BINDER & SCHWARTZ

Eric B. Fisher
Binder & Schwartz LLP
366 Madison Avenue 6th Floor
New York, NY 10017
(T) 212.933.4551
(F) 212.510.7299
efisher@binderschwartz.com

August 7, 2018

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 write on behalf of the Avoidance Action Trust[1] in response to Defendants' pre-motion letter dated July 31, 2018 ("Defendants' July 31 Letter"), in which Defendants propose five different summary judgment motions.

Defendants' first proposed summary judgment motion as to assets located in the Mansfield, Ohio stamping facility has been resolved based on recent discussions among the parties. The parties plan to work on a stipulation to be submitted to the Court, reflecting the Avoidance Action Trust's concession of Mansfield assets it had previously disputed.

The parties agree that Defendants' third proposed motion concerning application of Louisiana law to assets located in GM's Shreveport facility (which corresponds to the last proposed motion identified in the Avoidance Action Trust's July 31 Letter) is ripe for summary judgment, although Defendants' argument that the issue is time-barred lacks merit. Contrary to the argument advanced by Defendants, the Avoidance Action Trust is not challenging the validity or priority of Defendants' security in the fixtures at GM's Shreveport facility nor arguing that there is any defect in Defendants' fixture filing. In fact, the Avoidance Action Trust acknowledges that Defendants have a perfected security interest in "all fixtures" at that facility. Instead, the Avoidance Action Trust seeks a determination under Louisiana law that the approximately 9,020 assets permanently attached to the land and building at the Shreveport facility as of the date of Defendants' fixture filing are not fixtures but realty and therefore not subject to Defendants' perfected security interest. In any event, all parties agree that the substance of the Louisiana law issue, along with Defendants' timeliness argument, can be addressed on summary judgment.

[1] All terms not otherwise defined herein are as defined in the Avoidance Action Trust's July 31, 2018 letter to the Court (the "Avoidance Action Trust's July 31 Letter").

As described below, the remaining three issues as to which Defendants currently seek leave to file motions do not lend themselves to resolution on motions for summary judgment. Rather, the issues should be resolved as part of focused trials, following any related mediation sessions and targeted discovery identified below.

I. Defendants' proposed motion concerning assets located at the Lansing Delta Township Central Utilities Complex raises fact issues not appropriate for summary judgment.

Defendants seek partial summary judgment and clarification as to the classification of assets that they contend are similar to assets located at the Lansing Delta Township Central Utilities Complex, Representative Asset No. 11 (the "CUC"). Defendants' July 31 Letter at 4. As explained below, the Court's holdings as to the CUC assets are clear, and the issues raised by Defendants involve fact questions concerning how to apply those holdings to particular assets. These issues are best left to mediation, in the first instance, and then trial to the extent there are any remaining disputes.

In its Decision, the Court distinguished between CUC assets considered to be ordinary building materials and the CUC Systems. The Court held that the ordinary building material portions of the CUC are real property and that the CUC Systems are fixtures, based on agreement by the parties as to certain assets and applying the three-part fixture test to the remaining disputed portions of the CUC Systems. Decision at 140. There is nothing ambiguous or in need of clarification about these holdings. Based on its concessions and the Court's holding as to the disputed portions of the CUC Systems, the Avoidance Action Trust has conceded to Defendants that many thousands of assets, previously in dispute, are fixtures.

Defendants ask the Court for partial summary judgment on the limited question of whether the portions of the CUC Systems that the parties agreed were fixtures are in fact fixtures. Defendants' July 31 Letter at 4. There is no basis for this motion as the Avoidance Action Trust agrees that all of the CUC Systems, whether conceded or ruled on by the Court, are fixtures. The Avoidance Action Trust again conveyed its position as to these assets to Defendants during a pre-conference meet-and-confer held on August 6.

