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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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

TERM LENDERS' REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT REGARDING FIXTURES AT SHREVEPORT ASSEMBLY

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JPMorgan Chase Bank N.A. ("JPMorgan") and the other signatory defendants respectfully submit this memorandum of law in reply to the AAT's opposition to defendants' motion for summary judgment regarding fixtures at Shreveport Assembly.

PRELIMINARY STATEMENT

Bankruptcy Rule 7001(2) provides that when a debtor, or a person standing in the shoes of the debtor, asks a bankruptcy court to declare a secured creditor's lien invalid or to limit the collateral as to which the lien is effective, it must do so in an adversary proceeding. At this point, in nearly 40 pages of briefing, the AAT has not pointed to a single allegation in its Amended Complaint asserting the claim that the Term Lenders' lien as to 7,801 of the more than 8,700 potential fixtures located at Shreveport Assembly is invalid.

In the face of this simple, indisputable fact, the AAT offers essentially three arguments. As shown in greater detail below, none has merit:

1. Citing the Court's decisions with respect to Pontiac Engineering and the CUC, and glossing over the Court's decision with respect to LDT, the AAT asserts that the issue it seeks to raise with respect to the fixtures at Shreveport Assembly is "substantively the same" as those the Court has previously decided. AAT Opp. at 14. Not true. Unlike Pontiac Engineering and the CUC, this challenge — which is grounded on a provision in Louisiana's version of the UCC providing that creation of a security interest in fixtures that are already attached to the realty is governed by real property law rather than the UCC — cannot be resolved by construing the Collateral Agreement, which on its face granted a lien on *all* fixtures at Shreveport Assembly, a fact that is not disputed by the AAT. *See* AAT Statement of Material Facts ¶¶ 4-5 [Adv. Pro. Dkt. 1091] ("The assets and property identified in the Collateral Agreement included 'all Equipment and all Fixtures' . . . located at the 42 Old GM facilities identified in Schedule 1 to the Collateral Agreement."). By conceding that the Term Lenders

were granted a security interest in all of the fixtures at Shreveport Assembly, and that they had a valid security interest in *some* of those fixtures, the AAT effectively concedes that its motion attacks the "validity" and "extent" of the Term Lenders' security interest in the more than 7,800 *other* potential fixtures located in that plant. Rule 7001(2) thus applies by its terms.

2. Citing paragraph 601 of its Amended Complaint, the AAT asserts that "the scope of the Term Lenders' security interest — whether characterized as a question of validity or of extent — was raised in the pleadings" and that the Term Lenders are "urg[ing] this Court to take a narrow view" of the issues raised in its complaint. AAT Opp. at 18. Again, not true. Just as the Court, in its September 26, 2017 Decision,[1] rejected the notion that paragraph 601 was so broad as to encompass any argument that "the Fixtures at LDT are not 'Surviving Collateral,'" Decision at 90-91, the question of the validity or extent of the fixtures lien at Shreveport Assembly is likewise nowhere to be found in paragraph 601. Like the fixtures at LDT, all of the fixtures at Shreveport Assembly were covered by the granting language in the Collateral Agreement. The AAT challenged the priority (perfection) of that grant in the case of LDT on the basis of the metes and bounds description; it is challenging the "validity" and "extent" of that grant in the case of Shreveport Assembly on the basis of the date of installation of 7,801 of the fixtures. Rule 7001(2) requires that all challenges to validity, extent or priority of a lien must be pleaded in a timely adversary proceeding. The AAT failed to do so.

3. Finally, the AAT argues that its challenge to the 7,801 disputed fixtures at Shreveport Assembly is to the scope of the grant, which can be determined by construing the Collateral Agreement, because the grant did not cover real property and the "fixtures are real

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[1] References to the "Decision" are to the Court's memorandum opinion. Adv. Pro. Dkt. 1015.

property under Louisiana law." AAT Opp. at 15. Once again, not true. The AAT's argument that 7,801 of the fixtures were not included within the granting language because fixtures in Louisiana are real property after they are annexed misstates Louisiana law. Finally, the AAT's related argument that the 7,801 fixtures were carved out of the grant because the grant of those fixtures was "prohibited" by law is also incorrect. To the contrary, Louisiana law expressly provides that a security interest in already-installed fixtures may be created under Louisiana real property law.

