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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	:	Chapter 11 Case
MOTORS LIQUIDATION COMPANY, *et al.*,	:	Case No. 09-50026 (MG)
Debtors.	:	(Jointly Administered)
MOTORS LIQUIDATION COMPANY AVOIDANCE ACTION TRUST, by and through the Wilmington Trust Company, solely in its capacity as Trust Administrator and Trustee,	:	Adversary Proceeding Case No. 09-00504 (MG)
Plaintiff,	:	
vs.	:	
JPMORGAN CHASE BANK, N.A., individually and as Administrative Agent for Various Lenders Party to the Term Loan Agreement described herein, *et al.*,	:	
Defendants.	:	

TERM LENDERS' REPLY IN SUPPORT OF MOTION FOR ORDER ESTOPPING AVOIDANCE ACTION TRUST FROM ASSERTING THAT ASSETS LEFT WITH OLD GM SHOULD BE ASSIGNED KPMG OLV VALUES

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PRELIMINARY STATEMENT

At the same time that this Court and the Term Lenders were expending massive efforts in 2016 and 2017 to resolve the central issues in dispute in this case, the Avoidance Trust claims that it was only litigating about "forty discrete assets," with no intention whatsoever that this Court's decision in the Representative Assets Trial was to be "extrapolat[ed]" to the remaining assets. Pl. Br. 24; *see id.* at 3-4, 19-21. Hardly.

The very purpose of the Representative Assets Trial was to enable the parties to use the Court's decision to serve as the template for resolving the remaining assets in dispute. When this Court held that "[f]or assets whose proposed disposition at the Valuation Date was to remain with the Motors Liquidation estate and be liquidated, Goesling's OLVIE analysis is the best available valuation" (Op. 185), it meant just that. It is folly, therefore, for the Avoidance Trust to argue that the Court ruled only that Mr. Goesling's approach yielded "the best available valuation" for just two assets, or anticipated that if there were some other "available" valuation that a party chose not to assert, the party could reverse course later.

In defense of its attempt to sidestep all of this, the Avoidance Trust offers a lengthy excursion, arguing that there are "overlap[s]" between Mr. Goesling's method and KPMG's. Pl. Br. 14; *see id.* at 3-4, 14-20. The Avoidance Trust overstates the overlaps and understates the differences. *See* pp. 2-6, below. But more fundamentally, its argument misses the point. Regardless whether there are "overlaps" between how KPMG reached its valuation and how Mr. Goesling reached his, their approaches are clearly inconsistent, with the result that KPMG's approach results in starkly lower valuations. The Avoidance Trust obviously prefers KPMG's approach to the approach it successfully advanced at trial. But the time to express that preference was when the issue was tried to the Court, not now, after it successfully convinced the Court to accept Mr. Goesling's testimony.

ARGUMENT

THE COURT SHOULD JUDICIALLY ESTOP THE AVOIDANCE TRUST FROM TAKING THE POSITION THAT ASSETS LEFT WITH OLD GM BE ASCRIBED KPMG OLV VALUES

The parties agree that three factors govern whether the doctrine of judicial estoppel applies: (1) a party's later position is clearly inconsistent with an earlier one; (2) the former position has been adopted in some way by the court in an earlier proceeding; and (3) the party asserting the two positions would derive some unfair advantage. *E.g.*, *In re Adelphia Recovery Tr.*, 634 F.3d 678, 695-96 (2d Cir. 2011). Nothing in the Avoidance Trust's opposition changes the conclusion that all three factors are present here.

A. The Avoidance Trust's new position that this Court should assign KPMG OLV values to the assets left with Old GM is clearly inconsistent with its prior position.

1. Mr. Goesling's and KPMG's OLV values, and the respective methods each used to reach those values, are clearly inconsistent.

As an initial matter, it remains beyond dispute that the results from Mr. Goesling's methodology and KPMG's OLV analysis are starkly inconsistent: for the 28 Representative Assets determined to be fixtures, KPMG's values are *nine times* lower. Open. Br. 7-8.

