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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	
	Chapter 11
MOTORS LIQUIDATION COMPANY, f/k/a GENERAL MOTORS CORPORATION, *et al.*,	Case No. 09-50026 (MG) (Jointly Administered)
Debtors.	
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.	

PLAINTIFF'S MEMORANDUM OF LAW
IN OPPOSITION TO DEFENDANTS' MOTION
FOR AN ORDER ESTOPPING PLAINTIFF FROM ASSERTING THAT
ASSETS LEFT WITH OLD GM SHOULD BE ASSIGNED KPMG OLV VALUES

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Plaintiff Motors Liquidation Company Avoidance Action Trust (the "**Trust**") respectfully submits this memorandum of law in opposition to Defendants' motion for an order estopping the Trust from asserting that assets left with Motors Liquidation Company ("**Old GM**") should be valued using the orderly liquidation values concluded by KPMG, LLP's Economic and Valuation Services ("**KPMG**"), Adv. Pro. Dkt. No. 1116 (the "**Motion**").[1] For the reasons set forth below, the Motion should be denied.

PRELIMINARY STATEMENT

One issue to be determined at the trial soon to be held before this Court is the value of more than 43,000 assets that remained with Old GM. The parties agree that the Orderly Liquidation Value in Exchange ("**OLVIE**") premise of value is the proper approach to valuing those assets. While the parties presented valuations of two individual assets that remained with Old GM (or the RACER Trust) at the representative assets trial in 2017 (the "**Representative Assets Trial**"), no party has yet presented to the Court any values for the remaining tens of thousands of assets of Old GM.

However, these assets were valued in 2009 at the request of Old GM. Specifically, Old GM retained KPMG to estimate the fair value of the "Property, Plant and Equipment" ("**PP&E**") that was to remain with Old GM after the government-sponsored sale to New GM pursuant to Section 363 of Chapter 11 of the United States Code (the "**363 Sale**"). The purpose of KPMG's fair value analysis was to support Old GM's asset impairment that was necessitated by the sharp decline in the value of the personal property at Old GM in the wake of the Great Recession. The fair value conclusions of KPMG were used by Old GM to impair the value of its assets and

[1] Defendants' Memorandum of Law in Support of their Motion, Adv. Pro. Dkt. No. 1117, is referred to herein as "**Defendants' Brief**." This Court's Memorandum Opinion Regarding Fixture Classification and Valuation, Adv. Pro. Dkt. No. 1015, is referred to herein as the "**Opinion**."

report the new values in its financial reporting to the SEC. To value the personal property assets, KPMG employed the market approach and, specifically, the percent to cost technique. Relying on market data from General Motors that KPMG deemed most reliable, KPMG determined OLVIE values for all of Old GM's personal property assets.

Defendants seek to prevent this Court from hearing evidence on KPMG's OLVIE values by contending, counter to the facts and unsupported by the law, that the Trust should be estopped from presenting such evidence because it allegedly has already presented a position adopted by this Court that is "clearly inconsistent" with KPMG's OLVIE values. This is not true, and Defendants' Motion must fail because the factors necessary for judicial estoppel are not present: (1) the KPMG values are not "clearly inconsistent" with the valuation methodology applied by the Trust's expert, David Goesling; (2) the Court did not adopt any positions that would be contradicted or undermined by the KPMG OLVIE values; and (3) the equities do not warrant application of judicial estoppel because Defendants would suffer no prejudice and the Trust would gain no unfair advantage.

As part of the Representative Assets Trial in 2017, the Trust presented OLVIE values for two assets that remained with Old GM and thirty-seven assets that were purchased by New GM for use in the new company. The Court adopted the Trust's proffered values for the two representative assets that remained with Old GM. For those two assets, the parties had agreed, and the Court held, that OLVIE was the proper valuation methodology. The dispute at trial was whether the OLVIE values advanced by Mr. Goesling, or Defendants' expert, Carl Chrappa, would be adopted. The Court held that Mr. Goesling's values for the two representative assets were more reliable because he, unlike Mr. Chrappa, considered the market approach.

Defendants' argument that the Trust should be estopped from presenting evidence on KPMG's valuation of assets that remained at Old GM rests on their claim that the value of all 43,000 assets must be determined by reference to the direct or comparable sales techniques, two of the three valuation techniques employed by Mr. Goesling. This argument is fundamentally flawed. KPMG's approach to valuing the assets that remained at Old GM is consistent with the approach applied by Mr. Goesling's to value the representative assets, and Defendants' description of both Mr. Goesling's work and the Trust's position is inaccurate.

The valuation approach advanced by Mr. Goesling and adopted by the Court is one that looks, where possible, to the market approach, the same approach used by KPMG. And as part of his use of the market approach, Mr. Goesling determined which market approach technique (direct match, comparable match, or percent to cost) to use based on the availability of market data for the assets he valued. As Mr. Goesling explained at trial and the Court noted, he applied all three techniques, including the percent to cost technique, which he used in circumstances where there was limited or no market data available. In connection with his application of the direct and comparable sales techniques, however, Mr. Goesling acknowledged that it was difficult to find comparable sales data even just for the forty assets he valued. KPMG, too, recognized the impact of the availability of comparable sales data; it concluded that there was not sufficient sales data to apply the direct and comparable sales approaches to value the tens of thousands of assets left with Old GM.