ARGUMENT

I. THE COURT'S PRIOR DETERMINATIONS OF ISSUES CONCERNING THE SCOPE OF THE COLLATERAL GRANT ARE IRRELEVANT IN DETERMINING WHETHER THE AAT'S CHALLENGE TO THE VALIDITY AND EXTENT OF THE TERM LENDERS' SECURITY INTEREST IN FIXTURES LOCATED AT SHREVEPORT ASSEMBLY IS TIME-BARRED.

The bulk of the AAT's opposition to this motion rests on the argument that since the Court has already adjudicated whether the Term Lenders were granted a security interest in the fixtures located at Pontiac Engineering and the CUC, it is also able to adjudicate the validity and extent of the Term Lenders' security interest in the fixtures at Shreveport Assembly. AAT Opp. at 9-12. The argument is without merit. The issues with respect to Pontiac Engineering and the CUC are decidedly different from the issue presented in this motion.

With respect to Pontiac Engineering, the AAT argued that the facility was not included on Schedule I to the Collateral Agreement and therefore was not covered by the collateral grant. The Term Lenders argued that, by virtue of being "appurtenant or related" to Pontiac Assembly, Pontiac Engineering was within the collateral grant. To resolve that issue, the Court construed the language of the Collateral Agreement, determined that the facility was not "appurtenant or related," and thus ruled that the facility fell outside the scope of the collateral grant. Regarding the CUC, the AAT argued that the CUC fell within an express carve-out to the

collateral grant which precluded Old GM from granting liens on contract rights or on property subject to prior liens; the Court ruled that the CUC was subject to a financing lease and the Collateral Agreement did not preclude the assignment of Old GM's residual interest in the property. Decision at 139.

Both of these issues are fundamentally different in kind from the issue the AAT has now raised with respect to Shreveport Assembly. Unlike Pontiac Engineering and the CUC, but like LDT, the AAT's primary challenge to the lien on fixtures at Shreveport Assembly does not involve construction of the Collateral Agreement or a determination of whether an asset was covered by the agreement's granting language.

To the contrary, the AAT agrees in its statement of undisputed facts that the Collateral Agreement granted the Term Lenders a lien on *all* fixtures at Shreveport Assembly. *See* AAT Statement of Undisputed Facts ¶¶ 4-5 [Adv. Pro. Dkt. 1091] ("The assets and property identified in the Collateral Agreement included 'all Equipment and all Fixtures' . . . located at the 42 Old GM facilities identified in Schedule 1 to the Collateral Agreement."). The same was true with respect to LDT: everyone agreed that the fixtures at the plant were within the scope of the grant; the issue was whether the defective metes and bounds description in the UCC-1 meant that it failed to perfect the Term Lenders' interest in the fixtures at that plant.[2]

With respect to Shreveport Assembly, in contrast to Pontiac Engineering and the CUC, the AAT is asking the Court to determine not whether the disputed fixtures were covered by the Collateral Agreement's grant of a lien on all fixtures, but rather whether the lien created

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[2] The AAT's assertion that the parties agree the issue here is not one of priority, AAT Opp. at 14, while true, is also irrelevant, as Bankruptcy Rule 7001(2) is not limited to challenges to priority.

thereby was invalid with respect to some, but not all, of the fixtures at Shreveport Assembly. For more than 7,800 assets, the AAT wants the Court to conclude that even though they were within the scope of the granting clause, the lien on those assets was invalid as a matter of Louisiana law because they were in place at the time the grant was made.[3] For the remaining 967 assets, the AAT is prepared to concede that the assets may be fixtures and litigate whether they meet the Louisiana state law fixture test and, if so, what they are worth.[4] Thus, as a matter of law and logic, the AAT is presenting a paradigmatic challenge to the "validity" of the Term Lenders' lien on 7,801 assets, and to the "extent" of the Term Lenders' lien on the universe of 8,700-plus assets that were all covered by the collateral grant. That challenge to the validity of the lien under the Louisiana UCC based upon the date of installation of the fixtures had to be brought timely in an adversary proceeding. *See* Term Lenders' Summ. J. Br. at 7-11.