The Avoidance Trust has no answer, so it ignores this elephant in the room. To state the obvious: any contention that the positions that assets are worth "X" and assets are worth "one-ninth X" are not "clearly inconsistent" defies reality.

But there is more: KPMG and Mr. Goesling reached starkly different results because they used clearly inconsistent assumptions and methodologies. The Avoidance Trust's arguments that there are high level "similarities" between the two valuations does not change this. For example:

(1) **Mr. Goesling** assumed that, in an orderly liquidation, Old GM would have 9-18 months to sell assets. Open. Br. 8, 12. This feature of Mr. Goesling's analysis was touted by counsel at closing argument in persuading the Court to adopt it. Trial Tr. (Mr. Binder) at 3700:6-11 (Mr. Goesling's "18-month time frame" squared with "*how things would actually work in a bankruptcy*." (emphasis added)). **KPMG** instead used just three months of data from asset dispositions — from March, April, and May 2009 — by Maynards (GM's liquidator of unwanted assets). *See* Open. Br. 9; Wilson Reply Decl. Ex. H[1] (Furey Dep.) at 390:8-18.

(2) **Mr. Goesling** assumed that "buyers would be a mix of end users, speculative purchasers [*i.e.*, used machinery dealers], and scrap dealers" and rejected that there would be a "higher percentage of speculative purchasers and scrap dealers" because the latter assumption would have been in line with "a Forced Liquidation Value premise." Wilson Decl. Ex. D (Goesling Direct) ¶ 392. **KPMG** instead valued all assets using three months of data in which *over 90%* of dispositions — 4,057 out of 4,485 — represented scrap sales or abandonments. *See* Wilson Reply Decl. Ex. H (Furey Dep.) at 506:5-507:23.

(3) **Mr. Goesling** identified categories of assets for which (a) there was an active secondary market (*e.g.*, stamping presses); (b) the highest value was scrap (*e.g.*, conveyors); and (c) he deemed had no value (*e.g.*, pits) — and applied different methodologies to each. Open. Br. 8-11. **KPMG** instead applied the same liquidation percentage methodology regardless of asset type — be it stamping

[1] Exhibits A-G were contained in the *Declaration of C. Lee Wilson* filed with the Term Lenders' moving papers on October 26, 2018 [Adv. Pro. Dkt. No. 1118]. Exhibits H and I are contained in the *C. Lee Wilson Reply Declaration* submitted herewith.

press, robot or anything else. *See id.* at 9.

(4) For assets that traded actively in the secondary market, **Mr. Goesling** applied adjustments for an asset's age, market conditions at time of sale, and "conditions of sale" (*e.g.*, an upward adjustment if the comparable sale had been a forced liquidation) to the "direct" and "comparable" market data he found for each asset. *Id.* at 8-9. **KPMG** instead applied its "liquidation percentages" to the inflation-adjusted installed cost of each asset, and made none of the adjustments Mr. Goesling did to account for asset age, market condition, or conditions of the sale. *Id.*

(5) **Mr. Goesling** performed a "scrap value[]" analysis on an asset-by-asset basis for assets that did not actively trade in the secondary market, ultimately determining a "Mixed Steel Scrap Factor" of 0.64% and an "Electrical System Scrap Factor" of 6.4%, which he applied as a percentage of replacement cost new to determine the scrap value of the remaining assets. *Id.* at 10-11. **KPMG** instead used the same liquidation percentages — nearly all of which were less than 1%, and most less than 0.03% — for everything, regardless of whether there was an active secondary market. Thus, for assets that sell in the secondary market, KPMG's OLV values more closely resemble Mr. Goesling's scrap values than his OLVIE values. And, for assets that only sell for scrap, KPMG's OLV values — skewed downward by bulk scrap sales and other "zero proceeds" dispositions — approximate zero. *Id.*

These differences establish that Mr. Goesling's analysis is clearly inconsistent with KPMG's, regardless whether one is appraising 2, 40, or 40,000 assets. The Avoidance

Trust's attempt (Pl. Br. 19) to explain away these differences on the premise that Mr. Goesling was only considering the sale or disposition of 40 assets instead of 40,000 is thus disingenuous at best.

