Re: Adv. Pro. Dkt. Nos. 864-867
Pretrial Conference: April 7, 2017 at 10:00 a.m. (EDT)

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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In re:

Chapter 11

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

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

Debtors.

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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,

Adversary Proceeding

Plaintiff,

Case No. 09-00504 (MG)

against

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

Defendants.

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

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Plaintiff respectfully submits this reply 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 (Adv. Pro. Dkt. Nos. 864, 865, 867) (the "**Motion**").

PRELIMINARY STATEMENT

In their Opposition,[1] Defendants fail to establish that Mr. Marquardt's opinion is relevant and not speculative. As explained in the Motion, Mr. Marquardt does not offer any opinion on the only relevant question: whether the Eaton County Fixture Filing[2] was sufficient to provide constructive notice of a lien against the fixtures at either of the Lansing Plants. Defendants respond to the argument that the opinion is irrelevant by pointing out that Mr. Marquardt opines that, as a result of the search steps he describes, "a potential purchaser or lender would be put on *notice of the fixture filing*." Defs. Opp'n 7 (emphasis added). But that opinion is not relevant. The legal standard under Michigan law is not whether through a series of searches a potential purchaser or mortgage lender could have learned of the fixture filing, but rather whether the fixture filing itself was sufficient to give constructive notice of a mortgage. *See* Mich. Comp. Laws Ann. § 440.9502(2) (West 2016). As Defendants tacitly admit, Mr. Marquardt does not offer any opinion on this question.

According to Defendants, "[Mr. Marquardt] specifically states that as a result of the title search he conducted, a potential purchaser or lender would have been put *on notice* that JPMorgan Chase Bank, N.A., as Administrative Agent may have had a lien against the fixtures at

[1] References to "Opposition" or "Defs. Opp'n" are to Term Lenders' Memorandum in Opposition to the Motion (Adv. Pro. Dkt. No. 893).

[2] All capitalized terms not otherwise defined shall have the same meaning as those in the Motion.

[LDT]." Defs. Opp'n 7 (internal quotations omitted) (emphasis in original). This only further highlights the irrelevance of Mr. Marquardt's opinion. Mr. Marquardt does not opine that the Eaton County Fixture Filing itself provides notice of a lien; only that the broad title search he conducted provides inquiry notice that JPMorgan *may* have had a lien – not that it actually did. Mr. Marquardt simply does not offer any relevant opinion that would assist this Court in determining the issue before it.

Further, Mr. Marquardt's opinion also should be excluded because it turns entirely on his speculation about a hypothetical conversation between a lien searcher and an Old GM employee that he posits could take place as a consequence of the lien search process he describes in his report. Even if a potential purchaser or mortgage lender would have undertaken the series of broad searches conducted by Mr. Marquardt (and he or she would not), and even if those broad searches caused the searcher to reach out with a question to Old GM, Mr. Marquardt admitted at his deposition that he does not know what (if any) information about Defendants' lien would have been disclosed as a result of this inquiry. He acknowledges that would be "speculation." Fisher Decl.[3], Ex. D (Marquardt Dep. 87:14). Accordingly, the opinion is inadmissible.

ARGUMENT

Defendants bear the burden of demonstrating admissibility by a preponderance of the evidence. *See In re Electronic Books Antitrust Litig.*, No. 11 MD 2293 (DLC), 2014 WL 1282298, at *3 (S.D.N.Y. Mar. 28, 2014) (citing *United States v. Williams*, 506 F.3d 151, 160 (2d Cir. 2007)). Defendants have not met their burden here because Mr. Marquardt's opinion is irrelevant and the heart of the opinion is conceded to be speculation.

[3] References to "Fisher Decl." are to the Declaration of Eric B. Fisher in Support of Plaintiff's Motion (Adv. Pro. Dkt. No. 867).

