BINDER & SCHWARTZ

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February 3, 2017

VIA ECF AND FEDERAL EXPRESS

Honorable Martin Glenn
United States Bankruptcy Court
Southern District of New York
One Bowling Green, Courtroom 523
New York, NY 10004

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

Dear Judge Glenn:

We represent plaintiff Motors Liquidation Company Avoidance Action Trust (the "Trust") in the above-referenced adversary proceeding. We write pursuant to the Court's scheduling order of December 2, 2016 (Adv. Pro. Dkt. No. 805), to inform the Court of an issue that the Trust views as appropriate for resolution on summary judgment motion prior to the upcoming trial on the 40 representative assets selected by the parties (the "Representative Assets Trial"). Specifically, the Trust seeks leave to move for summary judgment on the issue of whether Defendants had a perfected security interest in the fixtures at the General Motors Corporation ("Old GM") Lansing Delta Township Assembly or Lansing Regional Stamping facilities as of June 1, 2009.[1] Resolution of this issue will narrow the scope of the issues to be addressed at the Representative Assets Trial and facilitate the resolution of this matter thereafter.[2]

Background

Defendants are parties to a syndicated term loan (the "Term Loan") to Old GM pursuant to a term loan agreement dated as of November 29, 2006, as amended on March 4, 2009 (the "Term Loan Agreement"). The Term Loan Agreement incorporated the terms of an

[1] To the extent that the Trust prevails on summary judgment and the Court determines as a matter of law that any fixtures at the two Lansing facilities are not part of Defendants' surviving collateral, then the Court will not need to reach the question of whether the Lansing Regional Stamping facility and the Lansing Delta Township Assembly facility are "appurtenant" or "related" facilities within the meaning of the collateral agreement between JPMorgan Chase Bank, N.A. ("JPMorgan"), Old GM and Saturn, dated November 29, 2006 (the "Collateral Agreement").

[2] The fixture classification and valuation issues with respect to any representative assets at the Lansing Delta Township Stamping and Lansing Regional Assembly facilities will be tried as part of the Representative Assets Trial, regardless of whether the Trust prevails on its argument that there are no assets covered by the Eaton County Fixture Filing. *See* Adv. Pro. Dkt. No. 613 (letter proposal, later approved by the Court by email).

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accompanying Collateral Agreement that specified the Old GM assets securing the Term Loan. Those assets included all of Old GM's equipment and fixtures at 42 domestic Old GM facilities, including the Lansing Delta Township Assembly and Lansing Regional Stamping facilities in Eaton County, Michigan.

JPMorgan, the administrative and collateral agent for the Term Loan, was required under the Term Loan Agreement to make fixture filings with respect to those of the 42 facilities deemed to have a net book value of at least $100,000,000 and listed in Schedule 3.12 to the Term Loan Agreement. On April 26, 2007, JPMorgan recorded a fixture filing in Eaton County, Michigan, listing General Motors Corporation as debtor (the "Eaton County Fixture Filing"). *See* Exhibit 1. On its face, the Eaton County Fixture Filing covered "all fixtures located on the real estate described on Exhibit A." Exhibit A of the Eaton County Fixture Filing contained a legal description of the real estate that read:

> 8400 MILLETT HWY, LANSING TOWNSHIP, LANSING MI 48917-9549
>
> S 1/2 SEC 28 LYING W OF W LINE HWY 1-96/69, EXC NW 1/4 OF SW 1/4, AND EXC PARTS S & E OF LINE COM 100 FT W OF S 1/4 COR SAID SEC, TH N 50 FT, E 400 FT, N 25 FT, E 188.65 FT TO W LINE SAID HWY R/W & POE, EXC LANDS USED FOR GUNIEA RD & MILLETT HWY; 144 ACRES +/-; SEC 28 T4N R3W

Below the description there is the imprint of a stamp containing the text: "GM Assembly Lansing Delta, 8400 Millett Hwy, Lansing, Eaton County, MI, LandAmerica File No. 100729." This stamp was made by the title insurance company that handled the Eaton County Fixture Filing (or stamped at the title company's direction).