Defendants also understood that Mr. Goesling's market approach "cannot be scaled up from the 40 Representative Assets . . . to the hundreds of thousands of assets at issue in the broader litigation" because in part "[h]is analysis for just 40 assets took a tremendous amount of time because he struggled in 'actually finding comparable sales information' — the comparables

'just weren't there.'" Adv. Pro. Dkt. No. 993, Defs. Post-Trial Br. ¶ 343. Moreover, a market-based valuation of 43,000 assets requires broader techniques than valuing forty individual assets. That the technique employed to value 43,000 assets is different from techniques employed to value an individual asset does not mean the two valuations are inconsistent. Each is appropriate in the context of the valuation being performed. Defendants' critiques of various inputs and judgment decisions of KPMG do not establish inconsistency.

Finally, in light of the massive disruption to the market and the fact—observed by both Mr. Goesling and KPMG—that many assets could not be sold, it would distort Mr. Goesling's opinion and economic reality to assume that the valuation of a single asset as presented at the Representative Assets Trial implies that all subsequent assets would sell for a similar price. That was not the case during the market upheaval of 2009, as acknowledged by Mr. Goesling, Mr. Furey, General Motors management, and Maynards. The average price obtained when selling a thousand robots would be different than the price obtained when selling one, and Defendants' attempts to paint these differences as inconsistencies between KPMG's methodology and Mr. Goesling's defy common sense and are contrary to the evidence.

For these reasons, and as set out below, Defendants' Motion should be denied.

STATEMENT OF FACTS

I. THE REPRESENTATIVE ASSETS TRIAL

At the Representative Assets Trial, the Court held a trial to adjudicate issues concerning forty representative assets (the "**Representative Assets**") selected by the parties. One issue decided was the value of 39 of the Representative Assets.

A. The Trust's Expert, Mr. Goesling, Valued all Representative Assets at OLVIE

With respect to the issue of valuation, at the Representative Assets Trial the Trust argued that all of the Representative Assets should be valued using OLVIE. The Trust contended that both assets that were sold to General Motors Company ("**New GM**") as part of the 363 Sale, as well as assets that remained with Old GM, should be valued at liquidation value because as of the valuation date, June 30, 2009, there was no market for the assets as a going concern.

Accordingly, Mr. Goesling valued each of the Representative Assets using OLVIE.[2] Following the guidelines of the Uniform Standards of Professional Appraisal Practice ("**USPAP**") and the American Society of Appraisers ("**ASA**"), Mr. Goesling first determined the highest and best use of the assets, taking into consideration only legal, physically possible, and financially feasible uses. Binder Decl. Ex. A (Goesling Direct ¶ 383). Mr. Goesling concluded that the highest and best use of the assets was not in continued use because as of the valuation date it was widely understood that Old GM could not continue to operate as a going concern and absent the government's heavily subsidized purchase of Old GM's assets, Old GM would have liquidated. *Id.* ¶¶ 390-93. Thus, the appropriate premise of value was determined to be value in exchange, where it is anticipated the assets will be removed from its current location and sold for a similar or alternate use. *Id.* ¶ 387.

Having concluded that OLVIE was the proper valuation premise, Mr. Goesling then determined which of the three valuation approaches to apply: the income approach, the cost approach, or the market approach. Binder Decl. Ex. A (Goesling Direct ¶ 395). Consistent with USPAP and ASA guidelines, Mr. Goesling determined that the market approach was preferable

[2] The parties did not present evidence as to the value of one of the forty Representative Assets.

where sufficient market data existed for an asset or where an asset could be sold on the secondary market. *Id.* ¶ 397. For assets where there was insufficient or no market data, Mr. Goesling applied the cost approach. *Id.* ¶ 445. Ultimately, Mr. Goesling calculated values under the cost approach for each of the Representative Assets and, for those assets with sufficient market data, Mr. Goesling also calculated values using the preferred market approach. Whenever possible, Mr. Goesling's final values were derived from the market approach. *Id.* ¶¶ 396-98, 408.

As the Court noted, "[i]n developing his opinion of Orderly Liquidation Value using the Market Approach, [Mr. Goesling] considered the following three techniques to estimate the value of the assets: (1) a direct match of a recent sale in the used market; (2) a comparable match, which determined value based on the analysis of similar used equipment sales; and (3) the percent to cost technique." Op. at 175-76. The percent to cost technique (the "**Percent to Cost Technique**") was used in circumstances where there was limited or no market data available. Binder Decl. Ex. A (Goesling Direct ¶ 409). To conduct his Percent to Cost valuation, as the Court noted, Mr. Goesling analyzed the ratio of used sales prices to the replacement cost (or RCN) of the asset by reviewing transactions in assets similar in nature and age. *See* Op. at 176. He then analyzed the relationships between age, selling price, and replacement cost to develop a percent to cost factor, which represented the average selling price as a factor of cost. Binder Decl. Ex. A (Goesling Direct ¶ 409). He applied those percent to cost factors to the cost of similar assets for which only limited or no market data was available." Op. a 176. "Where there was no available data for comparable sales of similar assets, [Mr. Goesling] considered whether the asset had any scrap value." Op. at 176. Mr. Goesling testified that it was difficult to find comparable sales data for many of the forty assets. Binder Decl. Ex. B (Trial Tr. (Goesling) at

3432:2-18). He further acknowledged that application of sales comparison techniques to the hundreds of thousands of assets at issue in this litigation would be extremely, if not prohibitively, difficult. *See id.* at 3548:16-3549:2.

B. Defendants Advocated for Going-Concern Value for Assets Sold to New GM but Agreed that Assets Remaining with Old GM Should Be Valued in Liquidation

For assets that were sold to New GM, Defendants advocated an in-use premise of value. They relied on an in-use valuation performed by KPMG in connection with New GM's fresh-start accounting (the "**KPMG Fresh Start Valuation**"). *See* Op. at 146-47. Specifically, Defendants argued that the KPMG Fresh Start Valuation was admissible and that an interim calculation of KPMG, termed RCNLD ("**RCNLD**"), was the most reliable calculation of the value of the Representative Assets sold to New GM. *Id*.

