

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE:	.	Case No. 09-50026-mg
	.	
MOTORS LIQUIDATION COMPANY,	.	Chapter 11
et al., f/k/a GENERAL	.	
MOTORS CORP., et al,	.	(Jointly administered)
	.	
Debtors.	.	
	.	
MOTORS LIQUIDATION COMPANY	.	Adv. Proc. No. 09-00504-mg
AVOIDANCE ACTION TRUST, by and	.	
through the Wilmington Trust	.	
Company, solely in its capacity	.	
as Trust Administrator and	.	
Trustee,	.	
	.	
Plaintiff,	.	
v.	.	
	.	
JPMORGAN CHASE BANK, N.A.,	.	
individually and as	.	
Administrative Agent for	.	
Various lenders party to the	.	One Bowling Green
Term Loan Agreement described	.	New York, NY 10004
herein, et al.,	.	
	.	
Defendants.	.	Tuesday, February 14, 2017
	.	10:18 a.m.
	.	

TRANSCRIPT OF ADVERSARY PROCEEDING: 09-00504-mg
MOTORS LIQUIDATION COMPANY AVOIDANCE ACTION TRUST V.
JPMORGAN CHASE BANK, N.A. ET AL, (CC: DOC. NOS. DOC# 823, 831,
832, 833, 840) MOTION TO DISMISS ADVERSARY PROCEEDING;
(CONTINUED)

**BEFORE THE HONORABLE MARTIN GLENN
UNITED STATES BANKRUPTCY COURT JUDGE**

APPEARANCES CONTINUED

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TRANSCRIPT OF: (CONTINUED)
(CC: DOC# 13829) MOTION OF WILMINGTON TRUST COMPANY, AS GUC TRUST ADMINISTRATOR, FOR AN ORDER (A) GRANTING AUTHORITY TO REALLOCATE AND USE DISTRIBUTABLE CASH FOR THE PURPOSES OF FUNDING ADMINISTRATIVE AND REPORTING FEES, COSTS AND EXPENSES OF THE GUC TRUST AND (B) EXTENDING THE DURATION OF THE GUC TRUST; ADVERSARY PROCEEDING: 09-00504-mg
MOTORS LIQUIDATION COMPANY AVOIDANCE ACTION TRUST V. JPMORGAN CHASE BANK, N.A. ET AL, CASE MANAGEMENT CONFERENCE
(CC: DOC# 839, 834, 835, 836, 837, 838)

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1 (Proceedings commence at 10:18 a.m.)

2 THE COURT: All right. Please be seated. All right.
3 We're here in Motors Liquidation Company, 09-50026, also in
4 adversary proceeding, Motors Liquidation Company Avoidance
5 Action Trust v. JPMorgan Chase Bank, et al, 09-00504.

6 Mr. Fisher.

7 MR. FISHER: Good morning, Your Honor. Eric Fisher
8 from Binder & Schwartz on behalf of the avoidance action trust.
9 I believe the first thing on Your Honor's agenda is Defendant
10 Immigon Portfolioabbau's motion to dismiss, Your Honor.

11 THE COURT: Right.

12 MR. FISHER: And so I would presume that the Court
13 would want to hear from the movant first on that.

14 THE COURT: Correct. Thank you.

15 MR. GRACE: Thank you, Your Honor. Bruce Grace of
16 Lewis Baach on behalf of Immigon.

17 THE COURT: Thank you.

18 MR. GRACE: Immigon has moved to dismiss on two
19 grounds, lack of personal jurisdiction and untimely service.
20 I'd like first to talk about the lack of personal jurisdiction.
21 And I'd like to divide that up into two pieces. Plaintiff has
22 a theory of jurisdiction by reason of consent, and then their
23 fallback position is jurisdiction by reason of OEVAG or
24 Immigon's purchase of the interest in the loan.

25 THE COURT: Do you agree that Immigon stands in the



1 shoes of --

2 MR. GRACE: I pronounce it OEVAG.

3 THE COURT: Okay.

4 MR. GRACE: But that's my -- I don't know if that's
5 correct.

6 THE COURT: I have no idea.

7 MR. GRACE: Yeah. I do, Your Honor.

8 THE COURT: Okay.

9 MR. GRACE: We do agree with that.

10 THE COURT: So if there is jurisdiction over the
11 original participant holder, then there's jurisdiction in the
12 case.

13 MR. GRACE: Absolutely.

14 THE COURT: Okay, go ahead.

15 MR. GRACE: Yes. Yes. And so we've put in an
16 affidavit showing that Immigon and its -- and OEVAG, both of
17 them, didn't do business in New York, didn't have bank accounts
18 -- or didn't have --

19 THE COURT: They did have bank accounts.

20 MR. GRACE: They did have a bank account.

21 THE COURT: Did have a bank account here. That's
22 where the money went into, correct?

23 MR. GRACE: Yes, that's correct. That's correct.

24 And the plaintiff argues that the presence of that bank account
25 means that there's jurisdiction without more. We disagree with



1 that. And --

2 THE COURT: What about the consent to jurisdiction in
3 the original note agreement, loan agreement?

4 MR. GRACE: Right. The plaintiff says there's a
5 consent to jurisdiction there. Now, they say that the --

6 THE COURT: It's what the language says.

7 MR. GRACE: It says loan parties. It says loan
8 parties consent to jurisdiction. Loan parties are defined as
9 the guarantor and the -- General Motors. It applies to people
10 who are assignees. There's no -- plaintiff hasn't established
11 that OEVAG was an assignee.

12 THE COURT: Really?

13 MR. GRACE: Yes. And that's something that plaintiff
14 has the burden of showing. And the term loan agreement
15 provides that for every assignee, there shall be an assignment
16 agreement signed by both parties and then maintained by
17 JPMorgan, as the agent for General Motors. Plaintiff has not
18 produced a signed assignment agreement. And so the agreement
19 itself says there will be such an agreement -- an assignment,
20 it will be maintained, and plaintiff hasn't produced it and
21 they've not provided any explanation for its absence.

22 Now, they have put in some miscellaneous documents
23 concerning the trade itself. So, for example, there is a trade
24 confirmation going from JPMorgan's secondary trading desk to
25 Volksbank. That confirmation references LSTAs, a standard form



1 agreement, which provides that the documentation that will
2 finally be created for the loan will either be an assignment or
3 a participation. So the fact that there is a trade
4 confirmation that refers to the LSTA terms just indicates this
5 was going to be either by an assignment or participation.
6 Everything that the plaintiff has put in is consistent with
7 either an assignment or a participation, but what's missing is
8 if it was an assignment, there would have been assignment
9 agreement. And so given that it's plaintiff's burden to show
10 that, they haven't established it.

11 And the other point I would make is that the forum
12 clause does refer to loan parties, and loan parties are a
13 defined term. And it doesn't include lenders. Matter of fact,
14 in the same clause, there's a reference to lenders, and it
15 provides that lenders can sue the loan parties in any
16 jurisdiction.

17 So plaintiff hasn't established consent by means of
18 the term loan agreement. Their second point on consent is that
19 the DIP order itself provides that the secured lenders will
20 consent to jurisdiction when they receive the money. Receiving
21 the money means consent to jurisdiction.

22 We have two responses to that. One is, if, as I'm
23 suggesting, OEVAG was a participant, then it's not covered by
24 that. The term loan agreement makes it very clear that --

25 THE COURT: Was that a gift when they received the



1 money?

2 MR. GRACE: No, no. I'm not saying it was a gift.
3 They -- we have no -- we're not quibbling with the fact that
4 they received the money, and they received the money because
5 they had loaned the money. The question is does the receipt of
6 that money mean that they consented to jurisdiction in New
7 York. That is the only question. And to the extent that
8 plaintiff is relying on the DIP order, it needs to show that
9 they were covered by that order. That is, that they were
10 assignees and not participants because the term loan agreement
11 makes it very clear in section ten that participants -- when
12 it's a participation, the lender is the one who remains
13 obligated under the term loan agreement. That's the
14 distinction between an assignee and a participant.

15 So our first response is, you haven't shown that
16 we're covered by that order. Our second response is that
17 there's a due process issue with having one line in a long
18 order saying, anyone who receives these funds will be held to
19 have consented to jurisdiction in New York. And the case we
20 cite for that is the Brown v. Lockheed case.

21 Plaintiff says, well, that case concerned general
22 jurisdiction. But, in fact, it's a very articulated discussion
23 of what is necessary to find jurisdiction by consent. In that
24 case, the plaintiff was arguing that Lockheed, by virtue of
25 having designated someone to accept service in Connecticut, had



1 consented, for all purposes, to jurisdiction. So the court had
2 to go through and talk about the due process implications of
3 finding consent in that situation. And it made it very clear
4 that there are serious due process issues there, and in fact,
5 it found that there was no jurisdiction by consent. We rely on
6 that to argue that with the DIP order, with that one sentence,
7 comes out on a Thursday, the payment is made on the Monday,
8 that isn't enough to meet the due process requirement for
9 consent to jurisdiction. And again, the case we rely on is
10 Brown v. Lockheed.

11 Now, let me come back, if I could, to the question
12 you asked me at the beginning about the bank account. Is that
13 enough? So you have a bank in Vienna which is purchasing
14 something on the secondary market. It's a security that's
15 denominated in dollars. So it has a bank account in New York
16 City to facilitate that transaction because it's a dollar
17 transaction.

18 THE COURT: Did it use the account for other
19 purposes?

20 MR. GRACE: For -- it used it for these dollar
21 transactions.

22 THE COURT: Did it use it for other dollar
23 transactions? Was that an account it maintained in New York in
24 which to facilitate dollar-denominated transactions?

25 MR. GRACE: That's correct. That's correct.



1 THE COURT: Is there any indication in the record as
2 to how many transactions money flowed through that account?

3 MR. GRACE: There is not. There is not. But what I
4 can represent is that the account was used, to use your words,
5 for money flowing through.

6 THE COURT: Yeah, but I mean, isn't that like Licci,
7 where here, the bank maintained an account in New York for
8 dollar-denominated transactions. This was not a one-off
9 transaction.

10 MR. GRACE: Right.

11 THE COURT: Isn't that sufficient to establish
12 specific jurisdiction in connection with this transaction where
13 the money was paid into that account?

14 MR. GRACE: No, for two reasons. First, it's not
15 like Licci because in that case, the bank is holding itself out
16 to customers and allowing them, I think that was Hezbollah, to
17 use the account for money to pass through the account.

18 THE COURT: Well, what was it using this account for?
19 What was the bank using this account for?

20 MR. GRACE: This --

21 THE COURT: This specific account.

22 MR. GRACE: Right. Was being used for transactions
23 in dollars.

24 THE COURT: And if a trial record established that it
25 had 100 transactions where money flowed through that account in



1 a year, would that be sufficient to establish jurisdiction
2 under Licci?

3 MR. GRACE: No, it wouldn't under Licci.

4 THE COURT: Why not?

5 MR. GRACE: Because under Licci, the bank was saying
6 to Hezbollah, we have an account in New York that you can use.
7 So they were making it available to a third party and they were
8 conducting terrorist operations.

9 THE COURT: This is one step closer. It's not a
10 question of making it available for third parties. It was its
11 own account.

12 MR. GRACE: Ah, but here's the distinction. I think
13 if a bank, a foreign bank, gets an account in New York and then
14 makes that available to third parties, it's pretty easy to say
15 that it's doing business in New York, particularly when it's
16 facilitating terrorist transactions or fraudulent transactions.
17 That's part of the whole context. I don't think that can be
18 separated. But when a bank is sitting in Austria and buying
19 Euro-denominated instruments and using an account in Paris to
20 do that, pound-denominated instruments using an account in
21 London to do that, dollar-denominated instruments using an
22 account to facilitate that, it's not doing business in New
23 York. It's doing business in Austria, and the New York account
24 is simply there, as you put it, for the dollars to flow
25 through, and I think that's an important distinction.



