UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re: MOTORS LIQUIDATION COMPANY, *et al.*, Debtors.	:	Chapter 11 Case Case No. 09-50026 (MG) (Jointly Administered)
MOTORS LIQUIDATION COMPANY AVOIDANCE ACTION TRUST, by and through the Wilmington Trust Company, solely in its capacity as Trust Administrator and Trustee, Plaintiff, vs. JPMORGAN CHASE BANK, N.A., individually and as Administrative Agent for various lenders party to the Term Loan Agreement described herein, *et al.*, Defendants.	:	Adversary Proceeding Case No. 09-00504 (MG)

ORDER DENYING PLAINTIFF'S MOTIONS TO EXCLUDE KPMG REPORT AND TESTIMONY OF MARYANN KELLER, GLENN HUBBARD, AND ABDUL LAKHANI

Before the Court are the following motions (together, the "Valuation MILs"): (i) the Plaintiff's *Notice of Motion in Limine to Exclude the KPMG Report and its Schedules and Work Papers* (the "KPMG Motion," ECF Doc. # 872); (ii) the Plaintiff's *Notice of Motion in Limine to Exclude the Expert Report and Testimony of Abdul Lakhani* (the "Lakhani Motion," ECF Doc. # 869); (iii) the Plaintiff's *Notice of Motion in Limine to Exclude the Expert Report and Testimony of Glenn Hubbard* (the "Hubbard Motion," ECF Doc. # 870); and (iv) the Plaintiff's *Notice of Motion to Exclude the Expert Reports and Testimony of Maryann Keller* (the "Keller Motion," ECF Doc. # 871). For each of the Valuation MILs, the Plaintiff filed under seal a memorandum of law in support of the accompanying motion (the "KPMG Memorandum," "Lakhani

Memorandum," "Hubbard Memorandum," and "Keller Memorandum"). The Plaintiff also filed declarations of Neil S. Binder and accompanying exhibits in support (the "Binder KPMG Declaration," "Binder Lakhani Declaration," "Binder Hubbard Declaration," and "Binder Keller Declaration"). The Defendants filed an omnibus memorandum of law in opposition (the "Opposition") and the declaration of Emil A. Kleinhaus with accompanying exhibits (the "Kleinhaus Valuation Declaration"), also under seal. The Plaintiff filed a reply in further support of the Motions (the "Valuation Reply"), likewise under seal.

For the following reasons, the Motions are **DENIED**.

I. BACKGROUND

The Plaintiff seeks to exclude from evidence a report authored by a consulting division of KPMG LLC ("KPMG") titled "Valuation of Total Invested Capital and Certain Assets, Liabilities and Equity Interests of General Motors Company, as of July 10, 2009" (the "KPMG Report"), along with its accompanying work schedules and papers. In addition, flowing from the Plaintiff's argument that the KPMG Report is irrelevant, the Plaintiff seeks to exclude the testimony of three of Defendants' experts who will opine on the KPMG Report: Lakhani, Hubbard, and Keller (together, the "KPMG Experts").

"New GM engaged KPMG as its advisor to 'determine its opinion of the fair value of TIC [Total Invested Capital] and the Subject Assets, Liabilities and Equity Interests acquired from MLC [Old GM] under Section 363(b) of the Bankruptcy Code.' Declaration of Neil S. Binder dated March 8, 2017 ("Binder Decl.") Ex. A (KPMG Rep. 13)." (KPMG Memo at 3.) KPMG defined "TIC" as "the sum of the fair value of equity and fair value of debt of a business enterprise, whereby debt is inclusive of interest bearing liabilities, non-operating liabilities, capital lease obligations, pension and [other pension and employment benefits]." *Id.* at 4. The Plaintiff describes KPMG's work as "an accounting exercise to determine the accounting fair values of specified asset, liability, and equity categories." *Id*. The Plaintiff argues, and the Defendants do not seriously contest, that KPMG valued categories of assets, not individual assets. *Id.* at 5.

The parties dispute the correct characterization of each step of KPMG's analysis, and the Court makes no ruling at this time regarding the reliability of KPMG's methods. But one step in KPMG's method, called RCNLD (defined below), is particularly important to these Valuation MILs. After calculating the "initial" values of each category of assets, KPMG adjusted for physical depreciation, functional obsolescence (depreciation related to the asset itself), and economic obsolescence (depreciation related to factors external to the asset). *Id.* at 7–8. The first step of adjusting for economic obsolescence involved applying a formula provided by New GM to take into account historical and expected asset utilization rates. *Id.* at 8. At this point, KPMG arrived at an "interim" value called Replacement Cost New Less Depreciation, or "RCNLD." *Id.* at 9. It is this value upon which Defendants seek to rely at trial, referring to the RCNLD as a "going-concern value[]." (Opp'n at 1.)

