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Company Avoidance Action Trust*

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

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In re:

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

Chapter 11

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

Debtors.

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MOTORS LIQUIDATION COMPANY AVOIDANCE
ACTION TRUST, by and through the Wilmington Trust
Company, solely in its capacity as Trust Administrator and
Trustee,

Adversary Proceeding

Plaintiff,

Case No. 09-00504 (MG)

against

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

Defendants.

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**PLAINTIFF’S RESPONSE TO NON-JPMORGAN TERM LOAN LENDERS’
COUNTER-STATEMENT OF MATERIAL FACTS PURSUANT
TO LOCAL BANKRUPTCY RULE 7056-1**

Pursuant to Federal Rule of Civil Procedure 56 and Local Bankruptcy Rule 7056-1, Plaintiff respectfully respond to the Non-JPMorgan Term Lenders' Counter-Statement of Material Facts ("CSMF") as follows:¹

59. Statement: The Synthetic Lease was a real estate transaction originated in 2001, and provided Old GM with \$325 million to finance the acquisition and/or improvement of twelve parcels of real estate, consisting primarily of parking garages and office buildings. Macdonald Decl. Ex. B (Origination Closing Binder). The list of properties is prominently displayed in the first pages of a closing binder where Mayer Brown assembled relevant contracts. *Id.*

Response: This statement is not disputed except for the word "prominently," which is an advocate's characterization—not a fact. The particulars of the Synthetic Lease transaction are not material to the issues raised by Plaintiff's summary judgment motion.

60. Statement: The properties involved in the Synthetic Lease were: (i) SPO Warehouse (Ontario, CA); (ii) SPO Warehouse (Bolingbrook, IL); (iii) Transmission Parts Distribution Center (Indianapolis, IN); (iv) SPO Warehouse (Reno, NV); (v) SPO Headquarters Building (Grand Blanc, MI); (vi) Franklin Parking Deck (Detroit, MI); (vii) Parcel 6/C (Detroit, MI); (viii) River East Parking Deck (Detroit, MI); (ix) SPO Warehouse (Denver, CO); (x) SPO Warehouse (Brandon, MS); (xi) SPO Warehouse (Charlotte, NC); and (xii) Powertrain L6 Engine Plant (Flint, MI). *Id.*

Response: This statement is not disputed. The particulars of the Synthetic Lease transaction are not material to Plaintiff's summary judgment motion.

61. Statement: By the time Old GM repaid the Synthetic Lease in October 2008, only five properties (all in Michigan) were still part of the financing. Macdonald Decl. Ex. A (October 14, 2008 Email from Green to Braybrook and Gonshorek). Those properties were: (i) SPO Headquarters (Grand Blanc, MI); (ii) Franklin Parking Deck (Detroit, MI); (iii) Parcel 6/C (Detroit, MI); (iv) River East Parking Deck (Detroit, MI); and (v) Powertrain L6 Engine Plant (Flint, MI). *Id.*

Response: This statement is not disputed. The particulars of the Synthetic Lease transaction are not material to Plaintiff's summary judgment motion.

62. Statement: The key documents comprising the Synthetic Lease transaction

¹Capitalized terms not otherwise defined have the meaning set forth in Plaintiff's Memorandum of Law in Support of its Motion for Partial Summary Judgment Dismissing the Non-JPMorgan Term Lenders' Effectiveness Defense (Adv. Pro. Dkt. No. 1086).

were a Participation Agreement; a lease between Old GM and the trust that was specially created for the transaction; an Agency Agreement; a Structural Support Agreement; a Loan Facility Agreement among the Backup Facility Banks, JPMorgan, and RFC; a Pledge Agreement and Control Agreement between the Trust and JPMorgan; and a Liquidity Agreement among RFC, the Backup Facility Banks, and JPMorgan. *Id.* Ex. B (Origination Closing Binder).

Response: This statement is not disputed. The particulars of the Synthetic Lease transaction are not material to Plaintiff's summary judgment motion.

63. Statement: The parties involved in the Synthetic Lease included Old GM, Auto Facilities Real Estate Trust 2001-1, Wilmington Trust Company, BMT Capital Corporation, JH Equity Realty Investors, Inc., Relationship Funding Company, LLC, and a series of banks, including JPMorgan. *Id.*

Response: This statement is not disputed. The particulars of the Synthetic Lease transaction are not material to Plaintiff's summary judgment motion.

64. Statement: The amount of financing from the Synthetic Lease was \$325 million. *Id.*

Response: This statement is not disputed. The particulars of the Synthetic Lease transaction are not material to Plaintiff's summary judgment motion.

65. Statement: The Term Loan originated in 2006 was secured by liens on machinery, equipment, and fixtures at forty-two manufacturing facilities (as these terms were defined, respectively, in the Collateral Agreement) spread across the United States. *See* Fisher Decl. Ex. T at 23 (Schedule 1 to Collateral Agreement). These forty-two manufacturing facilities were located in thirty-five different cities in twelve different states. *Id.*

Response: This statement is not disputed. The statement should not be read to expand the original security interest for the Term Loan beyond what the Collateral Agreement provides.

66. Statement: The collateral for the Term Loan consisted of machinery, equipment, and fixtures. *Id.* The key documents comprising the Term Loan transaction were a Term Loan Agreement and a Collateral Agreement. Fisher Decl. Exs. U & T.

Response: This statement is not disputed.

67. Statement: The participants appearing on the cover pages of the key documents for the Term Loan were Old GM, Saturn Corporation, and a group of banks including JPMorgan. Fisher Decl. Exs. U & T.

Response: This statement is not disputed.

