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Company Avoidance Action Trust*

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

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In re:

MOTORS LIQUIDATION COMPANY, f/k/a
GENERAL MOTORS CORPORATION, *et al.*,

Chapter 11

Case No. 09-50026 (MG)
(Jointly Administered)

Debtors.

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MOTORS LIQUIDATION COMPANY AVOIDANCE
ACTION TRUST, by and through the Wilmington Trust
Company, solely in its capacity as Trust Administrator and
Trustee,

Adversary Proceeding

Plaintiff,

Case No. 09-00504 (MG)

against

JPMORGAN CHASE BANK, N.A., *et al.*,

Defendants.

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**REPLY IN SUPPORT OF PLAINTIFF'S
MOTION FOR PARTIAL SUMMARY JUDGMENT ON CERTAIN ASSETS
LOCATED IN THE SHREVEPORT PLANT**

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Plaintiff Motors Liquidation Company Avoidance Action Trust (the “**Avoidance Action Trust**”) respectfully submits this reply memorandum of law in further support of its motion for partial summary judgment (“**AAT Shreveport Motion**”) pursuant to Rule 56 of the Federal Rules of Civil Procedure, Rule 7056 of the Federal Rules of Bankruptcy Procedure, and Rule 7056-1 of the Local Bankruptcy Rules.

PRELIMINARY STATEMENT

Under the terms of the Collateral Agreement and Louisiana state law, no security interest was or could have been created in any of the assets incorporated as fixtures into the Shreveport Plant as of the date of the Collateral Agreement. This is not in dispute. Defendants agree that Louisiana law governs whether and how a security interest can be created in the Shreveport Plant assets; Defendants agree that under Louisiana law a security interest cannot be created in goods once those goods have become fixtures; and Defendants agree that under Louisiana law a party cannot create a UCC lien in assets after they have become fixtures. In short, Defendants concede that under Louisiana’s UCC statute Old GM could not have granted a security interest in any of the assets at the Shreveport Plant that were already fixtures as of the date of the Collateral Agreement. That concession is dispositive.

Defendants nevertheless contend that they have a security interest in the assets *anyway*, not because the law permits it—Defendants acknowledge that it does not—but because, in Defendants’ view, their asserted security interest, however baseless or contrary to law, is unchallengeable in this proceeding.

The Term Lenders are incorrect. Nothing gives the Term Lenders license to assert a security interest that plainly was not and could not have been granted under Louisiana law, and the Avoidance Action Trust’s challenge to the Term Lenders’ assertion of such an interest is

properly raised in this adversary proceeding. As explained in the Avoidance Action Trust's Memorandum of Law in Opposition to Term Lenders' Motion for Partial Summary Judgment Regarding Fixtures at Shreveport Assembly ("**AAT Opposition**"), the purpose of this adversary proceeding is to determine the extent and value of the surviving security interest granted by the Collateral Agreement. Consistent with issues and disputes already resolved by the Court in this adversary proceeding, the AAT Shreveport Motion seeks a determination that Defendants' security interest does not include any fixtures that existed at the Shreveport Plant as of the date of the Collateral Agreement. Such a determination requires only that the Collateral Agreement be construed under applicable state law and is fully within the scope of this proceeding.

ARGUMENT

The AAT Shreveport Motion should be granted because there is no genuine issue as to any material fact and no dispute that, as a matter of law, no security interest was created in the 7,801 assets (the "**Shreveport Real Property Assets**") identified in the eFAST list submitted with the AAT Shreveport Motion. Accordingly, those assets are not part of the Term Lenders' collateral.

I. Louisiana's Commercial Code Does Not Permit The Creation Of A Security Interest In Goods That Already Have Become Fixtures

The scope of Defendants' interest in the assets at the Shreveport Plant must be interpreted pursuant to Louisiana law and Louisiana's Commercial Code. *See* Fisher Decl. Ex. B at Art. I, § 1.01(b) (Collateral Agreement definition of "UCC" provides that the relevant Uniform Commercial Code is the one in effect in the jurisdiction where the Collateral is located for purposes of the Collateral Agreement's provisions relating to attachment, perfection, or priority and for purposes of definitions related to such provisions). As Defendants acknowledge, under Louisiana law no valid UCC security interest could be created in fixtures that were already

installed in the Shreveport Plant as of the date of the Collateral Agreement. In their opposition (“**TL Shreveport Opp.**”), Adv. Pro. Dkt. No. 1101, Defendants expressly concede the following:

