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 IN PART AND GRANTING IN PART PLAINTIFF'S MOTION *IN LIMINE* TO EXCLUDE TESTIMONY OF FORMER GM EMPLOYEES

Before the Court is the Plaintiff's *Notice of Motion in Limine to Exclude the Expert Reports and Testimony of Former GM Employees* (the "Motion," ECF Doc. # 874). A memorandum of law (the "Memo") and declaration of Eric B. Fisher with accompanying exhibits (the "Fisher GM Declaration") were filed under seal in support of the Motion. The Defendants filed a memorandum of law in opposition (the "Opposition") and the declaration of C. Lee Wilson with accompanying exhibits (the "Wilson GM Declaration"), also under seal. The Plaintiff filed a reply in further support of the Motion (the "Reply"), likewise under seal.

For the following reasons, the Motion is **DENIED IN PART AND GRANTED IN PART**.

I. BACKGROUND

The Avoidance Trust seeks to exclude entirely the testimony of John Buttermore, Dan Deeds, Max Miller, Eric Stevens, John Thomas, and Steve Topping (the "Designated Former GM Employees"). The Designated Former GM Employees held "various jobs with different responsibilities while working at GM," and the Plaintiff acknowledges that "[m]ost" of them "have personal knowledge of some facts concerning certain of the Representative Assets." (Memo at 2.) The Term Loan Lenders characterize the Designated Former GM Employees as "former GM executives and engineers," "each of whom has between 28 and 39 years of experience in designing, purchasing, installing, and operating precisely the kind of automobile manufacturing equipment and systems in question." (Opp'n at 1.)

The Designated Former GM Employees opine that each of the 40 Representative Assets meets the three-part fixture tests under Michigan and Ohio law. (Memo at 2.) Additionally, Buttermore and Stevens opine on Old GM's "manufacturing practices" (Opp'n at 13) that show its intent to permanently affix the Representative Assets. The Plaintiff objects to this testimony as impermissible state of mind speculation. (Memo at 22–24.) Finally, Buttermore also opines on the relatedness of the Pontiac Engineering and Pontiac Assembly facilities. The Plaintiff objects to this testimony on the grounds that Buttermore is unqualified to testify as an expert regarding their relatedness or lack thereof, and that in any event Buttermore is merely a fact witness regarding these facilities. (*Id.* at 24–25.)

The Designated Former GM Employees initially worked with a larger group of 11 former GM employees (the "Former GM Employees") to submit one joint report regarding the Representative Assets. (*Id.* at 4; Fisher Decl. Ex. A (the "Joint Report.").) In December 2016, following negotiations between the parties and a conference with the Court, the Defendants split the Joint Report into six separate reports, one for each of the Designated Former GM Employees.

(Memo at 4.) The Plaintiff argues that the Designated Former GM Employees "used an unreliable group-think process" to create the Joint Report, and the division of the work product into six separate reports does not adequately "separate" each expert's opinions. (*Id.* at 2–3.)

II. LEGAL STANDARD

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. 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).

C. State of Mind Testimony

This Court recently addressed the question of whether an expert may opine on parties' state of mind or intent, answering with a resounding, "no."

> Rule 702's "requirement of 'knowledge' guards against the admission of subjective or speculative opinions." [*In re Rezulin Prod. Liab. Litig.*, 309 F.Supp.2d 531, 541 (S.D.N.Y. 2004)] (citing *Daubert*, 509 U.S. at 590, 113 S.Ct. 2786 (stating that "the word 'knowledge' connotes more than subjective belief or unsupported speculation")). Therefore, no expert may opine on parties' states of mind or intent. *See, e.g., id.* at 546 ("[T]he opinions of [expert] witnesses on the intent, motives, or states of mind of corporations, regulatory agencies and others have no basis in any relevant body of knowledge or expertise.") . . . .

In re Lyondell Chem. Co., 558 B.R. 661, 667–68 (Bankr. S.D.N.Y. 2016). However, the line between testimony supported by evidence and impermissible speculation is not always clear. In *Lyondell*, this Court held that experts could not testify about a party's "bias," but permitted

experts to draw conclusions supported by the factual record. (*Id.* at 670 ("Experts are entitled to draw inferences and conclusions from facts, and as long as this testimony is grounded in the factual evidence, it is not impermissibly speculative.").)

III. DISCUSSION

A. The Former GM Employees are Qualified Under Rule 702

The Plaintiff argues that the Designated Former GM Employees lack expertise in the three-part fixture tests. (Memo at 6–7.) But the Designated Former GM Employees' expertise is in the assets themselves, not the legal test the Court must analyze. The Plaintiff devotes a single page of the Memorandum to arguing that the Designated Former GM Employees lack the requisite expertise in *applying the three-part fixture test*, but does not dispute that the Designated Former GM Employees have decades of experience working with the types of assets the Court must analyze and value here. (*Id.*) While the question of whether each Representative Asset is a fixture is ultimately a question for the Court, the Designated Former GM Employees may "assist the trier of fact to understand the evidence" through their extensive experience working with the assets at issue. *William*s, 506 F.3d at 160.

