

Andrew J. Entwistle  
**ENTWISTLE & CAPPUCCI LLP**  
280 Park Avenue, 26<sup>th</sup> Floor West  
New York, New York 10017  
Tel: (212) 894-7200  
Fax: (212) 894-7272

*Counsel for Teachers' Retirement System  
of the State of Illinois and TCW Illinois  
State Board of Investments*

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

In re:

MOTORS LIQUIDATION COMPANY, *et al.*,  
  
Debtors.

MOTORS LIQUIDATION COMPANY  
AVOIDANCE ACTION TRUST,  
  
Plaintiff,

v.

JPMC CHASE BANK, N.A., *et al.*,  
  
Defendants.

Chapter 11

Case No. 09-50026 (REG)

(Jointly Administered)

Adversary Proceeding

Case No. 09-00504 (REG)

**ANSWER OF DEFENDANTS TEACHERS' RETIREMENT SYSTEM OF THE STATE  
OF ILLINOIS AND TCW ILLINOIS STATE BOARD OF INVESTMENTS TO FIRST  
AMENDED ADVERSARY COMPLAINT FOR (1) AVOIDANCE OF UNPROTECTED  
LIEN, (2) AVOIDANCE AND RECOVERY OF PAYMENTS, AND (3)  
DISALLOWANCE OF CLAIMS BY DEFENDANTS**

Teachers' Retirement System of the State of Illinois ("TRS Illinois") and TCW Illinois State Board of Investments ("TCW ISBI"), by their attorneys Entwistle & Cappucci LLP, hereby answer (the "Answer") the amended adversary complaint of Motors Liquidation Company Avoidance Action Trust ("AAT"), dated May 20, 2015 (the "Amended Complaint"), in this adversary proceeding (the "Adversary Proceeding") as follows:

### **JURISDICTION AND VENUE**

1. The allegations in Paragraph 1 of the Amended Complaint constitute legal conclusions to which no response is required. To the extent that a response is required, TRS Illinois and TCW ISBI deny knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 1 of the Amended Complaint.

2. The allegations in Paragraph 2 of the Amended Complaint constitute legal conclusions to which no response is required. To the extent that a response is required, TRS Illinois and TCW ISBI deny knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 2 of the Amended Complaint.

3. The allegations in Paragraph 3 of the Amended Complaint constitute legal conclusions to which no response is required. To the extent that a response is required, TRS Illinois and TCW ISBI deny knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 3 of the Amended Complaint.

4. The allegations in Paragraph 4 of the Amended Complaint constitute legal conclusions to which no response is required. To the extent that a response is required, TRS Illinois and TCW ISBI deny knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 4 of the Amended Complaint.

5. The allegations in Paragraph 5 of the Amended Complaint constitute legal conclusions to which no response is required. To the extent that a response is required, TRS Illinois and TCW ISBI deny knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 5 of the Amended Complaint.

### **PARTIES**

6. TRS Illinois and TCW ISBI admit that Motors Liquidation Company f/k/a General Motors Corporation and certain of its subsidiaries (collectively, the “Debtors”) filed voluntary petitions for relief under Chapter 11 of Title 11 of the United States Code (the “Bankruptcy Code”) on June 1, 2009 (the “Petition Date”) in the United States Bankruptcy Court for the Southern District of New York (the “Bankruptcy Court”)

7. TRS Illinois and TCW ISBI admit the allegations in Paragraph 7 of the Amended Complaint.

8. The allegations in Paragraph 8 of the Amended Complaint constitute legal conclusions to which no response is required. To the extent that a response is required, TRS Illinois and TCW ISBI deny the allegations in Paragraph 8 of the Amended Complaint, except admit that the *Final Order Pursuant to Bankruptcy Code Sections 105(a), 361, 362, 363, 364 and 507 and Bankruptcy Rules 2002, 4001 and 6004 (A) Approving a DIP Credit Facility and Authorizing the Debtors to Obtain Post-Petition Financing Pursuant Thereto, (B) Granting Related Liens and Super-Priority Status, (C) Authorizing the Use of Cash Collateral and (D) Granting Adequate Protection to Certain Pre-Petition Secured Parties* dated June 25, 2009 (the “DIP Order”) provided the Committee certain rights, and refer to the DIP Order for the terms set forth therein.

9. TRS Illinois and TCW ISBI deny knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 9 of the Amended Complaint.

10. TRS Illinois and TCW ISBI deny knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 10 of the Amended Complaint.

11. TRS Illinois and TCW ISBI deny knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 11 of the Amended Complaint.

12. The allegations in Paragraph 12 of the Amended Complaint constitute legal conclusions to which no response is required. To the extent that a response is required, TRS Illinois and TCW ISBI deny the allegations in Paragraph 12, except admit that on March 18, 2011, the Bankruptcy Court entered an order (the "Confirmation Order") confirming the Debtors' Second Amended Joint Chapter 11 Plan (the "Plan"), and refer to the Plan for the terms set forth therein.

13. TRS Illinois and TCW ISBI deny knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 13 of the Amended Complaint.

14. The allegations in Paragraph 14 of the Amended Complaint constitute legal conclusions to which no response is required. To the extent that a response is required, TRS Illinois and TCW ISBI deny the allegations in Paragraph 14 of the Amended Complaint.

15. to 297. The allegations in Paragraphs 15 to 297 of the Amended Complaint concern defendants other than TRS Illinois and TCW ISBI and thus no response is required. To the extent that a response is required, TRS Illinois and TCW ISBI deny knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraphs 15 to 297 of the Amended Complaint.

298. The allegations in Paragraph 298 of the Amended Complaint constitute legal conclusions to which no response is required. To the extent that a response is required, TCW ISBI replies that McDonnell Illinois State Board of Investment was the former name of TCW ISBI and admits the allegations in Paragraph 298 of the Amended Complaint to the extent the allegations refer to TCW ISBI.

299. to 512. The allegations in Paragraphs 299 to 512 of the Amended Complaint concern defendants other than TRS Illinois and TCW ISBI and thus no response is required. To the extent that a response is required, TRS Illinois and TCW ISBI deny knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraphs 299 to 512 of the Amended Complaint.

513. The allegations in Paragraph 513 of the Amended Complaint constitute legal conclusions to which no response is required. To the extent that a response is required, TCW ISBI admits the allegations in Paragraph 513 of the Amended Complaint.

514. to 517. The allegations in Paragraphs 514 to 517 of the Amended Complaint concern defendants other than TRS Illinois and TCW ISBI and thus no response is required. To the extent that a response is required, TRS Illinois and TCW ISBI deny knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraphs 514 to 517 of the Amended Complaint.

518. The allegations in Paragraph 518 of the Amended Complaint constitute legal conclusions to which no response is required. To the extent that a response is required, TRS Illinois admits the allegations in Paragraph 518 of the Amended Complaint.

519. to 569. The allegations in Paragraphs 519 to 568 of the Amended Complaint concern defendants other than TRS Illinois and TCW ISBI and thus no response is required. To

the extent that a response is required, TRS Illinois and TCW ISBI deny knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraphs 519 to 569 of the Amended Complaint.

570. The allegations in Paragraph 570 of the Amended Complaint constitute legal conclusions to which no response is required. To the extent that a response is required, TRS Illinois and TCW ISBI deny the allegations in Paragraph 570 of the Amended Complaint.

### **GENERAL ALLEGATIONS**

#### **The Term Loan Agreement**

571. The allegations in Paragraph 571 of the Amended Complaint constitute legal conclusions to which no response is required. To the extent that a response is required, TRS Illinois and TCW ISBI deny the allegations in Paragraph 571 of the Amended Complaint, except admits that General Motors Corporation (“General Motors”), Saturn Corporation and JPMC Chase Bank, N.A. (“JPMC”), as Administrative Agent, and the lender, were parties to the Term Loan Agreement (as that term is defined in the Amended Complaint).

572. The allegations in Paragraph 572 of the Amended Complaint constitute legal conclusions to which no response is required. To the extent that a response is required, TRS Illinois and TCW ISBI deny knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 572 of the Amended Complaint, except refer to the Term Loan Agreement for the terms set forth therein and admit that certain lenders (the “Term Lenders”) loaned approximately \$1.5 billion pursuant to the Term Loan Agreement.

573. TRS Illinois and TCW ISBI deny knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 573 of the Amended Complaint.

**The Dip Order**

574. The allegations in Paragraph 574 of the Amended Complaint constitute legal conclusions to which no response is required. To the extent that a response is required, TRS Illinois and TCW ISBI deny knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 574 of the Amended Complaint, except admit that on the Petition Date, the Debtors filed a motion (the “DIP Motion”) seeking certain authority from the Bankruptcy Court and refer to the DIP Motion for the content therein.

575. The allegations in Paragraph 575 of the Amended Complaint constitute legal conclusions to which no response is required. To the extent that a response is required, TRS Illinois and TCW ISBI deny the allegations in Paragraph 575 of the Amended Complaint, except refer to the DIP Motion for the content therein.

576. TRS Illinois and TCW ISBI deny knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 576 of the Amended Complaint.

577. The allegations in Paragraph 577 of the Amended Complaint constitute legal conclusions to which no response is required. To the extent that a response is required, TRS Illinois and TCW ISBI deny the allegations in Paragraph 577 of the Amended Complaint, except refer to the DIP Order for the content therein.

578. The allegations in Paragraph 578 of the Amended Complaint constitute legal conclusions to which no response is required. To the extent that a response is required, TRS Illinois and TCW ISBI deny knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 578 of the Amended Complaint.