Instead, the dispute raised by the Defendants is at bottom a factual question: whether there are additional assets that are sufficiently similar to the conceded portions of the CUC Systems that the Avoidance Action Trust should concede them as well. The determination of whether a particular asset is similar or not to one of the CUC Systems that the Court ruled to be fixtures requires a factual comparison of the assets, often with the assistance of fact-finding and expert analysis regarding the particular asset. The parties are currently working through these issues as part of the asset mediation, and mediation sessions to address this particular dispute are scheduled for October 16-17 and November 6. *See* Ex. A to Stipulation and Order Amending and Superseding Certain Prior Orders Regarding Discovery and Scheduling, Adv. Pro. No. 1059. While the scheduled mediation sessions may or may not altogether resolve these asset-specific issues, they are almost certain to narrow the issues and leave fewer assets in dispute.

Defendants also seek clarification of the Court's Decision as to whether common utilities are encompassed by its holding that "disputed components of the CUC are fixtures." Defendants' July 31 Letter at 4. This proposed motion is not justified under Bankruptcy Rule 9024, which implements Rule 60 of the Federal Rules of Civil Procedure. *See In re Silber*, No. 08–40000MG, 2009 WL 2902571, at *2 (Bankr. S.D.N.Y. June 10, 2009) (J. Glenn). Rule 60(a), the relevant subsection, limits requests for clarification to instances of "a clerical mistake or a mistake arising from oversight or omission" and such corrections are disfavored and "properly granted only upon a showing of exceptional circumstances." *Parade Place, LLC v. Shapiro (In re Parade Place, LLC)*, 508 B.R. 863, 869 (Bankr. S.D.N.Y. 2014) (J. Glenn). Here, Defendants have made no effort to show that they can meet this standard and there are no exceptional circumstances requiring clarification of the Court's Decision.

In any event, the Decision is clear and does not need clarification. The Court defined what it meant by both ordinary building materials and CUC Systems. Specifically, the Court provided a list of the assets it considers to be ordinary building materials, Decision at 70 (citing Goesling's Direct Testimony ¶ 199),[2] and a chart of the assets it considers to be part of what the Court defined as the "CUC Systems," *id*. at 71-72. With regard to the CUC Systems, the Court listed those portions that the parties agreed were fixtures and then analyzed whether the remaining "disputed" portions of the CUC Systems were fixtures, ultimately concluding that they were. *Id*. at 140-42. Because of the careful framing by the Court, there is no question as to the meaning of the Court's ruling that the disputed portions of the CUC Systems are fixtures.

Defendants' argument concerning common utilities is nothing more than a request for the Court to resolve an ongoing factual dispute between the parties. The Court addressed common utilities in two portions of the Decision. With respect to ordinary building material portions of the CUC—not defined as the CUC Systems—the Court stated that in addition to the steel frame of the CUC building, the "CUC building also included various utilities common to most industrial real estate." Decision at 70. The Court then provided a list of assets that made up these common utilities, citing to a list from Dave Goesling's Direct Testimony in which Goesling concluded that the assets in the list were part of the CUC building itself and were thus real estate and not fixtures. Decision at 70 (citing Goesling's Direct Testimony ¶ 199). With respect to the CUC Systems, the Court included in its chart certain common utilities that were part of the component parts of the CUC and not the realty itself. *Id*. at 71-72. Although Defendants do not like the Court's adoption of Mr. Goesling's view that portions of the common utilities are real property and not fixtures, the Decision does not require clarification.

To the extent the parties are not able to resolve their dispute about the ordinary building material category in mediation, certain additional discovery will be required before the issue can be tried. This discovery includes as-built construction plans, drawings, and/or blueprints of the

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[2] The Court also provided a list of similar assets it considered to be ordinary building materials in relation to its discussion of the Courtyard Enclosure, Representative Asset No. 37. Decision at 69-70.

entire structures in which the contested assets are contained and construction specification documents for structures containing the contested assets. Depending on the particular assets that remain in dispute following mediation, other types of discovery may also be required.

II. Defendants' estoppel motion is misguided because Plaintiff has no intention of proposing a valuation method that is inconsistent with the Orderly-Liquidation-Value-in-Exchange method endorsed by the Court.

Defendants "seek a ruling that plaintiff is estopped by the Court's ruling from using a valuation methodology inconsistent with Mr. Goesling's for valuing assets left with Old GM." Defendants' July 31 Letter at 5-6. There is no basis for the request nor need for such a ruling.