68. Statement: The amount of financing from the Term Loan was \$1.5 billion. *Id.*

Response: This statement is not disputed.

69. Statement: The Term Loan Lenders' liens were perfected in part by a single, blanket financing statement filed with the Delaware Secretary of State, file number 6416808 4. Macdonald Decl. Ex. O (Main Term Loan UCC-1).

Response: This statement is not disputed. For clarification, Plaintiff asserts that the Main Term Loan UCC-1 purported to perfect the lien in all of Old GM's collateral that secured the Term Loan.

70. Statement: The Main Term Loan UCC-1 consists of a UCC-1 financing statement dated November 30, 2006 bearing file number 6416808 4. *Id.*

Response: This statement is not disputed.

71. Statement: This financing statement includes Annex I, which immediately follows the cover page of the Main Term Loan UCC-1. Annex I is a four-page document that lists Old GM as the debtor and JPMorgan as the secured party of record; a description of the collateral that the financing statement covers, which defines the collateral to include "(1) all Equipment and all Fixtures, other than Excluded Equipment and Fixtures; (2) all Documents and General Intangibles attributable solely to Equipment or Fixtures, other than Excluded Equipment and Fixtures; (3) all books and records pertaining solely to Equipment or Fixtures . . . ; and (4) . . . all Proceeds and products of any and all of the foregoing"; two and a half pages of defined terms, including "Credit Agreement," which is defined as "the term loan agreement dated as of November 29, 2006, among the Debtor [Old GM], Saturn Corporation and JPMorgan," and "Collateral Agreement," which is defined as "the collateral agreement, dated as of November 29, 2006, among the Debtor [Old GM], Saturn Corporation and JPMorgan." *Id.*

Response: This statement is not disputed.

72. Statement: Annex I is followed by Schedule 1, which lists forty-two manufacturing facilities in thirty-five cities in twelve states. *Id.* All of the facilities listed are either "assembly," "MFD," or "Powertrain" facilities. *Id.* In order to reach Schedule 1, one has to page through Annex I.

Response: The first and second sentences are not disputed. The third sentence is disputed because it is an argumentative point that is not supported by any evidence. There is no evidence that any person ever “paged through” Annex I to reach Schedule I.

73. Statement: In October 2008, Old GM decided to repay the remaining amounts outstanding on the Synthetic Lease. Macdonald Decl. Ex. C (October 1, 2008 Email from Gordon to Green).

Response: This statement is not disputed.

74. Statement: Old GM was represented in the repayment transaction by Mayer Brown. *Id.*; *see also* Fisher Decl. Ex. B (Green 2010 Dep. Tr.) at 10:19–21.

Response: This statement is not disputed.

75. Statement: JPMorgan was represented in the repayment transaction by Simpson Thacher. Fisher Decl. Ex. H (Merjian 2010 Dep. Tr.) at 9:2–10.

Response: This statement is not disputed.

76. Statement: Mayer Brown prepared the documentation necessary to unwind the Synthetic Lease. Macdonald Decl. Ex. L (October 15, 2008 Email from Merjian to Duker).

Response: Disputed. The evidence shows that while Mayer Brown prepared the initial draft documents, JPMorgan’s counsel subsequently reviewed and provided comments on the drafts. *See, e.g.*, Fisher Decl. Ex. F (Merjian of Simpson Thacher responding to October 15, 2008 email from Green attaching the draft documents and saying “Nice job on the documents. My only comment, unless I am missing something, is that all references to JPMorgan Chase Bank, as Administrative Agent for the Investors should not include the reference ‘for the Investors’”); *id.* Ex. L (Merjian stating that the draft escrow letter “was fine”). This statement is not material to Plaintiff’s motion.

77. Statement: The professionals at Mayer Brown who worked on the Synthetic Lease termination included Gordon, Green, Gonshorek, and Perlowski. *See generally*, Fisher Decl. Exs. A (Gordon 2010 Dep. Tr.), B (Green 2010 Dep. Tr.), and C (Gonshorek 2010 Dep. Tr.); Macdonald Decl. Ex. P (Perlowski 2010 Dep. Tr.).

Response: This statement is not disputed except that Plaintiff clarifies that Gonshorek and Perlowski were paralegals with Mayer Brown at that time.

78. Statement: Gordon assigned to Green responsibility for preparing the documentation necessary to terminate the Synthetic Lease. Macdonald Decl. Ex. C (October 1, 2008 Email from Gordon to Green); Fisher Decl. Ex. B (Green 2010 Dep. Tr.) at 5:13–20.

Response: This statement is not disputed.

79. Statement: Green understood that JPMorgan (and his client, Old GM) intended to terminate *only* the financing statements filed in connection with the Synthetic Lease, and not any other loan. Fisher Decl. Ex. B (Green 2010 Dep. Tr.) at 83:6–11, 87:7–88:8, 88:21–90:19.

Response: This statement is an undisputed summary of Green’s testimony except Plaintiff clarifies that the deposition transcript does not contain any emphasis.

80. Statement: Green did not have a list of financing statements associated with the Synthetic Lease. Macdonald Decl. Ex. D (October 7, 2008 Email from Romick to Green).

Response: This statement is not disputed.

81. Statement: On October 7, 2008, at 3:21 p.m., Green asked Perlowski to run “full UCC searches” in Michigan and Delaware for filings in favor of JPMorgan as “Agent” against Old GM. Fisher Decl. Ex. D.

Response: This statement is not disputed. The Court is respectfully referred to the email for its complete contents.

82. Statement: On October 7, 2008 at 4:39 p.m., Perlowski emailed Green, informing Green that as of May 7, 2008, there were 1,777 financing statements against Old GM filed with the Delaware Secretary of State. Macdonald Decl. Ex. E (October 7, 2008 Email from Perlowski to Green and Gonshorek).

