WACHTELL, LIPTON, ROSEN & KATZ

51 WEST 52ND STREET
NEW YORK, N.Y. 10019-6150

DIRECT DIAL: (212) 403-1226
DIRECT FAX: (212) 403-2226
E-MAIL: MWOLINSKY@WLRK.COM

August 7, 2018

By Hand, ECF, and Email

The Honorable Martin Glenn
United States Bankruptcy Court
Southern District of New York
One Bowling Green
New York, NY 10004-1408

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

Dear Judge Glenn:

I write on behalf of JPMorgan Chase Bank, N.A. ("JPMorgan"), with the concurrence of the Defendants' Steering Committee, both to respond to plaintiff's July 31, 2018 pre-motion letter (Dkt. No. 1058) and to address the issues the Court identified in its August 2, 2018 pre-motion conference order (Dkt. No. 1063).[1]

As discussed in more detail below, with respect to the four issues that plaintiff seeks to raise by motion, we believe that only plaintiff's belated challenge to the Term Lenders' perfected security interest in the fixtures at GM's assembly plant in Shreveport, Louisiana should be resolved by motion now — though for a different reason than plaintiff suggests. As explained in

[1] Defendant Continental Casualty Company also joins in this letter.

our July 31, 2018 pre-motion letter (Dkt. No. 1061 at 5), plaintiff's challenge to defendants' perfected security interest in the fixtures at the Shreveport Assembly Plant is time-barred.

Defendants' constructive trust and earmarking defenses, however, are not appropriate for resolution by motion at this time. Since before discovery was stayed on these defenses in December 2016, defendants were clear that they required additional discovery.[2]

Finally, per the Court's request, we identify the discovery we believe is necessary for our constructive trust and earmarking defenses, as well as for the other issues that we identified in our pre-motion letter, and identify which issues we believe should be resolved on motion and which by trial. As the Court instructed, we met and conferred with plaintiff on these issues on August 6, 2018, and also identify where the parties have been able to reach agreement, subject to the Court's approval, as to issues that should be resolved by motion or at trial. At the conclusion of this letter, we provide our proposed schedule for completing this discovery.

1. Plaintiff's Challenge to the Term Lenders' Security Interest in Fixtures at the Shreveport Assembly Plant Is Time-Barred.

Plaintiff now argues — for the first time, over nine years into this litigation — that the Term Lenders' fixture filing did not perfect their security interest in the fixtures at the Shreveport Assembly Plant because the fixtures were attached to the realty before the fixture filing was made. Dkt. No. 1058 at 6. This newly asserted challenge can be quickly resolved by motion consistent with the Court's prior ruling that plaintiff's challenge to the Lansing Delta Township

[2] I understand that Munger, Tolles & Olson LLP will submit a separate response on behalf of the non-JPMorgan defendants as to plaintiff's request for leave to file a summary judgment motion as to the effectiveness of the UCC-3.

("LDT") fixture filing was barred by the statute of limitations. *See* Dkt. No. 1061 at 5; *In re Motors Liquidation Co.*, 576 B.R. 325, 390-95 (Bankr. S.D.N.Y. 2017) (the "Decision").

Bankruptcy Rule 7001(2) requires that "a proceeding to determine the validity, priority, or extent of a lien or other interest in property" be brought as an adversary proceeding. As explained in our pre-motion letter, plaintiff's challenge to the Louisiana fixture filing is plainly a challenge to the "validity" and "extent" of the property to which the Term Lenders' lien attached and attained priority through perfection. This is precisely the sort of challenge that has uniformly been held to require an adversary proceeding. *See, e.g., Matter of Beard,* 112 B.R. 951, 956 (Bankr. N.D. Ind. 1990) (debtor's challenge that federal tax lien did not attach to property which was subject to a statutory exemption from levy "sought to limit the scope of the lien by excluding property from it" and required an adversary proceeding).

Plaintiff's time to commence an adversary proceeding to challenge the scope of the Term Lenders' lien on fixtures at the Shreveport Assembly Plant has long since passed. Like the Term Lenders' lien on the fixtures at LDT, which the Court ruled "may not be challenged, regardless whether the lien was property perfected," 576 B.R. 325, 390-95, the scope of the property to which the Term Lenders' lien attached at the Shreveport Assembly Plant is no longer subject to challenge.