The Trust's principal objection to the KPMG Fresh Start Valuation was its use of a going-concern premise of value, which the Trust contended was not the appropriate premise of value for the Representative Assets, as an in-use premise of value represented the value of the assets in the hands of New GM after the 363 Sale—not Old GM in bankruptcy. *See* Adv. Pro. Dkt. No. 994 ("**Plaintiff's Post-Trial Brief**") at 437. The Trust did not question the reliability of the KPMG Fresh Start Valuation for the purposes for which it was intended—providing values for KPMG's accounting and public filings—but objected to KPMG's reliance on inputs that were generated at the category- and plant-level and thus provided less individualized values for each of the Representative Assets. The Trust did not seek to "discredit" KPMG's work, as Defendants contend, Defs. Br. at 4, but instead challenged the relevancy of the report given the scope of the assignment. As the Trust wrote in its Post-Trial Brief:

> Given the nature of KPMG's task—which included determining a value for over 400,000 discrete machinery and equipment assets—KPMG necessarily employed certain practical expedients in order to efficiently determine values for GMNA's

> Personal Property and Building & Improvements. Plaintiff[] do[es] not take issue with the use of these practical expedients as used by KPMG for purposes of assisting New GM in preparing its fresh start accounting balance sheet. However, it is nevertheless true that this approach sacrifices precision at the asset level, precision that would be—and, with respect to Mr. Goesling's appraisals, is—present in individualized appraisals of the Representative Assets.

Pl. Post-Trial Br. at 437. The Trust contended that when valuing hundreds of thousands of assets, the use of practical expedients was appropriate, but when valuing only the handful of assets at issue in the Representative Asset Trial, such an approach was not sufficiently precise. *Id.*

For assets not sold to New GM, Defendants agreed that OLVIE was the appropriate premise of value. However, Defendants proffered an expert witness, Mr. Chrappa, who opined that OLVIE should be determined using the cost approach, not the market approach. Mr. Chrappa exclusively applied the cost approach to determine the value of the two Representative Assets that remained with Old GM.

C. For Assets Sold to New GM, the Court Adopted the KPMG Fresh Start Valuation

Ultimately, the Court held that in-use was the correct premise of value for assets sold to New GM and agreed with Defendants that the KPMG Fresh Start Valuation was a reliable indicator of the value of those assets, though the Court declined to adopt the RCNLD values advanced by Defendants and instead determined that KPMG's final fair values were the best measure of value. *See* Op. at 147. The Court further held that the KPMG Fresh Start Valuation was sufficiently particular as to the values of individual assets and found the testimony of Patrick Furey, a managing director at KPMG who oversaw the valuation, to be credible and relevant. *Id.* at 153.

The Court concluded that the KPMG Fresh Start Valuation was reliable in part because the values were determined by a neutral third party outside of the context of litigation, unlike the

expert valuations submitted by the parties. To that end, the Court rejected Defendants' arguments that KPMG made significant errors during the course of their valuation that Defendants claimed improperly lowered KPMG's final concluded values. *See* Op. at 183. The Court also rejected the Trust's objection and adopted Defendants' view that it was appropriate to use expedients and inputs generated at the line- and facility-level. *See, e.g.*, *id.* ("Especially considering the scale of the valuation task, the Court finds that it was reasonable for KPMG to value assets at the line-by-line, rather than individual level."). The Court noted, however, that "individual appraisal of over 200,000 assets is simply not feasible" in this action. *Id.* at 6.

D. For Assets that Remained with Old GM, the Court Adopted Mr. Goesling's OLVIE Values

For the two Representative Assets not sold to New GM, the Court concluded that Mr. Goesling's valuation, not Mr. Chrappa's, was the better indicator of value. Op. at 195. Though both experts were determining orderly liquidation values, the Court found Mr. Goesling's appraisal more reliable because Mr. Goesling included the use of the market approach in his valuation, and did not rely exclusively on the cost approach, as Mr. Chrappa did. *Id.* The Court held that, consistent with accepted appraisal literature, use of the market approach was preferable because market data, on which the market approach relies, inherently captures all forms of obsolescence and generally results in more accurate conclusions of orderly liquidation values. *Id.* at 195. The Court adopted Mr. Goesling's valuation only for the two Old GM Representative Assets.

II. KPMG CONDUCTED A SEPARATE VALUATION THAT VALUED THE OLD GM ASSETS IN DISPUTE AT OLVIE

All KPMG-related evidence presented at the Representative Assets Trial concerned the going-concern values in KPMG's Fresh Start Valuation that were advanced by Defendants (albeit with proposed adjustments). But separate from its valuation work supporting New GM's

fresh-start accounting, KPMG also was engaged by Old GM in 2009 to assist with Old GM's valuation of its assets after the 363 Sale for SEC reporting purposes. Binder Decl. Ex. C (Furey Tr. at 346:6-17).[3] This valuation was done at the request of Old GM in order to support their impairment analysis, which was necessary in light of the rapidly declining value of the Old GM assets. *See id.* at 354:9-355:16. As with KPMG's valuation of New GM's assets, Mr. Furey oversaw this valuation, managing a team of six to seven people who worked nearly full time on the project for three to four months to value over 60,000 PP&E assets of Old GM. *Id.* at 347:5-12, 347:24-349:3. At trial, Mr. Furey was not questioned about, nor did he discuss, KPMG's valuation of Old GM's assets.

