UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE:	.	Case No. 09-50026-mg
MOTORS LIQUIDATION COMPANY, et al., f/k/a GENERAL MOTORS CORP., et al,	.	Chapter 11
	.	(Jointly administered)
Debtors.	.	
. . . . .	.	
MOTORS LIQUIDATION COMPANY AVOIDANCE ACTION TRUST, by and through the Wilmington Trust Company, solely in its capacity as Trust Administrator and Trustee,	.	Adv. Proc. No. 09-00504-mg
Plaintiff,	.	
v.	.	
JPMORGAN CHASE BANK, N.A., individually and as Administrative Agent for Various lenders party to the Term Loan Agreement described herein, et al.,	.	One Bowling Green New York, NY 10004
	.	Thursday, August 9, 2018
Defendants.	.	10:00 a.m.
. . . . .	.	

TRANSCRIPT OF ADVERSARY PROCEEDING: 09-00504-mg
MOTORS LIQUIDATION COMPANY AVOIDANCE ACTION TRUST V. JPMORGAN CHASE BANK, N.A. ET AL, PRE-MOTION CONFERENCE
(RELATED DOCUMENT(S) 1062, 1061, 1058, 1059, 1060)

BEFORE THE HONORABLE MARTIN GLENN
UNITED STATES BANKRUPTCY COURT JUDGE

APPEARANCES CONTINUED

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(Proceedings commence at 10 a.m.)

THE COURT: Please be seated. We're here in the adversary proceeding, Motors Liquidation Company Avoidance Action Trust v. JPMorgan Chase Bank, N.A. et al. It's adversary proceeding number 09-00504. I have the list of appearances in front of me.

Mr. Fisher.

MR. FISHER: Good morning, Your Honor. Eric Fisher from Binder & Schwartz on behalf of the Avoidance Action Trust.

THE COURT: You'll forgive me, Mr. Fisher, if I say I was hoping I would never see you all again.

MR. FISHER: I understand why you say that, Your Honor.

THE COURT: Nothing personal.

MR. FISHER: Well, maybe I could start there. I think we all know and agree that the best outcome here is a negotiated outcome. And we've reported to the Court jointly that, to this point, we have not been able to reach that kind of outcome.

And so we're here today to talk about how we see the path forward so that we don't delay this case indefinitely. But I think that we all remain committed to looking for opportunities to get the case resolved. I think we also all believe that so long as we haven't been able to do that, we need to move it forward.

THE COURT: We do. And we need to move it forward more rapidly than the schedule that was proposed in the Wachtell letter.

With only, I think, one prior request for -- in an order for an update, I've sort of let you all try and get this resolved. I'm not suggesting that you have -- that people haven't tried, in good faith, to get it resolved. But I've sat back much longer than I do in most of the matters on my calendar. And so we're going to wind up with a very aggressive schedule.

MR. FISHER: So, Your Honor, maybe I should begin by briefly describing how we see the path --

THE COURT: Okay. Go ahead.

MR. FISHER: -- forward to resolution here. I think three parts to it. One is continued mediation of asset disputes. And in the stipulation that we jointly submitted, there is an Exhibit A that lays out a mediation schedule that we've already agreed to that goes through November 6. There are sessions scheduled with all counsel and with the mediator through November 6th to address specific remaining asset disputes in an effort to narrow them as much as we can.

There are two -- on that mediation schedule, there are two TBD dates at the end related to CWIP and Saturn Special Tooling, and that's because the term lenders need additional time and some additional discovery, they say, before they can

commit to the full scope of what they claim to be their collateral. So those placeholder sessions are meant to address that issue and try to seek resolution. So asset mediations is one aspect of getting this case to resolution.

The second aspect, we think, is resolution of our proposed motions. We propose -- chiefly, what I'm focused on here are our proposed motions that are directed towards their threshold defenses. So that's earmarking, constructive trust, and the binding nature of the Second Circuit's decision as to effectiveness.

For reasons that are described in our letter and that I'm happy to elaborate on today, we think that those issues are appropriate for summary judgment. If the Court prefers to hear those in some sort of expedited trial, of course we're open to that.

THE COURT: You know, after reading the response letters -- and obviously the first two -- I have the first two letters. In reading the response letters, I guess because I plan to move this forward expeditiously, I'm sort of resigned to having to do it in two stages.

One, you both -- all sides agree that there are some issues as to which a trial may be necessary if you don't resolve them with some further discovery, And both sides seem to agree that there are issues that can be resolved as a matter of law. And so we'll talk specifically about the issues --

which issues fall under which categories. I'm inclined to do this then in two steps: One, move forward expeditiously with briefing on those issues as to which parties agree. There are some issues where you don't agree, but I may have other -- my own views about it. And you go forward, brief, and we'll deal with that.

And at the same time, you move forward on those where you agree, unless it's settled, discovery and trial -- further discovery and trial will be necessary. That can go forward on a separate track. And both of those tracks, it seems to me -- you know, in many cases, Mr. Fisher, I'm pleased when the parties agree to mediate, but I don't necessarily slow down what's pending before me while a mediation goes on.

I'm determined to bring this to a conclusion, at least in this court. So it may be you're going to be litigating and mediating the same issue at the same time. I've been patient until now, but we've got to move forward.

MR. FISHER: On the last point that Your Honor made, we didn't react to the schedule that Wachtell had proposed. And I think that that was in part because we wanted to get direction from the Court.

With regard to many of the asset issues, though, I do believe that at least letting the mediation -- discovery, as we've all proposed it, begins August 14th, so no one is delaying the recommencement of discovery. I think that it

really will ultimately streamline matters for the Court's resolution if trials on the asset issues happen after we've had an opportunity to mediate each of the asset issues. Because I there isn't a complete resolution process, there's at least a windowing process and a focusing on --

THE COURT: Well, I'm not proposing anything -- I may -- and I'm not sure whether I'm proposing anything different. Because I guess what I'm suggesting is, is that on -- where there are disputes about where assets fall and you agree that further discovery is going to be required, you'll move forward with the discovery. And you can move forward with the mediation and having in mind that there's going to be a schedule that has a cutoff on discovery and trial dates.

So I don't know. You may not want to have to -- you may want to let mediation run its course before you have to prepare for trial. But what I'm suggesting is, they may happen at the same time.

MR. FISHER: Okay. Understood, Your Honor. So maybe what I should do then is turn briefly to our proposed motions so that --

THE COURT: Yes, please.

MR. FISHER: -- we can focus in on the substance of how each issue will be handled by the Court.

So on the issue of earmarking, essentially, the term lenders are arguing that the DIP proceeds that were used to pay

off the term loan were earmarked for that purpose, and therefore it's not really property of the debtor and not really subject to the avoidance powers of the bankrupt estate.

THE COURT: I take it you agree, not with respect to the issue -- the factual issues here. Earmarking can be a defense to an avoidance claim.

MR. FISHER: Yes, Your Honor.

THE COURT: Okay.

MR. FISHER: I think that -- of course, it can. I think, as a matter of law based on the undisputed facts, I don't think they can possibly meet that standard here.

And just by way of a few quick examples, the debtor maintained control over these proceeds the entire period of time. Matt Feldman, who was general counsel to the automotive task force said there was actually a deliberate decision to allow GM maximum flexibility in terms of how it used the proceeds. The funds were never segregated. The DIP loan was never conditioned on repayment of the term loan.

But maybe even more fundamentally, Your Honor, I think that their position is directly inconsistent with the DIP order in this case. Which, in paragraph 19 of the DIP order, on the one hand, the debtor was directed to use, and authorized to use DIP proceeds to pay off the term loan. And on the other hand, that same paragraph, 19(d), preserved the ability of the creditors' committee, and now this trust, to bring actions

related to that payoff.

And so I think at that very time, there was already a determination that these funds that were being used to pay off the term lenders were not earmarked, because the avoidance powers with respect to that payoff were being preserved.

THE COURT: Are there -- and your view is there are not factual disputes with respect to earmarking?

MR. FISHER: That's right, Your Honor. Really, all they say -- they say they need more discovery, and my understanding is -- there are some documents they identified, but I think that that's quite vague. Really, what they say is they need the deposition of Mr. Adil Mistry, who was the assistant treasurer at GM.

And we just don't think that under Rule 56(d) that that would be a basis for opposing the summary judgment motion that we are considering. Because I can't imagine what fact that -- in light of all the facts that are already known and undisputed, could call into question that the earmarking defense fails as a matter of law.

THE COURT: You know, I might be inclined to say, take his deposition in the next two weeks. Look, I don't -- I'm going to wait. I'm not ordering it yet. But I'm just -- if a -- I haven't permitted discovery on the affirmative defenses. Do you agree with that?

MR. FISHER: Yes.

THE COURT: Okay. And if a party, in good faith, makes an argument, you acknowledge that earmarking can be a defense to an avoidance claim.

MR. FISHER: Yes.

THE COURT: And if a party, in good faith, believes that -- it believes it can show that there was earmarking, and they haven't been permitted to take discovery with respect to it, you may well be right, Mr. Fisher, but I'd be inclined to say, okay. I'll ask Mr. Wolinsky specifically what discovery do you wish to undertake with respect to your earmarking defense. And, you know, I don't know whether it's going to be two weeks, but it's going to be very short if I give him any opportunity for discovery on it. Let him take the deposition, and he'll make the arguments.

You know, I may do that at the same time that I'm saying, okay, I'm going to permit you to move for summary judgment on it. Don't file that motion until the following discovery takes place. But I want to -- I have not decided yet, but I'm just -- the thing that gives me some pause, Mr. Fisher, is -- it wasn't really disputed. I mean, everybody agreed pro hac, not discovery on the affirmative defenses, okay. And so that leads me to think, okay, before I permit summary judgment motion on an earmarking defense, to let them have a reasonable amount of discovery very promptly and let them take their best shot.

But I'm not ruling yet because I want to hear the other side about it, and I want to know exactly what discovery they want to take on the earmarking defense, they think they're entitled to take on the -- they did lay out some of that in their letter response, because I wanted to know specifically what discovery people wanted and think they're entitled to.

Okay. Let's go on to the next.

MR. FISHER: Okay. The next issue, Your Honor, is constructive trust.

THE COURT: I'm mystified on the constructive trust issue, because their letter suggests that there was some -- that unjust enrichment -- and they talk about the debtor. Well, the avoidance claim doesn't belong -- never belonged to the debtor. It belonged to a trustee, debtor in possession. Now the right to pursue it goes to the Avoidance Action Trust. And what, if any, equitable defenses they might've had in claims against Old GM are not -- those are not necessarily defenses that they could assert against the Avoidance Action Trust.

So their letter -- and Mr. Wolinsky will address that. Their letter was somewhat confusing to me, because it seemed to suggest that there was some -- the unfairness the unjust enrichment is because of conduct of the debtor. Well, that's too bad. That doesn't mean it's a defense on an avoidance action -- a statutory avoidance claim, which is what

you're pursuing, which was an estate cause of action.

So what's your view about the constructive trust defense?

MR. FISHER: So, Your Honor, certainly we agree, as a matter of law, that it doesn't apply. Our view is that it doesn't apply as a matter of law. I agree with Your Honor's observation that, for one thing, there's no unjust enrichment here. And to make the point --

THE COURT: Well, they'll have -- you know, if they're -- if you prevail in the avoidance action, they'll have a right to assert unsecured creditor claims and share pro rata with other unsecured creditors. There -- it doesn't seem to me to fall in the category of unjust enrichment. It's an issue of what recovery, if any, are unsecured creditors entitled to.

If there's no recovery in your action, it'll benefit the unsecured creditors. They would get to file an unsecured claim for an amount that they have to disgorge. So I don't understand how this could possibly be unjust enrichment, either.

MR. FISHER: Right. And, Your Honor, to take the point perhaps even one step further, our trust benefits not only unsecured creditors, but 30 percent of our recoveries go to the DIP lenders. And I don't think that they have any argument that the DIP lenders have been unjustly enriched here.

THE COURT: Okay.