As noted in the Term Lenders' opening brief, at the close of evidence, the Court specifically raised this issue, stating "I'm searching for an approach, whatever the numbers are, that would provide some meaningful guidance to both sides when you try to deal with the vast number of assets that are not involved in this trial." Trial Tr. 3547-48. In response, counsel for the Avoidance Trust acknowledged this issue and urged the Court to adopt Mr. Goesling's methodology, stating that counsel had "ideas" on how the need for a mass appraisal could be addressed in mediation. *Id.* at 3548-49. But what counsel did not say then is that the "idea" was to use KPMG's liquidation values. To the contrary, Mr. Goesling's approach was held out as the correct way to value assets that were liquidated. *Id*. The Avoidance Trust simply has no response to this point.

And the Court proceeded on this basis. As the Court recognized in its decision, Mr. Goesling was asked by the Avoidance Trust to assume, and did assume, that everything must go — not just the 40 assets. Op. 173 ("Goesling determined that Old GM was under 'compulsion' to sell its assets."). The stark difference in the valuations reached by Mr. Goesling and KPMG was not driven by the number of assets that each valued but by the methodology and assumptions each used to reach their respective conclusions.[2]

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[2] The cases the Avoidance Trust cites (Pl. Br. 14, 17-18) where judicial estoppel was denied because positions were not clearly inconsistent thus bear no resemblance to the situation here. *See Chevron Corp.* v. *Donziger*, 833 F.3d 74 (2d Cir. 2016) (oil company's representation for *forum non conveniens* that it would not challenge a foreign judgment absent fraud did not preclude suit against plaintiff's lawyers for procuring foreign judgment by paying a bribe); *United States* v. *Apple, Inc.*, 791 F.3d 290 (2d Cir. 2015) (government's entry into two-year consent order against publishers did not preclude the government from seeking a longer

The Avoidance Trust's further argument (Pl. Br. 10-11, 16) that Mr. Goesling's and KPMG's respective approaches both fall within FAS 157 is beside the point. The approaches are still "clearly inconsistent." The argument, in any event, proves nothing. FAS 157 "does not prescribe a methodology for making significant adjustments . . . when estimating fair value." FAS 157-13. In the words of FAS 157, it is the key differences in "assumptions," "methodology," or "adjustments" between Mr. Goesling's approach and KPMG's that result in their dramatically different values.[3] FAS 157-13, -15.

2. The Avoidance Trust's argument that KPMG's approach is superior to Mr. Goesling's is misguided and irrelevant.

The Avoidance Trust's attempt to argue that judicial estoppel should not apply because KPMG's approach is better than Mr. Goesling's, likewise, should be dismissed out of hand. *See* Pl. Br. 18-19.

Despite sponsoring his testimony, the Avoidance Trust now attacks the values

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injunction against Apple); *DeRosa* v. *Nat'l Envelope Corp.*, 595 F.3d 99 (2d Cir. 2010) (injured employee who was permitted to work from home but then fired for doing so was not judicially estopped from claiming employment discrimination based on prior sworn statement that using a computer caused pain); *Jacobs* v. *D'Alessandro (In re Dewey & LeBoeuf LLP)*, No. 14-01919 (MG), 2014 WL 4746209, at *5 (Bankr. S.D.N.Y. Sept. 23, 2014) (trustee's statement that Dewey's insolvency would be "difficult to prove" before 2011 did not estop him from proving it when new evidence surfaced indicating that it was); *Goldberg* v. *Sotheby's Int'l Realty, LLC (In re SOL)*, No. 11-01719-AJC, 2012 WL 2673254, at *8 (Bankr. S.D. Fla. July 5, 2012) (omission of listings in expert report in prior adversary proceeding did not preclude inclusion in later proceeding, since "many of . . . these contracts were not in place as of the date . . . at issue in the prior adversary proceeding" and the expert had not previously been provided them).