Like the Fresh Start Valuation, the purpose of KPMG's Old GM valuation was to determine the fair value of the subject assets in accordance with Financial Accounting Standards Board Standard 157 (now ASC 820) ("**FAS 157**"). Binder Decl. Ex. C (Furey Tr. at 361:2-20, 598:3-14). To determine fair value under FAS 157, KPMG first analyzed the highest and best use of the assets in order to determine the appropriate premise of value. Based on the economic reality that these assets were not going to continue in operation, KPMG concluded that the highest and best use of the assets was a piecemeal sale of the assets in the secondary market. *Id.* at 363:4-25. KPMG made this determination based on conversation with General Motors regarding their future use of the assets—which was either immediate closure of the plants at

[3] Defendants state that in the KPMG Fresh Start Valuation report, KPMG describes that it valued tens of thousands of assets left at Old GM. *See* Defs. Br. at 3 (quoting the KPMG Fresh Start Valuation Report at 140). That is incorrect. The portion of the KPMG Fresh Start Valuation report cited by Defendants references KPMG's valuation of certain New GM assets that were identified as disposed of, abandoned, or idled. KPMG valued these assets at OLVIE (because New GM did not intend to operate them as part of a going concern) and utilized the same methodology that it employed to value the Old GM assets. *See* Binder Decl. Ex. C (Furey Tr. at 467:11-24). There was no briefing or testimony at the Representative Assets Trial regarding KPMG's valuation of disposed of, abandoned, or idled New GM assets. KPMG's Fresh Start Valuation workpapers include OLVIE values for many of the New GM assets, which Defendants reference in Exhibit A to the Declaration of C. Lee Wilson.

which the assets were located or closure of the plants in the near future after the Transitional Service Agreement with New GM expired. *Id*. at 363:13-19. KPMG further concluded that there was no market to purchase the Old GM facilities as a whole, *id.* at 364:16-19, and therefore the appropriate valuation methodology was OLVIE. *Id.* at 364:20-24.

To determine OLVIE for the personal property assets of Old GM, KPMG, like Mr. Goesling, considered the three approaches to valuation: income, cost, and market. Ultimately, it relied exclusively on the market approach. Binder Decl. Exs. C (Furey Tr. at 370:17-373:17) & D (Tangible Assets Memo at 9). In determining which techniques to use when applying the market approach, KPMG followed FAS 157 (as it did with the KPMG Fresh Start Valuation) which classifies inputs to valuation techniques into one of three categories:

- Level 1: Quoted market prices for identical assets;
- Level 2: Observable inputs other than quoted prices included within Level 1; and
- Level 3: Unobservable inputs.

Id. at 3. "Given the facts and circumstances of the analysis, [KPMG] determined that the market approach using Level 2 inputs is applicable and appropriate." *Id.* at 3. Specifically, KPMG explained that "there are limited Level 1 inputs available to estimate the fair value of the Subject Assets," but "[t]here are Level 2 inputs available based on sales of similar assets." *Id.* at 3-4.

To perform its valuation using the market approach, among other things, KPMG "[c]onducted site inspections," "[h]eld discussions with site Management personnel to understand the general age of the PP&E assets, repair and maintenance programs, custom and installed nature of the assets, and future intended use of the assets," "[p]erformed market research to gather comparable sales data for use in our application of the market approach," and

"[p]erformed a valuation analysis of the PP&E using the appropriate valuation methodologies." Binder Decl. Ex. D (Tangible Assets Memo at 4).

KPMG utilized market data provided by General Motors' primary auctioneer, Maynards Industries Ltd. ("**Maynards**"). In making the decision to use such data, KPMG held extensive discussions with General Motors' asset disposal group, as well as Maynards' employees. Binder Decl. Ex. D (Tangible Assets Memo at 9); *see also id.* Ex. C (Furey Tr. at 394:10-14) (testifying that KPMG communicated with General Motors management almost daily and met with them a "couple of times a week" during the course of the valuation of Old GM's assets). Though Maynards provided KPMG with two years (2007-2009) of General Motors auction data, based on its discussions with Maynards and General Motors management, KPMG determined that in light of the rapidly deteriorating market conditions at the time of the valuation date, the most reliable market data were transactions that closed during the three-month period leading up to the valuation date. *Id*. at 398:18-391:15. Though the transactions on which KPMG relied closed during this three-month period, the assets would have been listed for sale prior to March 2009. *Id.* at 391:16-392:1. In total, KPMG relied on data for over 4,000 asset sales that closed between March and May 2009. *Id.* Ex. D (Tangible Assets Memo at 9).

Relying on this data, KPMG applied the Percent to Cost Technique. *See* Binder Decl. Ex. C (Furey Tr. at 596:2-12). KPMG analyzed the relationship between market prices and reproduction cost new (an asset's historical cost multiplied by a trend factor) to determine a percent to cost factor, which KPMG referred to as a liquidation factor. *Id.* Ex. D (Tangible Assets Memo at 9). Given the scope of their exercise (and comparable to the method used in connection with assets sold to New GM), KPMG determined its liquidation factors at the asset

category level.[4] *Id.* Ex. C (Furey Tr. at 383:24-384:25). KPMG applied the respective liquidation factor to each asset's reproduction cost new to determine the asset's orderly liquidation value in exchange. *Id.* Ex. D (Tangible Assets Memo at 9). KPMG determined OLVIE for each individual asset utilizing the Percent to Cost Technique. *Id.* Ex. C (Furey Tr. at 596:2-12).

