or postpone the scheduled date of expiration of any Commitment, without the written consent of each Lender affected thereby, (iv) change Section 2.12 in a manner that would alter the pro rata sharing of payments required thereby, without the written consent of each Lender affected thereby, (v) change any of the provisions of this Section or the percentage set forth in the definition of "Majority Lenders" or any other provision of any Loan Document specifying the number or percentage of Lenders required to waive, amend or modify any rights thereunder or make any determination or grant any consent thereunder, without the written consent of each Lender affected thereby, (vi) release any Guarantor from its guarantee hereunder (except as permitted by this Agreement), or limit its liability in respect of such guarantee, without the written consent of each Lender, (vii) release all or substantially all of the Collateral from the Liens of the Security Documents without the written consent of each Lender, (viii) consent to the assignment or transfer by any Loan Party of any of its rights and obligations under this Agreement or any other Loan Document, without the written consent of each Lender, or (ix) amend, modify or waive any provision of Article VIII or any other provision of this Agreement governing the rights or obligations of the Agent without the written consent of the Agent. In the case of any waiver, the Loan Parties, the Lenders and the Agent shall be restored to their former position and rights hereunder, and any Default or Event of Default waived shall be deemed to be cured and not continuing; but no such waiver shall extend to any subsequent or other Default or Event of Default, or impair any right consequent thereon. Notwithstanding anything to the contrary herein, the Agent may, with the consent of the Borrower, amend, modify or supplement any provision of this Agreement or any other Loan Document to cure any ambiguity, omission, defect or inconsistency, so long as such amendment, modification, or supplement does not adversely affect the rights of any Lender.

SECTION 10.02. Notices. All notices, requests and demands to or upon the respective parties hereto to be effective shall be in writing (including by telecopy), and, unless otherwise expressly provided herein, shall be deemed to have been duly given or made when delivered by hand, or, in the case of overnight courier, facsimile or telecopy notice, when received, or four days after being deposited in the mail, postage prepaid addressed as follows in the case of the Borrower, any Guarantor and the Agent, and as set forth in the administrative questionnaire of any Lender, or to such other address as may be hereafter notified by the respective parties hereto and any future holders of the obligations owing hereunder:

The Borrower or any Guarantor:

General Motors Corporation
767 Fifth Avenue
New York, New York 10153
Attention: Treasurer
Telecopy: (212) 418-3632

with a copy to:

Office of the Secretary
General Motors Corporation
300 Renaissance Center
Detroit, Michigan 48265-3000

and with a copy to:

Weil Gotshal & Manges, LLP
767 Fifth Avenue
New York, New York 10153-0119
Attention: Soo-Jin Shim
Telecopy: 212-310-8007

The Agent:

JPMorgan Chase Bank, N.A.
Loan & Agency Services
1111 Fannin Street – 10th Floor
Houston, TX 77002
Attention: Denise Ramon
Telecopy: 713-750-2938;

provided that any notice, request or demand to or upon the Agent or the Lenders pursuant to Section 2.02, 2.04 or 2.05 shall not be effective until received.

SECTION 10.03. No Waiver; Cumulative Remedies. No failure to exercise and no delay in exercising, on the part of the Agent or any Lender, any right, remedy, power or privilege hereunder or under any other Loan Document shall operate as a waiver thereof; nor shall any single or partial exercise of any right, remedy, power or privilege hereunder preclude any other or further exercise thereof or the exercise of any other right, remedy, power or privilege. The rights, remedies, powers and privileges herein provided are cumulative and not exclusive of any rights, remedies, powers and privileges provided by law.

SECTION 10.04. Survival of Representations and Warranties. All representations and warranties made hereunder and in any document, certificate or statement delivered pursuant hereto or in connection herewith shall survive the execution and delivery of this Agreement and the making of the Loans hereunder.

SECTION 10.05. Payment of Expenses and Taxes. The Borrower agrees (a) to pay or reimburse the Agent for all its reasonable out–of–pocket costs and expenses reasonably incurred in connection with the development, preparation and execution of, and any amendment, supplement or modification to, this Agreement and any other documents prepared in connection herewith or therewith, and the consummation and administration of the transactions contemplated hereby and thereby, including the reasonable fees and disbursements of counsel to the Agent (which fees and disbursements of counsel shall be paid on the date which is, (i) in the case of the entry into this Agreement, the later of (A) thirty days following the Funding Date and (B) ten Business Days after the delivery of any invoice related thereto and (ii) in all other cases, the date which is ten Business Days after the delivery of any invoice related thereto), (b) to pay or reimburse each Lender and the Agent for all its reasonable costs and expenses reasonably incurred in connection with the enforcement of any rights under this Agreement, including the reasonable fees and disbursements of counsel to the Agent and to the several Lenders (other than those incurred in connection with the compliance by the relevant Lender with the provisions of Section 2.17(a)), (c) to pay, indemnify, and hold each Lender and the Agent harmless from, any and all recording and filing fees and any and all liabilities with respect to, or resulting from any delay by the Borrower in paying, stamp, excise and other similar taxes (other than any Non-Excluded Taxes), if any, in each case, which may be payable or determined to be payable in connection with the execution and delivery of, or consummation or administration of any of the transactions contemplated by, or any amendment, supplement or modification of, or any waiver or consent under or in respect of, this Agreement and (d) to pay, indemnify, and hold each Lender and the Agent harmless from and against any and all other liabilities, obligations, losses, damages, penalties, actions, judgments, suits, costs, reasonable expenses or disbursements of any kind or nature whatsoever with respect to the execution, delivery, enforcement, performance and administration of this Agreement (all the foregoing in this clause (d), collectively, the "indemnified liabilities"); provided that the Borrower shall not have any obligation hereunder to the Agent or any Lender with respect to indemnified liabilities arising from the gross negligence or willful misconduct of the Agent or any such Lender. The agreements in this Section shall survive repayment of the Loans and all other Obligations.

SECTION 10.06. Successors and Assigns; Participations and Assignments. (a) The provisions of this Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors and assigns permitted hereby, except that (i) no Loan Party may assign or otherwise transfer any of its rights or obligations hereunder except as provided in Section 6.01 or with the consent of each Lender and (ii) no Lender may assign or otherwise transfer its rights or obligations hereunder except in accordance with this Section.

(b) (i) Subject to the conditions set forth in paragraph (b)(ii) below, any Lender may assign to one or more assignees (each, an "Assignee") all or a portion of its rights and obligations under this Agreement (including all or a portion of its Commitments and the Loans at the time owing to it) with the prior written consent (such consent not to be unreasonably withheld or delayed) of:

(A) the Borrower; provided that no consent of the Borrower shall be required for an assignment to a Lender, an Affiliate of a Lender, an Approved Fund (as defined below) or, if an Event of Default

under Article VII(a) or (e) has occurred and is continuing, any other Person; and

(B) the Agent; provided that no consent of the Agent shall be required for an assignment to an Assignee that is a Lender immediately prior to giving effect to such assignment.

(ii) Assignments shall be subject to the following additional conditions:

(A) except in the case of an assignment to a Lender, an Affiliate of a Lender or an Approved Fund or an assignment of the entire remaining amount of the assigning Lender's Commitments or Loans, the amount of the Commitments or Loans of the assigning Lender subject to each such assignment (determined as of the date the Assignment and Acceptance with respect to such assignment is delivered to the Agent) shall not be less than $1,000,000, unless each of the Borrower and the Agent otherwise consent; provided that (I) no such consent of the Borrower shall be required if an Event of Default under Article VII(a) or (e) has occurred and is continuing and (II) such amounts shall be aggregated in respect of each Lender and its affiliates or Approved Funds, if any;

(B) the parties to each assignment shall execute and deliver to the Agent an Assignment and Acceptance substantially in the form of Exhibit A (an "Assignment and Acceptance"), together with a processing and recordation fee of $3,500;

(C) the Assignee, if it shall not be a Lender, shall deliver to the Agent an administrative questionnaire; and

(D) in the case of an assignment by a Lender to a CLO (as defined below) administered or managed by such Lender or an Affiliate of such Lender, the assigning Lender shall retain the sole right to approve any amendment, modification or waiver of any provision of this Agreement; provided that the Assignment and Acceptance between such Lender and such CLO may provide that such Lender will not, without the consent of such CLO, agree to any amendment, modification or waiver that (I) requires the consent of each Lender directly affected thereby pursuant to the proviso to the second sentence of Section 10.01 and (II) directly affects such CLO.

For the purposes of this Section, the terms "Approved Fund" and "CLO" have the following meanings:

"Approved Fund" means (a) with respect to any Lender, a CLO administered or managed by such Lender or an Affiliate of such Lender and (b) with respect to any Lender that is a fund which invests in bank loans and similar extensions of credit, any other fund that invests in

bank loans and similar extensions of credit and is managed by the same investment advisor as such Lender or by an Affiliate of such investment advisor.

"CLO" means, as to any Lender, any entity (whether a corporation, partnership, trust or otherwise) that is engaged in making, purchasing, holding or otherwise investing in bank loans and similar extensions of credit in the ordinary course and is administered or managed by such Lender or an Affiliate of such Lender.

(iii) Subject to acceptance and recording thereof pursuant to paragraph (b)(iv) below, from and after the effective date specified in each Assignment and Acceptance, the Assignee thereunder shall be a party hereto and, to the extent of the interest assigned by such Assignment and Acceptance, have the rights and obligations of a Lender under this Agreement, and the assigning Lender thereunder shall, to the extent of the interest assigned by such Assignment and Acceptance, be released from its obligations under this Agreement (and, in the case of an Assignment and Acceptance covering all of the assigning Lender's rights and obligations under this Agreement, such Lender shall cease to be a party hereto but shall continue to be entitled to the benefits of Sections 2.14, 2.15, 2.16 and 10.05); provided that no Assignee shall then be entitled to receive any greater amount pursuant to Section 2.13, 2.14, 2.15 or 2.16 in respect of any event or circumstance existing at the time of the assignment pursuant to which it acquired its interest hereunder than the assigning Lender would have been entitled to receive thereunder in respect of the rights and obligations assigned by such assigning Lender to such Assignee had no such assignment occurred. Any assignment or transfer by a Lender of rights or obligations under this Agreement that does not comply with this Section shall be treated for purposes of this Agreement as a sale by such Lender of a participation in such rights and obligations in accordance with paragraph (c) of this Section.

(iv) The Agent, acting for this purpose as an agent of the Borrower, shall maintain at one of its offices a copy of each Assignment and Acceptance delivered to it and a register for the recordation of the names and addresses of the Lenders, and the Commitments of, and principal amount of the Loans owing to, each Lender pursuant to the terms hereof from time to time (the "Register"). The entries in the Register shall be prima facie evidence of the existence and amounts of the obligations of the Borrower therein recorded, and the Borrower, the Agent and the Lenders may treat each Person whose name is recorded in the Register pursuant to the terms hereof as a Lender hereunder for all purposes of this Agreement, notwithstanding notice to the contrary. The Register shall be available for inspection by the Borrower and any Lender, at any reasonable time and from time to time upon reasonable prior notice. The Agent shall provide a copy of the Register to the Borrower on a monthly basis.

(v) Upon its receipt of a duly completed Assignment and Acceptance executed by an assigning Lender and an Assignee, the Assignee's completed administrative questionnaire (unless the Assignee shall already be a Lender hereunder), the processing and recordation fee referred to in paragraph (b)

of this Section and any written consent to such assignment required by paragraph (b) of this Section, the Agent shall accept such Assignment and Acceptance and record the information contained therein in the Register.

(c) (i) Any Lender may, without the consent of the Borrower or the Agent, sell participations to one or more banks or other entities (a "Participant") in all or a portion of such Lender's rights and obligations under this Agreement (including all or a portion of its Commitments and the Loans); provided that (A) such Lender's obligations under this Agreement shall remain unchanged, (B) such Lender shall remain solely responsible to the other parties hereto for the performance of such obligations, (C) the Borrower, the Agent and the other Lenders shall continue to deal solely and directly with such Lender in connection with such Lender's rights and obligations under this Agreement and (D) such Lender shall have given prior written notice to the Borrower of the identity of such Participant. Any agreement pursuant to which a Lender sells such a participation shall provide that such Lender shall retain the sole right to enforce this Agreement and to approve any amendment, modification or waiver of any provision of this Agreement; provided that such agreement may provide that such Lender will not, without the consent of the Participant, agree to any amendment, modification or waiver that (I) requires the consent of each Lender pursuant to the proviso to the second sentence of Section 10.01 and (II) directly affects such Participant. Subject to paragraph (c)(ii) of this Section, the Borrower agrees that each Participant shall be entitled to the benefits of Sections 2.13, 2.14, 2.15, 2.16 and 10.05 to the same extent as if it were a Lender and had acquired its interest by assignment pursuant to paragraph (b) of this Section.

(ii) A Participant shall not be entitled to receive any greater payment under Sections 2.13, 2.14, 2.15, 2.16 or 10.05 than the applicable Lender would have been entitled to receive with respect to the participation sold to such Participant, unless the sale of the participation to such Participant is made with the Borrower's prior written consent. Any Participant that is a Non-US Lender shall not be entitled to the benefits of Section 2.15 unless such Participant complies with Section 2.15(b).

(d) Each Lender shall maintain at its office a copy of each participation agreement to which it is a party and a register for the recordation of the names and addresses of the Participants under such participation agreement and the Commitments of, the principal amount of, and any interest on, the Loans owing to and paid to each Participant pursuant to the terms hereof from time to time.

(e) Nothing herein shall prohibit any Lender from pledging or assigning all or any portion of its Loans to any Federal Reserve Bank in accordance with applicable law or to any holder of, or trustee for the benefit of the holders of, such Lender's securities; provided that no such pledge or assignment shall release such Lender from any of its obligations hereunder or substitute any such pledgee or assignee for such Lender as a party hereto. In order to facilitate any such pledge or assignment, the Borrower hereby agrees that, upon request of any Lender at any time and from time to time, the Borrower shall provide to such Lender, at the Borrower's own expense, a promissory note, substantially in the form of Exhibit B, evidencing the Loans owing to such Lender.

(f) On or prior to the effective date of an assignment, the assigning Lender shall surrender any outstanding Notes held by it all or a portion of which are being assigned, and the Borrower shall, upon the request to the Agent made at the time of such assignment by the assigning Lender or the Assignee, as applicable, execute and deliver to the Agent (in exchange for the outstanding Notes of the assigning Lender) a new Note to the order of such Assignee in an amount equal to the amount of such Assignee's Loan owing to it. Any such new Notes shall be dated the Funding Date and shall otherwise be in the form of the Note replaced thereby. Any Notes surrendered by the assigning Lender shall be returned by the Agent to the Borrower marked "canceled".

(g) Notwithstanding the foregoing, any Conduit Lender may assign any or all of the Loans it may have funded hereunder to its designating Lender without the consent of the Borrower or the Agent and without regard to the limitations set forth in paragraph (b) of this Section (other than paragraph (b)(ii)(D)); provided, that no Conduit Lender shall be entitled to receive any greater amount pursuant to Sections 2.13, 2.14, 2.15, 2.16 or 10.05 than the designating Lender would have been entitled to receive in respect of the extensions of credit made by such Conduit Lender. In addition, any Conduit Lender may disclose, on a confidential basis, the existence and terms of the Loans it has funded to any rating agency, commercial paper dealer or provider of any surety, guarantee or credit or liquidity enhancements to such Conduit Lender; provided that no such Person shall receive any confidential financial information with respect to the Borrower unless such Person has complied with paragraph (h) of this Section as if such Person were a Transferee. The Borrower, each Lender and the Agent hereby confirms that it will not institute against a Conduit Lender or join any other Person in instituting against a Conduit Lender any bankruptcy, reorganization, arrangement, insolvency or liquidation proceeding under any state bankruptcy or similar law, for one year and one day after the payment in full of the latest maturing commercial paper note issued by such Conduit Lender; provided, however, that each Lender designating any Conduit Lender hereby agrees to indemnify, save and hold harmless each other party hereto for any loss, cost, damage or expense (including legal expenses) arising out of its designation of a Conduit Lender, including the inability to institute such a proceeding against such Conduit Lender during such period of forbearance.

(h) The Borrower authorizes each Lender to disclose to any prospective Participant, any Participant or any prospective Assignee (each, a "Transferee") any and all financial information in such Lender's possession concerning the Borrower and its Affiliates which has been delivered to such Lender by or on behalf of the Borrower pursuant to this Agreement or which has been delivered to all Lenders by or on behalf of the Borrower in connection with their respective credit evaluations of the Borrower and its Affiliates prior to becoming a party to this Agreement; provided that (i) such Transferee has executed and delivered to the Borrower a written confidentiality agreement substantially in the form of that contained in the Confidential Information Memorandum, dated November 2006 and (ii) in the case of any information other than that contained in the Confidential Information Memorandum, dated November 2006, the Borrower has been informed of the identity of such Transferee and has consented (such consent not to be unreasonably withheld) to the disclosure of such information thereto. Nothing contained in this paragraph (h) shall be deemed to prohibit the delivery to any Transferee of any financial information which is otherwise publicly available.

(i) Notwithstanding anything herein to the contrary, any Person subject to confidentiality obligations hereunder or under any other related document (and any employee, representative or other agent of such Person) may disclose to any and all Persons, without limitation of any kind, such Person's US Federal income tax treatment and the US Federal income tax structure of the transactions contemplated by this Agreement relating to such Person and all materials of any kind (including opinions or other tax analyses) that are provided to it relating to such tax treatment and tax structure. However, no such Person shall disclose any information relating to such tax treatment or tax structure to the extent nondisclosure is reasonably necessary in order to comply with applicable securities laws.

SECTION 10.07. Adjustments. If any Lender (a "benefited Lender") shall at any time receive any payment of all or part of its Loans or interest thereon, or receive any collateral in respect thereof (whether voluntarily or involuntarily, by set–off or otherwise), such that it has received aggregate payments or collateral on account of its extensions of credit in a greater proportion than any such payment to or collateral received by any other Lender, if any, in respect of such other Lender's extensions of credit which are then due and payable, or interest thereon, such benefited Lender shall purchase for cash from the other Lenders a participating interest in such portion of each such other Lender's extensions of credit, or shall provide such other Lenders with the benefits of any such collateral, or the proceeds thereof, as shall be necessary to cause such benefited Lender to share the excess payment or benefits of such collateral or proceeds ratably with each of the Lenders; provided, however, that if all or any portion of such excess payment or benefits is thereafter recovered from such benefited Lender, such purchase shall be rescinded, and the purchase price and benefits returned, to the extent of such recovery, but without interest, unless the Lender from which such payment is recovered is required to pay interest thereon, in which case each Lender returning funds to such Lender shall pay its pro rata share of such interest.

SECTION 10.08. Counterparts. This Agreement may be executed by one or more of the parties to this Agreement on any number of separate counterparts (including by telecopy or electronic image scan), and all of said counterparts taken together shall be deemed to constitute one and the same instrument. A set of the copies of this Agreement signed by all the parties shall be lodged with the Borrower and the Agent.

SECTION 10.09. Severability. Any provision of this Agreement which is prohibited or unenforceable in any jurisdiction shall, as to such jurisdiction, be ineffective to the extent of such prohibition or unenforceability without invalidating the remaining provisions hereof, and any such prohibition or unenforceability in any jurisdiction shall not invalidate or render unenforceable such provision in any other jurisdiction.

SECTION 10.10. **GOVERNING LAW. THIS AGREEMENT AND THE RIGHTS AND OBLIGATIONS OF THE PARTIES UNDER THIS AGREEMENT SHALL BE GOVERNED BY, AND CONSTRUED AND INTERPRETED IN ACCORDANCE WITH, THE LAW OF THE STATE OF NEW YORK.**

SECTION 10.11. Jurisdiction; Consent to Service of Process. (a) Each Loan Party hereby irrevocably and unconditionally submits, for itself and its property, to the nonexclusive jurisdiction of any New York State court or Federal court of the United States of

America sitting in New York City, and any appellate court from any thereof, in any action or proceeding arising out of or relating to this Agreement, or for recognition or enforcement of any judgment, and each of the parties hereto hereby irrevocably and unconditionally agrees that all claims in respect of any such action or proceeding may be heard and determined in such New York State court or, to the extent permitted by law, in such Federal court. Each of the parties hereto agrees that a final judgment in any such action or proceeding shall be conclusive and may be enforced in other jurisdictions by suit on the judgment or in any other manner provided by law. Nothing in this Agreement shall affect any right that any Agent or any Lender may otherwise have to bring any action or proceeding relating to this Agreement against any Loan Party or its properties in the courts of any jurisdiction.

(b) Each Loan Party hereby irrevocably and unconditionally waives, to the fullest extent it may legally and effectively do so, any objection which it may now or hereafter have to the laying of venue of any suit, action or proceeding arising out of or relating to this Agreement in any New York State or Federal court. Each of the parties hereto hereby irrevocably waives, to the fullest extent permitted by law, the defense of an inconvenient forum to the maintenance of such action or proceeding in any such court.

(c) Each Loan Party irrevocably consents to service of process in the manner provided for notices in Section 10.02. Nothing in this Agreement will affect the right of any party to this Agreement to serve process in any other manner permitted by law.

SECTION 10.12. Releases of Collateral. Upon any Permitted Transfer of any Collateral (other than a Permitted Transfer to a Subsidiary that is to become a Guarantor as provided in Section 10.15), or upon the effectiveness of any written consent to the release of the security interest granted under any Loan Document in any Collateral pursuant to Section 10.01 of this Agreement, the security interest in such Collateral shall be automatically released. In connection with any termination or release pursuant to this Section, the Agent shall execute and deliver to any Loan Party, at such Loan Party's expense, all documents that such Loan Party shall reasonably request to evidence such termination or release upon receipt by the Agent of a certificate of a Financial Officer of the Borrower (i) certifying that such release is in connection with a Permitted Transfer and (ii) either (A) setting forth the total net book value (as determined as of the end of the most recent fiscal quarter of the Borrower for which a Collateral Value Certificate or Summary Collateral Value Certificate has been delivered hereunder) of all Dispositions of Collateral with an aggregate net book value of greater than $100,000,000 individually (whether in a single transaction or a series of related transactions) since such date or (B) certifying that the aggregate net book value (as determined as of the end of the most recent fiscal quarter of the Borrower for which a Collateral Value Certificate or Summary Collateral Value Certificate has been delivered hereunder) of all Dispositions of Collateral since such date is equal to or less than $500,000,000. Any execution and delivery of documents pursuant to this Section shall be without recourse to or warranty by the Agent.

SECTION 10.13. USA Patriot Act. Each Lender hereby notifies the Borrower that pursuant to the requirements of the USA Patriot Act (Title III of Pub. L. 107-56 (signed into law October 26, 2001)) (the "Act"), it is required to obtain, verify and record information that identifies the Borrower, which information includes the name and address of the Borrower and

other information that will allow such Lender to identify the Borrower in accordance with the Act.

SECTION 10.14. WAIVER OF JURY TRIAL. EACH OF THE PARTIES HERETO HEREBY IRREVOCABLY AND UNCONDITIONALLY WAIVES TRIAL BY JURY IN ANY LEGAL ACTION OR PROCEEDING RELATING TO THIS AGREEMENT AND FOR ANY COUNTERCLAIM.