1 We put into our reply some facts about correspondent
2 banking accounts. There are hundreds of thousands of them in
3 New York. The idea that every foreign entity which uses a
4 correspondent banking account in this sort of situation is
5 thereby opening itself up to jurisdiction in New York --

6 THE COURT: It's not a question of general
7 jurisdiction, though. This is a question of specific
8 jurisdiction. It's not a question that by using that account,
9 it's opening itself up to general jurisdiction for any lawsuit.

10 MR. GRACE: No. What I was going to say was opening
11 itself up to jurisdiction for any lawsuit that touches on any
12 of those dollar-denominated transactions. And I don't think
13 that's what the law is. The other thing that I would point out
14 is, what about Paris? What about London? Do they get to
15 assert jurisdiction over U.S. banks that --

16 THE COURT: That's not my problem.

17 MR. GRACE: Well, but I think that when courts look
18 at this, particularly looking at asserting jurisdiction over a
19 foreign entity, they do take into account, what if the shoe
20 were on the other foot, how would that seem? And so I think
21 there's a comity consideration here which would suggest that
22 the Court shouldn't extend Licci to this situation, given the
23 concerns that even the Supreme Court and the Second Circuit
24 have talked about, about having a very broad sense of
25 jurisdiction here in the United States that reaches out to



1 foreign entities that, again, don't maintain any contacts other
2 than this bank. I mean, they don't advertise it. They don't
3 hold themselves out as doing business, none of the usual indicia
4 of jurisdiction.

5 And so, for that reason, we say, one, for the reasons
6 that I laid out, there was no consent. And two, this isn't a
7 significant enough contact to find jurisdiction.

8 One last point on that. What was the transaction
9 that gives rise to this claim? It was the payment of the money
10 after this Court ordered that the payment would take place.
11 Immigon, or OEVAG, didn't request that payment. It didn't have
12 any power over that payment. That was a unilateral decision of
13 this Court, and the payment goes into that account. And the
14 idea that that situation would be held to say, well, Immigon
15 was seeking out the benefits and protections of the U.S. legal
16 system, I don't think that fits. This was a unilateral move
17 that they didn't ask for, they didn't solicit, and I think
18 those are factors that courts look at when they decide whether
19 to have jurisdiction in this type of situation.

20 If I could go on to the other leg of our motion,
21 which is untimely service.

22 THE COURT: 4(m) doesn't apply in this case, Rule
23 4(m), correct, because there's a service under the Hague, so
24 the 120 days and the extension orders which I've had to rule on
25 in the past aren't really pertinent to this dispute, correct?



1 MR. GRACE: I wouldn't go so far as to say they're
2 not pertinent. They don't apply directly, but the Second
3 Circuit has said that when we're looking at foreign service, if
4 the plaintiff takes more than the 120 days, or now it's 90
5 days, then they -- then we're going to look at that and they're
6 not -- they do not necessarily fall within the exception. And
7 we cite that case in our opening brief. So in other words,
8 there is a time limit, and courts look to the 120 days, or now
9 the 90 days, to get a sense of what's a reasonable amount of
10 time for a plaintiff to take to serve a foreign defendant.

11 What I would say here is -- and I'd like to take it
12 in two bites. One is, the first attempt at service didn't
13 work. And in -- on December 15th, the plaintiff was told that
14 it hadn't worked, that the letter rogatory hadn't been served.

15 THE COURT: I thought it was January 15th.

16 MR. GRACE: I'm sorry, January 15th. I'm looking for
17 my notes here. Right, January 15th.

18 THE COURT: January 15th, 2016.

19 MR. GRACE: Right.

20 THE COURT: They were advised that the Austrian
21 Ministry had rejected the letters rogatory seeking to serve the
22 complaint, correct?

23 MR. GRACE: Right. They then waited to March 25th to
24 seek a fourth summons. Then this Court issued the summons
25 within --



1 THE COURT: There's an intermediate step because they
2 first received the bid on February 19th for preparations. It's
3 not a simple matter. That second letter is ECF Docket 597, and
4 then on -- am I right on that?

5 MR. GRACE: Well, you're right that they did receive
6 the bid, but I'm not sure why it took from January 15th to
7 March 25th to file something with the court seeking a fourth
8 summons. I don't believe that they needed to go out and bid
9 anything to do that. They had been told the summons has been
10 rejected. They were told that on January 15th. The case has
11 been around by that time for at least six years. Waiting more
12 than two months to --

13 THE COURT: No, I've covered the period from the
14 filing until what I refer to as the phase one litigation was
15 completed in two prior opinions, so --

16 MR. GRACE: I understand.

17 THE COURT: And I've also found in those two prior
18 opinions basically no prejudice, and it seems to me you haven't
19 shown any more prejudice than was argued in any of the two
20 prior cases that I -- opinions I wrote.

21 MR. GRACE: Your Honor, I read those opinions, and I
22 didn't want to reargue anything. So I didn't come in and make
23 those arguments again. I believe that this is a different set
24 of facts, and the reason I mentioned the case being, you know,
25 so far along is I would suggest that taking into account Your



1 Honor's opinions on that, six years is still a long time, and
2 it should have added a bit of urgency to the idea that we're
3 going to get service on this foreign plaintiff, and I don't
4 think there's urgency going from January 15th to March 25th.

5 Then the Court issues the summons on April 1st, so
6 the Court had it for five days or six days, depending on how
7 many days there are in March, and then the plaintiff waits
8 until May 11th to submit an application for letter rogatory.
9 The Court has that application for -- 11 from 26 is -- 15 days.
10 May 26th, it issues the letter rogatory, and then the plaintiff
11 waits until July 6 to submit the second letter rogatory to the
12 Department of State.

13 There's a case from the Second Circuit concerning
14 service on a foreign defendant that we cite, and the court
15 comments, it doesn't look as if the plaintiff exactly bent over
16 backwards to get quick service. And I would say that this is
17 not a situation where there was any kind of urgency exhibited
18 by the plaintiff here.

19 But I said I wanted to take this in two parts, and I
20 picked up on January 15th, 2016, but let me go back in time to
21 July 24th, 2015. That's the date that plaintiffs submitted the
22 first letter rogatory to the Department of State. They wait
23 until January 15th, 2016, so fully six months, to be told by
24 the Department of State that the first letter hadn't worked.
25 There's no indication in the affidavits they've put in that



1 they did any followup after July 24th to monitor what was going
2 on. And I submit that letting something linger from July to
3 January of next year is again not diligence.

4 THE COURT: So they submitted the first letter to the
5 Department of State on July 24th, 2015, correct?

6 MR. GRACE: Yes.

7 THE COURT: And -- but the state department didn't
8 transmit it to the Austrian Ministry until November 18th, 2015,
9 correct?

10 MR. GRACE: Yes. That's what the Austrian --

11 THE COURT: We can't lay that fault at the hands of
12 the plaintiff, can we?

13 MR. GRACE: Yes. And here's what I say about that.
14 I think that whenever you're dealing with a government agency
15 with something that you believe needs dispatch, you don't just
16 pass it off to the agency. You monitor. You call.

17 THE COURT: You think you can needle the state
18 department to transmit the letter rogatory sooner? Okay.

19 MR. GRACE: Well, I think you can at least try.

20 THE COURT: Have you done that? Have you done that
21 yourself? Yes or no?

22 MR. GRACE: Yes, Your Honor.

23 THE COURT: You have?

24 MR. GRACE: I don't know whether it was successful,
25 but my first legal assignment was as a summer associate.



1 THE COURT: And you have no idea whether it was
2 successful or not?

3 MR. GRACE: But we call --

4 THE COURT: You don't know whether it worked?

5 MR. GRACE: We called every Friday to find out what
6 the status was.

7 THE COURT: I'm sure they loved talking to you. Did
8 you talk to the same person every week?

9 MR. GRACE: Yes, yes. I remember it vividly because
10 she was very hard to understand.

11 THE COURT: I'm sure they're happy to speak to you.

12 MR. GRACE: But the point is --

13 THE COURT: What did -- you did that for how long?

14 MR. GRACE: For the summer.

15 THE COURT: And how long did it take to get the
16 letters rogatory served?

17 MR. GRACE: Well, I assume, you know, that someone
18 else picked it up.

19 THE COURT: Had it been served before you finished
20 your summer?

21 MR. GRACE: I don't believe it had been served, no.

22 THE COURT: So your efforts as a summer associate
23 were unsuccessful in prodding with your weekly calls to get it
24 served?

25 MR. GRACE: Well, they were certainly diligent.



1 THE COURT: Well, you were very diligent, but you
2 don't know if you accomplished anything.

3 MR. GRACE: No. But here's the point. Let's say
4 that they had been diligent and they were calling the state
5 department and the state department said, it's not happening.
6 Then they could come back into this court and say, we're --

7 THE COURT: What do you think that Judge Gerber or
8 myself could have done to prompt the state department to
9 transmit the letters rogatory to the Austrian Ministry?

10 MR. GRACE: You wouldn't have needed to do that
11 because --

12 THE COURT: Really?

13 MR. GRACE: No. Because there's another provision of
14 Rule 4 which provides that by order of the court, other methods
15 of service can be used if it's done by order of the court, so
16 long as they don't violate an international agreement.

17 THE COURT: Do you have any cases that say that the
18 failure of a plaintiff to get a court to authorize other means
19 of service would mean that their patience in waiting for the
20 state department to serve results in the dismissal of the case?

21 MR. GRACE: I don't have that case, but the cases I
22 do have talk about diligence. And diligence, in my view, means
23 if one method doesn't work, you do what's necessary to try
24 another method. And I think waiting six months while the
25 litigation is proceeding without coming back to the court and



1 saying to the court, this doesn't seem to be working, we'd like
2 to try plan B -- there was no plan B here, and that, to me, is
3 evidence of lack of diligence. And so when I combine both the
4 delay from July 24th, 2015 to January 15th, 2016, which is six
5 months, and then the delay from January 15th, 2016 to July 6th,
6 2016, when they finally submit it to the state department, and
7 it was only -- you know, in that delay, there are times when it
8 was before this Court --

9 THE COURT: July 6th, wasn't it?

10 MR. GRACE: July 6th, yes.

11 THE COURT: July 6th, 2016.

12 MR. GRACE: Yeah. During that period, there were
13 times when it was before this Court, and I can't complain about
14 that, but --

15 THE COURT: I have your argument.

16 MR. GRACE: -- but it was five days or --

17 THE COURT: All right. Anything else you want to
18 raise?

19 MR. GRACE: No, that's it. Thank you, Your Honor.

20 THE COURT: Thank you very much, Mr. Grace.

21 MR. GRACE: Appreciate it.

22 THE COURT: Mr. Fisher. Is it correct, Mr. Fisher,
23 you didn't bend over backwards to get service?

24 MR. FISHER: No, that's not correct, Your Honor.

25 THE COURT: What did you do to try and move the



1 process along?

2 MR. FISHER: We submitted our first letter rogatory
3 request, Your Honor, on July 24, 2015, which was within the
4 120-day period. As Your Honor already observed, we didn't
5 learn about the failure of that letter rogatory to effect
6 service on this party in Austria until January 2016 and through
7 no fault of our own through, as Your Honor has already
8 indicated, delays occasioned by the state department's
9 transmittal of the letter rogatory. And in my experience,
10 parties are frequently helpless when it comes to letters
11 rogatory. You submit them, and you have to rely on both the
12 government here and the government in the foreign
13 jurisdiction --

14 THE COURT: Try getting a summer associate to call
15 every week to see whether you could prod them along.

16 MR. FISHER: Well, and Your Honor, and to the other
17 point that -- we certainly kept the Court apprised that there
18 were defendants where we were still waiting for letters
19 rogatory, and certainly, we had this defendant in mind. The
20 idea that we should have come back here and requested some
21 alternative service, I think there are actually cases directly
22 to the contrary, specifically concerning Austria, and they're
23 cited in our brief, Your Honor, the In re Ski Train Fire case,
24 Judge Scheindlin's case from 2003, and then a case out of the
25 Southern District of Texas, Baker Hughes, from 2012, both of



1 them stressing that Austria actually considers alternative
2 service an infringement on its sovereignty, so I really don't
3 think that it's realistic to suggest that we had an alternative
4 except to pursue the letters rogatory, which clearly is a
5 recognized mode of service under Rule 4(f).