Response: This statement is not disputed. The Court is respectfully referred to the email for its complete contents.

83. Statement: On October 9, 2008, Perlowski sent Green and Gonshorek an email describing four UCC-1 financing statements: three filed in connection with the Synthetic Lease, and the Main Term Loan UCC-1. Macdonald Decl. Ex. G (October 9, 2008 Email from Perlowski to Green and Gonshorek).

Response: This statement is not disputed. The Court is respectfully referred to the email for its complete contents.

84. Statement: Perlowski described the three Synthetic Lease financing statements as “blanket-type financing statement[s] as to *real property* and related collateral” at specific properties. *Id.* (emphasis added).

Response: This statement is not disputed except for the addition of emphasis. The Court is respectfully referred to the email for its complete contents.

85. Statement: Perlowski described the Main Term Loan UCC-1 as a “financing statement as to *equipment, fixtures* and related collateral located at certain U.S. manufacturing facilities ... file date November 30, 2006.” *Id.* (emphasis added).

Response: This statement is not disputed except for the addition of emphasis. The Court is respectfully referred to the email for its complete contents.

86. Statement: Green and Gonshorek prepared termination statements for all four of these UCC-1 financing statements and listed all four (among others) in the closing checklist they sent to Simpson Thacher. Macdonald Decl. Ex. L (October 15, 2008 Email from Merjian to Duker).

Response: This statement is not disputed.

87. Statement: Mayer Brown also listed all four UCC-1 financing statements (among others) in the Escrow Agreement that Mayer Brown sent to Simpson Thacher. Fisher Decl. Ex. M.

Response: This statement is not disputed.

88. Statement: Neither Merjian nor Duker noticed the presence of the Main Term Loan UCC-1 among the liens to be terminated. Fisher Decl. Ex. H (Merjian 2010 Dep. Tr.) at 34:19–35:5; Duker Affidavit (ECF No. 31) ¶ 16 (“I did not believe that any of the documents I received related to anything but the Synthetic Lease Transaction”).

Response: Disputed. This statement mischaracterizes the testimony and lacks context. Merjian and Duker both received information specifically identifying each of the four termination statements to be filed. Neither of them noticed that one of the four termination statements related to the Term Loan.

89. Statement: Green had worked on transactions involving the release of security “a number of times before.” Fisher Decl. Ex. B (Green 2010 Dep. Tr.) at 7:23–8:20, 9:24–10:7, 83:6–11.

Response: This statement is not disputed.

90. Statement: Green was familiar with the Synthetic Lease transaction and had reviewed the Participation Agreement. *Id.* at 7:23–8:20, 83:6–11.

Response: This statement is not disputed.

91. Statement: Green spent more than 50 hours over five weeks working on the Synthetic Lease. *See* Macdonald Decl. Ex. I (Mayer Brown Billing Records).

Response: This statement is disputed because it is not supported by any testimony. Mr. Green testified that he did not recognize the billing statement printout that was shown to him. Fisher Decl. Ex. Q at 25:19-22. The statement is not material to Plaintiff’s summary judgment motion.

92. Statement: Gonshorek spent almost as much time as Green working on the Synthetic Lease. *See id.*

Response: This statement is disputed because it is not supported by any testimony. Mr. Green testified that he did not recognize the billing statement printout that was shown to him. Fisher Decl. Ex. Q at 25:19-22. The statement is not material to Plaintiff’s summary judgment motion.

93. Statement: Gonshorek testified that he used the October 9, 2008 email from Perlowski describing the UCC-1 financing statements against Old GM and Auto Facilities Real Estate Trust 2001-1 (Macdonald Decl. Ex. G), which attached the Main Term Loan UCC-1, “as the basis for the preparation” of “which filings needed to have terminations prepared for.” Fisher Decl. Ex. C (Gonshorek 2010 Dep. Tr.) at 12:21–23.

Response: The statement is an accurate summary of Gonshorek’s testimony.

94. Statement: Gonshorek reviewed the Main Term Loan UCC-1. Fisher Decl. Ex. B (Green 2010 Dep. Tr.) at 96–99; *id.* Ex. C (Gonshorek 2010 Dep. Tr.) at 9:17–24.

Response: The statement is not disputed.

95. Statement: Gonshorek reviewed Schedule 1 and realized that the list of properties on Schedule 1 did not line up with the list of properties involved on the Synthetic Lease checklist. Fisher Decl. Ex. B (Green 2010 Dep. Tr.) at 96–99.

Response: Disputed. According to the cited testimony, Gonshorek discussed with Green that the “cities and states” listed on the schedule to the Main Term Loan UCC-1 were “broader” than what was listed on the Synthetic Lease checklist. This fact is not material.

96. Statement: Gonshorek informed Green of his “concern,” raising a “question about the properties identified,” and showed Green a copy of Schedule 1. *Id.*

Response: Disputed. The cited testimony does not support that Gonshorek described the information he shared with Green as a “concern.” This statement is not material to Plaintiff’s summary judgment motion.

97. Statement: Green testified that Gonshorek pointed out to him that the “cities and states listed [on Schedule 1 to the Main Term Loan UCC-1] is broader than what the properties in” the Synthetic Lease were. *Id.* at 98.

Response: Disputed. According to the cited testimony, Gonshorek was comparing Schedule 1 to the Main Term Loan UCC-1 to a checklist he was working with. This fact is not material to Plaintiff’s motion.