SECTION 10.15. Additional Guarantors. Upon execution and delivery by the Agent and any direct or indirect wholly-owned domestic Subsidiary of the Borrower of a joinder agreement in form and substance reasonably acceptable to the Agent for the purpose of causing such Subsidiary to become a Guarantor hereunder and a Grantor under and as defined in the Collateral Agreement, such Subsidiary shall become a Guarantor hereunder with the same force and effect as if originally named as a Guarantor herein. The execution and delivery of any such instrument shall not require the consent of any other Loan Party or any Lender hereunder. The rights and obligations of each Loan Party hereunder shall remain in full force and effect notwithstanding the addition of any new Guarantor as a party to this Agreement.

Remainder of page left blank intentionally; signature pages to follow

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be duly executed and delivered by their proper and duly authorized officers as of the day and year first above written.

GENERAL MOTORS CORPORATION, as the Borrower,

by _____

Name: Walter G. Borst
Title: Treasurer

SATURN CORPORATION, as a Guarantor,

by _____

Name:
Title:

JPMORGAN CHASE BANK, N.A., as Agent and a Lender,

by _____

Name:
Title:

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be duly executed and delivered by their proper and duly authorized officers as of the day and year first above written.

GENERAL MOTORS CORPORATION, as the Borrower,

by

_____

Name:
Title:

SATURN CORPORATION, as a Guarantor,

by

_____

Name: J.A. Ladziak
Title: General Manager & Vice President

JPMORGAN CHASE BANK, N.A., as Agent and a Lender,

by

_____

Name:
Title:

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be duly executed and delivered by their proper and duly authorized officers as of the day and year first above written.

GENERAL MOTORS CORPORATION, as the Borrower,

by

_____

Name:
Title:

SATURN CORPORATION, as a Guarantor,

by

_____

Name:
Title:

JPMORGAN CHASE BANK, N.A., as Agent and a Lender,

by 

_____

Name: RICHARD W. DUKER
Title: MANAGING DIRECTOR

CREDIT SUISSE, CAYMAN ISLANDS BRANCH,
as a Lender,

by _____

Name: JOHN D. TORONTO
Title: DIRECTOR

RANKA MOHAN
ASSOCIATE

ABN AMRO Bank N.V.
as a Lender

by _____
Name: Linda Boardman
Title: Vice President and Director

_____
Julia Rollins
Vice President

BARCLAYS BANK PLC,
as a Lender,

by _____
Name: David Barton
Title: Associate Director

THE BANK OF NEW YORK,
as a Lender,

by

Name: KEVIN HIGGINS
Title: VICE PRESIDENT

National City Bank,

as a Lender,

by 

Name: **Kenneth M. Blackwell**
Title: **Vice President**

Schedule 2.01
to
General Motors Term Loan Agreement

Commitments

Lender	Commitment
JPMorgan Chase Bank, N.A.	874,800,000.00
Credit Suisse	583,200,000.00
ABN AMRO	15,000,000.00
Barclays Bank PLC	15,000,000.00
Bank of New York	10,000,000.00
National City Bank	2,000,000.00
Total:	**$1,500,000,000.00**

Schedule 3.12
to
General Motors Term Loan Agreement

Financing Statements to be Filed

SCHEDULE 3.12

LIST OF FINANCING STATEMENTS TO BE FILED

Uniform Commercial Code

General Motors Corporation and Saturn Corporation: filing of UCC-1 financing statements in the office of the Secretary of State of the State of Delaware.

Fixture Filing Financing Statements

Filing of UCC-1 financing statements as fixture filings for each of the Material Facilities in the corresponding office of the County Clerk listed below:

Material Facility Name	County Clerk Office
GM Powertrain Tonawanda	Erie, NY
GM Assembly Arlington	Tarrant, TX
GM Assembly Lordstown	Trumbull, OH
GM Powertrain Willow Run	Washtenaw, MI
GM Assembly Janesville	Rock, WI
GM Assembly Detroit Hamtramck	Wayne, MI
GM Assembly Orion	Oakland, MI
GM Assembly Flint	Genesee, MI
GM Assembly Pontiac East	Oakland, MI
GM Powertrain Warren Transmission	Macomb, MI
GM Assembly Lansing Grand River	Ingham, MI
GM Powertrain Romulus Engine	Wayne, MI
GM Assembly Fairfax	Wyandotte, KS
GM MFD Pontiac	Oakland, MI
GM Powertrain Livonia	Wayne, MI
GM MFD Grand Rapids	Kent, MI
GM MFD Mansfield	Richland, OH
GM Powertrain Bay City	Bay, MI
GM Assembly Shreveport	Caddo, LA
GM Assembly Moraine	Montgomery, OH
GM Powertrain Defiance	Defiance, OH
GM Assembly Fort Wayne	Allen, IN
GM Assembly Saturn Wilmington	New Castle, DE
GM Assembly Lansing Delta Township	Eaton, MI

Schedule 6.02(b)
to
General Motors Term Loan Agreement

Existing Liens

SCHEDULE 6.02(B)

Debtor: General Motors Corporation						
JURISDICTION/SEARCH TYPE	**FILE NUMBER**	**FILING DATE**	**TYPE OF FILING**	**SECURED PARTY**	**DESCRIPTION OF COLLATERAL**	**SEARCH DATE**
Delaware – New Castle Superior Court						
Local Defendant Suit Search	02C-12-014	12/03/02	Pending Litigation	Federowicz, Michael & Catherine	Product Liablity	3/30/06
	04C-06-174	6/15/04	Pending Litigation	Black, Naomi	Complaint	3/30/06
	05C-05-203	5/18/05	Pending Litigation	Davis, George & Rachel	Product Liablity	3/30/06
Delaware –U.S. District Court						
	06cv187	3/17/06	Pending Litigation	Automotive Technologies International, Inc.	Patent	4/21/06
Georgia – DeKalb County						
Local Judgment Search	1371/429	7/18/2001	Judgment	A Wellness Center, P.C.	$1,253.76	4/14/2006
Louisiana – Caddo Parish						
State Tax Lien Search	3986/59	1/3/05	Tax Lien	Louisiana Dept. of Labor Office of Regulatory Services	$3.214.23	4/25/06
State Tax Lien Search	4023/539	3/10/05	Tax Lien	Louisiana Dept. of Labor Office of Regulatory Services	$478.96	4/25/06
State Tax Lien Search	4259/751	3/9/05	Tax Lien	Louisiana Dept. of Labor Office of Regulatory Services	$93,187.34	4/25/06
New Jersey – New Jersey Superior Court						

Debtor: General Motors Corporation

JURISDICTION/SEARCH TYPE	FILE NUMBER	FILING DATE	TYPE OF FILING	SECURED PARTY	DESCRIPTION OF COLLATERAL	SEARCH DATE
Local Judgement Search	W004861-88	5/4/90	Judgement	Richard T. Aldridge	$1,086,043.00	4/27/06
Local Judgement Search	L000919-89	6/20/90	Judgement	Virignia Mastrando	$750.00	4/27/06
Local Judgement Search	L091267-85	1/17/91	Judgement	Edith Becker	$243,103.00	4/27/06
Local Judgement Search	DJ082727-1991	7/30/91	Judgement	Grover Hobbs	$33,565.66	4/27/06
Local Judgement Search	87019433	8/8/91	Judgement	Grover Hobbs	$2,123.33	4/27/06
Local Judgement Search	L005192-92	12/02/92	Judgement	Mary Sanford	$73,676.17	4/27/06
Local Judgement Search	DC1885-92	4/23/93	Judgement	Geoffrey Pecan	$3,121.00	4/27/06
Local Judgement Search	DC006702-96	2/20/1998	Judgement	Kozlov Hersh	$3,586.91	4/27/06
Local Judgement Search	DJ-337653-2005	12/28/2005	Judgement	State of New Jersey	$1,079,050.02	4/27/06
California – Alameda County						
State Tax Lien Search	2000228959	6/1/00	Tax Lien	State of California Employment Development Dept.	$29,114.15	4/21/06
Local Judgement Search	93374155	10/21/93	Judgement	Robert Craig Wagner (Plaintiff)	$30,655.72	4/21/06
California – Santa Clara Superior Court						
Local Judgement Search	CV787043	4/29/04	Judgement	Dmitri Baker (Plaintiff)	N/A	4/27/06
California – San Mateo Superior Court						
Local Judgement Search	395606	1/15/97	Judgement	Lyle Pesh (Plaintiff)	N/A	4/27/06
Local Judgement Search	402285	4/6/99	Judgement	Paul Escovedo	$10,000.00	4/27/06
Ohio – Trumbull County Court of Common Please						
State Tax Lien Search	200212100047382	12/10/02	Tax Lien	ICX Corporation	$0.00 (See Personal Property Tax Liens)	4/28/06
Michigan – Oakland County						

Debtor: General Motors Corporation

JURISDICTION/SEARCH TYPE	FILE NUMBER	FILING DATE	TYPE OF FILING	SECURED PARTY	DESCRIPTION OF COLLATERAL	SEARCH DATE
Local Judgement Search	L23447 P868	8/9/01	Judgment	Board of Oakland County Road Commissioners of Oakland County	$1.00	4/27/06
Local Judgement Search	L37412 P789	4/13/06	Judgment	HRN CORP	$1.00	4/27/06
Indiana – Madison County						
Local Judgment Search	48D020304PL00359	10/23/2003	Settlement	Hubble, Rex A		4/26/2006
Local Judgment Search	48D030206PL00517	6/25/2002	Judgment	Sheets, Kirby J. and Becky L.	$40,777.74	
Local Judgment Search	48C010508MF0082 9	12/16/2005	Judgment	JPMorgan Chase Bank	$58,816.02	
Local Judgment Search	48C010512MF0129 3	3/10/2006	Judgment	Wachovia Bank	$80,437.38	
Indiana – St. Joseph County						
Local Judgment Search	71D079701SC00349	1/15/1997	Judgment	Linda Schelle	$1,889.50	4/24/2006
Local Judgment Search	71C010404PL101	4/29/2004	Judgment	Bill Cabanaw	$19,357.19	
Michigan – USDC Eastern District						
Local Pending Judgment Search	2:06CV11784-NGE-VMM	4/13/2006	Pending Judgment	Zieleziensei v. GM	Amended Complaint filed	4/19/2006
Local Pending Judgment Search	2:97CV75231-PJD	10/14/1997	Pending Judgment	Gratz et al. v. Bollinger et al.	_____ pre-trail phase	4/19/2006
Local Pending Judgment Search	2:97X75878-GER	11/26/1997	Pending Judgment	RM Taylor Corp. v. GM	Objection to subpoena	4/19/2006
Local Pending Judgment Search	2:98CV73282-ADT	06/28/1998	Pending Judgment	Mink v. GM	Complaint filed in Wayne County, MI	4/19/2006
Local Pending Judgment Search	2:99CV60782-MOB	8/16/1999	Pending Judgment	GM v. Adell Corp et al.	Motion to stay action pending	4/19/2006
Local Pending Judgment Search	2:00X71120-RHC	3/10/2000	Pending Judgment	US v. Howard	Awaiting Final Judgment	4/19/2006
Local Pending Judgment Search	2:00X73118-PJD	7/11/2000	Pending Judgment	Babcock v. GM	Suit in Discovery	4/19/2006

Debtor: General Motors Corporation

JURISDICTION/SEARCH TYPE	FILE NUMBER	FILING DATE	TYPE OF FILING	SECURED PARTY	DESCRIPTION OF COLLATERAL	SEARCH DATE
Local Pending Judgment Search	2:00X70364-NGE	01/20/2000	Pending Judgment	EEOC v. GM	Application by EEOC filed for administrative subpoena	4/19/2006
Pending Local Judgment Search	2:05CV74770-JAC-RSW	12/15/2005	Pending Judgment	Gluckstern v. Wagoner	Suit in pretrial motion phase	4/19/2006
Pending Local Judgment Search	2:05CV74862-GCS-DAS	12/22/2005	Pending Judgment	Peterson v. GM	Suit in pretrial motion phase	4/19/2006
Pending Local Judgment Search	2:06X50034-MOB	1/13/2006	Pending Judgment	Orion IP L.L.C. v. Daimler Chrysler Corp.	Suit in pretrial motion phase	4/19/2006
Pending Local Judgment Search	2:06CV10201-NGE-WC	1/13/2006	Pending Judgment	J&R Marketing, SED v. GM	Suit in joinder phase	4/19/2006
Pending Local Judgment Search	2:06CV10789-PJD-VMM	2/22/2006	Pending Judgment	Jones v. GM	Suit in pretrial motion phase	4/19/2006
Pending Local Judgment Search	2:06CV10933-LPZ-MKM	3/01/2006	Pending Judgment	Green and Associates P.C. v. Metlife et al.	Suit in pretrial motion phase	4/19/2006
Pending Local Judgment Search	2:06CV11086-JF-MKM	03/14/2006	Pending Judgment	Bain et al. v. GM	Complaint filed	4/19/2006
Pending Local Judgment Search	2:06CV11211-PJD-VMM	3/21/2006	Pending Judgment	Jones v. GM	Summons served	4/19/2006
Pending Local Judgment Search	2:06CV11743-RHC-DAS	4/11/2006	Pending Judgment	Edgin v. Rising et al.	Complaint filed	4/19/2006
Pending Local Judgment Search	2:05CV73018-AV-VMM	8/4/2005	Pending Judgment	Cole v. GM	Suit in pretrial motion phase	4/19/2006
Pending Local Judgment Search	2:05CV73233-ADT-SDP	8/22/2005	Pending Judgment	Hunter v. GM	Suit in pretrial conferences	4/19/2006
Pending Local Judgment Search	2:05CV73541-LPZ-MKM	9/15/2005	Pending Judgment	Woodard v. GM	Suit in pretrial motion phase	4/19/2006
Pending Local Judgment Search	2:05CV74086-PJD-RSW	10/25/2005	Pending Judgment	Stoudemire v. GM	Suit in Pre-discovery	4/19/2006
Pending Local Judgment Search	2:05CV74104-RHC-WC	10/26/2005	Pending Judgment	Motes v. GM	Suit in Pre-discovery	4/19/2006

Debtor: General Motors Corporation

JURISDICTION/SEARCH TYPE	FILE NUMBER	FILING DATE	TYPE OF FILING	SECURED PARTY	DESCRIPTION OF COLLATERAL	SEARCH DATE
Pending Local Judgment Search	2:05CV74334-JAC-RSW	11/10/2005	Pending Judgment	Stein v. Bowles	Suit in Pre-discovery	4/19/2006
Pending Local Judgment Search	2:05X74421-PDB	11/21/2005	Pending Judgment	U.S. v. Albertie & GM	GM garnished $8,745.16	4/19/2006
Pending Local Judgment Search	2:05CV74532-MOB-MKM	11/30/2005	Pending Judgment	King v. GM	Suit in pretrial motion phase	4/19/2006
Pending Local Judgment Search	2:05CV74769-GER-PJK	12/15/2005	Pending Judgment	Orr v. Wagoner	Pretrial motion phase	4/19/2006
Pending Local Judgment Search	2:04X70650-DPH	02/20/2004	Pending Judgment	Nanvaez v. GM	Motion to quash ordered	4/19/2006
Pending Local Judgment Search	2:05CV70547-AC-DAS	02/10/2005	Pending Judgment	Thelen v. Hamtrack	Pending summary judgment for defendants	4/19/2006
Pending Local Judgment Search	2:05CV70666-AJT-VMM	02/18/2005	Pending Judgment	McKnight v. GM	Suit currently in pretrial conferences phase	4/19/2006
Pending Local Judgment Search	2:05CV70727-AC-RSW	02/25/2005	Pending Judgment	Harchick v. GM	Suit currently in pretrial conferences phase	4/19/2006
Pending Local Judgment Search	2:05CV71085-MGE-RSW	03/18/2005	Pending Judgment	Pyrka v. Balnius	Suit in pretrial phase	4/19/2006
Pending Local Judgment Search	2:05CV72300-PDB-MKM	6/10/2005	Pending Judgment	Zanger v. Gulf Stream Coach, Inc.	Summary judgment for GM pending	4/19/2006
Pending Local Judgment Search	2:05CV72827-PDB-RSW	7/19/2005	Pending Judgment	Hanspard v. GM	Pending amended answer by GM	4/19/2006
Pending Local Judgment Search	2:05CV72851-MOB-MKM	7/21/2005	Pending Judgment	Thamas v. GM	Pre-discovery phase	4/19/2006
Pending Local Judgment Search	2:05CV72927-NGE-SDP	7/27/2005	Pending Judgment	Kuta v. GM	Suit in pretrial phase	4/19/2006
Local Judgment Search	2:02CV74587-NGE-SDP	11/18/2002	Judgment	GM v. Keystone Auto Inc.	Summary judgment for Defendants	4/19/2006
Local Judgment Search	2:03CV70940-JCO	03/07/2003	Judgment	GM v. Transportation System Division	Summary judgment for GM	4/19/2006

Debtor: General Motors Corporation						
JURISDICTION/SEARCH TYPE	**FILE NUMBER**	**FILING DATE**	**TYPE OF FILING**	**SECURED PARTY**	**DESCRIPTION OF COLLATERAL**	**SEARCH DATE**
Local Judgment Search	2:04CV72324-PJD-SDP	6/23/2004	Judgment	Barsh v. GM	Declaroty judgment for GM	4/19/2006
Local Judgment Search	2:05CV72256-NGE-MKM	6/8/2005	Judgment	U.S. v Michael Ross & GM	GM garnished $4,394.50	4/19/2006
Local Judgment Search	2:05CV73144-BAF-MKM	9/15/2005	Judgment	U.S. v. Sheila Bell & GM	GM garnished $5,139.03	4/19/2006
Pending Local Judgment Search	2:02X73693-AC	9/16/2002	Pending Judgment	Beilowitz v. GM	subpoena quashed	4/19/2006
Pending Local Judgment Search	2:03CV73141-JF	8/18/2003	Pending Judgment	Neason v. GM	Settlement pending	4/19/2006
Pending Local Judgment Search	2:04X70092-JCO	1/12/2004	Pending Judgment	Archay Financial v. GM	Motion to appeal dismissed	4/19/2006

Debtor: General Motors Corporation						
JURISDICTION/SEARCH TYPE	**FILE NUMBER**	**FILING DATE**	**TYPE OF FILING**	**SECURED PARTY**	**DESCRIPTION OF COLLATERAL**	**SEARCH DATE**
West – Virginia Berkeley County						
Local Judgment Search	90-C-108N	10/23/1992	Judgment	Gregory F. Johnson A. Minor et al	$2,912,500.00	4/21/2006
Local Judgment Search	99-C-142	6/23/1999	Judgment	LLI Technologies Engineering and Construction Inc.	$153,328.50	4/21/2006
Oklahoma – Oklahoma County						
State Tax Lien Search	2991926991	3/5/2001	Tax lien	N/A	$686,345.69	4/28/2006
Indiana – Marion County						
State Tax Lien Search	0002589054	10/18/200	N/A	N/A	$61.07	4/27/2006

Debtor: General Motors Corporation						
JURISDICTION/SEARCH TYPE	**FILE NUMBER**	**FILING DATE**	**TYPE OF FILING**	**SECURED PARTY**	**DESCRIPTION OF COLLATERAL**	**SEARCH DATE**
State Tax Lien Search	050055214278	9/02/2005	N/A	N/A	$33.00	4/27/2006
Local Judgment Search	49DDD01-9607-CP-0922	1/22/1997	Judgment	Carolyn Martin	Judgment of $22,092.43 plus $2,313.22 interest	4/27/2006
Local Judgment Search	49011-0309-PL-001693	4/20/2004	Judgment	N/A	GM is entitled to no portion of Damage award, having received $150.00 previously for right of way access interest.	4/27/2006
Michigan – Washtenaw County						
Local Judgment Search	NGW960002615CK	4/10/1997	Judgment	Estate of Jeffrey Mite, deceased	$100,000	4/24/2006
New Jersey – Union County						
Local Judgment Search	J134207 92	12/02/1992	Judgment	Mary Sanford	$60,000	4/11/06
Local Judgment Search	j 61412 96	3/14/1996	Judgment	Mary Sanford	$12,000	
New York – Erie County						
Local Judgment Search	I 1992 014852 Bk 73 Pg 5207	1/19/2000	Judgment	Roger Melius, Sr. et al	$482.47	4/25/2006
New York – New York County						
Local Judgment Search	163284-03	7/13/1989	Judgment	Wecht, Robert G	$2,540,735.10	4/21/2006
Local Judgment Search	163284-06	7/13/1989	Judgment	Wecht, Alice M	$272,902.50	
Local Judgment Search	1612643-03	10/01/2002	Judgment	Ann Styles, as the administrator of the estate of James Styles	$901,586.71	
Local Judgment Search	1612643-06	10/01/2002	Judgment	Ann Styles, as guardian ad litem of Gordon Styles, infant	$30,625.33	
Local Judgment Search	1612643-09	10/01/2002	Judgment	Ann Styles, as guardian ad litem of John Styles, infant	$30,625.33	

Debtor: General Motors Corporation						
JURISDICTION/SEARCH TYPE	**FILE NUMBER**	**FILING DATE**	**TYPE OF FILING**	**SECURED PARTY**	**DESCRIPTION OF COLLATERAL**	**SEARCH DATE**
Local Judgment Search	1612643-12	10/01/2002	Judgment	Kaufman Borgeest & Ryan	$1,707,215.98	
Local Judgment Search	1612643-15	10/01/2002	Judgment	Ann Styles, as the administrator of the estate of James Styles	$251,999.38	
Local Judgment Search	1612643-18	10/01/2002	Judgment	Ann Styles, as guardian ad litem of Gordon Styles, infant	$4,358.67	
Local Judgment Search	1612643-21	10/01/2002	Judgment	Ann Styles, as guardian ad litem of John Styles, infant	$4,358.67	
Ohio – Trumbull County						
State Tax Lien Search	200212100047382	12/10/2002	Tax Lien	Trumbull County	45,431.18	
Pennsylvania – Allegheny County						
Local Judgment Search	AR-01-4047	1/23/2002	Judgment	Donna & Danielle Pazin	$25,000	4/28/2006
Local Judgment Search	GD-03-11882	6/27/2003	Judgment	West Mifflin Borough	$2,184.22	
Local Judgment Search	GD-03-6161	1/29/2004	Judgment	William Lisac Jr. and Lois Jean Lisac	$180,000	
Local Judgment Search	AR-04-5447	12/16/2005	Judgment	$3,337.50	Theresa A Pietrowski	
Pennsylvania – Chester County						
Local Judgment Search	92-06398	12/02/1998	Judgment	John D. Ackerman	$120,000	4/03/2006
Texas – Tarrant County						
Local Judgment Search	141-173352-98	7/01/1999	Judgment	Mel Anthony Harper, et al	$8,006,764.23	4/17/2006

Debtor: General Motors Corporation						
JURISDICTION/SEARCH TYPE	**FILE NUMBER**	**FILING DATE**	**TYPE OF FILING**	**SECURED PARTY**	**DESCRIPTION OF COLLATERAL**	**SEARCH DATE**
Texas – Travis County						
Local Judgment Search	1999062551	7/07/1999	Judgment	Mel Anthony Harper, et al	$5.00	4/26/2006
West Virginia – Berkeley County						
Local Judgment Search	90-C-108N	10/23/1992	Judgment	Gregory F Johnson a minor et al	$2,912,500	4/21/2006
Local Judgment Search	99-C-142	6/23/1999	Judgment	LLI Technologies Engineering & Construction Inc.	$153,328	
Wisconsin – Rock County						
Local Judgment Search	2002CV001081	7/31/2002	Judgment		$607.89	4/19/2006

Exhibit A
to
General Motors Term Loan Agreement

Form of Assignment and Acceptance

FORM OF ASSIGNMENT AND ACCEPTANCE

Reference is made to the Term Loan Agreement, dated as of November 29, 2006 (as amended, supplemented or otherwise modified from time to time, the "Agreement"), among General Motors Corporation, as the Borrower, Saturn Corporation, as a Guarantor, the Lenders named therein and JPMorgan Chase Bank, N.A., as Administrative Agent. Terms defined in the Agreement are used herein with the same meanings.