After determining OLVIE values for each asset, KPMG validated the reliability of their findings. First, KPMG determined the average age at the asset category level of the assets sold by Maynards from March through May 2009 and the subject Old GM assets. Binder Decl. Ex. D (Tangible Assets Memo at 9). KPMG then compared the average ages and concluded that the sold assets and the subject assets were sufficiently similar in age. *Id.* Second, KPMG shared its conclusions with both General Motors management and Maynards, who confirmed that the estimates of value reasonably represented current market conditions and were comparable to what market participants would anticipate on average from disposition of these assets. *Id.* at 9.

ARGUMENT

Judicial estoppel is only appropriate where "1) a party's later position is 'clearly inconsistent' with its former, 2) the court in the earlier proceeding adopted in some way the party's former position, and 3) the party asserting the conflicting statements would gain an unfair advantage against the party seeking estoppel." *DeRosa v. Nat'l Envelope Corp.*, 595 F.3d 99, 103 (2d Cir. 2010) (citation omitted). The Second Circuit "limit[s] judicial estoppel to situations

[4] Mr. Furey testified at the Representative Assets Trial that a "[m]ass appraisal is generally a term that's utilized for large analyses of high volume number of assets." Binder Decl. Ex. G (Trial Tr. (Furey) at 1465:21-23). He was asked whether "KPMG's work for New GM was a mass appraisal," *id*. at 1465:24-25, and he testified that he "wouldn't characterize it as a mass appraisal; although, we did employ certain techniques related to a mass appraisal to facilitate being able to handle the large volume of assets in this deal." *Id.* at 1466:2-6. At his 2018 deposition, Mr. Furey testified that this answer would "apply equally to the orderly liquidation values at Old GM." *Id.* Ex. C (Furey Tr. at 473:9-13).

where the risk of inconsistent results with its impact on judicial integrity is certain." *Id.* (quotation marks omitted).

As set out below, Defendants do not satisfy any of the factors necessary for application of judicial estoppel. Defendants' Motion should be denied.

I. KPMG'S OLVIE METHODOLOGY FOR ASSETS AT OLD GM IS NOT "CLEARLY INCONSISTENT" WITH MR. GOESLING'S VALUATION

In determining whether a party is asserting a position that is clearly inconsistent with a prior position, courts consider whether there is "a true inconsistency between the statements in the two proceedings." *DeRosa*, 595 F.3d at 103 (quotation marks and citations omitted). The statements must "evince *intentional contradictions*, not just simple error or inadvertence." *Jacobs v. D'Alessandro (In re Dewey & LeBoeuf LLP)*, No. 14-01919 (MG), 2014 WL 4746209, at *12 (Bankr. S.D.N.Y. Sept. 23, 2014) (emphasis added) (quotation marks and citations omitted). The Second Circuit has held that judicial estoppel is not applied "where the statements at issue do not present an irreconcilable conflict." *Chevron Corp. v. Donziger*, 833 F.3d 74, 128 (2d Cir. 2016); *see also United States v. Apple, Inc.*, 791 F.3d 290, 337 (2d Cir. 2015) ("[W]e have emphasized the need to carefully consider the contexts in which apparently contradictory statements are made to determine if there is, in fact, direct and irreconcilable contradiction.").

The OLVIE methodology employed by KPMG and Mr. Goesling are neither "clearly inconsistent" nor "irreconcilable." To the contrary, both applied standard OLVIE methodology using overlapping techniques based on the particular circumstances of the valuation exercises. The alleged differences in specific valuation techniques within their respective applications of the market approach are due to differences in the particular circumstances of the valuations and are not central to the methodology and valuation approaches applied.

A. KPMG and Mr. Goesling Both Employed the Market Approach to Calculate OLVIE

Both Mr. Goesling and KPMG were tasked with determining the fair market value of their respective subject assets; Mr. Goesling was valuing forty in total, and KPMG was valuing over 60,000 (at Old GM). To determine fair value, both considered the highest and best use of the assets and both determined that, for assets that were to remain with Old GM, the highest and best use indicated the appropriate premise of value was OLVIE. *See id.* Exs. A (Goesling Direct ¶ 395) & D (Tangible Assets Memo at 2).

Both Mr. Goesling and KPMG concluded that the market approach would yield the most reliable values—and both applied the market approach where appropriate (KPMG exclusively applied the market approach; Mr. Goesling applied the market approach to every Representative Asset for which he identified comparable individualized market data). *Id.* Exs. A (Goesling Direct ¶ 411) & D (Tangible Assets Memo at 9). Where appropriate, Mr. Goesling applied the Percent to Cost Technique, the same technique applied by KPMG to value all personal property assets. KPMG exclusively relied on this technique due to the scope of its assignment, *id.* Ex. D (Tangible Assets Memo at 9); Mr. Goesling relied on both the sales comparison and Percent to Cost techniques depending on the circumstances of the data relating to the asset he was valuing, *id.* Ex. A (Goesling Direct ¶¶ 410-11).

That Mr. Goesling in some circumstances used the "direct match" and "comparable match" techniques does not make the valuations clearly inconsistent. Mr. Goesling was able to utilize these techniques because he was only valuing forty assets, not 43,000. And as Mr. Goesling testified at the Representative Assets Trial, it was difficult to find comparable sales data even just for forty assets. Binder Decl. Ex. B (Trial Tr. (Goesling) at 3432:2-18). Mr. Goesling and the Trust acknowledged that application of sales comparison techniques to the

hundreds of thousands of assets at issue in this litigation would be extremely, if not prohibitively, difficult; indeed, when asked if he would be willing to conduct a sales comparison analysis for the 200,000 assets in dispute in this proceeding, Mr. Goesling remarked wryly that he "reserve[d] judgment." *See id.* at 3433:16-24. And, as Mr. Furey explained,

> 40 assets would be certainly more amenable to doing a true comparable sales method as opposed to forty -- over 40,000. . . . But whether you're doing percentage of cost, whether you're employing that technique, or whether you're looking at market comparables and making adjustments, all of that is under FAS 157 Appropriate Methodologies for Concluding Orderly Liquidation Values.

