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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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In re:

MOTORS LIQUIDATION COMPANY, f/k/a GENERAL MOTORS CORPORATION, *et al.*,

Debtors.

Chapter 11

Case No. 09-50026 (MG)
(Jointly Administered)

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MOTORS LIQUIDATION COMPANY AVOIDANCE ACTION TRUST, by and through the Wilmington Trust Company, solely in its capacity as Trust Administrator and Trustee,

Plaintiff,

against

JPMORGAN CHASE BANK, N.A., *et al*.,

Defendants.

Adversary Proceeding

Case No. 09-00504 (MG)

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MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFF'S MOTION *IN LIMINE* TO EXCLUDE THE
EXPERT REPORT AND TESTIMONY OF JAMES M. MARQUARDT

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES ii

PRELIMINARY STATEMENT 1

BACKGROUND 3

ARGUMENT 4

I. The Applicable Legal Standard 4

II. Mr. Marquardt's Opinion Is Not Relevant to the Issue of Whether Defendants Had a Perfected Security Interest in the Fixtures at The Lansing Plants 6

III. Mr. Marquardt's Opinion that a Real–Property Searcher Would Have Discovered the Eaton County Fixture Filing Is Speculative and Should Be Excluded 9

CONCLUSION 10

TABLE OF AUTHORITIES

Page(s)

Cases

Amorgianos v. Nat'l R.R. Passenger Corp.,
303 F.3d 256 (2d Cir. 2002)....................4, 5

Boucher v. U.S. Suzuki Motor Corp.,
73 F.3d 18 (2d Cir. 1996) 6

Daubert v. Merrell Dow Pharms., Inc.,
509 U.S. 579 (1993)....................2, 4, 5, 8

Dora Homes, Inc. v. Epperson,
344 F. Supp. 2d 875 (E.D.N.Y.2004) 6, 9

Hickey v. City of N.Y.,
173 F. App'x. 893 (2d Cir. 2006) 4

Highland Capital Mgmt., L.P. v. Schneider,
379 F. Supp. 2d 461 (S.D.N.Y. 2005)....................5, 8, 10

Lippe v. Bairnco Corp.,
288 B.R. 678 (S.D.N.Y. 2003)....................5

Moyer v. Edlund (In re Vandenbosch),
405 B.R. 253 (Bankr. W.D. Mich. 2009)....................6, 7, 8

R.F.M.A.S., Inc. v. So,
748 F. Supp. 2d 244 (S.D.N.Y. 2010)....................5

In re Rezulin Prods. Liab. Litig.,
309 F. Supp. 2d 531 (S.D.N.Y. 2004)....................5

S.E.C. v. Tourre,
950 F. Supp. 2d 666 (S.D.N.Y. 2013)....................5

U.S. Commodity Futures Trading Comm'n v. Moncada,
No. 12 Civ. 8791, 2014 WL 2945793 (S.D.N.Y. June 30, 2014)....................5, 8

Zaremba v. GMC,
360 F.3d 355 (2d Cir. 2004)....................5

Statutes

Mich. Comp. Laws Ann. § 440.9502(1)(c) (West 2016) 7

Mich. Comp. Laws Ann. § 440.9502(2) (West 2016) 1, 6

Mich. Comp. Laws Ann. § 440.9502(2)(c) (West 2016)....................7

Other Authorities

Fed. R. Civ. P. 401 5

Fed. R. Evid. 702 ....2, 5

Plaintiff Motors Liquidation Company Avoidance Action Trust (the "**Trust**" or "**Plaintiff**") respectfully submits this memorandum of law in support of its motion to exclude the proposed expert report and testimony of James M. Marquardt from evidence at the upcoming trial on the 40 representative assets selected by the parties.

PRELIMINARY STATEMENT

The parties agree that the UCC-1 fixture filing recorded in Eaton County, Michigan, listing General Motors Corporation ("**Old GM**") as debtor (the "**Eaton County Fixture Filing**"), includes a metes-and-bounds description and a street address that identify a vacant parcel across the road from where the Lansing Delta Township Assembly plant and Lansing Regional Stamping plant (collectively, the "**Lansing Plants**") are located.[1] At trial, this Court will be asked to determine whether the Eaton County Fixture Filing was nonetheless sufficient to give constructive notice of a lien against fixtures at the Lansing Plants. *See* Mich. Comp. Laws Ann. § 440.9502(2) (West 2016) (a fixture filing must "[p]rovide a description of the real property to which the collateral is related sufficient to give constructive notice of a mortgage under the law of this state if the description were contained in a record of the mortgage of the real property").