MR. FISHER: Also, on constructive trust, I don't think they have pointed to, or really can point to any wrongful conduct by GM here. Essentially, they're saying that because GM continued to certify that there was no default under the term loan, even when GM had in its possession some documents that showed that the UCC-3 termination statement had been filed, which would have been an event of default, they're saying that that's the wrongful conduct.

THE COURT: Tell me what your -- what's the legal basis for your summary judgment motion with respect to constructive trust.

MR. FISHER: In short, they can't make out any of the elements of the claim. There's no wrongful conduct. There's no --

THE COURT: Whose wrongful conduct would have to be shown? I mean --

MR. FISHER: Well, they're pointing to wrongful conduct on the part of Old GM before it filed for bankruptcy, so not really Old GM. General Motors Corporation is what they're pointing at.

THE COURT: And are there any -- what I -- I didn't see their letter cite any cases that would provide a defense to an estate cause of action for -- state avoidance cause of action for some bad conduct by the debtor before bankruptcy, because this is a claim of the estate. Are you aware of any

cases that would permit a constructive trust defense to an avoidance claim where the conduct -- or misconduct that's alleged is of the pre-petition debtor?

MR. FISHER: So, Your Honor, I'm not comfortable answering that question definitively. I would -- but no, right -- standing here now, I'm not aware. The only case I think that they cite to is Howard's Appliance Corp (2d Cir.). What they don't tell the Court was that that was not a New York constructive trust issue. It was applying New Jersey Law. And I would need to look at --

THE COURT: And was that in the avoidance action context?

MR. FISHER: That's -- Your Honor, that's why I'm hesitant. I would need to take a closer look at that case to know if it was an avoidance action.

THE COURT: Which case are you saying? It's Howard --

MR. FISHER: It's Howard's Appliance Corp.

THE COURT: Okay.

MR. FISHER: I mean, I had focused really on the facts of that case as opposed to Your Honor's legal question. I mean, in that case, it involved air-conditioning units that, six months before bankruptcy, the debtor moved from New York to New Jersey in order to defeat the secured lender's security interest because the UCC filings were only in New York.

And the court there found that the debtor must've known, or should've known, that this would defeat the secured lender's interest, and so it imposed a constructive trust in those circumstances. That's not anything like the facts here.

THE COURT: All right. Go on to your next --

MR. FISHER: One -- on constructive trust, one other point that's not in our letter, but that -- I guess this case is now old enough that I have recovered memories. But I remembered, and I looked that in 2010, before Judge Gerber, the defendant's moved for summary judgment in the alternative on the basis of constructive trust. And Judge Gerber did not reach that issue.

Judge Gerber says, in the footnotes towards the very end of the opinion, that because he ruled in favor of JPMorgan on other grounds, namely that the UCC-3 was not effective, he didn't need to reach that issue. But certainly in 2010, they felt that it was summary judgment worthy.

And so I think the Court should look skeptically --

THE COURT: What's the cite of that opinion by Judge Gerber?

MR. FISHER: If you give me just one moment.

THE COURT: Come back to it before --

MR. FISHER: Okay. I will.

THE COURT: Before we finish today, give me a cite. If you don't have it with you, you'll send the letter with it.

MR. FISHER: I do have the decision with me.

THE COURT: Okay. That's fine.

MR. FISHER: It just may take me a couple minutes --

THE COURT: That's fine.

MR. FISHER: -- to locate it.

Also, it fails as a matter of law. There -- also, unjust enrichment cases require some fiduciary relationship, and there's no fiduciary relationship here. I think the Howard's Appliance Corp case may be an outlier in that regard, but again, that was a case decided under New Jersey law, not under New York law.

New York law is quite clear that a fiduciary or special confidential relationship is required between the parties in order to impose a constructive trust. This is a contractual relationship. That's constructive trust in a nutshell, Your Honor.

Turning to the Second Circuit's ruling on the effectiveness of the UCC-3 filing and whether that decision is binding on term lenders other than JPMorgan. So here --

THE COURT: Is someone here from Munger Tolles?

MR. MACDONALD: Yes, Your Honor.

THE COURT: You are?

MR. MACDONALD: Matt Macdonald from Munger Tolles.

THE COURT: Let me raise it right now, Mr. Macdonald. Your letter of August 7th, which is ECF docket number 1065,

argues at some length and with some vehemence that Mayer Brown was an agent and not authorized to do what it did. And you rely extensively on the restatement of agency.

It seems to me you've come very close to the line of Rules of Professional Conduct 3.3(a)(2), fail to disclose to the tribunal controlling legal authority known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel. Well, we haven't had full briefing. But when I say close -- and I'm not deciding the issue. But nowhere in your letter do you cite to the Second Circuit's -- excuse me, the Seventh Circuit's opinion in Oakland Police and Fire Retirement System v. Mayer Brown, LLP, 861 F.3d 644 (7th Cir. 2017). Were you aware of that case?

MR. MACDONALD: I have heard of that case, Your Honor. I have read that -- I am sure I have read that opinion at some point, Your Honor.

THE COURT: You know, that case was in a putative class action brought by the lenders for the term loan against Mayer Brown. The district court dismissed the complaint for failure to state a claim. And Judge Hamilton, writing for the Seventh Circuit, has a very clear analysis.

And one of the things that you rely on in your letter, you say the Second Circuit does not -- in its opinions, doesn't say anything about -- or mistakes whether anybody at Mayer Brown knew about the fact that the term loan was included

-- had been included in the UCC-3 releases. And in Judge Hamilton's decision at 861 F.3d at 648, Judge Hamilton, in recounting the facts, says, quote:

> "Another paralegal tasked with preparing the termination statements recognize that the 2006 term loan had been included by mistake, but he ignored the discrepancy. The erroneous checklist and documents were then sent to Simpson Thacher for review."

So Judge Hamilton and the Seventh Circuit Panel specifically were aware of the facts that you're relying on to support your argument that the filing of the UCC-3 was not authorized. And in the Seventh Circuit's opinion, Judge Hamilton very carefully goes through and says that Mayer Brown owed no duty to JPMorgan or to the lenders.

And it seems to me, you know, directly -- now, you can argue that, well, that's a Seventh Circuit decision. It's not binding. It's not binding authority on you. It's this case. It's these facts. It's the release of the lien on the term loan's collateral. And I happen to know about the decision.

You just filed the letter on the 7th, so Mr. Fisher hasn't had a chance to respond to it. But it seems to me that, at a minimum, good lawyering would have required you to at least put a footnote that called the Court's attention to this decision. I wanted to get that off my chest right now, because

I was very -- I thought, oh, well, that's a plausible argument they're marking. That's a -- isn't there a Seventh Circuit decision that specifically addressed Mayer Brown's role in connection with this transaction? That's the decision. This is the district court decision just affirmed.

I'll give you a chance later, but I wanted to make that clear right now. It seems to me you've come very close to skirting the line with Rule 3.3(a)(2).

Go ahead, Mr. Fisher.

MR. FISHER: Your Honor, as to this issue, first of all, everyone agrees discovery is closed, so it -- the issue is certainly ready for summary judgment. And, you know, Your Honor gave the term lenders an opportunity in discovery to try to find facts that weren't presented to the Second Circuit or legal arguments that weren't presented to the Second Circuit that would've changed the outcome. And they have found neither, Your Honor.

In terms of facts, attached to the letter from Munger Tolles is a snippet from a 2010 deposition from the associate at Mayer Brown, Ryan Green. They retook his deposition, and there was nothing new to be said on the topic. That deposition transcript was part of the record on appeal to the Second Circuit.

In terms of legal arguments, they cite to the restatement on agency, and they talk about horses and cows and,

you know, if you know that -- if you're an agent and you know that the principal has authorized you to sell his cow, and the agent says --

THE COURT: Well, it was interesting to me that they refer to Mayer Brown as an agent but didn't say who the principal was. And it seems to me that the Seventh Circuit decision that I refer to, Oakland Police and Fire, pretty clearly holds Mayer Brown as the lawyer and agent for General Motors and not for JPMorgan. And, in fact, it refers to it as an adversary relationship. Not in the sense they were litigating each other, but adversary, they had distinct interests of the parties.

So, you know, it does seem to me that -- and I've read over the Second Circuit's decision reversing Judge Gerber, the Delaware Supreme Court decision with respect to the UCC issue, and the Second Circuit opinion with the result that brings you all back here. But I'm going to wait until counsel has a chance to respond before deciding whether to permit you to make the motion.

MR. FISHER: And, Your Honor, on -- with regard to the legal argument that they present as a new argument that was not previously presented to the Second Circuit, there was a letter brief submitted to the Second Circuit after the Delaware Supreme Court decision, before the Second Circuit decided the issue. It's in the Second Circuit's docket. In this case,

document number 128, where this legal argument is made and the same restatement provision involving the horse and --

THE COURT: Could you send me a copy of that?

MR. FISHER: Yes, Your Honor.

So we think the issue is -- everyone agrees that discovery's closed. We think it's an issue that can and should be resolved on summary judgment, Your Honor.

THE COURT: Okay.

MR. FISHER: The last issue as to which we've proposed a motion for summary judgment is not like the others. It's a much more discreet issue, and it's a question about how to apply Louisiana fixture law to assets located at a GM plant in Shreveport, Louisiana.

And for different reasons, I think everyone agrees that the issue is one that's capable of resolution on summary judgment. They argue that Your Honor's ruling with respect to the Eaton County fixture filing where the court found that we were time-barred from challenging that fixture filing controls here, and we should similarly be time-barred from raising this issue.

THE COURT: Yeah. My reaction -- and again, I'm not ruling, but my reaction was, I spent more than half of a very long opinion deciding what's a fixture. The issue in the trial was, was it a fixture or personalty. The issue that you're raising with respect to Louisiana is, was it a fixture or

realty.

So, you know, the issue that I decided in the opinion with respect to Lansing Delta Township started with a review of the collateral documents and concluded that yes, the collateral documents granted the term loan lenders a lien on fixtures. The issue was whether -- then became, was it properly perfected, what happens if it wasn't, and I ruled the way I did.

So that's where I'm having some trouble understanding their position, because you acknowledge they have a perfected lien on fixtures. What you're challenging is, under Louisiana law, what's a fixture.

MR. FISHER: That's exactly right, Your Honor. And that's exactly why we think this is not --

THE COURT: And both sides agree that summary judgment is appropriate, and I'm -- you know, I think I'm this -- I agree that summary judgment is appropriate. I don't know how I'm going to come out on it. They may have an answer to what my concern is. There's no question that with respect to Rule 7001, what I focused on was the issue of priority. Whether they had -- whether you had a -- whether they had a perfected security interest where a trustee is exercising avoidance powers was an issue of priority. Here, it clearly isn't an issue of priority. But I'll wait to see the briefs. I see their argument. I see your argument.

MR. FISHER: That's our position on Louisiana law.

Your Honor, to fill in the missing cite, I don't have the published cite.

THE COURT: That's fine.

MR. FISHER: But in this adversary proceeding, it's docket entry number 71, is Judge Gerber's summary judgment decision. And it's footnote 216 that he notes --

THE COURT: No comment.

MR. FISHER: -- that he's not going to reach the constructive trust issue.

Your Honor, the remaining issue -- I don't know if the Court wants me to address those issues that the term lenders propose to raise on summary judgment, or if you would rather --

THE COURT: Well, let me let them --

MR. FISHER: -- that I respond.

THE COURT: Let me hear from them first.

MR. FISHER: Thank you, Your Honor.

THE COURT: Yeah. Mr. Wolinsky. So Mr. Fisher doesn't think I'm picking on him, I hope to never see you in this courtroom in this matter again, either. But -- nothing personal.

MR. WOLINSKY: I don't want to say that the feeling is mutual, Your Honor, but it is.

THE COURT: It's okay.

MR. WOLINSKY: No. I think everyone hoped that we would've resolved this case. It's more than a year later since we've seen you. And we all -- had all hoped that we would've resolved the case.

THE COURT: And again, I should've asked Mr. Fisher this, but you're standing up there. I guess the motions for relief to appeal still have -- no action's been taken?

MR. WOLINSKY: Correct. Correct, Your Honor.

MR. FISHER: Correct, Your Honor.