Id. Ex. C (Furey Tr. at 597:19-598:9).

Because Mr. Goesling and KPMG applied the same valuation premise, approach, and even the same techniques, their valuations are not "clearly inconsistent," especially in light of the varying scopes of their respective assignments. As set forth below, Defendants' attempts to draw distinctions between their valuation methodologies should be rejected.

B. KPMG's OLVIE Is Not Inconsistent with Mr. Goesling's Use of the Sales Comparison Approach

Defendants point to Mr. Goesling's use of the direct and comparable sales techniques for assets with active secondary markets to support their argument that his approach is inconsistent with KPMG's. *See* Defs. Br. at 11-12. They conclude that because Mr. Goesling used these approaches where he was able to locate direct and comparable sales comparisons, and because he relied on market data spanning ten years whereas KPMG only considered sales that concluded between March and May 2009, Mr. Goesling's valuation is clearly inconsistent with KPMG's. *Id*. at 11-12. As a threshold matter, this argument ignores that Mr. Goesling did apply the same technique—Percent to Cost—as KPMG for certain of the forty Representative Assets. It also ignores the fact that there was no secondary market for many of the assets Mr. Goesling valued and that, as Mr. Goesling acknowledged, it was difficult to locate comparable sales for the assets.

Binder Decl. Ex. B (Trial Tr. (Goesling) at 3432:6-18). It further ignores that KPMG specifically determined that data from the three-month period on which they relied was the data that would most accurately reflect the current market conditions, and that KPMG had received and considered Maynards sales data dating back two years but concluded that data older than three months was not reliable in light of the rapidly deteriorating market. *Id.* Ex. C (Furey Tr. at 389:18-391:15).

But it also fails because these purported differences are not fundamental to the respective valuations and therefore do not rise to the level of "clear[] inconsist[ency]" that judicial estoppel is designed to prohibit. *DeRosa*, 595 F.3d at 103; *see also In re Dewey & LeBoeuf LLP*, No. 14-01919 (MG), 2014 WL 4746209, at *12 (statements must "evince intentional contradictions"); *see also Chevron Corp.*, 833 F.3d at 128 ("We do not apply judicial estoppel where the statements at issue do not present an irreconcilable conflict.") (internal quotation mark omitted). Use of differing techniques within the market approach or differing time periods for market data are not "irreconcilable conflict[s];" rather, as appraisal literature confirms, the circumstances and scope of an appraisal impact the techniques and data sets on which a valuation under the market approach should rely. *See* Binder Decl. Ex. E (ASA at 94) ("The implementation of the [market] approach may differ significantly depending on whether the subject is an individual asset, a group of assets, or an entire facility.").[5] Critiques of a valuation's inputs and techniques are better left for trial. *Cf. Goldberg v. Sotheby's Int'l Realty, LLC (In re SOL, LLC)*, No. 11-01719-AJC, 2012 WL 2673254, at *9 (Bankr. S.D. Fla. July 5,

[5] The ASA refers to the market approach as the "sales comparison approach," but the underlying approach—and the three techniques used to apply the approach—is the same. *See* Binder Decl. Ex. E (ASA at 117 n.1) ("The sales comparison approach is sometimes referred to as the market approach or market data approach.")

2012) (purported inconsistencies in valuation opinions did not warrant order judicially estopping plaintiff from relying on valuation as issues raised by the Defendants "went to the credibility and weight of the opinion and not its admissibility").

C. KPMG's Reliance on "Zero Proceeds" Sales Is Not Inconsistent with Mr. Goesling's OLVIE Methodology and Properly Accounts for Market Conditions for Old GM's Assets

Defendants further argue that an inconsistency exists because KPMG relied on "scrap dispositions and abandonments" that were "recorded by Maynards as 'zero proceeds' dispositions." Defs. Br. at 9. This argument mischaracterizes what KPMG did and misinterprets the Maynards data. Contrary to Defendants' argument, Mr. Furey testified that the "zero proceeds" data represents *completed sales* during March to May 2009. *See* Binder Decl. Ex. C (Furey Tr. at 426:23-427:3) ("Q. So then the zero [proceeds] does not reflect a situation where an asset simply did not sell at all or there was no transaction at all? A. That -- our – our understanding was that all of the information in the Maynards file reflected some sort of transaction."). It reflects the actual net amounts received by General Motors on account of the disposition, which Mr. Furey testified likely included sales for scrap value. *See id.* at 425:10-16, 427:4-428:3. Thus, as Mr. Furey testified, the data on which KPMG relied did not relate to assets that had been abandoned or did not sell. *See id.* at 424:10-425:2. KPMG's values were not "reduced" by these zero proceeds sales, as Defendants describe it; rather, the zero proceeds sales were an integral part of KPMG's analysis that captured the economic reality that the market was extremely depressed for the vast majority of assets. *See id*. at 422:19-423:15, 424:10-425:2. Were the 43,000 Old GM assets put up for an orderly liquidation sale, the vast majority likely would sell for little if any net proceeds. This concept is consistent with Mr. Goesling's recognition that some assets may be difficult to sell "due to an excessive amount of similar assets available in the marketplace . . . ." *Id.* Ex. F (Goesling Report at 335).