To supposedly address this issue, Defendants offer the opinion of James M. Marquardt. *See generally*, Fisher Decl. Ex. C (Expert Report of James M. Marquardt ("**Marquardt Rep.**")). In paragraphs 37 through 53 of his report, Mr. Marquardt describes a convoluted search process that he contends would have put a potential purchaser on notice that JPMorgan Chase Bank, N.A. ("**JPMorgan**") "*may* have had a lien against the fixtures" in the Lansing Plants. *Id.*

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[1] Declaration of Eric B. Fisher ("**Fisher Decl.**") Ex. A (Eaton County Fixture Filing); Fisher Decl. Ex. B (Adv. Pro. Dkt. No. 827, Ex.1, a stipulated sketch map of metes and bounds description in the Eaton County Fixture Filing).

(Marquardt Rep. ¶ 53) (emphasis added). Then, the crux of Mr. Marquardt's opinion is that this potential purchaser "would have contacted General Motors" about the Eaton County Fixture Filing, and that General Motors "then would have disclosed to the potential purchaser or lender the relevant details about the lien." *Id.* (Marquardt Rep. ¶ 54); *see also id.* (Marquardt Rep. ¶ 10). As a result of this hypothetical, speculative chain of events, Mr. Marquardt opines that a potential purchaser would have been on inquiry notice that the Eaton County Fixture Filing pertained to a lien against assets in the Lansing Plants.

The report and the anticipated testimony of Mr. Marquardt do not meet the standards for admitting expert testimony under Federal Rule of Evidence 702 or *Daubert v. Merrell Dow Pharms., Inc.* 509 U.S. 579, 597 (1993), for the following two reasons:

First, Mr. Marquardt's opinion is not relevant because it does not relate to the applicable legal standard imposed by Michigan statutory law. Under Michigan's enactment of the Uniform Commercial Code ("**U.C.C.**"), the only relevant question is whether the Eaton County Fixture Filing itself was sufficient to provide constructive notice of a lien against the Lansing Plants. Mr. Marquardt does not offer any opinion on this question. Rather, he offers an irrelevant opinion: namely, that a searcher would have undertaken a series of broad searches that could have led the searcher to ask Old GM whether there was a lien against the Lansing Plants; and that the unknown interlocutor at Old GM would have then told the searcher that JPMorgan had a lien against the Lansing Plants. That opinion is utterly irrelevant to the only question that matters under the Michigan U.C.C. – whether the Eaton County Fixture Filing itself provides constructive notice of a lien against fixtures at the Lansing Plant.

Second, Mr. Marquardt's opinions that a real-property searcher would have discovered Defendants' purported lien against the Lansing Plants through communications with Old GM is

inadmissible because it is unfounded and speculative. At his deposition, Mr. Marquardt conceded that his opinion was speculative, and thus conceded its own inadmissibility. Fisher Decl. Ex. D (Deposition Transcript of James Marquardt ("**Marquardt Dep**.") 86:22-88:6).

BACKGROUND

JPMorgan, as Administrative and Collateral Agent, recorded the Eaton County Fixture Filing on April 26, 2007. Fisher Decl. Ex. A (Eaton County Fixture Filing). On its face, the Eaton County Fixture Filing covered "all fixtures located on the real estate described on Exhibit A." *Id.* The parties do not dispute that the legal description contained in Exhibit A to the Eaton County Fixture Filing—in terms of both street address and metes and bounds description—corresponds to a parcel of land that does not contain any buildings comprising either of the Lansing Plants. The parcel described in Exhibit A of the Eaton County Fixture Filing is outlined in red on a sketch plan of the area jointly commissioned by the parties. *Id.* Ex. B (Adv. Pro. Dkt. No. 827, Ex. 1). As plainly shown in the agreed-to sketch, the Lansing Plants are not located on the parcel described in the Eaton County Fixture Filing. Nevertheless, Defendants continue to contend that they have a perfected security interest in the fixtures at the Lansing Plants.