MR. WOLINSKY: And just to start where you started, we have no problem with a very aggressive schedule. The schedule that we put together, frankly, dealt with the reality that the party that has most of the documents and information we need is General Motors, and it's not a party. So if they're prepared to move aggressively --

THE COURT: Well, whether they're prepared or not, I'm inclined to say, you know, you serve your subpoena, and if they don't cooperate, you'll be back here or you may have to go to a district court in Michigan to enforce the subpoena if they don't want to let me do it.

But, you know, I'm not -- I'm not going to be unreasonable about it, but what I do think is that I'm inclined to permit very targeted discovery. Go ahead.

MR. WOLINSKY: That's fine. And in terms of two tracks, that's also fine. Happy to brief the issues at the

same time we're going forward with the discovery. That's obviously --

THE COURT: Well, you know, with -- that I'm not sure makes sense, because briefs could be very different depending on what shows up in discovery. But -- so I think that I'd be more inclined to have a very short period of discovery, and have you -- both sides report back to the Court what the situation is with respect to the discovery. And you can -- I'm sure you're working on your briefs already.

MR. WOLINSKY: Well, just to be clear, what I meant is any issue that we all agree, or you decide, should be briefed now. We're prepared to do that.

THE COURT: Fine. Okay.

MR. WOLINSKY: And Louisiana law issue is obviously one.

One thing that Mr. Fisher said, where we pushed back on you on, where I do agree with him, for issues that we have scheduled mediation sessions, it is much -- the experience is, it is much more productive to let us mediate those issues rather than start preparing to try them right now.

We have had several mediation sessions that are asset specific. We bring in Mr. Stevens. They've -- I don't want to get too much into the mediation. But they are very productive sessions in narrowing the issues, and to try that --

THE COURT: I hear you. I hear you. But that's not

what I'm inclined to do.

MR. WOLINSKY: That's -- okay. That's fine.

THE COURT: I think -- I'm not trying to make unnecessary work for all of you, but a year has gone -- more than a year has gone by and we are where we are. You know, I've had one new clerk who's started and two more yet to come in the next couple of weeks. I'm not -- this is going to be done before their clerkship -- at least as far as I'm concerned, this is going to be done before their clerkship term is done.

They come in for a year, and -- you know, you had possibly a trial in April. Well, that may slip to -- you know, and I'm suddenly faced with getting law clerks up to speed on all of this, and then have them depart. So we need a more aggressive schedule.

MR. WOLINSKY: That's fine.

THE COURT: And it may mean that you're mediating and preparing for a trial at the same time.

MR. WOLINSKY: Okay. Your Honor, on earmarking, in all candor, we're evaluating whether the game is worth the candle. And we'll take your comments to heart, and we'll evaluate that. The discovery, if we take it, is limited.

THE COURT: When will you finish evaluating that?

MR. WOLINSKY: When I get back to the office and talk to the client.

THE COURT: Okay. Could you let me know what you all decide?

MR. WOLINSKY: Yes.

Your Honor, as to constructive trust, Mr. Fisher pointed out the case that's our principal case, Howard's Appliance. We don't think New Jersey law's substantially different than New York law. In that case -- you know, obviously we'll brief it --

THE COURT: I'm aware of the case, so -- but does it specifically address the issue of whether equitable defenses against the debtor applied to a state claim against a party?

MR. WOLINSKY: Well, that case was brought by the debtor in possession. And I think the fundamental issues is that our interest, our lien in this property is not, as a matter of equity, part of the estate. So I think the -- I'm happy to brief the issue as to whether the adoption applies in this context. We think it does, and we think Howard's Appliance stands for that proposition.

Mr. Fisher said the facts are very different. Actually, the facts are very similar. The Court said that in the -- you didn't need to show a sinister motive. The debtor moved the property out to a separate state.

THE COURT: And what discovery do you think you need on constructive trust?

MR. WOLINSKY: Principally, Mr. Mistry, and the issue

is this, and Mr. Fisher alluded to this. We got certificates from General Motors that were supposed to be to the best of their knowledge. Best of their knowledge imposes a duty of inquiry. We think it does. And we'd like to ask him, you know, did you sign a piece of paper when somebody slipped it under your nose as you were drinking your morning coffee, or did you actually engage in an effort to determine there was truth behind what you were saying?

We also have the issue of the Mayer Brown, which is, Your Honor, as to the equities. As to the equities.

THE COURT: I disagree. I disagree. You know, as --

MR. WOLINSKY: That's what -- that's where -- how --

THE COURT: -- Judge Hamilton said in his opinion, these lenders brought this suit asserting legal malpractice and negligent misrepresentation, but they sued not JPMorgan or its law firm who would seem to be the most obvious defendants under the circumstances, but borrower, General Motors's, law firm, Mayer Brown.

MR. WOLINSKY: As to the equities, whether General Motors and its estate should benefit from a mistake by their own lawyer, we think, goes --

THE COURT: General Motors is not benefitting from the mistake that was made by JPMorgan. General Motors is gone. This is an estate cause of action. And I'll go back and read Howard Appliance, but I think, you know, any briefing is going

to need to specifically deal with the issue of whether any equitable defenses that may have existed as to the debtor can be asserted where an estate claim is prosecuted here by the avoidance action trust. But go ahead.

MR. WOLINSKY: No, we'll brief that issue, and we'd like to take the discovery so that you can --

THE COURT: When are you prepared to take the deposition? I know you have to -- you haven't subpoenaed it.

MR. WOLINSKY: We haven't subpoenaed him --

THE COURT: Discovery has been stayed with respect to the affirmative defenses?

MR. WOLINSKY: Correct. Correct, Your Honor. And they're also -- there are documents we'd like to get out of General Motors, kind of the basics, who -- what was Mr. Mistry told, what was he asked to do, when was he asked to do it. Well, that discovery hasn't taken place.

So how long it will take GM to produce those documents I can't predict, but as soon as we have them, we'll take the deposition.

THE COURT: When are you prepared -- if I lift the stay on that discovery, when are you prepared to serve your discovery -- your document requests?

MR. WOLINSKY: We can serve it on Monday. We --

THE COURT: It'll be a subpoena and not a --

MR. WOLINSKY: Yeah. We've already started drafting

our document requests in anticipation of August 14th. We can carve this one out and serve it Monday.

THE COURT: Well, we don't have to wait until August 14th.

MR. WOLINSKY: That's fine.

THE COURT: We can do that right away.

MR. WOLINSKY: Then that's what we'll do.

THE COURT: I guess, look, I'm skeptical about the assertion with the defense, but skeptical, I'm not ruling. And as I said to Mr. Fisher, you -- by agreement of the parties and ordered by the Court, there has been no discovery with respect to the affirmative defenses. And so my inclination is to say, okay, I will permit targeted discovery related to -- in a compressed timeframe as to the affirmative -- these affirmative defenses you're asserting. And I'm not sure this would apply to the earmarking, but if so, okay. Let's see where we go.

MR. WOLINSKY: That's fine, Your Honor. And with respect to -- obviously, Mr. MacDonald will deal with the UCC. As with respect to the Louisiana law issue, we all agree that that issue is ripe for judgment. We have a different perspective. Under the UCC -- the Louisiana UCC-3, goods that are attached to the realty are still fixtures. The issue is how do you perfect your interest. And you need a mortgage as opposed to a fixture filing. And this is squarely within 7001(2). They're basically -- they are challenging the extent

of our lien just like at LDT, Mr. Fisher's --

THE COURT: Well, they weren't challenging the extent of your lien at LDT. Their argument was if you had a lien on anything, it was on a vacant lot.

MR. WOLINSKY: Right. This is --

THE COURT: And the issue was -- there was a granting clause, so they had the security. You had the security interest. The issue was perfection --

MR. WOLINSKY: Right.

THE COURT: -- and what priority. If it wasn't perfected, what, if anything, priority you have against a challenge by a trustee.

MR. WOLINSKY: Yeah. So we think the granting clause covers these assets and they're challenging.

THE COURT: Okay. So you'll brief?

MR. WOLINSKY: So we'll brief it.

THE COURT: Okay. Anything else, Mr. Wolinsky? Why don't you -- what are the issues that you agree --

MR. WOLINSKY: Sure.

THE COURT: -- require discovery in a trial if they're not settled?

MR. WOLINSKY: The issues -- I'm sorry, Your Honor. I was distracted. Could you ask the question again?

THE COURT: Yeah. My question -- because your letter, you seem to agree that there are some issue that if

they're not resolved --

MR. WOLINSKY: Oh, sure.

THE COURT: -- in mediation, that a trial is going to be required. And so that's what I wanted.

MR. WOLINSKY: Sure. I'll just go through our list of --

THE COURT: Okay.

MR. WOLINSKY: Okay.

THE COURT: Sure.

MR. WOLINSKY: So our motion number one, decision that Mansfield is a specialized facility, that motion has now been mooted.

THE COURT: That's moot, okay. That's what I thought.

MR. WOLINSKY: That's moot. Okay.

THE COURT: That was -- their letter -- that's moot.

MR. WOLINSKY: Right. They've conceded.

THE COURT: Let's not use the term -- they agree that --

MR. WOLINSKY: They agree.

THE COURT: Okay.

MR. WOLINSKY: Partial summary judgment and clarification that the building systems at LDT CUC are fixtures. There are two aspects of this. We think both of these can be resolved by motion, okay.

THE COURT: Tell me what those aspects are.

MR. WOLINSKY: Okay. The first --

THE COURT: I must say I haven't done this in -- mercifully, I hadn't done it in some time, but I spent a good part of yesterday reviewing a fixture decision.

MR. WOLINSKY: There are two aspects to this motion. The first is, and this is they conceded that the air handling units, which are those big boxes on top of the buildings at the CUC, are fixtures. So we didn't try it. So Your Honor didn't decide. But, frankly, our experience is that now they're standing with their fingers behind their back and they're saying, oh yes, we conceded that that air handling unit is a fixture, but all the others are not.

And they want to engage in extensive discovery of every air handling unit at 26 plants. We think that was decided by the -- by Your Honor's decision. You can't conceded something with a fixture for purposes of the trial and then turn around and say, but we're not conceding all the others. So that's issue number one that we think can be resolved by motion.

THE COURT: So these air handlers are where?

MR. WOLINSKY: Well, the ones at the CUC were spread -- it turns -- we called them the CUC assets. It turns out that they're all over the roof of the building at LDT.

THE COURT: So you're saying there's still a dispute

with respect to air handlers on the roof at Lansing Delta Township?

MR. WOLINSKY: No. I think their position is those -- yes.

THE COURT: They agree?

MR. WOLINSKY: I think, but they're saying that decision does not have broader application.

THE COURT: No. But let me --

Mr. Fisher, is their dispute about their air handlers at Lansing Delta Township?

MR. FISHER: No, Your Honor.

THE COURT: Okay. All right. And so the issue is the extent to which the prior decision has binding effect with respect to air handlers at other locations?

MR. WOLINSKY: Our basic position, an air handling unit is an air handling unit is an air handling unit. And we don't think they can take the position that having a representative trial over an asset that included an air handling unit gives them flexibility to say all other air handling units -- we now can litigate every other air handling unit in the universe of General Motors.

THE COURT: Is the dispute to the extent there's a dispute about air handling units on central utility complexes in other plants or air handling units on any factory or location? What's the dispute?

MR. WOLINSKY: I think it's probably both.

THE COURT: Because the trial of the 40 representative assets, both sides agreed on the 40, quote/unquote, "representative assets." The CUC at Landing Delta Township was a very large facility, physically separated the assembly stamping plants. It's one of the things I visited on the site visit.

And what I'm -- I guess what I'm concerned about is, is it fair to say that everything in the CUC at Lansing Delta Township, no matter how -- because things were connected in a particular way -- that that should resolve the issue about air handling wherever air handlers are located?

MR. WOLINSKY: Your Honor, you may have a factual misperception. Actually, I had it until not too long ago. We did not see the air handling units because they were up on the roof spread across the facility.

THE COURT: Well, we didn't dispute that they were.