_____ (the "Assignor") and _____ (the "Assignee") agree as follows:

1. The Assignor hereby irrevocably sells and assigns to the Assignee without recourse to the Assignor, and the Assignee hereby irrevocably purchases and assumes from the Assignor without recourse to the Assignor, as of the Effective Date (as defined below), the interest (the "Assigned Interest") in and to the Assignor's rights and obligations under the Agreement in a principal amount as set forth on Schedule 1 (the "Assigned Facility").

2. The Assignor (i) makes no representation or warranty and assumes no responsibility with respect to any statements, warranties or representations made in or in connection with the Agreement or the execution, legality, validity, enforceability, genuineness, sufficiency or value of the Agreement or any other instrument or document furnished pursuant thereto, other than that it has not created any adverse claim upon the interest being assigned by it hereunder and that such interest is free and clear of any such adverse claim; (ii) makes no representation or warranty and assumes no responsibility with respect to the financial condition of the Borrower, any of its Subsidiaries or any other obligor or the performance or observance by the Borrower, any of its Subsidiaries or any other obligor of any of their respective obligations under the Agreement or any other instrument or document furnished pursuant hereto or thereto; and (iii) attaches the Note (if any) held by it evidencing the Assigned Facility and requests that the Agent exchange such Note for a new Note payable to the Assignor in the amount which reflects the assignment being made hereby (and after giving effect to any other assignments which have become effective on the Effective Date).

3. The Assignee (i) represents and warrants that it is legally authorized to enter into this Assignment and Acceptance; (ii) confirms that it has received a copy of the Agreement, together with copies of the financial statements delivered pursuant to Section 3.01 thereof and such other documents and information as it has deemed appropriate to make its own credit analysis and decision to enter into this Assignment and Acceptance; (iii) agrees that it will, independently and without reliance upon the Assignor, the Agent or any other Lender and based on such documents and information as it shall deem appropriate at the time, continue to make its own credit decisions in taking or not taking action under the Agreement or any other instrument or document furnished pursuant hereto or thereto; (iv) appoints and authorizes the Agent to take such action as agent on its behalf and to exercise such powers and discretion under the Agreement or any other instrument or document furnished pursuant hereto or thereto as are delegated to the Agent by the terms thereof, together with such powers as are incidental thereto; and (v) agrees that it will be bound by the provisions of the Agreement and will perform in accordance with its terms all the obligations which by the terms of the Agreement are required to be performed by it as a Lender including, if it is organized under the laws of a jurisdiction outside the United States, its obligation pursuant to Section 2.15(b) of the Agreement to deliver the forms prescribed by the Internal Revenue Service of the United States certifying as to the Assignee's exemption from United States withholding taxes with respect to all payments to be made to the Assignee under the Agreement, or such other documents as are necessary to indicate that all such payments are subject to such tax at a rate reduced by an applicable tax treaty.

4. The effective date of this Assignment and Acceptance shall be _____, 20__ (the "Effective Date"). Following the execution of this Assignment and Acceptance, it will be delivered to the Agent for acceptance by it and recording by the Agent pursuant to Section 10.06(b)(iv) of the Agreement, effective as of the Effective Date (which shall not, unless otherwise agreed to by the Agent, be earlier than five Business Days after the date of such acceptance and recording by the Agent).

5. Upon such acceptance and recording, from and after the Effective Date, the Agent shall make all payments in respect of the Assigned Interest (including payments of principal, interest, fees and other amounts) to the Assignee whether such amounts have accrued prior to the Effective Date or accrue subsequent to the Effective Date. The Assignor and the Assignee shall make all appropriate adjustments in payments by the Agent for periods prior to the Effective Date or with respect to the making of this assignment directly between themselves.

6. From and after the Effective Date, (i) the Assignee shall be a party to the Agreement and, to the extent provided in this Assignment and Acceptance, have the rights and obligations of a Lender thereunder and shall be bound by the provisions thereof and (ii) the Assignor shall, to the extent provided in this Assignment and Acceptance, relinquish its rights and be released from its obligations under the Agreement.

7. This Assignment and Acceptance shall be governed by and construed in accordance with the laws of the State of New York.

IN WITNESS WHEREOF, the parties hereto have caused this Assignment and Acceptance to be executed as of _____, 20__ by their respective duly authorized officers on Schedule 1 hereto.

SCHEDULE 1
TO ASSIGNMENT AND ACCEPTANCE
RELATING TO THE TERM LOAN AGREEMENT,
DATED AS OF NOVEMBER 29, 2006,
AMONG GENERAL MOTORS CORPORATION, AS THE BORROWER,
SATURN CORPORATION, AS A GUARANTOR, THE LENDERS NAMED THEREIN AND
JPMORGAN CHASE BANK, N.A., AS ADMINISTRATIVE AGENT

Name of Assignor: _____

Name of Assignee: _____ [Such Assignee is an Affiliate/Approved Fund of [identify Lender].]

Effective Date of Assignment: _____

Principal Amount of Loans Assigned	Applicable Percentage Assigned (to at least fifteen decimals)

The Assignee agrees to deliver to the Administrative Agent a completed Administrative Questionnaire in which the Assignee designates one or more credit contacts to whom all syndicate-level information (which may contain material non-public information about the Borrower and its Affiliates or their respective securities) will be made available and who may receive such information in accordance with the Assignee's compliance procedures and applicable laws, including Federal and state securities laws.

Accepted:

[ASSIGNOR]

By: _____
Name:
Title:

[ASSIGNEE]

By: _____
Name:
Title:

Consented To:[1]

JPMorgan Chase Bank, N.A.,
as Agent

By: _____
Name:
Title:

General Motors Corporation,[2]

By: _____
Name:
Title:

[1] To the extent required by Section 10.06(b)(i)(B) of the Agreement.

[2] To the extent required by Section 10.06(b)(i)(A) of the Agreement.

Exhibit B
to
General Motors Term Loan Agreement

Form of Note

FORM OF NOTE

$_____ New York, New York
[●], 2006

FOR VALUE RECEIVED, the undersigned, GENERAL MOTORS CORPORATION, a Delaware corporation (the "Company"), hereby unconditionally promises to pay to the order of _____ (the "Lender") at the office of JPMorgan Chase Bank, N.A., located at 270 Park Avenue, New York, New York 10017, in lawful money of the United States of America and in immediately available funds, the principal amount of the lesser of (a) _____ DOLLARS ($_____) and (b) the aggregate unpaid principal amount of all Loans made by the Lender to the Company pursuant to Section 2.01 of the Agreement hereinafter referred to. The principal amount of each Loan evidenced hereby shall be payable on the Maturity Date (or on such earlier date as set forth in the Agreement). The Company further agrees to pay interest at such office on the unpaid principal amount hereof from time to time outstanding at the applicable interest rate per annum determined as provided in, and payable as specified in, the Agreement.

In addition to any method set forth in the Agreement for recording the Loans made by the holder of this Note, such holder is hereby authorized to endorse on the Schedules annexed hereto and made a part hereof (or on a continuation thereof which shall be attached hereto and made a part hereof) the date, Type and amount of each Loan made by the Lender pursuant to Section 2.01 of the Agreement, each continuation thereof, each conversion of all or a portion thereof to another Type, the date and amount of each payment or prepayment of principal thereof, which endorsement shall constitute *prima facie* evidence of the accuracy of the information endorsed; provided, however that the failure to make any such endorsement shall not affect the obligations of the Company in respect of such Loans.

This Note is one of the Notes referred to in the Term Loan Agreement, dated as of November 29, 2006 (as amended, supplemented or otherwise modified from time to time, the "Agreement"), among the Company, as the Borrower, Saturn Corporation, as a Guarantor, the Lenders named therein and JPMorgan Chase Bank, N.A., as Administrative Agent. Terms used herein which are defined in the Agreement shall have such defined meanings unless otherwise defined herein. The undersigned hereby agrees to pay costs and expenses incurred by the Lender in connection with the enforcement of its rights and remedies under the Agreement and this Note to the extent provided in the Agreement.

Upon the occurrence of any one or more of the Events of Default specified in the Agreement, all amounts then remaining unpaid on this Note shall become, or may be declared to be, immediately due and payable, all as provided therein.

THIS NOTE SHALL BE GOVERNED BY, AND CONSTRUED AND INTERPRETED IN ACCORDANCE WITH, THE LAW OF THE STATE OF NEW YORK.

GENERAL MOTORS CORPORATION,

By: _____
Name:
Title:

Schedule A to Note

ABR LOANS
AND REPAYMENTS OF ABR LOANS

Date	Amount of ABR Loans	Amount Converted to ABR Loans	Amount of Principal Repaid	Amount Converted to Eurodollar Loans	Unpaid Principal Balance of ABR Loans	Notation Made By

[[2655560v3]]

Schedule B to Note

EURODOLLAR LOANS
AND REPAYMENTS OF EURODOLLAR LOANS

Date	Amount of Eurodollar Loans	Amount Converted to Eurodollar Loans	Interest Period and Eurodollar Rate with Respect Thereto	Amount of Principal Repaid	Amount Converted to Alternate Base Rate Loans	Unpaid Principal Balance of Eurodollar Loans	Notation Made By

[[2655560v3]]

Exhibit C
to
General Motors Term Loan Agreement

Form of Collateral Agreement

See Tab 4.

Exhibit D
to
General Motors Term Loan Agreement

Form of Tax Compliance Certificate

FORM OF TAX COMPLIANCE CERTIFICATE

Reference is made to the Term Loan Agreement, dated as of November 29, 2006 (as amended, supplemented or otherwise modified from time to time, the "Agreement"), among General Motors Corporation, as the Borrower, Saturn Corporation, as a Guarantor, the Lenders named therein and JPMorgan Chase Bank, N.A., as Administrative Agent. Capitalized terms used herein that are not defined herein shall have the meanings ascribed to them in the Agreement. _____ (the "Non-U.S. Lender") is providing this certificate pursuant to subsection 2.15(b)(ii)(B) of the Agreement. The Non-U.S. Lender hereby represents and warrants that:

A. The Non-U.S. Lender is the sole record and beneficial owner of the Loans or the obligations evidenced by Note(s) in respect of which it is providing this certificate.

B. The Non-U.S. Lender is not a "bank" for purposes of Section 881(c)(3)(A) of the Internal Revenue Code of 1986, as amended (the "Code"). In this regard, the Non-U.S. Lender further represents and warrants that:

(a) the Non-U.S. Lender is not subject to regulatory or other legal requirements as a bank in any jurisdiction; and

(b) the Non-U.S. Lender has not been treated as a bank for purposes of any tax, securities law or other filing or submission made to any Governmental Authority, any application made to a rating agency or qualification for any exemption from tax, securities law or other legal requirements.

C. The Non-U.S. Lender is not a 10-percent shareholder of General Motors Corporation within the meaning of Section 881(c)(3)(B) of the Code; and

D. The Non-U.S. Lender is not a controlled foreign corporation receiving interest from a related person within the meaning of Section 881(c)(3)(C) of the Code.

IN WITNESS WHEREOF, the undersigned has duly executed this certificate.

[NAME OF NON-U.S. LENDER]

By: _____
Name:
Title:

Date:_____, 20__

Exhibit E-1
to
General Motors Term Loan Agreement

Form of Opinion of Weil, Gotshal & Manges LLP

See Tab 5.

Exhibit E-2
to
General Motors Term Loan Agreement

Form of Opinion of Martin I. Darvick, Esq.

See Tab 6.

Exhibit F-1
to
General Motors Term Loan Agreement

Form of Collateral Value Certificate

[FORM OF]
COLLATERAL VALUE CERTIFICATE

Dated: [•]

This Collateral Value Certificate (this "Certificate") is delivered pursuant to Section 5.02[(b)][(c)] of the Term Loan Agreement, dated as of November 29, 2006 (as amended, supplemented or otherwise modified from time to time, the "Credit Agreement"), among General Motors Corporation, as the Borrower, Saturn Corporation, as a Guarantor, the Lenders named therein and JPMorgan Chase Bank, N.A., as Administrative Agent. Unless otherwise defined herein, terms defined in the Credit Agreement and used herein shall have the meanings given to them in the Credit Agreement.

The undersigned hereby certifies, in the name and on the behalf of the Borrower, and without assuming any personal liability therefor, that:

(1) I am a duly authorized and acting Financial Officer of the Borrower.

(2) I have reviewed and am familiar with the terms of the Credit Agreement and the contents of this Certificate.

(3) As of [insert date of the last day of the fiscal period to which this Certificate relates] (the "Measurement Date"), the Borrower is in compliance with Section 6.04 of the Credit Agreement;

(4) [As of the Measurement Date, the Collateral Value is equal to or greater than 300% of the Total Exposure as of such date.][1]

(5) Attached hereto as Exhibit A is a correct and complete computation of the Collateral Value, as of the Measurement Date.

IN WITNESS WHEREOF, the undersigned has set forth [his][her] name as of the date set forth above.

GENERAL MOTORS CORPORATION,

by

_____
Name:
Title:

[1] Bracketed phrase to be included only if this Certificate is being delivered during a Quarterly Collateral Reporting Period and Collateral Value is equal to or greater than 300% of the Total Exposure as of the Measurement Date. If the bracketed phrase cannot be included because the Collateral Value is not equal to or greater than 300% of the Total Exposure as of the Measurement Date, then a statement as to such inability shall be included.

Exhibit A to Collateral Value Certificate

Measurement Date: [insert date of the last day of the fiscal period to which this Certificate relates]

Name of Facility	Street Address	City	State	Zip	Net Book Value of Machinery & Equipment	Net Book Value of Special Tools	Total
[Name of U.S. Manufacturing Facility]	[•]	[•]	[•]	[•]	$[•]	$[•]	$[•]
[Name of U.S. Manufacturing Facility]	[•]	[•]	[•]	[•]	$[•]	$[•]	$[•]
[list each U.S. Manufacturing Facility separately]	[•]	[•]	[•]	[•]	$[•]	$[•]	$[•]
						Total Collateral Value:	$[•]

[[NYCORP:2660689v4]]

Exhibit F-2
to
General Motors Term Loan Agreement

Form of Summary Collateral Value Certificate

[FORM OF]
SUMMARY COLLATERAL VALUE CERTIFICATE

Dated: [•]

This Summary Collateral Value Certificate (this "Certificate") is delivered pursuant to Section 5.02(d) of the Term Loan Agreement, dated as of November 29, 2006 (as amended, supplemented or otherwise modified from time to time, the "Credit Agreement"), among General Motors Corporation, as the Borrower, Saturn Corporation, as a Guarantor, the Lenders named therein and JPMorgan Chase Bank, N.A., as Administrative Agent. Unless otherwise defined herein, terms defined in the Credit Agreement and used herein shall have the meanings given to them in the Credit Agreement.

The undersigned hereby certifies, in the name and on behalf of the Borrower, and without assuming any personal liability therefor, that:

(1) I am a duly authorized and acting Financial Officer of the Borrower.

(2) I have reviewed and am familiar with the terms of the Credit Agreement and the contents of this Certificate.

(3) As of [insert date of the last day of the fiscal quarter to which this Certificate relates] (the "Measurement Date"):

(a) the Borrower is in compliance with Section 6.04 of the Credit Agreement; and

(b) the Collateral Value is equal to or greater than 300% of the Total Exposure as of the Measurement Date.

IN WITNESS WHEREOF, the undersigned has set forth [his][her] name as of the date set forth above.

GENERAL MOTORS CORPORATION,

by

_____

Name:
Title:

Exhibit 2

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	::	Chapter 11
	::	Case No. 09-50026 (REG)
General Motors Corporation, *et al.*,	::	
	::	(Jointly Administered)
Debtors.	::	

FINAL ORDER PURSUANT TO BANKRUPTCY CODE SECTIONS 105(a), 361, 362, 363, 364 AND 507 AND BANKRUPTCY RULES 2002, 4001 AND 6004 (A) APPROVING A DIP CREDIT FACILITY AND AUTHORIZING THE DEBTORS TO OBTAIN POST-PETITION FINANCING PURSUANT THERETO, (B) GRANTING RELATED LIENS AND SUPER-PRIORITY STATUS, (C) AUTHORIZING THE USE OF CASH COLLATERAL AND (D) GRANTING ADEQUATE PROTECTION TO CERTAIN PRE-PETITION SECURED PARTIES

THIS MATTER having come before this Court by the motion dated June 1, 2009 (the "**Motion**") of General Motors Corporation ("**GM**") and its affiliated debtors in the above-captioned cases, as debtors and debtors-in-possession (collectively with GM, the "**Debtors**"),[1] seeking, among other things, entry of a final order (the "**Final Order**"):

(i) Authorizing the Debtors, pursuant to sections 105, 362, 363 and 364 of title 11 of the United States Code (the "**Bankruptcy Code**"), Rules 2002, 4001 and 6004 of the Federal Rules of Bankruptcy Procedure (the "**Bankruptcy Rules**"), and Rule 4001 of the Local Bankruptcy Rules for the Southern District of New York (the "**Local Bankruptcy Rules**"), to enter into the Secured Superpriority Debtor-in-Possession Credit Agreement, by and among GM, as borrower, and The United States Department of the Treasury ("**U.S. Treasury**") and Export Development Canada ("**EDC**"), as lenders

[1] The Debtors in these cases include: GM, Saturn, LLC, Saturn Distribution Corporation, and Chevrolet-Saturn of Harlem, Inc.

(together, the "**DIP Lenders**"), in substantially the form annexed hereto as Exhibit 1 (as the same may be amended, supplemented, restated or otherwise modified from time to time, and together with all related agreements and documents, the "**DIP Credit Facility**"), and to obtain post-petition financing on a secured and super-priority basis pursuant to the terms and conditions thereof, up to a maximum aggregate amount of $33.3 billion (the "**Commitment**");

(ii) Authorizing the Debtors to execute and deliver the DIP Credit Facility and to perform such other acts as may be reasonably necessary or desirable in order to give effect to the provisions of the DIP Credit Facility, including the unconditional, joint and several guaranty of the obligations of GM under the DIP Credit Facility by each other Debtor (each, a "**Guarantor**", and collectively, the "**Guarantors**");

(iii) Providing, pursuant to sections 364(c)(1) and 507(b) of the Bankruptcy Code, that all obligations owing to the DIP Lenders under the DIP Credit Facility shall be accorded administrative expense status in each of these cases, and shall, subject only to the Carve-Out (as defined below), have priority over any and all other administrative expenses arising in these cases; provided, however, that subsequent to the closing of the Related Section 363 Transactions (as defined in the DIP Credit Facility), claims against the Debtors' estates that have priority under Sections 503(b) or 507(a) of the Bankruptcy Code, including costs and expenses of administration that are attendant to the formulation and confirmation of a liquidating chapter 11 plan, whether incurred prior or subsequent to the consummation of the Related Section 363 Transactions (the "**Old GM Administrative and Priority Claims**") shall have priority over such obligations (up to the aggregate amount of $950,000,000; provided, however, that any greater amount shall

be subject to approval by the DIP Lenders) owing to the DIP Lenders under the DIP Credit Facility; and

(iv) Granting the DIP Lenders security interests in and liens on (the "**DIP Liens**") all property and assets of each of the Debtors, of every kind or type whatsoever, including tangible, intangible, real, personal or mixed, whether now owned or hereafter acquired or arising, wherever located, all property of the estates of each of the Debtors within the meaning of section 541 of the Bankruptcy Code and all proceeds, rents and products of the foregoing, (including all avoidance actions arising under chapter 5 of the Bankruptcy Code and applicable state law except avoidance actions against the Prepetition Senior Facilities Secured Parties (as defined below)) with the exception of (a) any stocks, warrants, options or other equity interests issued to or held by any Debtor pursuant to the Related Section 363 Transactions (the "**New GM Equity Interests**"), (b) any leasehold interest of the Debtors in (i) the real property located at and commonly known as 301 Freedom Drive, City of Roanoke, Denton County, Texas or (ii) the real property located at and commonly known as 475 Brannan Street, City and County of San Francisco, California; and (c) certain Excluded Collateral (as defined in the DIP Credit Facility) (collectively, "**Property**") as follows:

(A) pursuant to section 364(c)(2) of the Bankruptcy Code, valid, perfected, first-priority security interests in and liens on all Property that is not subject to non-avoidable, valid and perfected liens in existence as of the Petition Date (as defined herein) (or to non-avoidable valid liens in existence as of the Petition Date that are subsequently perfected as permitted by section 546(b) of the Bankruptcy Code), in each case subject

only to (1) the Permitted Liens (as defined in the DIP Credit Facility), (2) the Carve-Out, (3) the adequate protection liens granted in connection with the Prepetition Revolving Credit Agreement pursuant to paragraph 6(b)(1)(x) of the Interim Order (the "**Prepetition Revolving Credit Agreement Order**") Under 11 U.S.C. §§ 105, 361, 362, 363 and FED. R. BANKR. P. 2002, 4001 And 9014 (I) Authorizing Debtors to Use Cash Collateral, (II) Granting Adequate Protection to Prepetition Revolver Secured Parties and (III) Scheduling a Final Hearing Pursuant to Bankruptcy Rule 4001(B) (the "**Prepetition Revolving Credit Agreement Adequate Protection Liens**"), and (4) the adequate protection liens granted in connection with the Prepetition Term Loan Agreement pursuant to paragraph 5(b)(i) of the Interim Order (the "**Prepetition Term Loan Facility Order**", and together with the Prepetition Revolving Credit Agreement Order, the "**Prepetition Revolving And Term Loan Orders**") Under 11 U.S.C. §§ 105, 361, 362, 363 and FED. R. BANKR. P. 2002, 4001 and 9014 (I) Granting Adequate Protection to Term Loan Secured Parties and (II) Scheduling a Final Hearing Pursuant to Bankruptcy Rule 4001(B) (the "**Prepetition Term Loan Adequate Protection Liens**", and together with the Prepetition Revolving Credit Agreement Adequate Protection Liens, the "**Prepetition Revolving And Term Adequate Protection Liens**");

(B) pursuant to section 364(c)(3) of the Bankruptcy Code, valid, perfected junior security interests in and liens on all Property that is subject to non-

avoidable, valid and perfected liens in existence as of the Petition Date, or to non-avoidable valid liens in existence as of the Petition Date that are subsequently perfected as permitted by section 546(b) of the Bankruptcy Code, subject only to the Carve-Out; and

(C) nothing in this Final Order, the Interim Order or the DIP Credit Facility shall in any way be construed to authorize or permit the DIP Lenders to seek recourse against the New GM Equity Interests at any time.