579. The allegations in Paragraph 579 of the Amended Complaint constitute legal conclusions to which no response is required. To the extent that a response is required, TRS

Illinois and TCW ISBI deny the allegations in Paragraph 579 of the Amended Complaint, except refer to the DIP Order for the content therein.

**The Lien(s) Securing the Term Loan Agreement**

580. The allegations in Paragraph 580 of the Amended Complaint constitute legal conclusions to which no response is required. To the extent that a response is required, TRS Illinois and TCW ISBI deny the allegations in Paragraph 580 of the Amended Complaint.

581. The allegations in Paragraph 581 of the Amended Complaint constitute legal conclusions to which no response is required. To the extent that a response is required, TRS Illinois and TCW ISBI deny the allegations in Paragraph 581 of the Amended Complaint, except admit that on November 30, 2006, a UCC-1 financing statement (the "Financing Statement") was filed with the Delaware Secretary of State, and refer to the Financing Statement for the content therein.

582. The allegations in Paragraph 582 of the Amended Complaint constitute legal conclusions to which no response is required. To the extent that a response is required, TRS Illinois and TCW ISBI deny the allegations in Paragraph 582 of the Amended Complaint, except admit that on October 30, 2008, a UCC-3 financing statement amendment (the "Termination Statement") was filed with the Delaware Secretary of State, and refer to the Termination Statement for the content therein.

583. The allegations in Paragraph 583 of the Amended Complaint constitute legal conclusions to which no response is required. To the extent that a response is required, TRS Illinois and TCW ISBI deny the allegations in Paragraph 583 of the Amended Complaint.

584. The allegations in Paragraph 584 of the Amended Complaint constitute legal conclusions to which no response is required. To the extent that a response is required, TRS



Illinois and TCW ISBI deny knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 584, except admit that on March 1, 2013, this Court entered its *Decision on Cross Motions for Summary Judgment, a Judgment and an Order on Cross Motions for Summary Judgment*, and refer to those decisions and judgments for the contents therein.

585. The allegations in Paragraph 585 of the Amended Complaint constitute legal conclusions to which no response is required. To the extent that a response is required, TRS Illinois and TCW ISBI deny knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 585, except admit that on January 21, 2015, the United States Court of Appeals for the Second Circuit issued a decision on the decisions and judgments referenced in Paragraph 584, and refer to the Second Circuit's decision for the contents therein.

**AS AND FOR AN ANSWER TO THE FIRST CLAIM FOR RELIEF**

586. TRS Illinois and TCW ISBI repeat and re-assert their answers to the allegations in Paragraphs 1 through 585 of the Amended Complaint with the same force and effect as if fully set forth herein.

587. The allegations in Paragraph 587 of the Amended Complaint constitute legal conclusions to which no response is required. To the extent that a response is required, TRS Illinois and TCW ISBI deny knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 587 of the Amended Complaint.

588. The allegations in Paragraph 588 of the Amended Complaint constitute legal conclusions to which no response is required. To the extent that a response is required, TRS Illinois and TCW ISBI deny the allegations in Paragraph 588 of the Amended Complaint.

589. The allegations in Paragraph 589 of the Amended Complaint constitute legal conclusions to which no response is required. To the extent that a response is required, TRS Illinois and TCW ISBI deny the allegations in Paragraph 589 of the Amended Complaint.

**AS AND FOR AN ANSWER TO THE SECOND CLAIM FOR RELIEF**

590. TRS Illinois and TCW ISBI repeat and re-assert their answers to the allegations in Paragraphs 1 through 589 of the Amended Complaint with the same force and effect as if fully set forth herein.

591. The allegations in Paragraph 591 of the Amended Complaint constitute legal conclusions to which no response is required. To the extent that a response is required, TRS Illinois and TCW ISBI deny the allegations in Paragraph 591 of the Amended Complaint.

592. The allegations in Paragraph 592 of the Amended Complaint constitute legal conclusions to which no response is required. To the extent that a response is required, TRS Illinois and TCW ISBI deny knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 592 of the Amended Complaint.

593. The allegations in Paragraph 593 of the Amended Complaint constitute legal conclusions to which no response is required. To the extent that a response is required, TRS Illinois and TCW ISBI deny the allegations in Paragraph 593 of the Amended Complaint, except admit that the DIP Order authorized the Debtors to apply the proceeds of the DIP Credit Facility to repay amounts outstanding under the Term Loan Agreement and refer to the DIP Order for the content therein.

594. The allegations in Paragraph 594 of the Amended Complaint constitute legal conclusions to which no response is required. To the extent that a response is required, TRS

Illinois and TCW ISBI deny knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 594 of the Amended Complaint.

595. TRS Illinois and TCW ISBI deny knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 595 of the Amended Complaint, except admit that they received payments from JPMC in in the amounts as set forth in Exhibit 3.

596. The allegations in Paragraph 596 of the Amended Complaint constitute legal conclusions to which no response is required. To the extent that a response is required, TRS Illinois and TCW ISBI deny knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 596 of the Amended Complaint.

597. The allegations in Paragraph 597 of the Amended Complaint constitute legal conclusions to which no response is required. To the extent that a response is required, TRS Illinois and TCW ISBI deny knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 597 of the Amended Complaint, except refer to the DIP Order for the content therein.

598. The allegations in Paragraph 598 of the Amended Complaint constitute legal conclusions to which no response is required. To the extent that a response is required, TRS Illinois and TCW ISBI deny the allegations in Paragraph 598 of the Amended Complaint.

599. The allegations in Paragraph 599 of the Amended Complaint constitute legal conclusions to which no response is required. To the extent that a response is required, TRS Illinois and TCW ISBI deny the allegations in Paragraph 599 of the Amended Complaint.

600. The allegations in Paragraph 600 of the Amended Complaint constitute legal conclusions to which no response is required. To the extent that a response is required, TRS Illinois and TCW ISBI deny the allegations in Paragraph 600 of the Amended Complaint.

601. The allegations in Paragraph 601 of the Amended Complaint constitute legal conclusions to which no response is required. To the extent that a response is required, TRS Illinois and TCW ISBI deny the allegations in Paragraph 601 of the Amended Complaint.

602. The allegations in Paragraph 602 of the Amended Complaint constitute legal conclusions to which no response is required. To the extent that a response is required, TRS Illinois and TCW ISBI deny knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 602 of the Amended Complaint.

603. The allegations in Paragraph 603 of the Amended Complaint constitute legal conclusions to which no response is required. To the extent that a response is required, TRS Illinois and TCW ISBI deny the allegations in Paragraph 603 of the Amended Complaint.

**AS AND FOR AN ANSWER TO THE THIRD CLAIM FOR RELIEF**

604. TRS Illinois and TCW ISBI repeat and re-assert their answers to the allegations in Paragraphs 1 through 603 of the Amended Complaint with the same force and effect as if fully set forth herein.

605. The allegations in Paragraph 605 of the Amended Complaint constitute legal conclusions to which no response is required. To the extent that a response is required, TRS Illinois and TCW ISBI deny the allegations in Paragraph 605 of the Amended Complaint.

606. TRS Illinois and TCW ISBI deny knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 606 of the Amended Complaint, except admit that they received payments from JPMC on the dates as set forth in Exhibit 4.

607. The allegations in Paragraph 607 of the Amended Complaint constitute legal conclusions to which no response is required. To the extent that a response is required, TRS

Illinois and TCW ISBI deny knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 607 of the Amended Complaint.

608. The allegations in Paragraph 608 of the Amended Complaint constitute legal conclusions to which no response is required. To the extent that a response is required, TRS Illinois and TCW ISBI deny knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 608 of the Amended Complaint.

609. The allegations in Paragraph 609 of the Amended Complaint constitute legal conclusions to which no response is required. To the extent that a response is required, TRS Illinois and TCW ISBI deny knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 609 of the Amended Complaint.

610. The allegations in Paragraph 610 of the Amended Complaint constitute legal conclusions to which no response is required. To the extent that a response is required, TRS Illinois and TCW ISBI deny knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 610 of the Amended Complaint.

611. The allegations in Paragraph 611 of the Amended Complaint constitute legal conclusions to which no response is required. To the extent that a response is required, TRS Illinois and TCW ISBI deny knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 611 of the Amended Complaint.

612. The allegations in Paragraph 612 of the Amended Complaint constitute legal conclusions to which no response is required. To the extent that a response is required, TRS Illinois and TCW ISBI deny knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 612 of the Amended Complaint.

613. The allegations in Paragraph 613 of the Amended Complaint constitute legal conclusions to which no response is required. To the extent that a response is required, TRS Illinois and TCW ISBI deny the allegations in Paragraph 613 of the Amended Complaint.

614. The allegations in Paragraph 614 of the Amended Complaint constitute legal conclusions to which no response is required. To the extent that a response is required, TRS Illinois and TCW ISBI deny knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 614 of the Amended Complaint.

615. The allegations in Paragraph 615 of the Amended Complaint constitute legal conclusions to which no response is required. To the extent that a response is required, TRS Illinois and TCW ISBI deny the allegations in Paragraph 615 of the Amended Complaint.

**AS AND FOR AN ANSWER TO THE FOURTH CLAIM FOR RELIEF**

616. TRS Illinois and TCW ISBI repeat and re-assert their answers to the allegations in Paragraphs 1 through 615 of the Amended Complaint with the same force and effect as if fully set forth herein.

617. The allegations in Paragraph 617 of the Amended Complaint constitute legal conclusions to which no response is required. To the extent that a response is required, TRS Illinois and TCW ISBI deny the allegations in Paragraph 617 of the Amended Complaint.

618. The allegations in Paragraph 618 of the Amended Complaint constitute legal conclusions to which no response is required. To the extent that a response is required, TRS Illinois and TCW ISBI deny the allegations in Paragraph 618 of the Amended Complaint.