The parties do not dispute that this legal description contained in Exhibit A to the Eaton County Fixture Filing—in terms of both street address and metes and bounds description—corresponds to a parcel of land that does not contain any buildings comprising either the Lansing Delta Township Assembly or Lansing Regional Stamping facilities. The parcel described in Exhibit A of the Eaton County Fixture Filing is denoted in red outline on Exhibit 2 (Adv. Pro. Dkt. No. 827, Ex. 1), a sketch plan of the area jointly commissioned by the parties. As plainly shown in the agreed-to sketch, the Lansing Delta Township Assembly and the Lansing Regional Stamping facilities are not located on the parcel described in the Eaton County Fixture Filing. Rather, they are located at 8175 Millett Highway, Lansing, MI, (a/k/a 8001 Davis Highway). *See* Exhibit 2 at 2. Accordingly, the Eaton County Fixture Filing covers any fixtures located on the vacant parcel (which incidentally was also owned by Old GM as of the date of the bankruptcy filing), but does not cover the two Lansing facilities where Defendants continue to contend without basis that there is surviving collateral.

The Trust's Proposed Motion

The Trust does not challenge the validity or enforceability of the Eaton County Fixture Filing or the perfection of the lien on any property covered by the Eaton County Fixture Filing.

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Rather, the Trust will demonstrate that there are no fixtures located at the parcel that is the subject of the Eaton County Fixture Filing, and that neither the Lansing Delta Township Assembly nor the Lansing Regional Stamping facilities come within the scope of the property described in the Eaton County Fixture Filing. Because no fixture filing covered the fixtures located at those facilities, Defendants did not have a perfected security interest in them as of June 1, 2009.

JPMorgan was responsible for assuring that the Eaton County Fixture Filing was properly recorded. "[T]he person presenting the instrument for recording must bear the burden of making sure that it is properly recorded, not the register of deeds to whom it is presented. The person presenting the instrument bears the risk of any clerical errors." *Tibble v. Wells Fargo Bank, N.A. (In re Hudson)*, 455 B.R. 648, 654 (Bankr. W.D. Mich. 2011). JPMorgan has not met its burden here.

Under the Michigan UCC, a financing statement is sufficient only if it provides the name of the debtor, provides the name of the secured party or a representative of the secured party, and indicates the collateral covered by the financing statement. Mich. Comp. Laws Ann. § 440.9502(1) (West 2016). Additionally, when that financing statement "is filed as a fixture filing and covers goods that are or are to become fixtures" it must also indicate that the collateral covered is fixtures, indicate that it is to be recorded in the real property records, and "[p]rovide a description of the real property to which the collateral is related sufficient to give constructive notice of a mortgage under the law of this state if the description were contained in a record of the mortgage of the real property." Mich. Comp. Laws Ann. § 440.9502(2) (West 2016). Accordingly, the key inquiry here is whether the description of the property contained in the Eaton County Fixture Filing would provide a bona fide purchaser with constructive notice of the Defendants' interest in the fixtures located at the Lansing Delta Township Assembly or Lansing Regional Stamping facilities.

Here, the Eaton County Fixture Filing would not be "sufficient to give constructive notice of a mortgage" against either of the two Lansing facilities. The address and metes and bounds description in the Eaton County Fixture Filing refer only to the vacant parcel. The stamp below the legal description of the vacant parcel similarly contains the address of the vacant parcel, and the plant referenced in the stamp does not correspond with the plant name for either the Lansing Delta Township Assembly or the Lansing Regional Stamping facilities as they are identified in the Term Loan Agreement or as they are identified by Defendants' own proposed experts. The address and metes and bounds for the Lansing Delta Township Assembly or the Lansing Regional Stamping do not appear anywhere in the Eaton County Fixture Filing.

Courts have considered facts very similar and concluded that such a fixture filing does not give a bona fide purchaser constructive notice of the interest when that fixture filing describes a different parcel of land. In *Moyer v. Edlund (In re Vandenbosch)*, 405 B.R. 253, 264 (Bankr. W.D. Mich. 2009), a bankruptcy court found a recorded mortgage to be avoidable by the debtor's trustee because it described a neighboring vacant lot adjacent to the property at issue. The bankruptcy court concluded that the recorded mortgage on the wrong property did not

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provide constructive notice to a bona fide purchaser of the interest in the property and of the mortgage thereon. *Id.*

Similarly, the bankruptcy court in *In re Hudson* found that the debtor's trustee could avoid a recorded mortgage that contained the wrong legal description of the property. 455 B.R. at 654. The debtor owned a lot of land of the platted property, but the legal description on the mortgage described an adjacent lot, including its corresponding permanent parcel number. *Id*. at 651. The court found that the mortgage would not have been in the chain of title for the property owned by the debtor, and therefore would not have provided constructive notice of the mortgage to a bona fide purchaser of debtor's property. *Id.* at 654.