After calculating the RCNLD, KPMG applied a TIC adjustment, which Plaintiffs characterize as the second half of the economic obsolescence analysis. (KPMG Memo at 9–10.) The Defendants characterize the TIC adjustment as an optional final step taking into account an "earnings analysis." (Opp'n at 14.) The Court will not analyze the import of the TIC analysis here, but it suffices for the purpose of these motions to note that the TIC was based on discounted cash flow ("DCF") analysis to project New GM's earnings, which took into account the weighted average cost of capital ("WACC") of each business unit. (*Id.* at 14–15.) KPMG used a WACC of 23% for the GM North America ("GMNA") business unit. (*Id.*) Because of what the Defendants characterize as a too-high WACC, there was a gap of about $6.4 billion between the RCNLD and the TIC value for GMNA. (*Id.*) KPMG reduced the value of "hard assets"—namely property, plant, and equipment ("PP&E")—by approximately 43% "to make up the different." (*Id.* at 15.)

Lakhani will testify regarding KPMG's derivation of the RCNLD values and the TIC adjustment "from an accounting standpoint." (*Id.* at 2.) Keller will testify regarding KPMG's projections of GM's earnings. (*Id.* at 3.) And Hubbard will testify regarding KPMG's use of a company-specific risk premium ("CSRP") in its DCF valuation. (*Id.*) Hubbard also offers testimony regarding the "effective price" Treasury paid for its share of the common equity of GM, suggesting that his own higher "effective price" casts doubt on KPMG's final estimate. (Hubbard Memo at 7.)

II. <u>LEGAL STANDARD</u>

A. Motions in Limine

"The purpose of an in limine motion is to aid the trial process by enabling the Court to rule in advance of trial on the relevance of certain forecasted evidence, as to issues that are definitely set for trial, without lengthy argument at, or interruption of, the trial." *Highland Capital Mgmt., L.P. v. Schneider*, 379 F. Supp. 2d 461, 467 (S.D.N.Y. 2005) (quoting *Palmieri v. Defaria*, 88 F.3d 136, 141 (2d Cir.1996)). "However, evidence should be excluded on a motion in limine only when the evidence is clearly inadmissible on all potential grounds." *MBIA Ins. Corp. v. Patriarch Partners VIII, LLC*, No. 09 CIV. 3255, 2012 WL 2568972, at *2 (S.D.N.Y. July 3, 2012) (internal quotation marks and citations omitted). Further, the Court may reserve judgment on the motion until the appropriate factual context is developed at trial. *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. L.E. Myers Co. Grp.*, 937 F. Supp. 276, 287 (S.D.N.Y. 1996).

B. Relevance Under Rules 401 and 402

Federal Rule of Evidence ("Rule") 402 provides that relevant evidence is admissible. Rule 401 provides that "[e]vidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." FED. R. EVID. 402. Rule 401's bar is fairly low, and an "incremental effect" is "sufficient" to clear it. *See, e.g.*, *United States v. Certified Envtl. Servs., Inc.*, 753 F.3d 72, 90 (2d Cir. 2014); *Fed. Hous. Fin. Agency v. Nomura Holding America, Inc.*, 74 F.Supp.3d 639, 651 (S.D.N.Y. 2015) (holding that evidence "need not be conclusive in order to be relevant. An incremental effect is sufficient") (citing *Certified Envtl. Serv*., 753 F.3d at 90)); *United States v. White*, 692 F.3d 235, 246 (2d Cir. 2012) (explaining that Rule 401 prescribes a "very low standard") (citing *United States v. Al-Moayad*, 545 F.3d 139, 176 (2d Cir. 2008)).

C. The Business Records Exception to the Prohibition on Hearsay

Rule 803(6) provides that records of regular business activity are not hearsay if:

> (A) the record was made at or near the time by—or from information transmitted by—someone with knowledge;
>
> (B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;
>
> (C) making the record was a regular practice of that activity;
>
> (D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and
>
> (E) the opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.

FED. R. EVID. 803(6).

"To lay a proper foundation for a business record, a custodian or other qualified witness must testify that the document was kept in the course of a regularly conducted business activity and also that it was the regular practice of that business activity to make the record." *United States v. Komasa*, 767 F.3d 151, 156 (2d Cir. 2014) (internal quotation marks and citations omitted), *cert. denied*, 135 S. Ct. 1579 (2015); *see also United States v. Freidin*, 849 F.2d 716, 719–20 (2d Cir. 1988) ("[A]dmissibility under Rule 803(6) requires *both* that a memorandum have been kept in the course of a regularly conducted business activity *and also* that it was the regular practice of that business activity to make the memorandum.") (internal quotation marks and citations omitted; emphasis added). While the custodian "need not have personal knowledge of the actual creation of the document," the party offering the document into evidence must nevertheless prove that "it was the business entity's regular practice" to create the record. *Phoenix Associates III v. Stone*, 60 F.3d 95, 101 (2d Cir. 1995).