TRS Illinois and TCW ISBI repeat and re-assert their answers to the allegations in Paragraphs 1 through 618 of the Amended Complaint with the same force and effect as if fully set forth herein, and further deny and object to each one of the Committee's "prays for

judgment” numbered 1 through 8 and set forth on pages on pages 77 and 78 of the Amended Complaint.

### **AFFIRMATIVE DEFENSES**

In asserting the following affirmative defenses to ATT’s claims, TRS Illinois and TCW ISBI do not concede that the assertion of such defenses imposes any burden of proof on them with respect thereto. Nor have TRS Illinois and TCW ISBI yet completed their investigation and, to the extent that investigation and/or discovery warrant, reserve the right to supplement, amend or delete any or all of the following affirmative defenses prior to any trial of this action. At the present time, TRS Illinois and TCW ISBI assert that the claims alleged in the Amended Complaint against them are barred, in whole or in part, because:

#### **FIRST DEFENSE**

The Amended Complaint fails to state a claim against TRS Illinois and TCW ISBI upon which relief may be granted.

#### **SECOND DEFENSE**

TRS Illinois and TCW ISBI are protected from liability for the facts in the Amended Complaint by the principles of sovereign immunity.

#### **THIRD DEFENSE**

TRS Illinois and TCW ISBI were not properly served with Amended Complaint in this Adversary Proceeding and/or TRS Illinois and TCW ISBI are not subject to personal jurisdiction in the United States Bankruptcy Court for the Southern District of New York.

#### **FOURTH DEFENSE**

The claims asserted in the Amended Complaint against the Answering Defendants are barred by applicable statutes of limitations.

**FIFTH DEFENSE**

The Termination Statement is void and ineffective because JPMC, in its capacity as Administrative Agent for a syndicate of financial institutions on a different financing for General Motors, was not the secured party of record under the Term Loan UCC Financing Statements and therefore had no power or authority to cause the Termination Statement to be filed.

**SIXTH DEFENSE**

The Termination Statement is void and ineffective because JPMC never obtained the consent of TRS Illinois and TCW ISBI to cause the filing of the Termination Statement as required under the Term Loan Agreement.

**SEVENTH DEFENSE**

The Termination Statement is void and ineffective because JPMC, both in its capacity as administrative agent for the synthetic lease and in its capacity as Administrative Agent for the \$1.5 billion Term Loan, exceeded the extent of its authority as an agent of its principals, including the TRS Illinois and TCW ISBI, when it caused the Termination Statement to be filed.

**EIGHTH DEFENSE**

The Termination Statement is void and ineffective because JPMC did not authorize its filing.

**NINTH DEFENSE**

The unauthorized and ineffective filing of the Termination Statement did not waive or terminate the security interests that the TRS Illinois and TCW ISBI had in certain assets of the Debtors pursuant to the Term Loan Agreement and the Term Loan UCC Financing Statements.



**TENTH DEFENSE**

TRS Illinois and TCW ISBI were secured parties and beneficiaries of perfected security interests on the Petition Date in certain assets of the Debtors pursuant to the Term Loan Agreement as set forth in multiple UCC-1 financing statements filed throughout the United States, including, but not limited to, the UCC-1 financing statement numbered 6416822 3 and filed on November 30, 2006 with the Delaware Secretary of State listing Saturn as the “debtor.”

**ELEVENTH DEFENSE**

The claims asserted in the Amended Complaint against TRS Illinois and TCW ISBI are barred by the doctrines of *in pari delicto*, unclean hands, and/or the *Wagoner* Rule.

**TWELFTH DEFENSE**

AAT is estopped from bringing the claims asserted in the Amended Complaint against TRS Illinois and TCW ISBI.

**THIRTEENTH DEFENSE**

The claims asserted in the Amended Complaint against TRS Illinois and TCW ISBI are barred by the doctrines of mistake, restitution, and unjust enrichment, which collectively or individually require reinstatement of the erroneously terminated financing statement.

**FOURTEENTH DEFENSE**

The Bankruptcy Court should find that the Debtors held the collateral under the Term Loan Agreement pursuant to a constructive trust for the benefit of the Term Lenders, including TRS Illinois and TCW ISBI, and, therefore, that such collateral is excluded from the bankruptcy estate.

**FIFTEENTH DEFENSE**

The claims asserted in the Amended Complaint against TRS Illinois and TCW ISBI are barred by the doctrine of earmarking.

**SIXTEENTH DEFENSE**

The claims asserted in the Amended Complaint are barred to the extent that either TRS Illinois or TCW ISBI is not a transferee from which AAT may recover the value of an avoided transfer under section 550(b) of the Bankruptcy Code.

**SEVENTEENTH DEFENSE**

Because the DIP Order reserves for the AAT “only [the right to challenge] the perfection of first-priority liens of the Postpetition Senior Facilities Secured Parties,” all other claims have been released and the AAT lacks standing and authority to bring the Second, Third, and Fourth Claims for Relief asserted in the Amended Complaint.

**EIGHTEENTH DEFENSE**

The claims asserted in the Amended Complaint are barred to the extent that either TRS Illinois or TCW ISBI did not receive a transfer made under the Term Loan Agreement on May 27, 2009.

**NINETEENTH DEFENSE**

The claims asserted in the Amended Complaint are barred to the extent that either TRS Illinois or TCW ISBI did not receive a transfer made under the Term Loan Agreement on June 29, 2009.

**TWENTIETH DEFENSE**

At the time any of the purported transfers referenced in the Amended Complaint were allegedly made by the Debtors, TRS Illinois and TCW ISBI were perfected secured

creditors thereby excepting all of the alleged transfers from avoidance as preferential transfers pursuant to section 547(b)(5) of the Bankruptcy Code.

**TWENTY-FIRST DEFENSE**

Pursuant to section 547(c)(2) of the Bankruptcy Code, the purported transfers sought from TRS Illinois and TCW ISBI were (i) in payment of a debt incurred by the Debtors in the ordinary course of business or financial affairs of the Debtors and TRS Illinois and TCW ISBI, (ii) made in the ordinary course of business or financial affairs of the Debtors and TRS Illinois and TCW ISBI, and (iii) made according to ordinary business terms.

**TWENTY-SECOND DEFENSE**

The claims asserted in the Amended Complaint against TRS Illinois and TCW ISBI are barred by the doctrines of recoupment and/or setoff.

**TWENTY-THIRD DEFENSE**

Pursuant to the Term Loan Agreement, the Debtors agreed to hold harmless and indemnify each lender to the full extent of any losses, expenses, claims, or proceedings related to or arising out of the Term Loan Agreement. TRS Illinois and TCW ISBI hereby invoke all of its contractual and common law indemnity rights, and hereby provides notice to AAT and the Debtors thereof.

**TWENTY-FOURTH DEFENSE**

Any injury or damages to the AAT should be reduced to the extent that the culpable conduct of others caused or contributed to any injury or damages that the AAT may have sustained.

WHEREFORE, as to their answer to the allegations in the Amended Complaint, TRS Illinois and TCW ISBI respectfully request that judgment be entered in their favor as follows:

- A. Dismissing with prejudice Plaintiff's Amended Complaint in its entirety and

on the merits as to TRS Illinois and TCW ISBI;

- B. Awarding TRS Illinois and TCW ISBI their costs of defending this action, including reasonable attorneys' fees and costs and disbursements; and
- C. Awarding to TRS Illinois and TCW ISBI such other and further relief as this Court may deem just and proper.

### **CROSS-CLAIMS OF TRS ILLINOIS AND TCW ISBI AGAINST JPMC**

Pursuant to Federal Rule of Civil Procedure 13(g), made applicable to this Adversary Proceeding by Federal Rule of Bankruptcy Procedure 7013, TRS Illinois and TCW ISBI hereby assert the following cross-claims (the "Cross-Claims") against Defendant and Cross-Defendant JPMC, and as the bases therefore, allege as follows:

#### **PARTIES**

1. TRS Illinois is a pension system that provides retirement, disability and survivor benefits to Illinois teachers, administrators and other public school personnel employed outside the City of Chicago, Illinois. TRS Illinois is located at 2815 West Washington Street, Springfield, Illinois.

2. TCW ISBI was a fund managed by The TCW Group Inc. on behalf of the Illinois State Board of Investments, which manages assets available to meet the statutory needs of the General Assembly Retirement System, the Judges' Retirement System of Illinois, the State Employees' Retirement System of Illinois, and the Illinois Power Agency Trust. The Illinois State Board of Investments is located at 180 North LaSalle Street, Suite 2015, Chicago, Illinois.

3. TRS Illinois and TCW are named as Defendants in the Adversary Proceeding.

4. JPMC, a national banking association with its principal office in the State of Ohio, is a principal bank subsidiary of JPMC Chase & Co., with its principal office located in the State of New York. JPMC was Administrative Agent under the Term Loan Agreement, and was

at all times required to act on behalf of, and for the benefit of, the Term Lenders pursuant to the terms of the Term Loan Agreement. Among other things, the Term Loan Agreement provided that JPMC, as Administrative Agent, was prohibited from terminating any security interests without the written consent of each Term Lender.

### **JURISTITION AND VENUE**

5. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157, 1331, 1332, 1334, and 1367.

6. Venue is proper under 28 U.S.C. § 1409(a) because these Cross-Claims arise in and relate to the underlying adversary proceeding, because the parties to the Term Loan Agreement expressly consented to venue in this district, and because many of the events that give rise to the Cross-Claims took place within this district.