6 And then, once we learned that service had been
7 rejected in Austria, again, that was not through any fault of
8 our own. The apparent reason for rejection of service was that
9 by the time this got served, that --

10 THE COURT: The state department waited so long to
11 transmit it that the conference -- a conference was scheduled
12 very shortly after, and so they rejected the letter rogatory.

13 MR. FISHER: That's -- the conference had already
14 happened. And so that's why -- when we learned about the
15 letters rogatory being rejected, we went to the clerk's office,
16 got an alternative summons, had to prepare a new motion for
17 letters rogatory, had that motion submitted to the Court and
18 approved by the Court, had the papers then translated in an
19 appropriately certified translation, got client approval, and
20 then proceeded to serve the letters rogatory. Service was
21 effected September 23rd, 2016.

22 It certainly sounds like a long time, learning
23 January 2016 and not effecting service until September 2016.
24 Again, Your Honor, I don't think that that is all that unusual
25 with respect to letters rogatory. And I also think it's



1 important to note that when the defendant here was served on
2 September 23rd, 2016, there were still more than two months
3 left to the fact discovery period. If the defendant had
4 elected to participate, the defendant certainly could have
5 participated, and I don't think there's been any showing
6 whatsoever of prejudice by reason of this delay, Your Honor.

7 THE COURT: Let's shift to the argument of the -- can
8 you tell me, is there evidence of an assignment agreement?

9 MR. FISHER: Yes, there is, Your Honor.

10 THE COURT: Where do I find that?

11 MR. FISHER: Exhibit A to my declaration contains a
12 copy of both trade confirmations. It's two \$5 million --

13 THE COURT: It's the trade confirmations. Not an
14 assignment?

15 MR. FISHER: The trade confirmation has an election
16 box. So, for example, at Immigon Bates number 1, again Exhibit
17 A to my declaration, it says, form of purchase, if no election
18 is made, assignment applies, and then election was made and the
19 assignment box was checked as to both trade confirmations.

20 THE COURT: Just on the trade confirmation.

21 MR. FISHER: Yes. And the term loan agreement
22 provides that where it's an assignment, a form of assignment
23 agreement will be entered into in a form attached to the term
24 loan. It's true that we have not located the actual assignment
25 agreement. I don't think that changes the fact that, by virtue



1 of the trade confirmation and by virtue of both JPMorgan and
2 the defendant's behavior here, this was an assignment.

3 And then, Your Honor, if I can then perhaps
4 transition from that point to --

5 THE COURT: Let's assume it's an assignment. What
6 follows from that?

7 MR. FISHER: So I think -- we have two arguments with
8 respect to why this Court has jurisdiction over this defendant:
9 one, consent, and the second, even if there's not consent, the
10 facts here give rise to specific jurisdiction.

11 So in terms of consent, under the term loan agreement
12 itself -- and here -- I mean, Mr. Grace is partially correct,
13 but he's only talking about a part of the consent to
14 jurisdiction that's found in the term loan itself. So in
15 section 10.11 of the term loan, the first part of the
16 jurisdiction provision does say it is limited to each loan
17 party, "hereby irrevocably and unconditionally submits" --

18 THE COURT: And you agree they're not a loan party.

19 MR. FISHER: I agree that they're not a loan party
20 within the definition of the term loan agreement.

21 THE COURT: All right.

22 MR. FISHER: But it then goes on to say, "And each of
23 the parties hereto," lowercase parties -- and it's clear in
24 other references in the term loan agreement that when there's a
25 reference to each of the parties hereto in that way, it applies



1 to all the lenders -- "each of the parties hereto hereby
2 irrevocably and unconditionally agrees that all claims in
3 respect of any such action or proceeding may be heard and
4 determined in such New York state court or, to the extent
5 permitted by law, in such federal court." And so I do think
6 that --

7 THE COURT: So you're relying on section 10.11 of the
8 term loan agreement?

9 MR. FISHER: Yes, Your Honor, as one indication that
10 there's consent to jurisdiction. It is also, of course, true
11 that when payment was made to the term lenders on June 30,
12 2009, the term loan agreement itself, strictly speaking, was
13 terminated, but then was replaced with the consent to
14 jurisdiction that's found in the DIP order.

15 THE COURT: Were they served with a copy of the DIP
16 order?

17 MR. FISHER: There is affirmative evidence in the
18 record, Your Honor, that they were aware of --

19 THE COURT: No, I didn't ask that. Were they -- I
20 mean, not exactly the same thing, but in the first opinion
21 about service, I rejected your argument -- actually, I didn't
22 decide the issue of who knew what about the action. What is it
23 that you're relying on, saying they were aware?

24 MR. FISHER: Specifically, Your Honor, there are
25 email communications from a representative at this particular



1 defendant to JPMorgan concerning the prospective entry of the
2 DIP order and then following the entry of the DIP entry, making
3 specific reference to the DIP order. And I don't think that
4 Mr. Grace contests any of those facts, Your Honor.

5 THE COURT: Okay.

6 MR. FISHER: And to that point, I mean, to the extent
7 that there are any controverted facts --

8 THE COURT: Can the DIP order create jurisdiction?

9 MR. FISHER: A party -- the parties to the DIP order
10 consented to the jurisdiction of this court as a condition of
11 receipt of payment because the context of the DIP order was a
12 recognition that those payments were potentially subject to
13 clawback. So certainly, Your Honor, if a party had -- to the
14 extent that order is binding on a party, certainly, that order
15 can create personal jurisdiction by virtue of that party's
16 consent.

17 THE COURT: Okay.

18 MR. FISHER: Also, to the extent that there are
19 controverted facts here, and I don't genuinely believe that
20 there are, I've heard a few times Mr. Grace say that it's our
21 burden to prove that there was an assignment. I don't think
22 that that's right in the context of a 12(b)(2) and 12(b)(5)
23 motion. Uncontroverted facts are actually supposed to be
24 resolved in favor of the plaintiff.

25 THE COURT: It may be that this issue ultimately



1 would have to -- if they persist in asserting that they were
2 not an assignee that the issue would have to be resolved
3 finally at a trial. Would you agree with that?

4 MR. FISHER: To the extent there's a bonafide dispute
5 about this, but I don't believe that there is, Your Honor, and
6 I don't -- as I said, there's uncontroverted evidence in the
7 record that they were an assignee.

8 THE COURT: All right.

9 MR. FISHER: So those -- that's a summary, I would
10 say, of the facts related to the issue of consent to
11 jurisdiction. Even if the Court were to find that they did not
12 consent to jurisdiction through either or both of the term loan
13 agreement or that the DIP order -- the facts here, we think,
14 very clearly give rise to specific jurisdiction over this
15 particular defendant. I think that even if the Court were to
16 find that, for example, because of the termination of the term
17 loan agreement, that provision is no longer binding as a
18 consent to jurisdiction, I still think the very fact that this
19 party entered into an assignment becoming a lender, standing in
20 the shoes of a lender under an agreement that included a
21 consent not only to jurisdiction in New York, but also to New
22 York law, I think that that shows purposeful availment of this
23 forum. The trade confirmation that they signed was pursuant to
24 a forum of LSTA, also attached to my declaration, Your Honor,
25 which also selects New York law.



1 So this is -- it is not true that we are relying only
2 on the fact of a correspondent bank account in New York that
3 was used for purposes of this transaction to establish personal
4 jurisdiction, although, as Your Honor suggested, perhaps under
5 Licci, that is enough, in and of itself, but that's not this
6 case because there are so many other facts.

7 THE COURT: Are there any facts in the record about
8 the extent to which this bank used the correspondent account
9 earlier?

10 MR. FISHER: There are not, Your Honor. All we know
11 is that certainly it was the bank's choice about what bank
12 account to use, and the bank, in dealing with a counterparty in
13 New York, JPMorgan, elected to use a New York correspondent
14 banking account.

15 THE COURT: Right.

16 MR. FISHER: We don't know anything else about the
17 account.

18 The transaction by which the assignment was made was
19 with a New York counterparty, JPMorgan. There is evidence in
20 the record attached as exhibits to my declaration, Your Honor,
21 of emails from representatives of the defendant in Austria
22 going to JPMorgan representatives in New York specifically
23 concerning the payment that is at issue, and so because
24 specific jurisdiction really involves comparing the nature of
25 the facts to the nature of the action, there's a very tight fit



1 here between the facts that we point to as important
2 jurisdictional facts and this action which concerns the very
3 payment that was made into a New York bank account after
4 consultation with a New York administrative agent at a New York
5 counterparty.

6 And as I've already described, Your Honor, there is
7 record evidence that this particular defendant monitored
8 proceedings in the New York bankruptcy court, was well aware
9 that the borrower on the loan that they had become an assignee
10 of was a borrower in bankruptcy proceedings in New York and was
11 aware of entry of the DIP order, which was the condition on
12 which this lender was paid before its entry. We think that all
13 of those facts, Your Honor, are more than ample to support
14 specific personal jurisdiction over this defendant.

15 THE COURT: All right. I'm going to take it under
16 submission.

17 MR. FISHER: Thank you.

18 THE COURT: Thank you, Mr. Grace.

19 MR. GRACE: All right, thank you. Any rebuttal?

20 THE COURT: No, I don't want to hear any more
21 rebuttal. I've read all the papers. I'm going to take it
22 under submission.

23 MR. GRACE: All right.

24 THE COURT: I've got to think about it. Okay?

25 MR. GRACE: Thank you, Your Honor.



1 THE COURT: Thank you very much, Mr. Grace.

2 Okay. Mr. Fisher.

3 MR. FISHER: Your Honor, I did observe that there --
4 in addition to the avoidance action trust matters, there is a
5 GUC Trust matter.

6 THE COURT: Yes.

7 MR. FISHER: I don't know what Your Honor's
8 preference is, but I know that Mr. Martorana from Gibson Dunn
9 is here, and I don't know whether you would do that first.

10 THE COURT: Let's deal with that. Go ahead. And I
11 have the GUC Trust quarterly report that was filed on --

12 MR. MARTORANA: Yesterday.

13 THE COURT: -- February 13th, yes.

14 MR. MARTORANA: Yes. Good morning, Your Honor.
15 Keith Martorana, Gibson, Dunn & Crutcher, on behalf of the
16 Motors Liquidation Company GUC Trust. I'm here today to
17 present the GUC Trust administrator's motion to reallocate
18 otherwise distributable funds for the purposes of satisfying
19 administrative and reporting costs and to further extend the
20 duration of the GUC Trust for one more year. That motion was
21 filed on January 20th. It was served on -- well, it was served
22 on all parties in interest, including all unitholders, each of
23 the term loan defendants that would have a potential interest
24 in the GUC Trust --

25 THE COURT: And there have been no objections?



1 MR. MARTORANA: And there were no objections.

2 THE COURT: The --

3 MR. MARTORANA: What's --

4 THE COURT: The motion's granted.

5 MR. MARTORANA: Thank you very much, Your Honor.

6 THE COURT: Okay. All right, thank you.

7 All right. Just bear with me a second. All right.

8 Let's move on to the case management conference in the
9 avoidance trust action.

10 Mr. Fisher, do you want to speak first, please.

11 MR. FISHER: So, Your Honor, as usual, all the
12 parties have been working hard and, as much as possible, I
13 think fairly cooperatively to get through what was a very
14 grueling expert deposition phase of the case, which I'm happy
15 to report is now complete and we otherwise remain on track with
16 respect to the pretrial deadlines leading up to the April 24th
17 trial. Specifically on for today, Your Honor, is a dispute
18 about the terms of a site visit, if a site visit is to occur,
19 and then of course, there are a number of pre-motion letters
20 that were submitted to the Court to be addressed today. I'm
21 happy to start wherever the Court --

22 THE COURT: Let's talk about whether there's going to
23 be a site visit, and if there's a site visit, what the protocol
24 for the visit will be. Okay. Let's deal with that.