2. Plaintiff's Challenges to Defendants' Constructive Trust and Earmarking Defenses Are Premature.

Summary judgment motions on defendants' constructive trust and earmarking affirmative defenses are premature. As plaintiff acknowledges in its letter, "the fact discovery deadline has been deferred with respect to [these] affirmative defenses" (Dkt. No. 1058 at 5) pursuant to a Stipulation and Order entered by the Court on December 2, 2016 (Dkt. No. 805 at ¶ 5). Indeed,

the parties specifically agreed to stay discovery on defendants' affirmative defenses in order to allow the parties to focus on preparing for the representative assets trial. Although some discovery has been taken to date on these defenses, essential discovery remains outstanding — including discovery from GM itself.

a. Defendants Require Limited Additional Discovery on Their Constructive Trust and Earmarking Defenses

As noted, defendants require limited additional discovery on both their constructive trust and earmarking defenses. Although the discovery that defendants seek is narrow and focused, it is not limited to a deposition of Adil Mistry as plaintiff suggests in its pre-motion letter. Dkt. No. 1058 at 5 fn. 3. Specifically, defendants anticipate requiring the following discovery on these defenses:

- **Deposition of Adil Mistry.** Mr. Mistry, who was Old GM's Assistant Treasurer during 2009, signed the collateral value certificates Old GM submitted to the Term Lenders after the erroneous UCC-3 termination statement was filed that certified, among other things, that there were no defaults. Because failure to perfect the Term Lenders' lien would be an event of default, once the erroneous UCC-3 had been filed, the certifications were inaccurate — yet Old GM kept making them. The process followed by Mr. Mistry and Old GM in making these certifications, and the information they reviewed or failed to review, are highly relevant to defendants' constructive trust defense given that the Second Circuit has held that a failure to comply with contractual requirements in a security agreement can justify the imposition of a constructive trust. *See In re Howard's Appliance Corp.*, 874 F.2d 88, 94 (2d Cir. 1989). In addition, defendants seek

discovery from Mr. Mistry in connection with the earmarking defense because he worked closely with the Presidential Task Force on the Automotive Industry to size the DIP financing, has knowledge regarding the intended use of the proceeds of the DIP financing including their use to pay off the Term Loan, and was involved with GM's actual repayment of the Term Loan using the proceeds of the DIP financing.

- **Document discovery from New GM.** Defendants have received document productions from various third parties including the U.S. Treasury, Weil, Gotshal & Manges LLP ("Weil Gotshal") (Old GM's bankruptcy counsel), and Mayer Brown (Old GM's counsel on the Synthetic Lease Transaction), related to these two defenses. However, despite subpoenaing such documents from New GM as well, defendants have yet to receive any document productions (including emails) from New GM regarding these two defenses. Defendants intend to serve a renewed subpoena on New GM as soon as discovery resumes.

As to constructive trust, defendants anticipate that the document discovery would be limited in time — between October 1, 2008 and June 1, 2009 — and to a small number of Old GM custodians, including Mr. Mistry, Julie Engell, Roberto Bel and Arun Sundaram. Based on discovery taken to date, defendants have determined that these individuals possess information bearing on the constructive trust defense.

As to earmarking, defendants will seek documents from Old GM to further support that (1) Treasury directed that the proceeds of the DIP financing be used

in part to repay the Term Loan, (2) Old GM in fact complied with Treasury's directive that the earmarked funds be applied to the Term Loan debt, and (3) Old GM lacked control over the funds supplied by Treasury for repayment of the Term Loan.

Once defendants have received and reviewed this discovery and taken Mr. Mistry's deposition, defendants may also identify the need for a small number of additional depositions.

b. Plaintiff's Pre-Motion Letter Mischaracterizes the Law and Facts on Defendants' Constructive Trust Defense

Plaintiff's pre-motion letter also misstates the law and the facts uncovered to date with regard to the constructive trust defense. Plaintiff argues that, as a matter of law, the existence of the Term Loan agreements precludes defendants from establishing certain of the four elements required for a constructive trust. Dkt. No. 1058 at 4. Plaintiff is incorrect.