Defendants asked Mr. Marquardt, a Michigan real estate attorney, to opine on whether the Eaton County Fixture Filing would have been identified by a real-property searcher in search of liens and encumbrances against the Lansing Plants. *Id.* Ex. C (Marquardt Rep. ¶ 8). Mr. Marquardt concludes that a real-property searcher performing a title search of the Lansing Plants would have discovered the Eaton County Fixture Filing and would have contacted an employee of Old GM to inquire about the details of the lien; and that the Old GM employee would then have reported to the searcher that JPMorgan had a lien against fixtures at the Lansing Plants. *Id.* Ex. C (Marquardt Rep. ¶ 10).

To arrive at this conclusion, Mr. Marquardt speculates that a searcher examining title to the Lansing Plants would have examined the Eaton County grantor-grantee index, seen the various interests recorded against Old GM for the various parcels of land it owned in Eaton County, examined any and all liens against Old GM property filed in Eaton County, and located the Eaton County Fixture Filing among the various filings. *Id.*; *see also* Fisher Decl. Ex. C (Marquardt Rep. ¶¶ 37-53). Mr. Marquardt and Defendants concede that the Eaton County Fixture Filing does not identify the Lansing Plants by either address or formal legal description. But Mr. Marquardt then goes on to opine that, because of a supposed ambiguity in the Eaton County Fixture Filing, the searcher would have contacted an unknown employee of Old GM to inquire as to the particular security interest at issue. Fisher Decl. Ex. C (Marquardt Rep. ¶¶ 37-53). His opinion states that the Old GM employee would have provided information about JPMorgan's collateral interest in the Lansing Plants to the searcher. *Id.*; Fisher Decl. Ex. D (Marquardt Dep. 86:22-87:9). However, at his deposition, Mr. Marquardt admitted that he cannot conclude that Defendants' security interest in the Lansing Plants would have been discovered because he does not know what a searcher would have asked the unknown employee of Old GM, or what that Old GM employee might have said in response to the hypothetical inquiry. *Id.* Ex. D (Marquardt Dep. 87:10-88:6).

<u>ARGUMENT</u>

I. The Applicable Legal Standard

Courts act as gatekeepers by ensuring that proffered experts' testimony is probative and reliable. *See Amorgianos v. Nat'l R.R. Passenger Corp.*, 303 F.3d 256, 265-66 (2d Cir. 2002). Under *Daubert,* courts are tasked with "properly admitting only such testimony as would help the jury understand the evidence or determine a fact at issue." *Hickey v. City of N.Y.*, 173

F. App'x. 893, 894 (2d Cir. 2006) (citing *Daubert,* 509 U.S. at 591-93). Therefore, courts "should undertake a rigorous examination of the facts on which the expert relies, the method by which the expert draws an opinion from those facts, and how the expert applies the facts and methods to the case at hand." *Amorgianos*, 303 F.3d at 267; *see also S.E.C. v. Tourre*, 950 F. Supp. 2d 666, 674 (S.D.N.Y. 2013). The party seeking to introduce and rely on the expert testimony bears the burden of demonstrating admissibility by a preponderance of the evidence. *R.F.M.A.S., Inc. v. So*, 748 F. Supp. 2d 244, 249 (S.D.N.Y. 2010) (citing *Zaremba v. GMC*, 360 F.3d 355, 358 (2d Cir. 2004); *Lippe v. Bairnco Corp.*, 288 B.R. 678, 685 (S.D.N.Y. 2003).

A requirement for admissibility is that expert opinion evidence must "actually be relevant to an issue in the case." *Highland Capital Mgmt., L.P. v. Schneider*, 379 F. Supp. 2d 461, 468 (S.D.N.Y. 2005). "Expert testimony that is not probative of a key issue is irrelevant and inadmissible." *U.S. Commodity Futures Trading Comm'n v. Moncada*, No. 12 Civ. 8791, 2014 WL 2945793, at *2 (S.D.N.Y. June 30, 2014). In assessing the relevance of the testimony, "[e]xpert testimony which does not relate to any issue in the case is not relevant and ergo, nonhelpful." *Daubert*, 509 U.S. at 591. This helpfulness requirement is "akin to the relevance requirement of Rule 401, which is applicable to all proffered evidence [,][but] . . . goes beyond mere relevance . . . because it also requires expert testimony to have a valid connection to the pertinent inquiry." *In re Rezulin Prods. Liab. Litig.*, 309 F. Supp. 2d 531, 540 (S.D.N.Y. 2004) (internal quotations omitted).