25 MR. FISHER: Your Honor, we laid out our position, of



1 course, in a letter to the Court. As we have previously
2 indicated, we consent to a site visit with two important
3 conditions.

4 THE COURT: There was enthusiastic consent in your
5 letter to the Court.

6 MR. GRACE: Well, it's nonetheless genuine consent.
7 Here are the two conditions, Your Honor, the two objections
8 that we've raised really to the way in which they propose to
9 conduct these site visits. One, we think it's improper for
10 there to be any form of testimony during the course of the site
11 visit.

12 THE COURT: You know what, I agree.

13 MR. GRACE: Okay.

14 THE COURT: So we're putting that issue to rest.

15 MR. GRACE: Okay. So we think it should be a site
16 visit attended by the Court and representatives of the court
17 and counsel.

18 THE COURT: Well, I agree -- so, look, I reviewed the
19 proposed protocols. I don't -- I'm not going to permit
20 testimony during the site visit. It seems to me that -- and
21 I'm still not wildly enthusiastic about going to visit the
22 plants, but I do think if I'm -- if it's going to happen, it's
23 going to happen before the trial, not after the trial. All
24 right.

25 I think that the parties need to agree on the



1 specific assets that I'm going to be shown and agreed script of
2 what I'm going to be told I'm seeing to avoid the issue that's
3 been raised. Somehow, you seem to think I'm going to be awed
4 by the experts who are going to show me around the facility.
5 There have got to -- enough people knowledgeable about it. I
6 don't want anyone who is designated as an expert witness to
7 testify at trial to lead the tour.

8 All right. That ought to -- I have no problem about
9 each of you having an expert present -- a testimonial expert
10 present to observe what goes on, and if it becomes relevant to
11 hear testimony about it at trial, but I want someone other than
12 the testimonial expert to lead the tour.

13 I want the parties to agree on what I'm going to be
14 shown. I'll have to resist the temptation of asking -- I
15 reserve the right to ask some questions. I don't want a court
16 reporter. I think that a, you know, a sound recording of
17 whatever takes place can take place. I don't want to have to
18 keep stopping while the court reporter sets up her machine and
19 takes down. So this is not formal testimony.

20 If I have some limited questions, I might ask them,
21 and I don't want to make this awkward. If you all think you
22 have problems about the question I've asked, you can -- I won't
23 be offended if one side or the other objects. Fine. But I
24 think that -- I see some value, not overwhelming value, some
25 value in actually seeing, on the ground, what I'm going to see



1 pictures of during the trial and hear testimony about could be
2 valuable. How valuable? I don't know. But by my comments
3 now, hopefully, I'm narrowing the areas for disagreement
4 between you.

5 Go ahead, Mr. Fisher.

6 MR. FISHER: Well, Your Honor, I just don't want to
7 give up on our point about timing, and I'd just like to explain
8 it, if I may.

9 THE COURT: Go ahead.

10 MR. FISHER: Which is that Your Honor said there
11 would be a need for us to work with the other parties to come
12 up with a script describing each asset that you were to visit
13 if the visit were to happen in advance of trial. We'd have to
14 agree on which assets you should be shown. Our --

15 THE COURT: Well, there are 40 assets that are going
16 to be involved in the trial. How many of those assets --
17 you're talking about visiting three plants.

18 MR. FISHER: Correct.

19 THE COURT: Are all --

20 UNIDENTIFIED: Two plants.

21 THE COURT: I'm sorry?

22 UNIDENTIFIED: Two plants.

23 THE COURT: Two plants. Are all 40 at the two
24 plants?

25 MR. FISHER: So this, too, is a dispute whether it's



1 two or three. In Lansing Delta Township, there's a --

2 THE COURT: One across the --

3 MR. FISHER: They're connected, Your Honor. There's
4 a stamping plant on the --

5 THE COURT: All right. Well, you can -- I'll tell
6 you what, you don't disagree about what I would see. You just
7 disagree as to whether it's two or three.

8 MR. FISHER: Yes.

9 THE COURT: We'll let that dispute continue to
10 percolate. Okay. Are all 40 assets at the two or three
11 plants?

12 MR. FISHER: No, Your Honor. You would not be
13 visiting, fortunate for you, the Defiance, Ohio foundry. So
14 there are -- the assets in that particular plant, you would not
15 be visiting.

16 THE COURT: How many assets are there?

17 MR. FISHER: Off the top of my head, I don't know.

18 THE COURT: All right. It's all right. Okay. It --
19 is it contemplated that I'll be shown all of the assets that
20 are in the two or three plants that I will visit, if I visit?

21 MR. FISHER: I think it would be possible to arrange
22 the visit for you to be able to see all of the assets. In at
23 least one case, the asset is not there, and so you'd be looking
24 at empty floor space, but you'd be able to view the area where
25 the asset had previously been located, Your Honor. The issue



1 is, we think, that -- first of all, it's true that, yes, we're
2 consenting, although --

3 THE COURT: Reluctantly.

4 MR. FISHER: -- I think -- reluctantly, and I think
5 we still are maintaining our objections with respect to timing.
6 The testimony, Your Honor has already resolved.

7 THE COURT: Testimony, I've resolved. I'm not going
8 to hear testimony.

9 MR. FISHER: But we do think that the trial
10 presentation of photographs, diagrams, expert testimony is
11 likely more than ample to educate the Court about what each
12 side wants to make sure that the Court knows. We think that to
13 the extent that the Court finds that it's not enough, that
14 there's a particular asset, for example, about which there was
15 testimony about some quick disconnect fitting that wasn't well
16 pictured in the photograph and Your Honor thinks it would be
17 helpful to see it for yourself, then we'd be able to --

18 THE COURT: It's not going to happen, but go ahead.

19 MR. FISHER: Well, I mean, and then -- well, then --
20 but sort of the point is you would then be standing before an
21 asset, knowing exactly what it is about that asset that caused
22 a question in your mind when you saw the photographic evidence
23 and heard the testimony. And we -- again, the touchstone here
24 is to be helpful. We had thought that that kind of approach
25 would, on the one hand, be more helpful, and on the other hand,



1 minimize any prejudice issues because we wouldn't be describing
2 assets to you pretrial, you would already have taken in all of
3 the evidence that there is to take in about these assets,
4 you've decided what considerations are relevant. You would
5 have heard all the admissible evidence, and then you would
6 approach the site visit with that framework firmly in mind,
7 Your Honor. And that's why we think -- that's why --

8 THE COURT: Go ahead.

9 Somebody have a phone on? Please close it off.

10 MR. FISHER: That's why we recommended that the site
11 visits happen after the trial or as the concluding phase of the
12 trial, to be more precise, Your Honor.

13 THE COURT: Okay. Anything else you want to add?

14 MR. FISHER: I don't think.

15 THE COURT: All right. Mr. Wolinsky?

16 MR. WOLINSKY: Your Honor, Marc Wolinsky, Wachtell
17 Lipton. What Your Honor has in mind, frankly, is not perfect,
18 but it's acceptable. So --

19 THE COURT: I'd be happy not to go if, you know --

20 MR. WOLINSKY: Your Honor, I can -- as a -- the kid
21 in you will have a ball. It is one of the most impressive
22 experiences that you will ever see to see a piece of sheet
23 metal at one end of Lansing Delta Township ultimately driving
24 off the assembly line as a finished car. It is -- it will be
25 an enjoyable experience, frankly. Whether that's meaningful or



1 not, I leave it to you. In terms of allowing the Court --

2 THE COURT: You've had this opportunity and you found
3 it --

4 MR. WOLINSKY: I have.

5 THE COURT: -- a moving experience.

6 MR. WOLINSKY: Not moving, but it was fun. It was
7 fun. I don't -- everybody who was there, I think, can -- we
8 can swear them in. Everyone will say it was a really fun
9 experience. But in terms of helping Your Honor resolve the
10 issues, frankly, there's no substitute for seeing --

11 THE COURT: Why do you think this is going to help me
12 resolve the issues?

13 MR. WOLINSKY: Your Honor, when you walk into -- it
14 will allow you to put these assets into context. It is one
15 thing to look at a picture of a machine ranging from, you know,
16 20 to 30 feet wide and 10 feet high to two football fields and
17 two houses high. But when you actually see the assets in
18 place, operating or not, you'll get a sense of two of the --
19 well, attachment, I frankly think is easy, and when you look --
20 when you'll see the pretrial briefs, there's really not much
21 disagreement between the parties as to whether these assets
22 attached -- are attached, either physically or constructively.

23 Where the disagreement is mostly is, to a certain
24 extent, adaptation and largely intent. And, Your Honor, when
25 you see the way the machines are integrated into the facility



1 physically and when you see the size of the -- when you see how
2 the machines are configured to operate in tandem, one in
3 relation to the other, it's hugely informative, both as to
4 adaptation and especially intent. And there's just no
5 substitute. Looking at a picture of a machine in isolation is
6 just not the same as seeing it. That's why, frankly, Your
7 Honor, we think it's important for you to see it before the
8 trial starts because when -- if you do it --

9 THE COURT: I've already said --

10 MR. WOLINSKY: Yeah.

11 THE COURT: -- if I'm going to go, it's going to be
12 before the trial starts.

13 MR. WOLINSKY: Okay. In turn --

14 THE COURT: You can show -- I don't know whether, in
15 addition to still photos, whether you have segments of tape
16 that you're showing and --

17 MR. WOLINSKY: We have some video, but the machines
18 are not operating in the video.

19 Now, as to timing, I know GM put in a letter. We've
20 actually been speaking to GM after that letter went in. I
21 think in light of what Your Honor has laid out, GM's concerns
22 are -- have been allayed. Their concern -- they obviously are
23 -- they don't want a lot of people, for safety and disruption
24 purposes. If we're not going to -- there was never going to be
25 a court reporter, but there was going to be a person --



1 THE COURT: Well, somebody wanted a court reporter,
2 but there isn't going to be one.

3 MR. WOLINSKY: There was never going to be -- court
4 reporter's out. In terms of making a video -- an audio
5 recording, we've been working on that with GM. Mr. Cavalli has
6 been doing that. When we toured -- when I toured GM, they had
7 headsets with walkie -- with microphones and you could speak to
8 each other because it is loud. And then we would just put a
9 audio recorder to pick up what's discussed over the headsets.

10 With those additions and without a photographer -- GM
11 really didn't want another photographer. We have 10,000
12 pictures. So with those additions, I think GM is indifferent
13 between before and after. Obviously, there will be a safety
14 briefing before we go into the plant and -- but I think Mr.
15 Ripley may be on the phone, and he can address any issues that
16 GM has, but I think GM's concerns have been addressed and
17 they're indifferent between before or after.

18 The only other thing I would say was when GM wrote
19 its letter, they didn't understand that May was after the
20 trial. So they didn't really -- they can speak for themselves,
21 but I don't think they wanted to put their thumb on the scale
22 as to that issue.

23 Your Honor, I really have nothing else to say on
24 that. I -- you know, I -- as I started, we think it would be
25 hugely important for Your Honor to be able to see the machinery



1 in place.

2 MR. RIPLEY: Judge, it Ed Ripley with King & Spalding
3 on behalf of New GM. Is this a appropriate time for me to be
4 heard?