First, the crucial element for establishing a constructive trust is the need to prevent unjust enrichment. *See In re First Cen. Fin Corp.,* 377 F.3d 209, 212 (2d Cir. 2004)*; In re McLean Indus.*, 132 B.R. 271, 286 (Bankr. S.D.N.Y. 1991) (citing *Sharp* v. *Kosmalski*, 40 N.Y.2d 119, 121 (N.Y. 1976)). In light of the fundamentally equitable nature of the remedy, a constructive trust may be imposed even in the absence of "sinister motives" of the debtor where the debtor "must have known that, under the terms of [its] security agreement, it was obligated" to meet certain contractual requirements yet failed to meet them. *In re Howard's Appliance*, 874 F.2d at 94; *see also In re Koreag, Controle Et Revision S.A.*, 961 F.2d 341, 354 (2d Cir. 1992) ("willfully wrongful conduct" is not required for imposition of a constructive trust); *Counihan* v. *Allstate Ins. Co.*, 194 F.3d 357, 361 (2d Cir. 1999) (stating post-trial that the purpose of a

constructive trust "is to prevent unjust enrichment, although unjust enrichment does not necessarily implicate the performance of a wrongful act").

In light of the equitable nature of the remedy, contrary to plaintiff's argument, courts do not require that all four factors that courts look at in determining whether to impose a constructive trust be present. *See Counihan,* 194 F.3d at 362 (2d Cir. 1999) ("[T]he lack of a fiduciary relationship does not defeat the imposition of a constructive trust"); *see also In re Koreag,* 961 F.2d at 353 ("[T]he absence of any one factor will not itself defeat the imposition of a constructive trust when otherwise required by equity"). Rather, courts have consistently stressed the need to apply the doctrine of constructive trust flexibly to prevent unjust enrichment in a wide range of circumstances. *See Counihan,* 194 F.3d at 362 ("[W]e have observed that, although these [four] factors provide important guideposts, the constructive trust doctrine is equitable in nature and should not be 'rigidly limited'") (citing *In re Koreag,* 961 F.2d at 353).

Second, the contractual relationship between Old GM and defendants does not "preclude" defendants from establishing the elements of a constructive trust. To the contrary, in *In re Howard's Appliance* — which plaintiff's letter ignores — the secured creditor had perfected its interest in inventory of the debtor in New York only, based on the terms of the parties' written security agreement that the inventory would be kept in New York. 874 F.2d at 89-90. Without the creditor's knowledge, the debtor moved the inventory to New Jersey, causing the creditor to lose its security interest. Despite the parties' contractual relationship, the Second Circuit held that a constructive trust should be imposed on the inventory. *Id.* at 93.[3]

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[3] The cases plaintiff cites in its pre-motion letter are not to the contrary. For instance, in *In re First Cen. Fin Corp.*, 377 F.3d at 215, the Second Circuit determined not to impose a constructive trust because it determined that there was no evidence of a pattern of conduct that as

Finally, contrary to plaintiff's characterizations, defendants' constructive trust defense does not simply rely on a breach of contractual provisions in the Term Loan agreements. Evidence uncovered in discovery to date from non-GM parties shows a pattern of conduct by Old GM and its agents that establish that as a matter of "equity and good conscience" the Term Lenders should not be prejudiced by virtue of Old GM's errors:

- Prior to preparing the documentation necessary for the payoff of a separate Synthetic Lease Transaction, Old GM's counsel (Mayer Brown) conducted a UCC search that showed that the UCC-1 associated with the erroneous UCC-3 pertained to the Term Loan.
- Mayer Brown also actually identified the erroneous UCC-3 as an error before filing, but took no action to correct it. Deposition testimony, as well as documentary evidence, shows that a paralegal at Mayer Brown reviewed the erroneous UCC-3, became concerned that it represented an error, and flagged his concern to a Mayer Brown attorney.
- That same counsel informed Old GM of the UCC-3s that would be filed as part of the termination of the Synthetic Lease transaction and sent drafts of those UCC-

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a matter of equity and good conscience justified the imposition of a constructive trust. Here, for all the reasons explained below, there was a pattern of conduct by Old GM that supports a constructive trust. The same is true with respect to both *N. Shipping Funds I, LLC* v. *Icon Capital Corp.*, 921 F. Supp. 2d 94 (S.D.N.Y. 2013) and *MBM Entm't LLC et al.* v. *M&M Developer, LLC et al. (In re MBM Entm't, LLC),* 531 B.R. 363, 414-15 (Bankr. S.D.N.Y. 2015). None involved evidence like defendants have been able to develop through discovery to date here.