7. This adversary proceeding constitutes a “core” proceeding as defined in 28 U.S.C. § 157(b)(2)(A). To the extent that this or any other appropriate Court finds any part of this adversary proceeding, including any individual Cross-Claim, to be “non-core,” or to the extent that it is determined that the Bankruptcy Court does not have jurisdiction to enter a final judgment or order consistent with Article III of the United States Constitution, TRS Illinois and TCW ISBI do not consent at this time to the entry of final orders and judgments by the Bankruptcy Court, pursuant to Rule 7008 of the Federal Rules of Bankruptcy Procedure and Rules 7008-1 and 7012-1 of the Local Bankruptcy Rules for the Southern District of New York; provided, however, that each of TRS Illinois and TCW ISBI reserves its right to so consent at a later date.

## FACTUAL ALLEGATIONS

### A. Introduction

8. TRS Illinois and TCW ISBI are Defendants in this adversary proceeding solely due to the unauthorized and reckless acts and abdication of responsibility by JPMC. JPMC recklessly and with gross negligence caused the filing of an unauthorized UCC-3 termination statement purporting to terminate the Financing Statements that perfected the security interest that protected the Term Lenders, including TRS Illinois and TCW ISBI, in connection with the Term Loan. JPMC caused this filing in its capacity as an administrative agent for a *different* set of lenders and in connection with a transaction that was entirely separate from the Term Loan. JPMC's actions were taken wholly outside of its authority as Administrative Agent for Term Loan, in violation of the duties that JPMC owed to the Term Lenders, including TRS Illinois and TCW ISBI, with full knowledge or in reckless disregard of the fact that that *none* of the conditions for filing such a termination statement was present.

9. The Term Lenders, including TRS Illinois and TCW ISBI, extended credit to General Motors based on the commitment and understanding that the Term Lenders would be protected by a perfected security interest in certain General Motors assets valued in excess of the amount needed to secure payment of the Term Loan. As administrative Agent, JPMC undertook to serve as the Secured Party of Record for the Term Loan UCC Financing Statements filed to perfect the security interest.

10. In 2008, acting as administrative agent and secured party of record for a entirely different financing for General Motors (the "Synthetic Lease"), JPMC caused the filing of the Termination Statement that purported to terminate the Main Term Loan UCC-1, which protected a significant portion of the security interest in collateral securing the Term Loan. JPMC did so

despite obvious red flags that the Termination Statement had nothing to do with any collateral underlying the Synthetic Lease, but instead related to the collateral for the Term Loan.

11. In so doing, JPMC violated a fundamental obligation as Administrative Agent and Secured Party of Record -- namely, the obligation *not* to cause to be filed UCC-3 termination statements related to the collateral unless the conditions precedent to such filing had been satisfied. JPMC also deprived TRS Illinois and TCW ISBI of a critical benefit to which they were entitled under the Term Loan Agreement -- namely, the perfected security interest that would protect the collateral supporting their interest in the Term Loan. In so doing, JPMC exposed TRS Illinois and TCW ISBI to the risk of potentially devastating losses.

12. TRS Illinois and TCW ISBI are now exposed to that risk. General Motors's unsecured creditors filed the Adversary Proceeding naming the Term Lenders. The sole basis for the Adversary Proceeding is AAT's contention that JPMC's wrongful conduct destroyed the perfection of the security interest that was designed to protect the Term Lenders, TRS Illinois and TCW ISBI.

13. Following its 2008 error, JPMC engaged in conduct calculated to serve its own interests at the expense of the Term Lenders. Among other things, by agreement with AAT, JPMC spent six-years litigating this case without the participation of the Term Lenders and while operating under a fundamental conflict of interest, litigating in its own best interests and contrary to the interests of the Term Lenders.

14. JPMC's misconduct should not provide a basis for liability on the part of TRS Illinois and TCW ISBI. As described in their Answer above, TRS Illinois and TCW ISBI dispute AAT's claims and deny that the filing of the Termination Statement was effective to destroy the perfection of a significant portion of the Term Loan security interest. But to the

extent that TRS Illinois and TCW ISBI are subject to any liability in the Adversary Proceeding, JPMC must hold them harmless. TRS Illinois and TCW ISBI would not have been placed at risk of liability had it not been for JPMC's gross negligence, unauthorized acts, and breaches of duty. Accordingly, TRS Illinois and TCW ISBI seek a judgment that JPMC breached its duties, acted wholly outside of any authority that it was granted in connection with the Term Loan, and must hold TRS Illinois and TCW ISBI harmless.

**B. The Term Loan**

15. The Term Loan provided \$1.5 billion of essential financing to General Motors. Because of its size and risk profile, the Term Loan was syndicated to a large number of lenders. JPMC acted as arranger for the Term Loan, negotiating its terms and organizing the group of syndicated lenders. JPMC would not have been able to syndicate this Term Loan (and earn the substantial fees associated with that work) had it not been for the promise that syndicate members would be protected by a perfected first-priority security interest in collateral having a value far in excess of the amount of the loan.

16. Certain of the parties' rights and obligations are set out in two agreements relating to the Term Loan, each dated as of November 29, 2006: (i) the Term Loan Agreement; and (ii) a Collateral Agreement. Upon information and belief, JPMC and/or its representatives drafted both agreements, which were signed on behalf of JPMC by Richard W. Duker, a managing director at JPMC.

17. Any extension of credit to General Motors at the end of 2006 had to be undertaken with extreme caution. General Motors had incurred substantial financial losses, and there was widespread speculation that the automaker might file for bankruptcy protection. Absent a perfected security interest, any interest in properties pledged as collateral to secure



repayment of the Term Loan could be jeopardized by a General Motors bankruptcy. It was critically important, and it was expressly represented to TRS Illinois and TCW ISBI, that the collateral supporting the Term Loan would be protected by a first-priority perfected security interest in substantially all of the United States machinery, equipment, and special tools of General Motors.

18. The Term Loan also included an express commitment that the collateral underlying the Term Loan would be protected at all times by a perfected, first-priority security interest. Specifically, Article II of the Collateral Agreement for the Term Loan reflected General Motors's grant to JPMC, for the benefit of the Secured Parties, of a first-priority security interest in a substantial portion of General Motors's assets, including all of General Motors's fixtures and equipment at 42 different facilities across the United States, as well as associated intangibles, documents, and proceeds (the "Collateral"). As required by Section 5.05 of the Term Loan Agreement, General Motors granted JPMC, for the benefit of the Term Lenders, a perfected security interest in the Collateral, including the filing of UCC financing statements.

19. The security interest created by the Collateral Agreement for the Term Loan was perfected by the filing of 28 UCC-1 financing statements, the broadest of which was the Main Term Loan UCC-1. The Main Term Loan UCC-1 perfected the Term Lenders' security interest in equipment, fixtures and related property at 42 General Motors manufacturing facilities across the United States.

20. Under the Term Loan Agreement, JPMC accepted the appointment as Administrative Agent for the Term Lenders, with authority to take certain specified actions on their behalf. Separately, JPMC undertook to serve as Secured Party of Record on the Term Loan

UCC Financing Statements (including the Main Term Loan UCC-1) for the benefit of all Secured Parties on the Term Loan, including TRS Illinois and TCW ISBI.

21. Upon information and belief, Duker was the JPMC employee with primary responsibility for arranging the Term Loan and for ensuring the execution of JPMC's duties as Administrative Agent and Secured Party of Record for the Term Loan.

22. JPMC had no authority either to terminate, or to permit others to terminate, the Term Loan UCC Financing Statements for the Term Loan unless: (i) the Term Loan had been repaid in full; or (ii) the Term Lenders had consented in writing to the termination.

23. These limitations on JPMC's authority were central to the purpose and structure of the Term Loan. JPMC, as agent for the Term Lenders, had a fundamental duty not to take improper actions that would damage the Term Lenders' interests in connection with the Term Loan. This included a fundamental responsibility, before causing the filing of a termination statement, to read the statement and understand which security interests it would be releasing.

24. JPMC also had fundamental obligations: (i) not to take actions outside the scope of its authority as agent; (ii) to follow the instructions of its principals; (iii) promptly to notify its principals if it breached either of the preceding duties, in order to give its principals an opportunity to mitigate or cure the consequences of the breach; (iv) not to act adversely to its principals with respect to the subject matter of the agency; and (v) to act consistently with the covenant of good faith and fair dealing in the performance of the Term Loan agreements, including by not taking actions that would have the effect of destroying or injuring the rights of the Term Lenders to receive the benefits of the agreements.

25. JPMC also undertook to serve as the Secured Party of Record for the Term Loan UCC Financing Statements that were filed in order to perfect the security interests in the

Collateral. All 28 UCC-1 financing statements, including the Main Term Loan UCC-1, named “JPMC Chase Bank, N.A. as Administrative Agent” as the Secured Party of Record. As was apparent from the face of the Main Term Loan UCC-1, the reference to JPMC as Secured Party of Record was to JPMC as “Agent” for the principals/lenders in the Term Loan. An annex to the Main Term Loan UCC-1 referenced, among other things, the Term Loan Agreement dated November 29, 2006.

26. As Secured Party of Record, JPMC had a fundamental obligation to refrain from taking wrongful actions that would have the effect of destroying the perfection of the security interests for which it was Secured Party of Record.

27. TRS Illinois and TCW ISBI are Term Lenders and express third-party beneficiaries of the Collateral Agreement and also were principals to the agency relationship with JPMC.

28. JPMC’s obligations under the Term Loan Agreement and the Collateral Agreement are valid and enforceable obligations.

29. TRS Illinois and TCW ISBI have performed all conditions precedent to JPMC’s obligations under the relevant agreements.