[3] While the argument that Mr. Goesling and KPMG both fall under FAS 157 is a red herring, it should also be noted that the Avoidance Trust's brief misquotes Mr. Furey of KPMG. It was Mr. *Binder*, not Mr. Furey, who said: "[b]ut whether you're [using one method or another], all of that is under FAS 157 [a]ppropriate [m]ethodologies for [c]oncluding [o]rderly [l]iquidation [v]alues." Pl. Br. 16. Mr. Furey testified only that "[t]o the extent that the circumstances support the use of those approaches, those would be supported under FAS 157." Wilson Reply Decl. Ex. H (Furey Dep.) at 598:12-14.

resulting from Mr. Goesling's approach as "*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." *Id.* at 19 (emphasis added). Instead, now it is KPMG's approach that "[p]roperly [a]ccounts for [m]arket [c]onditions for Old GM's [a]ssets." *Id.* at 18. But of course, economic conditions in June 2009 were already history by the time the Avoidance Trust called Mr. Goesling to the stand. And Mr. Goesling took the historically poor market conditions into account in his analysis. Wilson Reply Decl. Ex. I (Goesling Direct) § VI.A ("Market Conditions on the Valuation Date").

So if KPMG's approach is better, why didn't the Avoidance Trust advance it at trial? If it is better, why didn't the Avoidance Trust include KPMG's estimates in the chart that the Court requested at the close of trial? If it is better, why did the Avoidance Trust take up the Court's valuable time by proffering Mr. Goesling's testimony at all?

The answer is obvious and undeniable: the Avoidance Trust made a tactical decision to denounce KPMG's work *in toto* because it wanted to convince the Court that KPMG's going concern values were not reliable and wanted to be able to accuse the Term Lenders of cherry-picking in urging the Court to accept KPMG's RCNLD estimates but reject the TIC adjustment. But these are reasons to apply judicial estoppel, not reject it.[4]

Even more fundamentally, as a legal matter, what matters is not whether the Avoidance Trust's prior position or the one it now wishes to advance is better. What matters is

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[4] The Avoidance Trust's reliance on caselaw for the proposition that "inadvertence" does not suffice for estoppel is thus misplaced. Pl. Br. 14. The Avoidance Trust's decision to sponsor Mr. Goesling's work, not KPMG's, was tactical, not inadvertent. The Avoidance Trust does not claim otherwise. *See also In re Residential Capital, LLC*, No. 12-12020 (MG), 2014 WL 301974, at *8 (Bankr. S.D.N.Y. Jan. 27, 2014) (applying judicial estoppel; inconsistent position is "inadvertent" only when party "lacks knowledge" of relevant information or "has no motive for [its] concealment").

that they are "clearly inconsistent." The Supreme Court's unanimous decision in *New Hampshire* v. *Maine*, 532 U.S. 742 (2001), is instructive on this point. There, the Court recognized that the new position New Hampshire sought to take found support in "official documents and events from the colonial and post-colonial periods." *Id.* at 754. But New Hampshire was still judicially estopped from taking it, because it was inconsistent with its prior position the Court adopted. *Id.* at 754-55. *See also RSR Corp.* v. *Int'l Ins. Co.*, 612 F.3d 851, 859-60 (5th Cir. 2010) (although "plain reading" of document supported position, party was judicially estopped from taking it).

So it is self-defeating for the Avoidance Trust now to argue, for example, that KPMG's liquidation percentages better "captured the economic reality that the market was extremely depressed," because they reflected a likelihood that many assets would not sell at all. Pl. Br. 18. If that is true now, it was true when the parties tried the issue. Mr. Goesling took account of the dire state of the marketplace as of the Valuation Date. Wilson Reply Decl. Ex. I (Goesling Direct) § VI.A. Yet in spite of that assumption, Mr. Goesling, unlike KPMG, made no such adjustment for likelihood of sale. Indeed, Mr. Goesling's 425-page report and 197-page written direct testimony do not even flag this as a potential issue.

B. The Avoidance Trust's former position has already been adopted by this Court.

As shown (Open. Br. 12), the second judicial estoppel factor is also satisfied, because this Court adopted the Avoidance Trust's position that "[f]or assets whose proposed disposition at the Valuation Date was to remain with the Motors Liquidation estate and be liquidated, Goesling's OLVIE analysis is the best available valuation." Op. 185.