MR. WOLINSKY: And no one at that time said, well, because they're not in the confines of the CUC and they're on the roof, there's a different issue. So let me be more precise as to what we'll see because maybe it's overreaching to ask you to rule that every air handling unit for all times is a fixture. We may get there, but --

THE COURT: My concern -- let me give you an example, okay. So I said in the opinion, and this may not be at all

analogous, but I said robots are troublesome to me. And I didn't rule that every robot was a fixture. I ruled that some of the robots were a fixture, and it dealt with the level of integration and stuff like that. And there was some other robots, like I said, I concluded weren't fixtures.

So I guess what I'm asking about and I'll ask Mr. Fisher about is an issue that was not challenged and not specifically addressed in the opinion about air handlers on the CUC, does that mean they're precluded from challenging air handlers everywhere else that may be connected in a different way, maybe differently configured?

It's like I think, you know, somebody could have central air conditioning in their home and other people have windows boxes stuck in the wall. They both, in theory, do the same thing. Is the window box a fixture? The air conditioning, the central air conditioning may be a fixture.

MR. WOLINSKY: Right. Your Honor, let me be more precise and maybe narrower. They conceded that the air handling units at LDT were fixtures so there's no judicial finding. What we would seek is a judicial finding that the characteristics of the air handling units at LDT establish that they are fixtures.

THE COURT: But my -- I go on for pages and pages and pages talking about the characteristics of all of the representative assets. The CUC was a representative asset, but

it wasn't broken down. There's no discussion in my opinion about air handlers as part of the CUC, correct?

MR. WOLINSKY: Correct.

THE COURT: Okay.

MR. WOLINSKY: Correct. And that's since -- but there was no discussion.

THE COURT: There's a lot of discussion about what are the characteristics of fixtures.

MR. WOLINSKY: But there was no discussion because it was not -- that aspect was not disputed. So in light of the absence of a judicial finding, we'd like a judicial finding as to that. And the evidence --

THE COURT: How am I supposed to do that? I mean -- when I say how am I supposed to do, you can put an order in front of me, I could sign it. That's how you do it. But it's an issue for whatever reason -- I got voluminous briefing about 40 representative assets and lots of briefing about the CUC but none of -- do any of those briefs talks about the air handlers?

MR. WOLINSKY: Yes. Sure. Well, our testimony does, and no one focused in the briefing because it was conceded. So now that we have the absence of judicial finding, we'd like a judicial finding as to that.

THE COURT: And you tell me -- pick another plant that was not subject of the trial. And has -- so is there a specific dispute about the air handler at some factory in Ohio

that we didn't talk about?

MR. WOLINSKY: There's a dispute, without getting into the mediation, there's a dispute as to every other air handling unit. We're trying to -- Your Honor, we're trying to simplify things and --

THE COURT: You should.

MR. WOLINSKY: -- getting a ruling that at least the air handling -- a judicial ruling that we can take to them and say, okay, this air handling unit at LDT is a fixture adjudicated. Now show us why the others are different. That will -- that's a $50 million issue. And we think the evidence is already in on this point.

THE COURT: All right. Go ahead.

MR. WOLINSKY: Okay. The other issue on the LDT CUC is the dispute we have as to what European meant. And, again, I think no one's in a better position to clarify that than you. And it all boils down to footnote 3 on page 452 in the official reporter.

THE COURT: Of which?

MR. WOLINSKY: The official -- your decision, footnote 3 at page 452 in the official reporter.

THE COURT: I have WestLaw. Wait, let me find it.

MR. WOLINSKY: Okay. I think I have --

THE COURT: Let me find it.

MR. WOLINSKY: -- the WestLaw, too. It's the last

page of the -- it's the next to last page. I can hand it up if you'd like.

THE COURT: Oh, footnote 3 of the chart at the end.

MR. WOLINSKY: Yes.

THE COURT: Not footnote -- on Exhibit A?

MR. WOLINSKY: Correct.

(Pause)

THE COURT: Actually, in the WestLaw version of this, part of footnote 3 may be cut off.

MR. WOLINSKY: It carries over to in --

THE COURT: Let's see, page 452 and 453.

MR. WOLINSKY: Yeah, it's on 453. You don't have page 453?

THE COURT: I do have it, but --

MR. WOLINSKY: Okay.

THE COURT: Oh, wait a second. Hold on. Okay.

(Pause)

THE COURT: Can I see yours?

MR. WOLINSKY: Yeah, sure.

THE COURT: Somehow some of the -- part of this footnote appears to be dropped.

MR. WOLINSKY: The last two pages.

(Pause)

THE COURT: Oh, it's right here. It was confusing. It is here.

MR. WOLINSKY: Oh, okay.

THE COURT: You can have your opinion back.

(Pause)

THE COURT: Okay. So you're probably seeing it on, "The Court finds that the rest of the CUC including the CUC systems is a fixture."

MR. WOLINSKY: So what the dispute boils down to when you said "the rest of the CUC including the CUC systems," what is "the rest"? And then elsewhere in the decision, you find -- this is at page -- actually, page 420, this is another portion of your decision --

THE COURT: Hold on. Let me --

MR. WOLINSKY: Just above the word "K software."

THE COURT: Hold on.

(Pause)

THE COURT: So CUC systems is a defined term.

MR. WOLINSKY: Correct.

THE COURT: Where did I define it?

MR. WOLINSKY: Correct. So --

THE COURT: Where do I -- do I define it somewhere?

MR. WOLINSKY: You define it at page 378.

(Pause)

THE COURT: Okay.

MR. WOLINSKY: So it boils down to if we read footnote 3 to say that the rest of the CUC including the CUC

systems is a fixture, so we're reading the rest of the CUC to have meaning, understandably. And we go back to the evidence that was presented to you and I'm happy to walk you through it now.

THE COURT: Well, let me ask you this. The ventilation system, air cooler --

MR. WOLINSKY: Right.

THE COURT: -- it's part of the CUC systems and let's say they're a fixture. So would that mean that in another facility, if there's an air -- window box air conditioner, that that's part of the cooling system in an office, that it's a fixture?

MR. WOLINSKY: No. No, and we're not taking that position.

THE COURT: But I -- the problem I'm having is I don't -- can you give me --

MR. WOLINSKY: Sure.

THE COURT: -- give me a specific example. You've been -- I don't want to know what's happened and, you know, the positions of the parties. So in mediation you talked about another plant.

MR. WOLINSKY: Yeah.

THE COURT: And there is, what, a cooling air handling system?

MR. WOLINSKY: Yeah, Your Honor, I can be very

concrete about it --

THE COURT: Go ahead. Yeah, please.

MR. WOLINSKY: -- because there was testimony about it. And I'm happy to hand it up or we can --

THE COURT: No, go ahead. Tell me about it.

MR. WOLINSKY: Okay. So in Mr. Stevens's direct testimony at page 65, paragraph 160, he specifically addresses their assertion as to certain of these assets are ordinary building materials. And here's what he says, "I believe that for other inputs, however, while they may be common in many industrial buildings, I believe they have -- they clearly have an identity independent from the building."

If I can pause there, that's the definition of an ordinary building material is something that has an identity separate from the building. So that wall has no identity separate from the building. That window has no identity separate from the building. Your Honor's bench does.

So putting that in context, what Mr. Stevens says is: "Mr. Goesling classifies his common amenities such as the electrical power distribution, components of the heating system, the sprinkler system and certain specialized foundations. Each of these assets, while attached, adapted, and intended to be installed permanently, still can be identified separately from the building itself."

And then Mr. Stevens goes on to say, in his view,

these, because they have an identity separate from the building itself, because they're attached, intended to remain in place, they're fixtures. And then he says the same thing -- then Mr. Goesling disputes that in his testimony at page 84, paragraph 201 where he says:

"I concluded that the building and the associated common utilities are real property because they constitute basic elements that are found in virtually any standard industrial building."

And then in the post-trial briefing, this was an issue that was disputed. In our proposed findings in fact and conclusions of law, paragraph 670, we specifically identified the assets that Mr. Goesling called as common utilities that were disputed and we believe were fixtures. And he talks about heating and ventilation systems, not window air conditions but systems that those are fixtures. And then we in our proposed -- I'm sorry -- that's in our -- yeah, that's in our legal section. And then on page 396 of our post-trial brief, we again say that the common utilities are fixtures and we identify the kinds of assets that Mr. Goesling deemed to be ordinary building materials.

THE COURT: I have your point, but I mean I'll let Mr. Fisher address it in a little while. But go on. Are there more?

MR. WOLINSKY: Your Honor, no the point is, just to

sum up, that we think you addressed this issue. If there's an ambiguity in your decision, we'd request that you clarify it. If you'd like further briefing on it, we're happy to do that. But this is a $300 million issue that's dividing the parties potentially, a big issue.

THE COURT: And the dispute between the parties, have you got down to the granular level of dealing with another specific plant and whether the ventilation and cooling system is or is not a fixture?

MR. WOLINSKY: Yes, Your Honor. We have been working with the other side on a spreadsheet that's this thick, line item by line items. We've exchanged them up and back. And we'll be shortly filing a version or submitting a version of that spreadsheet identifying where we have our dispute. So we've spent a lot of time trying to identify where the disputes are. That's what a good part of the last year has been about. It's been painstaking, but that's where we are.

So that's the next issue. We're happy to brief it, and we think Your Honor's decision is clear. Frankly, they think Your Honor's decision is clear. And we need clarity on that.

THE COURT: Okay. Anything else?

MR. WOLINSKY: Yes.

THE COURT: Go ahead.

MR. WOLINSKY: Mr. Goesling's OLV methodology, as

Your Honor knows, you adopted Mr. Goesling's OLV methodology. And we think that methodology should apply across the universe.

THE COURT: But they're not disputing that that methodology applies. What they're saying is, you know, what you didn't do, Judge, is because Goesling's testimony focused on Lansing Delta Township, we're in transmission.

MR. WOLINSKY: Right.

THE COURT: I didn't receive or if I did, I wasn't aware of evidence. Certainly, I've got the whole -- I mean it sounds like there was this separate KPMG report that I didn't -- that wasn't introduced.

MR. WOLINSKY: There was a separate KPMG estimate of orderly liquidation value of the whole universe of assets including the two we tried. The KPMG number is -- Mr. Goesling's number is six times bigger than the KPMG number. It was there. It was open for them to present it to you as a basis for valuing those two assets that we tried. They didn't do it.

And, Your Honor, the ultimate unfairness is that they didn't do it for a reason. And no one has ever disputed what happened, right? Mr. Klein, I think his name was, stood on the -- say on the stand and he said, you should discard all of KPMG's work because it was unreliable. So they didn't want to be in a position of saying discard all of KPMG's work because it's unreliable except this little piece which we really think

is reliable and you should use it. This was a tactical decision on their part. They could have presented the KPMG orderly liquidation values for the two assets that we tried. They didn't. And, frankly, we think it's just too late. If they want to come up with some other methodology, we're working on a methodology to apply Mr. Goesling's valuation methodology to the universe of assets. That's fine. But they can't use KPMG.

THE COURT: I don't know. I mean, that's the point. So we tried 40 representative assets, two plants that I did visit, the Defiance plant that I didn't visit, and as to the plants that I did -- well, let's see. No, I guess there were some assets that I concluded those assets that weren't sold to New GM.

MR. WOLINSKY: Right.

THE COURT: And that's where I did side with Goesling's analysis.

MR. WOLINSKY: Mr. Goesling, right.

And it's just -- look, Your Honor, there has to come a point of finality, and that's why we had a trial to establish the basis.

THE COURT: Okay. Well, I'll hear Mr. Fisher about it, but okay. Anything else?

MR. WOLINSKY: Yes, unfortunately, but why don't we just continue through the list.

Orion Assembly and Pontiac Stamping. Frankly, we don't think there should -- there needs to be an issue because we don't think there's a good faith basis for a dispute, but there is one.

THE COURT: What's the dispute?

MR. WOLINSKY: The dispute is that Orion Assembly and Pontiac Stamping were plants purchased by New GM, and KPMG valued the assets in those two plants. The other side's claim is that the values that KPMG established should not be used because those plants, in fact, were idle.

THE COURT: Oh, is the issue and you say they weren't idle?