D. Rule 702

Rule 702 of the Federal Rules of Evidence (the "Rules") permits opinion testimony from a "witness who is qualified as an expert by knowledge, skill, experience, training, or education." FED. R. EVID. 702. As the Supreme Court has explained, expert testimony admissible under Rule 702 "rests on a reliable foundation and is relevant to the task at hand." *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 597 (1993). The standard in *Daubert* applies to all expert testimony. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147 (1999). Testimony must be reliable, which requires the Court to perform "a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and whether that reasoning or methodology properly can be applied to the facts in issue." *Daubert*, 509 U.S. at 592–93. In assessing reliability, "the district court should consider the indicia of reliability identified in Rule 702, namely, (1) that the testimony is grounded on sufficient facts or data; (2) that the testimony is the product of reliable principles and methods; and (3) that the witness has applied the principles and methods reliably to the facts of the case." *United States v. Williams*, 506 F.3d 151, 160 (2d Cir. 2007). Testimony must also be relevant, which means it must "assist the trier of fact to understand the evidence or to determine a fact in issue." *Id.* at 591–92. Still, the inquiry is a flexible one and it is not necessary to evaluate every specific factor in every case. *Id.*

The party seeking to admit an expert bears the burden of demonstrating admissibility by a preponderance of the evidence. *See id.* at 160–61; *see also Lippe v. Bairnco Corp.*, 288 B.R. 678, 685–87 (S.D.N.Y. 2003), *aff'd*, 99 F. App'x 274 (2d Cir. 2004).

III. <u>DISCUSSION</u>

A. The KPMG Report Is Not Inadmissible Hearsay

The Plaintiff first argues that the KPMG Report and its work papers and schedules are inadmissible as hearsay, because there is no witness with "personal knowledge" to testify about the RCNLD components at trial. (KPMG Memo at 11–12.) But the Defendants have successfully argued that the KPMG Report, along with its work papers and schedules, is admissible as a business record. (Opp'n at 16–19.) The KPMG Report was prepared over the course of months, by a company whose "regularly conducted business" involved providing valuation and accounting services. (*Id.* at 18.) It is settled law that a business record need not be introduced by a witness with personal knowledge of the document. But the party offering the document into evidence must nevertheless prove that "it was the business entity's regular practice" to create the record. *Phoenix Associates III*, 60 F.3d at 101. The Defendants indicate that they intend to introduce the KPMG Report through the testimony of Patrick Furey, a KPMG employee who worked on at least some aspects of the KPMG Report and is familiar with KPMG's practices. (Opp'n at 18.) The Court also finds today that Furey "is knowledgeable on the policies and processes that went into the [KPMG Report]." (*Order Granting in Part and*

Denying in Part Plaintiff's Motion in Limine to Exclude the Non-Party Rule 30(b)(6) Testimony of KPMG and Deloitte, ECF Doc. # 944.)

The Court finds that Furey is an appropriate custodian to introduce the KPMG Report and that the KPMG Report is admissible as a business record.

B. The KPMG Report Clears Rule 401's Relevance Bar

The Plaintiff argues that the KPMG Report is not relevant because it was an "accounting exercise," not a valuation exercise. (KPMG Memo at 13.) KPMG valued asset *categories*, not individual assets, in such a way that "the implied transaction price [of the 363 Sale] was distributed among the various balance sheet categories in a manner that results in the sum of the parts equaling the purchase price of the firm as a whole." (*Id.* at 13.) It follows, according to the Plaintiff's argument, that any proffered valuation must value each of the Representative Assets *individually* to be relevant. But this argument suffers from a fatal flaw: this trial is not merely about the 40 Representative Assets individually, but about "(a) which of the over 200,000 assets of Old GM located in the facilities covered by the fixture filings are 'fixtures,' and (b) what is the proper methodology for valuing assets that are found to be fixtures." (Joint Pre-Trial Order, ECF Doc. # 918.) While the Court makes no determination at this time whether KPMG's RCNLD values are the appropriate method to value the 40 Representative Assets, it would be inappropriate to exclude the KPMG Report in its entirety simply because KPMG took a categorical approach to its valuation and accounting. This trial, by its very nature, requires at least some categorical analysis. The bar for relevance under Rule 401 is quite low, and the Court is reluctant to exclude evidence that might have *any* tendency to assist it as the trier of fact, even an "incremental effect." *See* FED. R. EVID. 401; *Certified Envtl. Servs., Inc.*, 753 F.3d at 90.