**C. The Synthetic Lease**

30. In 2001, five years before the Term Loan was issued, JPMC helped arrange the Synthetic Lease, which involved a \$300 million sale and leaseback of real properties in various states.<sup>1</sup>

---

<sup>1</sup> Chase Manhattan Bank, N.A. (“Chase Manhattan”) was named to serve as Administrative Agent for the Synthetic Lease. In or about 2001, JPMC & Co. merged with Chase Manhattan. Upon information and belief, JPMC took over Chase Manhattan’s duties as Administrative Agent under the Synthetic Lease, and acted as Secured Party of Record for the Synthetic Lease.

31. The Synthetic Lease was unrelated to the Term Loan. It involved a different set of lenders on whose behalf Chase Manhattan and, later, JPMC, acted as Administrative Agent. The Synthetic Lease agreements did not purport to grant JPMC any authority to take actions in connection with that transaction that would affect any party's interests under the Term Loan. On the contrary, the Synthetic Lease documentation specifically limited JPMC's authority, including in connection with the termination of any financing statements, solely to properties and matters encompassed by the Synthetic Lease transaction.

32. General Motors's obligations under the Synthetic Lease were secured by liens on 12 specific General Motors properties in Michigan and Indiana that were identified in the Synthetic Lease agreements. This collateral consisted largely of real estate and was entirely separate from the assets that served as Collateral under the Term Loan.

33. In order to perfect the liens for the Synthetic Lease, JPMC filed UCC-1 financing statements with a variety of recording offices. All of the statements identified the secured party of record as: "JPMC Chase Bank, as Administrative Agent." Three UCC-1 financing statements were filed in Delaware. Two were dated April 12, 2002, and pertained to real property and related collateral in Marion County, Indiana. The third was filed in 2007 against Auto Facilities Real Estate Trust 2001-1, and related to parking lots in Detroit, Michigan. The phrase "as Administrative Agent" referred to JPMC in its capacity as Administrative Agent under the Synthetic Lease documents, and specifically as "Agent" for the principals/lenders in the Synthetic Lease.

34. Upon information and belief, Duker was the JPMC employee/officer with primary responsibility for the performance of JPMC's obligations under the Synthetic Lease.

**D. JPMC Recklessly Terminates the Main Term Loan UCC-1**

35. The Synthetic Lease was scheduled to mature on October 31, 2008. On or about October 1, 2008, General Motors informed Duker that General Motors intended to repay the Synthetic Lease in full. Duker was also personally familiar with the Term Loan, and knew that General Motors was not repaying the Term Loan at that time.

36. General Motors retained the law firm of Mayer Brown LLP (“Mayer Brown”) in connection with the repayment of the Synthetic Lease. Upon information and belief, Mayer Brown was not retained to provide advice or representation to General Motors, JPMC, or any other party in connection with the Term Loan.

37. JPMC retained the law firm of Simpson Thacher & Bartlett LLP (“Simpson”) in connection with the Synthetic Lease. Simpson was retained to, and did, represent JPMC in this transaction solely in JPMC’s capacity as Administrative Agent under the Synthetic Lease. JPMC did not retain Simpson or seek Simpson’s advice in connection with the Term Loan, nor did Simpson provide any legal representation or advice to JPMC with respect to its obligations or actions under the Term Loan. JPMC did not delegate to Simpson any of JPMC’s responsibilities as Administrative Agent under the Term Loan, nor did it delegate its responsibilities as Secured Party of Record for the Term Lenders.

38. General Motors and JPMC agreed that General Motors (including its lawyers) would prepare drafts of the documentation necessary to terminate the Synthetic Lease. In so doing, JPMC authorized General Motors to act as its agent in connection with the termination, which it knew and understood would be performed under its name as Secured Party of Record.

39. As Secured Party of Record for the Synthetic Lease transaction, JPMC was responsible for approving the termination of the relevant UCC-1 financing statements supporting the Synthetic Lease upon repayment of the debt involved in the transaction.

40. JPMC knew that if it caused an incorrect UCC-3 termination statement to be filed under its name, such as a termination statement relating to the Term Loan instead of the Synthetic Lease, such an error could result in devastating financial losses to the Term Lenders:

(a) JPMC knew that it was serving as Administrative Agent and Secured Party of Record for the Secured Parties named in the Synthetic Lease.

(b) JPMC knew that it also was designated as Administrative Agent and Secured Party of Record for the different set of Secured Parties (including TRS Illinois and TCW ISBI) for the Term Loan.

(c) JPMC knew that UCC-1 financing statements had been filed with the Delaware Secretary of State in connection with both the Term Loan and the Synthetic Lease transactions.

(d) JPMC knew that the Term Loan UCC Financing Statements filed in Delaware identified the secured party of record as “JPMC Chase Bank, N.A., as Administrative Agent,” meaning Administrative Agent in connection with the Term Loan.

(e) JPMC knew that the UCC-1 financing statements filed in Delaware in connection with the Synthetic Lease identified the secured party of record as “JPMC Chase Bank, as Administrative Agent,” meaning Administrative Agent in connection with the Synthetic Lease.

(f) Upon information and belief, JPMC never informed Simpson of the risk created by its simultaneous service as an administrative agent for both the Synthetic Lease and the Term Loan.

(g) JPMC knew that, in the event of a General Motors bankruptcy, a termination statement purporting to terminate UCC-1 financing statements for certain of the collateral supporting the Term Loan might be used in any ensuing General Motors bankruptcy as a basis to disregard the Term Lenders' security interest in the Collateral supporting the Term Loan.

(h) JPMC also knew, in October 2008, that there was a significant risk that General Motors would file for bankruptcy protection in the imminent future. Indeed, on October 10, 2008, while General Motors was preparing the closing documents for the Synthetic Lease payoff, a representative of Wells Fargo emailed Duker, expressing concern about General Motors' financial condition, and inquiring into the status of the Collateral securing the Term Loan. The email noted that General Motors' stock had fallen "~84%" and that General Motors' bonds had "seen a similar decline." The Wells Fargo representative questioned whether the value of the Collateral was sufficient to ensure repayment of the Term Loan, and inquired whether the Term Lenders should seek to reduce their exposure to General Motors or demand additional collateral. Duker responded that the collateral included "M&E/special tools" (referring, upon information and belief, to "machinery and equipment") and that "property is not part of the collateral." This exchange once again alerted Duker, as he already was well aware, that the Term Loan was secured by substantially all of General Motors's United States machinery, equipment, and special tools. It also provided a vivid reminder to Duker, if any reminder were needed, that it was imperative to protect the security interest that JPMC held as Secured Party of Record for the benefit of the Term Lenders.

41. Nevertheless, and despite the serious consequences of any error as set out above, neither Duker nor anyone else at JPMC took any steps at all to ensure that the actions taken in

connection with the repayment of the Synthetic Lease did not adversely affect the security interests of the Term Lenders.

42. In fact, JPMC made a colossal error in connection with the Synthetic Lease termination. General Motors and Mayer Brown's drafts incorrectly identified the Main Term Loan UCC-1 as one of the financing statements to be terminated in connection with the payoff of the Synthetic Lease. Mayer Brown then sent to Simpson, in connection with the payoff of the Synthetic Lease, draft closing checklists that identified the Main Term Loan UCC-1 as one of the UCC-1 financing statements to be terminated at the time of the closing of the Synthetic Lease payoff. General Motors also sent draft closing documents to Simpson, including a draft of the improper Termination Statement. Simpson forwarded the checklists and the draft documents including the Termination Statement to JPMC (specifically, to Duker). General Motors also circulated a draft of a Synthetic Lease Escrow Agreement. The escrow agreement provided that, upon the delivery of the funds necessary to repay the Synthetic Lease, the escrow agent would permit General Motors to file various UCC-3 termination statements, including the improper Termination Statement.

43. Upon information and belief, despite its full awareness of the significant consequences of the filing of a UCC-3, as well as the risks presented by its serving as administrative agents and secured parties of record on multiple credit facilities, at no point during this process did JPMC take any steps to determine for itself whether the draft documents provided by General Motors and its counsel had identified the correct financing statements for termination in connection with the Synthetic Lease. Nor, upon information and belief, did JPMC take any steps to ensure that no other financing statements were scheduled for termination, including the Main Term Loan UCC-1 that is at issue in this action. Nor, upon information and



belief, did JPMC even take steps to determine what UCC-1 financing statements it was causing to be terminated. Because JPMC undertook to serve as Secured Party of Record on the UCC-1 financing statements, no UCC-3 termination statement could have been filed without JPMC's name on it. JPMC accordingly assumed a duty to read and understand at least the most basic elements of any UCC-3 statements filed in its name. Upon information and belief, that is the very reason that the UCC-3 termination statements were sent to JPMC. Instead of complying with this obligation, JPMC, in its capacity as Administrative Agent for the Synthetic Lease, caused the escrow agent to file UCC-3 termination statements without taking any steps to verify that those UCC-3 termination statements related only to the Synthetic Lease that was being terminated.

44. On or about November 1, 2008, the Termination Statement was filed with the Delaware Secretary of State. The Termination Statement was filed at the same time as termination statements pertaining to the Synthetic Lease.

45. JPMC's actions did not constitute "authorization" within the meaning of the UCC. JPMC was not acting in its capacity as Administrative Agent for the Term Lenders, and therefore was not acting as Secured Party of Record under the Main Term Loan UCC-1, when it caused the Termination Statement to be filed. In its capacity as Administrative Agent and Secured Party of Record for the Synthetic Lease, JPMC lacked power to authorize the filing of any termination statements related to the Term Loan. When JPMC caused the Termination Statement to be filed, it was acting beyond the authority delegated to it under the Term Loan Agreement, and contrary to express contractual obligations and instructions provided by its principals, the Term Lenders.