5 THE COURT: Yes, it is. Go ahead.

6 MR. RIPLEY: Thank you, Judge. It's Ed Ripley with
7 King & Spalding. I'm actually in Houston, Texas, and so I
8 appreciate the Court permitting me to appear by telephone.

9 We have heard the Court, and for the most part, our
10 concerns have been addressed. Again, we're -- we want to be
11 able to accommodate the Court and the parties. We welcome you
12 to our facilities. Our concern was one of safety, and that
13 dealt with the number of people that were going to be coming
14 and, again, photographers and stenographers running around. As
15 you've heard, you have to have ear protection. You have to
16 have headsets. You just -- no way to have some kind of roving,
17 you know, discussion as you walk through these.

18 Mr. Mark Riashi, who is an in-house counsel at
19 General Motors, will be part of the coordinating and will be,
20 if you will, leading the tours. He was -- he had that same
21 role when this was done back in 2016, and so he knows how to
22 work with the plant personnel to get that done.

23 And so we just wanted to minimize the number of
24 people for safety and logistical concerns. And as we
25 understanding it, we're now talking about, in addition to the



1 court personnel, just a total, with lawyers and experts if they
2 come, of four or five. And that's a manageable group from a
3 safety and a protocols point of view.

4 And then on the timing, as we had indicated, you
5 know, our Lansing plant is going to be temporarily shut down,
6 so May -- during that May period, but again, we're happy to
7 have the visits during April so the parties can see the plants
8 in operation. And again, we just wanted to be able to
9 accommodate the parties in a way that made sense.

10 THE COURT: Thank you very much.

11 What did you -- I know you contemplated this would be
12 over two days, right? We --

13 MR. WOLINSKY: Right. Yes, Your Honor.

14 THE COURT: -- fly early one morning. Is that --

15 MR. WOLINSKY: Yes. And you'll fly early one
16 morning. One plant is a half-day plant, the Warren
17 transmission plant. Lansing Delta Township is a massive, 3.4
18 million square foot facility. It takes better part of a day to
19 track the 22 assets that are in that plant because we have them
20 going from stamping press, all the way to finish car -- wheels
21 being put onto the cars. But we've timed it out. The -- we've
22 already done this twice. I've done it once. The group have
23 done it another time. We think we can get it done in the
24 timeframe.

25 The only thing -- I don't want to cross swords with



1 Mr. Ripley, but my count is a little bit different. We would
2 have Your Honor plus a -- your person of your choosing, myself,
3 one other member of the defendant's year-end committee, they
4 don't let me go by myself. I assume Mr. Fisher will go. And
5 then my preference would be to have one of my experts at my
6 side as we walk through.

7 THE COURT: As I say, I don't have a problem about
8 having each of you having one of your experts at your side, but
9 I don't want one of the -- I don't want to get into this issue
10 about one of the testimonial experts --

11 MR. WOLINSKY: Right.

12 THE COURT: -- you know, said something during the
13 site visit, so I'm sure you can get somebody else to do it.

14 MR. WOLINSKY: Yeah. Understood, Your Honor. But
15 that --

16 THE COURT: I understand.

17 MR. WOLINSKY: It brings it up to seven.

18 THE COURT: Mr. Ripley, is that a problem?

19 MR. RIPLEY: Again, I think that's what we
20 understood, it was going to be five -- four or five plus the
21 Court and if you have one or more of your personnel. And
22 again, that's a manageable group from a safety and protocol
23 perspective.

24 THE COURT: So when you do this over two days, what
25 time do you fly out in the morning?



1 MR. WOLINSKY: It's in the protocol. Let's see,
2 there is a Delta flight that leaves at 9 a.m., gets in at
3 eleven o'clock.

4 THE COURT: All right. So you'd visit one plant in
5 the afternoon.

6 MR. WOLINSKY: Right.

7 THE COURT: And then, the next day, you visit --

8 MR. WOLINSKY: Next day, we contemplate starting at
9 7:30 a.m. at the visitor center. There's a hotel not far from
10 the plant. So there would be an orientation and safety
11 briefing at 7:30 a.m., and then we would plan to make a 6:30
12 flight back. I think it's an American flight. Yeah.

13 THE COURT: And I take it the parties did not come to
14 an agreement about the expenses of the trip.

15 MR. WOLINSKY: No, I think we did. We actually -- if
16 Your Honor has a budget for it, obviously, we're not into that,
17 but otherwise, we would split the expenses.

18 THE COURT: Mr. Fisher.

19 MR. FISHER: Your Honor, I think that's something we
20 need to talk about.

21 THE COURT: Well, now is the time to talk about it.

22 Whoever's on the phone, you need to either put it on
23 mute because I'm picking up heavy breathing.

24 Go ahead, Mr. Fisher.

25 MR. FISHER: Well, I'm confident -- if the issue is



1 cost, Your Honor, I'm confident we will be able to work that
2 out. I don't think that this issue needs to be held up over
3 that issue. I would like to be heard, though --

4 THE COURT: Sure. Go ahead.

5 MR. FISHER: -- definitely still on the issue of
6 timing because I think there's an issue just beneath the
7 surface here which gets to my prejudice concern.

8 We had no role in New GM's letter to this Court
9 saying that New GM's preference was for the visit to happen in
10 May because that's when the plant was closed and it would be
11 easier for them to accommodate the site visit at that time.
12 I've now learned today in court that the defendants have spoke
13 with New GM and have gotten them now to weigh in on the side of
14 the pretrial --

15 THE COURT: It had no effect on my statement earlier
16 that if it's going to happen, it's going to happen before
17 trial, okay? So that wasn't -- that was not a factor.
18 Obviously, they seem to prefer May, but I'm not -- if I'm going
19 to do this, it's going to be before the trial.

20 MR. FISHER: But what's interesting and I think what
21 Mr. Wolinsky's not saying is that what's so important to him
22 about the site visit is that you get to see these assets in
23 operation because it feeds the whole way that they think about
24 the issue of fixtures. Essentially, their experts say if
25 something is a fixed manufacturing asset and it's making cars



1 and it's part of making cars, it's a fixture. And --

2 THE COURT: And you say something different.

3 MR. FISHER: And we say something different. And the
4 Lansing plant is closed in May because there's \$520 million of
5 new equipment coming in. And so it's just an example of why I
6 think it's important for the Court to already have a frame in
7 place into which the Court will assimilate what it is that it's
8 viewing. It just speaks to my concern. I'm not saying that to
9 accommodate the Court's preference, we're not going to work
10 hard with the other side to try to work this all out, but I did
11 think that it was important to explain an issue that's just
12 beneath the surface that I think is a big part of what's really
13 going on here.

14 THE COURT: Maybe I'm being dense. And that issue
15 is, you don't want me to see it in operation?

16 MR. FISHER: It's not that I don't want you to see it
17 in operation, Your Honor. Your Honor will see it however Your
18 Honor wants to see it, and whether that's before trial or after
19 trial. It's that there are ways in which the view itself can
20 be skewed depending on the planning process and depending on
21 what's emphasized and what it is that they want you to see or
22 what it is that we want you to see. And we thought that the
23 process --

24 THE COURT: The two of you ought to be able to work
25 out what I'm going to see. There may be things you -- aspects



1 of it you want me to see and aspects that Mr. Wolinsky or
2 people on the defense side want me to see, and I can't believe
3 you're not going to work that out, you know. I don't mean this
4 as a pejorative. You have a storyline you want to tell, they
5 have a storyline they want to tell.

6 I want to give each side -- this is not testimony.
7 It's a site visit. I don't want to hear testimony in the site
8 visit. When I say I want a script, the world doesn't come to
9 an end if somebody adds sentences or I had a couple of
10 questions or something. That's why I want voice recording of
11 what's there. You know, you can quibble about it later.

12 MR. FISHER: Well, and, Your Honor, having heard now
13 from New GM in terms of a script, I think it might be best if
14 we tried to agree on a script and then had, for example, Mr.
15 Riashi or some non-party to the case just read what's on the
16 script, but we can work out those kinds of details. I have
17 nothing further to add, Your Honor.

18 THE COURT: Okay. So the trial is scheduled to start
19 April 24th. Passover holiday starts on April 10th and runs
20 through the 18th, and I will not travel during that period.
21 Looking at my calendar, dates that would work on my calendar
22 are Wednesday, April 5th, and Thursday, April 6th. I don't
23 feel like coming home late Friday night, so that's why I said
24 Wednesday and Thursday.

25 I don't have -- my calendar is open for those two



1 days. So I guess what I would request is that counsel confer
2 and see if they can work out arrangements for the site visit
3 for those days and iron out any issues about expense sharing,
4 revise the protocol to reflect -- and I'd ask, you know, Mr.
5 Fisher whether there -- I think I -- I tried to identify a
6 couple of the issues where I agreed with you, and so the
7 protocol would need to be revised to reflect that.

8 Are there other specific issues with -- and I'll give
9 you another chance because I want -- after hearing what I've
10 had to say today, you can both go back and try and refine it.
11 If there's still disagreements, you can submit
12 counterproposals. Just work -- you ought to be able to work it
13 out. Are there other issues in the proposed protocol that you
14 have a problem with, Mr. Fisher?

15 MR. FISHER: No, Your Honor. I think the most
16 important thing will be to agree on what is said about each of
17 the assets.

18 THE COURT: All right.

19 Mr. Wolinsky?

20 MR. WOLINSKY: Your Honor, there's one thing, and
21 it's really a matter of your preference. The pretrial briefs
22 go in on March 1st. I think from the pretrial briefs, you will
23 have a very good sense of what the -- what divides the parties.
24 The expert testimony on the 40 assets, which is previewed in
25 the pretrial brief, goes in on the 7th. If Your Honor would



1 like to have the pretrial -- the testimony before --

2 THE COURT: I kind of prefer not to have the
3 testimony before I see it.

4 MR. WOLINSKY: I think, frankly, that's fine. I
5 think you would be weighed down by a lot of detail that -- the
6 briefs will really give you the overview that you need to make
7 the site visit productive.

8 THE COURT: Okay. All right. Let's -- the other
9 thing that I indicated in the order scheduling the case
10 management conference was the requests from each side for
11 partial summary judgment motions on the issues identified in
12 the two February 3rd letters, I believe it is.

13 Mr. Fisher, let me hear from you first.

14 MR. FISHER: So, Your Honor, we submitted a pretrial
15 letter concerning the question of whether there is -- there are
16 any collateral -- there's any collateral at either of the two
17 Lansing plants by virtue of the fact that the fixture filing
18 concerning those plants does not designate the parcel of land
19 where those plants are located. I don't know if Your Honor has
20 a color copy of our letter because it had an exhibit that I
21 think is helpful to illustrate the point, which I'm happy to
22 hand up if Your Honor's exhibit is in black and white.

23 May I --

24 THE COURT: Give me a second, okay?

25 MR. FISHER: Sure.



1 THE COURT: I do have a color picture. I have the
2 color version.

3 MR. FISHER: Well, then, Your Honor will see on the
4 last page of the exhibit --

5 THE COURT: The last page, the February 3rd letter,
6 which is ECF docket 837.

7 MR. FISHER: Correct. The last page, this is an
8 agreed-to drawing. Both parties agree that this depicts -- the
9 red depicts the parcel of property designated by the fixture
10 filing.

11 THE COURT: Doesn't look like it has a lot of assets
12 on it.

13 MR. FISHER: Right. And so really the point of this
14 whole phase of the case is to decide what collateral is left
15 and what is it worth. And when it comes to Lansing Delta
16 Township, we think it's quite clear that as a matter of law,
17 under the Michigan UCC, a fixture filing designating parcel
18 section 28, which is what's outlined in red, is not sufficient
19 to provide constructive knowledge of a mortgage on sections 31
20 and 32, which are the parcels to the south and across Millett
21 Highway where the plants are located. And so we think it's
22 actually quite a simple motion.