(v) Authorizing the application of a portion of the proceeds of the DIP Credit Facility toward payment in full of all principal, interest, letter of credit reimbursement obligations (including obligations to cash collateralize undrawn letters of credit) and other amounts due or outstanding under (A) that certain Term Loan Agreement, dated as of November 29, 2006, among GM, Saturn Corporation and JPMorgan Chase Bank, N.A., as administrative agent, and the lenders party thereto from time to time (as may be amended, restated, supplemented or otherwise revised from time to time, and together with all related agreements and documents, the "**Prepetition Term Loan Agreement**") secured by a first-priority lien on certain Property (the "**Prepetition Term Loan Collateral**"), (B) that certain Amended and Restated Credit Agreement, dated as of July 20, 2006, among GM, General Motors of Canada, Limited ("**GMCL**"), Saturn Corporation, Citicorp USA, Inc., as administrative agent, and the lenders party thereto from time to time (as may be amended, restated, supplemented or otherwise revised from time to time, and together with all related agreements and documents, the "**Prepetition Revolving Credit Agreement**") secured by a first-priority lien on certain Property (the "**Prepetition Revolving Credit Agreement Collateral**"), and (C) that certain Loan and

Security Agreement, dated as of October 2, 2006, among GM and Gelco Corporation (d/b/a GE Fleet Services) (as may be amended, restated, supplemented or otherwise revised from time to time, and together with all related agreements and documents, the "**Prepetition Gelco Loan Agreement**", and together with the Prepetition Term Loan Agreement and the Prepetition Revolving Credit Agreement, the "**Prepetition Senior Facilities**") secured by a first-priority lien on certain Property (the "**Prepetition Gelco Loan Agreement Collateral**", and together with the Prepetition Term Loan Collateral and the Prepetition Revolving Credit Agreement Collateral, the "**Prepetition Senior Facilities Collateral**");

(vi) Authorizing the Debtors to use cash collateral of the Existing UST Secured Parties (as defined below) (the "**Cash Collateral**");

(vii) Granting to the Existing UST Secured Parties (as defined below), as adequate protection for the potential diminution in value of their respective liens on and security interests in Property, (A) a claim as contemplated by section 507(b) of the Bankruptcy Code (the "**Adequate Protection Claim**"), which Adequate Protection Claim shall have a priority immediately junior to the Super-priority Claim (as defined below) and pari passu with the super-priority claims granted under the Prepetition Revolving And Term Loan Orders, (B) liens on and security interests in the Property (the "**Adequate Protection Liens**"), only to the extent of and on account of any diminution in the value of the Existing UST Secured Parties' interests in the Debtors' interests in the Property on and after the Petition Date, which Adequate Protection Liens shall have a priority immediately junior to the DIP Liens on the Property, and (C) reimbursement by the Debtors of all reasonable expenses incurred in the course of these

chapter 11 cases by the Existing UST Secured Parties and their respective professional advisors and counsel. "**Existing UST Secured Parties**" shall mean the secured parties under (1) that certain Loan and Security Agreement, dated as of December 31, 2008, by and between GM and the U.S. Treasury (as may be amended, restated, supplemented or otherwise revised from time to time, and together with all related agreements and documents, the "**TARP Loan Agreement**") and (2) that certain Credit Agreement, dated as of April 2, 2009, by and between GM Supplier Receivables LLC and the U.S. Treasury (as may be amended, restated, supplemented or otherwise revised from time to time, and together with all related agreements and documents, the "**Supplier Receivables Facility**", and together with the TARP Loan Agreement, the "**Existing UST Loan Agreements**"). For the avoidance of doubt, the Adequate Protection Liens shall be pari passu with any adequate protection liens granted under the Prepetition Revolving And Term Loan Orders except the Prepetition Revolving And Term Adequate Protection Liens as detailed in paragraph (iv)(A) above;

(viii) Authorizing and directing the Debtors to pay, without further order of this Court, the principal, interest, reasonable fees, expenses and other amounts (including the Additional Notes (as defined in the DIP Credit Facility)) payable to the DIP Lenders and their professional advisors and counsel under the DIP Credit Facility, as the same become due, including all reasonable expenses incurred in the course of these chapter 11 cases by the DIP Lenders and their professional advisors and counsel, all as and to the extent provided in the DIP Credit Facility; provided, that copies of the invoices for reimbursement by the Debtors of such expenses and fees (if any) are to be provided to

the Committee, any other statutory committee appointed in the Debtors' chapter 11 cases, and the United States Trustee on a confidential basis; and

(ix) Vacating and modifying the automatic stay imposed by section 362 of the Bankruptcy Code to the extent necessary to implement and effectuate the terms and provisions of the DIP Credit Facility and this Final Order.

This Court having considered the Motion, the DIP Credit Facility, the pleadings in support thereof and the pleadings in response thereto; and due and proper notice of the Motion having been provided in accordance with Bankruptcy Rules 2002, 4001, and 6004, and Local Bankruptcy Rule 4001 as reflected in the Affidavit of Service (Docket No. 134) filed with the Court on June 1, 2009; and a hearing pursuant to Bankruptcy Rule 4001(c)(2) having been held and concluded on June 1, 2009 (the "**Interim Hearing**") to consider the interim relief requested in the Motion; and the Court having entered an order granting the interim relief requested in the Motion (the "**Interim Order**"); and the Court having held a final hearing with respect to the Motion on June 25, 2009 (the "**Final Hearing**"); and it appearing that granting the relief requested in the Motion is appropriate, fair and reasonable and in the best interests of the Debtors, their estates, creditors and other parties in interest, and is essential for the Debtors' continued operations; and all objections to the relief requested in the Motion having been withdrawn, resolved or overruled on the merits by this Court; and upon consideration of the evidence presented, proffered or adduced at the Interim Hearing, the Final Hearing and in the Affidavit of Frederick A. Henderson, which was filed pursuant to Local Bankruptcy Rule 1007-2 on the Petition Date, the Declaration of William C. Repko in Support of Debtors' Proposed Debtor in Possession Financing Facility, the Statement of the United States of America Upon The Commencement Of General Motors Corporation's Chapter 11 Case [Docket No. 37] and

any other evidence presented at the Interim Hearing and the Final Hearing; and upon the record of the Interim Hearing and the Final Hearing; and upon the arguments of counsel; and after due deliberation and consideration and good and sufficient cause appearing therefor:

BASED UPON THE RECORD ESTABLISHED AT THE INTERIM HEARING AND THE FINAL HEARING, THIS COURT HEREBY MAKES THE FOLLOWING FINDINGS OF FACT AND CONCLUSIONS OF LAW:

A. On June 1, 2009 (the "**Petition Date**"), the Debtors each filed a voluntary petition under chapter 11 of the Bankruptcy Code in this Court, commencing these cases. The Debtors continue to manage and operate their businesses and properties as debtors in possession pursuant to sections 1107 and 1108 of the Bankruptcy Code. No trustee or examiner has been appointed in these cases; the United States Trustee appointed the Official Committee of Unsecured Creditors (the "**Committee**") on June 3, 2009.

B. Jurisdiction and Venue. This Court has jurisdiction over these proceedings, and over the property affected hereby, pursuant to 28 U.S.C. §§ 157(b) and 1334. Consideration of the Motion constitutes a core proceeding as defined in and pursuant to 28 U.S.C. § 157(b)(2). Venue for these cases and for the proceedings on the Motion is proper in this district pursuant to 28 U.S.C. §§ 1408 and 1409.

C. Need for Post-petition Financing. The Debtors have demonstrated a need for immediate and continuing access to post-petition financing pursuant to sections 363 and 364 of the Bankruptcy Code and Bankruptcy Rule 4001(c)(2). In the absence of this access, the Debtors will be unable to continue operating their business, causing immediate and irreparable loss or damage the Debtors' estates, to the detriment of the Debtors, their estates, their creditors and other parties in interest in these cases. The Debtors do not have sufficient unrestricted cash

and other financing available to operate their businesses, maintain the estates' properties, and administer these cases absent the relief provided in this Final Order.

D. No Credit Available on More Favorable Terms. Given the Debtors' current financial condition, available assets and current and projected liabilities, as well as current conditions in the automotive and credit markets, the Debtors are unable to obtain financing from any other lender on terms more favorable than those provided by the DIP Lenders in the DIP Credit Facility. Other than pursuant to the DIP Credit Facility, the Debtors have been unable to obtain credit that either (i) was allowable under section 503(b)(1) of the Bankruptcy Code as an administrative expense, (ii) would have priority over all other administrative expenses specified in sections 503(b) and 507(b) of the Bankruptcy Code, (iii) would be secured solely by a lien on property of the Debtors' estates that is not otherwise subject to a lien, or (iv) would be secured only by a junior lien on property of the Debtors' estates that is subject to a lien.

E. Good Faith of DIP Lenders. The Debtors chose the DIP Lenders as post-petition lenders in good faith and after obtaining the advice of experienced counsel and other professionals. The Debtors and the DIP Lenders proposed and negotiated the terms and provisions of the DIP Credit Facility, the Interim Order and this Final Order in good faith, at arm's length, without collusion and with the intention that all obligations owed under the DIP Credit Facility would be valid claims accorded the priority and secured by the liens set forth herein. The loans and extensions of credit authorized in the Interim Order and this Final Order are supported by reasonably equivalent value and fair consideration and the terms and provisions of the DIP Credit Facility, the Interim Order and this Final Order are fair and reasonable and reflect the Debtors' exercise of prudent business judgment consistent with their fiduciary duties.

Any credit extended, loans made, or funds advanced to the Debtors pursuant to this Final Order, the Interim Order or the DIP Credit Facility is deemed to be so extended, made or permitted to be used in good faith by the DIP Lenders as required by and within the meaning of section 364(e) of the Bankruptcy Code. As good faith lenders, the DIP Lenders' claims, super-priority status, security interests and liens and other protections arising from or granted pursuant to this Final Order and the DIP Credit Facility will not be affected by any subsequent reversal, modification, vacatur or amendment of this Final Order or any other order, as provided in section 364(e) of the Bankruptcy Code.

F. Authority for the DIP Credit Facility. The U.S. Treasury has extended credit to, and acquired a security interest in, the Debtors as set forth in the DIP Credit Facility and as authorized by the Interim Order and this Final Order. Before entering into the DIP Credit Facility, the Secretary of the Treasury, in consultation with the Chairman of the Board of Governors of the Federal Reserve System and as communicated to the appropriate committees of Congress, found that the extension of credit to the Debtors is "necessary to promote financial market stability," and is a valid use of funds pursuant to the statutory authority granted to the Secretary of the Treasury under the Emergency Economic Stabilization Act of 2008, 12 U.S.C. §§ 5201 et. seq. ("**EESA**"). The U.S. Treasury's extension of credit to, and resulting security interest in, the Debtors as set forth in the DIP Credit Facility and as authorized in the Interim Order and this Final Order is a valid use of funds pursuant to EESA.

G. Waiver. Upon entry of this Final Order, each of the Debtors hereby forever releases, waives and discharges the Existing UST Secured Parties and DIP Lenders, together with their respective officers, directors, employees, agents, attorneys, professionals, affiliates, subsidiaries, assigns and/or successors (collectively, the "**Released Parties**") from any

and all claims and causes of action arising out of, based upon or related to, in whole or in part, (i) the Existing UST Loan Agreements, (ii) any aspect of the prepetition relationship, or any prepetition transaction, between any Debtor, on the one hand, and any Released Party, on the other hand, or (iii) any acts or omissions by any or all of the Released Parties in connection with any prepetition relationship or transaction with any Debtor or any affiliate thereof including, without limitation, any claims or defenses as to the extent, validity, characterization, priority or perfection of the liens and security interests granted to any Existing UST Secured Parties pursuant to the Existing UST Loan Agreements, "lender liability" and similar claims and causes of action, any actions, claims or defenses arising under chapter 5 of the Bankruptcy Code or any other claims or causes of action. The waivers described in this paragraph were binding on the Debtors immediately upon entry of the Interim Order, and shall be binding upon the Committee or any other statutory committee and all other parties in interest sixty (60) days after entry of this Final Order if, prior to the expiration of such sixty (60) day period, the Committee or other party in interest has not commenced, or filed a motion with this Court for authority to commence, a proceeding asserting a claim or cause of action waived under this paragraph.

H. Notice. Due and proper notice of the Motion, the DIP Credit Facility, and the time and location of the Final Hearing has been provided in accordance with the Interim Order. Such notice was adequate and sufficient, and no other or further notice need be provided.

BASED UPON THE FOREGOING FINDINGS AND CONCLUSIONS, AND UPON THE MOTION AND THE RECORD MADE BEFORE THIS COURT AT THE INTERIM HEARING AND THE FINAL HEARING, AND GOOD AND SUFFICIENT CAUSE APPEARING THEREFOR, IT IS HEREBY ORDERED THAT:

1. The Motion is granted to the extent provided in this Final Order. All objections to the Motion heretofore not withdrawn or resolved by the Final Order are overruled

on the merits in all respects. The Debtors are authorized, pursuant to section 364(c) of the Bankruptcy Code, to obtain post-petition financing on a final basis up to the maximum aggregate amount of the Commitment, on a super-priority and secured basis, pursuant and subject to the terms and conditions of the DIP Credit Facility and this Final Order including, without limitation, the Initial Budget (as defined in the DIP Credit Facility) and the DIP Credit Facility is approved in all respects.

2. The Debtors are hereby authorized to (A) enter into the DIP Credit Facility and are authorized and directed to perform all obligations under the DIP Credit Facility and this Final Order, including paying the principal, interest, fees, expenses, and other amounts (including the Additional Notes) due to the DIP Lenders and their professional advisors and counsel pursuant to the DIP Credit Facility or this Final Order as the same become due, which payments shall not otherwise be subject to the approval of this Court, and (B) unconditionally guaranty such payments on a joint and several basis as provided in the DIP Credit Facility.

3. Upon execution and delivery of the DIP Credit Facility and entry of this Final Order, the Debtors' obligations under the DIP Credit Facility (including the Additional Notes) shall constitute final, valid and binding obligations of the Debtors, enforceable against each Debtor and its estate in accordance with the terms thereof. No obligation, payment, transfer or grant of security under the DIP Credit Facility or this Final Order shall be stayed, restrained, voided or recovered under any provision of the Bankruptcy Code (including section 502(d) of the Bankruptcy Code) or other applicable law, or shall be subject to any defense, reduction, setoff, recoupment or counterclaim.

4. Except for the Carve-Out, and upon entry of this Final Order, no costs or expenses of administration of these cases or any future proceeding that may result therefrom,

including liquidation in bankruptcy or other proceedings under any chapter of the Bankruptcy Code, shall be imposed or charged against, or recovered from, the DIP Lenders or any of the Property under section 506(c) of the Bankruptcy Code or any similar principle of law, and each of the Debtors hereby waives for itself and on behalf of its estate any and all rights under section 506(c) of the Bankruptcy Code or otherwise to assert or impose, or seek to assert or impose, any such costs or expenses of administration against the DIP Lenders or the Property.

5. The DIP Lenders are hereby granted, pursuant to section 364(c)(1) of the Bankruptcy Code, an allowed super-priority administrative expense claim in each of these cases (the "**Super-priority Claim**") for all loans, reimbursement obligations and any other indebtedness or obligations, contingent or absolute, which may now or from time to time be owing by any of the Debtors to the DIP Lenders under the DIP Credit Facility or hereunder, including, without limitation, all principal, accrued interest, costs, fees, expenses and all other amounts (including the Additional Notes) due under the DIP Credit Facility, which Super-priority Claim (A) shall have priority over any and all administrative expense claims and unsecured claims (including without limitation, the Adequate Protection Claim) against each Debtor or its estate in these cases, now existing or hereafter arising, of any kind or nature whatsoever including, without limitation, administrative expenses and claims of the kind specified in or ordered pursuant to Bankruptcy Code sections 105, 326, 328, 330, 331, 503(a), 503(b), 506(c) 507(a), 507(b), 546(c), 546(d), 726, 1113, and 1114, and any other provision of the Bankruptcy Code, as provided under section 364(c)(1) of the Bankruptcy Code, and (B) shall at all times be senior to the rights of each Debtor or its estate, and any successor trustee or other representative of any Debtor's estate in these cases or in any subsequent proceeding or case under the Bankruptcy Code, to the extent permitted by law; provided, however, that subsequent

to the closing of the Related Section 363 Transactions, claims against the Debtors' estates that have priority under sections 503(b) or 507(a) of the Bankruptcy Code, including costs and expenses of administration that are attendant to the formulation and confirmation of a liquidating chapter 11 plan, whether incurred prior or subsequent to the consummation of the Related Section 363 Transactions, shall have priority over the remaining obligations owing to the DIP Lenders under the DIP Credit Facility (up to the aggregate amount of $950,000,000; provided, however, that any greater amount shall be subject to approval by the DIP Lenders). The Super-priority Claim shall be subject and subordinate only to the Carve-Out and the claims set forth in the preceding proviso.

6. The DIP Lenders are hereby granted, pursuant to sections 364(c)(2) and 364(c)(3) of the Bankruptcy Code, continuing, valid, binding, enforceable, and automatically perfected DIP Liens in and on any and all of the Property, with the priorities set forth in paragraph (iv) above, to secure all repayment and other obligations of the Debtors under the DIP Credit Facility and this Final Order, including the Additional Notes. Except as expressly provided in the DIP Credit Facility or this Final Order, the DIP Liens shall not be made subject to or pari passu with any lien on, or security interest in, the Property, and shall be valid and enforceable against any trustee appointed in these cases, in any successor case, or upon the dismissal of any of these cases. The DIP Liens shall not be subject to sections 510, 549, 550 or 551 of the Bankruptcy Code. Except as provided in the DIP Credit Facility, this Final Order, or as otherwise agreed to by the DIP Lenders, the Debtors shall not grant any liens on the Property junior to the DIP Liens. In addition, except as permitted in the DIP Credit Facility, this Final Order, or as otherwise agreed to by the DIP Lenders, the Debtors shall not incur any debt with priority equal to or greater than the DIP Credit Facility. For the avoidance of doubt,

notwithstanding anything to the contrary in this Final Order, the Interim Order or the DIP Credit Facility, the Permitted Liens shall include any valid, perfected, non-avoidable prepetition senior liens in any Property of the Debtors' estates (or non-avoidable valid liens in existence as of the Petition Date that are subsequently perfected only as permitted by section 546(b) of the Bankruptcy Code), including, but not limited to, valid, perfected, non-avoidable prepetition senior statutory and possessory liens, and recoupment and setoff rights. Further, nothing in this Final Order, the Interim Order or the DIP Credit Facility shall in any way impair the right of any claimant with respect to any alleged reclamation right or impair the ability of a claimant to seek adequate protection with respect to any alleged reclamation right; provided, however, that nothing in this Final Order, the Interim Order or the DIP Credit Facility shall prejudice any rights, defenses, objections or counterclaims that the Debtors, the DIP Lenders, any agent under the Prepetition Senior Facilities, the lender under the TARP Loan Agreement, the Committee or any other party in interest may have with respect to the validity or priority of such asserted liens or rights, or with respect to any claim for adequate protection; provided, further, that nothing in this Final Order, the Interim Order or the DIP Credit Facility shall in any way be construed to permit or authorize the DIP Lenders to seek recourse against the New GM Equity Interests at any time. Notwithstanding the foregoing, the DIP Liens shall be subject and subordinate to valid and enforceable liens of governmental units for personal property taxes, real property taxes, special taxes, special assessments, and infrastructure improvement taxes arising after the Petition Date to the extent that such liens of governmental units take priority over previously granted and perfected consensual liens or security interests in property of the Debtors under applicable non-bankruptcy law.

7. Except as expressly agreed by the DIP Lenders, the obligations of the Debtors, including, without limitation, all obligations under the Notes (as defined in the DIP Credit Facility), shall be unconditionally guaranteed on a joint and several basis by each of the entities listed on Schedule 1.1B to the DIP Credit Facility. Except as otherwise expressly agreed to by each DIP Lender, the obligations of the Debtors shall further be unconditionally guaranteed on a joint and several basis by each and every subsequently acquired or organized direct or indirect domestic subsidiary of any Debtor (other than GMCL and direct and indirect subsidiaries of GMCL), each of which shall be made a guarantor under the DIP Credit Facility immediately upon its acquisition and/or organization as provided in the DIP Credit Facility.

8. The Existing UST Secured Parties are hereby granted, pursuant to sections 361, 362, 363, 364 and 507 of the Bankruptcy Code, the Adequate Protection Claim and the Adequate Protection Liens with the priorities set forth in paragraph (vii) hereof, in each case to the extent of any diminution in the value of the relevant Existing UST Secured Party's interests in the Debtors' interests in the Property (including Cash Collateral) occurring on or after the Petition Date.

9. The Debtors are hereby authorized to use the Cash Collateral in accordance with the Initial Budget, until the DIP Lenders have exercised remedies as a result of an Event of Default under, and as defined in, the DIP Credit Facility.

10. The DIP Liens, the Super-priority Claim, the Adequate Protection Liens and the Adequate Protection Claim shall continue in any superseding case or cases for any or all of the Debtors under any chapter of the Bankruptcy Code, and such liens, security interests and claims shall maintain their priorities as provided in this Final Order. If an order dismissing any of these cases, pursuant to section 1112 of the Bankruptcy Code or otherwise, is at any time

entered, such order shall provide that (A) the DIP Liens, the Super-priority Claim, the Adequate Protection Liens and the Adequate Protection Claim shall continue in full force and effect, shall remain binding on all parties in interest in these cases, and shall maintain their priorities as provided in this Final Order, until all obligations of the Debtors under the DIP Credit Facility (with respect to the DIP Liens and the Super-priority Claim) and the Existing UST Loan Agreements (with respect to the Adequate Protection Liens and the Adequate Protection Claim) have been paid and satisfied in full. Notwithstanding the dismissal of any or all of these cases, this Court shall retain jurisdiction with respect to enforcing the DIP Liens and the Super-priority Claim and the DIP Lenders' rights with respect thereto, and the Adequate Protection Liens and the Adequate Protection Claim and the Existing UST Secured Parties' rights with respect thereto.

11. Except as provided in this Final Order or in the DIP Credit Facility, the DIP Liens, the Super-priority Claim, the Adequate Protection Liens and the Adequate Protection Claim, and all rights and remedies of the DIP Lenders, shall not be modified, impaired or discharged by the entry of an order or orders confirming a plan or plans of reorganization in any or all of these cases and, pursuant to section 1141(d)(4) of the Bankruptcy Code, each Debtor waives any discharge as to any remaining obligations under the DIP Credit Facility and this Final Order including, without limitation, the Additional Notes.