46. Nonetheless, AAT has contended that JPMC "authorized" the filing of the Termination Statement. To the extent that JPMC's actions constituted "authorization" or

otherwise impaired the perfection of TRS Illinois and TCW ISBI's security for the Term Loan, JPMC must indemnify TRS Illinois and TCW ISBI and hold them harmless.

47. JPMC's actions with respect to the Termination Statement under the circumstances described above constituted recklessness and gross negligence because (among other reasons):

(a) JPMC knew that an erroneous filing could be used by General Motors's creditors in a General Motors bankruptcy in an attempt to disregard or displace the Term Lenders' security interests, and thus could seriously impair the Term Lenders' right to repayment.

(b) JPMC knew that at the same time it was acting as Administrative Agent for the benefit of the Synthetic Lease syndicate in connection with the termination of the Synthetic Lease, it had continuing responsibilities as Administrative Agent for the Term Lenders in connection with the Term Loan, and that General Motors was not at that time paying off the Term Loan.

(c) As of October 2008, JPMC knew that General Motors was experiencing serious financial difficulties, that there was a significant likelihood that General Motors would file for bankruptcy protection, and that the risks associated with a filing mistake in that context would be particularly severe.

(d) Nevertheless, JPMC implemented no procedures and took no steps to ensure that the debtor-prepared termination statements filed in connection with the payoff of the Synthetic Lease actually pertained to the Synthetic Lease, and did not instead terminate the financing statements for other financings, including the Main Term Loan UCC-1.

(e) The costs of employing such procedures would have been trivial in comparison to the devastating potential consequences associated with an erroneous filing.

(f) JPMC also ignored red flags indicating that the draft UCC-3 termination statement related to Collateral for the Term Loan. On October 15, 2008, General Motors' lawyers sent JPMC's lawyers a draft closing checklist along with a collection of draft UCC filings, all of which pertained to real property except the draft Termination Statement. That same day, JPMC's lawyers forwarded the checklist and the draft documents to Duker at JPMC. Under the heading "Termination of UCCs (central, DE filings)," the draft checklist listed a "financing statement as to equipment, fixtures and related collateral located at certain U.S. manufacturing facilities (file number 6416808 4, file date 11/30/2006)." This entry on the checklist made it obvious that an error had been committed.

(i) The Synthetic Lease was a *real estate* transaction, and the collateral securing that loan consisted of real estate and fixtures relating to that real estate. The references to "equipment" at "U.S. manufacturing facilities" – without any corresponding reference to real estate – were sufficient to alert JPMC to the fact that the draft termination statement did not relate to the collateral for the Synthetic Lease -- and instead related to collateral that secured the Term Loan. Duker, the person to whom the drafts were sent, was responsible for managing both the Synthetic Lease and the Term Loan, and was well aware of the difference between the collateral securing those two obligations.

(ii) The reference in the proposed Termination Statement to "file date 11/30/2006" – the day after the closing of the Term Loan – was another red flag for JPMC, which was well aware that the Synthetic Lease had closed in 2001, and that it was the Term Loan, and not the Synthetic Lease, that closed in November 2006.

(iii) The numbering by which the Term Loan financing statement was designated on the proposed Termination Statement was yet another red flag, because that numbering was different in form from the numbers on the Synthetic Lease financing statement.

(g) Despite all these warning signs, Duker and JPMC caused the filing of the Termination Statement.

(h) On October 15, 2008 – the *very same day* Duker received the draft checklist – Wells Fargo provided yet another reminder of the importance of preserving, for the benefit of the Term Lenders, the security interest in General Motors’ machinery, equipment, and special tools. That day, the same Wells Fargo representative who had sent the October 10 email expressing concern about the machinery and equipment collateral securing the Term Loan forwarded that same email exchange once again to Duker, asking Duker to “give me a call to discuss; it’s not urgent but nonetheless important.” Yet neither Duker nor anybody else at JPMC took any steps to avoid endangering the Term Lenders’ security interest.

(i) JPMC’s conduct showed a reckless disregard for the interests of the Term Lenders that it was required to serve, and reflected a failure to take even slight care.

48. Furthermore, upon information and belief, JPMC – which held itself out as the industry leader in the field of syndicated lending – simultaneously served as administrative agent and secured party of record for many different syndicated loan transactions. When it so served, JPMC had a practice of using identical or virtually identical language to identify itself on UCC filings. This situation created a grave risk of an erroneous filing. Having created this risk, JPMC had an obligation to adopt and follow procedures that would prevent such an error. JPMC either

failed entirely to adopt such procedures, or failed to follow them when it caused the filing of the Termination Statement. In either case, its conduct evinced recklessness and gross negligence.

49. JPMC's actions described above were not lawfully taken.

**E. JPMC Compounds Its Breach of Duty With Additional Breaches In and After 2009**

*Acts and Omissions Prior to General Motor's Bankruptcy Filing*

50. By virtue of its status as Agent for the Term Lenders, and by virtue of its responsibilities as Secured Party of Record for the Term Lenders, JPMC had a duty, not waived or diminished by the Term Loan Agreement, promptly to notify the principals of its transgression of authority and to take any necessary actions to assist the principals in remedying any injury caused by that transgression -- including, in this case, by alerting TRS Illinois and TCW ISBI to the need to file a new UCC-1 financing statement and then undertaking to file such a statement.

51. Despite this duty, JPMC failed promptly to alert TRS Illinois and TCW ISBI of its error or otherwise take steps either to enable TRS Illinois and TCW ISBI to take action to protect their interests as a result of JPMC's transgression, or to rectify the problem promptly itself.

52. Upon information and belief, in January 2009, General Motors informed JPMC that its financial situation had further deteriorated. General Motors told JPMC that its auditors were going to include a "going concern" qualification in connection with their audit of General Motors' financial statements, and that General Motors therefore would not be in compliance with the Term Loan Agreement. A "going concern" qualification is necessary only when there is substantial doubt about a company's ability to avoid bankruptcy or otherwise continue its operations.

53. General Motors and JPMC negotiated an amendment to the Term Loan Agreement that, among other things, prevented General Motors from defaulting on the Term Loan due to the “going concern” qualification. For helping General Motors avoid default, JPMC was paid a \$6 million fee.

54. Upon information and belief, once the General Motors bankruptcy became likely, it would have been standard practice for JPMC to review relevant UCC filings associated with General Motors’ secured loans. Upon information and belief, JPMC did undertake to perform such a review of the UCC filings for the Term Loan in the first half of 2009. Even a rudimentary search would have uncovered the Termination Statement. Thus, upon information and belief, JPMC either (i) discovered the Termination Statement or indicia thereof and did nothing, or (ii) conducted the search in such a clumsy and reckless manner that it failed to identify its obvious error. Had it exercised even minimal care, JPMC could have sought to correct its error by (i) filing (or demanding that General Motors file) a new UCC-1 financing statement for the Term Loan; and/or filing (or demanding that General Motors file) a correction statement that would have informed record-searchers that the Termination Statement was wrongfully filed and unreliable.

55. Upon information and belief, JPMC discovered its error no later than June 15, 2009.

*The Adversary Proceeding*

56. General Motors filed for bankruptcy on June 1, 2009.

57. On June 30, 2009, the Term Lenders received all interest and principal outstanding under the Term Loan Agreement from the proceeds of the DIP Credit Facility (as defined in the DIP Order) approved by the Bankruptcy Court on June 25, 2009.

58. As initially filed with the Court on June 1, 2009, the proposed DIP Order contained a broad release of the Term Lenders. On or before June 25, 2009, the proposed release language was modified to reserve certain potential claims relating to the perfection of first-priority liens with respect to the Term Loan and other senior secured debt (the “Prepetition Secured Facilities”). Along with this modification, however, came new language stating that it was “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.” In other words, the modified proposed DIP Order purported to exculpate JPMC, in its capacity as Administrative Agent, from any claims by the Committee seeking to recover funds paid to the other Term Lenders. Upon information and belief, the modified release language was negotiated between JPMC and the Committee after JPMC disclosed to the Committee its role in the filing of the Termination Statement, and the quoted language was negotiated for the purpose of minimizing the risk of JPMC at the expense of the innocent Term Lenders. The modified proposed DIP Order was submitted to the Bankruptcy Court on June 25, 2009, without any disclosure to the Bankruptcy Court concerning the Termination Statement, JPMC’s responsibility for the filing of the Termination Statement, or the fact that the modified language was intended to limit the liabilities of the party at fault (JPMC) while reserving potential claims against the innocent Term Lenders.

59. On July 31, 2009, the Committee initiated this adversary proceeding against JPMC and the Term Lenders, including TRS Illinois and TCW ISBI. The complaint alleged that, because of JPMC’s error, the Term Lenders were not protected by a perfected security interest in

the collateral covered by the Main Term Loan UCC-1. The complaint further alleged that the remaining collateral securing the Term Loan had negligible value, and that the Term Lenders should not have been treated as secured creditors under the DIP Order. The complaint demanded from certain of the Term Lenders a substantial portion of the \$1.5 billion they received in repayment of the Term Loan. AAT served the complaint on JPMC in 2009, but did not serve the Term Lenders, including TRS Illinois and TCW ISBI, until 2015.

60. Specifically, on or before October 6, 2009, following the filing of the initial complaint, JPMC sought and obtained an agreement with AAT to ask the Bankruptcy Court to allow a delay of the service of process on the Term Lenders.

61. Critically, in presenting this proposal to the Bankruptcy Court, JPMC's counsel made a point of telling the Bankruptcy Court that they were appearing for JPMC both individually "and as administrative agent." In response to this proposal, the Bankruptcy Court specifically asked JPMC's counsel whether JPMC had some of its own money in the Term Loan facility, and JPMC's counsel responded in the affirmative. The clear purpose of the Bankruptcy Court's inquiry was to obtain assurance that JPMC's interests were aligned with the Term Lenders who were unrepresented in the court, that JPMC would not act adversely to them, and therefore that the interests of the unserved parties would not be prejudiced by the delay in service.