3s, including the erroneous UCC-3, to Old GM for its review prior to filing. Old GM raised no objections.

- Between the time the erroneous UCC-3 was filed in October 2008 and the bankruptcy filing on June 1, 2009, Old GM's bankruptcy counsel (Weil Gotshal) conducted multiple lien searches in December 2008 and April/May 2009, obtaining copies of the erroneous UCC-3 filing.
- Right up to the time of the bankruptcy filing, including as part of an amendment to the Term Loan agreement that Old GM specifically requested, Old GM repeatedly certified to defendants via signed collateral value certificates that it was in compliance with the contractual requirements of the Term Loan — including that all of the UCC filings remained in effect and the Term Loan was fully secured — notwithstanding the fact that Old GM and its counsel had copies of documents in their possession showing that this was not true.
- In February 2009, counsel to Treasury contacted Old GM's bankruptcy counsel to specifically ask whether any collateral had been released from the Term Loan facility to date and Old GM responded that none had been released.

Accordingly, contrary to plaintiff's assertion that "equity and good conscience do not support the imposition of a constructive trust" (Dkt. No. 1058 at 4), discovery to date has shown that the erroneous UCC-3 filing resulted from the actions of Old GM and its counsel, which was discovered through the diligence of JPMorgan and its counsel who, unprompted and voluntarily, disclosed this error. As a matter of equity and good conscience, JPMorgan's candor should not be punished by bestowing a double windfall on creditors who (1) never expected or understood

that the collateral securing the Term Loan would be available to satisfy their claims, and (2) certainly did not expect that they would get the benefit of the collateral *plus* the money paid by the purchaser for that collateral.

Defendants, therefore, should be afforded a full opportunity to complete discovery from Old GM to support their constructive trust defense. The Court can then determine on a full record whether equity requires the imposition of a constructive trust. Although discovery needs to be completed, based on the record to date, the Term Lenders believe that this issue would most appropriately be decided on the basis of a trial.

c. Discovery to Date Supports Defendants' Earmarking Defense

To prevail on their earmarking defense, defendants only need to show (1) the existence of an agreement between the new lender and the debtor that the new funds will be used to pay a specified antecedent debt, (2) performance of that agreement according to its terms, and (3) that the transaction viewed as a whole (including the transfer in of the new funds and the transfer out to the old creditor) did not result in any diminution of the estate. *See Cadle Co.* v. *Mangan (In re Flanagan)*, 503 F.3d 171, 184-85 (2d Cir. 2007) (quoting *McCuskey* v. *Nat'l Bank of Waterloo (In re Bohlen Enters.)*, 859 F.2d 561, 566 (8th Cir. 1988)).

Discovery to date has provided evidence supporting every element of this standard. For example, documents and testimony from the United States Government (specifically, the Presidential Task Force on the Automotive Industry) prove: (i) the major stakeholders understood that the bankruptcy restructuring process required paying off the Term Loan; (ii) throughout the restructuring process, the DIP financing was consistently sized specifically so that there were sufficient funds so that the Term Loan could and would be repaid; (iii) Old GM was

required to use an allocated amount of the DIP financing proceeds to repay the Term Loan and did so; and (iv) repayment of the Term Loan did not diminish GM's estate, as the DIP financing would have been $1.48 billion less if the Term Loan was not repaid, and, moreover, the estate's unsecured creditors received a heavily negotiated fixed 10% equity stake in New GM that would not have changed in the absence of the DIP's repayment of the Term Loan.

Plaintiff's statement to the Court that there is uncontradicted testimony that there was no earmarking of funds for the Term Loan is simply wrong. As just one example, Matt Feldman, Chief Legal Adviser to the Treasury's Task Force on the Automotive Industry, has already testified that the Treasury's extension of DIP financing was contingent on GM repaying the Term Loan and that a failure by GM to use the allocated funds to repay the Term Loan could have jeopardized the entire 363 sale process and GM's emergence from bankruptcy. This testimony demonstrates that Old GM had a "clear obligation to use that money to pay off the preexisting debt." *See Cadle*, 503 F.3d at 185.