12. This Final Order shall be sufficient and conclusive evidence of the validity, perfection and priority of the DIP Liens and the Adequate Protection Liens, without the necessity of filing or recording any financing statement or other instrument or document, or the taking of any other act that otherwise may be required under state or federal law, rule, or regulation of any jurisdiction to validate or perfect the DIP Liens or the Adequate Protection Liens or to entitle the DIP Lenders and the Existing UST Secured Parties to the priorities set

forth herein. The DIP Liens and the Super-priority Claim granted to the DIP Lenders pursuant to this Final Order and the DIP Credit Facility with respect to the property of the Debtors' estates were perfected by operation of law upon entry of the Interim Order by the Court. The Debtors may execute, and the DIP Lenders or the Existing UST Secured Parties, as applicable, are hereby authorized to file or record financing statements or other instruments to evidence the DIP Liens and the Adequate Protection Liens, and the Debtors are hereby authorized and directed, promptly upon demand by any DIP Lender or Existing UST Secured Party, to execute, file and record any such statements or instruments as the DIP Lenders or such Existing UST Secured Party may request; provided, however, that no such execution, filing, or recordation shall be necessary or required in order to create or perfect the DIP Liens or any Adequate Protection Lien, and further, if the DIP Lenders or any Existing UST Secured Party, each in its sole discretion, shall choose to file such financing statements, mortgages, notices of lien or similar instruments or otherwise confirm perfection of such liens, all such documents shall be deemed to have been filed or recorded as of the Petition Date. A certified copy of this Final Order may, in the discretion of the DIP Lenders or any Existing UST Secured Party, as applicable, be filed with or recorded in any filing or recording office in addition to or in lieu of such financing statements, notices of lien or similar instruments, and all filing offices are hereby authorized to accept a certified copy of this Final Order for filing and recording, and to deem this Final Order to be in proper form for filing and recording.

13. Each and every federal, state, and local governmental agency, department or office is hereby authorized and directed to accept this Final Order and any and all documents and instruments necessary or appropriate to consummate the transactions contemplated by this Final Order or the DIP Credit Facility.

14. The automatic stay imposed by section 362(a) of the Bankruptcy Code is hereby modified to permit (A) the Debtors to grant the DIP Liens, the Super-priority Claim, the guaranties and other security provided for in the DIP Credit Facility, and to perform such acts as the DIP Lenders may request to assure the perfection and priority of the DIP Liens, (B) the Debtors to grant the Adequate Protection Liens and the Adequate Protection Claim, and to perform such acts as any Existing UST Secured Party may request to assure the perfection and priority of the Adequate Protection Liens, (C) the implementation of the terms of this Final Order and the DIP Credit Facility, (D) the repayment of the Prepetition Senior Facilities as detailed in paragraph 19 hereof, and (E) immediately upon the occurrence of an Event of Default under the DIP Credit Facility or the maturity of the credit extensions provided thereunder, the exercise by the DIP Lenders of all rights and remedies under such agreement or applicable law without further application to or order of this Court; provided, however, that prior to exercising any setoff of amounts held in any accounts maintained by any Debtor or enforcing any liens or other remedies with respect to the Property, the DIP Lenders shall provide to the Debtors (with copies to the Committee, any other statutory committee and the United States Trustee) five business days' prior written notice; provided further, however, that upon receipt of any such notice, the Debtors may only make disbursements in the ordinary course of business and with respect to the Carve-Out, but may not make any other disbursements. Upon the occurrence and during the continuance of an Event of Default under the DIP Credit Facility, the DIP Lenders and their respective representatives shall be granted access to all locations in support of the enforcement and exercise of their remedies.

15. Upon the occurrence and during the continuance of any Event of Default under the DIP Credit Facility, and subject to the five business day notice provision set forth in

paragraph 14 above, the DIP Lenders may compel any Debtor to exercise such Debtor's rights (if any) to sell any or all of the Property in its possession pursuant to section 363(b) of the Bankruptcy Code or any other applicable law, the DIP Lenders shall be entitled to exercise their right (if any) to credit bid the DIP Liens in any such sale pursuant to section 363(k) or other applicable provision of the Bankruptcy Code, or other applicable law, and the Debtors shall use best efforts (subject to applicable law) to exercise their rights (if any) to sell such Property if requested by the DIP Lenders (pursuant to section 363 of the Bankruptcy Code or otherwise).

16. As used in this Final Order, "**Carve-Out**" means, following the occurrence and during the continuance of an Event of Default under the DIP Credit Facility, an amount sufficient for payment of (A) allowed professional fees and disbursements incurred by professionals retained by the Debtors, the Committee and any other statutory committee (after application of all outstanding retainers held by those professionals) and allowed expenses of members of the Committee and any other statutory committee in an aggregate amount not to exceed $20,000,000 (plus all such professional fees and disbursements, and expenses of members of the Committee and any other statutory committee that are unpaid after application of all outstanding retainers, and that were accrued or incurred prior to the occurrence of the Event of Default, to the extent allowed by this Court at any time), (B) fees pursuant to 28 U.S.C. § 1930 and any fees payable to the clerk of this Court, (C) fees and disbursements incurred by a chapter 7 trustee (if any) not to exceed $2,000,000, and (D) fees and expenses incurred by a privacy ombudsman retained by Appointment of Ombudsman dated June 10, 2009 [Docket No. 565]; provided, however, that, so long as an Event of Default has not occurred, the Debtors shall be permitted to pay fees and expenses allowed and payable under 11 U.S.C. §§ 330 and 331, as the same may become due and payable, and the same shall not reduce the Carve-Out;

provided further, however, that the Carve-Out shall not include any fees or disbursements related to the investigation of, preparation for, or commencement or prosecution of, any claims or proceedings against the DIP Lenders, the Existing UST Secured Parties or EDC, in its capacity as lender under the Canadian Facility (as defined in the DIP Credit Facility) and on behalf of the Governments of Ontario and Canada, or other Canadian Lender Consortium Member (as defined in the DIP Credit Facility), or the claims or security interests in or liens on the property granted under the Canadian Facility, or their claims or security interests in or liens on the Property granted under the DIP Credit Facility or this Final Order.

17. The DIP Lenders have acted in good faith in connection with the DIP Credit Facility, the Interim Order and this Final Order and their reliance on the provisions of this Final Order when extending credit under the DIP Credit Facility will be in good faith. Accordingly, if any provision of this Final Order is hereafter modified, vacated, or stayed by subsequent order of this Court or any other court for any reason, the DIP Lenders are entitled to the protections provided in section 364(e) of the Bankruptcy Code. The DIP Credit Facility may not be recharacterized as an equity investment or otherwise.

18. The DIP Lenders may exercise their right (if any) to credit bid the loans and the Additional Notes under the DIP Credit Facility (pursuant to section 363(k) or other applicable provision of the Bankruptcy Code, or other applicable law), in whole or in part, in connection with any sale or other disposition of some or all of the Property in these cases.

19. (a) Upon entry of this Final Order, the Debtors shall be authorized to apply and shall apply the proceeds of the DIP Credit Facility to repay amounts outstanding under the Prepetition Senior Facilities and all second lien Hedging Obligations (as defined in the Prepetition Revolving Credit Agreement), including principal, accrued and unpaid interest, fees,

letter of credit reimbursement obligations (including obligations to cash collateralize undrawn letters of credit) and any other amounts due or owed by the Debtors thereunder within three business days of entry of this Final Order.

(b) Upon payment ("**Payment**") of all obligations under the Prepetition Senior Facilities, all commitments under each of the Prepetition Senior Facilities shall be deemed irrevocably terminated. Further, upon Payment, except as set forth in subsection (c) below, the holders of such obligations (the "**Prepetition Senior Facilities Secured Parties**") shall have no further rights with respect to the Debtors, the DIP Lenders, the Property or any claims or liens relating thereto (all of which liens and claims shall be deemed automatically satisfied and released without further action), whether such claims or liens arise under the Prepetition Term Loan Agreement, Prepetition Revolving Credit Agreement, the Prepetition Gelco Loan Agreement or related documentation, and the Debtors and their estates shall have no further obligations to the Prepetition Senior Facilities Secured Parties in connection with the Prepetition Senior Facilities. Nothing in this Order shall be deemed to alter, amend, release or waive any liens against, or obligations of, any non-Debtor affiliate under the Prepetition Revolving Credit Agreement and documents related thereto.

(c) The Prepetition Senior Facilities Secured Parties' liens, claims and interests in the Property and any adequate protection claims or adequate protection liens, shall expire upon the Payment. In the event that the Committee investigates any liens of any of the Prepetition Senior Facilities Secured Parties or any third party brings an action against a Prepetition Senior Facilities Secured Party that is entitled to indemnification by the Debtors under the applicable Prepetition Senior Facility, then, notwithstanding any other provision of this Final Order, (i) the Debtors shall pay (in accordance with Paragraph 6(d) of the Prepetition

Revolving Credit Agreement Order and Paragraph 5(d) of the Prepetition Term Loan Facility Order), the reasonable fees, costs and charges incurred by the agents for the Prepetition Senior Facilities (and, in the case of Gelco, reasonable fees, costs and charges incurred by Gelco, so long as Gelco complies with the expense reimbursement procedures applicable to the agents under the other Prepetition Senior Facilities) in responding to such investigation or in defending any challenge to such liens or to their ability to retain any Payment, and (ii) the super-priority adequate protection claims granted pursuant to the Prepetition Revolving and Term Adequate Protection Orders shall remain in effect with respect to such expense reimbursement obligations, provided that such claims shall not have recourse to the New GM Equity Interests and Gelco is hereby granted superpriority adequate protection claims equivalent to those provided to the agents under the other Prepetition Senior Facilities. Nothing in this order shall affect the rights and remedies, if any, of the Prepetition Senior Facility Secured Lenders (other than Gelco and the agents under the other Prepetition Senior Facilities, whose rights and remedies shall be as described herein) to seek reimbursement of their reasonable fees, costs, and charges incurred in responding to any such investigation or in defending any challenge to such liens or Payment. Without limiting the generality of the foregoing, upon Payment, the Prepetition Senior Facilities Secured Parties (i) authorize the Debtors to file Uniform Commercial Code termination statements, mortgage releases and all other documents necessary to evidence the release of the liens against the Debtors securing the obligations under the Prepetition Senior Facilities and (ii) will take all such action and deliver all such other instruments and documents as may be reasonably requested by the Debtors or the agents under the Prepetition Senior Facilities to effectuate or evidence the termination of all such claims of the Prepetition Senior Facilities Secured Parties, in each case, at the sole cost and expense of the Debtors.

(d) Effective upon entry of this Final Order, the Debtors (on behalf of their estates) and any successor thereto release the Prepetition Senior Facilities Secured Parties and each of their directors, officers, appointees, counsel, advisors and employees serving in any capacity or function, including as a fiduciary, agents, advisors, shareholders, subsidiaries, affiliates, heirs, executors, administrators, attorneys, advisors, successors and assigns from, against and with respect to any and all actual or potential demands, claims, actions, causes of action (including derivative causes of action), suits, assessments, liabilities, losses, costs, damages, penalties, fees, charges, expenses and all other forms of liability whatsoever, in law or equity, whether asserted or unasserted, known or unknown, foreseen or unforeseen, arising under the Bankruptcy Code, state law or otherwise now existing or hereafter arising, directly or indirectly related to the Prepetition Senior Facilities and any and all dealings between the Prepetition Senior Facilities Secured Parties in connection with the Prepetition Senior Facilities, provided, however, that such release shall not apply to the Committee with respect only to the perfection of first priority liens of the Prepetition Senior Facilities Secured Parties (it being agreed that if the Prepetition Senior Facilities Secured Parties, after Payment, assert or seek to enforce any right or interest in respect of any junior liens, the Committee shall have the right to contest such right or interest in such junior lien on any grounds, including (without limitation) validity, enforceability, priority, perfection or value) (the "**Reserved Claims**"). The Committee shall have automatic standing and authority to both investigate the Reserved Claims and bring actions based upon the Reserved Claims against the Prepetition Senior Facilities Secured Parties not later than July 31, 2009 (the "**Challenge Period**"), provided, that upon the filing of any adversary proceeding prosecuting any Reserved Claim, the Challenge Period shall be extended with respect to such adversary proceeding through and until a court of competent jurisdiction

dismisses such adversary proceeding. The grant of automatic standing shall be without any further order of this Court or any requirement that the Committee file a motion seeking standing or authority to file a motion seeking standing or authority before prosecuting any such challenge. Any Prepetition Senior Facilities Secured Party accepting Payment shall submit to the jurisdiction of the Bankruptcy Court, it being understood that the respective administrative and collateral agents for the Prepetition Senior Facilities shall have no responsibility or liability for amounts paid to any Prepetition Senior Facilities Secured Parties and such agents shall be exculpated for any and all such liabilities, excluding only such funds as are retained by each such agent solely in its respective role as a lender.

(e) Immediately upon Payment, the DIP Lenders shall be deemed to have obtained a secured, non-avoidable, perfected security interest in and lien on the Prepetition Senior Facilities Collateral.

20. Notwithstanding anything herein to the contrary, none of the proceeds of any extension of credit under the DIP Credit Facility shall be used in connection with (a) any investigation (including discovery proceedings), initiation or prosecution of any claims, causes of action, adversary proceedings or other litigation against the DIP Lenders or the Existing UST Secured Parties or EDC, in its capacity as lender under the Canadian Facility and on behalf of the Governments of Ontario and Canada, (b) the initiation or prosecution of any claims, causes of action, adversary proceedings or other litigation against the DIP Lenders or the Existing UST Secured Parties or EDC, in its capacity as lender under the Canadian Facility and on behalf of the Governments of Ontario and Canada, or any of their respective affiliates with respect to any loans, extensions of credit or other financial accommodations made to any Debtor prior to, on or after the Petition Date, or (c) any loans, advances, extensions of credit, dividends or other

investments to any person not a Borrower or Guarantor other than for certain permitted exceptions set forth in the DIP Credit Facility.

21. On or substantially contemporaneous with the closing of the Related Section 363 Transactions, the Tranche C Term Loan (as such term is defined in the DIP Credit Facility) in an amount not less than $950,000,000 shall be provided to the Borrower in accordance with section 2.14 of the DIP Credit Facility to fund the wind-down of the Debtors (the "**Wind-Down Facility**"). The funding of the Wind-Down Facility shall be subject to an appropriate amendment to the DIP Credit Facility, acceptable to the Debtors and the DIP Lenders, which amendment shall be subject to approval by this Court on three days notice after the filing of a motion seeking approval of the Wind-Down Facility. The Committee shall be copied on all drafts of the credit agreement related to the Wind-Down Facility and the Wind-Down Budget (as defined in the DIP Credit Facility) that are circulated between the Debtors and the DIP Lenders and shall be included in all substantive negotiations of the Wind-Down Facility and the Wind-Down Budget between the Debtors and the DIP Lenders.

22. In the event of any inconsistency between the terms and conditions of the DIP Credit Facility or the Interim Order and this Final Order, the terms and conditions of this Final Order shall control.

23. The parties to the DIP Credit Facility may, from time to time, enter into waivers or consents with respect thereto without further order of this Court. In addition, the parties to the DIP Credit Facility may, from time to time, enter into amendments with respect thereto without further order of this Court; provided, that, (A) the DIP Credit Facility, as amended, is not materially different from the form approved by this Final Order, (B) notice of all amendments is filed with this Court, and (C) notice of all amendments (other than those that are

ministerial or technical and do not adversely affect the Debtors) are provided in advance to counsel for the Committee and any other statutory committee, all parties requesting notice in these cases and the United States Trustee. For purposes hereof, a "material" difference from the form approved by this Final Order shall mean any difference resulting from a modification that operates to (1) shorten the maturity of the extensions of credit under the DIP Credit Facility or otherwise require more rapid principal amortization than is currently required under the DIP Credit Facility, (2) increase the aggregate amount of any of the commitments thereunder, (3) increase the rate of interest or any other fees or charges payable thereunder (other than to the extent contemplated in the DIP Credit Facility as in effect on the date of this Final Order), (4) add specific new Events of Default (as defined in the DIP Credit Facility) or shorten the notice or grace period in respect to any Default (as defined in the DIP Credit Facility) or Event of Default currently in the DIP Credit Facility, (5) enlarge the nature and extent of default remedies available to the DIP Lenders or agents under the DIP Credit Facility following the occurrence and during the continuance of an Event of Default, (6) add additional financial covenants or make any financial covenant or other negative or affirmative covenant or representation and warranty more restrictive on the Debtors, or (7) otherwise modify the DIP Credit Facility in a manner materially less favorable to the Debtors and their estates.

24. This Final Order shall constitute findings of fact and conclusions of law pursuant to Bankruptcy Rule 7052, made applicable to this proceeding by Bankruptcy Rule 9014, and shall be deemed effective and enforceable immediately upon its entry and nunc pro tunc to the Petition Date.

25. The rights, benefits, and privileges granted pursuant to this Final Order (including, without limitation, the DIP Liens, the Super-priority Claim, the Adequate Protection

Liens and the Adequate Protection Claim granted herein) shall attach and be enforceable against the bankruptcy estate of any direct or indirect subsidiary of the Debtors that is a party to the DIP Credit Facility and which hereafter becomes a debtor in these procedurally consolidated cases automatically and without further court order on a final basis. Except as may be provided in this Final Order, such subsidiary shall be deemed a "Debtor" hereunder effective as of the date such subsidiary files a petition and becomes a debtor in these cases.

26. Except as otherwise provided in this Final Order, the provisions of the DIP Credit Facility and the provisions of this Final Order, including all findings of fact and conclusions of law set forth herein, shall, immediately upon entry of this Final Order in these cases, become valid and binding upon the Debtors, the DIP Lenders, the Existing UST Secured Parties, all other creditors of the Debtors, the Committee, any other statutory committee and all other parties in interest in these cases and their respective successors and assigns, including any trustee or other fiduciary hereafter appointed as a legal representative of any Debtor's estate in these cases or in any subsequent chapter 7 case. In no event shall the DIP Lenders, whether in connection with the exercise of any rights or remedies under the DIP Credit Facility, hereunder or otherwise, be deemed to be in control of the operations of the Debtors or to be acting as a "responsible person" or "owner or operator" with respect to the operation or management of the Debtors, so long as the actions of the DIP Lenders do not constitute, within the meaning of 42 U.S.C. § 9601(20)(F), actual participation in the management or operational affairs of a vessel or facility owned or operated by a Debtor, or otherwise cause liability to arise to the federal or state government or the status of responsible person or managing agent to exist under applicable law (as such terms, or any similar terms, are used in the Comprehensive Environmental Response,

Compensation and Liability Act, sections 9601 et seq. of title 42, United States Code, as amended, or any similar federal or state statute).

27. The Committee shall receive the same reports provided by the Debtors to the DIP Lenders under section 5.2 of the DIP Credit Facility.

28. The Debtors have provided adequate and sufficient notice of the Final Hearing and this Final Order as required under section 364 of the Bankruptcy Code, Rule 4001 of the Bankruptcy Rules and Rule 4001-2 of the Local Bankruptcy Rules.

29. The Final Hearing was held pursuant to Rule 4001 of the Bankruptcy Rules.

30. This Court shall retain exclusive jurisdiction to interpret and enforce the provisions of the DIP Credit Facility, the Interim Order and this Final Order in all respects; provided, however, that in the event this Court abstains from exercising or declines to exercise jurisdiction with respect to any matter provided for in this paragraph or is without jurisdiction, such abstention, refusal, or lack of jurisdiction shall have no effect upon and shall not control, prohibit or limit the exercise of jurisdiction of any other court having competent jurisdiction with respect to any such matter.

Dated: ***June 25, 2009***
New York, New York

/s/ Robert E. Gerber
HON. ROBERT E. GERBER
UNITED STATES BANKRUPTCY JUDGE

Exhibit 3

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In Re:	)	Chapter 7
	)	
WORLDSPACE, INC., et al.,	)	Case No. 08-12412(PJW)
	)	(Jointly Administered)
Debtors.	)	
_____	)	
	)	
Charles M. Forman, chapter 7 trustee for WorldSpace, Inc., et al.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Adv. Proc. No. 10-53286(PJW)
	)	
Mentor Graphics Corporation,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION

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Counsel to Charles M. Forman, the Chapter 7 Trustee

Dated: June 5, 2014

WALSH, Judge

This opinion is with respect the Motion to Dismiss of defendant Mentor Graphics Corporation. (Doc. No. 83). This Court rules on three grounds. First, the Court takes issue with the strategic use of motions to extend time to serve process coupled with a lack of proper notice thereof to named defendants. Second, paragraph five of the Stipulation Scheduling Time to Answer/Respond to Amended Complaint and Addressing Related Relief (Doc. No. 69-1) does not salvage the service issues presented. Lastly, this Court does not believe that pursuant to Federal Rule of Civil Procedure 15(c) there is proper grounds for utilization of the relation back doctrine. The Motion to Dismiss is granted.

Procedural Background and Statement of Facts

This adversary proceeding was filed on October 15, 2010 to avoid and recover certain preferential transfers. The named defendant in the original adversary complaint was Mentor Graphics (Ireland) Limited (hereinafter "Mentor Ireland"). At that point in time, the case was a Chapter 11 reorganization, and the debtor WorldSpace, Inc. ("WorldSpace") was the entity prosecuting these claims through various adversary proceedings. WorldSpace filed its Chapter 11 on October 17, 2008 and was subsequently converted to a Chapter 7 on June 12, 2012. Prior to its conversion, WorldSpace filed five motions to extend the time to serve process relating to

the complaints to avoid and recover preferential transfers, including the complaint at issue here. In total, WorldSpace initiated fourteen adversary proceedings, and by and through its five motions extended the service of process deadline on all fourteen adversary proceedings.

Upon conversion to Chapter 7, a Trustee was appointed who subsequently filed four additional motions to extend the time to serve process in those same fourteen adversary proceedings. In total, this Court granted nine motions to extend the time to serve process. Outlined below are the dates of the motions to extend.

1. The First Motion to Extend Time was filed on 02/11/2011
2. The Second Motion to Extend Time was filed on 06/09/2011
3. The Third Motion to Extend Time was filed on 10/07/2011
4. The Fourth Motion to Extend Time was filed on 02/07/2012
5. The Fifth Motion to Extend Time was filed on 05/25/2012
6. The Sixth Motion to Extend Time was filed on 10/04/2012
7. The Seventh Motion to Extend Time was filed on 01/08/2013
8. The Eighth Motion to Extend Time was filed on 06/03/2013
9. The Ninth Motion to Extend Time was filed on 09/23/2013

Below are the details of the service, or lack thereof, of the motions to extend in relation to Mentor Ireland.

1. Mentor Ireland was served with the first motion to extend time, as well as served with the signed Order of this Court granting that motion. Service was sent to an address listed as: Mentor Graphics Ireland Limited, East Park Shannon Free

Zone, County Clare Shannon, Ireland pursuant to an affidavit of service (Doc. No. 8).