I. THE COURT SHOULD EXCLUDE MR. MARQUARDT'S IRRELEVANT OPINION

Under Rule 702 of the Federal Rules of Evidence, an expert may only offer testimony if the expert's opinion "will help the trier of fact to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702(a). Rule 702's requirement that opinion testimony assist the trier of fact "goes primarily to relevance." *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579, 591 (1993). In assessing relevance, "[e]xpert testimony which does not relate to any issue in the case is not relevant and ergo, nonhelpful." *Id.* at 591.[4]

Defendants' Opposition only serves to underscore the degree to which Mr. Marquardt's opinion does not relate to the applicable legal standard this Court will use to determine whether the Eaton County Fixture Filing was sufficient to provide constructive notice of a lien against the Lansing Plants. According to Defendants' recap of Mr. Marquardt's opinion, "Mr. Marquardt does opine that a potential purchaser or lender would be put *on notice of the fixture filing*. He specifically states that as a result of the title search he conducted, a potential purchaser or lender would have been put on notice that JPMorgan Chase Bank, N.A., as Administrative Agent *may* have had a lien against the fixtures at [LDT]." Defs. Opp'n 7 (emphasis added) (quotations omitted). Defendants' summary of Mr. Marquardt's opinion reveals precisely what makes the opinion irrelevant.

The Michigan statutory issue is not whether a potential purchaser or lender would have, or could have, come across the Eaton County Fixture Filing. It is whether the Eaton County Fixture Filing provides constructive notice of a lien against the Lansing Plants. In addition, the

[4] The cases Defendants cite to support their argument that Mr. Marquardt's opinions are the type that courts have found relevant and reliable are inapposite. *See United States v. Ruffin*, 575 F.2d 346, 357 (2d Cir. 1978) (attorney qualified to testify about title issues, where relevancy of testimony was not at issue); *Nat'l Assistance Bureau, Inc. v. Macon Mem'l Intermediate Care Home, Inc.*, 714 F. Supp. 2d 1192, 1202-03 (M.D. Ga. 2009) (because the parties did not dispute the conclusions reached by the expert, his testimony was "plainly admissible").

issue is not whether a potential purchaser or lender *may* have learned about Defendants' lien. Rather, the issue is whether the contents of the Eaton County Fixture Filing were sufficient to give constructive notice of Defendants' lien. *See* Mich. Comp. Laws Ann. § 440.9502(2) (West 2016) (issue is whether fixture filing provided "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"). Mr. Marquardt's opinion – that as a result of a series of broad searches outside the chain of title of the Lansing Plants, a "potential purchaser or lender would be put on notice of the fixture filing." (Defs. Opp'n 7) – is irrelevant because it fails to address the requirements of the statute.[5]

The opinion is also irrelevant because the search described by Mr. Marquardt goes beyond a search of the chain of title for the parcel identified in the Eaton County Fixture Filing. Michigan courts have found that a potential purchaser did not have the requisite notice under very similar circumstances. *See, e.g., Moyer v. Edlund (In re Vandenbosch),* 405 B.R. 253, 264 (Bankr. W.D. Mich. 2009).[6] Similarly, in *Tibble v. Wells Fargo Bank, N.A.* (*In re Hudson),* 455 B.R. 648, 654 (Bankr. W.D. Mich. 2011), the legal description on the mortgage to a lot of land erroneously described an adjacent lot, including its corresponding permanent parcel number. *Id.* at 651. The court found that the mortgage would not have been in the chain of title for the property, and therefore would not have provided constructive notice of the mortgage to a bona fide purchaser of the property, even though there were ambiguities in the legal description of the

[5] The cases cited by Defendants all acknowledge that the proper legal standard is constructive notice based on the fixture filing itself. That is what the statute says.

[6] Defendants do not meaningfully distinguish *In re Vandenbosch* in the Opposition, and instead argue that expert testimony was not at issue in that case. Defs. Opp'n 10 n.7. *In re Vandenbosch* demonstrates that under Michigan law, where it is undisputed that a mortgage mistakenly describes a vacant lot adjacent to the property (as it is undisputed that the Eaton County Fixture Filing describes a vacant lot adjacent to the Lansing Plants) a bona fide purchaser did not have requisite notice. 405 B.R. at 264. The requisite notice was derived from the filing itself. *Id.*

property and references to both the mortgaged property and the adjacent lot. *Id.* at 654. The court held that the title examination that would have had to occur in order to uncover the error was "far beyond any reasonable concept of 'obvious inquires' or 'ordinary diligence.'" *Id*. at 656. Thus, Mr. Marquardt's opinion is also irrelevant because it turns on what Mr. Marquardt asserts might be learned as the result of a series of broad searches outside the chain of title to the Lansing Plants. Defs. Opp'n 5-6; *see also* Szcerban Decl.[7] Ex. A (Marquardt Rep. ¶¶ 37-53). These are exactly the kinds of searches that the *In re Hudson* court found to be legally irrelevant to the Michigan statutory standard.[8]