98. Statement: There were many “red flags indicating that the Main Term Loan UCC-1 had nothing to do with the Synthetic Lease” (Stern Decl. Ex. A at 8), including the following just on the face of Schedule 1:

(i) at least forty-one of the forty-two properties listed on Schedule 1 were not properties in the Synthetic Lease;

(ii) four of the five properties remaining in the Synthetic Lease were not listed on Schedule 1.

(iii) the only remaining properties in the Synthetic Lease were in Michigan, whereas Schedule 1 listed properties in twelve states; and

(iv) the only properties remaining in the Synthetic Lease were in Grand Blanc, Detroit, and Flint, whereas Schedule 1 listed properties in thirty-two other cities.

Stern Decl. Ex. A at 5, 8; Harris Decl. Ex. A at 6, 8, 11–12.

Response: Disputed. The content of Schedule 1 is not properly characterized as a “red flag.” The Court is respectfully referred to Schedule 1 for its contents. This statement is not supported by admissible evidence. This statement is not material to Plaintiff’s motion.

99. Statement: It is likely that Green and Gonshorek also read Annex I, as Schedule 1 is the last page of Annex I. Macdonald Decl. Ex. O (Main Term Loan UCC-1). Reading Annex I, it is obvious that the Main Term Loan UCC-1 pertains to another transaction because:

(i) it describes parties, including Saturn Corporation, that were not involved in the Synthetic Lease;

(ii) it describes documents, including the Term Loan Agreement and the Collateral Agreement, that were not involved in the Synthetic Lease;

(iii) it describes that these documents were dated November 29, 2006, which was approximately five years after the Synthetic Lease originated;

(iv) it did not describe any of the agreements relating to the Synthetic Lease;

(v) it describes the collateral for the Term Loan as including “equipment,” which was not collateral in the Synthetic Lease; and

(vi) it did not describe many of the parties, including BTM Capital Corporation (secured investor); JH Equity Realty Investors, Inc. (equity investor); Relationship Funding Company, LLC (provider of RFC loans); and Auto Facilities Real Estate Trust 2001-1 (lessor).

Stern Decl. Ex. A at 7, 9, 10; Harris Decl. Ex. A at 12–13.

Response: Disputed. Assertions about what is or is not “likely” or what is or not “obvious” with the benefit of hindsight are not statements of fact. This statement is not supported by admissible evidence. This statement is not material to Plaintiff’s motion.

100. Statement: Someone at Mayer Brown actually noticed the language on the Main Term Loan UCC-1 stating it had been filed in connection with a 2006 “term loan agreement” because this language is circled by hand on a copy of the Main Term Loan UCC-1 printed from Gonshorek’s computer. Macdonald Decl. Ex. J (October 9, 2008 Email from Perlowski to Green and Gonshorek with handwritten marks).

Response: Disputed. This statement is not supported by admissible evidence. There is no evidence about anything that anyone at Mayer Brown noticed with respect to the “term loan agreement.” There is no evidence about who made a circle on the Main Term Loan UCC-1, when the circle was made, or why it was made. The consistent testimony of all Mayer Brown witnesses is contrary to the above statement, insofar as no witness noticed that any filing had anything to do with the Term Loan. This statement is not material to Plaintiff’s motion.

101. Statement: None of the Mayer Brown witnesses that were asked recalled or knew whose handwriting this was. *See* Fisher Decl. Ex. B (Green 2010 Dep. Tr.) at 27:10–14; *id.* Ex. P (Gordon 2017 Dep. Tr.) at 87:15–18; *id.* Ex. R (Gonshorek 2017 Dep. Tr.) at 144:6–145:14. Gonshorek testified in 2017 that he did not believe that the handwriting on the first page of Exhibit 3 was his because it was not the style he uses. *Id.* Ex. R. (Gonshorek 2017 Dep. Tr.) at 144:6–145:14.

Response: This statement is not disputed. This statement is not material to Plaintiff’s motion.

102. Statement: Green’s conduct following this conversation is inconsistent with an assertion that he believed that the Main Term Loan UCC-1 related to the Synthetic Lease. A reasonable practitioner in Green’s position would have (i) escalated the concern internally and discussed the issue with other Mayer Brown attorneys familiar with the transaction; (ii) raised the concern with Simpson Thacher to see if its attorneys could explain the filing and confirm that JPMorgan intended to terminate the financing statement; or (iii) conducted additional research on his own into the provenance of the Main Term Loan UCC-1, including review of the documents referred to on it. Stern Decl. Ex. A at 10–11.

Response: Disputed. There is no fact testimony to support this assertion. This statement is contrary to Green’s testimony. Arguments about what is or is not reasonable are not facts. Speculation about what other practitioners in Green’s position might have done are speculative. The statement is not supported by admissible evidence. The statement is not material to Plaintiff’s motion.

103. Statement: In sum, any lawyer or paralegal with even basic familiarity with the UCC system would have recognized the very significant risk that the Main Term Loan UCC-1 did not relate to the Synthetic Lease. Stern Decl. Ex. A. at 11–12.

Response: Disputed. There is no fact testimony to support this assertion. This statement is contrary to the testimony of all Mayer Brown witnesses. Arguments about what a lawyer or paralegal would or would not have recognized are not facts. The statement is not supported by admissible evidence. The statement is not material to Plaintiff's motion.

104. Statement: The "red flags" obvious on the Main Term Loan UCC-1 would have been significant to any reasonable practitioner in Green's position. Stern Decl. Ex. A at 8; Harris Decl. Ex. A at 11-12.

Response: Disputed. There is no fact testimony to support this assertion. This statement is contrary to the testimony of all Mayer Brown witnesses. Arguments about what a lawyer or paralegal would or would not have recognized are not facts. The statement is not supported by admissible evidence. The statement is not material to Plaintiff's motion.