Further, any attacks on KPMG's methodology are best reserved for cross examination and go to the weight of the evidence, not its admissibility. The Plaintiff points out, correctly, that Defendants' own experts attack portions of the KPMG Report as unreliable. (KPMG Memo at 14.) Further, the KPMG Report valued the assets in the hands of New GM as of July 10, 2009, not in the hands of Old GM on June 30, 2009. (*Id.* at 14–15.) But these critiques and others raised in the KPMG Memorandum do not make the KPMG Report entirely irrelevant; these are appropriate topics for cross-examination and should be reserved for trial.

C. Lakhani, Hubbard, and Keller are Qualified Under Rule 702 and Their Testimony is Relevant

As a preliminary point, the Plaintiffs do not seriously contest the credentials and experience of each of the KPMG Experts, instead taking issue with the fact that each expert lacks complete experience in the automotive industry, accounting, *and* valuation. (*See, e.g.*, Keller Memo at 2–3 ("[Keller] has authored multiple publications on General Motors and the automotive industry" but "is not an expert in accounting, economics, valuation or appraisal."); Hubbard Memo at 3 (Hubbard "is Dean of the Columbia University School of Business and a professor of finance and economics" but "Hubbard is not an accountant or an appraiser"); Lakhani Memo at 4 (Lakhani was a "lead audit partner" for Ernst & Young, but "did not conduct valuation work"; acknowledging that "Lakhani professes experience in 'dealing with valuation work'").) Each expert need not offer a complete package regarding every aspect of the KPMG Report. Lakhani, as a former audit partner, is qualified to testify to KPMG's adherence with applicable accounting standards. Hubbard's experience as an economist qualifies him to testify about the CSRP used by KPMG. And Keller, whom Plaintiffs do not dispute is an expert in the automotive industry, is qualified to testify regarding GM's earnings projections and therefore KPMG's CSRP. Plaintiff's concerns that the KPMG Experts' testimony may stray outside the bounds of each expert's expertise are noted, and the Plaintiff is welcome to cross examine each expert regarding the scope of his or her expertise.

Plaintiffs likewise do not advance a credible argument that the relevance of the KPMG Experts' testimony is independent of the KPMG Report's relevance. Plaintiff's argument is essentially that because the KPMG Report is irrelevant and unreliable, so too is the KPMG Experts' testimony. (*See*, *e.g.*, Keller Memo at 1 ("Defendants are the only parties to this proceeding to contend that the KPMG Report has any relevance to what is at issue for this Court . . . ."); Hubbard Memo at 2 ("Professor Hubbard's report attacks the KPMG Report as fundamentally flawed at the core. But what is at issue in this proceeding is not the equity value of GMNA, nor the reasonableness of KPMG's estimate of that value."); Lakhani Memo at 3 ("Mr. Lakhani never establishes that his evaluation of the KPMG Report is relevant to any disputed issue.").) Each KPMG Expert's testimony is not made less relevant or reliable because each expert focuses on a separate aspect of the KPMG Report.

While the Court makes no determination as to the *weight* appropriately accorded to the KPMG Report, the Court holds today that it is admissible as relevant evidence. Accordingly, the Plaintiff's relevance objections to the testimony of the KPMG Experts fall along with its objections to the KPMG Report itself. And for the same reasons that criticisms of the reliability of the KPMG Report are best resolved on cross examination, criticisms of the KPMG Experts' reliability (which are closely bound up with the reliability of the KPMG Report itself) are likewise best explored at trial.

Finally, the Plaintiff argues that Hubbard's opinion regarding the "effective price" paid by the U.S. Treasury for its share of the common equity of GM is irrelevant because Hubbard "does not suggest how that amount relates to the value of the Representative Assets." (Hubbard Memo at 7.) This relevance argument fails for the same reasons already discussed: it takes issue with the KPMG Report itself, not Hubbard's testimony independently. (*See* Opp'n at 46

(Hubbard's testimony regarding the purchase price paid by the U.S. Treasury goes to the reasonableness of KPMG's WACC).) The Court notes, however, that while the arguments advanced by the Plaintiff do not rise to the level worthy to exclude any of the KPMG Experts' testimony at this point, the Court will not admit testimony based on the subjective intent or state of mind of any individual, corporation, or the U.S. government. *See In re Lyondell Chem. Co.*, 558 B.R. 661, 667–68 (Bankr. S.D.N.Y. 2016) ("[N]o expert may opine on parties' states of mind or intent.").

IV. <u>CONCLUSION</u>

For the above reasons, the Motions are **DENIED**.

IT IS SO ORDERED.

Dated: April 7, 2017
New York, New York

_____Martin Glenn__________
MARTIN GLENN
United States Bankruptcy Judge