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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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

STATEMENT OF DEFENDANT AND CROSS-CLAIM DEFENDANT JPMORGAN CHASE BANK, N.A. IN RESPONSE TO MOTION OF TERM LOAN LENDERS FOR JUDGMENT ON THE PLEADINGS

INTRODUCTION

JPMorgan Chase Bank, N.A. ("JPMorgan"), a defendant and a cross-claim defendant in this adversary proceeding, respectfully submits this limited response to the Motion of Term Loan Lenders for Judgment on the Pleadings (Dkt. No. 377, the "Motion").[1] The Motion seeks dismissal of Plaintiff's[2] action based on insufficient service of process. The Movants contend that Plaintiff was required to serve all of the defendants with the complaint earlier in the litigation, and that Plaintiff's failure to serve the Term Loan lenders for approximately six years requires dismissal of the amended complaint.

JPMorgan is not a party to the Motion and takes no position on the relief requested. The Motion, however, was filed by Term Loan lenders that have separately asserted cross-claims against JPMorgan, and it includes gratuitous allegations against JPMorgan that are similar to those made in the cross-claims. The allegations in the Motion relating to JPMorgan are inaccurate, misleading and irrelevant to the relief sought. Accordingly, to avoid any risk that the allegations will be credited by the Court in resolving the Motion, JPMorgan is compelled to file this brief statement in response.

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[1] Although styled as being made on behalf of "the Term Loan Lenders," the Motion in fact is submitted on behalf of a subgroup of the Term Loan lenders ("Movants"). (*See* Dkt. No. 241 at Appendix A.) Some other Term Loan lenders have joined in the Motion or brought similar motions and this response applies to those filings as well. (*See* Dkt. Nos. 262, 281, 293, 308, 311, 380, 383-385, 388-389, 398 and 425.)

[2] Pursuant to a Stipulation and Order entered by the Bankruptcy Court (the "Court") on May 19, 2015, the Motors Liquidation Company Avoidance Action Trust (the "AAT") was substituted as the named plaintiff in this adversary proceeding for the Official Committee of Unsecured Creditors of Motors Liquidation Company f/k/a General Motors Corporation (the "Committee") (collectively, the "Plaintiff"). (*See* Dkt. No. 90.)

STATEMENT

I. JPMorgan Did Not Mislead The Court

The Motion asserts that JPMorgan withheld information from the Court concerning its role in this case and an alleged "potential conflict of interest" between JPMorgan and the unserved Term Loan lenders. (Motion at 2-4.) Nothing could be further from the truth.

On June 25, 2009, the Court entered an Order[3] in the chapter 11 case of General Motors Corporation ("Old GM") that, in part: (i) required Old GM to repay the Term Loan lenders in full out of the DIP Credit Facility financing from the United States Treasury; and (ii) gave the Committee the right to investigate and bring certain claims with respect to the perfection of the Term Loan lenders' security in the Term Loan. (DIP Order at 25-26.) Thereafter, on June 30, 2009, the Term Loan lenders, including the Movants, were repaid approximately $1.5 billion. The Committee then filed an adversary proceeding against JPMorgan and the Term Loan lenders on July 31, 2009, seeking disgorgement of the amounts paid to them.

The threshold issue presented in the Committee's complaint was whether JPMorgan had authorized Old GM's erroneous filing of a UCC-3 termination statement pertaining to the Term Loan in October 2008. JPMorgan contended that it did not authorize the filing, making it "ineffective," and that, accordingly, the Committee had no valid claims against JPMorgan *or any of the other Term Loan lenders*. It was common ground that the Term Loan lenders besides

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[3] *See 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* ("DIP Order"). (Dkt. No. 2529 in Chapter 11 Case No. 09-50026.)

JPMorgan did not possess discovery relating to the authority issue because, as the Motion concedes, they "were not involved at all" (Motion at 7) in the errant UCC-3 filing.

Following a scheduling conference in October 2009, the Court directed the parties to submit a proposed scheduling order to govern discovery that the Committee claimed it needed on the threshold authority issue. (Dkt. No. 13 at 11-13.) Thereafter, JPMorgan and the Committee submitted a scheduling order that called for an expedited period of fact discovery to be completed in three months, followed by briefing on the case-dispositive authority issue to be completed by February 1, 2010. (Dkt. No. 10 at 2-3.) The Court entered the scheduling order on October 6, 2009. (*Id.*) The scheduling order also extended the service date with respect to other Term Loan lenders from 120 to 240 days, and preserved the ability of defendants that had not yet been served to pursue non-duplicative discovery later in the case. (*Id.* at 3.)

JPMorgan filed its summary judgment motion on the threshold authority issue on July 1, 2010, nine months after entry of the scheduling order. (*See* Dkt. Nos. 28-30.)[4] The Committee moved only for partial summary judgment, recognizing that JPMorgan and the Term Loan lenders retained other defenses — the very defenses that are now being litigated before this Court. (*See* Dkt. Nos. 24-26.) Summary judgment briefing was completed on August 26, 2010. (*See* Dkt. Nos. 55-56.)