105. Statement: Nevertheless, Green failed to take any steps to resolve Gonshorek's concern. Fisher Decl. Ex. B (Green 2010 Dep. Tr.) at 98:21-25.

Response: Disputed. The cited testimony states that Green did not talk about Gonshorek's comparison of the checklist with the Main Term Loan UCC-1 with Gordon or with JPMorgan. It does not refer to any sense of concern. In fact, it is reasonable to infer that he was not concerned. The statement is not material to Plaintiff's motion.

106. Statement: Attorneys and paralegals handling UCC filings understand and are thoroughly trained about the importance of accuracy in UCC filings, and the necessity of resolving any potential discrepancies before a filing is completed. Stern Decl. Ex. A at 11.

Response: Disputed. There is no fact testimony to support this assertion, and there is no testimony about any UCC training received by any of the individuals involved in the filing of the Termination Statement. The statement is not supported by admissible evidence. The statement is not material to Plaintiff's motion.

107. Statement: This custom and practice is necessitated by the potentially serious consequences of errors with respect to UCC filings for creditors and debtors alike, including consequences not just for the secured party, but also for the debtor because the termination of a

financing statement for an active loan can trigger events of default or other legal remedies. *Id.*; Harris Decl. Ex. A at 15.

Response: Disputed. There is no fact testimony to support this assertion, and there is no testimony about any UCC training received by any of the individuals involved in the filing of the Termination Statement. The statement is not supported by admissible evidence. The statement is not material to Plaintiff's motion.

108. Statement: Avoiding errors is even more important when handling filings involving large organizations that may have many filings in the public record. Stern Decl. Ex. A at 11.

Response: Disputed. There is no fact testimony about this subject. The statement is not supported by admissible evidence. The statement is not material to Plaintiff's motion.

109. Statement: It is industry practice for such persons to handle filings scrupulously in order to avoid error. *Id.*

Response: Disputed. There is no fact testimony about this subject. The statement is not supported by admissible evidence. The statement is not material to Plaintiff's motion.

110. Statement: Given the red flags described above (*supra*, paragraphs 98–99), it was not objectively reasonable for Green to conclude that the Main Term Loan UCC-1 had been filed in connection with the Synthetic Lease, as there was nothing that pointed to the fact that it was part of the Synthetic Lease, and every indication that it was not. Stern Decl. Ex. A at 11.

Response: Disputed. There is no fact testimony to support this assertion. This statement is contrary to the testimony of all Mayer Brown witnesses. Arguments about what a lawyer or paralegal would or would not have recognized are not facts. The statement is not supported by admissible evidence. The statement is not material to Plaintiff's motion.

111. Statement: The fact that the Main Term Loan UCC-1 was filed against Old GM and in favor of JPMorgan is not sufficient to make any belief that Green may have had reasonable, as it is not uncommon for large corporations such as Old GM to have several lines of secured financing in favor of the same secured party. *Id.* at 12.

Response: Disputed. There is no fact testimony to support this assertion. Arguments about whether a lawyer acted reasonably are not facts. The statement is not supported by admissible evidence. The statement is not material to Plaintiff's motion.

112. Statement: The fact that neither JPMorgan nor its counsel, Simpson Thacher, objected would not render Mayer Brown's belief reasonable either, as it is not consistent with industry custom and practice for debtor's counsel to assume that creditor's counsel has reviewed financing statements for accuracy. *Id.*; Macdonald Decl. Ex. R (Stern Dep. Tr.) at 32:7–33:9.

Response: Disputed. There is no fact testimony to support this assertion. Arguments about whether a lawyer acted reasonably are not facts. The statement is not supported by admissible evidence. The Second Circuit has already determined that Simpson Thacher's assent to the filing of the Termination Statement rendered that filing legally effective. The statement is not material to Plaintiff's motion.

113. Statement: Neither Merjian's "nice job on the documents" email nor his execution of the Escrow Agreement renders any belief that Green had that the Main Term Loan UCC-1 pertained to the Synthetic Lease reasonable. Harris Decl. Ex. A at 15.

Response: Disputed. There is no fact testimony to support this assertion. Arguments about whether a lawyer acted reasonably are not facts. The statement is not supported by admissible evidence. The Second Circuit has already determined that Simpson Thacher's assent to the filing of the Termination Statement rendered that filing legally effective. The statement is not material to Plaintiff's motion.

114. Statement: An attorney advised of Gonshorek's concern would not reasonably believe that the Main Term Loan UCC-1 pertained to the Synthetic Lease. *Id.*; Harris Decl. Ex. A at 10–11. *See* Macdonald Decl. Ex. Q (Harris Dep. Tr.) at 30:23–31:2 ("Q: So when it comes to Mayer Brown's belief, is it fair to say that your opinion in this case is that the belief was not objectively reasonable?" A: "Yes. . . ."); Harris Decl. Ex. A at 9 ("In my opinion, Mayer Brown's belief that the Main Term Loan UCC-1 pertained to the Synthetic Lease Transaction (assuming it was subjectively held) was not objectively reasonable."). Macdonald Decl. Ex. R (Stern Dep. Tr.) at 33:4–9 ("Q: And it's your opinion that . . . Mr. Green behaved in a way that was objectively unreasonable in proceeding with the filing of the UCC-3 termination statement? A: That is my opinion."); Stern Decl. Ex. A at 3 ("in light of the facts known to Mayer Brown and concerns raised by Mayer Brown employees, Mayer Brown could not reasonably have

concluded that it was authorized to file the UCC-3 termination statement (the ‘Termination Statement’) that is at issue in this case”).