2. Mentor Ireland was served with the second motion to extend. Service was sent to an address listed as: Mentor Graphics Ireland Limited, East Park Shannon Free Zone, County Clare Shannon, Ireland pursuant to an affidavit of service (Doc. No. 11) However, Mentor Ireland was not served with the Order of this Court granting the motion.

3. Mentor Ireland was not served with the third motion to extend. An affidavit of service was filed (Doc. No. 18) without listing Mentor Ireland as a recipient of service.

4. Mentor Ireland was not served with the fourth motion to extend. An affidavit of service was filed (Doc. No. 25) without listing Mentor Ireland as a recipient of service.

5. Mentor Ireland was not served with the fifth motion to extend. An affidavit of service was filed (Doc. No. 30) without listing Mentor Ireland as a recipient of service.

6. Mentor Ireland was not served with the sixth motion to extend. The docket does not reflect any affidavit of service of the sixth motion. The docket does reflect an affidavit of service of the signed Order, however Mentor Ireland was not on that service list (Doc. No.42).

7. Mentor Ireland was not served with the seventh motion to extend. The docket does not reflect any affidavit of service of the seventh motion. The docket does reflect an affidavit of service of the signed Order, however Mentor Ireland was not on that service list (Doc. No.48).

8. Mentor Ireland was served with the eighth motion to extend time. Service was sent to an address listed as: Mentor Graphics Ireland Limited, East Park Shannon Free Zone, County Clare Shannon, Ireland pursuant to an affidavit of service (Doc. No. 50).

9. Mentor Ireland was served with the ninth motion to extend time. Service was sent to an address listed as: Mentor Graphics Ireland Limited, East Park Shannon Free Zone, County Clare Shannon, Ireland pursuant to an affidavit of service (Doc. No. 58).

Based on the record, Mentor Ireland was only served with the following: the first motion and corresponding Order, the second motion, the eighth motion, and the ninth motion. Notably, it is unclear whether or not the sixth and seventh motions were served on any interested party, as the docket does not reflect any affidavit of service in connection with those two motions.

On December 12, 2013, the Trustee filed a Summons and Certificate of Service (Doc. No. 63) in order to effectuate the prosecution of the adversary proceeding. The Certificate of Service was mailed to Mentor Graphic Corporation, Attn: Helen Lushenko, 8005 S. W. Boeckman Road, Wilsonville, OR 97070. This appears to be the first time that Mentor Graphics Corporation is mentioned as a (potential) defendant by either WorldSpace or the Trustee. In response to the summons, Mentor Ireland filed a Motion to Quash Service of Process. Subsequently, Trustee filed an amended complaint. (Doc. No. 68). Trustee amended the complaint to substitute the original defendant (Mentor Ireland) with a new defendant, Mentor Graphics Corporation (hereinafter "Mentor Oregon"). Upon that amendment, Mentor Oregon filed the Motion to Dismiss.

Jurisdiction

This Court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. §§ 157 and 1334. This proceeding involves core matters under 28 § 157(b)(2). Venue is proper in this

Court pursuant to 28 U.S.C. §§ 1408 and 1409.

Standard of Review

Defendant brought the Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(5) and 12(b)(6). Both are made applicable to the instant proceeding by Federal Bankruptcy Rule 7012. See Fed. R. Bankr. P. 7012. Federal Rule 12(b)(5) provides that a defendant may move to dismiss a complaint when a plaintiff fails to properly serve the defendant. Fed. R. Civ. P. 12(b)(5). Rule 12(b)(6) governs a motion to dismiss for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6).

When a motion challenging sufficiency of service is filed pursuant to Rule 12(b)(5), "the party asserting the validity of service bears the burden of proof on that issue." Tani v. FPL/Next Era Energy, 811 F. Supp. 2d 1004, 1025 (D. Del. 2011) (citing Grand Entm't Group, Ltd. v. Star Media Sales, Inc., 988 F.2d 476, 488 (3d Cir.1993)). In a bankruptcy context and adversary proceeding, service of process must be made in accordance with Bankruptcy Rule 7004 . Accordingly, in determining the sufficiency of service of process, Federal Rule of Civil Procedure 4 applies to this bankruptcy case pursuant to Bankruptcy Rule 7004. See Fed. R. Bankr. P. 7004. Here, the objection under Rule 12(b)(5) is an argument that the plaintiff failed to comply with the procedural requirements for proper service of the summons and complaint as set

forth in Rule 4, specifically subsection (m).

This Court has broad discretion "[u]pon determining that process has not been properly served on a defendant" to dismiss the complaint in its totality or to instead quash service of process. Umbenhauer v. Woog, 969 F.2d 25, 30 (3d Cir. 1992). Dismissal is not appropriate if it is reasonable and possible to rectify the service deficiency. Id.

In assessing a Rule 12(b)(6) motion to dismiss, this Court must "accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief." Eid v. Thompson, 740 F.3d 118, 122 (3d Cir. 2014) (citations omitted). A plaintiff must, to successfully rebuff a motion of this nature, provide factual allegations which "raise a right to relief above the speculative level...." Id. (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, (2007)). As a result, a complaint must state a plausible claim for relief to defeat a motion to dismiss. Id. (citing Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009)).

Discussion

I. Deficiencies in Notice of Motions to Extend Time to Serve Process

The most important aspect of the lack of notice present in this case stems from the lack of notice of the third motion to extend. That specific service oversight is significant. Mentor

Ireland was never made aware of the fact that the second extension motion was granted, nor made aware of any other extension requests thereafter until it was served with the eighth motion to extend, a full two years later. Any notice that Mentor Ireland had at one point concerning the possibility of being named in a lawsuit logically ended when it was never provided with the second signed Order extending service. Once the extension period stemming from the second extension motion ended, and Mentor Ireland was not served in a lawsuit, nor served with another extension motion, it had no reason know that it should take pre-litigation precautions, preserve evidence, consult with employees or take any other measure to ensure that it could defend itself on the merits of a claim. Moreover, during the two year gap period between the service of the second motion to extend and the eighth motion to extend, the statute of limitations on the underlying action expired.

Neither party has cited cases or rules which describe the notice requirements for motions to extend the service period. Due to their very nature, these types of motions can be granted on an *ex parte* basis, thus negating the notion that there exists a hard-and-fast rule that service was required upon Mentor Ireland. However, that does not end this Court's inquiry, and cannot satisfy the equitable issue before the Court.

Instances of service extension motions going forward on an *ex parte* basis do so because service cannot be effectuated by a

plaintiff, due to a defendant evading service, lack of knowledge of a defendant's whereabouts or address, or the like. See e.g. In re Global Crossing, Ltd., 385 B.R. 52, 82 (Bankr. S.D.N.Y. 2008) ("The cause for securing a Rule 4(m) order has historically been difficulties in serving a named defendant with process including such things as difficulties in finding the defendant, or a defendant's ducking service."). That is distinguishable from the case at bar. The address of Mentor Ireland was known (as exemplified by the fact that the first two extension motions were sent to their address) and the new defendant, Mentor Oregon, filed a proof of claim with a contact address in September of 2012.[1]

This Court was never apprised of the fact that service was being delayed without the full knowledge of all named defendants. This Court was under the impression that the strategic use of the extension motions was to facilitate the cases procedurally, with all interested parties aware of the proceedings.

That impression was represented to this Court and garnered from the pleadings. In the second motion to extend, in order to persuade this Court to grant another extension motion, it was pled that the first motion to extend was "served upon interested parties." (Doc. No. 10, ¶ 3). That was a true statement as noted above, Mentor Ireland was served with the first motion to extend. In the third motion to extend, it was pled to this Court

[1] Trustee filed four motions to extend the time to serve process after Mentor Oregon's proof of claim was filed.

that the second motion to extend was "served upon interested parties." (Doc. No. 17, ¶ 4). Again, that was a true statement. In the pleadings requesting a fourth motion to extend, it was represented to this Court that the third motion to extend was "served upon interested parties." (Doc. No. 24, ¶ 5). As it turns out, that is not a true statement. In the Fifth motion to extend, it was represented to this Court that the fourth motion to extend was "served upon interested parties." (Doc. No. 28, ¶ 6). Again, that is not a true statement. The last four motions to extend do not address notice to named defendants.

It bears emphasis that there is nothing inherently improper concerning the use of extension motions in a bankruptcy context to facilitate a reorganization or for some other procedural or equitable endeavor. See e.g. In re Interstate Bakeries Corp., 460 B.R. 222, 230 (B.A.P. 8th Cir. 2011) aff'd, 476 F. App'x 97 (8th Cir. 2012) (discussing that extension of service deadline was proper and discussing further in *dicta* that the debtor "obtained an extended [service] deadline from the court and provided all potential defendants with notice and the opportunity to be heard" and that the interested defendant "was afforded six separate opportunities to object to the extension of time[.]").

Had this Court known that four years after the original complaint was filed, service would be made for the first time, alerting a corporation to the existence of a potential lawsuit for

the first time, this Court would have questioned in a different manner the existence of due diligence in service, due diligence in prosecution, good cause and prejudice when reviewing the nine extension motions. The issues stated above are outcome determinative in this matter as they affect the relation back doctrine, discussed below.

II. Misplaced Reliance on Stipulation Agreement

On behalf of Mentor Ireland and Mentor Oregon their counsel consented to the filing of the amended complaint (Doc. # 68). However, that stipulation provides that "Nothing in this Stipulation shall be deemed a waiver of any defense or argument which Defendant Mentor Graphics Corporation might raise in this adversary proceeding." (Doc. # 69, ¶ 5).

III. There is No Ability to Relate Back Pursuant to Rule 15(c)

Trustee's Rule 15(c) relation back argument is unpersuasive. Federal Rule 15(c) is written in the conjunctive, and as such courts conclude that all of the conditions of this Rule must be met for a successful relation back of an amended complaint that seeks to substitute newly named defendants. Singletary v. Pa. Dep't of Corr., 266 F.3d 186, 194 (3d Cir.2001). The Trustee bears the burden of proof on these requirements. Markhorst v. Ridgid, Inc., 480 F. Supp. 2d 813, 815 (E.D. Pa. 2007). The purpose of the relation back doctrine is to balance the interests of the defendant, which are protected by the statute of limitations, with

the general preference to resolve disputes on the merits and not on mere technicalities. Krupski v. Costa Crociere S. p. A., 560 U.S. 538, 550 (2010). Rule 15(c) provides:

> (c) Relation Back of Amendments.
>
> (1) When an Amendment Relates Back. An amendment to a pleading relates back to the date of the original pleading when:
>
> (A) the law that provides the applicable statute of limitations allows relation back;
> (B) the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out--or attempted to be set out--in the original pleading; or
> (C) the amendment changes the party or the naming of the party against whom a claim is asserted, if Rule 15(c)(1)(B) is satisfied and if, within the period provided by Rule 4(m) for serving the summons and complaint, the party to be brought in by amendment:
> (i) received such notice of the action that it will not be prejudiced in defending on the merits; and
> (ii) knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity.

Civ. P. 15(c).

The original complaint filed on October 15, 2010 named Mentor Ireland as the defendant, but was never served. The amended complaint named Mentor Oregon, and was filed and served on January 29, 2014.

A. Same Transaction or Occurrence in Original Pleading

The first applicable requirement is 15(c)(1)(B)'s mandate that the amended pleading can only relate back as long as it

asserts a claim that arose out of the conduct, transaction or occurrence which was set out or attempted to be set out, in the original pleading. Fed. R. Civ. P. 15(c)(1)(B). This requirement is met in part. The original complaint outlines claims that arose from three preference transactions, totaling approximately $234,390.00. Exhibit A of the original complaint outlined the three transactions in more detail, claiming a payment of $77,908.50 was made on 7/31/2008; a payment of $74,012.00 was made on 8/22/2008 and a payment of 82,469.50 was made on 9/4/2008. No other details nor evidence of the three transactions were provided. The amended complaint asserts the same preference transactions, but it identifies a different transferee.

Rule 15(c) outlines the seemingly complex hurdles that a plaintiff must jump to allow an amended claim to relate back. Relation back allows a plaintiff to evade the otherwise applicable statute of limitations. See Glover v. F.D.I.C., 698 F.3d 139, 145 (3d Cir. 2012) (citing Krupski, 560 U.S. 538). That extraordinary result potentially allowed under Rule 15(c) is premised on fair notice. Fair notice comes into play to balance the rights provided under Rule 15(c) with the protections defendants receive from the statute of limitations. Glover, 698 F.3d at 145-46 ("Though not expressly stated, it is well-established that the touchstone for relation back is fair notice, because Rule 15(c) is premised on the theory that a party who has been notified of litigation concerning

a particular occurrence has been given all the notice that statutes of limitations were intended to provide.") (citations omitted).

B. The Applicable Rule 4(m) Time-Period

Under Rule 15(c)(1)(C), in order to add a new defendant the notice requirements within the rule are tied to the timing requirements of Rule 4(m). See Fed. R. Civ. P. 15. Rule 4(m) requires that a defendant is served within 120 days after the complaint is filed. Fed. R. Civ. P. 4(m). If that deadline expires before service occurs, the court must dismiss the action or order that service be effectuated. Id. However, if good cause exists for the failure to serve, a court can also extend the time to serve. Id. This Court granted the nine extension motions in part pursuant to Rule 4(m).

Thus, in analyzing Rule 15(c), an amendment relates back when, during the above described Rule 4(m) period, a party to be brought in by amendment: (i) received notice of the action and will not be prejudiced defending on the merits and (ii) knew or should have known the action would be brought but for a mistake. See Fed. R. Civ. P. 15. Upon careful review of the facts specific to this case, and the Federal Rules of Civil Procedure, this Court needs to decide exactly what the relevant 4(m) time period is to determine whether Mentor Oregon can be added as a defendant.

Trustee argues that for the purposes of relation back, the relevant Rule 4(m) period extended through January 30, 2014

which includes all nine motions to extend. Mentor Oregon believes that none of the motions to extend should allow the relation back, and the relevant Rule 4(m) period ended 120 days after the filing of the original complaint which expired on February 12, 2011.

This Court is mindful of the fact that in most situations, motions to extend are included in a relation back analysis. See Wright and Miller, 6A Fed. Prac. & Proc. Civ. § 1498.1 (3d ed.) ("[N]otice required under the rule . . . is linked to the federal service period of 120 days or any additional time resulting from a court ordered extension." Even the comments to the Rules themselves seemingly contextualize that this is the appropriate result. See Fed. R. Civ. P. 15, Advisory Committee Notes to 1991 Amendment ("In allowing a name-correcting amendment within the time allowed by Rule 4(m), this rule allows not only the 120 days specified in that rule, but also any additional time resulting from any extension ordered by the court pursuant to that rule, as may be granted . . . ."). Numerous other courts addressing only the issue of the relevant Rule 4(m) period, without the service failures present here, have also come to the same conclusion. See Robinson v. Clipse, 602 F.3d 605, 608 (4th Cir. 2010)("Rule 15(c)'s notice period incorporates any extension of the 120-day period under Rule 4(m)."); Williams v. City of New York, 06-CV-6601 NGG, 2009 WL 3254465 at *5 (E.D.N.Y. Oct. 9, 2009); Sciotti v. Saint-Gobain Containers, Inc., 06-CV-6422 CJS, 2008 WL

2097543 at *5 (W.D.N.Y. May 19, 2008). See also In re Global Link Telecom Corp., 327 B.R. 711, 715 (Bankr. D. Del. 2005) (stating that service was sufficient to survive a 12(b)(5) motion and defendant was bound by the Rule 4(m) extension motion when defendant was served with notice of the motion, did not object, and a hearing was held to address concerns of other defendants who did raise objections).

This Court felt that is was prudent to analyze the Rule 4(m) period in depth, considering the specific facts of this case which detail significant notice failures.

It would, for all intents and purposes, defeat the purpose of the relation back doctrine if it was a stead-fast rule that motions to extend were deemed ineffective as against previously unknown or unnamed defendants or unnamed in all situations. However, this Court cannot ignore the inherent injustice in failing to serve a named defendant with an extension motion, which operates to keep a claim alive years after the statute of limitations would have already expunged the issue. This Court should not allow a motion which was not served on an original, named defendant, to extend the time applicable to sue a new defendant.

As such, the relevant time period for analyzing Rule 15(c) does not include any motion to extend which was not served on

Mentor Ireland. The relevant period ends after the expiration of the second motion to extend on October 10, 2011.

C. Notice to Avoid Prejudice in Defending on the Merits

Notice to avoid prejudice in defending itself can be either actual or imputed. Garvin v. City of Philadelphia, 354 F.3d 215, 222-23 (3d Cir. 2003). The notice must be received such that there is no prejudice to the newly named defendant which would prevent them from maintaining a defense on the merits. Miller v. Hassinger, 173 F. App'x 948, 955 (3d Cir. 2006). Relation back can only occur if on or before October 10, 2011 Mentor Oregon had notice to prevent prejudice. It is clear from the evidence that actual notice was not had.

Without actual notice, there can be instead imputed or constructive notice. In the Third Circuit, imputed notice requires a showing of either a shared attorney or an identity of interest. In re Joey's Steakhouse, LLC, 474 B.R. 167, 179 (Bankr. E.D. Pa. 2012) (citing Garvin, 354 F.3d at 222–223). There is no feasible argument that during the relevant time period, the shared attorney theory of imputed notice provided notice to Mentor Oregon. No evidence was proffered that Mentor Oregon had retained, spoke with or conferred with counsel during all relevant times. Additionally, no evidence was proffered that Mentor Ireland retained counsel during that same time period. Thus, imputed notice fails under this theory. See Singletary, 266 F.3d at 196 ("The 'shared attorney'

method of imputing Rule 15(c)(3) notice is based on the notion that, when an originally named party and the party who is sought to be added are represented by the same attorney, the attorney is likely to have communicated to the latter party that he may very well be joined in the action.").

Notice under identity of interest also fails to provide notice. To meet imputed notice under this theory, "the newly named Defendant and the original Defendants may be so closely intertwined in their business operations or other activities that the filing of suit against one effectively provides notice of the action to the other." Joey's Steakhouse, 474 B.R. at 180. Again, there has been no evidence that these entities are sufficiently intertwined. This inquiry is a fact intensive determination. There has been no evidence presented to the Court that these two entities share service agents, share officers, board members or directors, nor do they share offices or addresses. The sole piece of evidence proffered of the shared identity of the two entities is a document which was printed on 3/10/2014 that states that, pursuant to the website of Mentor Graphics Worldwide, the Irish corporation appears to now be named "Mentor Graphics Corporation." (Doc. No. 77). However, Trustee did not provide this Court with a date or time line of when the name change occurred. It was simply stated that it was "post-petition." (Doc. No. 91). Accordingly, its evidentiary value is negligible.

Moving forward, this notice analysis is inextricably intertwined with a prejudice analysis. Abdell v. City of New York, 759 F. Supp. 2d 450, 454 (S.D.N.Y. 2010) ("Indeed, the linchpin of relation back doctrine is notice within the limitations period, so that the later-named party will not be prejudiced in defending the case on the merits.") (citations omitted). Notice itself is not sufficient, it must be notice such that the defendant is not the victim of an unfair surprise. Without notice, there is inherent prejudice, which makes the actual prejudice Mentor Oregon faces clear. The transaction outlined in the complaint occurred in 2008, the complaint was filed (but never served) against a different entity (Mentor Ireland) in 2010, and the newly added defendant was not aware of the suit until the fall of 2013. The claims are stale and the evidence is lost or eroded. There is no evidence that pre-litigation precautions were taken by Mentor Oregon.

This is a perfect example of winning the battle, only to lose the war. While the relevant time period was extended for WorldSpace and the Trustee to effectuate service, it is that precise time period which undoubtedly harms Mentor Oregon's ability to defend itself. The notice requirement exists so that the new defendant has the ability to "anticipate and therefore prepare for his role as a defendant." In re Integrated Res. Real Estate Ltd. Partnerships Sec. Litig., 815 F. Supp. 620, 648 (S.D.N.Y. 1993) ("A firm or an individual may receive notice that the lawsuit exists

. . . without recognizing itself as the proper defendant and so without knowledge that it would be sued . . . just as a firm or individual may be the proper party without receiving any notice at all. The former is as thoroughly barred by Rule 15(c) as the latter."). Those unserved motions to extend the time to serve did not place Mentor Oregon in a position upon which it knew to initiate any type of preservation of evidence process. There is no evidence that employees of Mentor Oregon involved in the transaction were questioned, nor were files preserved on a litigation hold.

It is inconceivable under these facts that Mentor Oregon could be called upon to defend itself. That is why it would be particularly prudent for a party using Rule 4(m) motions to strategically and tactfully extend the time to serve process to ensure that before years go by without service, that adequate notice is given. See Nelson v. Cnty. of Allegheny, 60 F.3d 1010, 1014-15 (3d Cir. 1995) ("The emphasis of the first prong of this [Rule 15(c)] inquiry is on notice. The 'prejudice' to which the Rule refers is that suffered by one who, for lack of timely notice that a suit has been instituted, must set about assembling evidence and constructing a defense when the case is already stale.")(citations omitted); Bryant v. Vernoski, CIV.A. 11-263, 2012 WL 1132503 at *2 (M.D. Pa. Apr. 4, 2012) ("The second condition, requiring notice in order to avoid prejudice, is the

heart of the relation back analysis.") (citing Schiavone v. Fortune, 477 U.S. 21, 31 (1986)).

D. Mistake Concerning the Proper Party's Identity

This last requirement for adding a new defendant and relating it back to an original complaint is wholly separate from the notice and prejudice element discussed above. Under Rule 15(c)(1)(C)(ii), the change relates back if the new defendant "knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity." Fed. R. Civ. P. 15(c)(1)(C)(ii). Thus, Trustee needs to proffer evidence that Mentor Oregon knew or should have known during the 4(m) period that it should have been the target of the original complaint. The Supreme Court has made it clear that the accurate inquiry is what the party to be added knew or should have known, and should not focus on the plaintiffs knowledge or timeliness in amending the complaint. Krupski, 560 U.S. at 541.

There is no evidence that Mentor Oregon had reason to believe it was incorrectly omitted from the original lawsuit or that but for an error, it should have been the defending party. Both Mentor Ireland and Mentor Oregon signed separate contracts at separate times with WorldSpace. To be clear, Mentor Ireland was never served, and thus never saw the complaint at issue. All it received was two extension motions. Those extension motions did not outline the claims that would be potentially asserted, or specify

the contracts under which avoidance was sought. More importantly, calling into question the potential avoidability of one contract does not impute potential avoidability of a different contract. So Mentor Ireland was never appraised of any fact upon which they knew the wrong transferee was being sued. The same logic applies to Mentor Oregon; it was never appraised of a fact that would alert them that a potential mistake was made.[2]

Other than a similarity in name, Trustee has not provided any evidence that these two separate entities had any reason to believe that a preference action against could possibly be a mistake for a preference against the other. Both corporations have separate and distinct addresses. The post-petition name change of Mentor Ireland, outlined above, again does not satisfy the Trustees burden that these two entities should have known they could be mistaken for each other. The document which outlines an undated change is essentially irrelevant. More importantly, calling into question the payments stemming from one contract with a debtor does not impute a potential preference action of a different contract. See In re 360networks (USA) Inc., 367 B.R. 428, 434 (Bankr. S.D.N.Y. 2007) ("[T]he mere fact that all of these transactions are potentially preferential transfers is of no consequence when

[2] Due to the fact that the original complaint and amended complaint are seeking avoidance on the same set of three payments, had Mentor Ireland been served, it would not have taken long for them to inform all other interested parties that the wrong transferee is being sued. This is the risk taken when waiting years to finally effectuate service.

performing a Rule 15(c)(2) analysis. In the context of preference actions, each potential preferential transfer is a separate and distinct transaction: a preference action based on one transfer does not put defendant on notice of claims with respect to any other unidentified transfers.").