Mr. Goesling valued the assets left with Old GM on the basis of Orderly Liquidation Value in Exchange ("OLVIE"), which the Court held "is the appropriate valuation method for the assets that were not part of the 363 Sale." Decision at 195. The Court noted that "Goesling applied both the cost and market approaches, choosing the method for each asset with the best available data." *Id*. at 185. The Avoidance Action Trust intends to present evidence of the values of the assets left with Old GM based on the application of this same methodology, i.e., application of both the market and cost approaches to determine OLVIE.

Because the OLVIE analysis must be applied to a large number of assets (more than 40,000 in dispute), and KPMG valued almost all of these assets using an OLVIE method, there appear to be readily available OLVIE values for the assets at issue but some more discovery as to KPMG's OLVIE values is needed.

Specifically, in 2009, KPMG estimated the fair value of the assets left with Old GM using the OLVIE methodology (the "KPMG OLVIE Analysis"). KPMG prepared a line-by-line analysis of those values similar to the one that it prepared in connection with KPMG's Fresh Start Accounting (which was adopted by the Court for valuing the assets purchased by New GM), and which provides OLVIE values for almost all of the more than 40,000 Old GM assets at issue. In a memo prepared by Patrick Furey from KPMG, he explained KPMG's valuation of the Old GM assets as follows: "In estimating the fair value for the Subject Assets . . . we have relied primarily on the cost and market approach." KPMG-GM0092233 at 1. Among other things, KPMG, like Mr. Goesling, used auction data from Maynards, one of Old GM's main liquidators, in applying the market approach. KPMG also had the benefit of discussions with individuals at Maynards and General Motors to validate KPMG's findings. Although done on a mass appraisal basis and necessarily based on market information available to KPMG at the time of its work, KPMG's OLVIE values appear to be derived by the same methodology for determining OLVIE that was adopted by the Court as the proper methodology for valuing assets intended to be left behind at Old GM.

However, although KPMG's Fresh Start Accounting work for New GM was the focus of substantial discovery, there was no significant discovery concerning the KPMG OLVIE Analysis for assets left behind at Old GM. Accordingly, the Avoidance Action Trust proposes to seek

discovery concerning the KPMG OLVIE Analysis, including KPMG work papers showing the analysis, calculations and source support to arrive at these values, and depositions of KPMG personnel chiefly responsible for the OLVIE valuation.

Because the Court held that OLVIE was the appropriate valuation methodology for the Representative Assets not sold to New GM and the Avoidance Action Trust intends to offer evidence applying that same methodology, whether ultimately KPMG's OLVIE values or another expert's values, the issue of judicial estoppel does not arise and summary judgment is not appropriate.[3]

The issue of the correct OLVIE values to apply in this case is particularly ill-suited to summary judgment because our expectation is that Defendants will seek to prove OLVIE values through expert reports and testimony (and the Avoidance Action Trust reserves its right to present expert testimony on this subject as well). Defendants' proposed estoppel motion is misguided and does nothing to promote resolution of this significant issue. In light of the Court's ruling that KPMG's work provides the best contemporaneous evidence of value, if the proposed additional discovery from KPMG supports the reliability of their OLVIE values, then those values are likely to be the best and most efficient way to derive values for the more than 40,000 assets at issue. In sum, the question of the best OLVIE values to be applied should be resolved at trial following the targeted discovery described above.

III. Additional fact and expert testimony is required before the Court can decide the issue of how to value assets that New GM purchased individually out of Old GM facilities that were closed and not sold to New GM for continued operation.

Defendants seek partial summary judgment that KPMG's Fresh Start Accounting values should be used to value fixtures that New GM purchased on an individual basis out of Old GM facilities that were closed and not sold to New GM for continued operation. Defendants' July 31 Letter at 7. Specifically, Defendants suggest that the Court's valuation methodology for assets sold to New GM as installed in place as part of the sale of an operating GM facility is equally applicable for assets sold piecemeal to New GM out of Old GM facilities that did not continue operations, and argue that there is no outstanding discovery necessary before the Court can rule on this valuation methodology. *Id*. at 7-8. There is currently an insufficient record for the Court