The Plaintiff's arguments that the Designated Former GM Employees' methods are unreliable likewise misses the mark. The fact that the Designated Former GM Employees opine that each of the Representative Assets meets the three part fixture test is not itself an indication that their methods are unreliable; according to such backward reasoning, any litigation expert whose opinion supported the party that hired him or her would be deemed unreliable. To the extent that the Designated Former GM Employees weighed certain criteria over others, or did not address certain criteria for each asset, those concerns go to the weight of the testimony rather than its admissibility and are appropriately questioned on cross-examination.

B. The Designated Former GM Employees' Reports Are Not Inadmissible Hearsay

The Court is well familiar with the standards for excluding expert reports as mere "conduits for hearsay," having recently confronted the issue in *Lyondell*. *See* 558 B.R. at 666–68. In *Lyondell*, the Court excluded portions of expert reports that merely "cherry-picked" evidence from the discovery record and added the experts' characterizations. *Id.* Here, that is not the case. The Plaintiff challenges the Designated Former GM Employees' expert reports not on the grounds that they are a backdoor way of introducing inadmissible factual material (such as the e-mails in *Lyondell*), but because the Designated Former GM Employees worked with each other and the larger group of Former GM Employees. (*See* Memo at 12 ("The process employed by Defendants melded together the experiences of several Former GM Employees, and it is those combined experiences that are behind each expert report.").) As this Court has noted, "In any big case . . . I've had here, I've never seen an expert report that reflects the work of only a single person . . . [T]here's been a team." Dec. 12, 2016 Hr'g Tr. at 5:13–19. Concerns about a particular expert's knowledge on a particular issue are appropriately addressed on cross examination, and go to the weight of the report's value rather than its admissibility.

C. The Designated GM Experts May Testify About Objective Indicators of Intent, but not Old GM's Subjective Intent

The Plaintiff seeks to exclude testimony of Buttermore and Stevens regarding Old GM's subjective intent to permanently install the Representative Assets. (Memo at 16–24.) Unlike the Plaintiff's hearsay argument, this type of testimony is analogous to the state of mind testimony this Court rejected in *Lyondell* and will be excluded. *See* 558 B.R. at 670–71. Stevens states that the "overwhelming norm was that once a fixed asset was installed it was expected to be operated in place until the end of its useful life." (Fisher GM Decl. Ex. B (Stevens Report ¶ 41).) And Buttermore opines that "GM's intent, when it installed fixed manufacturing equipment, was

generally that those assets be permanently installed." (*Id.* at Ex. D (Buttermore Report ¶ 15).) While the Term Loan Lenders characterize this testimony as "objective," Buttermore acknowledged that his opinion is based at least partly on his experience as a senior executive at the company. He testified at his deposition that he feels "very comfortable that [he knows] what GM's directions and strategies were." (*Id.* at Ex. P (Buttermore Dep. 112:15–113:4).)

In any event, testimony about GM's subjective intent is irrelevant to the three-part fixture test. As Defendants acknowledge, under Michigan law the intent element of the fixture test "is determined by 'objective visible facts' from the 'surrounding circumstances,' not any 'secret subjective intent' of the annexor." (Defs. Pre-Trial Br. at 11 (quoting *Wayne Cty. v. Britton Trust*, 563 N.W.2d at 676); *see also id.* at 20 (Ohio law turns on the annexor's "apparent or legal intention") (quoting *Holland Furnace Co. v. Trumbull Sav. & Loan Co*., 19 N.E.2d 273, (Ohio 1939)).)

Accordingly, testimony about objective indicators of GM's intent at the time of annexation is relevant and admissible. Testimony based on GM's subjective intent is inadmissible both because it is impermissible state of mind testimony and also because it is irrelevant.

D. Buttermore May Opine on GM MFD Pontiac and GM Powertrain Engineering Pontiac

The Plaintiff also seeks to exclude Buttermore's testimony regarding the relationship between GM MFD Pontiac and GM Powertrain Engineering Pontiac. (Memo at 24–25.) The Court finds that Buttermore's nine years of experience working at and visiting the facilities qualifies him to testify to their relationship. (Opp'n at 17.) Further, the Court notes that even if not qualified as expert opinion under Rule 702, Buttermore would clearly be entitled to give a

lay opinion based on his own knowledge under Rule 701. *See United States v. Rigas*, 490 F.3d 208, 224 (2d Cir. 2007) (permitting lay opinion testimony based on employee's observations).

IV. CONCLUSION

For the above reasons, the Motion is **DENIED IN PART AND GRANTED IN PART**. The Motion is **GRANTED** with respect to testimony regarding GM's subjective intent, and **DENIED** in all other respects.

IT IS SO ORDERED.

Dated: April 7, 2017
New York, New York

Martin Glenn
MARTIN GLENN
United States Bankruptcy Judge