MR. WOLINSKY: Yeah. They weren't idle. We can have a trial about whether they were idle, or we can have discovery about whether they were idle. They weren't idle. We can bring in the plant manager if you want and we're happy to do it, and he'll say, we were building cars. He'll also say, we were building cars up until the end of the year because prior to June 30th, the plant --

THE COURT: Up to the end of 2009?

MR. WOLINSKY: Right. Because prior to June 30th, 2009, the plant had developed to convert Orion and MFD Pontiac to build small cars. So we built cars for a period of time, and then we shut the plants, turned them over, and started building small cars.

The values of the assets are impacted by the fact that GM was planning to remove a certain portion of them after the plant was converted. So we've taken the dollar hit, but we don't think -- in KPMG's analysis, so that's the issue.

THE COURT: All right. And you think this is a matter of law and not factual disputes?

MR. WOLINSKY: We don't think there are legitimate factual disputes, but the other side is raising them, so --

THE COURT: The factual dispute being whether the plant was operating?

MR. WOLINSKY: Right. Okay.

Another issue, Your Honor, New GM purchased -- this is our motion number five. New GM purchased assets out of closed plants. These were things that New GM -- they were closing the plants leaving them behind, but they took assets out. New GM purchased them, they show up on the May 2010 eFAST ledger, there are values assigned to them by KPMG. We think the value of those assets should be established with reference to the KPMG values.

What happened after the fact, whether they got shipped to Mexico or GM changed its mind, really is irrelevant. And the question is value and intention as of June 30th. So that's our next issue.

THE COURT: Wait, let me just -- so your position is that the assets that were purchased -- these assets that were

purchased should be valued at their going concern value rather than liquidation value?

MR. WOLINSKY: Correct, because they were intended to become part of the going concern of New GM.

THE COURT: And if they're valued on a going concern basis, then, consistent with the Court's rulings, (indiscernible) opinion, the KPMG values should determine what the values were.

MR. WOLINSKY: Correct. And probably more than you want to know, but KPMG adjusted the values for the fact that they had to be uninstalled and moved. So there is a deduct, we took that hit, and that alone is $179 million.

And then finally, Your Honor, the Lordstown facility. Lordstown is in Ohio. It's an assembly plant. It's older than LDT but functionally the same as LDT. We think it's a specialized facility within the way you use that issue -- use that term in your opinion. The other side disputes it. Very limited discovery. We'd like to get schematics, plant schematics, from New GM to show how the plant was laid out so someone can say the plant is laid out similarly to LDT, or differently, but here's how the plant was laid out. It has pits, it has trenches, it has all of the things that make it a specialized facility.

We have a plant manager who will testify about the --

THE COURT: How big of a dollar issue is this?

MR. WOLINSKY: That is a $40 million issue.

And the other side's position is that that there's another plant in Ohio that they think should be tried at the same time. That's the Moraine plant. We thought it was a $9 million issue, we're refining our numbers. It looks like it could be a bigger than $9 million. We weren't going to push it for trial, but we're happy to try that too.

THE COURT: Is the issue again, is it a specialized facility?

MR. WOLINSKY: Correct.

THE COURT: What did they do at Moraine?

MR. WOLINSKY: Moraine is an interesting story. Moraine was sold to a third-party developer. The third-party developer is sitting on part of it. Part of it was sold off to a Japanese glass company. The Japanese glass company spent about $300 million to convert a portion of an assembly plant to a glass manufacturing plant, and we think the fact that they had to spend $300 million to convert means that it really was a specialized facility because basically everything -- most of the things in there got trashed, and they -- it's like --

If I can have an aside, I remember in third grade, teacher said, this -- you know, what do you all think? Here's a shovel that's been in the family for 100 years, but we've replaced the blade three times and the stake five -- the handle five times. That's really what happened.

THE COURT: How far did you walk to school?

MR. WOLINSKY: Excuse me?

THE COURT: How far did you walk to school?

MR. WOLINSKY: In the snow and bare feet.

THE COURT: Yeah. How far?

MR. WOLINSKY: About a quarter of a mile.

THE COURT: It's a good thing you lived that close to the school.

MR. WOLINSKY: So Your Honor, that's really the nature of the issue. Moraine was repurposed. It doesn't mean it's not specialized.

THE COURT: What was it used for before it was --

MR. WOLINSKY: It was an assembly plant. And the other two-thirds may be -- I think part of it is empty, part of it was basic warehousing. That's the other side's claim, that because it was repurposed, it wasn't specialized. Our position was because the aspects of the plant that made it a plant had basically been trashed. And to the extent it was --

THE COURT: How big a dollar issue is Orion and Pontiac, Michigan?

MR. WOLINSKY: Lordstown is 40, and our current estimate of Moraine is it may be as big as 15.

THE COURT: And how big an issue is the Orion?

MR. WOLINSKY: Orion and Pontiac together are 113.

THE COURT: 113?

MR. WOLINSKY: Yes.

THE COURT: Okay. Anything else?

MR. WOLINSKY: Yes, Your Honor. Then there's a number of issues which we explain on discovery that we think, as Mr. Fisher agrees, that once we get this additional discovery, we'll be able to mediate them. But if you'd like -- obviously, if you want to put them on a trial track, we're happy to put them on a trial track if we can't settle them.

THE COURT: What's the discovery in your statement?

MR. WOLINSKY: On CWIP, construction work in progress, we need the project files to show to what extent the machinery had been installed as of June 30th. So it's a percentage completion type deal.

THE COURT: These plants were completed and used?

MR. WOLINSKY: They ultimately, the construction was completed. It was in process as of June 30th, went into service after June 30th, so the eFAST ledger doesn't have them. The eFAST is only assets in service. An asset that's not yet in service is in a separate ledger. We need some more discovery on that ledger.

But more importantly, we need to be able to show what percentage completion they were as of June 30th. So if you have $10 million project that's 90 percent completed, we think we're entitled to $9 million, and the other side is putting us to our proof, which is fine.

THE COURT: Okay. Anything else?

MR. WOLINSKY: Yes. On Saturn, we -- there's a separate ledger that GM maintained for tools which we never got in discovery because we never focused on Saturn.

On the Fairfax capital leases, that's a $24 million issue. We've never taken discovery on that.

THE COURT: What are the Fairfax capital leases?

MR. WOLINSKY: There was a machinery and equipment in a Kansas plant that was sold and leased back under industrial revenue bonds that the State of Kansas -- or maybe it was the municipality -- provided. GM owned all the bonds. So we think those assets are -- it was not a true lease. These are assets that belonged to GM for all purposes, except for this financing that gave GM a tax angle.

THE COURT: Is it an issue of valuing your residual interest, or is it --

MR. WOLINSKY: No, I don't think -- I think the issue is the characterization of the lease.

UNIDENTIFIED: It's both.

MR. WOLINSKY: Yeah. And value? It could be value as well. But it's principally the characterization of the lease.

THE COURT: Anything else?

MR. WOLINSKY: Yeah. There are, I think, one thousand?

UNIDENTIFIED: Two thousand.

MR. WOLINSKY: Oh, there are 1,000 assets. Look, Your Honor, in light of the schedule that you're talking about, we're going to reconsider whether we should go after these building assets. It could be $5 million, it could be -- excuse me, what we call the TBD assets. These are assets that you look at the eFAST ledger, despite all our efforts, we can't figure out what they are. It's $5 million. Life is short. We'll reconsider whether we should burden GM with that because GM has more important things to do.

And then there are building components. What GM did, if you look at the eFAST ledger for Lansing Delta Township, you will see a line item for heating and ventilation system for X part of the plant. And we think that's a fixture under Your Honor's ruling.

If you look at, and I'll take an example, it may not be -- it's just illustrative. If you look at MFD Pontiac, that same line item was combined in a line item called building additions. So we can't -- we need to go behind that, and the building additions line item obviously is more than the structure of the building. It includes the guts of the -- the elements of the building that make it functional, just like a --

THE COURT: You know, when this -- I may be completely off base. When Mr. Goesling did his movement

analysis and your criticisms of the movement analysis, he took data from the eFAST system, and I think I talked about this in the opinion sustaining your objections to what he did, is that sometimes the entries in the eFAST system don't correspond to specific assets, things like that. The eFAST system wasn't reliable -- you argued it wasn't reliable for purposes of its movement analysis.

MR. WOLINSKY: No. No, Your Honor, we're saying Mr. Goesling's analysis of the eFAST system wasn't reliable because Mr. Goesling didn't have the command of the eFAST ledger that our experts did.

THE COURT: I see. Yours is better.

MR. WOLINSKY: We retained people who actually lived in these plants. It's a big difference. And I hope it showed at the trial. So for these assets, you know, it's just an accounting. Different plants accounted for assets in different ways and there could be as much as 10- to $20 million there.

THE COURT: Okay. Anything else?

MR. WOLINSKY: I think that's it.

THE COURT: Okay. Before you sit down, just for purposes of discussion, let's assume that I conclude that with respect to air handlers, in places other than the Lansing Delta Township, that the Court wants the parties to agree on the 41st representative asset. Air handlers at some other place where you agree that yes, these are characteristic. Where Mr. Fisher

says, no, we think there are differences between the air handler at XYZ plant and what is it at Lansing Delta Township and we didn't really litigate the Lansing Delta Township.

But yes, we agree with you Mr. Wolinsky, that the air handling system at XYZ plant is characteristic of other places. And so we'll try and stipulate as to the fact as to the air handlers at XYZ and let the Court resolve the issue. And you and Mr. Wolinsky can argue, Judge, you've already done this. Okay. And he can argue, no you haven't, but you'll both get your chance to say why with respect to this, you both agree this 41st representative asset really -- the only asset is the air handlers. That really is representative of a lot more places, and we agree.

Judge, you decide it as to that 41st, and it will apply to all the rest of the area. How much time do you think it would take to do that? I don't know that I'm going to hit that road, but what I want to -- my goal -- it was my goal before. It's still my goal to decide things, you know, once because I think I said something about cars will fly around the moon before -- or mars. Cars will fly around Mars before we resolve 200,000-plus assets.

I want to give each side -- and I'm going to ask Mr. Fisher because I think you make persuasive arguments as to why the decision on LDT really does apply to air handlers elsewhere unless they can show that this is a window box

that's, you know, that's attached to the building, it cools the whole plant, et cetera. And I want to hear from him why that isn't so.

But what I want to know is -- air handlers, maybe there ought to be some discovery as to one another -- you know, agree on one other place, do the discovery on it, take your photos. You know, the issue about whether Orion and Pontiac, Michigan were operating, I can't believe you can't resolve that issue. But you know, if you can't, you'll put in your evidence.

As to -- I don't know whether -- you say Lordstown limited discovery, Moraine you agree we'll do that at the same time limited discovery, CWIP needs some discovery, Saturn needs some discovery. Whether the Fairfax capital leases need discovery or not is not clear to me. Building components, I don't know whether -- I mean, how much -- realistically, I'm not trying to put you all on a death march. But how much time do you need to do the discovery with respect to those matters as to which either side -- whether you agree with Mr. Fisher or not -- look, I have a hard time.

If one of you tells me that you believe in good faith that there are factual disputes as to some issue, I'm inclined to say, okay. It's sort of the same reason that with respect to constructive trust. I'm skeptical, but you know you haven't had discovery on that. I'd say, do it. But I want the two of

you to agree on an aggressive discovery schedule. You know, it may be that you'll conclude that it's just not worth it. There's not enough money as to that one, we'll forget that one. We'll agree to settle.

But as to those where you believe you've got enough dollars at stake and there's a good faith dispute as to whether there is a factual issue, I want a compressed schedule for going forward with actual discovery. You'll do it and you may conclude that, all right, you'll settle it before you actually have to try it. But otherwise you'll try it, okay. That's what I really want you to do.

You've gone through it. I'm going to get Mr. Fisher to respond to these specifics that you've raised, earmarking, you're hopefully going to tell me that you're not going to pursue that, but constructive trust, you seem that you want to pursue constructive trusts.

MR. WOLINSKY: Right.