Response: Disputed. There is no fact testimony to support this assertion. Arguments about whether a lawyer acted reasonably are not facts. The statement is not supported by admissible evidence. The Second Circuit has already determined that Simpson Thacher’s assent to the filing of the Termination Statement rendered that filing legally effective. The statement is not material to Plaintiff’s motion.

115. Statement: Green’s failure to act in response to Mr. Gonshorek’s concerns reflects an extreme departure from the standard expected from a lawyer practicing in the area of secured transactions. Stern Decl. Ex. A at 8.

Response: Disputed. There is no fact testimony to support this assertion. Arguments about whether Green departed from standards expected of a lawyer practicing in the area of secured transactions are not facts. The statement is not supported by admissible evidence. The statement is not material to Plaintiff’s motion.

116. Statement: Despite the significance of Gonshorek’s concern, all of the obvious red flags, and Mayer Brown’s complete failure to resolve Gonshorek’s concern, Mayer Brown filed the Termination Statement on October 30, 2008. Macdonald Decl. Ex. S (October 29, 2008 Email from Gonshorek to Kluever).

Response: Disputed. As shown in the cited exhibit, the Termination Statement was provided to CT Lien Solutions for filing after JPMorgan assented to its filing. The assertions about red flags and failures are arguments, not facts. Those assertions are not supported by admissible evidence and are not material to Plaintiff’s motion.

117. Statement: Plaintiff brought this action on July 31, 2009. ECF No. 1.

Response: This statement is not disputed.

118. Statement: Plaintiff and JPMorgan litigated “Phase I” of this action without the involvement of the Term Loan Lenders. *See* SUMF 13, *supra*; Response No. 13, *supra*.

Response: Disputed, except admit that the Non-JPMorgan Term Lenders had not been served with the complaint until after the conclusion of Phase I.

119. Statement: As such, the Term Loan Lenders were not invited to participate in the 2010 depositions of Gordon, Green, Gonshorek, and Perlowski. *See* Fisher Decl. Ex A (Gordon 2010 Dep. Tr.); *id.* Ex. B (Green 2010 Dep. Tr.); *id.* Ex. C (Gonshorek 2010 Dep. Tr.); Macdonald Decl. Ex. P (Perlowski 2010 Dep. Tr.).

Response: It is not disputed that the Term Loan Lenders did not participate in those depositions. Plaintiff has no knowledge as to the extent to which JPMorgan may have solicited input or involvement from the Term Loan Lenders.

120. Statement: In his 2010 deposition, Green testified “I do remember having a conversation about a schedule to the financing statement” to the Main Term Loan UCC-1 with Gonshorek. Fisher Decl. Ex. B (Green 2010 Dep. Tr.) at 97:1–3, 17.

Response: This statement is not disputed. This statement is not material to Plaintiff’s motion because it was not a conversation with JPMorgan or Simpson Thacher.

121. Statement: Green testified that “[t]here was a question about whether the properties identified relate to synthetic lease.” *Id.* at 97:10–11.

Response: This statement is not disputed. This statement is not material to Plaintiff’s motion because it was not a conversation with JPMorgan or Simpson Thacher.

122. Statement: Green did not “remember exactly when” the conversation took place, but that it was “[p]rior to closing.” *Id.* at 97:14–15.

Response: This statement is not disputed. This statement is not material to Plaintiff’s motion because it was not a conversation with JPMorgan or Simpson Thacher.

123. Statement: Green testified that Gonshorek “showed me the exhibit and raised a question about the properties identified. And I didn’t have any additional discussions about it.” *Id.* at 97:24–98:1.

Response: This statement is not disputed. This statement is not material to Plaintiff’s motion because it was not a conversation with JPMorgan or Simpson Thacher.

124. Statement: When asked by JPMorgan’s counsel “what is it about the schedule that you discussed” with Gonshorek, Green testified “[j]ust that the cities and states listed is broader

than what the properties in – say on the checklist is broader. That was the concern.” *Id.* at 98:9–13.

Response: This statement is not disputed. This statement is not material to Plaintiff’s motion because it was not a conversation with JPMorgan or Simpson Thacher.

125. Statement: When asked “[w]hat did you conclude with respect to the issue” Gonshorek raised, Green testified “I didn’t conclude anything,” and did not talk about it with Gordon or anybody else from JPMorgan. *Id.* at 98:16–25.

Response: Disputed due to incompleteness. Green later testified that, by the time of closing, he understood “that the document related to the synthetic lease.” *Id.* at 99:1-8. This statement is not material to Plaintiff’s motion.

126. Statement: Then, counsel for JPMorgan asked the following question: “At the time of the closing, sir, which I believe was in the end of October 2008, did you have any understanding that any of the documentation that was prepared in connection with that closing purported to release security in connection with the term loan financing between General Motors and JPMorgan?” to which Green responded “No. At the time of closing I understood that the documents related to the synthetic lease.” *Id.* 99:1–8.

Response: This statement is not disputed. This statement is not material to Plaintiff’s motion.

127. Statement: Green did not offer any explanation for how he came to this belief. *Id.*

Response: Disputed. This is a characterization, not a fact. It is reasonable to infer that Green concluded that the filings related to the Synthetic Lease because they had been specifically approved for filing by JPMorgan’s counsel. This statement is not material to Plaintiff’s motion.

128. Statement: None of the attorneys present at Green’s 2010 deposition asked any additional follow-up questions about Gonshorek’s “concern” about the Main Term Loan UCC-1. *Id.*

Response: Disputed. There is no evidence supporting the assertion that Gonshorek described his observation as a “concern” about the Main Term Loan UCC-1. Counsel did ask

follow-up questions, *see, e.g., id.* at 98:9-99:8. This statement is not material to Plaintiff's motion.