Defendants suggest that the integrity of the judicial process would be jeopardized if two identical presses were valued differently. But if, for instance, demand in the marketplace could not support the sale of more than one of the same type press for the same price, then subsequent presses held for sale would have much lower values. The same holds true for other assets. For example, Mr. Goesling concluded as part of his expert report that the CB 91 Robot would sell—as a single standalone asset—for $8,000.[6] *Id.* Ex. F (Goesling Report at 3). This value for a single robot is not determinative of whether the thousands of similar robots would sell for near that price or at all given the extremely low demand at the time. If Defendants' point is that KPMG had a much lower value for the same press that Mr. Goesling valued, such difference is a function of the different exercises they were performing. Mr. Goesling was valuing a single press and KPMG was determining values for assets that would be applied across entire asset categories. Judicial integrity is not threatened by adoption of a methodology that accurately takes into account the fact that the values assigned to a handful of assets will be higher than the values assigned to 43,000 assets if demand in the marketplace as of the valuation date could not support the sale of most of those assets.

What Defendants call "judicial integrity" is their effort to impose on this Court the adoption of values that are unmoored from economic reality because they ignore the undeniable fact that there was extremely low demand for tens of thousands of automobile manufacturing equipment assets in June 2009. *See* Binder Decl. Exs. C (Furey Tr. 389:18-391:15) & F (Goesling Report at 335). KPMG's OLVIE values take these demand issues into account; Mr. Goesling had no occasion to do so, as he was valuing individual assets, some of which had

[6] Although the parties did not present evidence of the value of this asset, the Trust uses it as an example because Mr. Goesling valued the asset in his expert report.

specific market value evidence. Defendants seem to suggest that because Mr. Goesling was able to establish that there was market value evidence for a single asset that the Trust is then bound to apply that same value to every similar asset (presumably making adjustments for factors such as age) regardless of whether there was a market for just the one asset that was sold. But that is not so.[7]

At bottom, KPMG and Mr. Goesling both applied a standard market valuation methodology for determining OLVIE in a manner consistent with the nature of the valuation exercise. Differences in their conclusions of value for certain discrete assets are attributable to differences in the scope of their respective assignments and judgment determinations in their analyses. KPMG needed to determine values for over 60,000 assets, and its approach captured the fact that when faced with the liquidation of 60,000 assets, and thousands of assets of the same or similar asset class, it was expected that only a small fraction would actually sell. Thus, KPMG applied the same percent to cost factor across all assets within a given asset category. In contrast, Mr. Goesling was valuing discrete assets and, of course, his valuation of discrete assets does not suggest that the same values should be applied to every comparable asset were tens of thousands of assets liquidated at the same time.[8]

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[7] Defendants' argument that the Trust "assiduously avoided," Defs. Br. at 14, arguing in favor of KPMG's OLVIE at the Representative Assets Trial is untrue. The Trust understood the Representative Assets Trial to be valuing the individual Representative Assets and, on that basis, presented individualized appraisals evidencing specific values for each of the assets. Similarly, the fact that the Trust did not include KPMG's OLVIE values in the parties' post-trial summary chart is irrelevant. Neither party presented the KPMG OLVIE values to the Court because neither the Trust nor the Defendants briefed or advocated those values. Now, however, how to value over 43,000 assets is an issue before the Court and the KPMG OLVIE values are relevant to that determination.

[8] The cases cited by Defendants that find judicial estoppel to be warranted are not analogous to the issue before the Court. In each instance, the claim of inconsistency involved a very specific factual or legal issue. *See New Hampshire v. Maine*, 532 U.S. 742 (2001) (state took inconsistent positions as to the location of border); *Adelphia Recovery Trust v. Goldman Sachs*, 748 F.3d 110 (2d Cir. 2014) (party took inconsistent positions as to ownership of asset); *Lia v. Saporito*, 541 F. App'x 71 (2d Cir. 2013) (summary order) (plaintiff took inconsistent positions regarding whether he owned car dealership);

II. THE COURT DID NOT ADOPT A VALUATION METHODOLOGY INCONSISTENT WITH KPMG'S OLVIE VALUATION

Defendants' Motion also should be denied because the Court did not adopt—because the Trust did not advance—any position that is inconsistent with KPMG's valuation methodology for assets remaining with Old GM. As mentioned above, the parties agreed at the Representative Assets Trial that the appropriate methodology to value the two Representative Assets remaining with Old GM was OLVIE. *See* Op. at 178; *see also id.* at 195. The Court adopted Mr. Goesling's values with respect to two assets—Asset Nos. 29 and 30—both of which remained with Old GM. *See id*. at 172 ("[T]he Court rejects Goesling's valuation premise for the assets sold to New GM."); *see also id.* at Am. Table A. Where the parties disagreed, however, was on the proper approach to apply to determine orderly liquidation value in exchange for those assets: Mr. Goesling preferred the market approach—and where possible he relied exclusively on the market approach and market data, s*ee id.* at 174-75—while Mr. Chrappa deemed the market approach "inappropriate" and relied exclusively on the cost approach to value each of the Representative Assets. *Id.* at 179.

This Court found Mr. Goesling's approach "the more reliable valuation method in this circumstance." Op. at 185. This Court did not adopt—and Mr. Goesling did not proffer—an opinion of specific values for assets beyond the Representative Assets, nor did he suggest that the OLVIE values for the Representative Assets could be extrapolated to thousands of other assets. Nor did the Court rule on how the market approach would be applied beyond the

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Intellivision v. Microsoft Corp., 484 F. App'x 616 (2d Cir. 2012) (plaintiffs took inconsistent positions regarding ownership of patent applications); *Adelphia Recovery Trust v. HSBC Bank USA (In re Adelphia Recovery Trust)*, 634 F.3d 678 (2d Cir. 2011) (plaintiff took inconsistent positions regarding existence of fraudulent conveyance claims); *Sewell v. 1199 Nat'l Benefit Fund for Health & Human Servs.*, 187 F. App'x 36 (2d Cir. 2006) (plaintiff took inconsistent positions regarding whether defendant breached their contract); *Penberthy v. Chickering*, No. 15 Civ. 7613, 2017 WL 176312 (S.D.N.Y. Jan. 13, 2017) (plaintiff took inconsistent positions regarding whether claims were discharged in bankruptcy).