THE COURT: I'll tell you what, I'm not going to put either of you on the spot now. I expect that by early next week you're going to tell me -- you're going to recalibrate the schedule. Which of the issues that you each reluctantly agree try to get discovery as required and what's the reasonable period for accomplishing it? Okay?

MR. WOLINSKY: That's fine. We'll do that.

THE COURT: All right. Were there any other issues

that you wanted to cover? I just want to make sure I've heard all of them.

MR. WOLINSKY: No, Your Honor, that's it.

THE COURT: Okay. Thank you, very much. Before I hear from you, Mr. Fisher, let me hear from Mr. Macdonald, is it?

MR. MACDONALD: Yes. Thank you, Your Honor.

THE COURT: Okay. Sorry, Mister --

MR. MACDONALD: Just for the record, Matt Macdonald of Munger, Tolles and Olson, on behalf of a group of term lenders.

Let me address first the question that I think is on Your Honor's mind. We did not cite to the Seventh Circuit opinion because we think it's addressing a completely different issue. When we say in our brief that Mayer Brown is an agent of JPMorgan --

THE COURT: Who's their principal?

MR. MACDONALD: JPMorgan.

THE COURT: Didn't the Seventh Circuit specifically reject that issue?

MR. MACDONALD: On a very different -- the Seventh Circuit addressed a very different question than the question that we think is before the Court and that was before the Second Circuit last time around.

The question before the Seventh Circuit, Your Honor,

was whether or not Mayer Brown could be liable to the term lenders in a lawsuit for breach of fiduciary duty or for malpractice or whatever. That is not the question before the Court today.

We are not arguing -- when I say Mayer Brown was the agent of JPMorgan, I am not literally saying that they were the agent of JPMorgan. I am not saying they can be liable to us for breach of fiduciary duty.

THE COURT: So when the Seventh Circuit specifically said that Mayer Brown represents an adverse party and therefore could have no duty to JPMorgan, why isn't that determinative of the issue that you're raising? They did say that, didn't they?

MR. MACDONALD: They did, and I don't dispute that, but we are not arguing that --

THE COURT: It would have been nice for you to at least call the case to the Court's attention, but you didn't do that.

MR. MACDONALD: So Your Honor, I apologize. It may be that I'm drinking my own Kool-Aid on this argument --

THE COURT: I think so.

MR. MACDONALD: -- too much, but I think they were addressing a very, very different question.

So the Seventh Circuit was addressing the question whether or not Mayer Brown could be liable for breach of fiduciary duty or malpractice to the term lenders.

THE COURT: There had to be a duty in order for them to be liable.

MR. MACDONALD: I agree.

THE COURT: And they specifically analyze and reject three arguments that were made as to why Mayer Brown had a duty to JPMorgan or the note holders, and they reject each of them based on Illinois law not on the restatement applicable. Mayer Brown was in Chicago, did the work from Chicago, they specifically -- you flagged the issue that, oh, somebody -- a lawyer, not just a paralegal, but a lawyer at JPMorgan, knew that -- because the question was raised with him. The issue you raise in your letter that JPMorgan in fact knew but didn't tell Simpson Thacher or JPMorgan, and therefore, it's not an authorized filing.

The Seventh Circuit seems to specifically reject any theory by which Mayer Brown had a duty to JPMorgan or the term lenders. Didn't they?

MR. MACDONALD: Right. I think that's right.

My argument, Your Honor, does not depend on Mayer Brown owing a legal duty to JPMorgan or the term lenders.

THE COURT: How could they be an agent if they were in an adversary relationship?

MR. MACDONALD: I am not arguing that they are literally an agent. Let me --

THE COURT: Well you keep citing the restatement of

agency.

MR. MACDONALD: I do. I do. This is a weird situation. This is a weird case, and so let me just --

THE COURT: The only authority you've given me you're now saying you're not relying on?

MR. MACDONALD: No, I am absolutely relying on the restatement. Let me just explain how the argument works and maybe that'll try to clarify it, because I do think it is an odd construct and so I think Your Honor's position is -- I understand where Your Honor's coming from on this.

The UCC says that a financing statement is effective if it has been authorized by the secured party of record, here JPMorgan.

THE COURT: And both the Second Circuit and the Seventh Circuit say that this mistaken UCC-3 was authorized by JPMorgan.

MR. MACDONALD: Well, I don't think the Seventh Circuit addresses the authorization question. I don't think -- I have not read the opinion in some time, Your Honor, but I think the Seventh Circuit was addressing a different issue.

The Second Circuit did hold that the filing was authorized by the secured party of record, JPMorgan, but we think was operating under an error of fact when it did that.

THE COURT: Well, what about -- is Mr. Fisher correct that before the Second Circuit issued its final ruling, a

letter brief was presented to the Second Circuit that specifically addressed the issue of whether Mr. Green knew about that UCC-3 shouldn't have covered the term loan?

MR. MACDONALD: I think what Mister --

THE COURT: Is that correct?

MR. MACDONALD: No, I don't believe it is. I think what Mr. Fisher was saying was that, the particular statement of the particular section of the restatement to which we cite was raised by JPMorgan in a petition for rehearing en banc.

THE COURT: Well, Mr. Fisher said, and I don't have it in front of me. I understood him to say, not on a petition for rehearing en banc but before the Second Circuit, based on the Delaware Supreme Court decision, handed down as a written opinion, and I have it here somewhere.

MR. MACDONALD: I may not have understood Mr. Fisher correctly about --

THE COURT: Mr. Fisher, did I understand you correctly?

MR. FISHER: You did, Your Honor. You did understand me correctly. It may also have been raised in the petition for rehearing en banc, but I was referring to a different letter.

And to clarify Your Honor, the point I was making was that the legal argument that's being made here on the basis of the restatement was a legal argument that was presented to the Second Circuit.

THE COURT: Were the facts, though, that somebody -- that Green or somebody at -- that Mayer Brown knew that it was erroneous?

MR. FISHER: There's discussion around that issue, Your Honor. I don't -- whether it was presented in exactly the same way, I wasn't trying to say that. I just don't think there are any new facts. And my point was that there's a legal argument being made that's not a new argument, that had already been presented to the Second Circuit.

THE COURT: You know, Mr. Macdonald, in the Second Circuit's opinion at 777 F.3d 100, this is after the Delaware Supreme Court ruled, at 102, the per curiam opinion specifically says the third UCC-1 number 64168084 related instead to the term loan. So the Second Circuit before it handed down its final ruling, certainly specifically said that this list that Mayer Brown had in front of it and forwarded to Simpson Thacher included the reference to the term loan.

MR. MACDONALD: Yes, that's correct.

THE COURT: So how can you say that no one -- that the Second Circuit didn't know that someone -- Mayer Brown knew that the UCC-3 was covering a different loan?

MR. MACDONALD: The Second Circuit, Your Honor, I think certainly knew that lists of UCC filings had been exchanged between Simpson and Mayer Brown that included references to the underlying financing statement that is issue

in this case.

What the Second Circuit was not told was that Mayer Brown had in fact put the pieces together and figured out that they were making a mistake. That was never told to the Second Circuit. In fact, both plaintiff and JPMorgan repeatedly told the Second Circuit that no one had noticed the error. And every single appellate decision in this case states that no one noticed the error in different verbal formulations. But every single --

THE COURT: Well, the Seventh Circuit decision specifically does say that an associate at Mayer Brown -- the error was called to his attention before the UCC-3 was filed and he didn't do anything further.

MR. MACDONALD: That is also correct. But as I think --

THE COURT: Okay. All right. I --

MR. MACDONALD: -- the Seventh Circuit is addressing --

THE COURT: I'm going to permit the trust to make its summary judgment motion. You can take your best shot at it, but I'm specifically authorizing them to make their summary judgment motion and I continue to have real -- I'm very uncomfortable about the letter you filed with the Court without citing the Seventh Circuit's decision which specifically dealt with the erroneous lien release with respect to the term loan.

MR. MACDONALD: Your Honor, I believe that if I can explain my argument, I believe I can alleviate those concerns.

THE COURT: Go ahead.

MR. MACDONALD: So I appreciate the Court's indulgence. I want to be clear, we are not arguing and do not argue that Mayer Brown was literally JPMorgan's agent. That paragraph that you're referring to in our brief is simply applying a legal construct that plaintiff argued for, that JPMorgan argued for, and that the Court -- that the Second Circuit adopted.

The UCC says that a financing statement is effective only if it has been authorized by the secured party of record. The Court -- the Second Circuit held that that term, "authorized," incorporates the law of agency. So when --

THE COURT: Simpson Thacher was JPMorgan's agent.

MR. MACDONALD: Yes. And Mayer Brown was GM's agent. But for purposes of authorization, for the authorization analysis, the question that the Court was dealing with and the question that the parties briefed and the Second Circuit addressed is did JPMOrgan and Simpson authorize Mayer Brown and GM to file the termination statement. Even though those parties are adverse in one sense, the Second Circuit applies an agency analysis to determine whether or not Mayer Brown --

THE COURT: Did the Second Circuit say that Mayer Brown was the agent for JPMorgan?

MR. MACDONALD: It did not literally say they were an agent, but it applied an agency analysis and acted as if Mayer Brown was the agent. The question the Second Circuit answered was, was a question of agency law as if Mayer Brown was JPMorgan/Simpson Thacher's agent because the UCC imports this concept from agency law. So even though they are not actually an agent, which was the question that was before --

THE COURT: You'll argue it in your brief. We're going to go forward with summary judgment in --

MR. MACDONALD: Thank you very much, Your Honor.

THE COURT: Mr. Fisher. Tell me about the air handlers. You know, Mr. Wolinsky points to where in the opinion -- you're not disputing that the air handlers at Lansing Delta Township CUC are fixtures.

MR. FISHER: No, Your Honor. The Court ruled as to that.

THE COURT: So why are -- what's the difference with the air handlers located in other facilities? Is it the window box versus the central air conditioning or is it something else?

MR. FISHER: So, Your Honor, the -- we think that the Court's decision gives enough guidance to the parties to go ahead and try to apply the ruling to all of the different kinds of assets that one -- that the Court ruled on at the CUC. With respect to the air handling units, they are discussed in the

Court's opinion. As part of that two-and-a-half-page chart where CUC's systems, as the Court uses it, is spelled out the last item as 43 air handling units, and the Court there explains that the asset could not be inspected, but its location on the roof suggests that removal would leave a hole in the roof. Removal would also likely damage the material used for installation of a typical air handling unit, such as sheet metal flanges and flashing, along with any duct work that is included in this asset.

THE COURT: So pick another plant and tell me why you don't think it's a fixture.

MR. FISHER: So, Your Honor, I think that Your Honor's proposal that we identify air handling units that are -- that we contend are different from this particular air handling unit is the right way to handle this issue. And I think that there would be some need for some additional discovery, and we'd only bring the issue to you if we had a good faith basis to differentiate it from the air handling units as to which the Court already ruled.

THE COURT: Did -- and I don't want to know exactly what happened in mediation. In mediation, did you focus on any other specific -- the air handling units at other specific plants?

MR. FISHER: So not at the asset level yet, Your Honor. And these are sessions that are specifically scheduled

to be coming up, and it encompassed -- it's sort of a broad issue. It's not just an air handling unit issue. There -- as the term lenders note, there are more than 10,000 assets that we're fighting about, and part of -- with regard to this issue, this issue is, are these assets like or not like the CUC systems that the Court ruled to be fixtures.

THE COURT: You agree if they're like the CUC systems, then the prior decision is -- has a preclusive effect on it?

MR. FISHER: Or to say that a slightly different way, Your Honor, I think we agree that if they're like the air handling units or the other CUC systems, we'd better concede them and not bring them to the Court --

THE COURT: So --

MR. FISHER: -- because we know how the Court would deal with it.

THE COURT: Okay. So, look, I let you each -- and how many -- have you gotten down to talking about one or more other plants where the parties dispute whether the air handling system is or is not a fixture? I'll let you each pick one, you know. Mr. Wolinsky says they're all fixtures. You say there are some that are not. You seem to be agreeing if they're sufficiently similar to the air handling system at Lansing Delta Township, you won't contest the issue. Is that a fair statement?

MR. FISHER: Right. That's right, Your Honor. And the reason -- yes, that's correct.