The Avoidance Trust attempts to argue that the Court did not adopt its prior position, because it only decided what valuation principles should be applied to the Representative Assets.

Pl. Br. 21-22. This misperceives judicial estoppel. "Adoption" requires only that "the party's former position has been adopted *in some way* by the court in the earlier proceeding." *In re Adelphia Recovery Tr.*, 634 F.3d 678, 695-96 (2d Cir. 2011) (emphasis added) (citing *New Hampshire* v. *Maine*, 532 U.S. at 750-51). That indisputably happened here: The Court adopted the Avoidance Trust's position that Mr. Goesling's analysis was "the best available valuation" for the assets left with Old GM. Op. 185.

That this Court has not yet fixed the values of the remaining assets is irrelevant. Again, *New Hampshire* v. *Maine* is instructive. In the earlier proceeding, the Court, based on New Hampshire's position that "Middle of the River" meant the geographic middle of the main channel, had fixed only the offshore lateral marine boundary. 532 U.S. at 747. In the later proceeding to fix the inland boundary, New Hampshire was still judicially estopped from taking the position that the boundary ran further to the Maine shoreline, because it was clearly inconsistent with the position it took and the Court adopted in the earlier proceeding. *Id.* at 751.

Indeed, judicial estoppel is *a fortiori* appropriate here, given that the very purpose of the earlier proceeding in this case, *i.e.*, the Representative Assets Trial, was for the Court to make rulings that would then be applied to the remaining assets. Op. 1-2. The notion that the Avoidance Trust could sponsor a witness and valuation approach in the Representative Assets Trial, only to walk away from it in valuing the remaining assets that the 40 were supposed to represent does violence to the integrity of the judicial process set by the Court in this case. *See In re Adelphia*, 634 F.3d at 696 ("[A] party puts the integrity of the judicial process at risk not only when it knowingly lies but when it takes a position in the short term knowing it may be on the verge of taking an inconsistent future action."); *cf. Clark* v. *AII Acquisition, LLC*, 886 F.3d 261, 265 (2d Cir. 2018) (court applying judicial estoppel "is the 'judicial actor . . . better positioned' to determine whether the criteria for invoking judicial estoppel have been met within the particular factual context of a given case").

C. The Avoidance Trust would derive an unfair advantage by switching positions now.

As shown (Open. Br. 13-14), the Term Lenders would be unfairly disadvantaged by the Avoidance Trust's new position, both by exposure to additional liability running over a hundred million dollars as well as the need to relitigate the issue. They would also be disadvantaged by the Avoidance Trust having been able to denounce KPMG *in toto* in the prior trial while (successfully) accusing the Term Lenders of cherry-picking.

The Avoidance Trust does not deny that these detriments exist; it only claims (citing nothing) that they do not qualify as unfair detriment. The law is otherwise. *See Penberthy* v. *Chickering*, No. 15 Civ. 7613, 2017 WL 176312, at *7-8 (S.D.N.Y. Jan. 13, 2017) ("unfair detriment" prong of judicial estoppel satisfied because new position could "expose [defendant] to a judgment . . . of nearly $2 million").

Thus, while the Second Circuit has made clear that this third judicial estoppel factor is not necessary, its presence makes estoppel even more appropriate. *See Adelphia Recovery Tr.* v. *Goldman, Sachs & Co.*, 748 F.3d 110, 116 (2d Cir. 2014).

CONCLUSION

The KPMG OLV values were well known to the Avoidance Trust at the time of the Representative Assets Trial. Instead of embracing this aspect of KPMG's work, the Avoidance Trust decided to sponsor Mr. Goesling's valuations. The Avoidance Trust did so to gain a tactical advantage. And it succeeded. Having succeeded, as a matter of equity, and in respect of the judicial process, the Avoidance Trust should not now be permitted to switch course and sponsor KPMG's OLV values. Judicial estoppel applies.

Dated: November 19, 2018
New York, New York

Respectfully submitted,

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