Defendants argue that any purchaser was nonetheless on inquiry notice of Defendants' security interest in the fixtures located at Lansing Delta Township Assembly and the Lansing Regional Stamping facilities. Based upon a purported expert opinion of a Michigan real estate lawyer, Defendants argue that a person examining title to the facilities would have examined the grantor-grantee index, seen the various interests recorded against Old GM for the various parcels of land it owned in Eaton County, examined any and all liens against Old GM property filed in Eaton County, located the Eaton County Fixture Filing amongst the various filings, contacted Old GM to inquire as to the particular security interest at issue, and then ***may*** have discovered Defendants' security interest in either the Lansing Delta Township Assembly or the Lansing Regional Stamping facilities.

The Trust will demonstrate in its motion that Defendants' arguments must fail because this convoluted process is not relevant for determining what interests are perfected under the Eaton County Fixture Filing pursuant to Michigan law. The *In re Hudson* court rejected Defendants' precise argument, finding that any bona fide purchaser would examine the grantor-grantee index for the subject property only, and not for any adjacent property. *See* 455 B.R. at 656-57. The *In re Vandenbosch* court similarly rejected the argument that properly recorded documents against the property in the chain of title put a bona fide purchaser on inquiry notice of the defective mortgage describing a lot adjacent to the property. 405 B.R. at 264. The court there rejected the assertion that discovery of earlier recorded land contracts and mortgages on the property would have put a bona fide purchaser on notice of the defective mortgage, concluding that because the legal description of the property on the recorded mortgage was wrong, it was unenforceable since "no amount of inquiry" into the chain of title would have revealed it. *Id*. at 265.

The Dispute is Appropriate for Summary Resolution

All fact and expert discovery relevant to this issue has been concluded and there is no evidence to support Defendants' claim that the Eaton County Fixture Filing covers the fixtures at the Lansing Delta Township Assembly or Lansing Regional Stamping facilities. Resolution of this issue by summary judgment would narrow the scope of trial, as Defendants' proposed expert witness and plaintiff's rebuttal expert witness will not need to be examined and one fact witness' testimony can be limited. This issue is a time-consuming distraction from the central classification and valuation issues that will be addressed at the Representative Assets Trial.

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For the reasons discussed herein, the Trust respectfully requests permission to file its summary judgment motion on this issue. We propose to file our motion for summary judgment within ten days of the Court's resolution of this pre-motion request. The parties should be directed to work together to agree upon a briefing schedule that would have the motion fully briefed within thirty days of when our motion for summary judgment is filed.

We thank the Court for considering this request.

Respectfully,

/s/ Eric B. Fisher

Eric B. Fisher

cc: (via ECF)
All Counsel of record

Exhibit 1

COUNTY
R ... DEEDS
ED
2007 APR -4 A 11:07

EATON COUNTY

RECORDED
04/26/2007 1:34:18 PM
M. FRANCES FULLER, CLERK/REGISTER OF DEEDS
EATON COUNTY, MICHIGAN

RECEIPT# 11894, STATION 3
$15.00 FIXTURE FILING

[redacted]

LIBER 2113 PAGE 660

UCC FINANCING STATEMENT

FOLLOW INSTRUCTIONS (front and back) CAREFULLY

A. NAME & PHONE OF CONTACT AT FILER [optional]
UCC Filings 800-828-0938

B. SEND ACKNOWLEDGMENT TO: (Name and Address)

~~National Corporate Research~~
WHEN RECORDED RETURN TO:
LANDAMERICA - NCS
1050 Wilshire Drive, Suite 310
Troy, MI 48084
41 State Street
Suite 600
~~Albany, NY 12207~~
Case No. 100729
~~melissa@nationalcorp.com~~