23 It does not involve any expert issues. It's, as a
24 matter of law, is that fixture filing sufficient to provide
25 constructive knowledge of a mortgage had it been filed as a



1 mortgage on the property? We cited in our letter two cases
2 that we think are quite on point, which simply say when you --
3 under Michigan law, when you designate the wrong parcel, you
4 get that parcel, but you don't get some other parcel that you
5 may have intended.

6 And just to anticipate an argument from the other
7 side, because the other side also put in a letter on this
8 topic, and they argue, as a matter of law, that we are
9 precluded from even raising this issue and having it
10 adjudicated because they say that a challenge to the perfection
11 of liens had to have been filed by July 31st, 2009. And we
12 don't think that that is in any way a legal obstacle to this
13 motion, Your Honor, because it's not a challenge to the
14 perfection of any liens.

15 THE COURT: Anything that's on that big, open area,
16 you say is perfected.

17 MR. FISHER: Yeah. So that's -- I think that's a
18 clever, maybe too cute way of framing our argument. I think
19 it's correct. But I think more fundamentally, what our
20 complaint does say is, you know, we're challenging this UCC-1
21 because there was the UCC-3 and the question is whether it's
22 effective. And if we prevail, then we have to have a trial
23 about any surviving collateral and what it's worth. So there
24 were 42 facilities that were part of the collateral agreement
25 for this loan. There are lots of facilities where there were



1 no fixture filings made. There's a plant in Massena, New York.
2 There's a plant in Toledo, Ohio. Certainly, JPMorgan can't
3 come and argue now, well --

4 THE COURT: JPMorgan did the fixture filing?

5 MR. FISHER: Yes, Your Honor. They can't come and
6 argue, well, you know, we filed someplace close to Massena, New
7 York, so we're going to pick up the Massena collateral, too. I
8 mean, they have to -- they're the secured lender. They have
9 the burden of saying what their surviving collateral is, and
10 this is just a simple matter of figuring out what that is before
11 the Court then goes on to value it.

12 THE COURT: First time that this issue got at all
13 previewed for me, I think Mr. Wolinsky told me then that
14 Michigan has a doctrine about pertinence and that that was
15 their theory. I don't know whether that's still their theory
16 or not, but at least when I was told that, well, it was a
17 problem that it was -- it's across the street from where the
18 plant is, it's vacant land --

19 MR. FISHER: So that wasn't in their letter, Your
20 Honor. I have not heard that --

21 THE COURT: I'm just thinking back to --

22 MR. FISHER: Right.

23 THE COURT: I remember being told that some time ago.

24 MR. FISHER: I think that gets into whether we think
25 Lansing Delta Township is two plants or three plants, but I



1 don't know -- and, of course, we'll hear from Mr. Wolinsky that
2 that is a direct response to this argument, Your Honor. I'm
3 happy to move on to some of the other motion issues unless Your
4 Honor prefers to take each in turn.

5 THE COURT: No, go on to the other issues.

6 MR. FISHER: So I'd like to then turn, Your Honor, to
7 address what the defendants have said about the valuation issue
8 in their letter on that topic. They want to move to establish
9 that these assets need to be valued based on fair market value.
10 And in the course of doing that, they seem to, I think,
11 mischaracterize and suggest something about our valuation
12 position that just simply is not correct. These assets will
13 need to be valued in light of 506(a). They will need to be
14 valued in terms of the proposed disposition or use of the
15 collateral.

16 THE COURT: Does that mean that you agree that if the
17 proposed use or disposition of the assets was continuing to use
18 them on a going-concern basis, that that would be -- those
19 would be the principles that would apply in valuation?

20 MR. FISHER: No. Not in this case, Your Honor, and
21 here's why we think this case is different. And we actually
22 think that it's the defendants here who, in their approach to
23 valuation, are creating hypothetical alternative realities and
24 ignoring what actually happened.

25 The defendants here are trying to value the



1 collateral based on some kind of going concern value as though
2 the government bailout were a market transaction. The evidence
3 will show, and we think it's important that there be evidence
4 to show this to the extent that it's disputed, that the
5 government bailout was a bailout. It was not in any way a
6 market transaction. There will be testimony from Alex
7 Partners, from Evercore, from Treasury, all establishing that
8 there were many pre-bankruptcy efforts to market these assets
9 as a going concern. There were no private purchasers for these
10 assets. There weren't even folks interested in financing GM
11 beginning already in June 2008. The bankruptcy happened, of
12 course, in June 2009.

13 So these assets, as a collection of assets in use as
14 part of a going concern, had no value as such. So what we then
15 need to do is consider the fact that there was a sale proposed.
16 Judge Gerber actually fairly squarely addressed this issue in
17 TPC, and it was surprising to me that the defendants claimed
18 the TPC decision in their favor since Judge Gerber specifically
19 rejects an in-use approach to value in the GM case in valuing a
20 secured lender's collateral.

21 So the way we value these assets, Your Honor, is by
22 trying to figure out what a realistic market transaction for
23 these assets would have yielded. And I think that in their
24 letter, they're using the word "liquidation" in a somewhat
25 loose way. As the Court knows, a lot of these valuation issues



1 tend to come down to nomenclature, and frequently, the
2 nomenclature is not consistent across the cases.

3 So it's true, we use the word "liquidation" in our
4 valuation approach. We use -- we derive an orderly liquidation
5 valuation for these assets. We think in this case, it is the
6 appropriate way to value the assets because it takes account of
7 the market. Orderly liquidation value does not mean
8 foreclosure value. It does not mean forced liquidation value.
9 Our expert contemplates 9 to 18 months to sell these assets and
10 actually looked at market comparables to try to figure out what
11 the assets are worth. So we think that at -- we are trying to
12 give the secured lenders the benefit of a market value.

13 THE COURT: Let me ask a couple questions.

14 MR. FISHER: Yes.

15 THE COURT: Perhaps show my ignorance about the
16 underlying transaction, give rise to New GM. Is there an
17 agreement about what the value that's ascribed to the
18 transaction, Old GM to New GM?

19 MR. FISHER: Your Honor, their experts have offered
20 opinions about that. I don't know that there's agreement about
21 exactly what the value is and how much of it went to Old GM
22 versus how much of it remained with New GM.

23 THE COURT: Well, you're both probably aware that in
24 an admittedly different context in ResCap, where the issue near
25 the end of the case was whether the junior secured noteholders



1 had established an adequate protection claim, that the issue
2 was the value at the -- the value of the collateral at the
3 petition date versus the value at the effective date. The
4 committee and the debtors argued that the collateral should be
5 valued at the petition date at -- I don't remember whether they
6 said foreclosure or liquidation value, but that was -- and the
7 JSNs argued going concern.

8 And applying 506 and what I understood the case law
9 to mean, I said the appropriate -- particularly where there was
10 -- at the outset of the bankruptcy, there was a stalking horse
11 bidder. It was contemplated that the assets would be sold and
12 continued in use, that going-concern value was an appropriate
13 methodology, but I rejected the defendant's expert's testimony
14 about value. I found that going-concern value, but you had to
15 take the condition of the assets, (indiscernible) is damaged,
16 they had to be fixed, et cetera.

17 So I recognize it's a different context, but I -- so
18 I ask myself, okay, so here, the assets that I'm being shown
19 are in use and was -- I gather it was contemplated they would
20 be in use. For anything that's not in use that was -- this
21 wouldn't be the appropriate valuation methodology. But some
22 form of going-concern valuation with adjustments were
23 appropriate. That was -- I'm not making any ruling on this
24 because I haven't seen any briefing on it, but why isn't -- I
25 don't understand why that isn't the case. Of course, when I



1 asked my question about has there been an overall value
2 ascribed to the transaction, I mean, if you get a going-concern
3 value of these 40 assets and it vastly exceeded -- the
4 aggregate of that vastly exceeded what the whole transaction
5 was valued, well, that wouldn't make any sense either.

6 MR. FISHER: So, Your Honor, we're certainly reading
7 ResCap. I'm sure both sides are going to use to you that their
8 approach is consistent with ResCap. Here, I think what makes
9 it --

10 THE COURT: I know the ABI commission had a different
11 view of how one may value this, but --

12 MR. FISHER: What makes this different, a few things.
13 First of all, we think the evidence will show that these assets
14 had no going-concern value. In other words, there was no
15 market participant willing to purchase these assets as a going
16 concern. They're required --

17 THE COURT: There was one.

18 MR. FISHER: There was one. I would not call the
19 government a market participant here, and this is part of, I
20 think, what will be at issue in the case. We're talking about
21 a \$40 billion subsidy in order to get over the hurdle to make
22 it -- to have it make sense to use these assets on a
23 going-concern basis. So to value these on a going-concern
24 basis likely would have yielded values at zero or close to
25 zero, where these assets actually are more valuable if they



1 were sold off piecemeal because the business had no going-
2 concern value, Your Honor. Yes. And that's what we think the
3 evidence will show. As Your Honor mentioned in summarizing
4 ResCap, there was a stalking horse here.

5 THE COURT: I hope I fairly summarized it, but --

6 MR. FISHER: There was no stalking horse bidder here.
7 There was no private party that indicated any interest in these
8 assets as an assemblage of assets.

9 THE COURT: It only takes one buyer, you know, and if
10 it happens to be the U.S. government, well, so be it.

11 MR. FISHER: Well, but it was the U.S. government
12 saving the U.S. economy that stepped in, and New GM is now a
13 successful business. But the idea of taking the value of that
14 government subsidy and giving it to the secured creditors, we
15 think is no way to value these assets using any kind of fair
16 market value standard.

17 THE COURT: What you're persuading me is that there
18 are disputed issues of fact and law and that summary judgment
19 is not appropriate and that it's going to have to be briefed
20 for trial.

21 MR. FISHER: And that's why, Your Honor, we didn't
22 submit a letter on this issue because we do acknowledge that
23 there are likely disputed issues of fact. If the Court were to
24 allow them to make a summary judgment, I think we would want to
25 reserve our right to cross-move in the event that we saw their



1 papers and thought that there were some way to thread the
2 needle without touching on disputed facts, but I think that
3 there are many disputed facts here that go to the proper way to
4 value these assets, Your Honor.

5 THE COURT: Okay.

6 MR. FISHER: I know that it -- in ResCap, it was very
7 important to the Court that the valuations take account of the
8 realities of the sale. So, for example, the ResCap sale
9 required consent from an RMBS trustee. We don't think that
10 their approach to value is taking account of any of those kinds
11 of factors. In fact, they value these assets using a cost
12 approach only. They don't even use the market approach, Your
13 Honor. So for them to send in a letter saying that our
14 valuation is not fair market value, we just think it simplifies
15 and misstates the respective parties' positions in an attempt
16 to make it look as though this is a matter that can be resolved
17 as a matter of law, when really it can't. Thank you.

18 THE COURT: What's the next one?

19 MR. FISHER: Okay. The next one. Well, perhaps in
20 the spirit of taking something off Your Honor's plate for
21 today, we also filed a pre-motion letter on three issues that
22 are very important. One, the effectiveness of the UCC-3 as it
23 relates to the term lender defendants, not JPMorgan, which is
24 an issue that, of course, Your Honor left open in denying the
25 term lenders' motions to dismiss. We think that that issue is



1 absolutely amenable to summary judgment. There's been an
2 opportunity for additional discovery. There's nothing new
3 that's turned up. The --

4 THE COURT: Well, the discovery period hasn't run.

5 MR. FISHER: Fact discovery has concluded on the
6 UCC-3 issues. There's a stipulation specifically governing
7 that issue, Your Honor. And what's left is for us to take the
8 depositions of their two expert witnesses. I don't think that
9 that's going to materially change anything. But I also think
10 that, as we made clear in the letter, we know that there's a
11 lot to do before trial. We don't think that it makes sense for
12 us to file this motion before the trial. We still wanted to
13 put it on the Court's radar because it's something that we've
14 made reference to before.