In a thorough, 78-page decision entered on March 1, 2013 (Dkt. Nos. 71-73), based in part, on the record submitted by JPMorgan, the Court granted judgment in favor of JPMorgan *and the Term Loan lenders*. That decision — which included a comprehensive discussion of the facts relating to Old GM's erroneous UCC-3 filing — refutes any suggestion that the Court was

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[4] Minor extensions of the deadline for dispositive motions resulted from the need to take third-party depositions and to seek permission of the Court to file summary judgment motions. (*See* Dkt. Nos. 17-23.) The Committee's deadline for service on other Term Loan lenders was extended until 30 days after the date of entry of the Court's decision on any dispositive motion. (*See* Dkt. No. 17.)

misled regarding JPMorgan's conduct, or failed to understand JPMorgan's actions with respect to the UCC-3 filing. Notably, the Court recognized in the decision that participation by other Term Loan lenders was not necessary for resolution of the summary judgment motion: "Appearances by the Lenders in this adversary proceeding were deferred while threshold issues, addressed in this decision, were addressed." (Dkt. No. 71 at 1, n.2.)

The Motion also asserts incorrectly that in April 2013, after the Court's summary judgment decision:

> Plaintiff again sought, *with JPMorgan*, an extension for service on the term lenders. Dkt 79. In this new request, *they* inserted a purportedly retroactive "good cause" finding for the prior extensions . . . Like all that preceded it, the Stipulation did not provide for notifying the absent defendants of the service extension. (Motion at 8-9 (emphasis added).)

Not true. JPMorgan did not seek any such extension of service. Rather, the Committee sought the extension, publicly filing a "Notice of Presentment of Order Further Extending Time To Serve Summons and Complaint" ("Notice"). (Dkt. No. 79.) That pleading — signed and filed by the Committee's counsel, not by JPMorgan's — sought a further adjournment of the time to serve defendants until after resolution of the Committee's appeal. By letter dated March 25, 2013, the Committee's counsel asked JPMorgan to transmit the Notice to the Term Loan lenders, which JPMorgan did on April 1, 2013. The Notice invited objections by April 8, 2013. Receiving no objections, the Court signed an order granting the Committee's request to extend the time to serve a summons and complaint. (*See* Dkt. Nos. 81-82.)

The claim that JPMorgan failed to inform the Court of a purported "conflict" with other Term Loan lenders is likewise baseless. There was no conflict. As noted above, the Court granted summary judgment in favor of all defendants, *including all the Term Loan lenders*. The issue initially litigated between the Committee and JPMorgan, and the only issue decided by the

Court, was whether JPMorgan authorized the filing of a UCC-3 — an issue on which the interests of JPMorgan and the Term Loan lenders were completely aligned. The Motion states that the "term lenders might not have joined JPMorgan's go-for-broke strategy of staking its case on summary judgment." (Motion at 20.) JPMorgan's strategy, however, was in no sense to "go-for-broke," inasmuch as all other defenses were fully preserved. The Movants, moreover, do not say what they would have done differently, let alone that an alternate strategy would have produced a different result. And, indeed, not a single Term Loan lender objected to the course that JPMorgan pursued, even though JPMorgan informed the Term Loan lenders in 2009 that it planned to file a dispositive motion. *See* Point II *infra*.

II. <u>JPMorgan Did Not Exclude The Term Loan Lenders</u>.

The Motion also asserts that JPMorgan "excluded" the Term Loan lenders from this case while "merits issues" were litigated. (*See* Motion at 1.) This also is not true.

As noted above, the only issue litigated was the threshold issue of whether JPMorgan authorized Old GM's filing of an erroneous UCC-3. In addition, as JPMorgan will demonstrate as needed in connection with the cross-claims, JPMorgan took appropriate and effective steps to inform the Term Loan lenders of developments in this litigation. For instance, even before the litigation was filed, various Term Loan lenders served on a "Term Loan Steering Committee" from May to July of 2009, which addressed issues relating to the Old GM bankruptcy, the UCC-3 filing, and the prospect of this adversary proceeding. During the summer of 2009, JPMorgan also invited all Term Loan lenders to participate in telephone conferences regarding this case—and many Term Loan lenders participated in those conferences.

Moreover, both before and after the Committee filed its complaint, JPMorgan employed the *Intralinks* system—the method used by JPMorgan as administrative agent to communicate

with the Term Loan lenders—to post, among other things: (1) the DIP Order; (2) the complaint; (3) the proposal to defer service on the Term Loan lenders while the threshold authority issue was being litigated; (4) the submission of summary judgment papers; (5) the Court's summary judgment decision; and (6) the Committee's March 2013 request for a further extension of time to effect service until after the appellate process.

CONCLUSION

Accordingly, the allegations in the Motion that JPMorgan misled the Court and excluded the Term Loan lenders from this case are false. Given that these extraneous allegations are not relevant to the legal issue presented by the Motion, they should be disregarded.

Dated: New York, New York
March 4, 2016

Respectfully submitted,

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