THE COURT: So I'll -- you know, identify two, one where Mr. Wolinsky -- where you haven't been able to agree so far, and Mr. Wolinsky says, we think they're both similar, but this one, you know, we think is, and you say it's not, okay. And then, we can deal with it, it seems to me, on very -- if you can't work out this issue -- because this is a big dollar issue. If you can't work out the issue, we'll have a separate evidentiary hearing with respect to those two, and I'll basically come to a conclusion whether the principles I enunciated in the fixture decision lead to the result that they're both fixtures or one's a fixture and one's not a fixture, and we'll get it resolved.

So I'm not going to open it up to every other plant that GM had, but let's -- you know, let me know within two weeks which plants that you want to have the Court resolve the fixture issue on air handling. And we'll do it very -- you know, we'll do it very expeditiously.

You know, Mr. Wolinsky thinks that's not necessary because the prior opinion is sufficiently clear about it. Maybe it is, maybe it isn't. And I'm willing to give you a fair shot at explaining why the air handling system at XYZ plant is different and the prior decision doesn't resolve the issue of whether it's a fixture or not.

MR. FISHER: Understood, Your Honor.

THE COURT: Okay. So tell me about OLVIE with respect to Goesling versus KPMG.

MR. FISHER: Sure. So at trial, what we asked the Court to do, and what the Court did, was to indicate which methodology for valuing assets at liquidating plants.

THE COURT: Well, more than methodology. You wanted me to apply Goesling's OLVIE, and I concluded that I agreed with Goesling's analysis and rejected the argument they made as to -- I don't know whether it was a client or somebody else's --

MR. FISHER: Mr. Chrappa.

THE COURT: Chrappa, okay. And I said, okay, apply Goesling. Now, you don't like Goesling.

MR. FISHER: It's not that we don't like Goesling, Your Honor.

THE COURT: Because, you know, Goesling's numbers are twice as high as KPMG. You never liked KPMG, but, you know, I ruled the way I did.

MR. FISHER: So, Your Honor, yes, in a adopting the methodology that Mr. Goesling advocated for --

THE COURT: I did more than just adopt his methodology. Your -- you sponsored his analysis and testimony, and I specifically adopted it as the correct methodology, and I applied his numbers.

MR. FISHER: Yes. And what the Court said explicitly about that was the reason you thought it was the better methodology was because it was not based on hypotheticals, it was a combination of the cost and market approach, and it relied on real world market data supplied by Maynard's, which was the auction house that was doing the liquidation. All of those features of the methodology and the methodology is consistent with how KPMG derived its orderly liquidation value in exchange values.

And what we said very explicitly, because this was a concern of the Court's at the trial, at the very end -- I think it was the very last day of trial, Your Honor said, I'm going to issue a decision, and then you're going to go into mediation, and you're not going to be able to do customized, one-off liquidation values for tens of thousands or maybe even more assets. So you're going to need to figure out how to apply this methodology across all of the assets. And what I told the Court was, I appreciate the point, and that what we thought would be productive was to get a ruling on the correct methodology and that we acknowledge that we would then need to figure out how to scale that up, if you will. Your Honor may recall that.

THE COURT: I don't. You know, I -- yes, and I did, and I -- so you'll point me to where in the transcript this was discussed --

MR. FISHER: Yes.

THE COURT: -- and whether you sufficiently left open something other than Goesling's OLVIE.

MR. FISHER: Your Honor, yes. Of course, we'd be happy to. And I think that there's a way in which -- first of all, the irony is not lost on me, but I don't think irony is estoppel. I understand that it's ironic in some sense that the defendants are now arguing, we don't like KPMG values, and at trial, they argued for the KPMG plus values and we argued against the KPMG values. But this particular question of KPMG's OLVIE values was never before the Court. It wasn't in evidence. What the Court ruled on was a method, and now we have to figure out how to scale up that method.

And their motion is incredibly unproductive because they're not even telling you to resolve the question of how to derive and apply OLVIE values. They just want to make a motion to estop us from, in the future, after a little bit of discovery because we do need some discovery on this methodology in particular --

THE COURT: Why?

MR. FISHER: Because it wasn't the focus of anyone's attention, Your Honor, in connection with the representative assets trial. And we explained that in our letter. We want documents from KPMG and a KPMG deposition of the person who was in charge of KPMG's orderly liquidation value in exchange

analysis. And then, we'll be able to determine whether these are the values that we would want to advocate for, and if they are -- and if the Court finds them to be credible values that are consistent with the methodology that the Court already endorsed in the representative assets opinion, then it offers a way out of a bottomless battle of experts again about how to scale up the orderly liquidation value in exchange analysis that was adopted by the Court.

THE COURT: And so the targeted limited discovery you want is KPMG documents and deposition.

MR. FISHER: Yes, Your Honor.

THE COURT: What I'm bothered about, Mr. Fisher, is that you sponsored Mr. Goesling as a witness. You advocated for his methodology more broadly than just the liquidated assets, but certainly for that. You put in evidence of the numbers that he derived, and I found it credible and the best methodology offered and adopted the numbers. And now, you know, the whole purpose of the exercise of the 40 representative assets was to resolve principles as best I could, what's a fixture, so that it could be applied more broadly, including as to the order that AA presses what you acknowledge -- or which Mr. Wolinsky acknowledged that there wasn't a perfected security interest, but there are other presses elsewhere, so I went ahead and signed that, as well. And now, you're seemingly trying to walk away from what your

own expert derived.

But I'm going to let you take this limited discovery. Get on with it. And -- you know, it strikes me that when you engage in mediation about, arguably, 200,000 assets or some subset of them and Mr. Wolinsky doesn't like something that the Court ruled on in the prior opinion, but -- you know, and argue, well, it doesn't apply to this other -- these other 100,000 assets or 40,000 assets, and you take the position, well, I like what Goesling said about the 40 representative assets, but I don't like what he says about the others, so let's have a do-over -- and whether or not either of you is legally correct, it's not a productive way to settle disputes.

That's -- you know, that's not -- directed at both sides, but it's just not a productive way. How -- and I think at numerous places in the opinion -- you know, I spent pages and pages trying to talk about specific characteristics of each asset to hopefully provide the guidance for resolving the rest. Whether it's preclusive or not or binding, I'm not -- I didn't say anything in the opinion that it would be. I was trying to provide everybody with the guidance needed to get the other issues resolved. And it just -- I've said enough on this.

MR. FISHER: Your Honor, I --

THE COURT: Let's just -- we'll go on from there.

MR. FISHER: Okay. The --

THE COURT: Orion and Pontiac, Michigan, is there

really a dispute as to whether the plants were operating?

MR. FISHER: Yes. So let me just explain why there is a dispute. These plants, at some point later, were reopened to make a smaller car, totally different car.

THE COURT: Well, Mr. Wolinsky said they never stopped -- as of the date that the sale closed --

Mr. Wolinsky, you're saying as of the dates the plants closed, the plants were operating.

MR. WOLINSKY: Yes, Your Honor. Marc Wolinsky.

THE COURT: And you dispute that.

MR. FISHER: Yes, Your Honor. I mean, the question we asked -- as the Court knows, the key question is what was the proposed or intended use or disposition of the assets at that plant as of the valuation of June 30, 2009. So, for example, there is evidence that the plan was for all of these assets to be idled.

THE COURT: Okay. It's a $113 million potential issue, and each of you will present your proofs. If you can't resolve it, you'll present your proofs. What about the purchased assets out of closed plants? It says -- Mr. Wolinsky says it's a $179 million issue.

MR. FISHER: So this is an issue that was not specifically presented to the Court in the representative asset trial because there were no assets. There were one-off, piecemeal assets sold out of liquidating plants to New GM among

the 40 representative assets.

So here, since the Court has authorized some limited discovery from KPMG, what we need -- and it can obviously be consolidated as part of the same discovery -- is we need discovery into how it is that they valued these piecemeal assets that were sold to New GM out of liquidating plants because a lot of what the Court said about the reliability of the eFAST values for purposes of this valuation dispute, we don't think would apply to the way that KPMG valued these particular kinds of assets, but we need a little bit more discovery to get to the bottom of it and to be able to take a position.

THE COURT: Okay. And what about Lordstown?

MR. FISHER: Right. So Lordstown --

THE COURT: The issue is, is it a -- you agree the issue is whether it's a specialized facility?

MR. FISHER: That's the issue, and it relates to the way in which the adaptation prong of the fixture in Ohio is different, and that's why we're focused on these two Ohio plants.

THE COURT: And you think Moraine is also the same issue?

MR. FISHER: Yes. Yes, Your Honor. And what we would plan to do, we have an expert who was involved in designing and all the engineering work that related to these

plants and similar plants. These are old plants. They're from the 1960s. And we think that expert testimony would show that these are plants that are designed to accommodate a whole range of different manufacturing uses. They're quite unlike Lansing Delta Township, which was a newer facility, which was all about the global manufacturing story and the ways in which GM's newer production processes were highly integrated. These are very different from that.

THE COURT: What about CWIP, the construction work in progress?

MR. FISHER: So, you know, I guess I just -- I wish that we would know in a stable way the full range of what the term lenders contend to be their collateral. There's hardly anything that is known about construction work in progress. They're going to need to show that these are assets that were sufficiently installed that they can even potentially be considered to be fixtures that were part of their collateral.

THE COURT: Mr. Wolinsky, do you know what specific assets you're talking about?

MR. WOLINSKY: We know by project name, but we don't know by -- at the asset level.

THE COURT: And then, you've given that information to Mr. Fisher?

MR. WOLINSKY: We've both -- both sides have.

THE COURT: Okay, all right.

MR. WOLINSKY: We tried to take discovery on this issue. We're happy to --

THE COURT: What about Saturn, Mr. Fisher?

MR. FISHER: It's the same issue, Your Honor. This is a newly-identified area where they think there may be additional collateral and they want to take discovery and see if there is.

THE COURT: Right. And what about the Fairfield Capital leases?

MR. FISHER: We -- from what -- from all the information that we have, we don't think that there's any residual value there to speak of. That's our position. They say they need more discovery to get to the bottom of that.

THE COURT: And building components, heating and ventilation systems, is 10- to $20 million control issue.

MR. FISHER: I think that gets -- again, that's an issue that's specifically going to be addressed in a mediation session at the end of October and beginning of November, and it relates to a comment that Your Honor made in a different context about Louisiana, which is that while at trial there was a lot of focus on the line between fixtures and personal property, there was less focus and thus less guidance on the line between realty, ordinary building materials, and fixtures, and that's what that dispute relates to.

THE COURT: Okay. So you're going on vacation next

week. Is that --

MR. FISHER: Yes, Your Honor.

THE COURT: Okay. When are you back?

MR. FISHER: I'll only be away for one week, come back Sunday, the 19th.

THE COURT: Okay. When you get back --

Mr. Wolinsky, are you going on vacation then?

MR. WOLINSKY: No. No, Your Honor. I'm hugely handicapped without Mr. Wilson.

THE COURT: And, Your Honor --

MR. FISHER: And, Your Honor, I respect Mr. Wilson's importance here and his vacation, as well, of course.

THE COURT: No. I don't want to -- I'm not -- when you get back from vacation, and even in your absence, you've got some of your troops here who can be pulling stuff together for you, you and Mr. Wolinsky and others on his side need to focus specifically on what discovery needs to be done.

And, Mr. Wolinsky, you know, with respect to the constructive trust issue, stay is lifted. Don't wait if you're going to, you know -- if you want to get a document request off to -- a document subpoena off to GM and -- I don't know if you need a notice of deposition immediately, want to see the document. Let's get going on it. But I want the two of you to sit down -- seems to me that many of these issues, there could be a lot of stipulated facts that'll narrow the areas where

there are disputed issues. And you need -- I want you to give me a status letter within two weeks after you return from vacation, whatever that date is, on the parties' proposals for discovery and further court proceedings with respect to those issues where there are factual disputes.