62. JPMC's stated rationale for the requested delay in service was that the Term Lenders did not have discovery relevant to the events surrounding the filing of the Termination Statement, and therefore it was not necessary to join them at the discovery stage. But in 2010 JPMC and AAT requested further extensions of the deadline to complete service on the Term Lenders until after the Bankruptcy Court ruled on upcoming motions for summary judgment --



extensions that went far beyond the original rationale offered to the Bankruptcy Court. By asking the Bankruptcy Court to allow JPMC and AAT to litigate potentially dispositive motions without the participation of the Term Lenders, JPMC implicitly represented that it would act to protect the interests of the Term Lenders in the litigation. As detailed below, it did not do so, but instead, laboring under a conflict of interest, sought to protect its own interests at the expense of the interests of the Term Lenders.

63. In 2013, following the Bankruptcy Court's order granting summary judgment to JPMC and shortly after the filing of a notice of appeal, AAT, with JPMC's consent, requested yet another extension of the deadline in which to complete service. By this point, upon information and belief, it was apparent to JPMC and its counsel that there was a reasonable prospect that the appellate process would extend more than six years from the 2008 date of the original breach of duty by JPMC, and that if the appellate ruling were to be adverse, continued delay in service might facilitate efforts by JPMC to argue that it had "run out the clock" on a statute of limitations. JPMC had a duty to disclose to the Bankruptcy Court that JPMC might use further extensions of time as a basis to argue that the statute of limitations had run on any cross-claims, and thus that further extensions could (if JPMC's argument prevailed) prejudice the Term Lenders.

64. Neither at the time of the original stipulation, nor on the other occasions over the ensuing six years when JPMC and AAT sought further extensions of the time to serve the Term Lenders, did JPMC disclose to the Bankruptcy Court that JPMC might later seek to use the delay in service of the Term Lenders as a basis to insulate itself from liability to the Term Lenders for its own breaches of duty. Had JPMC disclosed the possibility that it would use the extensions in an effort to prejudice the Term Lenders or that it intended to act solely in its own best interests

even when those interests conflicted with those of the absent Term Lenders, it is difficult to imagine that the Bankruptcy Court would have granted extensions.

65. But, in fact, JPMC engaged in a litigation strategy that was calculated to protect its own interests, even if that meant acting to the detriment of the Term Lenders:

(a) In litigating the effectiveness of the Termination Statement, JPMC failed to assert arguments and defenses that would have protected the Term Lenders but compromised JPMC's own position vis-a-vis the Term Lenders. For example, JPMC failed to assert as an independent basis for invalidity that JPMC, in causing the filing, acted wholly outside the authority granted to it by the Term Lenders and, indeed, in violation of the Term Loan Agreement and its duties as the agent of the Term Lenders.

(b) JPMC also agreed with AAT to the entry of a stipulation, buried in a scheduling order, that purported to limit the right of the Term Lenders to take discovery into the filing of the Termination Statement beyond that conducted by AAT and JPMC. Yet, in submitting this stipulation to the Bankruptcy Court for approval, JPMC did not disclose that its incentives for discovery were tainted by a conflict of interest: just as AAT did not have an interest to pursue discovery establishing that JPMC's acts in connection with the Termination Statement were unlawful, unauthorized by the Term Lenders, and contrary to the duties that JPMC owed the Term Lenders, neither did JPMC. JPMC now has taken the position that this stipulation precludes TRS Illinois and TCW ISBI from taking discovery concerning JPMC's misconduct. JPMC did not disclose to the Bankruptcy Court that it would attempt to use this stipulation as part of a strategy to avoid responsibility for its own wrongdoing.

(c) To the extent that JPMC did report on the adversary proceeding to some Term Lenders, it downplayed the risk to minimized its own transgressions of duty in the filing of the

Termination Statement, and failed to disclose that it was acting under a conflict of interest. The Term Lenders, to the extent they were aware of the adversary proceeding at all, thus were given reason to believe that JPMC would put their ahead of its own interests or, at a minimum, clearly advise the Term Lenders that their interest conflicted with those of their putative agent. JPMC did neither, and instead used the few communications it had with some Term Lenders them into inaction. JPMC, for example, assured certain Term Lenders the purpose of the service extensions was to promote “efficiency,” without disclosing that JPMC intended to use the passage of time caused by its own proposals to delay service to argue that any claims against JPMC were untimely.

(d) As the adversary proceeding now has unfolded, JPMC’s assurances to the Bankruptcy Court and to certain Term Lenders were not borne out. JPMC has now made clear that it intends to try to use the period of delay that it secured from the Bankruptcy Court to support a statute of limitations defense against any cross-claims. Such an argument necessarily would fail because each and every cause of action asserted herein is timely under settled law. But even attempting such a bad-faith tactic is contrary to JPMC’s obligations to the Term Lenders and inconsistent with the implicit representation that JPMC made to the Bankruptcy Court in requesting the extensions of time in the first instance.

66. Since the Second Circuit’s decision, JPMC has refused to take responsibility for the consequences of its actions and has denied that it has any responsibility to reimburse, indemnify, and hold harmless TRS Illinois and TCW ISBI in this case.

**CROSS-CLAIM COUNTS**

**FIRST CLAIM FOR RELIEF**

**Declaratory Relief**

67. TRS Illinois and TCW ISBI reallege and incorporate by reference as though set forth in full the allegations in paragraphs 1 through 66, inclusive.

68. An actual and justiciable controversy now exists between the parties as to JPMC's obligation to reimburse, indemnify, and hold harmless TRS Illinois and TCW ISBI for any liabilities or losses that TRS Illinois and TCW ISBI incur in the Adversary Proceeding.

69. As detailed above, TRS Illinois and TCW ISBI contend that, by virtue of JPMC's wrongful conduct, JPMC is obligated to reimburse, indemnify, and hold TRS Illinois and TCW ISBI harmless for any liabilities to AAT in the Adversary Proceeding.

70. TRS Illinois and TCW ISBI desire a judicial determination of the rights of TRS Illinois and TCW ISBI and JPMC's obligations.

**SECOND CLAIM FOR RELIEF**

**Indemnification**

71. TRS Illinois and TCW ISBI reallege and incorporate by reference as though set forth in full the allegations in paragraphs 1 through 70, inclusive.

72. If the Termination Statement is deemed effective as against TRS Illinois and TCW ISBI, and if TRS Illinois and TCW ISBI incur resulting liabilities to AAT, such liabilities are the proximate result of JPMC's breaches of duty and wrongful conduct.

73. The agent-principal relationship, the terms of the parties' agreements, and/or JPMC's wrongful conduct create an obligation for JPMC to indemnify TRS Illinois and TCW ISBI for any liabilities or losses that TRS Illinois and TCW ISBI incur in the Adversary Proceeding, whether as a result of the breaches described above or as a result of any other

breaches of duty in connection with the creation, perfection, and preservation of any security interest.

### **THIRD CLAIM FOR RELIEF**

#### **Breach of the Collateral Agreement and the Term Loan Agreement**

74. TRS Illinois and TCW ISBI reallege and incorporate by reference as though set forth in full the allegations in paragraphs 1 through 73, inclusive.

75. The Term Loan Agreement and the Collateral Agreement expressly prohibited JPMC from filing or authorizing others to file termination statements relating to the Collateral unless either: (i) the Term Loan had been repaid in full; or (ii) the Term Lenders had unanimously consented to the filing. Neither of these conditions had occurred when JPMC caused the Termination Statement to be filed.

76. To the extent TRS Illinois and TCW ISBI incur liabilities to AAT, any such losses are the natural, probable, and foreseeable consequences of JPMC's breach of contract, and JPMC should be required to reimburse TRS Illinois and TCW ISBI for those losses.

### **FOURTH CLAIM FOR RELIEF**

#### **Breach of Obligations as Agent**

77. TRS Illinois and TCW ISBI reallege and incorporate by reference as though set forth in full the allegations in paragraphs 1 through 76, inclusive.

78. By virtue of its status as agent and Secured Party of Record for the Term Lenders, JPMC assumed certain agency roles and duties. The Term Lenders entrusted JPMC with the security interests in the Collateral by permitting JPMC to be named as Secured Party of Record for the Term Loan.

79. The Term Lenders' express instructions precluded JPMC from filing or authorizing termination statements related to the Collateral unless: (i) the Term Loan had been

repaid in full; or (ii) the Term Lenders consented to the filing. In October 2008, the Term Loan had not been repaid in full, and none of the Term Lenders (much less all of them) had authorized JPMC to file termination statements of any kind.

80. By causing the Termination Statement to be filed, JPMC acted wholly outside of its authority as agent and in direct contravention of the express instructions of its principals.

81. JPMC further breached its obligation to rectify its error promptly.

82. JPMC further breached its obligations to the Term Lenders through its other actions set out above, including but not limited to its conduct in 2009 and in the course of litigating the Adversary Proceeding.

83. To the extent that TRS Illinois and TCW ISBI are held liable to AAT in this action, such losses are a direct and proximate result of JPMC's breaches of duty.

#### **FIFTH CLAIM FOR RELIEF**

##### **Breach of Fiduciary Duty**

84. TRS Illinois and TCW ISBI reallege and incorporate by reference as though set forth in full the allegations in paragraphs 1 through 83, inclusive.

85. By virtue of its status as agent and Secured Party of Record for the Term Lenders, JPMC assumed certain unwaivable fiduciary duties, including a duty not to act adversely to the Term Lenders or to destroy interests held by JPMC for their benefit.