Plaintiff is also wrong in asserting that the earmarking and constructive trust defenses are "at odds with the DIP Order itself." Dkt. No. 1058 at 4-5. Paragraph 19(d) of the DIP Order reserved the rights of the Creditors' Committee "with respect only to the perfection of first priority liens of the Term Loans." Case No. 09-50026-MG (Bankr. S.D.N.Y.), Dkt. No. 2529. But Paragraph 19(a) of the Order separately directed the Debtors to use the proceeds of the DIP financing to repay the Term Loan. Nothing in the Final DIP Order suggests that, following repayment of the Term Loan, the Lenders would be deprived of any of their defenses to an avoidance action.

In sum, the additional discovery from New GM identified above will further strengthen defendants' earmarking defense. Once this discovery is completed, defendants propose that the parties meet and confer to determine whether this issue can be resolved through motion or whether a trial will be necessary.

3. Defendants Require Limited Additional Discovery in Connection with Certain of the Issues Identified in Defendants' Pre-Motion Letter.

Pursuant to the Court's pre-conference order, for each of the proposed motions listed in our pre-motion letter, defendants identify below whether we believe additional discovery is necessary and, if so, the scope of the discovery we intend to seek. For each motion, we also address whether the dispute is most efficiently resolved by motion, or whether a trial would be a more or equally efficient way to resolve the dispute. Finally, we provide additional details on the handful of topics we identified at the end of our pre-motion letter for which we intend to seek additional discovery to facilitate the ongoing mediation.

Motion 1 — Clarification that the Decision holds that GM's Mansfield, Ohio Stamping Facility is a specialized facility. During our pre-motion conference meet and confer, plaintiff informed us that it will resolve this proposed motion by stipulating to all Mansfield assets that plaintiff previously excluded from the Term Lenders' collateral on the basis that Mansfield was not a "specialized facility." We expect that plaintiff will confirm this to the Court. Subject to memorializing plaintiff's agreement satisfactorily in a forthcoming stipulation, this dispute no longer needs to be resolved by the Court.

Motion 2 — Partial summary judgment and clarification that the building system assets located at the LDT CUC are fixtures. This issue was already tried to the Court. While the Court did not decide the entire issue because of plaintiff's prior concessions that a number of

the building system components of the LDT CUC are fixtures, the parties had a full opportunity to take discovery on this issue, and both sides put on factual and expert evidence as to all of the disputed and conceded components of the LDT CUC at trial. Defendants' position is that this dispute can be resolved through motion practice without additional discovery. At our meet and confer, we asked plaintiff for its position as to whether additional discovery is required to resolve this motion, and plaintiff responded that it was uncertain as to its position.

Motion 3 — Partial summary judgment that the AAT's challenge to the Term Lenders' security interest in the fixtures at GM's Shreveport, Louisiana Assembly Facility is time barred. All parties agree that this issue can be efficiently resolved by motion without additional discovery — though for different reasons.

Motion 4 — Partial summary judgment that plaintiff is bound by the Court's ruling that Mr. Goesling's Orderly Liquidation Value In Exchange ("OLVIE") methodology must be applied to value the assets left with Old GM. Resolving this dispute is a straightforward application of judicial estoppel; no trial or discovery is necessary.

While additional discovery and even trial may ultimately be necessary to determine what values result from the application of Mr. Goesling's methodology, no discovery or trial is necessary (or for that matter, permissible) to confirm that Mr. Goesling's OLVIE methodology must be used to value all assets left with Old GM given that plaintiff *won* this issue at trial.

At our pre-motion conference meet and confer, the AAT informed us that its position on this proposed motion is that plaintiff should first be permitted to take additional discovery of KPMG with regard to OLV values that KPMG calculated for some (though not all) of the fixtures that were left with Old GM, and then determine later whether it would advocate for

those values. Defendants believe that this discovery should be precluded on estoppel grounds for the reasons detailed in our July 31, 2018 pre-motion letter.

As the Court will recall, the AAT's consistent position at trial was that *Mr. Goesling* provided the best methodology for valuing the fixtures left with Old GM (and those sold to New GM, for that matter). The AAT offered *no* evidence concerning KPMG's OLV estimates. This was a calculated trial tactic by the AAT, which was seeking to discredit the reliability of all of KPMG's work. Indeed, at the conclusion of trial, the Court asked the parties to supply it with a chart showing all of the valuation options, regardless of whether any party had advocated for them during trial. Trial Tr. 3541:17-23. Even then, the AAT did not include KPMG's OLV estimates on the chart — despite the fact that KPMG did estimate OLVs for a number of the representative assets, values lower than those provided by Mr. Goesling.[4] And, of course, the AAT prevailed on this issue and convinced the Court that Mr. Goesling's OLV methodology should be adopted for valuing the assets left with Old GM.