129. Statement: Green was not asked about the handwritten circle around the definition of credit agreement in the version of the Main Term Loan UCC-1 printed from Gonshorek's computer. Green testified that he did not know who made the handwritten notations on the cover email that attached the printed Main Term Loan UCC-1. *Id.* 27:10–14.

Response: This statement is not disputed. This statement is not material to Plaintiff's motion.

130. Statement: Gonshorek was deposed the next day in 2010, and was not asked any questions about the conversation he had with Green about his "concern" regarding the Main Term Loan UCC-1. *See generally* Fisher Decl. Ex. C (Gonshorek 2010 Dep. Tr.).

Response: Disputed to the extent that "concern regarding the Main Term Loan UCC-1" is a characterization not supported by the record. This statement is not material to Plaintiff's motion.

131. Statement: In 2015, Plaintiff began serving the Term Loan Lenders. *See* ECF No. 90.

Response: This statement is not disputed.

132. Statement: Green, Gonshorek, Gordon, and Perlowski were deposed by the Term Loan Lenders in 2017. Fisher Decl. Exs. P–S.

Response: This statement is not disputed.

133. Statement: In his 2017 deposition, Green claimed near total amnesia about the Synthetic Lease Transaction: he testified that he did not remember or he did not recall over 100 times (*see generally* Fisher Decl. Ex. Q); he testified "I don't remember working on the synthetic lease transaction in September – or in 2008" (*id.* at 78:16–17); he testified "Sitting here today, I do not recall anything about the transaction during the time of October 2008" (*id.* at 169:1–3); he testified "I don't recall anything about the transaction" (*id.* at 169:16–17); and he testified "I don't recall the transaction"—twice (*id.* at 170:9, 15).

Response: Disputed. The reference to "near total amnesia" is an argumentative characterization. This statement is not material to Plaintiff's motion.

134. Statement: Green was not able to offer any explanation for the belief that he claimed in 2010 that the Main Term Loan UCC-1 related to the Synthetic Lease. *Id.* at 73:15–77:24.

Response: Disputed. All of the questions in the cited portion of the transcript are confusing and were objected to by the witness’s counsel. It is reasonable to infer that Green believed that the Main Term Loan UCC-1 related to the Synthetic Lease because its filing was approved by JPMorgan. This statement is not material to Plaintiff’s motion.

135. Statement: The Synthetic Lease was a notable transaction in Green’s career and he read about it in at least one news story. *Id.* at 82:21–83:11.

Response: Disputed. The testimony indicates that this transaction only became notable after this lawsuit was filed. Until then, there is no indication that it was considered anything other than a routine transaction. This statement is not material to Plaintiff’s motion.

136. Statement: The lawsuit has received substantial media coverage. *See, e.g.*, Macdonald Decl. Ex. T (Above the Law article); Ex. U (Reuters Article) & Ex. V (Wall Street Journal article).

Response: Plaintiff does not dispute that this lawsuit has received some media coverage. This statement is not material to Plaintiff’s motion.

137. Statement: In 2017, Gonshorek also did not remember any of the events associated with the repayment: he testified “I do not recall the specifics of any matter that I may have worked on during” the fall of 2008 (Fisher Decl. Ex. R (Gonshorek 2017 Dep. Tr.) at 21:11–20); he testified “no” when asked if he had “any memory at all of working on a transaction involving GM, JPMorgan, and a synthetic lease in the fall of 2008” or at any time while at Mayer Brown (*id.* 30:4–12); when asked whether he had “any memory about the subject of your 2010 deposition,” he testified that he had a “vague memory that it involved a UCC-3 termination” (*id.* at 50:7–14); when asked to confirm that his “mind remains a complete blank” about the events of 2008, he testified “Sadly, yes” (*id.* at 57:15–17); none of his time entries from 2008 refreshed his memory (*id.* at 80:5–17); and he did not recall the conversation he had with Green in 2008 where he expressed “concern” about Schedule 1 to the Main Term Loan UCC-1 (*id.* at 128:22–129:11).

Response: Disputed because these are unrelated and partial excerpts. The Court is respectfully referred to the deposition transcript for its contents. This statement is not material to Plaintiff's motion.

138. Statement: Gordon recalled few details about the Synthetic Lease transaction from October 2008 in his 2017 deposition. *See, e.g.*, Fisher Decl. Ex. P (Gordon 2017 Dep. Tr.) at 58:22–23 (“I really don’t remember what I did on one particular day over 8 years ago”); *id.* at 64:9–11 (“I remember working on the payoff of the Chase synthetic lease, but I don’t remember specific discussions I had with Ryan [Green]”); *id.* at 81:14–18 (when asked “have you ever had a discussion with anybody about the list of properties that’s contained here on Schedule 1 to Annex I to UCC-1 financing statement,” he responded “no”); *id.* at 113:7–10 (when asked “do you recall reviewing a draft closing checklist for a payoff and release of the properties related to this transaction,” he responded “that I do not recall”).

Response: Disputed because these are unrelated and partial excerpts. The Court is respectfully referred to the deposition transcript for its contents. This statement is not material to Plaintiff's motion.

139. Statement: Perlowski recalled very little about the 2008 Synthetic Lease transaction in his 2017 deposition. *See* Fisher Decl. Ex. S (Perlowski 2017 Dep. Tr.) at 20:12–14 (“I don’t remember anything with respect to Mr. Green and working with Mr. Green”); *id.* at 38:6–16 (when asked “so do you recall anything else about this transaction, other than the fact that you were assigned to work on the transaction” he responded “the only thing I remember specific[ly]– doing is looking at this report, the list of financing statements from the Secretary of State’s office, because it was so voluminous, so I remember going through that. But that’s, you know, the extent of it.”).