Further, there has been no argument proffered by Trustee that a mistake was made, as opposed to a deliberate choice to sue one entity over the other. Krupski, 560 U.S. at 549 ("making a deliberate choice to sue one party instead of another while fully understanding the factual and legal differences between the two parties is the antithesis of making a mistake concerning the proper party's identity."). Trustee's answering brief did not even address this element. No argument was made that it was a mistake to send notices of the extension motions to an address in Ireland, to recover on claims against a corporation in Oregon. This Court is not convinced that the mistake in naming the wrong defendant was due to a technicality or confusion between the two corporate entities. See Joseph v. Elan Motorsports Technologies Racing Corp., 638 F.3d 555, 560 (7th Cir. 2011) ("A potential defendant who has not been named in a lawsuit by the time the statute of limitations has run is entitled to repose—unless it is or should be apparent to that person that he is the beneficiary of a mere slip of the pen, as it were."). While Mentor Ireland was a subsidiary of Mentor Oregon, they each had independently contractual

relationships with WorldSpace. The alleged preferences arose out of those separately contractual relationships with WorldSpace.

The awareness of both Mentor Ireland and Mentor Oregon does not foreclose the possibility that a mistake still occurred in choosing which entity to sue; and it does not conclusively determine whether Mentor Oregon knew or should have known that there was an error. However, even after the Trustee was appointed, service of the motions to extend continued to be served on Mentor Ireland; underscoring a reasonable perception that it was the transactions between WorldSpace and Mentor Ireland which were being prosecuted. See Krupski, 560 U.S. at 552. ("When the original complaint and the plaintiff's conduct compel the conclusion that the failure to name the prospective defendant in the original complaint was the result of a fully informed decision as opposed to a mistake concerning the proper defendant's identity, the requirements of Rule 15(c)(1)(C)(ii) are not met.").

Conclusion

To summarize. The complaint was filed on October 15, 2010 with respect to transactions that occurred in July, August and September 2008. Plaintiff sought and obtained nine extensions of time to serve the complaint. A number of these extensions were procedurally improper. The last extension order set a cutoff date of January 30, 2014. Summons was served On Mentor Ireland on December 12, 2013. The amended complaint which dropped defendant

Mentor Ireland and substituted Mentor Oregon as the defendant was filed on January 29, 2014, over five years after the relevant transactions took place.

For the reasons stated above, the Motion to Dismiss of Mentor Oregon will be granted.

Exhibit 4

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 1-09-50026-reg

Adversary Case No. 09-00504-reg

- -x

In the Matter of:

GENERAL MOTORS CORPORATION,

Debtor.

- -x

OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF GENERAL MOTORS CORPORATION,

Plaintiff,

-against-

JPMORGAN CHASE BANK, N.A. individually and as Administrative Agent for various lenders party to the Term Loan Agreement described herein, ABN AMRO Bank N.V. et al.,

Defendants.

- -x

United States Bankruptcy Court

One Bowling Green

New York, New York

October 6, 2009, 9:55 AM

B E F O R E:

HON. ROBERT E. GERBER

U.S. BANKRUPTCY JUDGE

HEARING re Chamber Conference (1) Fee Examiner; (2) Case Management Order.

HEARING re Chamber Conference re: Evercore.

HEARING re Application for an Order Pursuant to Section 327(a) and 328(a) of the Bankruptcy Code and Bankruptcy Rule 2014(a) Authorizing the Employment and Retention of Evercore Group L.L.C. As Investment Banker and Financial Advisor for the Debtors Nunc Pro Tunc to the Petition Date.

HEARING re Motion to Strike Ad Hoc Committee of Asbestos Personal Injury Claimants' Objection to Motion to Extend Stay to Certain Litigation filed by N. Kathleen Strickland on Behalf Remy International, Inc.

HEARING re Motion to Extend Automatic Stay re: Remy International, Inc.

HEARING re Debtors' Third Omnibus Motion Pursuant to 11 U.S.C. Section 365 to Reject Certain Unexpired Leases for Nonresidential Real Property.

HEARING re Debtors' Seventh Omnibus Motion Pursuant to 11 U.S.C. Section 365 to Reject Certain Executory Contracts.

HEARING re Motion of Debtors for Entry of Order Pursuant to 11 U.S.C. Section 105(a) and Fed. R. Bankr. P. 3007 and 9019(b) Authorizing the Debtors to (I) File Omnibus Claims Objections and (II) Establish Procedures for Settling Certain Claims.

HEARING re Motion to Extend Automatic Stay on Behalf of Detroit Diesel Corporation to Cover Certain Litigation.

HEARING re Motion to Dismiss Party Detroit Diesel Corporation (related document(s) 3960) Filed by Gerolyn P. Roussel on Behalf of Jeanette Garnett Pichon.

HEARING re Adversary Proceeding Official Committee of Unsecured Creditors vs. JPMorgan Chase Bank N.A. Pretrial Conference.

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JENNIFER H. SCHILLING, Interested Party;

Capital Management

P R O C E E D I N G S

THE COURT: All right. GM, I'll start with the matters that GM has where it's the movant. Then I will take the status conference on the creditors' committee's adversary against JPMorgan Chase and then I'll take the two motions by the nondebtors vis-a-vis the extension of the stay. Go ahead, please.

MR. LEDERMAN: Good morning, Your Honor. Evan Lederman, Weil, Gotshal & Manges for the debtors.

THE COURT: Good morning, Mr. Lederman.

MR. LEDERMAN: Good morning, Your Honor.

We have three uncontested matters that are on for today. I'm happy to walk the Court through them or if you'd like --

THE COURT: I'll tell you the truth, Mr. Lederman, since there were no objections under my case management order, I hate to make your trip down here so meaningless but I'm of a view to just approve them all.

MR. LEDERMAN: That's certainly fine with us, Your Honor.

THE COURT: Okay. They're approved.

MR. LEDERMAN: Thank you, Your Honor.

THE COURT: Okay. We're now up to the adversary proceeding against JPMorgan Chase?

(Pause)

THE COURT: All right. Let me just get to know you guys. Tell me about your game plan for litigating this thing.

MR. FISHER: Good morning, Your Honor. Eric Fisher from Butzel Long, special counsel to the creditors' committee.

As Your Honor is aware, this is an avoidance action against JPMorgan and hundreds of other financial institution defendants seeking to avoid significant amounts, in excess of 1.5 billion dollars, that was paid out postpetition.

Our game plan, Your Honor, for litigation the case is we've conferred extensively with counsel for JPMorgan and we have a plan to litigate this case quickly and without the involvement of the hundreds of other defendants aside from JPMorgan. JPMorgan served as administrative agent on the loan that's really at issue here, the term loan. And the other defendants are defendants to the extent that they received payments under the loan. But neither side believes that those hundreds of other defendants have meaningful discovery.

And so what we would propose to Your Honor today, and we're prepared to hand up an agreed to scheduling order, is that the creditors' committee's time to serve the summons and complaint be extended out in total to 240 days. And that JPMorgan and the creditors' committee have proposed -- will propose a schedule that allows us to essentially litigate this case from beginning through dispositive motions during that period of time and have dispositive motions briefed to Your

Honor by March 2010.

THE COURT: Uh-huh. I may want to hear more from you, Mr. Fisher. But I'd like to hear from counsel for JPMorgan chase.

MR. CALLAGY: Good morning, Your Honor. John Callagy from Kelley Drye & Warren representing JPMorgan Chase both individually and as administrative agent, we were sued in both capacities.

THE COURT: Your client has some of its own money still in the facility?

MR. CALLAGY: Correct. Well actually the money has been paid, as Your Honor knows. The money has been paid out of the -- from the --

THE COURT: Okay. But it had a piece of the action --

MR. CALLAGY: Yes.

THE COURT: -- in the underlying indebtedness.

MR. CALLAGY: Yes.

THE COURT: It wasn't all, hundred percent, syndicated out.

MR. CALLGY: Correct. So as Mr. Fisher stated, we've been trying to wrestle with the idea of how do we get this thing resolved without bringing in 300 other investors, members of the syndicate. And it seems, even though JPMorgan is of the position -- and we have provided evidence to the creditor's counsel that there was no authority for the inadvertent filing

of the original UCC 3 which was actually filed on the wrong loan at the time it was filed on the wrong loan at the time it was originally filed.

Not being satisfied with that, we have offered to make certain discovery available to them to try to satisfy the creditors' committee that in fact there was no authority for the filing of the UCC 3 on what we refer to as the term loan as opposed to the other loan with a synthetic lease transaction which was properly terminated back in 2006. When the UCC 3 was filed terminating that loan and the UCC 3 was filed terminating the so-called term loan or the collateral on the term loan, the perfected nature of the term loan.

THE COURT: Uh-huh. All right. Here's what I want you to do, folks. I want you to prepare a stip or consent order that lays out what you're going to do. If it's along the lines of what you described to me I'm not going to give you a problem with approving it. I wanted to deal with the participation of the non-Chase parties. What you folks are going to do, how you're going to structure the discovery and your recommendations for teeing up motions.

I do want to do a stop, look and listen as to whether I think summary judgment's going to, which is what I assume you mean by dispositive motions, is going to be productive or not. I'm not saying that I would forbid people from doing summary judgment motions but history has taught me that sometimes a

reality check is constructive.

Is there anybody, other than the two of you, who wants to be heard on this adversary proceeding before I go further?

(No audible response)

THE COURT: I don't see anybody. Okay. Any problem with doing that, Mr. Callagy?

MR. CALLAGY: Your Honor, we actually have prepared, jointly, a stipulated scheduling order. And I believe that it's on a disk pursuant to Your Honor's preference and it is -- we can make that available on short order.

THE COURT: All right. Mr. Fisher, you've reviewed it and you're on board on that as well?

MR. CALLAGY: Yes, we agree with it and we're prepared to hand it up right now.

THE COURT: Well handing it up right now isn't going to accomplish much. But if you take it across the hall to my courtroom deputy and tell her to put it in the pile for stuff for me to see when I can get to it, I'll review it. And if it's the way you described it, I'll approve it.

MR. CALLAGY: Can I have a little more guidance, Your Honor, in terms of stop, look and listen in terms of how and what form would you like us to provide that advice to the Court?

THE COURT: Well I've got to tell you the truth, Mr. Callagy. I triage my matters and I deal with the most urgent

ones and that's both in terms of preparing for hearings and deciding disputes. I'm not up to speed on the underlying issues in this adversary to the same extent I would be if you actually had a motion before me rather than a status conference. And unless I'm missing something, this is the first status conference we've had in this adversary proceeding.

MR. CALLAGY: Yes.

THE COURT: What I normally do, and I see no reason why this would be an exception, is I find out what somebody wants to raise in the way of a dispositive motion and the theory under which he or she or it thinks it should be granted. And I don't look for a mini-briefing or mini-trial but I just try to get the lay of the land and understanding of what is the subject of the motion. Then I have, typically, a conference call, if people are in town sometimes in person. I tell you my views as to whether I would prefer to take a summary judgment motion or whether I just prefer that you give me your direct testimony affidavits and we try it.

MR. CALLAGY: Okay. Thank you. We will do that at the appropriate time, Your Honor. Thank you.

THE COURT: Okay. Have a good day, folks.

MR. FISHER: Thank you, Your Honor.

THE COURT: All right. Now, do I have anything on the calendar other than the Detroit Diesel and Remy motions to extend the stay?

(No audible response)

THE COURT: All right. Are the movants here on that?

UNIDENTIFIED ATTORNEY: Yes, Your Honor.

THE COURT: Come on up, please. I'll hear first from Detroit Diesel. Actually, no I want the movants on both to come up and I also want you to come up, Mr. Esserman.

MR. CONWAY: Good morning, Your Honor. Michael Conway of LeClair Ryan representing Detroit Diesel Corporation.

THE COURT: All right, Mr. Conway.

MR. CONWAY: Your Honor --

THE COURT: No, I'll take introductions and then I have preliminary remarks. I don't want to hear argument yet.

MR. HEINEMAN: Good morning, Your Honor. Geoffrey Heineman from Ropers Majeski Kohn and Bentley for Remy International.

THE COURT: All right.

MR. ESSERMAN: Good morning, Your Honor. Sander L. Esserman for the ad hoc committee.

THE COURT: All right. Gentlemen, the motion to strike the -- yes?

MR. DEATON: Good morning, Your Honor. John Deaton, I was admitted pro hac vice for four Rhode Island cases that are affected by this.

THE COURT: Your last name again?

MR. DEATON: D-E-A-T-O-N, John Deaton.

THE COURT: All right. Gentlemen, the motion to strike the asbestos committee's response on the ground that it was filed thirty-six minutes late is denied. And I don't know how people practice where you came from, but I'm not going to speak at length on what I think of that motion, we're going to deal with the merits.

Now, when it's time for Detroit Diesel and Remy to speak I want you to brief me on the extent, if any, to which a 362 extension motion has ever been granted when the debtor didn't ask for it and when the third party, which was seeking to extend it, was professing to speak what was good for the estate and the debtor and the creditors' committee didn't share its view and didn't join in that kind of a motion.

I also want you to address the prejudice, to me, of an incremental unsecured claim effecting the debtor's ability to reorganize or creating material distraction to a management operating its company and the extent to which impairing the ability of tort litigants to go against a nondebtor is consistent with the public interest. I'll start with you, Mr. Conway.

MR. CONWAY: Thank you, Your Honor. I'll start with your first inquiry with respect to a matter that's been raised of this nature by a nondebtor where the creditors' committee and the debtor did not join. Frankly, I'm not aware of any case like that. I'm also not aware of any case which was

denied -- any motion was denied for those reasons. And I will go so far as to say, Your Honor, that this motion was vetted with the debtor before it was made and there is no concerns raised to me from the debtor. I have no reason to believe that the debtor has an issue with this and I suspect the debtor has to realize that it's in the best interest -- in their best interest not to have the distraction during this case of having Detroit Diesel make claims for defense fees every time they're incurred. We're talking about --

THE COURT: Well, it's a prepetition -- the indemnification obligation, assuming it exists, is a prepetition debt, right?

MR. CONWAY: Your Honor, the prepetition obligation does exist. We have cases that relate to GM and because of GM Detroit Diesel that get filed on a regular basis. Last year there were 150, this year there are sixty-five. I suspect next year there'll be new cases we haven't heard of. And I believe the law is that a claim for indemnification that arises prepetition based on a third party tort allegation gives rise to a postpetition claim.

THE COURT: In anywhere other than the Third Circuit?

MR. CONWAY: Well, Your Honor, no. Most of these asbestos claims seem to end up in the Third Circuit. No, I can't give you --

THE COURT: Because the Third Circuit law in that area

is an aberration, right?

MR. CONWAY: I don't like to think of it that way, Your Honor, since I'm arguing the same position.

THE COURT: Go on.

MR. CONWAY: Your Honor, the -- I think the crux of your various questions was what is the harm to or what is the impact on the GM bankruptcy. Obviously the GM bankruptcy is not indicative of every bankruptcy we've ever seen; it's a little bit larger.

It's difficult for any of us who are not in the day-to-day trenches administering this bankruptcy to know how different it is from others. But if we focus on this not strictly as one of the largest bankruptcies in the history of this country but rather as if it were any other bankruptcy, there's no doubt that having hundreds of claims for indemnification filed on a regular basis and having to do a valuation hearing as to what the possible indemnification claims would be going forward for those cases that haven't been filed yet would be a tremendous burden to the estate. Whether that's material, in light of the billions of dollars at stake, in the GM bankruptcy is another question. But Detroit Diesel Corporation, which was not in existence when any of these claims were -- came to light, should not be held responsible for the fact that it happened to be related to a debtor that's larger than others.

The fact of the matter is, Your Honor, none of these cases relate to claims made after Detroit Diesel came into existence. They all relate to claims from the '60s, the 70s, before Detroit Diesel was ever even considered by GM. I think GM created Detroit Diesel in 1988 in a joint venture with the Penske Corporation. And these -- this concept that these plaintiffs are using to threaten liability here isn't that there's a -- that Detroit Diesel's a joint tortfeaser. It's that Detroit Diesel somehow has successor liability of GM.

GM didn't go out of business in 1988 and none of these assets are related to a wholesale sale of assets of a business. They were specific assets sold to a newly formed corporation. Any claims that could have been made based on problems with asbestos that GM had in the '60s and the '70s relate to GM. That's why GM entered into an agreement that said any costs you incur we'll pick up. Any liability you incur from a judgment we'll pick up.

They had an insurance policy specifically related to these claims, which will be attacked by Detroit Diesel Corporation if there's an unpaid judgment for indemnification or an unpaid claim for indemnification. And what we've got here is an opportunity for these plaintiffs who would otherwise, if these were just strictly claims against GM and they would be standing in the shoes of every other unsecured creditor of GM, it's an opportunity for them to say okay we'll

get a hundred cents on the dollar from Detroit Diesel. Detroit Diesel will then be responsible for going to GM and getting their share of the unsecured creditor's claim. And then going to the insurance carriers who, under both Michigan and New York law, would have to pay a hundred cents on the dollar from those policies that exist to protect GM and are property of the GM estate.

So now what they've done is they've -- one shifted the burden to Detroit Diesel to get paid in full but they've also stepped in front of all those creditors of GM that aren't going to get paid in full. It's simply an end to run around the Bankruptcy Code. It's not a situation here where we have joint tortfeasers the way you have in most cases where there's a request to extend the stay.

You've got debtors that request an extension of the stay to protect their officers and directors. When the officers and directors are clearly joint tortfeasers those motions are granted typically because of the necessity at the outset of a bankruptcy case. They're usually not stays that last throughout the case but the fact of the matter is that's not what A.H. Robbins was contemplating, it's what its become. H. Robbins contemplated what we have here, where you've got an entity which is being sued not because it's a joint tortfeaser but because it was once somehow a part of the debtor who was the tortfeaser.

There's no case that's been cited in any of the briefs that comes close to being an A.H. Robbins case as ours. Our case, unfortunately, is raised in a bankruptcy where it's hard to argue that the millions of dollars at stake, if not hundreds of millions of dollars at stake, are material. Because the GM case has billions of dollars at stake.

But again, as I pointed out Your Honor, I don't think that Detroit Diesel should be penalized because GM's a big case. I think the same principles should apply whether this was a hundred million dollar bankruptcy or a hundred billion dollar bankruptcy.

Now there's been some attack on this theory that Detroit Diesel will be entitled to make a claim against the insurance policies. Well as I point out, Your Honor, there's no question under the bankruptcy law that these policies are property of the estate. But there's also no question --

THE COURT: Don't bankruptcy courts traditionally make a distinction between entitlement to the policies being property of the estate and their proceeds being property of the estate? And aren't we really talking about access to the proceeds in contrast to the policy itself?

MR. CONWAY: Well at the end of the day, Your Honor, nobody cares about the policies; they only care about the proceeds. But I think that's true in every case. I think that --

THE COURT: Yeah. But when does the debtor get the proceeds of a liability policy?

MR. CONWAY: The debtor --

THE COURT: The debtor doesn't turn the proceeds of a liability policy and turn it into a distributable sum for the benefit of its creditors. It uses it to satisfy obligations that it owes to the plaintiffs of America.

MR. CONWAY: Well Your Honor, I think that in this case you're going to find that a number of the creditors out there are going to be creditors with claims that fall under these policies. If those creditors receive a recovery, whether it be ten cents on the dollar or one cent on the dollar, that's a claim that the GM estate has against that insurance policy for reimbursement so that they can then increase the pool for the creditors.

There's no reason why the pool that GM has established for its unsecured creditors should be diminished if there's an insurance policy in effect. The insurance policy proceeds aren't, somehow, cut away from the bankruptcy estate here. They are going to be available -- if there are claims made they're going to be made available to GM if there are claims made against GM that qualify under the policy.

Now I agree with you that Detroit Diesel is interested in the proceeds of the policy but so is GM. And the fact of the matter is, Your Honor, if the debtor was concerned about

having some negative impact of extending the stay, I imagine they probably would have put in papers objecting to the extension of the stay. The fact that they didn't, I think --

THE COURT: Well, could there be a middle course, that the debtor doesn't care? That it doesn't regard -- the effect on the estate is material enough to waste the 5,000 dollars applying something that might cost it?

MR. CONWAY: Your Honor, that's exactly why we're here making the motion and the debtor isn't. Because from the debtor's point of view this case is very complicated. There's an administration that involves issues that prevent it from really focusing on the problems of Detroit Diesel Corporation, of Remy. They don't have the time to do this, but we do. Maybe if they had another couple of years to focus on this they'd get around to it. But the fact is, they don't have the time we do, that's why we're making the motion. And frankly, Your Honor, if the debtor didn't care then -- well Your Honor, that's entire possible, they don't care. But it seems unlikely that they wouldn't take some position either for or against the motion. What they don't care about is incurring the expense of either supporting or objecting to the motion given the fact that there's no harm to the estate. And in fact it's pretty clear from the papers there's a benefit to the estate, however material. There's a benefit to the estate so why should they put in those few dollars, if you want to call it, 5,000 dollars

or whatever. It's something that they're leaving to Detroit Diesel's counsel and Detroit Diesel's pocketbook. And there's nothing wrong with that. There's nothing about that that should imply that it's not acceptable under the code to do it this way. There's nothing -- there's no case that says this is how you do it, if the debtor doesn't bring the motion, relief denied. There's no statute that says if the debtor doesn't do it, relief denied.

What we have here is a situation where, again, we've got a case that's larger than most where the debtor's counsel probably just don't have the time to give it as much consideration as counsel for Detroit Diesel.

I'd like to think I answered your questions, Your Honor, but if I didn't --

THE COURT: Okay. Anything else?

MR. CONWAY: No, Your Honor. I believe the papers answer every other question that might be asked.

THE COURT: Very well. Mr. Heineman?

MR. HEINEMAN: Good morning, Your Honor. Geoffrey Heineman from Ropers Majeski Kohn & Bentley for Remy International.

I don't really have much more to add that my cocounsel hasn't already made. I just want to address, just one or two points, one of which is just to make sure there's an understanding Remy was -- Remy, in 1994, purchased the assets

of the Delco Remy division. All of the litigations, the five litigations that we're involved in all relate to alleged exposure to asbestos prior to 1994. So that all arises out of GM products and GM premises and that's why we believe the expansion of the stay is appropriate. I would note that we did notice the plaintiffs in all five of those actions, none of those plaintiffs have opposed the motion. In addition, none of the members of the ad hoc committee are plaintiffs in any of the cases that Remy is a defendant in.