Plaintiff had every opportunity to take discovery with respect to the KPMG OLV values in advance of the representative assets trial, and had every opportunity to ask the Court to apply KPMG's lower OLV values at trial. It made the strategic decision not to advocate for those values, and is not now entitled to a second bite at the apple.

Motion 5 — Partial summary judgment that fixtures New GM purchased out of closed plants should be valued using KPMG fresh start values. Defendants believe that no

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[4] For example, Mr. Goesling valued the two representative asset stamping presses that were left with Old GM at $261,000 and $800,000 in OLVIE respectively. In its Decision, the Court adopted these values and listed them in Exhibit A. KPMG's OLVs for these two assets are $50,800 and $120,000 respectively — in other words, Mr. Goesling's OLVIE values are over six times higher than KPMG's OLVs.

additional discovery is necessary on this issue. KPMG has already produced the relevant documents on the subject and Patrick Furey testified as to the basis for KPMG's calculation and reasoning. Having met and conferred, the parties agree that this dispute can be resolved through a trial. Defendants believe this can be addressed at a less than full day trial, and will only require a small number of documents and testimony from Mr. Furey.

Motion 6 — Partial summary judgment that fixtures at Orion Assembly and Pontiac Stamping should be valued using KPMG fresh start values. Defendants do not see a good-faith basis for plaintiff's claim that GM's Orion Assembly and Pontiac Stamping plants were idled as of June 2009. Dkt. No. 1061 at 8-9. And, in fact, in our meet and confer, we asked plaintiff to identify what the basis was for its contrary view. (We are awaiting a response.)

Nonetheless, in light of plaintiff's position, defendants intend to present publicly available documents and testimony from former GM executives and plant managers that the Orion and Pontiac plants were not "idled" at the time of GM's bankruptcy filing, and that as of June 30, 2009, GM's proposed disposition of these plants and the assets therein was to use them to build a new small car. In order to bolster this proof, defendants also intend to seek a limited production from New GM showing that GM was producing cars and parts at these plants as of June 2009, and that GM had already finalized plans to continue to use these plants going forward.

Following discovery, defendants believe that the factual record will be undisputed. Having met and conferred, we believe this issue could be resolved with less than a full day trial involving a small set of documents and limited testimony. We understand plaintiff agrees that a trial is appropriate to resolve this dispute.

Motion 7 — Partial summary judgment that GM's Lordstown, Ohio Assembly Facility is a specialized facility. In light of the Court's ruling with respect to LDT, Warren, Defiance, and Mansfield, defendants again do not see a good-faith basis for plaintiff to claim that GM's Lordstown Assembly plant is not a "specialized facility." Dkt. No. 1061 at 9. Nonetheless, in light of plaintiff's position, defendants will seek limited discovery from New GM regarding the layout of the plant itself, including plant schematics and architectural plans that will further support a finding that Lordstown is a highly specialized facility specifically designed to GM's exacting standards in order to produce and assemble automobiles. Defendants also intend to present testimony from former GM experts regarding the specialized nature of the Lordstown Assembly facility, similar to the testimony Eric Stevens presented with respect to LDT, Dan Deeds presented with respect to GM Warren Transmission, Max Miller presented with respect to GM Mansfield Stamping, and John Thomas presented with respect to GM Defiance Foundry.

Defendants believe that a trial will be the most efficient means of resolving this dispute and currently believe that a day of testimony and a modest number of documents will be sufficient to establish that Lordstown, like LDT, Warren, Defiance, and Mansfield, is a specialized facility. To be clear, defendants believe that the trial should be focused exclusively on the physical characteristics of the Lordstown facility. Plaintiff should not be permitted to use the trial to re-litigate issues that were the subject of testimony in the 40 assets trial. We understand that plaintiff agrees a trial is appropriate to resolve this dispute, and believes that any trial should encompass GM Moraine Assembly, another Ohio plant.