II. THE COURT SHOULD EXCLUDE MR. MARQUARDT'S OPINION AS SPECULATIVE

Mr. Marquardt's entire opinion rests on his speculation about a hypothetical communication that might occur with an Old GM employee. Even if Mr. Marquardt's analysis were relevant and the Michigan U.C.C. charged a potential purchaser or mortgage secured lender with constructive knowledge based upon a series of broad searches outside the chain of title (and it does not), his report and testimony still should be excluded because it is speculative. Mr. Marquardt admitted at his deposition, and Defendants' Opposition does not rebut, that he cannot say what the potential purchaser or mortgage secured lender would have asked Old GM in the hypothetical conversation he posits, or what would have been learned about Defendants' lien

[7] References to "Szczerban Decl." are to the Declaration of S. Christopher Szczerban in Support of Defendants' Opposition (Adv. Pro. Dkt. No. 894).

[8] Defendants' argue that because Plaintiff's rebuttal expert, Robert D. Mollhagen, tested the broad search process conducted by Mr. Marquardt, the process should be considered reliable. Defendants have mischaracterized Mr. Mollhagen's testimony. Mr. Mollhagen explained at his deposition that the search process used by Mr. Marquardt was "a much broader search than would be done if you were searching for mortgages and liens on a parcel of real property." Declaration of Eric B. Fisher in Support of Plaintiff's Reply Memorandum to the Motion Ex. A (Deposition Transcript of Robert Mollhagen 179:11-14). In any event, Mr. Marquardt's search gets you nowhere without the necessary follow-up hypothetical conversation with Old GM. That is because the fixture filing itself does not provide notice of a lien against the Lansing Plants.

during the course of that conversation. According to Mr. Marquardt, that would be "speculation." Fisher Decl., Ex. D (Marquardt Dep. 87:14).

Further, the drafters of the Michigan U.C.C. did not ever intend for liens to be determined based on an expert's speculation about what might be learned in hypothetical communications with a borrower. As already explained above, the statute is quite clear in limiting the relevant inquiry to what constructive knowledge may be imputed based upon the fixture filing itself.

The court in *In re Hudson* rejected a similar argument. In that case, the issue was whether a potential bona fide purchaser would have to inquire of the property owner whether the mortgage describing the wrong property was actually for the property at issue. Because the court found that the mortgagor "failed to elicit or introduce *any* evidence" of what would have been uncovered had the hypothetical conversations occurred, 455 B.R. at 656 (emphasis in original), the court declined "to speculate or invent facts that might favor the [mortgagor]." *Id.* Similarly, here, Mr. Marquardt offers no opinion on what would have been discovered during the hypothetical conversation with Old GM or what (if any) information would have been disclosed about Defendants' security interests in the Lansing Plants.

The speculative character of Mr. Marquardt's opinion is not a matter of semantics or merely his failure to identify granular details, as Defendants suggest (Defs. Opp'n 11-12); rather, the defect lies at the very foundation of Mr. Marquardt's entire opinion. According to Mr. Marquardt, a series of broad searches would have led a potential purchaser or mortgage secured lender to inquire of Old GM about whether JPMorgan *may* have had an interest in the Lansing Plants. Defs. Opp'n 7. His entire opinion turns on whether *in that conversation* the potential purchaser or mortgage secured lender would have learned that JPMorgan claimed an interest in the fixtures located at the Lansing Plants. According to Mr. Marquardt, that is the only way a

potential purchaser or mortgage lender could have learned about Defendants' claimed lien on those fixtures. Mr. Marquardt's opinion is therefore speculative on the most fundamental issue it addresses and should be excluded.

CONCLUSION

For the foregoing reasons and the reasons set forth in Plaintiff's opening brief, Plaintiff 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 31, 2017
New York, New York

Respectfully submitted,

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