I want to separate -- I mean, I want you to sit down and -- I am concerned about air handling separately from what we've been discussing, okay, because there, I think -- I understand Mr. Wolinsky's argument that he thinks I've already decided it and that it should apply, but there, I'm willing to give each of you a chance -- each of you pick a representative asset for air handling where, you know, there may be one where, Mr. Fisher, you're willing to agree, okay, that one is a fixture, this one's not, and let's figure out how we're going to get that teed up as quickly as possible for a decision.

With respect to summary judgment motions, you know, I've said I will permit summary judgment or partial summary judgment -- may not get them all. I didn't write them down as a separate list here, but certainly on the issue that you listed as the -- I think you used the term "effectiveness" of the Second Circuit rulings as with respect to the term lenders. I'm permitting summary judgment on that issue. I'm permitting summary judgment on the constructive trust issue.

Mr. Wolinsky's going to advise with respect to earmarking whether they plan to continue to assert earmarking.

And I spent less time today asking about whether that would be ripe for summary judgment. I don't know whether -- are -- the two of you talk about it, okay. If they're not -- if you think there are good -- if they are not willing to drop the issue, you believe there are good faith factual disputes that need to be resolved, I'll permit discovery on it, but don't do this as a, you know -- unless you really believe there are factual disputes. If you believe it's legal issues, do it as a summary judgment.

In respect to summary judgment motions, and to the extent you can do stipulated facts, I think it helps, okay. And I want you to get back to me with respect to a proposed briefing schedule on the summary judgment motions that I'm permitting.

And I guess what I was suggesting is with respect to the air handlers, if you can agree on two representative assets that crystalize the dispute, we could have a trial on that, if necessary, more quickly than the other issues as to which a trial would be required.

You think I'm being sufficiently clear?

MR. WOLINSKY: Your Honor --

THE COURT: Go ahead, Mr. Wolinsky.

MR. WOLINSKY: -- Marc Wolinsky. A couple things.

THE COURT: Sure.

MR. WOLINSKY: First, in the spirit of moving things,

you said that discovery was lifted, we can proceed with discovery on constructive trust. We'd just like to start discovering across the board.

THE COURT: I would prefer if you -- what -- when you say "across the board" --

MR. WOLINSKY: Well, we're not going to do much discovery, but if there are specific things that we -- there's a ledger that -- the tools ledger that General Motors has for Saturn special tools, that's a very narrow, specific subpoena we can get out to GM. Why wait two weeks?

THE COURT: Well --

MR. WOLINSKY: So those are the kinds of things we'd like to start.

THE COURT: While Mr. Fisher is on vacation?

MR. WOLINSKY: Right. And Mr. Binder, I hope, was --

THE COURT: What's your position on that, Mr. Fisher?

MR. FISHER: Your Honor, I have no problem with a subpoena like that going out.

THE COURT: Okay.

MR. WOLINSKY: But, Your Honor -- I don't mean to --

THE COURT: I understand. I understand.

MR. WOLINSKY: Targeted things. The second thing Your Honor did not address, I'm sure you -- it was clear from the record, we'll be -- both sides will be moving on Louisiana.

THE COURT: Yes, I should have -- I do have that in

my notes, yes, on Louisiana.

MR. WOLINSKY: And then, the air handler units is a subset of the bigger issue of how to read footnote 3.

THE COURT: Mercifully, I hadn't picked up the decision to read it again until yesterday. And precisely what I had in mind when I included that footnote, footnote 3 to a table after 200 pages, perhaps I could reconstruct what I intended, but I -- what I'm thinking now is that that just made clear that with respect to the representative asset, the CUC, if everything else was a fixture. How that would -- how that really should apply in other facilities, I don't know.

MR. WOLINSKY: No, let me be clear. We're not asking you to apply it to other facilities. Footnote 3 says the common -- what's the phrase?

MR. FISHER: CUC systems.

MR. WOLINSKY: -- CUC systems to find term and the rest.

THE COURT: But that was in the context of deciding the CUC.

MR. WOLINSKY: Right. And we want to understand when you said "the rest" --

THE COURT: The rest at CUC.

MR. WOLINSKY: The rest of the CUC. So our position at trial was that the building shell obviously was ordinary building systems.

THE COURT: Okay. I don't want to --

MR. WOLINSKY: Ordinary building systems.

THE COURT: I'm not going to get into -- I just -- look, I'm just telling you I picked up the opinion yesterday probably for the first time since I issued it. It took me a long time to get through it. It brought back, I don't know, good and bad memories.

MR. WOLINSKY: Well, if I can suggest, we could summarize for you what the evidence was.

THE COURT: No.

MR. WOLINSKY: That won't help you, then we won't.

THE COURT: No. I think the way -- because the evidence related to the CUC at Lansing Delta Township, and the probably ridiculous hypothetical I give you, central air conditioning versus a window box. I don't know why -- you know, look, Mr. Fisher is going to have an uphill battle convincing me why an air handling system similar to the one at Lansing Delta Township wouldn't lead to precisely the same result, okay. That's not a legal ruling that I'm -- I'm just saying, look, that's the reality of it, okay. Let me stop there. I don't -- you know.

Look, I certainly knew -- I tried to provide as much guidance as I could as -- from 40 assets that would help the parties in resolving the other 200,000, but I wrote about 40 assets. I tried to generalize principles under Michigan law

and Ohio law based on the 40 assets, but that's -- it was generalization, okay. The utility of that exercise diminishes when one or the other party, at least as to any significant number of assets, oh, but we think this one's different and it really shouldn't apply, et cetera. But that's -- I can't -- you know.

So try and agree on two other air handling systems at other facilities where you seem to have disagreement so far in mediation, and I'll try and resolve it. And I'm not -- I'm certainly not precluding you from arguing that, you've already decided it, Judge, here's where you decided it, here was the evidence, here was the record, this is what they said. Okay. I'm not preventing you from doing that. I may ultimately find that's persuasive and really resolves this, why are you even raising this with me. Okay.

MR. WOLINSKY: Your Honor, just if I can clarify or to -- maybe not clarify -- take another example, a sprinkler system, a specialized sprinkler system that you would see in an industrial plant, which is, I don't know -- yes, that's what you would see here in -- I'm pointing up at the ceiling -- that obviously you know that's a sprinkler system. That's not what you see in an industrial plant. Our position is that you already ruled that in an industrial plant, the sprinkler system is a fixture. The other side is taking the position it's not. We think it's been ruled. So rather than just pick two air

handling units, we'd like to pick two other assets that are -- that the parties are similarly disputing as to whether they're common utilities or what the phrase that the other side is hung up on is "common utilities." Things that you would see in any industrial building can't be fixtures.

THE COURT: Did I rule on sprinkler systems?

MR. WOLINSKY: We think you did, they think you didn't. That's why I'm raising this, and it's a big dollar issue. So rather than try two, let's throw in two more based on what -- we think you already decided, but that's fine. We'll talk about sprinkler system. We'll talk about electrical distribution system. You already ruled that that big electrical panel was a -- was obviously part of electrical distribution system. We think that applies to electrical distribution system for the building as a whole. They don't. So rather than just -- air handling units, I think the other side, frankly, is going to fold pretty quickly, but maybe not, but we'll try that.

THE COURT: You're putting -- you know, you're putting Mr. Fisher on the spot now. He's almost required now to argue that the air handling system is not a fixture.

MR. WOLINSKY: You know, if you go to Google Earth and you look at any GM plant, you see these spread across the roof of the building. They look the same to me, and I think they'll look the same to you.

THE COURT: What's your issue about sprinkler systems, Mr. Fisher?

MR. FISHER: Well, Your Honor, I think -- first of all, I think the 40 representative asset decision did accomplish a lot, and unfortunately, we don't have the stipulation --

THE COURT: You wouldn't be here if it accomplished a lot.

MR. FISHER: It didn't accomplish -- it did not accomplish everything the Court had hoped it would accomplish. Maybe it still will. And the stipulation that's going to be filed is going to indicate. You don't hear us talking about robots, for example. And I think with sprinkler systems, took, I mean, it's not -- it just -- it depends. I need to --

THE COURT: Are you having a fight about a specific sprinkler system?

MR. FISHER: We probably are. I mean, we've been poring our way through a list ultimately of 200,000 assets. If -- I'm happy to talk to Mr. Wolinsky and -- because I agree, it -- the point, as with the 40 representative asset trial, is to the extent that we come to the Court for further asset-specific rulings, it's for the rulings to actually be helpful and extrapolatable across other assets. So I'm happy to have a conversation with Mr. Wolinsky about whether it should be more than just two air handling units, but another couple of assets,

as well, that we both agree are going to help us make progress.

THE COURT: Okay. When you come back from vacation, you need -- I'm not doing 40 assets again. If there are specific categories of assets as to which there has been -- there continues to be a dispute, air handlers, sprinkler systems -- I don't know whether there are a few others -- where you each think that it would be easier to resolve the issues in mediation if the Court were to determine sprinkler systems of a particular -- you know, that are connected in a particular way, yes, are fixtures, and it would even be helpful if you could agree that in reaching the determination, the Court can apply the law of Michigan, wherever it is, okay. Yes, there are some differences in the tests, but I don't want to have to go through again -- I understand Louisiana, it was different.

You know, there was some discussion of that very early on, but I don't want to have to painstakingly -- I would prefer not to have to painstakingly go through and say, well, in Michigan, the sprinkler is this, and in Ohio, the sprinkler is that. Try and agree that, okay, we -- it would be helpful to the parties in resolving the remaining disputes if the Court determined that this small number of assets, which are of a type that remain in dispute, whether the Court believes that they are fixtures or not, and for purposes of this determination, we will agree that the Court can apply the law of Michigan.

If you can't agree on that, well, I'll just have to deal with, but, you know, I would hopefully not have to do a deep dive into the law of additional states with respect to fixtures, okay. But that's just a suggestion. You can each reserve your -- you know, I -- but it's got to be a small -- you know, if there are two air handling examples and two sprinkler ones, that, I could deal with, but then you tell me there are two of this and two of that, and suddenly we're back in soup again, and that, I don't want to do again, really. If I ultimately have to decide it, that's -- you know.

Mr. Wolinsky, is that --

MR. WOLINSKY: Very good. And we may not need two. Some of them may be just one and --

THE COURT: Okay. That would be --

MR. WOLINSKY: -- we'll keep the list small.

THE COURT: That would be even better.

MR. WOLINSKY: Certainly mindful that it should be a short list.

THE COURT: You raised sprinklers. Are there other categories of assets?

MR. FISHER: Yeah. I'm just looking at the list. Power distribution is probably a big dollar issue. Heating systems, probably a very big issue.

THE COURT: Is that any different than the air handling?

MR. FISHER: Your Honor, I -- it's hard to say on the fly. I think -- and this is part of why --

THE COURT: When you get back from vacation, you need -- so your troops can be thinking about it while you're hopefully off in some nice place so that when you come back, you'll be ready to sit down with Mr. Wolinsky and see -- make your proposal to him about what -- which categories would benefit from further guidance from the Court and -- but make it as specific as possible. Okay?

MR. FISHER: Understood, Your Honor.

THE COURT: All right. Anything else for today?

MR. WOLINSKY: No, not -- Marc Wolinsky, not from us, Your Honor.

THE COURT: Okay. I want -- and please, with respect to -- I want you to get back to me with respect to proposed briefing on the summary judgment motions and include Mr. MacDonald in the discussion, as well. Okay. And I don't want a leisurely -- I don't want an overly leisurely schedule. I want to get this teed up and -- because it'll probably take me some time to decide after we have briefing and argument. Okay? All right. Thanks very much, everybody.

MR. FISHER: Thank you.

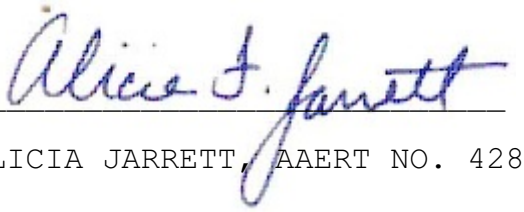
MR. WOLINSKY: Thank you, Your Honor.

THE COURT: We're adjourned.

(Proceedings concluded at 12:23 p.m.)

C E R T I F I C A T I O N

I, Alicia Jarrett, court-approved transcriber, hereby certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter.



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