THE ABOVE SPACE IS FOR FILING OFFICE USE ONLY

1. DEBTOR'S EXACT FULL LEGAL NAME - insert only one debtor name (1a or 1b) - do not abbreviate or combine names

1a. ORGANIZATION'S NAME: GENERAL MOTORS CORPORATION				
OR 1b. INDIVIDUAL'S LAST NAME	FIRST NAME	MIDDLE NAME		SUFFIX
1c. MAILING ADDRESS: 300 RENAISSANCE CENTER	CITY: DETROIT	STATE: MI	POSTAL CODE: 48265-3000	COUNTRY
1d. SEE INSTRUCTIONS / ADD'L INFO RE ORGANIZATION DEBTOR / 1e. TYPE OF ORGANIZATION: Corporation	1f. JURISDICTION OF ORGANIZATION: Delaware	1g. ORGANIZATIONAL ID #, if any: 0056825		☐ NONE

2. ADDITIONAL DEBTOR'S EXACT FULL LEGAL NAME - insert only one debtor name (2a or 2b) - do not abbreviate or combine names

2a. ORGANIZATION'S NAME				
OR 2b. INDIVIDUAL'S LAST NAME	FIRST NAME	MIDDLE NAME		SUFFIX
2c. MAILING ADDRESS	CITY	STATE	POSTAL CODE	COUNTRY
2d. SEE INSTRUCTIONS / ADD'L INFO RE ORGANIZATION DEBTOR / 2e. TYPE OF ORGANIZATION	2f. JURISDICTION OF ORGANIZATION	2g. ORGANIZATIONAL ID #, if any		☐ NONE

3. SECURED PARTY'S NAME (or NAME of TOTAL ASSIGNEE of ASSIGNOR S/P) - insert only one secured party name (3a or 3b)

3a. ORGANIZATION'S NAME: JPMORGAN CHASE BANK, N.A., AS ADMINISTRATIVE AGENT				
OR 3b. INDIVIDUAL'S LAST NAME	FIRST NAME	MIDDLE NAME		SUFFIX
3c. MAILING ADDRESS: P.O. BOX 2558	CITY: HOUSTON	STATE: TX	POSTAL CODE: 77252	COUNTRY: USA

4. This FINANCING STATEMENT covers the following collateral:

ALL FIXTURES LOCATED ON THE REAL ESTATE DESCRIBED IN EXHIBIT A ATTACHED HERETO AND INCORPORATED BY REFERENCE HEREIN.

THIS IS A FIXTURE FILING AND SHOULD BE INDEXED IN THE REAL ESTATE RECORDS.

RECEIVED
APR 26 2007
Eaton County Register of Deeds

RECEIVED
~~MAR 19 2007~~
Eaton County Register of Deeds

5. ALTERNATIVE DESIGNATION [if applicable]: ☐ LESSEE/LESSOR ☐ CONSIGNEE/CONSIGNOR ☐ BAILEE/BAILOR ☐ SELLER/BUYER ☐ AG. LIEN ☐ NON-UCC FILING

6. ☒ This FINANCING STATEMENT is to be filed [for record] (or recorded) in the REAL ESTATE RECORDS. Attach Addendum [if applicable] 7. Check to REQUEST SEARCH REPORT(S) on Debtor(s) [ADDITIONAL FEE] [optional] ☐ All Debtors ☐ Debtor 1 ☐ Debtor 2

8. OPTIONAL FILER REFERENCE DATA
6701-619 -- MI - Eaton County
F#179041
A#277625

FILING OFFICE COPY — UCC FINANCING STATEMENT (FORM UCC1) (REV. 05/22/02)

> LandAmerica
alicia Kowalski
1050 Wilshire Dr Ste 310
Troy MI 48084

15

3

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UCC FINANCING STATEMENT ADDENDUM