II. PARAGRAPH 601 OF THE AMENDED COMPLAINT DOES NOT SATISFY THE REQUIREMENTS OF BANKRUPTCY RULE 7001(2).

The AAT insists that, even if its challenge to the Shreveport Assembly fixtures lien is governed by Bankruptcy Rule 7001(2), the current adversary proceeding satisfies the

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[3] Even if this claim had somehow been pleaded in paragraph 601, which it was not, it would in any event be barred by the general release of claims against the Term Lenders contained in paragraph 19(d) of the Final DIP Order. In substance, the AAT's challenge is an avoidance claim, which seeks to avoid the lien on the already-attached fixtures under section 544(a) of the Bankruptcy Code as invalid under state law. The only claims that were carved out of the release under the Final DIP Order were claims relating to perfection. Main Dkt. 2529-1 ¶ 19(d).

[4] *See* AAT Summ. J. Br. at 1 n.1 ("Assets incorporated into the Shreveport Plant after the date of the Collateral Agreement also are not at issue.").

Rule's requirements. AAT Opp. at 7-8. The claim strains credulity.[5]

As the Court knows, all but one paragraph of the AAT's 618-paragraph Amended Complaint makes allegations in support of the AAT's challenge to the Term Lenders' lien on the collateral that was perfected solely by the Main Term Loan UCC-1. The one paragraph that the AAT relies upon, paragraph 601, contains no allegations that seek the avoidance of any lien. Rather, its allegations are in aid of recovery, asserting that "the value of the Surviving Collateral was less than the amount of the Term Loan Lenders' claim . . . and Defendants were not entitled to receive the Postpetition Transfers to the extent that the amount of such transfers exceeded the value of the Surviving Collateral," and that "[t]he Surviving Collateral is of inconsequential value." Amend. Compl. ¶ 601 [Adv. Pro. Dkt. 91 at 74].

Paragraph 601 cannot carry the weight that the AAT would have it bear. As the Court found when that same paragraph was invoked to defend the AAT's belated challenge to the lien at LDT, paragraph 601 does not contain a "short and plain statement" challenging the validity of the lien under Louisiana law or the extent of the fixtures located at Shreveport

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[5] The AAT offers no contrary authority in response to the uniform case law cited in the Term Lenders' Summary Judgment Brief establishing that Bankruptcy Rule 7001(2) requires an adversary proceeding to challenge the Shreveport Assembly fixtures lien. Instead, the AAT argues that those cases are inapposite because, in each of them, no adversary proceeding had been brought. AAT Opp. at 8. But the mere existence of *an* adversary proceeding does not suffice to satisfy the plaintiff's obligation to plead *the bases for and nature of the relief sought* in an adversary proceeding. *See* Decision at 95-96. The cases cited by the AAT are not to the contrary; they merely hold that if an issue is *already being disputed* in an adversary proceeding, a separate proceeding need not be brought to litigate that same issue. *In re Branford Partners, LLC*, 2008 WL 8448329, at *9 (B.A.P. 9th Cir. Oct. 24, 2008) (debtor was not required to commence separate adversary proceeding to avoid liens when it had already asserted lien avoidance as a defense to creditor's complaint asserting superior liens in the property); *Ontra, Inc.* v. *Wolfe*, 192 B.R. 679, 681-83 (W.D. Va. 1996) (separate adversary proceeding not required to determine the value and extent of a lien on property already subject to an adversary proceeding to obtain approval of sale of the property free and clear of lien).