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[3] Although there is no genuine judicial estoppel issue here, we note that judicial estoppel would not be appropriate were the Second Circuit's standard on judicial estoppel applied. *See Adelphia Recovery Trust v. HSBC Bank, N.A. (In re Adelphia Recovery Trust)*, 634 F.3d 678, 695 (2d Cir. 2011) (setting out test for judicial estoppel). There is no "true inconsistency" with KPMG's OLVIE values and the values determined by Mr. Goesling with respect to the Representative Assets not sold to New GM, *id.* at 695; the integrity of the Court is not called into question by relying on values prepared by KPMG as part of its ordinary course of business, an approach expressly endorsed by the Court in the Representative Assets trial; *id* at 696; and, there would no "unfair detriment" to Defendants were the Court to adopt KPMG's OLVIE values, *id.*

to decide this issue and additional discovery and trial is required.

Not one of the representative assets valued by the Court in the Decision was purchased by New GM out of an Old GM facility that closed and ceased operations. Thus, during the Representative Assets trial there was no evidence presented to the Court as to how KPMG valued assets sold to New GM out of Old GM facilities, and the Court did not address the valuation methodology for this particular class of assets in its Decision. In total, there are more than 9,000 such assets in dispute.

This particular subcategory of assets, which has not previously been the focus of the Court's attention, raises particular issues that can only be resolved through some additional, limited discovery. To start with, thousands of assets identified as having been sold to New GM for continued use were, in fact, never transferred to a New GM facility. In addition, New GM's plans and intentions with regard to assets purchased piecemeal from liquidating Old GM plants fluctuated materially throughout the relevant period and, as this Court is aware, a key issue in this case is what the proposed or intended use or disposition of the assets was as of June 30, 2009. Further, unlike the going-concern values adopted by the Court, these assets were not valued on the basis of being installed and operating in place as of the valuation date, raising questions that have not been addressed about the precise method by which KPMG valued them.

Before the Court can decide whether KPMG's fresh start values should be applied to assets sold piecemeal to New GM out of Old GM facilities, follow-up discovery from New GM is required about what its plans were, as of June 30, 2009, with respect to the disposition of these particular assets. In addition, we seek to discover what KPMG assumed and what KPMG was told about whether these assets would be sold piecemeal to New GM or left behind in liquidating plants. Last, discovery is needed concerning how exactly KPMG valued this particular subclass of assets. This discovery includes supporting documentation from KPMG about assumptions made in valuing the assets and potentially depositions from the individuals at KPMG with knowledge of how these assets were valued.

Following this limited discovery, to the extent that these asset values cannot be agreed upon between the parties, then the issue of how to value assets purportedly sold to New GM from liquidating plants should be resolved at trial.

IV. The Defendants' other proposed motions on Orion Assembly, Pontiac Stamping and Lordstown Assembly should be tried on a consolidated basis along with other issues, following mediation and an opportunity for additional discovery.

Defendants also present other issues to be resolved on motion following an opportunity for discovery, including "Motion 6," concerning Orion Assembly and Pontiac Stamping, and "Motion 7," concerning the Lordstown Assembly Facility. As to both of these issues, the Avoidance Action Trust agrees with Defendants that additional discovery is required and plans to pursue additional discovery as well.

Further, rather than resolution of narrowly defined issues, it will be more efficient to broaden the lens to address more issues in a single trial and thereby promote the overall resolution of this case. For example, it will likely promote judicial economy to address the specialized facility question with respect to the Moraine plant in Ohio at the same time that the Court addresses this issue with respect to the Lordstown, Ohio plant.

With respect to these issues and all other disputes that are not the subject of proposed summary judgment motions, all parties should be permitted to pursue further discovery in aid of both mediation and litigation. As to any issues not resolved through the ongoing mediation process, the parties should be directed to propose joint plans for the resolution of these issues at trial.

* * *

In summary, for the reasons described above and in our July 31 letter, we ask that the Court authorize summary judgment on the issues of the effectiveness of the 2008 Termination Statement, earmarking, constructive trust, and Louisiana fixture law, and otherwise direct the parties to propose a consolidated schedule for expedited, focused trials to address the other asset and valuation issues, following any scheduled mediation sessions and a reasonable period for targeted discovery.

Respectfully,

/s/ Eric B. Fisher
Eric B. Fisher

cc: All counsel of record (via ECF)