Representative Assets or to the 43,000 assets left with Old GM in particular. Rather, the Court adopted the OLVIE premise of value that utilizes the market approach wherever possible—which is exactly what KPMG did—and the conclusions regarding how that would apply to the two specific presses left with Old GM that were valued by Mr. Goesling at the Representative Assets Trial.

Indeed, in its opinion the Court specifically noted many of the factors that make clear why there is no inconsistency in the approach used by Mr. Goesling and KPMG. The Court noted the importance of the market approach (which was used by KPMG), *see id.* at 195 ("Goesling's OLVIE analysis is a particularly reliable method of calculating the liquidation value for the Representative Assets because it incorporates both the cost and market approaches."); that Mr. Goesling used the Percent to Cost approach as part of his OLVIE analysis (which is the approach used by KPMG), *id.* at 176; that Mr. Goesling acknowledged the difficulty in "finding comparable sales information," *id.* at 177; and that it was not possible to individually appraise the 200,000 disputed assets, *id.* at 6. Thus, the Court's holdings adopting orderly liquidation value in exchange, promoting the market approach, and selecting Mr. Goesling's values for the two Old GM Representative Assets would not present any "clear[] inconsist[ency]," *DeRosa*, 595 F.3d at 103, or "irreconcilable conflict," *Chevron*, 833 F.3d at 128, with the KPMG OLVIE values for the 43,000 Old GM assets in dispute.

III. THE EQUITIES DO NOT SUPPORT APPLICATION OF JUDICIAL ESTOPPEL

Even where a litigant has taken a prior inconsistent position that was adopted by an earlier tribunal (facts not present here), a court "must inquire into whether the particular factual circumstances of a case 'tip the balance of equities in favor' of [judicial estoppel]." *Clark v. All Acquisition, LLC*, 886 F.3d 261, 266-67 (2d Cir. 2018) (quoting *New Hampshire v. Maine*, 532 U.S. 742 (2001)). In making this determination, the court "begins by asking whether the

prior inconsistent position in question gave the party to be estopped an 'unfair advantage' over the party seeking estoppel." *Id.* at 267 (holding that district court abused its discretion in invoking judicial estoppel, even though litigant took a prior inconsistent position that was adopted in previous proceeding, where there was no suggestion that the litigant took the contrary position "in an effort to game the . . . system"). Here, even if KPMG's OLVIE valuation were inconsistent with the Trust's position at the Representative Assets Trial, Defendants would not be prejudiced and the Trust would gain no "unfair advantage." The "advantage" the Trust obtained from Mr. Goesling's valuation was the adoption of those values for two assets and the Court's acknowledgment that utilization of the market approach is, when possible, preferential.

Defendants' claimed disadvantage is that (i) they will have to "re-litigate" the issue, and (ii) KPMG's values are lower than those that "plaintiff would now be asserting." Defs. Br. at 13. But the parties have never litigated the value of the 43,000 assets at Old GM, and the Trust has never put forward any values for those assets. The value of the 43,000 assets at Old GM is yet to be litigated. *See* Adv. Pro. Dkt No. 1080 at 5. The Court will be presented with competing values for Old GM's assets at the upcoming trial and will determine which values most reliably estimate the assets' OLVIE as of the valuation date. Having to litigate this issue is not an unfair advantage; it is what the parties agreed to do and what must be done to resolve this proceeding.

It appears the underlying purpose of Defendants' Motion is not to avoid "re-litigation" but an effort to reframe Mr. Goesling's work in a manner that supports their own planned valuation approach, a valuation approach they say is based on "applying" what they have misleadingly and inaccurately called "Mr. Goesling's methodology" "to the approximately 43,000 other assets left with Old GM" using "standard economic and appraisal techniques . . . ." Defs. Br. at 15. But even from this minimal description it is apparent that what Defendants are

proposing is not an application of any methodology applied by Mr. Goesling. His values were for forty discrete assets selected by the parties. He was never asked to value the 43,000 assets, and he did not employ a methodology that would permit extrapolation of his value conclusions to those assets.

And what Defendants describe as their second form of prejudice—that they will face "sharply lower" liquidation values, Defs. Br. at 13—is no prejudice at all. The Court will determine the fair value of the 43,000 assets at the upcoming trial. The fact is that as of the valuation date, for many assets demand was low or non-existent. *See, e.g.*, Binder Decl. Ex. F (Goesling Report at 335). KPMG's OLVIE valuation takes into account that the fact that a single robot, press, or crane could transact at one price says nothing about whether tens of thousands of similar assets would sell for a comparable price. Defendants' purported prejudice is nothing other than the law of supply and demand and a dislike of KPMG's concluded values.

Defendants will have the opportunity to challenge the values the Trust puts forward for the assets that remained at Old GM, but that challenge should be made based on the reliability and persuasiveness of the evidence put forward, and not on an inaccurate description of the positions taken by the Trust or the findings of this Court.

CONCLUSION

For the foregoing reasons, the Trust respectfully requests that the Court deny Defendants' motion for an order estopping the Trust from asserting that assets left with Old GM should be valued using KPMG's OLVIE.

Dated: New York, New York
November 9, 2018

Respectfully submitted,

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