Assembly as to which the lien is alleged to be invalid. Decision at 95. Just as with LDT, paragraph 601 does not use the word "validity," does not refer to "Shreveport Assembly," does not invoke the "Louisiana UCC" and does not make distinctions between assets in place at the time the lien was granted and assets installed thereafter. *Cf.* Decision at 95 ("Absent from this paragraph are the words 'priority,' 'fixture,' 'avoidance,' and 'LDT' or 'Lansing Delta Township.'"). Thus, paragraph 601 does not provide notice of the "claim showing that the pleader is entitled to relief" or a "demand for the relief sought," Fed. R. Civ. P. 8(a), nor "fair notice of what the plaintiff's challenge is and the grounds upon which it rests," Decision at 92.[6]

Finally, the AAT's claim that, under the Term Lenders' reading of Bankruptcy Rule 7001(2), "the Term Lenders could have asserted an interest in *any* fixture at *any* GM plant, without possibility of challenge and without regard to which fixtures were actually part of the grant of collateral under the Collateral Agreement," is a straw man. AAT Opp. at 19. The collateral grant was limited, on its face, to "assets and property now owned or hereafter acquired by" Old GM, and (after the termination of the Main Term Loan UCC-1), to "[f]ixtures," at "U.S. Manufacturing Facilities," *i.e.*, any plant or facility listed on Schedule 1. Collateral Agreement arts. I, II at 2, 4 [Adv. Pro. Dkt. 1092-2 at 6, 8].

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[6] Plaintiff's claim that paragraph 601 of the Amended Complaint encompasses its challenge to the already installed fixtures at Shreveport Assembly is particularly unconvincing given that the paragraph focuses on the "portion of the Collateral . . . secured and perfected by filings other than the Financing Statement (the 'Surviving Collateral')." But the challenge here is that the Term Lenders' lien on the already installed fixtures at Shreveport was *never* valid — even when the Delaware UCC-1 "Financing Statement" was effective and in place. For plaintiff to argue that a paragraph in its Amended Complaint that is predicated on its having prevailed in challenging the Delaware UCC-1 provides notice of its entirely unrelated challenge to the validity of the Term Lenders' lien on fixtures at Shreveport Assembly — a challenge that would have existed separate and apart from its challenge to the Delaware UCC-1 — is meritless.

Thus, although paragraph 601, which the AAT has repeatedly invoked as its passport to making whatever challenges it belatedly undercovers, does not make any allegations regarding the scope of the collateral grant, there is nonetheless no risk of an "absurd outcome" if the Court rejects the AAT's invitation to disregard the mandate of Rule 7001(2). *See* AAT Opp. at 19. The Term Lenders have never disputed that the AAT can litigate whether an asset is within the scope of the collateral grant, *i.e.*, whether it was (i) property of Old GM, (ii) a fixture, and (iii) located at a covered plant. The AAT did not have to predict, and bring a timely adversary proceeding to challenge, a claimed lien on assets that were not the subject of the granting language in the Collateral Agreement. Once an asset is within the scope of the grant, however, Bankruptcy Rule 7001(2) mandates that the Term Lenders be afforded the due process of an adversary proceeding if the validity, extent or priority of their liens are challenged.[7]

III. THE AAT'S CHARACTERIZATION OF THE DISPUTED FIXTURES AT SHREVEPORT ASSEMBLY AS REAL PROPERTY IS IRRELEVANT AND ERRONEOUS.

The AAT's final argument is that the 7,801 disputed fixtures were not within the collateral grant because they were not fixtures at all, but rather real property. AAT Opp. at 16-18. The argument fails for all of the reasons discussed above: regardless of how the dispute is characterized, at bottom it is a dispute over the extent and validity of the Term Lenders' lien.