Whether an expert testifies on the basis of "experience alone or in conjunction with other knowledge, training, skill or education," *Lippe*, 288 B.R. at 686, the court must ensure the proffered testimony is "properly grounded, well-reasoned, and not speculative before it can be admitted." Fed. R. Evid. 702 advisory committee's note. "Rule 702 requires that expert

testimony rest on knowledge, a term that connotes more than subjective belief or unsupported speculation." *Highland Capital Mgmt.*, 379 F. Supp. 2d at 473, n.2 (internal quotations omitted). "Expert testimony that is 'speculative or conjectural,' therefore, is inadmissible." *Id.* (citing *Boucher v. U.S. Suzuki Motor Corp.,* 73 F.3d 18, 21 (2d Cir. 1996); s*ee also Dora Homes, Inc. v. Epperson,* 344 F. Supp. 2d 875, 889 (E.D.N.Y. 2004) (expert's "subjective" and speculative opinion rejected as "patently devoid of reliability").

II. Mr. Marquardt's Opinion Is Not Relevant to the Issue of Whether Defendants Had a Perfected Security Interest in the Fixtures at the Lansing Plants

Mr. Marquardt's opinion is not relevant and should be excluded because he does not offer an opinion about whether the Eaton County Fixture Filing provides constructive notice of a lien against the Lansing Plants. Defendants are only secured in collateral at the Lansing Plants to the extent they have a perfected security interest in the fixtures covered by the Eaton County Fixture Filing. Whether the fixtures located at the Lansing Plants are covered by the Eaton County Fixture Filing is determined under Michigan law. Under the Michigan U.C.C., the critical question is whether the fixture filing itself gave constructive notice to a bona fide purchaser of a lien against the parcels where the Lansing Plants are located. A fixture filing must "[p]rovide a description of the real property to which the collateral is related sufficient to give constructive notice of a mortgage under the law of this state if the description were contained in a record of the mortgage of the real property." Mich. Comp. Laws Ann. § 440.9502(2) (West 2016). In Michigan, "a properly recorded mortgage provides a bona fide purchaser of real property with constructive notice of the prior interest in the property." *Moyer v. Edlund (In re Vandenbosch)*, 405 B.R. 253, 264 (Bankr. W.D. Mich. 2009).

Notwithstanding the clear language of the Michigan U.C.C., Mr. Marquardt fails to offer

an opinion about whether the Eaton County Fixture Filing would have provided constructive notice to a bona fide purchaser of a lien against fixtures at the Lansing Plants. Instead, Mr. Marquardt attempts to change the subject. He posits a chain of inadmissible, speculative events that leads to a hypothetical conversation in which the lien against the Lansing Plants is disclosed. On that basis, Mr. Marquardt opines that the Eaton County Fixture Filing provided inquiry notice of a lien against the Lansing Plants. But inquiry notice is insufficient under Michigan law to give notice to a bona fide purchaser of a mortgage lien. Although Defendants admit, as they must based on the language of the Michigan statute, that constructive notice based on review of the fixture filing itself is the standard,[2] Mr. Marquardt fails to base his opinion on that standard.

In similar circumstances, Michigan courts have found that constructive notice derived from the filing itself is what matters. As the court held in *In re Vandenbosch*:

> [I]t is undisputed that the mortgage granted by the Debtors in connection with Loan 6 describes the vacant lot adjacent to the property, rather than the Property itself. Therefore, the recorded mortgage on the wrong property does not provide a bona fide purchaser with constructive notice of the [defendant's] interest in the Property.

405 B.R. at 264. So too, here, the recording of a fixture filing against a different parcel "does not provide a bona fide purchaser with constructive notice of the [defendants'] interest" in the parcels where the Lansing Plants are located. *Id.* Mr. Marquardt's opinion addresses the entirely irrelevant question of what inquiry into parcels other than the parcels where the Lansing Plants are located might have revealed.