86. By causing the Termination Statement to be filed, JPMC acted contrary to its fiduciary duties to the Term Lenders.

87. JPMC further breached its fiduciary duties to the Term Lenders through its other actions set out above, including but not limited to its conduct in 2009 and in the course of litigating the Adversary Proceeding.

88. To the extent that TRS Illinois and TCW ISBI are held liable to AAT in this action, such losses are a direct and proximate result of JPMC's breaches of duty.

### **SIXTH CLAIM FOR RELIEF**

#### **Slander of Title**

89. TRS Illinois and TCW ISBI reallege and incorporate by reference as though set forth in full the allegations in paragraphs 1 through 88, inclusive. To the extent that JPMC authorized the filing of the Termination Statement, JPMC caused the recording of a document that falsely cast doubt on the valid security interest in the collateral that was held by JPMC for the benefit of the Term Lenders.

90. JPMC's authorization constituted a false communication that the Term Loan had been paid off, that the Term Lenders no longer had a security interest in the Collateral, and/or that the Term Lenders had "authorized" the release of the security interest or the termination of the perfection of a portion of the security interest. JPMC's communication was reasonably calculated to cause harm because JPMC made the communication either with knowledge that it was false, or recklessly and without regard to its consequences. The Second Circuit Decision, which is binding as against JPMC, stated that "JPMC . . . knew that, upon the closing of the Synthetic Lease transaction, Mayer Brown was going to file the termination statement that identified the Main Term Loan UCC-1 for termination" and that "JPMC reviewed and assented to the filing of that statement."

91. If TRS Illinois and TCW ISBI incur any resulting liability to AAT, the full amount of such liability will constitute special damages that are the direct consequence of JPMC's wrongful conduct.

## **SEVENTH CLAIM FOR RELIEF**

### **Injurious Falsehood**

92. TRS Illinois and TCW ISBI reallege and incorporate by reference as though set forth in full the allegations in paragraphs 1 through 91, inclusive.

93. To the extent that JPMC authorized the filing of the Termination Statement, JPMC made a false communication about the Term Lenders' beneficially-owned security interest by representing that the Term Loan had been paid off, that the Term Lenders no longer had a security interest in the Collateral, and/or that the Term Lenders had "authorized" the release of the security interest or the termination of the perfection of a portion of the security interest. JPMC made the communication either with knowledge that it was false, or recklessly and without regard to its consequences. The Second Circuit Decision, which is binding as against JPMC, stated that "JPMC . . . knew that, upon the closing of the Synthetic Lease transaction, Mayer Brown was going to file the termination statement that identified the Main Term Loan UCC-1 for termination" and that "JPMC reviewed and assented to the filing of that statement."

94. A reasonable person would have anticipated that damage would flow from the false statement.

95. If TRS Illinois and TCW ISBI incur any resulting liability to AAT, the full amount of such liability will constitute special damages that are the direct consequence of JPMC's wrongful conduct.

## **EIGHTH CLAIM FOR RELIEF**

### **Injury to Property**

96. TRS Illinois and TCW ISBI reallege and incorporate by reference as though set forth in full the allegations in paragraphs 1 through 95, inclusive.



97. To the extent that JPMC authorized the filing of the Termination Statement, JPMC damaged the Term Lenders' property interests in the Collateral securing the Term Loan through an actionable wrong. JPMC did so in its capacity as Administrative Agent under the Synthetic Lease.

98. If TRS Illinois and TCW ISBI incur any resulting liability to AAT, such pecuniary losses will be a direct consequence of JPMC's wrongful conduct.

### **NINTH CLAIM FOR RELIEF**

#### **Gross Negligence**

99. TRS Illinois and TCW ISBI reallege and incorporate by reference as though set forth in full the allegations in paragraphs 1 through 98, inclusive.

100. By assuming the role of Secured Party of Record, JPMC voluntarily assumed a duty to handle the Term Lenders' security interests with due care.

101. By undertaking to permit General Motors to file termination statements, JPMC assumed a duty of care independent of its contractual obligations.

102. By causing the Termination Statement to be filed, JPMC breached those duties. To the extent that TRS Illinois and TCW ISBI incur any resulting liability to AAT, such losses are a direct and proximate result of JPMC's negligence.

### **TENTH CLAIM FOR RELIEF**

#### **Noncompliance with the UCC (§ 9-625)**

103. TRS Illinois and TCW ISBI reallege and incorporate by reference as though set forth in full the allegations in paragraph 1 through 102, inclusive.

104. When JPMC caused the Termination Statement to be filed, it was not acting in its capacity as Administrative Agent for the Term Loan. Rather, JPMC was acting wholly outside

its authority under the Term Loan, and exclusively in its capacity as Administrative Agent for the Synthetic Lease.

105. JPMC, in its capacity as Administrative Agent for the Synthetic Lease, was not the Secured Party of Record for the Term Loan.

106. JPMC's actions as described above had the effect of causing a termination statement to be filed that was completely unauthorized by the relevant principals.

107. When JPMC, in its capacity as Administrative Agent for the Synthetic Lease, caused the filing of a termination statement relating to the Collateral for the Term Loan, JPMC failed to comply with UCC Section 9-509(d) because it was not acting in its capacity as the Secured Party of Record for the Term Loan. JPMC, in its capacity as Secured Party of Record for the Synthetic Lease, was a stranger to the Term Loan and was not permitted under the UCC to authorize a filing related to it.

108. JPMC's conduct may cause loss to the Term Lenders. To the extent that TRS Illinois and TCW ISBI incur any liability to AAT, such losses are a direct and proximate result of JPMC's negligence.

## **ELEVENTH CLAIM FOR RELIEF**

### **Breach of the Covenant of Good Faith and Fair Dealing**

109. TRS Illinois and TCW ISBI reallege and incorporate by reference as though set forth in full the allegations in paragraphs 1 through 108, inclusive.

110. Implicit in all of the parties' agreements relating to the Term Loan was a covenant to exercise good faith and fair dealing in the performance of the agreements. Encompassed within that covenant was an obligation that JPMC not take actions that would have the effect of destroying or injuring the rights of the Term Lenders to receive the fruits of the contract.

111. One of the central benefits of the Term Loan agreements from the standpoint of the Term Lenders was their right and expectation, in connection with their loan of \$1.5 billion to a distressed entity such as General Motors, to the status of secured creditors under the terms of the Term Loan agreements. Among other things, the Term Lenders had a reasonable expectation that, in exchange for granting that loan, the Term Lenders would receive the status of secured creditors with a perfected, first-priority lien on billions of dollars' worth of General Motors's property. The Term Lenders also had a reasonable expectation that JPMC, in exercising its functions as Administrative Agent and Secured Party of Record, would not take action that would jeopardize the Term Lenders' status as secured creditors.

112. JPMC's actions as alleged above constituted a reckless disregard for the Term Lenders' rights to their benefits under the Term Loan Agreement, including their status as secured creditors. By these actions, JPMC breached the covenant of good faith and fair dealing implied in the Term Loan agreements.

113. Following the improper filing of the Termination Statement, JPMC again breached the covenant of good faith and fair dealing through its additional actions alleged above, which had the effect of potentially destroying or injuring the Term Lenders' right to receive the benefits of the Term Loan agreements, including the benefit of maintaining their status as secured creditors as General Motors approached and entered bankruptcy and the right to the services of a faithful agent.

114. To the extent TRS Illinois and TCW ISBI incur liabilities to AAT, any such losses are the natural, probable, and foreseeable consequence of JPMC's breaches of the covenant of good faith and fair dealing, and JPMC should be required to reimburse TRS Illinois and TCW ISBI for those losses.

## **TWELFTH CLAIM FOR RELIEF**

### **Equitable Subordination**

115. TRS Illinois and TCW ISBI reallege and incorporate by reference as though set forth in full the allegations in paragraphs 1 through 114, inclusive.

116. JPMC has engaged in inequitable conduct, including the conduct described in the Cross-Claims.

117. JPMC's inequitable conduct has caused a direct and particularized injury to TRS Illinois and TCW ISBI.

118. Under principles of equitable subordination, all claims that have been or may be asserted against the Debtors by, on behalf of, or for the benefit of JPMC in any capacity should be subordinated for purposes of distribution, pursuant to sections 510(c)(1) and 105(a) of the Bankruptcy Code, to the claims of TRS Illinois and TCW ISBI.

119. Equitable subordination as requested herein is consistent with the provisions and purposes of the Bankruptcy Code.

### **PRAYER FOR RELIEF**

WHEREFORE, as to their Cross-Claims as alleged herein, TRS Illinois and TCW ISBI respectfully pray for relief of the following:

- A. For an order requiring JPMC to reimburse, indemnify, and hold harmless TRS Illinois and TCW ISBI for any liabilities or losses they incur to AAT in the Adversary Proceeding;
- B. For an order declaring that JPMC is required to reimburse, indemnify, and hold harmless TRS Illinois and TCW ISBI for any liabilities or losses they incur to AAT in the Adversary Proceeding;
- C. For costs of suit and attorney fees, to the extent permitted by law;
- D. For pre- and post-judgment interest as authorized by law; and
- E. For such other relief as the court may deem proper.

Dated: New York, New York  
November 16, 2015

Respectfully submitted,

**ENTWISTLE & CAPPUCCI LLP**

*/s/ Andrew J. Entwistle*

---

Andrew J. Entwistle  
280 Park Avenue, 26<sup>th</sup> Floor West  
New York, New York 10017  
Tel: (212) 894-7200  
Fax: (212) 894-7272

*Counsel for Teachers' Retirement System  
of the State of Illinois and TCW Illinois  
State Board of Investments*