15 We have said before that we think it's amenable to
16 summary judgment. We still think it's amenable to summary
17 judgment. We think that it will help promote the ultimate
18 resolution of this case to have that issue addressed as soon as
19 possible after the representative assets trial. So since the
20 purpose of today was, in part, to deal with pre-motion issues
21 and summary judgment issues, we just didn't -- we wanted to put
22 it on the agenda, but we're not looking for a briefing --

23 THE COURT: All right.

24 MR. FISHER: -- schedule today, Your Honor. And
25 similarly, with regard to earmarking and constructive trusts,



1 which are two defenses that are asserted across the entirety of
2 the defendant pool that we think are, as a matter of law,
3 meritless defenses, discovery as to those two issues has not
4 concluded.

5 Mr. Bennett submitted a letter saying he still wants
6 to take the deposition of Mr. Mistry. There's been a lot of
7 testimony that relates to whether or not there was any
8 earmarking or whether or not there's any basis to put a
9 constructive trust on the one and a half billion dollars or on
10 the collateral, and there's simply no evidence, Your Honor, to
11 meet the standard hereto. We're not looking for a briefing
12 schedule today, but this is an issue that we've mentioned in
13 the past that we think will be important in terms of ultimately
14 positioning this case for resolution post-trial. And so we
15 wanted to make sure that it just remained on the Court's radar,
16 which is why we submitted the short letter that we did.

17 THE COURT: Thank you, Mr. Fisher.

18 MR. FISHER: I think, Your Honor, there may be some
19 stray case management issues, but in terms of pre-motion
20 issues, I don't think that -- I think I've addressed them all.

21 THE COURT: All right, thank you.

22 Mr. Wolinsky.

23 MR. WOLINSKY: Your Honor, thank you. Let me just
24 focus on -- I guess the issue for today is whether these
25 motions are going to be productive and whether there are



1 disputed issues of fact that preclude spending the time on
2 briefing, starting with Lansing Delta Township, their motion
3 that the fixture filing was ineffective.

4 Under Michigan law, the test is constructive notice,
5 not actual notice, and there's also a concept of a duty of
6 inquiry. So if Your Honor has the fixture filing --

7 THE COURT: Let me --

8 MR. WOLINSKY: -- it's appended to their letter.

9 THE COURT: Sure. Hang --

10 MR. WOLINSKY: Actually, the fixture filing -- they
11 are assuming, for purposes of their motion, that this piece of
12 paper would have been discovered. Okay. So in order to find
13 this piece of paper, there are a series of steps that a title
14 searcher would go through that would give much more context
15 than the piece of paper itself provides. But just start from
16 the premise that somebody picked up this piece of paper and saw
17 on the front page, all fixtures located on the real estate
18 described, and then go to the description, Exhibit A, GM
19 Assembly, Lansing Delta Township at the -- in bold.

20 THE COURT: It's the metes and bounds that doesn't --

21 MR. WOLINSKY: The metes and bounds is the problem,
22 but you don't -- just picking up this piece of paper, fixtures,
23 GM Assembly, Lansing Delta Township, would a prospective lender
24 or purchaser of GM Assembly, Lansing Delta Township, however
25 you manipulate the words, GM Lansing Delta Township, GM



1 Stamping, GM Manufacturing Division, whatever, would that --
2 those words put you on inquiry notice? And I think the --

3 THE COURT: What's the address of 8400 Millett
4 Highway?

5 MR. WOLINSKY: That's the empty lot. But if you just
6 picked up the piece of paper --

7 THE COURT: So the metes and bounds is the empty
8 lot --

9 MR. WOLINSKY: Empty lot.

10 THE COURT: -- and the address is the empty lot.

11 MR. WOLINSKY: Yes. Although actually, even in the
12 metes and bounds, there's an issue because section 28, you see
13 at the very end --

14 THE COURT: Yes.

15 MR. WOLINSKY: -- and then it says T4NR3W, those --
16 if you went and looked at a map, those would throw you off, and
17 they don't correspond to section 28, is my understanding. But
18 this is an issue -- if the question is constructive notice and
19 inquiry, duty of inquiry, and if you only picked up this piece
20 of paper, would somebody be on -- have a duty of inquiry, this
21 is not anybody in the abstract. This is someone who is going
22 to either loan to GM or buy this facility. They would be on
23 inquiry notice. That's why we think this issue is not ripe for
24 summary judgment.

25 If Your Honor would like us to brief it, obviously



1 we're happy to do it, but I don't think it's a productive use
2 of your time.

3 THE COURT: Well, if I don't get briefs on summary
4 judgment, when is this issue going to get --

5 MR. WOLINSKY: We would put on an expert at trial who
6 would actually walk Your Honor through what would happen if he
7 were asked to do a search on a plant. So he gets a phone call
8 from a prospective lender or purchaser, what would you do? And
9 he'll walk you through the steps. He's a title searcher, and
10 he'll walk you through the steps. They have an expert witness
11 who would do -- we actually have a motion in limine
12 contemplated by -- per his expert witness, but assuming he has
13 to testify, he would do the same thing.

14 And Your Honor would then have to ascertain whether
15 someone would be on constructive notice and whether they would
16 have a duty of inquiry and whether those two things together
17 would lead them to conclude, at least pick up the phone and
18 call GM and find out, hey, what's going on here, I see this
19 fixture filing, if I lend against your fixtures or if I buy the
20 plant, is there somebody ahead of me? So that's our
21 perspective on that issue.

22 In terms of our issue on Lansing Delta Township, it's a
23 two-year statute of limitations type issue. If you look at the
24 -- I apologize. We did not cite a case to you in our letter.
25 We should have. There's a case called Cen-Pen in the Fourth



1 Circuit, 58 F.3d 89, which addresses this, not only the --
2 which says that the existence of a lien has to be challenged
3 within the two-year statute of limitations. If you look at the
4 answer that we submitted before I was in the case and one of
5 our summary judgment briefs, we -- there's a specific reference
6 to the fact that there's 26 fixture filings secured by
7 collateral.

8 So there's no -- we were on record, bank was on
9 record, long, long ago that it had fixture filings against --
10 there were 26 existing fixture filings against collateral, and
11 now they're saying, well, one of them wasn't against
12 collateral, it was against an empty field. The time to flag
13 this issue was long, long ago.

14 So that's our motion. Again, Your Honor, we think
15 it's a legal issue, not a -- no factual issues to be decided,
16 and we think it's an appropriate issue.

17 On valuation, for purposes of the valuation dispute,
18 we don't think there are any disputed issues of fact. We're
19 willing to accept that as of June 30th, the government was
20 bailing out GM. No dispute. The question then is, in light of
21 the fact that the purchase was a subsidized purchase, a
22 government bailout, does that nonetheless mean that the asset
23 should be valued in the manner that the plaintiffs propose,
24 which is an asset-by-asset disposition of each asset on a
25 liquidation basis without any regard to the fact that they were



1 going to continue in use in place in an enterprise that
2 everyone understood and contemplated would be profitable.

3 So at the end of the day, the issue starts and ends
4 with section 506(a). The proposed disposition of this
5 collateral was to New GM as an operating concern for continued
6 use in place. In light of the proposed disposition -- it's as
7 simple as that.

8 In light of the proposed disposition, the assets have
9 to be valued in continued use, not on a piecemeal basis, not on
10 the assumption that a stamping press that's feeding a body
11 cell, that's feeding a general assembly line, that's feeding a
12 paint shop, that's feeding a place where every piece comes
13 together and a car drives off the line, that none of that was
14 going to remain in place. It's really as simple as that, and I
15 think the case law is equally as instructive.

16 Their -- it's nothing of their scale, but you know,
17 when we brief this issue to Your Honor, there are cases, one
18 comes to mind, the lenders to a chain of nine Wendy's
19 restaurants. They had fixture filings against six of the nine
20 restaurants, and the issue was, do we value those fixtures as
21 though the chain -- the restaurants get, you know, dismantled
22 or do we value the assets in those six restaurants as part of a
23 going concern of nine restaurants? The answer is the obvious
24 one, 506(a), continuing use.

25 Much larger, In re LTV Chateaugay. The question was



1 the lenders had filings against the plants, steel plants. And
2 in this case, it actually went against the lenders. The Court
3 said, look, these plants don't exist in isolation, these plants
4 exist as part of a going concern that has environmental
5 liabilities, so we're going to value the plants, but we're not
6 going to value the plants as though they don't exist in the
7 real world with environmental liabilities, you're stuck with
8 the good and the bad.

9 And here, you know, we accept we're stuck with the
10 good and the bad. To the extent there's depreciating, to the
11 extent there's functional obsolescence, to the extent there's
12 economic obsolescence, we accept that, but what we don't accept
13 is that these values can be premised on the basis that this
14 extraordinary business enterprise that constituted New GM was
15 dismantled and sold piece by piece by piece by piece. We think
16 that's an issue that could be resolved on summary judgment.

17 And, Your Honor, it is a huge issue. It is a \$1.5
18 billion issue. It's the difference between everybody in this
19 room going home happy and everyone in this room -- everyone on
20 this side of the room going home happy and everyone on this
21 side of the room going home very disappointed. It's a huge
22 issue, and it can be decided on summary judgment.

23 And the other thing I would say, it will have an
24 impact on the scope of the trial. A lot of the testimony that
25 you would be hearing about hypothetical things that didn't



1 happen would be swept away. And also, testimony from our side.
2 You know, we would put on testimony that if the federal
3 government had never shown up, what would have happened? The
4 government didn't show up in December and then got pregnant and
5 then continued through to the sale. If the government had not
6 shown up in December, we would be putting on evidence that GM
7 would have found a private solution in bankruptcy. That whole
8 hypothetical gets washed out of the case if Your Honor decides
9 this motion.

10 So I think it's -- to sum up, it's a motion that can
11 be decided as a matter of law. This is the right time to
12 decide it because it will affect the scope of the trial, and
13 it's a huge issue that will have massive implications to the
14 case, and it's one that the parties need guidance on.

15 THE COURT: Well, and to the extent you tell me there
16 are no disputed issues of fact, it's not going to take trial
17 time to put in the facts that you say.

18 MR. WOLINSKY: No.

19 THE COURT: It's -- go ahead.

20 MR. WOLINSKY: No, no. If we have to prove what
21 would have happened without the government, which is what we
22 would do, we would put on a case that says without the
23 government, GM would have successfully reorganized and these
24 assets would have continued in use, may not continued in use
25 the way it did, but they would have continued in use in another



1 way. So there's a whole set of hypotheticals that get swept
2 out of the case if Your Honor decides this issue.

3 THE COURT: All right. Anything else you want to
4 say?

5 MR. WOLINSKY: No, thank you.

6 THE COURT: Mr. Bennett.

7 MR. BENNETT: Your Honor, one technical point.

8 THE COURT: Just make your appearance.

9 MR. BENNETT: Sorry. Bruce Bennett, Jones Day, for
10 term lenders. One technical point about your comment about the
11 open field. The granting language in the relevant security
12 document is clear that the Lansing fixtures are included. This
13 is 100 percent only a perfection issue. There was no challenge
14 to the validity, perfection, or anything of the grant of a lien
15 on fixtures. So I don't think Your Honor's statement is an
16 accurate --

17 THE COURT: I was being a little flippant in my
18 comment.

19 MR. BENNETT: Okay. So the -- so there is a -- I
20 think a very live statute of limitations problem with that
21 aspect of the plaintiff's case.

22 THE COURT: Okay.

23 MR. BENNETT: And I also think that one is purely
24 legal, amenable to summary judgment and could, if granted,
25 resolve a problem that would be a kind of extra piece of the



1 trial.