- 1) Louisiana law governs “whether and how a security interest in [an] asset can be created.” TL Shreveport Opp. at 5.
- 2) LA. REV. STAT. ANN. § 10:9-334(a) provides that a “security interest under this Chapter may not be created or perfected in goods after they become fixtures.” *Id.*
- 3) Louisiana law thus “disables a party from creating a valid UCC lien in fixtures after they have been installed.” *Id.* at 6.

Thus, by Defendants’ own account, LA. REV. STAT. ANN. § 10:9-334(a) “disabled” Old GM from creating a valid UCC lien in the Shreveport Real Property Assets. *Id.* In other words, under Louisiana law and the terms of the Collateral Agreement, the Shreveport Real Property Assets were not and could not have been included in the Collateral Agreement’s grant of security interest. *See* LA. REV. STAT. ANN. § 10:9-334(a); Fisher Decl. Ex. B at Art. II (the Collateral Agreement “shall not constitute a grant of a security interest in any asset or property to the extent that . . . such grant of a security interest is prohibited by any Requirement of Law of a Governmental Authority. . . .”). Defendants have offered no argument to the contrary, nor have Defendants made any showing that the Shreveport Real Property Assets were otherwise within the grant of collateral under the Term Loan. Accordingly, the AAT Shreveport Motion should be granted.

II. This Proceeding Is Not Limited To “What Is A ‘Fixture’?”

The TL Shreveport Opposition rests on the flawed premise that the Collateral Agreement granted a lien on all assets at the Shreveport Plant that satisfy the definition of a fixture under

Louisiana law. TL Shreveport Opp. at 3-4. To read the Collateral Agreement in such a simplistic manner would ignore key terms of the agreement and controlling provisions of relevant law. As noted above, the Collateral Agreement provides on its face that the UCC in effect in the relevant jurisdiction—here, Louisiana—governs the issue of the attachment of a security interest. *See* Fisher Decl. Ex. B at Art. I, § 1.01(b) (defining “UCC”).¹ Thus, as Defendants acknowledge, it is Louisiana’s UCC that governs “whether and how a security interest in [an] asset can be created.” TL Shreveport Opp. at 5. Further, the Collateral Agreement expressly subjects the grant of security interest to the limitations of governing law. *See* Fisher Decl. Ex. B at Art. II (excluding grants of security interest prohibited by law). Because Louisiana law controls and because, as Defendants concede, Louisiana law “disables a party from creating a valid UCC lien in fixtures after they have been installed,” the Collateral Agreement could not and did not create any security interest in the Shreveport Real Property Assets. *See* TL Shreveport Opp. at 6; LA. REV. STAT. ANN. § 10:9-334(a).

Defendants attempt to avoid the implications of section 10:9-334(a) by arguing that the statute “does not govern whether something is a ‘fixture’” and “does not inform the question of

¹ In the first sentence of the preliminary statement of their opposition brief, the Term Lenders claim that the Avoidance Action Trust “does not dispute that, on its face, the Collateral Agreement granted to JPMorgan, as agent for the Term Lenders, a lien on all fixtures located at Shreveport Assembly, regardless of their date of installation.” TL Shreveport Opp. at 1. The assertion is wrong, and the Avoidance Action Trust has conceded no such thing. On its face, the Collateral Agreement provides for a grant of security that is subject to express restrictions, including restrictions based on the terms of relevant state law. *See* Fisher Decl. Ex. B at Art. II; *see also* Memorandum of Law in Support of Plaintiff’s Motion for Partial Summary Judgment on Certain Assets Located in the Shreveport Plant (“**AAT Shreveport Mem.**”) at 8, Adv. Pro. Dkt. No. 1090; Memorandum of Law in Opposition to Term Lenders’ Motion for Partial Summary Judgment Regarding Fixtures at Shreveport Assembly (“**AAT Opposition**”) at 21-22, Adv. Pro. Dkt. No. 1104.

whether the ‘good’ is a ‘fixture’” under Louisiana law. TL Shreveport Opp. at 5. The remark is a non-sequitur, because the relevant question on this motion is not whether a good is a fixture, but whether a security interest was created in favor of Defendants. Defendants’ only response is that this question is not properly before the Court and that the Avoidance Action Trust is time-barred from challenging the scope of the Term Lenders’ security interest under the Collateral Agreement, the same argument made in the Term Lenders’ Memorandum of Law in Support of Term Lenders’ Motion for Partial Summary Judgment Regarding Fixtures at Shreveport Assembly, Adv. Pro. Dkt. No. 1082. *See* TL Shreveport Opp. at 1-2, 8-9.