With respect to the insurance issue, Your Honor, you make very valid points with respect to that. Remy, as a division -- the Remy division of General Motors pre-1994 would in fact be insured under General Motor's policies. These are all occurrence based policies, the policies that are potentially at play in these five litigations are all current space policies that were in effect when the alleged exposure happened, which could be five years, ten years, fifteen years before 1994.

To the extent Remy was a division during that time period, Remy would have been insured and therefore Remy would be entitled to make claim under those policies. Which obviously would impact the estate.

I think the rest of the points have all been made, Your Honor, and I don't want to waste the Court's time reiterating the points that my cocounsel has made.

THE COURT: Very well. Thank you. Mr. Esserman?

(Pause)

MR. ESSERMAN: Your Honor, Sandy Esserman for the ad hoc committee. I just have a couple points I'd like to raise. I think we've addressed most everything in our papers. We do think the form of these motions are inappropriate and they should be brought by adversary proceeding.

I would note that the Remy motion was filed September 16th and there was an objection by one of the claimants that are the subject of the Remy motion filed, they joined in our papers.

Further, there's been some discussion of insurance. We've asked for the insurance policies. The only thing we've heard colloquial in this court is that there's a twenty-five million dollar deductible on these insurance. So I don't know, in fact, that there is any insurance that's realistically available to any claimant. I think that came out during the sale motion. So I don't know that joint insurance is somehow an issue and I don't know that these entities are even covered by it.

Other than that, we've made all the points in our papers. Thank you.

THE COURT: Okay. Anybody else want to weigh in? Yes, sir. Come on up, please.

MR. DEATON: Thank you, Your Honor. Your Honor, John

Deaton, D-E-A-T-O-N, for four individual plaintiffs in the state of Rhode Island.

I'm not going to belabor points but I want to make a few observations. The first observation I would make, and I want to thank the Court for letting my clients be heard and my pro hac vice motion. Counsel for Detroit Diesel not only in their brief but in their oral argument makes averments and they want the court to accept those averments as evidence. There is no evidence, whatsoever, in their brief.

For example, in their oral argument they say none of these claims deal -- they deal with the '50s and the '60s and the '70s. Well I might know my cases because I'm a tort attorney, I'm not a bankruptcy attorney, a little bit better than Detroit Diesel's counsel but that's a factual issue.

The Kroskob case is a forty-four year old living mesothelioma case.

THE COURT: Forgive me, Mr. Deaton, and I know you don't appear in bankruptcy court as often as some of the other folks in the room.

MR. DEATON: Yes, sir.

THE COURT: But I need to focus on the matters of bankruptcy law and I don't think it's either necessary or appropriate for me to delve into the merits of the individual lawsuit or lawsuits that you might be prosecuting. It seems to me that that's an issue for the foreign court to decide if I

allow that lawsuit to continue.

MR. DEATON: Yes, Your Honor. The only point that I was making was that counsel in their oral argument said all of these cases predate the '94 or not even to the '90s and that's not true. The Kroskob case does go into the '90s. So I just wanted to make that factual distinction since they addressed it.

I'm not going to go into the merits or the procedure other than to say that Your Honor just raised an important issue which is the foreign state. Detroit Diesel removed the claims to Rhode Island Federal District Court, got an extension and then we're here today. If this Court does not make some type of findings of fact or conclusions of law related to the bankruptcy matter, then I would be fighting this fight in Rhode Island Federal District Court where the intent will be to put it in the NDL. And so this is the right court to hear the merits, not of the individual cases but of Detroit Diesel's claim, Your Honor. And the only thing I would --

THE COURT: Why should I be doing anything more than dealing with the bankruptcy issues? Why should I be telling an Article III district judge how to manage his docket if he's got the case before him? Or if, for that matter, he wants to remand it that would, at least, seemingly be his business. If he wants to keep it and try it himself, that would at least seemingly be his business. Or if he wants to MDL it for

pretrial purposes before he hears it, I mean that's the way 28 U.S.C. 1407 works, isn't it?

MR. DEATON: Understood, Your Honor. But Detroit Diesel gave me notice and placed my plaintiffs and their claims in peril before this Court. And with all due respect to my fine judges in Rhode Island, they don't have the bankruptcy expertise that this Court has.

And the only comment I want to make, Your Honor, is that when you read the brief by Detroit Diesel it is a pyramid of possibilities and inferences. And the only comment I'll make is that they say they may have a claim for indemnification, they may be able to recover the debtor's insurance. Should they receive a judgment then maybe a judgment in an asbestos case could be used as offensive collateral estopple against the debtor. It's possible that a subsequent suit for indemnification may follow.

And finally, Detroit Diesel might be successful in indemnification action. That's six hypothetical possibilities, Your Honor. And zero plus zero six times equals zero.

Thank you.

MR. HEINEMAN: Your Honor, if I could just add one point?

THE COURT: Yeah. I'll give you a chance to reply but I want to deal with things in an order. Is there anybody who hasn't been heard a first time before I give Mr. Heineman a

chance to be heard a second, that is who hasn't been heard a first time who wants to be heard a first time?

MR. ROUSSEL: Yes, Your Honor.

THE COURT: Wait, was somebody speaking up?

MR. ROUSSEL: Yes.

THE COURT: Is there somebody on the phone?

MR. ROUSSEL: Yes.

THE COURT: Well speak up, sir. Tell me who you are, first.

MR. ROUSSEL: This is Perry Roussel. I'm the attorney for Jeanette Pichon that filed an objection in this case. Can you hear me, Judge?

THE COURT: Not very well, Mr. Roussel, so try to speak up.

MR. ROUSSEL: I just wanted to point out, besides what my -- the other attorneys have stated objecting to this motion, is that the A.H. Robbins case filed by the debtor is completely different than what Detroit Diesel is attempting to do in this case.

I mean, in A.H. Robbins basically the -- a property of the estate was brought in and it was a debtor's estate. And also the employees of the company was covered by the state and we all know that employees of a company aren't the ones that cause the liability, a corporation can only act through its employees.

What A.H., I mean what Detroit Diesel is requesting here is more analogous to having Allstate Insurance Company filing bankruptcy and all of the persons that caused an automobile accident around the country applying for coverage in the bankruptcy stay. Which -- and all of those individuals would be independently liable for their actions and could not fall under the bankruptcy estate.

There's no basis for what Detroit Diesel is attempting to do here in bankruptcy court. And again, we would ask that that motion be denied.

I have nothing further to add except that my brief has been filed.

THE COURT: All right. Mr. Conway, anything further?

MR. CONWAY: Only a quick response to the extent necessary, Your Honor. Again, counsel for Mr. Pichon likens our case to one where there are joint tortfeasers. Nobody's alleged Detroit Diesel Corporation is a joint tortfeaser but rather successor in interest to a joint tortfeaser -- to a tortfeaser.

Similarly, Your Honor, the allegation that there's no evidence here is refuted by our papers which are full of evidence. We've got witness statements and the documents involved. And Mr. Pichon, who's on the phone, has filed in his compliant which identifies the fact that his client was involved in exposure to asbestos during 1955 to 1975, not after

1988.

Thank you, Your Honor.

THE COURT: All right. Mr. Heineman, anything further?

MR. HEINMAN: Just one or two points, Your Honor. In contrast to the issues that I've just heard with regard to Detroit Diesel, there is no dispute that Remy is entitled to absolute indemnity here. There have been nineteen cases commenced since 1994. The debtor has indemnified Remy in each and every one of those cases where defense costs as well as any losses and settlements.

Also, with respect to this motion we're only seeking a stay with respect to Remy. General Motors is a defendant in those five cases. The claims have been stayed as to General Motors. We're seeking a stay only as to Remy not to any other defendants. We're not seeking to have the case transferred to this court; we're not seeking to have the case stayed in its entirety.

Thank you, Your Honor.

THE COURT: All right. Very well. Everybody sit in place for a minute.

(Pause)

THE COURT: All right. Ladies and gentlemen, I am denying each of the motions and the following are my findings of fact and conclusions of law in connection with this

determination.

First, as facts, I find that each of the two movants is not a debtor in this case. Nor has it been suggested or is it the case that either has been deputized by the debtor with the approval of the Court to act on behalf of the estate.

I further find that each of the two movants is a defendant in one or more litigations against it, asserting liability on behalf of the movant to one or more folks who are suing or who might later sue asserting liabilities for injuries associated with exposure to asbestos. Though not strictly relevant to this determination, I emphasize that I am expressing no views and am making no findings of fact with respect to the liability, if any, by any one of the movants to any asbestos litigant.

In the case of one of the two movants, it has been alleged that the debtors have an indemnification obligation to the movant, in the other case that it may have. Ultimately, the extent to which the may turns into a does is irrelevant to my determination because even assuming for the sake of argument that the debtors do have such obligations to indemnify, their unsecured claims, at least in this district and circuit. In fact, so far as I'm aware, in every district and circuit other than the Third. And because they're prepetition claims, we're not talking about administrative expense exposure in either event. So if and to the extent any indemnification obligations

exist, they're garden variety prepetition claims.

There is also been some, but not much, showing that the debtors have insurance, although the amount of the deductible is not established. Once more, I don't need to make findings of fact on that because the briefing confused insurance policies being property of the estate with the proceeds. Insurance policies are always, or almost always, property of the estate. But whether their proceeds are property of the estate depends upon the extent to which there is any realistic expectation that the debtor would have access to the proceeds by which it could get that money in the till and use it for debtor needs and concerns.

There has been no material showing that in these -- that these policies would give rise to a pot of cash that creditors could turn into additional recoveries for themselves, I'm sure creditors wish it were otherwise but that's simply not the case.

I further find as facts that the defense of these asbestos actions would have no material affect on the debtor's reorganization or, for that matter, their liquidation. They would not -- there's been no showing that they would give rise to material distraction of management or impair management doing its job. And while I assume, without deciding, that if the indemnifications were allowed they would result in some incremental dilution of other unsecured creditors' recoveries

since it's at least foreseeable that we're going to have a pot plan here. For the benefit of the unsecured creditor community the incremental affect is not likely to have a material affect on either the estate as a whole or on any of the other creditors' recoveries.

Now as conclusions of law and bases for the exercise of my discretion I state the following. First of all, as a conclusion of law, while a motion to extend the 362 stay is, in the view of most, a contested matter and an effort to grant a supplemental injunction under 105(a) to protect against the assertion of third party claims does, as Mr. Esserman argued, require an adversary proceeding. I say this mainly, however, for the benefit of the bar going forward because there are so many reasons why the relief isn't appropriate here anyway that this observation is not, by itself, dispositive in this case.

In this instance I have to deal with two other major deficiencies, the second deficiency breaking down to three or four separate deficiencies. The first is that as we established in oral argument there is no reported case in which an injunction of the type sought here has ever been granted when sought by somebody other than the debtor, a trustee or at least the estate. I guess there's no case to the contrary either; a request of this character is unprecedented.

The normal circumstance under which either we extend the scope of the 362 stay or grant a 105(a) injunction is to

protect the estate. And when the estate needs protecting, it asks for it. And I don't know how many times cases on my watch have presented exactly this issue but it's because the debtors have asked for it. And here, at the risk of stating the obvious, we don't have that type of situation.

I don't need to say that such a request never could be granted. Perhaps it can be theorized that if a debtor sat on its hands, and didn't do its job and an injunction of this character were necessary to protect the creditors of the estate, just like we sometimes grant STN authority such a request might be considered, but this isn't such a case.

I'm confident that with counsel of the quality that we have here representing the debtors and the creditors' committee, if either of them thought relief of this type was necessary to protect the interest of the estate we would have heard about that.

Getting beyond that, we traditionally look at particular factors to grant relief of this character. To be sure, as some of the papers note, irreparable injury is not required to grant relief of this character but some injury is. There's got to be some reason for granting the relief. It may be it needn't be irreparable but you've got to show something. And here, as I found as a fact, there is no material affect upon the estate or upon its ability to reorganize or upon its ability to liquidate.

The factor of likelihood of success in reorganizing is kind of a head scratcher here because this isn't going to have an effect upon reorganization either way. So while I think it is true that the debtors are going to reorganize, or to put it differently, I think it's true that the debtors are going to be successful in taking the pot of cash they have and giving it to their creditors and then confirming a plan to make that happen, this motion has no effect on that one way or the other.

Another factor is balancing of the harms. Now here we have another head scratcher because the usual way by which we've historically looked at the balance of the harms is to look to the harm to the debtor, which is the one that's normally asking for relief of this character, and the harm to the enjoined party or to the party that's on the receiving end of the broader extension of the stay.

While there is harm to tort litigants in having a delay in the consideration of their claims, now sometimes, probably more often then we'd wish but often we've got to deal with that and it's an unfortunate consequence of the need to reorganize debtors. But here we have no material prejudice to the debtor at all. So that balancing tips dramatically in favor of not granting the injunction and simply allowing tort litigants to have their day in court.

Now why don't we extend that to the means or manner by which this request is unprecedented? It's unprecedented

because this is the first case I've seen in my forty years of -- not forty, thirty-nine, years of doing this stuff where we've ever had a nondebtor asking for this relief as contrasted to a debtor.

There is some, but not much, prejudice to the movants. They have to defend themselves in a court of law like other defendants have to do all the time. There's nothing about this that ties their hands in putting forward their defenses to the tort litigants who are suing them but they're prejudiced in the sense that they're losing the freebee of the benefit by availing themselves of the opportunity to have the Court get in the way of the litigation that they'd otherwise have to defend.

Now are they prejudiced by having to defend themselves and if it ultimately turns out that they did something for which they're liable having to pay in real one hundred cent green dollars of the United States when they recover their indemnification, if at all, in baby bankruptcy dollars? Sure. But that's no different than the prejudice that all of the other creditors of this estate have to suffer. People who have direct claims against the estate, including perhaps the asbestos victims themselves, other tort litigants, bondholders, people who slipped on the ice in front of GM's plant, everybody has to take their recoveries in little baby bankruptcy dollars. And that is not the kind of legally cognizable injury that we weigh in evaluating the balance of harms.

And lastly, there is the public interest. I'm going to say, for the second or third or fourth time, that I express no view on whether, when this case or these cases get litigated, the asbestos plaintiffs are going to win or lose. Frankly folks, that's not my business to decide. I have no ability to decide that nor should I decide that. But there is a public interest in giving them their day in court unless other factors important to the conduct of the bankruptcy case trump that goal. Here there is no such countervailing policy.

For all of the foregoing reasons the two motions are denied. Mr. Esserman, I'm going to look to you to carry the ore for the prevailing parties to settle an order in accordance with the foregoing.

MR. ESSERMAN: I will. Thank you, Your Honor.

THE COURT: All right. Am I correct that we have no other business today?

(No audible response)

THE COURT: Then we're adjourned.

MR. HEINEMAN: Thank you, sir.

MR. ESSERMAN: Thank you, Your Honor.

(Proceedings Concluded at 10:46 a.m.)

I N D E X

RULINGS

C E R T I F I C A T I O N

I, Pnina Eilberg, certify that the foregoing transcript is a true and accurate record of the proceedings.

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Pnina Eilberg

AAERT Certified Electronic Transcriber (CET**D-488)

Veritext LLC

200 Old Country Road

Suite 580

Mineola, NY 11501

Date: October 7, 2009

Exhibit 5

LIST OF TERM LOAN INVESTOR DEFENDANTS

Correct Name of Entity	**Entity as Identified in the First Amended Complaint**
Bechtel Trust & Thrift Plan & Master Trust for Certain Tax Qualified Bechtel Retirement Plans	• Bechtel Trust & Thrift Plan Becon Trust & Thrift Plan • Logan Circle – Bechtel Corporation[1]
GoldenTree Loan Opportunities III, Ltd.	Goldentree Loan Opportunities III, Ltd.
GoldenTree Loan Opportunities IV, Ltd.	Goldentree Loan Opportunities IV, Ltd.
Arch Reinsurance Ltd.	Arch Reinsurance Ltd.
Coca-Cola Company Retirement & Master Trust	• Coca Cola Co Ret & MSTR Tr • The Assets Management Committee of the Coca-Cola Company Master Retirement Trust
Caterpillar Master Retirement Trust	DDJ Cap – Caterpillar Master Retirement Trust
J.C. Penney Corporation, Inc. Pension Plan Trust	DDJ – JC Penny Pension Plan Trust
Stichting Pensioenfonds Hoogovens	DDJ – Stichting Pensioenfonds Hoogovens
Stichting Bewaarder Syntrus Achmea Global High Yield Pool f/k/a Stichting Bewaarder Interpolis Pensioenen Global High Yield Pool	DDJ Cap MGMT – Stichting Bewaarder Interpolis Pensioenen
DDJ High Yield Fund	DDJ High Yield Fund
Stichting Pensioenfonds Metaal en Techniek	Stichting Pensionfonds Me[2]
Shinnecock CLO II, Ltd.	Shinnecock CLO II Ltd.
Kynikos Opportunity Fund II LP	Kynikos Opportunity Fund II LP
Kynikos Opportunity Fund International Limited	Kynikos Opportunity Fund International Ltd.
Kynikos Opportunity Fund LP	Kynikos Opportunity Fund LP
Debello Investors LLC	Debello Investors LLC
Wexford Catalyst Investors LLC	Wexford Catalyst Investors
Wexford Spectrum Investors LLC	Wexford Spectrum Investors LLC

[1] Solely with respect to the term debt held by Bechtel Trust & Thrift Plan & Master Trust for Certain Tax Qualified Bechtel Retirement Plans.

[2] Solely with respect to assets managed by DDJ Capital Management, LLC.

St. Luke's Health System Corporation, as successor to St. Luke's Episcopal Health System Foundation	• Pimco – St. Luke Episcopal Health System Foundation • Reams – St. Luke Episcopal Health System Foundation
Master Trust Pursuant to the Retirement Plans of APL LTD and Subsidiaries	• Reams – American President Lines Ltd. • Reams – Master Trust Pursuant to the Retirement Plans of APL Ltd. & Subsidiaries
Employees' Retirement System of Baltimore County	• Reams – Baltimore County Retirement • Reams – Employees' Retirement System of Baltimore County
Board of Pensions of the Presbyterian Church (U.S.A.)	Reams – Board of Pen Presbyterian Church
Building Trades United Pension Trust Fund	Reams – Building Trades United Pension Trust
Carpenters Pension Fund of Illinois	• Reams – Carpenters Pension Fund of Illinois • Reams – Carpenters Pension Fund of Illinois Pension Plan
The Children's Hospital of Philadelphia Foundation	• Reams Children's Hospital Fund • Reams – Children's Hospital Philadelphia • The Children's Hospital Foundation
Connecticut General Life Insurance Company In Respect of Its Separate Account 4828CP	Reams – Connecticut General Life Insurance Company
Retirement Board of the Park Employees' and Retirement Board Employees' Annuity and Benefit Fund of Chicago	• Reams – Chicago Park District • Reams – Retirement Board of the Park Employees Annuity & Benefit Fund
Cummins Inc. and Affiliates Collective Investment Trust	Reams – Cummins Inc. & Affiliates Collective Investment Trust
The Duchossois Group Inc. Pension Trust	• Reams – Duchossois Ind. Inc. • The Duchossois Group Inc.
Emerson Electric Co. Retirement Master Trust	• Reams – Emerson Electric • Reams – Emerson Electric Company Retirement Master Trust
Inter-Local Pension Fund of the Graphic	Reams – Inter Local Pension Fund of the

Communications Conference of the International Brotherhood of Teamsters	Graphic Comm. International Brotherhood of Teamsters
Taxable Fixed Income Managers: Portfolio 1 [Series] f/k/a Goldman Sachs GMS Core Plus Fixed Income Portfolio	Reams – Goldman Core Plus Fixed
Halliburton Company Employee Benefit Master Trust	• Reams – Halliburton Company • Reams – Halliburton Company Employee Benefit Master Trust
Health Care Foundation of Greater Kansas City	• Health Care Foundation of Greater Kansas City • Reams – Health Care Foundation of Greater Kansas City
Eighth District Electrical Pension Fund	Reams – Eight District Electrical Pension Fund
ILWU/PMA Pension Plan Trust	• Reams – ILWU/PMA • Reams – ILWU/PMA Pension Plan
State of Indiana Major Moves Construction Fund	• Reams – St. Indiana Major Moves • Reams – State of Indiana Major Moves Construction Fund • State of Indiana Major Moves
Indiana Public Retirement System	Reams Indiana State Teachers Retirement Fund
Indiana State Police Pension Trust	• Reams – Indiana State Police • Reams Indiana State Police Pension Fund • Reams Indiana State Police Pension Trust
Kraft Foods Global, Inc. & Kraft Foods Master Retirement Trust	• Kraft Foods Global Inc. • Reams Kraft Foods Global Inc. • Reams – Kraft Foods Master Retirement Trust
Board of Fire and Police Pension Commissioners of the City of Los Angeles	• Reams Board of Fire & Police Pension Commissioners of the City of Los Angeles • Reams – LA Fire & Police
Louisiana Carpenters Regional Council Pension Trust	• Louisiana Carpenters Regional Council Pension Trust Fund

	• Reams Louisiana Carpenters Regional Council Pension Trust Fund
Municipal Employees' Retirement System of Michigan	Reams Municipal Employee Retirement System of Michigan
City of Milwaukee Employes' Retirement System	• City of Milwaukee Employees Retirement System • City of Milwaukee Retirement System • Reams City of Milwaukee Retirement System • Reams – Employes' Retirement System of the City of Milwaukee
Montana Board of Investments	• Montana Board of Investments • Reams Montana Board of Investments
Mather Foundation	• Reams – The Mather Foundation Core Plus • The Mather Foundation
Reams – Prudential Retirement Insurance & Annuity Company, on behalf of Separate Account SA-18	Reams – Prudential Retirement Insurance & Annity Company
Purdue University	Reams – Trustees of Purdue University
The Rotary Foundation	• Reams – Rotary International Foundation • Reams – The Rotary Foundation
Columbus Unconstrained Bond Fund (formerly Reams Unconstrained Bond Fund)	• Reams – Columbus Extended Market Fund LLC • Reams Unconstrained Bond Fund LLC
Santa Barbara County Employees' Retirement System	• Reams – Santa Barbara County • Reams – Santa Barbara County Employees' Retirement System • Santa Barbara County
Sonoma County Employees' Retirement Association	Reams – Sonoma County Employees Retirement Association
Scout Core Plus Bond Fund (formerly Frontegra Columbus Core Plus Bond Fund)	Reams – Frontegra Columbus Core Plus Fund
Seattle City Employees' Retirement System	• Reams – Seattle City Employee's Retirement System • Seattle City Employees' Retirement

	System
Indiana University	• Indiana University • Reams – Indiana University • Reams Trustees of Indiana University
University of Kentucky	Reams – University of Kentucky
Ventura County Employees' Retirement Association	Reams – Ventura County Employees' Retirement Association
Bill & Melinda Gates Foundation Trust	• Oaktree – Bill & Melinda Gates Foundation Trust • Reams – Bill & Melinda Gates Foundation Trust • Wells – 14945000 • Wells Capital Management 18866500
Vulcan Ventures, Inc.	Vulcan Ventures Inc.