Response: Disputed because these are unrelated and partial excerpts. The Court is respectfully referred to the deposition transcript for its contents. This statement is not material to Plaintiff's motion.

140. Statement: Both JPMorgan and Plaintiff consistently asserted to this Court in their Motion for Summary Judgment papers in Phase I that nobody at Mayer Brown was aware that the Main Term Loan UCC-1 concerned a transaction other than the Synthetic Lease. *See* Memorandum of Law in Support of JPMorgan’s Motion for Summary Judgment (ECF No. 29) at 11 (“But Mr. Green, along with Mr. Gonshorek, believed that all of the Delaware UCC-1 financing statements identified by Mr. Perlowski pertained only to the Synthetic Lease Transaction”); *id.* at 32 (“Mayer Brown, [Old] GM’s counsel for the purpose of winding up the Synthetic Lease Transaction, has provided un-controverted testimony that they did not know they had filed a UCC-3 unrelated to the Synthetic Lease Transaction”); JPMorgan’s

Memorandum of Law in Opposition to the Plaintiff's Motion for Partial Summary Judgment (ECF No. 48) at 9 (Green "was never aware that Mayer Brown prepared and filed a UCC-3 relating to the Term Loan"); *id.* ("Gonshorek, the paralegal who assisted Mr. Green, testified that he believed that all of the work that he performed in October 2008 related to the repayment of the Synthetic Lease Transaction"); Plaintiff's Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment (ECF No. 45) at 13 ("While it may be true that Old GM's counsel – like JPMorgan and Simpson Thacher – failed to recognize at the time of filing that the Term Loan Termination Statement related to the Term Loan"); *id.* at 14 ("JPMorgan correctly asserts that this 'is not a situation in which Mayer Brown recognized it was filing a UCC-3 connected to the Term Loan but for whatever reason believed it was appropriate.' . . . Mayer Brown prepared a draft UCC filing, presumably without appreciating that the termination statement terminated collateral securing the Term Loan").

Response: These excerpts from various filings are not disputed. These excerpts are not material to Plaintiff's motion.

141. Statement: Both JPMorgan and Plaintiff consistently asserted on appeal that nobody at Mayer Brown was aware that the Main Term Loan UCC-1 concerned a transaction other than the Synthetic Lease. Plaintiff's Opening Brief at 19, ECF No. 32, No. 13-2187 (2d Cir. Sept. 17, 2013) ("Mayer Brown (and all other parties involved) believed, incorrectly, that the 2006 Financing Statement related to the 2001 synthetic lease financing."); JPMorgan's Opposition Brief at 14, ECF No. 58, No. 13-2187 (2d Cir. Dec. 9, 2013) ("Without dispute, everyone at Mayer Brown, GM's counsel . . . , believed that all of the Delaware UCC-1 financing statements referenced in the checklist pertained only to the Synthetic Lease"); Plaintiff's Reply Brief at 2, ECF No. 74, No. 13-2187 (2d Cir. Dec. 23, 2013) ("[A]s JPMorgan also repeatedly acknowledges, no one realized at the time . . . that the 2008 Termination Statement was erroneously included among the closing documents"); *id.* at 15 ("It is undisputed that, at the time of the transaction, neither he [Gordon] nor anyone else realized that the 2008 Termination Statement was unrelated to the Synthetic Lease transaction and mistakenly included within the batch of documents prepared for the Synthetic Lease Payoff."); Plaintiff's Opening Br. to Del. Sup. Ct. at 8, No. 325,2014 (July, 21, 2014); JPMorgan's Answering Br. to Del. Sup. Ct. at 12, No. 325,2014 (Aug. 21, 2014); Plaintiff's Letter Br. to 2d Cir. at 4–5, ECF No. 123, No. 13-2187 (Nov. 26, 2014); Plaintiff's Letter Br. to 2d Cir. at 1, ECF No. 130, *id.* (Dec. 1, 2014).

Response: These excerpts from various filings are not disputed. These excerpts are not material to Plaintiff's motion.

142. Statement: On appeal, Plaintiff also repeatedly argued that the term "authorizes" in the Delaware UCC incorporates the law of agency, that the Court should follow the Restatement, that the Restatement required an analysis of Mayer Brown's reasonable understanding of JPMorgan's instructions (including both Mayer Brown's subjective beliefs and the objective reasonableness of those beliefs), and that Mayer Brown's reasonable understanding should be judged in light of *all* the facts of which Mayer Brown was aware. *See, e.g.*, Plaintiff's

Opening Brief at 35–37, ECF No. 32, No. 13-2187 (2d Cir. Sept. 17, 2013) (citing Restatement (Third) of Agency §§ 3.01, 2.01, 1.01); Plaintiff’s Reply Brief at 9, 16–17, ECF No. 74, No. 13-2187 (2d Cir. Dec. 23, 2013) (arguing that the Termination Statement was not authorized based on the law of agency “because it is undisputed that none of the parties involved, including Mayer Brown, had any awareness at the time of the transaction that JPMorgan’s communications to its agent were authorizing an act inconsistent with JPMorgan’s interests or objectives *known to the agent*”); Plaintiff’s Letter Br. to 2d Cir. at 3, ECF No. 123, No. 13-2187 (Nov. 26, 2014) (arguing for application of the Restatement (Third) of Agency).

Response: Disputed as to the first sentence characterizing the arguments made by Plaintiff’s counsel. The Court respectfully refers the Court to the cited filings for their complete contents. This statement is not material to Plaintiff’s motion.

Dated: New York, New York
October 26, 2018

Respectfully submitted,

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