BINDER & SCHWARTZ

Binder & Schwartz LLP
366 Madison Avenue 6th Floor
New York, NY 10017

(T) 212.510.7008
(F) 212.510.7299
binderschwartz.com

February 10, 2017

By Email, ECF, and Federal Express
The Honorable Martin Glenn
United States Bankruptcy Court
Southern District of New York
One Bowling Green, Courtroom 523
New York, New York 10004-1408

Re: *Motors Liquidation Company Avoidance Action Trust v. JPMorgan Chase Bank, N.A. et al.*, Case No. 09-00504 (MG)

Dear Judge Glenn:

We represent plaintiff Motors Liquidation Company Avoidance Action Trust (the "Avoidance Action Trust") and write pursuant to paragraph 4 of the stipulation and order regarding scheduling entered on December 2, 2016 (ECF No. 805), the stipulation and order regarding scheduling entered on June 22, 2016 (ECF No. 634) and Local Bankruptcy Rule 7056-1(a) to request a pre-motion conference. The Avoidance Action Trust will seek summary judgment (i) against all Defendants other than JPMorgan Chase Bank, N.A.("JPMorgan") with respect to the effectiveness of the UCC-3 termination statement (the "2008 Termination Statement") filed by JPMorgan, as administrative agent, relating to collateral securing the term loan to Motors Liquidation Company, f/k/a General Motors Corporation ("Old GM") (the "Term Loan"); (ii) against all Defendants asserting an affirmative defense of "earmarking"; and (iii) against all Defendants asserting that the collateral alleged to secure the Term Loan was held by Old GM in "constructive trust" for the benefit of the Defendants.

Resolution of these issues will be beneficial to the proposed settlement discussions or mediation that the parties anticipate will occur soon after the Court issues its decision on the Representative Assets. Due to the demands of trial preparation, we respectfully request that the Avoidance Action Trust be permitted to file its motion shortly after the trial and pursuant to an expedited briefing schedule to be agreed to among the parties. We thought that it would nonetheless be helpful to raise this matter now in light of the upcoming conference this Tuesday, during which the Court is scheduled to address other pre-motion requests.[1] Below we briefly set forth the basis for the request.

First, as the Court is aware, the Second Circuit held during Phase I of this action that the UCC-1 financing statement that perfected the Term Lenders' security interest in all the equipment and fixtures at forty-two Old GM facilities (the "Main Term Loan UCC-1") was terminated by the filing of the 2008 Termination Statement. The Second Circuit determined that

[1] Under paragraph 1 of the stipulation and order regarding scheduling entered on June 22, 2016 (ECF No. 634), the deadline for pre-motion requests concerning the 2008 Termination Statement is March 15, 2017.

JPMorgan and its counsel "knew that . . . Old GM's counsel was going to file the termination statement that identified the Main Term Loan UCC-1 for termination and that JPMorgan reviewed and assented to the filing of that statement. *Nothing more is needed*." *Official Comm. of Unsecured Creditors of Motors Liquidation Co. v. JPMorgan Chase Bank, N.A.*, 777 F.3d 100, 105 (2d Cir. 2015) (emphasis added). Although the Second Circuit has already addressed the effectiveness of the 2008 Termination Statement, this Court held that because the non-JPMorgan Defendants had not been served with the complaint during Phase I, they would be permitted to litigate the effect of the filing of the 2008 Termination Statement. No facts were adduced during discovery that would lead to any outcome other than that reached by the Second Circuit. The Main Term Loan UCC-1 was terminated, and thus it does not create a perfected security interest in any of the assets of Old GM. Accordingly, summary judgment is appropriate.

Second, Defendants' earmarking affirmative defenses fail as a matter of law. The earmarking doctrine applies "where a third party lends money to the debtor for the specific purpose of paying a selected creditor." *In re Flanagan,* 503 F.3d 171, 184 (2d Cir. 2007) (internal quotation marks and citation omitted). In other words, the debtor must receive the funds "subject to a clear obligation to use that money to pay off a preexisting debt" and use the funds specifically for that purpose. *Id*. Here, no funds were earmarked for distribution to Defendants, and this affirmative defense should be dismissed.

Third, Defendants' affirmative defense based on the assertion that Old GM held the assets secured by fixture filings in a constructive trust for Defendants' benefit, and thus are excluded from bankruptcy, is not well founded. Defendants are not entitled to the imposition of a constructive trust, an equitable form of restitution applicable where the legal property owner is compelled to transfer title, "in equity and good conscience," to the true "owner." *In re Dreier LLP*, 429 B.R. 112, 135 (Bankr. S.D.N.Y. 2010) (citation omitted). Not only are Defendants unable to meet the test for the creation of a constructive trust, *see Sec. Inv'r Prot. Corp. v. Stratton Oakmont, Inc.,* 234 B.R. 293, 333 (Bankr. S.D.N.Y. 1999) (discussing elements of constructive trust under New York law), but the payments made to Defendants were authorized subject to the Avoidance Action Trust's express "right to challenge the perfection of the first lien priority."[2]

All fact discovery is complete with respect to the issues concerning the effectiveness of the Main Term Loan UCC-1. Though the fact discovery deadline has been deferred with respect to the affirmative defenses of earmarking and constructive trust, there has been considerable discovery to date concerning these issues and no further discovery will create an issue of fact that would be essential to oppose the motion. Fed. R. Civ. P. 56(d); *see also In re Ampal-Am. Israel Corp.,* No. 12-13689 (SMB), 2015 WL 5176395, at *14 (Bankr. S.D.N.Y. Sept. 2, 2015), *aff'd sub nom. In re: Ampal—American Israel Corp.,* No. 15-CV-7949 (JSR), 2016 WL 859352 (S.D.N.Y. Feb. 28, 2016).

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[2] ECF No. 643 (Opinion and Order Denying Motions to Dismiss dated June 30, 2009) at 39.

We thank the Court for its consideration.

Respectfully,

/s/Eric B. Fisher
Eric B. Fisher

cc: All counsel of record (via ECF)