Discovery Issue 1 — CWIP assets. Per our pre-motion letter, defendants intend to seek documents identifying assets that were physically installed at GM's plants as of June 2009 and intended to be permanent, but that had not yet been placed into active service and therefore do not appear on GM's June 2009 fixed asset ledger. Dkt. No. 1061 at 11-12. Specifically, defendants would seek limited discovery from New GM to identify and value such assets as of June 2009. In the first instance, defendants will seek the project files that should show the status and percentage completion of the relevant CWIP projects underway as of the June 30, 2009 valuation date.

Once defendants obtain this documentary discovery, we believe that further mediation efforts with respect to this category of collateral may be productive.

Discovery Issue 2 — Saturn equipment. As explained in our pre-motion letter, defendants will seek limited discovery from New GM to identify and value Saturn equipment, including special tools, in the plants listed on the Saturn UCC-1 as of June 2009 and not listed on the June 2009 fixed asset ledger. Dkt. No. 1061 at 12. Defendants understand that GM maintains this information in a "tools" database that is separate from, but comparable to, GM's electronic fixed asset ("eFast") ledger.

Once defendants obtain this documentary discovery, we contemplate that further mediation efforts with respect to this category of collateral may be productive.

Discovery Issue 3 — Fairfax capital lease assets. Defendants also intend to seek limited discovery from New GM showing that certain assets located at GM's Fairfax, Kansas assembly plant ("Fairfax Assembly") were subject to a capital lease that was created as part of a tax incentive package that Kansas provided to GM. Dkt. No. 1061 at 12. Defendants will also

seek limited discovery confirming that GM purchased all of the state-issued Industrial Revenue Bonds the state used to finance the capital lease, such that GM effectively owned a complete economic interest in the assets and was able to obtain a tax exemption. Defendants will also seek discovery from New GM that confirms which specific assets at Fairfax Assembly were the subject of this capital lease.

Once defendants obtain this documentary discovery, the parties will be in a better position to discuss how to efficiently resolve this dispute.

Discovery Issue 4 — TBD Assets. Finally, defendants will seek from New GM documents sufficient to describe approximately 100 assets listed on GM's June 2009 fixed asset ledger for which the information on the asset ledger is insufficient for our experts to determine if the assets are fixtures under the principles of the Court's Decision. Dkt. No. 1061 at 13.[5]

Once defendants obtain this documentary discovery, we contemplate that further mediation efforts with respect to this category of collateral may be productive.

4. Defendants' Proposed Discovery Schedule

Although defendants intend to keep their additional discovery limited and narrowly focused, all of the discovery will be taken from third parties to this litigation, primarily New GM, which will need to be subpoenaed. We have accordingly built time into our proposed discovery schedule that we believe will be sufficient to complete this third-party discovery, but reserve the right to petition the Court for extensions if third parties do not cooperate. Our

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[5] Defendants may also need to seek from New GM documents related to components of line items in GM's eFast ledger that GM categorized as "BLDG/ENCLOSURES OTHER" to confirm that, as defendants believe may be the case, those line items include building systems that defendants believe are fixtures and therefore collateral for the Term Loan. Discussions are currently ongoing with plaintiff regarding this issue.

schedule also includes deadlines for expert discovery, which we believe will be necessary prior to a trial or trials on a number of the issues identified in this letter.

August 14, 2018	Fact Discovery resumes
November 30, 2018	Deadline for document discovery
December 2018	Status conference on date set by the Court to determine what, if any, issues are ripe for early trial
February 7, 2019	Deadline for fact discovery
February 28, 2019	Parties serve expert reports
March 21, 2019	Parties serve rebuttal expert reports
April 25, 2019	Deadline for expert depositions / close of discovery
TBD by the Court	Pre-trial conference; trial dates; pre- and post-trial briefing

We have shared this proposed schedule with plaintiff, but have not heard back as to whether it agrees to this schedule for the issues identified herein. Plaintiff did indicate, however, that if discovery was completed on a more expedited timetable for any of the issues, it believes that a more accelerated motion or trial schedule could be set for those discrete issues. Defendants are not opposed to this concept, which, of course, depends on the level of cooperation obtained from the third parties that have custody of the documents that will be the subject of additional discovery. Defendants have proposed a status conference for December 2018 at which the parties and Court can discuss, with the benefit of additional discovery, whether there are issues that can be set for a more accelerated motion or trial schedule.

* * *

We look forward to discussing these issues with the Court at the August 9, 2018 conference.

Respectfully submitted,

Marc Wolinsky

CC: Counsel of Record (by ECF and email)