Defendants are incorrect, and in the AAT Opposition, the Avoidance Action Trust has addressed the deficiencies of Defendants’ argument in detail. Briefly, as discussed in the AAT Opposition, determining the scope of the Term Lenders’ security interest under the terms of the Collateral Agreement has been central to this adversary proceeding all along. AAT Opposition at 7-16, 18-20. Accordingly, determining the scope of the Term Lenders’ security interest in the assets at the Shreveport Plant is a proper subject for this Court in this adversary proceeding. Indeed, the Court’s prior decisions in this proceeding demonstrate that assessing whether an asset is or is not a fixture is only one aspect of this Court’s broader inquiry into the scope of the Term Loan collateral.

For example, as part of the Representative Assets Trial, the Court resolved a dispute as to the scope of the security interest granted in the Central Utilities Complex (the “CUC”). *Op.* at 139-42. Before reaching the question of whether the CUC assets were fixtures under Michigan law, the Court had to determine first whether the CUC was excluded outright from the grant of collateral and whether Old GM could assign residual rights in the CUC. *See id.* at 139-40. The classification of the CUC assets as fixtures or non-fixtures was necessarily secondary to the

threshold question of whether the assets—fixtures or otherwise—fell within the grant of security at all.

Similarly, in determining whether the security interest granted by the Collateral Agreement included fixtures at the Powertrain Engineering Pontiac (“**PTE Pontiac**”) facility, the Court did not confine itself to the fixture/non-fixture distinction and in fact did not look to whether the assets located at the facility met the definition of “fixtures” at all. *See id.* at 87-89. Instead, the Court relied on the granting language of the Collateral Agreement to conclude that whatever fixtures may have existed at PTE Pontiac, they were nevertheless *not* subject to the Term Lenders’ security interest. *Op.* at 89.

Here, the issue is not whether the Shreveport Real Property Assets are called “fixtures” or meet the definition of “fixtures” under Louisiana law, but whether the Shreveport Real Property Assets were included in the grant of security interest under the Collateral Agreement and Louisiana state law. Defendants seek to avoid this issue by urging the Court to confine its analysis to what is and is not a fixture at the Shreveport Plant, but the Court should decline Defendants’ invitation to adopt such a blinkered approach. Defendants do not dispute that the Louisiana Commercial Code restricts the extent to which Old GM could create a security interest in the Shreveport Plant assets. Indeed, Defendants concede that under the Louisiana Commercial Code, Old GM could not have created a security interest in any of the Shreveport Plant assets after they became fixtures, *i.e.*, component parts of realty. *See* TL Shreveport Opp. at 5-6; LA. REV. STAT. ANN. § 10:9-334 (a). Nothing in the law and nothing in the prior course of this

adversary proceeding requires the Court to turn a blind eye to the limitations imposed by the Collateral Agreement and by Louisiana law on the scope of the Term Loan collateral.²

III. Under Louisiana Law, Fixtures Are Treated As Real Property

Defendants argue that Louisiana, like other states, recognizes the existence of fixtures, and that Louisiana's conception of a "fixture" is "consistent with fixture law generally." TL Shreveport Opp. at 6-7.³ However, the idiosyncrasies of the Louisiana Civil Code cannot be so lightly shrugged aside, for Louisiana's treatment of fixtures is in fact "fundamentally different" from that of the Model U.C.C. See James A. Stuckey, *Louisiana's Non-Uniform Variations in U.C.C. Chapter 9*, 62 La. L. Rev. 795, 829-30 (2002) ("Chapter 9 is significantly non-uniform in the provisions pertaining to fixtures."); see also AAT Shreveport Mem. at 8-10.