2 THE COURT: Thank you. Anybody else want to be
3 heard? Mr. Spiegel?

4 MR. SPIEGEL: Good morning, Your Honor. John Spiegel
5 for the term lenders. Happy Valentine's Day to you.

6 I just want to respond very briefly to Mr. Fisher's
7 statement that there's nothing new in the term lenders'
8 challenge to the UCC-3 effectiveness. Your Honor has the
9 letter we submitted yesterday morning in response to Mr.
10 Fisher's of Friday. We explained there that we have a very
11 different factual record that we are presenting here than the
12 one on which the court of appeals decided it -- rendered its
13 decision.

14 The court of appeals assumed, because JPMorgan and
15 AAT agreed, that no one at Mayer Brown noticed the erroneous
16 UCC-3 -- UCC-1, the term loan UCC-1. We're going to submit
17 powerful testimony that the lawyer at Mayer Brown was doing
18 this before the closing, had pointed out to him the schedule --
19 he testified to the Bates number -- the schedule on the UCC-1
20 financing statement for the term loan that lists 42 properties
21 in 12 states. The paralegal, Mr. Gonshorek, pointed this out
22 to him and said -- the paralegal says, I'm concerned that this
23 UCC-1 doesn't relate to the synthetic lease because the cities
24 and states are broader than the ones in the synthetic lease,
25 which is only in Michigan, five properties in Michigan. And



1 Mr. Green, the lawyer who had been working on this, preparing
2 the checklist for the synthetic lease, sees this and is told
3 that this UCC financing statement doesn't relate.

4 Why is that important? Because under the law of
5 agency, the restatement says that the agent, here, Mayer Brown,
6 is not authorized by the principal, JPMorgan, to file the
7 termination of this UCC-1 if that agent, Mayer Brown, could not
8 have reasonably believed, could not have reasonably believed,
9 that that was consistent with JPMorgan's intentions.

10 So the Second Circuit's operating under the
11 assumption, undisputed fact, nobody at Mayer Brown noticed the
12 problem. We're going to show you the lawyer there admitted
13 that the problem was pointed out to him. And as the
14 restatement of agency, which the Second Circuit says governs
15 here, as the restatement of agency says, it's the horse and the
16 cow. If I, as the agent, know that you want to sell your
17 horse --

18 THE COURT: Sounds like you have an action against
19 the purported agent. It doesn't -- that's what it sounds like
20 to me.

21 MR. SPIEGEL: No, Your Honor. No, Your Honor.
22 That's not what we're saying, and it's very important that I
23 make this distinction. The law -- the issue is, was there a
24 lack of authorization for Mayer Brown to file the termination
25 statement based on instruction from JPMorgan. That's the



1 issue. Did they have a lack of authorization? If there was a
2 lack of authorization, then the UCC-3 is not effective. This
3 is not about Mayer Brown's exposure or anything else. This is
4 about was there a lack of authorization under the restatement
5 of agency. And the cow and the horse is, if I know you want to
6 sell your horse and I get an instruction from you to sell the
7 cow, I can't go out and sell the cow. That's -- I'm not
8 authorized to sell the cow. And that's right out of the
9 restatement here.

10 And what happened here is the lawyer at Mayer Brown
11 had pointed out to him, hey, man, that's a cow, that's not a
12 horse, you can't sell the cow because the instruction -- what
13 the principal wants done is selling the horse. So I agree with
14 Mr. Fisher, this is not an issue that has to be resolved now.
15 I completely disagree with him when he says there's nothing new
16 in our challenge to the UCC-3.

17 THE COURT: I read your letter, Mr. Spiegel.

18 MR. SPIEGEL: And a quickie summary judgment motion,
19 Your Honor, while right after the trial, is not consistent with
20 Your Honor's full and fair opportunity to litigate the issue.

21 THE COURT: Mr. Fisher indicated that he was flagging
22 the issue for the agenda today, but was not seeking a briefing
23 schedule. I've got a very full plate, Mr. Spiegel. I'm
24 mindful of your comments. I read your letter carefully. I'm
25 not scheduling briefing on summary judgment. We're going to go



1 forward with the trial on the fixtures, and then we'll see
2 where we are.

3 MR. SPIEGEL: Thank you, Your Honor.

4 THE COURT: Thanks, Mr. Spiegel.

5 Anything else anybody wants to raise?

6 Mr. Fisher.

7 MR. FISHER: Just to come back, Your Honor, to the
8 valuation issue. And not particularly on the merits, except to
9 say that there are a lot of disputed fact issues here because
10 even if Mr. Wolinsky concedes that the subsidy was a subsidy,
11 does that mean that he's conceding that as of June 30, 2009,
12 there was no fair market value of these assets as a going
13 concern? It's not clear to me exactly what he means when he
14 then slips from going concern to in-use value, which is a way
15 of valuing these assets that TPC specifically rejected. Judge
16 Gerber specifically rejected that way of valuing it.

17 But more to the point, this is the heart of the
18 trial, as Mr. Wolinsky said. If this issue were to be briefed
19 separately on summary judgment, it would require rethinking
20 many elements of pretrial preparations.

21 THE COURT: Let me stop you. No summary judgment
22 motions before the trial. From what I've read and listened to
23 today, it seems to me that there are disputed issues of
24 material fact that are going to have to be resolved with
25 potentially very complex legal issues. You can all brief it as



1 part of your pretrial briefing. If you believe that certain
2 issues can be resolved as a matter of law, you'll say that in
3 your pretrial briefs. I want everybody's focus completely on
4 getting ready for the April 24th trial.

5 So to allay Mr. Spiegel's concern, I'm not -- at this
6 stage, I'm not prepared to think about the issues of whether
7 the additional defendants have arguments about why they're not
8 bound by the UCC-3 filing or whatever. We'll get to that.
9 Okay. I'm not setting a schedule on that now. I want you all
10 focused on getting ready for the April 24th trial.

11 So the request to file motions for summary judgment,
12 partial summary judgment, in advance of the trial are denied
13 because, based on what I've heard, it seems to me I need to
14 hear the evidence and consider all of the arguments. I think
15 the valuation issues, certainly, I found them difficult in
16 ResCap. I'm sure I'm going to find them difficult here, as
17 well. But the unique circumstances of the GM bankruptcy, the
18 government's role in the transactions that ensued, we'll see
19 how that all plays out.

20 All right. I think that -- is there anything else
21 that has to get resolved for today? Mr. Fisher?

22 MR. FISHER: Nothing more that needs to get resolved,
23 Your Honor, but I just wanted to quickly -- in spirit of
24 focusing on the trial --

25 THE COURT: Sure.



1 MR. FISHER: -- and getting ready for that, I wanted
2 to ask for Your Honor's guidance, and then, of course, we will
3 consult with one another about page limits for pretrial briefs.
4 We're dealing with 40 assets. There are different ways to deal
5 with that, but even if one were to devote a few pages to each
6 asset, that's a very lengthy brief. And so I just wanted to
7 mention the issue and perhaps get some indication of preference
8 from the Court, and then happy to speak with the defendants and
9 come to some agreement about what those ought to look like.

10 THE COURT: When the trial ends, I'm going to ask for
11 proposed findings of fact and conclusions of law, and it seems
12 to me in the proposed findings of act, that's when you'll
13 really lay out the evidence with respect to each of the 40
14 fixtures. It seems to me for the opening trial briefs, in
15 terms of the facts, you know, I expect you to talk about
16 whether -- I don't know what you're going to drill down on each
17 of the 40 assets.

18 But I'm -- I had, earlier -- shortly after I took
19 over this case, I think I had you all brief the preliminary --
20 I don't know what you call them, the preliminary briefs on
21 principals for fixtures in the three states. I guess we're
22 only dealing with two of the three states. Is that right? So
23 I have those. I actually set them aside and would need to go
24 back, but I -- so I'm very interested in the pretrial briefs,
25 the focus and maybe your views have changed. Maybe not. I



1 don't know. You have a lot more knowledge about these 40
2 representative assets. They've been agreed on, and so I don't
3 expect hundreds of pages.

4 Shorter is better with respect to facts on each of
5 the 40. I mean, I think the aim in the 40 was they would
6 hopefully be representative assets that can be characteristics
7 of the 40 that you think are particularly representative and
8 why you think it leads to one result or another. I think using
9 examples of the specific assets to identify what you think
10 makes them representative and how those facts may apply -- I
11 know the facts as to each of them are going to be somewhat
12 different, but -- so that's what I have in mind.

13 I mean, I don't know whether that's of any -- so I --
14 you know, I haven't set page limits, but -- you know, I don't
15 know enough about the 40 assets. I'd be picking numbers at
16 random at this stage. I think the two of you ought to sit down
17 and try to agree on what you consider to be reasonable page
18 limits.

19 You know, I had closing argument in Lyondell two
20 weeks ago. I had, like, 500 pages of briefs and proposed
21 findings of fact to deal with before the argument. You know,
22 it was a complicated trial and everything. I don't want -- I
23 certainly don't want, in the pretrial briefs, hundreds of pages
24 of materials. I mean, I think the goal is to find --
25 hopefully, you'll have agreed on what you consider 40



1 representative assets. Yes, there are some that may fall in
2 different categories. Some, one side says clearly are
3 fixtures, the other side says, no, they're not. You know,
4 focus on those things that you think made them representative
5 one way or the other for your position. And I'll have to hear
6 all the evidence at trial.

7 I don't know whether that helped you or not, Mr.
8 Fisher, but I don't -- I'm not sure -- any page limit I would
9 set now would be totally arbitrary.

10 MR. FISHER: Understood. Thank you, Your Honor.

11 THE COURT: I don't know, Mr. Wolinsky, whether then
12 you want to speak to on that.

13 MR. WOLINSKY: Well, Your Honor, I'm happy to tell
14 you what we're contemplating --

15 THE COURT: Okay. Tell me --

16 MR. WOLINSKY: -- and see if that meets what you
17 need.

18 THE COURT: -- tell me what you're contemplating.

19 MR. WOLINSKY: We're working on a brief that lays out
20 the legal standards on fixtures. The one thing we now know
21 that we didn't know before is exactly how the plaintiff's
22 expert comes to his conclusions. So we're going to give you a
23 preview of why we think he's wrong, and I assume you'll hear
24 the same thing from them.

25 I was thinking that we would have less than a page,



1 maybe a paragraph or two on each asset, just so you know what
2 it is, what it does, where it is, how big it is, with a
3 picture. We're debating whether to put the picture in the
4 brief or give you a --

5 THE COURT: Instead of a picture book?

6 MR. WOLINSKY: Yeah. And basically, I kind of view
7 this as the playbill for the trial. So there will be a --

8 THE COURT: Sounds like a reasonable approach. I
9 don't know what you were contemplating, Mr. Fisher, but --

10 MR. FISHER: That sounds reasonable, as well, and --

11 MR. WOLINSKY: And it's less than 100 pages.

12 MR. FISHER: -- as Your Honor suggested, you know,
13 we'll discuss this.

14 MR. WOLINSKY: Probably closer to 75 than 100.

15 THE COURT: Okay. All right.

16 MR. WOLINSKY: And then on valuation, obviously,
17 you've got a preview as to the ships passing in the night on
18 valuation.

19 THE COURT: Well, you know, the ships were passing in
20 the night in ResCap, as well, and one side wound up
21 disappointed, and that's what's going to happen here.
22 Somebody's going to be disappointed at the end of the day,
23 although the strange -- as I said, the strange thing in ResCap
24 was I agreed with the defendants about the methodology, I just
25 found that their assumptions were completely off base and they



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C E R T I F I C A T I O N

I, Alicia Jarrett, court-approved transcriber, hereby
certify that the foregoing is a correct transcript from the
official electronic sound recording of the proceedings in the
above-entitled matter.

Alicia J. Jarrett

ALICIA JARRETT, AAERT NO. 428 DATE: February 15, 2017
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