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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)

MEMORANDUM OF LAW IN SUPPORT OF THE ADMISSIBILITY OF TESTIMONY OF FORMER GM EMPLOYEES PROBATIVE OF GM'S INTENT

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INTRODUCTION

In its order dated April 7, 2017, this Court distinguished between "testimony based on GM's subjective intent" and "testimony about objective indicators of GM's intent at the time of annexation." *In re Motors Liquidation Co*., No. 09-00504 (MG) (Bankr. S.D.N.Y. Apr. 7, 2017). While the Court ruled, consistent with its prior opinion in *Lyondell*, that testimony that GM had the intent to install assets permanently was inadmissible state of mind testimony, it made clear that testimony about objective indicators of GM's intent are both "relevant and admissible." *Id.*

With the initial focus of the trial to be on the fixture issue involving testimony from the Term Lenders' former GM employee expert witnesses, the purpose of this short brief is to set out for the Court the types of evidence that other courts have considered admissible as "objective indicators of intent."

THE DESIGN AND PURPOSE OF AN ASSET ARE OBJECTIVE FACTS THAT ARE ADMISSIBLE EVIDENCE OF THE ANNEXOR'S INTENT.

As the Court well knows, under Michigan's three-part fixture test, intent is determined by "objective visible facts" from the "surrounding circumstances," not from any "secret subjective intent" of the annexor. *Wayne Cty.* v. *Britton Trust*, 563 N.W.2d 674, 680 (Mich. 1997). This objective "[i]ntent may be inferred from the nature of the article affixed, the purpose for which it was affixed, and the manner of annexation." *Id.* "[T]he presumption in Michigan is that whatever is attached to a building by the owner, in complement, to facilitate its use and occupation becomes part of the realty though capable of removal." *In re Mahon Indus. Corp.*, 20 B.R. 836, 840 (Bankr. E.D. Mich. 1982).

Accordingly, in evaluating the annexor's intent, Michigan courts have looked to evidence concerning the business "purpose" for which an asset was affixed and the features of the asset designed to "facilitate" that purpose. For example, in *Mahon*, 20 B.R. at 840, the court looked to the business advantages of a set of overhead cranes in determining whether there had

been intent to affix those cranes to an industrial property. Explaining that "the value of the building as a manufacturing and industrial piece of property" would be "considerably lessened" without the cranes because they were necessary to "carry on manufacturing processes," the court concluded that the intent was for the cranes to be made permanently affixed. *Id.*

In *Dehring* v. *Beck*, 110 N.W. 56, 57 (Mich. 1906), the Michigan Supreme Court held that intent to permanently affix machinery and equipment in a brewery could be inferred from the fact that, without the machinery, "[the brewery] could not be operated." Thus, the business purpose behind the installation of the asset — to operate a brewery — was deemed to be evidence of intent. Likewise, in *Peninsular Stove Co.* v. *Young*, 226 N.W. 225, 226 (Mich. 1929), the court found that the intent to permanently affix gas ranges could be inferred from evidence that they were "uniform[ly] design[ed]" to facilitate the business purpose of the building "as an apartment house."

Similarly, in *Michigan National Bank* v. *City of Lansing*, 293 N.W.2d 626, 627-28 (Mich. Ct. App. 1980), *aff'd*, 322 N.W.2d 173 (Mich. 1982), the court held that bank equipment was intended to be permanently installed because "the present use of the[] buildings [was] dependent on the presence of" the equipment, and similarly, the equipment could not "be used unless [it was] affixed to a building or land" with which the equipment was physically "integrated." *Id.* Specifically, the court noted that the drive-up teller equipment and bank vault doors were cemented into place and integrated into the wall in which they were mounted and that the pneumatic tubing system ran from the remote transaction units through the ground to the main bank building. The fact that these assets were engineered to facilitate the business purpose of the underlying building — *i.e.*, to be a bank — suggested that these specially designed assets were intended to be fixtures of the property. *Id.*

Tuinier v. *Bedford Charter Twp.*, 599 N.W.2d 116 (Mich. Ct. App. 1999), is to the same effect. There, the court reversed a ruling that polyethylene greenhouses on the property of an ornamental horticulture business were personal property. Holding that the greenhouses were fixtures, the court relied on evidence demonstrating that these greenhouses had been

designed to support the plant life essential to the business. Specifically, the *Tuinier* court highlighted that the greenhouses had been supplied with natural gas through pipes, warmed through heaters installed into support bars, and cooled through large wall fans. Based on, *inter alia*, the addition of cement sidewalks within the greenhouses that were designed to make the use of the greenhouses more "efficient," the Court of Appeals found that there was sufficient evidence of intent to permanently affix the greenhouses. *Id.* at 121.

Finally, in *In re Cliff's Ridge Skiing Corp.*, 123 B.R. 753, 759 (Bankr. W.D. Mich. 1991), the court considered whether a chairlift that had been "engineered to be erected on the realty" and "specially modified to be attached to the realty" was a fixture. This engineering provided a basis for the court to find that the chairlift was intended to be permanently attached to the real estate. *Id.*

Other jurisdictions — which apply the same three-part fixture test and require intent to be proven through objective facts — likewise look to evidence of design and engineering considerations as an objective indicator of intent. So, for example, in *Ray* v. *GTE Prod. Corp.*, 15 F.3d 179, *2 (5th Cir. 1994), the court held that a bus duct electrical switch was intended to be permanent based on, *inter alia*, testimony from the engineering manager that the switch was "essential to the electrical system [he had] designed" and was "manufactured to be integrated and permanently affixed within the structure of a building's electrical system." Similarly, in *Enerquin Air, Inc.* v. *State Tax Assessor*, 670 A.2d 926, 929-30 (Me. 1996), the court relied on testimony that the air process system "had been designed to accommodate the requirements of the building," and was "heavily intertwined with the building structure" in concluding that the air process system was a fixture.

The former GM employees' expert testimony is admissible under these standards. They will explain how the design attributes of each of the Representative Assets facilitates the business purpose of the GM plants: to efficiently and cost-effectively mass produce automobiles. For example, the Term Lenders' first witness, Eric Stevens, is knowledgeable about the physical nature of and business advantages for GM's use of common vehicle

platforms. These are facts. Mr. Stevens is knowledgeable about the engineering requirements for the implementation of GM's use of lean manufacturing techniques (indeed, he "wrote the book on it") and the business objectives behind them. These too are facts. Mr. Stevens is knowledgeable about the design, business and engineering reasons for the complex integration of the production assets that form the manufacturing systems in GM's plants. These too are facts. All of these objective facts are evidence of GM's intent to install the manufacturing assets that comprise the 40 Representative Assets for their useful lives.

Thus, unlike the state of mind testimony the Court ruled inadmissible in *Lyondell*, the testimony the Term Lenders offer does not speculate, "without supporting evidence," about what was in the minds of GM's management or its Board of Directors when these assets were installed. *See In re Lyondell Chem. Co.*, 558 B.R. 661, 669-70 (Bankr. S.D.N.Y. 2016). Rather, in the words of the case law, the testimony will show that the relevant assets are designed for "efficient use," *Tuinier*, 599 N.W.2d at 121, are "essential" to how GM designed its manufacturing system in which the assets are "integrated," *Ray*, 15 F.3d at *2, facilitate the use of the plants in which they are located, *Dehring*, 110 N.W. at 57, and "accommodate the requirements" of those plants, *Enerquin Air*, 670 A.2d at 929-30. As the case law establishes, this type of evidence is probative of GM's intent under the fixture test and is admissible.

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Respectfully submitted,

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