

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

In re:	:	
	:	Chapter 11 Case
MOTORS LIQUIDATION COMPANY, <i>et al.</i> ,	:	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,		
	:	
Plaintiff,	:	Adversary Proceeding
vs.	:	Case No. 09-00504 (MG)
JPMORGAN CHASE BANK, N.A., individually and as Administrative Agent for various lenders party to the Term Loan Agreement described herein, <i>et al.</i> ,		
	:	
Defendants.	:	

**ORDER DENYING DEFENDANTS’ MOTION FOR AN ORDER ESTOPPING
PLAINTIFF FROM ASSERTING THAT ASSETS LEFT BEHIND WITH OLD GM
SHOULD BE ASSIGNED KPMG OLVIE VALUES**

Before the Court is the Defendants Motion for an Order estopping the Avoidance Action Trust (“AAT”) from asserting that assets left behind with Old GM should be valued using the KPMG OLVIE values. (“Motion,” ECF Doc. # 1117.) The AAT opposes the Motion. (Opposition,” ECF Doc. # 1130.) Defendants filed a reply. (“Reply,” ECF Doc. # 1132.)

The Motion raises the question whether the AAT should be precluded from using KPMG’S OLVIE values, and should instead be required to use the methodology for determining OLVIE values that the AAT relied upon, as performed by its expert David Goesling (“Goesling”), to determine OLVIE values during the Representative Assets trial. Goesling used

his methodology to determine OLVIE values for 40 representative assets, but the Court determined that going concern value applied to all of the assets which were transferred to New GM. The Court accepted Goesling's values for two of the representative assets that were left behind with Old GM. In accepting Goesling's values for those two assets, the Court found his values more persuasive than the values offered in evidence by the defendants' expert witness, Carl Chrappa. None of the parties during Representative Assets trial argued that the Court should use (or should not use) the KPMG OLVIE values for those two assets.

Rather than arriving at OLVIE values for 2 representative assets (or 40 representative assets, for that matter), the issues now involve determining OLVIE values for 43,000 assets that were left behind with Old GM. Both sides agree that OLVIE values need to be determined for all of the assets left behind with Old GM. The question is what methodologies may permissibly be used to determine OLVIE values for 43,000 assets.

The evidence during the Representative Assets trial showed that there is not one single method for determining OLVIE values. The evidence further established that Goesling's "market approach" could not easily be scaled-up to use for determining OLVIE values for many thousands of assets.

Judicial estoppel is only appropriate where (1) a party's later position is clearly inconsistent with the position earlier taken by the party, (2) the court adopted the earlier position, and (3) the party later asserting a conflicting position would gain an unfair advantage. *DeRosa v. Nat'l Envelope Corp.*, 595 F.3d 99, 103 (2d Cir. 2010). The Court finds that none of these three requirements has been satisfied here. As shown by the briefing on the Motion, the KPMG methodology is not clearly inconsistent with Goesling's explanation of the alternatives for determining OLVIE values. The Court did not conclude that only a single methodology for

determining OLVIE values may be used. The AAT would not gain an unfair advantage in relying on the KPMG OLVIE values as to 43,000 assets that remained behind with Old GM.

Of course, if the AAT offers the KPMG OLVIE values in evidence at trial, the AAT will need to establish that KPMG's OLVIE values satisfy the standards for admissibility—issues that cannot be determined based on the present Motion—that was not an issue decided during the Representative Assets trial. Without deciding the issue, it appears more likely that the defendants' criticisms go to the weight that should be given to the AAT's proffered evidence, rather than admissibility.

The defendants also remain free to provide evidence of OLVIE values based on any alternate methodology that satisfies the standards for admissibility. If the defendants choose to use a methodology that requires detailed analysis of each of the 43,000 assets that were left behind with Old GM—even though that seems quite unrealistic—the defendants are free to do so.

All of the other arguments raised by the Term Lenders have been considered by the Court and rejected. The Motion to estop the AAT from using the KPMG OLVIE values is **DENIED**.

IT IS SO ORDERED.

Dated: December 10, 2018
New York, New York

Martin Glenn

MARTIN GLENN
United States Bankruptcy Judge