FOLLOW INSTRUCTIONS (front and back) CAREFULLY

9. NAME OF FIRST DEBTOR (1a or 1b) ON RELATED FINANCING STATEMENT

9a. ORGANIZATION'S NAME
GENERAL MOTORS CORPORATION

OR

9b. INDIVIDUAL'S LAST NAME	FIRST NAME	MIDDLE NAME,SUFFIX

10. MISCELLANEOUS:

THE ABOVE SPACE IS FOR FILING OFFICE USE ONLY

11. ADDITIONAL DEBTOR'S EXACT FULL LEGAL NAME - insert only one name (11a or 11b) - do not abbreviate or combine names

11a. ORGANIZATION'S NAME

OR

11b. INDIVIDUAL'S LAST NAME	FIRST NAME	MIDDLE NAME	SUFFIX

11c. MAILING ADDRESS	CITY	STATE	POSTAL CODE	COUNTRY

11d. SEE INSTRUCTIONS	ADDL INFO RE ORGANIZATION DEBTOR	11e. TYPE OF ORGANIZATION	11f. JURISDICTION OF ORGANIZATION	11g. ORGANIZATIONAL ID #, if any
				☐ NONE

12. ☐ ADDITIONAL SECURED PARTY'S or ☐ ASSIGNOR S/P'S NAME - insert only one name (12a or 12b)

12a. ORGANIZATION'S NAME

OR

12b. INDIVIDUAL'S LAST NAME	FIRST NAME	MIDDLE NAME	SUFFIX

12c. MAILING ADDRESS	CITY	STATE	POSTAL CODE	COUNTRY

13. This FINANCING STATEMENT covers ☐ timber to be cut or ☐ as-extracted collateral, or is filed as a ☒ fixture filing.

14. Description of real estate:
SEE ATTACHED EXHIBIT A

16. Additional collateral description:

15. Name and address of a RECORD OWNER of above-described real estate (if Debtor does not have a record interest):
GENERAL MOTORS CORPORATION
300 RENAISSANCE CENTER
DETROIT, MI 48265-3000

17. Check only if applicable and check only one box.
Debtor is a ☐ Trust or ☐ Trustee acting with respect to property held in trust or ☐ Decedent's Estate

18. Check only if applicable and check only one box.
☐ Debtor is a TRANSMITTING UTILITY
☐ Filed in connection with a Manufactured-Home Transaction — effective 30 years
☐ Filed in connection with a Public-Finance Transaction — effective 30 years

FILING OFFICE COPY — UCC FINANCING STATEMENT ADDENDUM (FORM UCC1Ad) (REV. 05/22/02)

LIBER 2113 PAGE 662

EXHIBIT A

8400 MILLETT HWY, LANSING TOWNSHIP, LANSING MI 48917-9549

S 1/2 SEC 28 LYING W OF W LINE HWY I-96/69, EXC NW 1/4 OF SW 1/4, AND EXC PARTS S & E OF LINE COM 100 FT W OF S 1/4 COR SAID SEC, TH N 50 FT, E 400 FT, N 25 FT, E 188.65 FT TO W LINE SAID HWY R/W & POE, EXC LANDS USED FOR GUNIEA RD & MILLETT HWY; 144 ACRES +/-; SEC 28 T4N R3W

GM Assembly Lansing Delta
8400 Millett Hwy
Lansing, Easton County, MI
LandAmerica File No. 100729

Exhibit 2

SKETCH PLAN OF DESCRIPTION
"GM MILLETT HWY–LANSING"