Mr. Marquardt's opinion implicitly and necessarily concedes that a hypothetical purchaser examining title to the Lansing Plants would have had to go beyond the property

[2] *See* Adv. Pro. Dkt. No. 630, at 24 ("The issue for this Court is thus whether the collateral descriptions in the Fixture Filings were sufficient to provide constructive notice of defendants' lien on fixtures at the Additional Facilities under [Mich. Comp. Laws Ann.] § 440.9502(1)(c) and [Mich. Comp. Laws Ann.] § 440.9502(2)(c).").

records for the Lansing Plants. It is not disputed that the property records for the parcel where the Lansing Plants are located do not include the Eaton County Fixture Filing because the fixture filing is for a different parcel of land. *See* Fisher Decl. Ex. B (Adv. Pro. Dkt. No. 827, Ex. 1).[3] According to Mr. Marquardt's report, the hypothetical purchaser would have had to examine the Eaton County grantor-grantee index, seen the various interests recorded against Old GM for the various parcels of land it owned in Eaton County, examined any and all liens against Old GM property filed in Eaton County, and located the Eaton County Fixture Filing among the various filings. *Id.* Ex. C (Marquardt Report ¶¶ 10, 37-52). Mr. Marquardt further opines, without basis, that a title insurance company's stamp on the Eaton County Fixture Filing would have then put the hypothetical purchaser on inquiry notice that the Eaton County Fixture Filing may pertain to land other than what is described on the filing, causing the hypothetical purchaser to inquire further into the nature of the lien. *Id.* Ex. D (Marquardt Dep. 43:15-21); *id.* Ex. C (Marquardt Report ¶¶ 10, 53-54; 61-62).

Mr. Marquardt's opinion about whether a hypothetical purchaser could have engaged in a series of inquiries that would have led to a conversation with Old GM about whether JPMorgan asserted a lien against fixtures at the Lansing Plants is irrelevant. The legal standard requires constructive notice. The opinion is therefore not probative of the only issue that matters: whether the Eaton County Fixture Filing would provide a bona fide purchaser with constructive notice of the Defendants' interest in the fixtures located at the Lansing Plants. *Daubert*, 509 U.S. at 591 ("[e]xpert testimony which does not relate to any issue in the case is not relevant and ergo, nonhelpful."); *Moncada*, 2014 WL 2945793, at *4 (expert opinion on "matters not in issue" is

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[3] As the court held in *In re Vandenbosch*, as a matter of law, because the mortgage "had a different legal description" and thus was recorded against a different property, "no amount of inquiry into the Property's chain of title would have revealed the . . . mortgage." 405 B.R. at 264-65.

"irrelevant and inadmissible"). Because his opinion is irrelevant, it should be excluded. *Highland Capital Mgmt.*, 379 F. Supp. 2d at 468.

III. Mr. Marquardt's Opinion that a Real-Property Searcher Would Have Discovered the Eaton County Fixture Filing Is Speculative and Should Be Excluded

Even if Mr. Marquardt's analysis were relevant, his report and testimony should be excluded because his opinions are speculative and conjectural. Mr. Marquardt's report simply speculates about what a hypothetical purchaser ***may*** have discovered in a hypothetical conversation with an unknown Old GM employee. Fisher Decl. Ex. C (Marquardt Rep. ¶¶ 10, 53, 61, 79-80). In particular, Mr. Marquardt does not know what would have been asked during the hypothetical conversation, or what (if any) information would have been disclosed about Defendants' security interests in the Lansing Plants:

> Q: And what would the potential purchaser or lender ask the contact at General Motors?
>
> MR. JONKE: Objection
>
> A: Well, that's speculation. I don't know what they would ask, other than they would be exploring anything on the title commitment that they wondered about. That's very normal. That's very normal. You go over the Schedule B exceptions.
>
> Q: And what would General Motors tell the potential purchaser or lender in response?
>
> MR. DiPOMPEO: Objection
>
> A: I don't know.
>
> Q: How would the potential purchaser or lender know whether whatever the contact at General Motors told them was correct?
>
> MR. DiPOMPEO: Objection
>
> MR. JONKE: Objection
>
> A: I wouldn't know.

Id. Ex. D (Marquardt Dep. 87:10-88:6).

By his own admission, Mr. Marquardt's opinion is based on pure speculation, and thus "devoid of reliability." *Epperson,* 344 F. Supp. 2d at 889. Speculative opinions and testimony cannot be admitted. *Highland Capital Mgmt.,* 379 F. Supp. 2d at 473, n.2. Thus, Mr. Marquardt's opinion should be excluded.

CONCLUSION

For the foregoing reasons, the Trust respectfully requests that the Court grant its motion to exclude the proposed expert report and testimony of James M. Marquardt concerning the Eaton County Fixture Filing.

Dated: March 8, 2017
New York, New York

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