One key difference is that Louisiana's Chapter 9, unlike the Model U.C.C., draws a bright line between what is a good and what is a fixture for the purposes of creating a security interest, based on when a "movable" becomes an "immovable." On the one hand, if a security interest is created and perfected under Chapter 9 while a good is a movable, that good will continue to be treated as a movable even after it has been attached to an immovable. LA. REV.

² The fixture inquiry advocated by Defendants—focusing on how an asset is attached, how much damage its removal would cause, and the like—will be necessary with respect to those assets that were annexed to the Shreveport Plant *after* the grant of collateral. See TL Shreveport Opp. at 4. To avoid any potential misunderstanding, the Avoidance Action Trust did not and does not concede that a "lien" on such assets is "not subject to challenge on the basis of Section 9-334(a) of the Louisiana UCC." *Id.* at 2 n.1. Whether such assets are fixtures—as opposed to personal property or ordinary building materials—may be the subject of future mediation or litigation between the parties, but it is not a question addressed by the AAT Shreveport Motion. Indeed, no fixture analysis is needed with respect to the Shreveport Real Property Assets, as to which no security interest ever attached.

³ Contrary to the Defendants' suggestion, the Avoidance Action Trust has never argued that fixtures do not exist under Louisiana law or that Louisiana has "discarded the concept of fixtures annexed to the realty altogether." TL Shreveport Opp. at 8.

STAT. ANN. § 10:9-334(a). By contrast, once goods have become fixtures, they are no longer recognized as goods at all, for under Louisiana’s Chapter 9, the term “goods” includes “fixtures” only to the extent that the fixtures were “movable when a fixture filing covering them was made.” LA. REV. STAT. ANN. § 10:9-102(a)(44).

The result is that fixtures do not “retain their personal property nature” under Louisiana law, but are instead regarded as real property. *See* James A. Stuckey, *Louisiana’s Non-Uniform Variations in U.C.C. Chapter 9*, 62 La. L. Rev. 795, 829 (2002) (describing this as the “critical distinction” between UCC Article 9 and Louisiana’s Chapter 9). Defendants nevertheless insist that fixtures cannot be realty under Louisiana law because Louisiana recognizes that component parts may be either “separable” or “inseparable.” TL Shreveport Opp. at 7. The conceptual distinction between “separable” and “inseparable” component parts—terms not defined under the Louisiana Civil Code—is beside the point, and the passage relied upon by Defendants does not in any event indicate whether fixtures, as a class of component part, are “separable” or “inseparable,” or under what circumstances. 2 La. Civ. L. Treatise, Property § 2:21 (5th ed. 2018). The authority relied upon by Defendants does, however, have something of fundamental relevance to say here, something that Defendants chose not to quote: The “*component parts of an immovable are immovables.*” *Id.* (emphasis added). Translated from the nomenclature of Louisiana law, this means, simply, “fixtures are realty.” *See* LA. REV. STAT. ANN. § 10:9-102(a)(41) (defining “fixture” as a “component part” of an “immovable”); LA. REV. STAT. ANN. § 10:9-102(d)(16) (defining “real property” as “immovable property”).

Because already-attached fixtures are real property under Louisiana law, the creation of a security interest in such a fixture falls outside the scope of Chapter 9; a security interest in such a fixture can only be created by a mortgage over the whole of the real property. *See* LA. REV.

STAT. ANN. § 10:9-109(d)(11); AAT Shreveport Mem. at 8-14. This peculiar feature of Louisiana law has special significance here, for there is no dispute that the Collateral Agreement did not convey any interest in real property, and neither the Term Loan Agreement nor the Collateral Agreement create a mortgage in the real property at the Shreveport Plant. Accordingly, the Collateral Agreement could not and did not grant a security interest in any Shreveport Plant assets that were already fixtures at the time of the grant.

CONCLUSION

For the foregoing reasons, the Avoidance Action Trust respectfully requests that the Court enter partial summary judgment in favor of the Avoidance Action Trust: (i) excluding the 7,801 assets identified in the eFAST list submitted with the AAT Shreveport Motion from the assets that are part of the Term Lenders' collateral; and (ii) granting such other and further relief as the Court deems necessary.

Dated: October 26, 2018
New York, New York

Respectfully submitted,

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