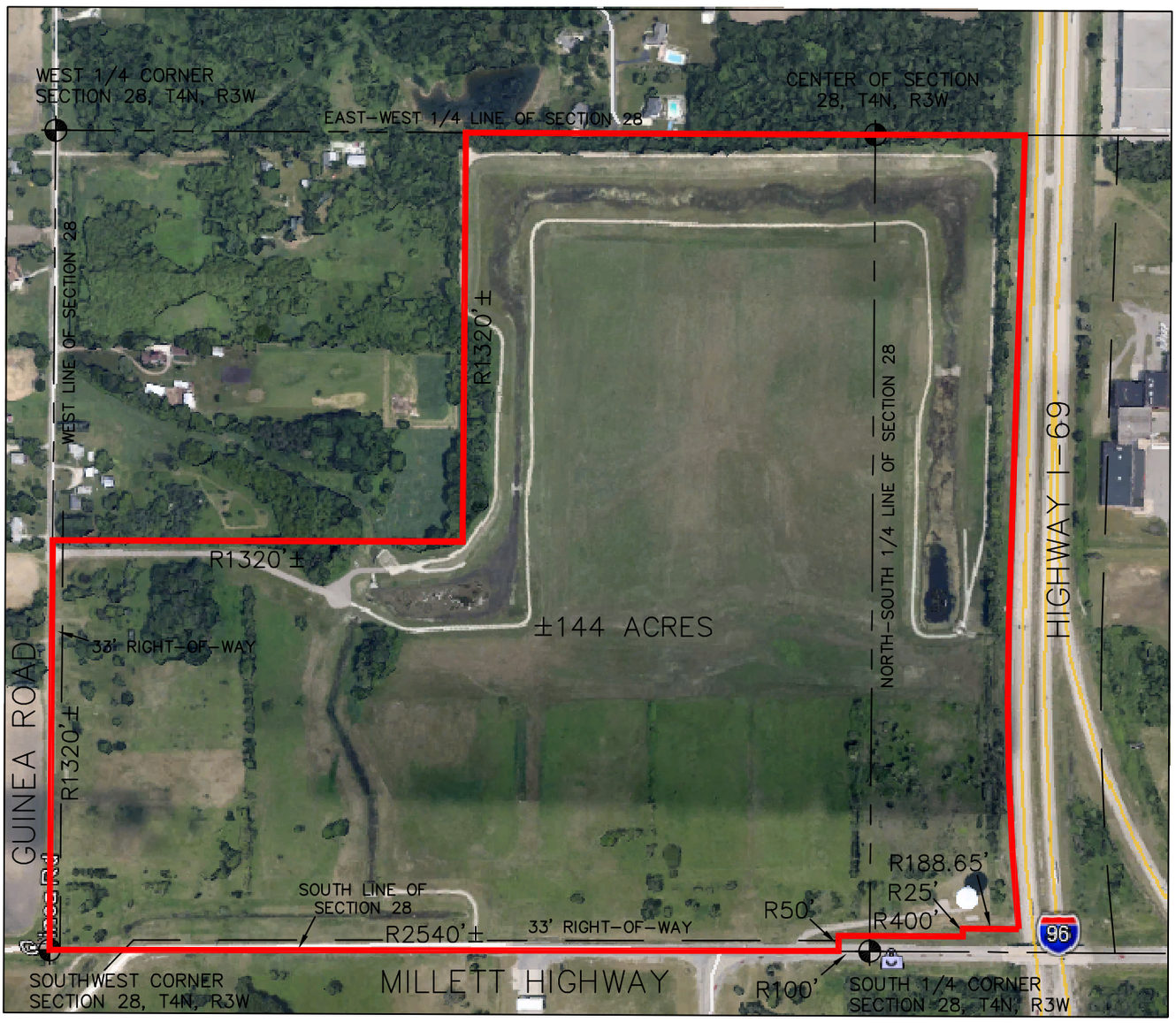
For:
Motors Liquidation Company Avoidance Action Trust v. JPMorgan Chase Bank, N.A., et al.

NOTES:
1. A CERTIFIED BOUNDARY SURVEY IS REQUIRED FOR THE EXACT LOCATION OF FENCE AND PROPERTY LINES.

2. EASEMENTS, IF ANY, NOT SHOWN

N

1" = 500'



This plan was made at the direction of the parties hereon and intended solely for their immediate use and no survey has been made and no property lines were monumented, all easements recorded or unrecorded may not be shown, unless specifically noted, and no dimensions are intended for use in establishing property lines.

R = Recorded Distance
= Deed Line
= Distance Not to Scale

KEBS, INC.
KYES ENGINEERING
BRYAN LAND SURVEYS
2116 HASLETT ROAD, HASLETT, MI 48840
PH. 517–339–1014 FAX. 517–339–8047
13432 PRESTON DRIVE, MARSHALL, MI 49068
PH. 269–781–9800 FAX. 269–781–9805

DRAWN BY KDB	SECTION 28, T4N, R3W
FIELD WORK BY ---	JOB NUMBER: 91408.PLT
SHEET 1 OF 2	

SKETCH PLAN OF DESCRIPTION
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PH. 269–781–9800 FAX. 269–781–9805

DRAWN BY KDB	SECTION 28, T4N, R3W
FIELD WORK BY ---	JOB NUMBER: 91408.PLT
SHEET 2 OF 2	