In any event, as the Term Lenders have previously demonstrated, the AAT's contention is incorrect. Just like fixtures in Michigan, fixtures in Louisiana become component

[7] In a separate argument, the AAT tries to make a virtue of its seven-year delay in asserting this challenge by arguing that the only issue the Term Lenders objected to in the past as not having been raised in the pleadings was the challenge to the LDT fixture filing. AAT Opp. at 20. Needless to say, the Term Lenders never objected to the timeliness of this challenge because it was never raised prior to the AAT's July 31, 2018 letter to the Court. The AAT's request that the Court allow it to amend its complaint *sua sponte* is similarly lacking in substance. This litigation was brought as an avoidance action aimed at the terminated Main Term Loan UCC-1. The AAT should not be granted license to invoke new avoidance theories nearly ten years later.

parts of the realty but nonetheless are recognized as fixtures, regardless of when they are annexed. *See* Term Lenders' Opp. at 5-8; *see also* Term Lenders' Summ. J. Br. at 11-14. It does not change the analysis to place the label "real property" on those fixtures. Whether or not they were annexed to the real property before the grant, all of the 8,700-plus assets were within the language granting a lien on all fixtures at Shreveport Assembly.

The AAT's related argument, *i.e.*, that the grant of a security interest in fixtures located at Shreveport Assembly was prohibited by law, is also without substance. The exclusion that the AAT relies upon provides: "[T]his Agreement shall not constitute a grant of a security interest in any asset or property to the extent that: (i) such grant of a security interest is prohibited by any Requirement of Law of a Governmental Authority or requires a consent not obtained of any Governmental Authority pursuant to such Requirement of Law. . . ." Collateral Agreement art. II, at 4 [Adv. Pro. Dkt. 1092-2 at 8].

"Requirement of Law" is defined in the credit agreement as follows: "as to any Person, any law, treaty, rule or regulation or determination of an arbitrator or a court or other Governmental Authority, in each case applicable to or binding upon such Person or any of its property or to which such Person or any of its property is subject." Term Loan Agreement § 1.01, at 10-11 [Adv. Pro. Dkt. 1092-1 at 16-17].

The lien on fixtures at Shreveport Assembly was not *prohibited* by any Requirement of Law within the meaning of these provisions. The Louisiana UCC merely provides that the creation of a lien against those fixtures that are already attached is governed by real property law, rather than the UCC. *Compare* La. Stat. § 10:9-334(a) ("A security interest under this Chapter may not be created or perfected in goods after they become fixtures.") *with id.* § 10:9-334(b) ("This Chapter does not prevent the creation of an encumbrance upon fixtures

under real property law."). As the grant of a lien on fixtures is not *prohibited* by law, the exclusion in Article II of the Collateral Agreement does not apply by its terms.

Moreover, the clause that the AAT points to has a purpose that has no relevance here. By limiting the scope of the grant to exclude *prohibited* liens, Article II protects the grantor of a security interest from acting in violation of law. A statutory prohibition is accompanied by a statutory penalty; by carving out prohibited liens, the clause avoids the risk of the grantor endangering its own property interest or suffering other adverse consequences.

For example, the Communications Act prohibits the grant of a lien on broadcasting licenses; violation of that prohibition exposes the grantor of the lien to revocation of its license. 47 U.S.C. §§ 310(d), 312; *cf. New Bank of N.E.* v. *Tak Commc'ns, Inc.*, 138 B.R. 568, 577 (W.D. Wis. 1992) (as corrected Apr. 9, 1992) (holding that debtor's grant of security interest in broadcasting licenses, which was contractually limited "to the extent that such rights are assignable," was prohibited by the FCC), *aff'd*, 985 F.2d 916 (7th Cir. 1993).

Here, if Old GM granted a lien that was ineffective (but not prohibited) under state law, the only impact would be that the secured party would have been granted an invalid lien. Because Old GM did not violate any law by granting a security interest in the already annexed fixtures at Shreveport Assembly, the Collateral Agreement's carve-out for *prohibited liens* did not apply.

Thus, for all of the reasons discussed above and in the prior briefing, the issue of whether the grant of the lien was ineffective as to certain fixtures at Shreveport Assembly had to be timely raised in an adversary proceeding. It was not.

CONCLUSION

The Term Lenders' motion should be granted.

Dated: October 26, 2018
New York, New York

Respectfully submitted,

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