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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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

MEMORANDUM OF LAW IN SUPPORT OF TERM LENDERS' MOTION FOR ORDER ESTOPPING AVOIDANCE ACTION TRUST FROM ASSERTING THAT ASSETS LEFT WITH OLD GM SHOULD BE ASSIGNED KPMG OLV VALUES

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PRELIMINARY STATEMENT

In 2016 and 2017, the Court and the parties devoted enormous effort so that the Court could determine the central issues necessary to resolve the parties' dispute: which of 40 assets chosen by the parties as representative are fixtures and how those fixtures are to be valued. The Court undertook these efforts for the express purpose of helping to bring about the end of this litigation, now entering its tenth year.

On the valuation issue, the Avoidance Trust sponsored the analysis and testimony of David K. Goesling, an appraiser of industrial machinery and equipment. The Court adopted Mr. Goesling's testimony and approach to valuing assets left behind with Old GM: "For assets whose proposed disposition at the Valuation Date was to remain with the Motors Liquidation estate and be liquidated, Goesling's OLVIE analysis is the best available valuation." Op. 185.

Having won on the issue, the Avoidance Trust now wants to take a different position. It now wants to assign OLV values estimated by KPMG to the assets left behind with Motors Liquidation. The reason for this change of position is obvious: the KPMG OLV values are drastically lower than the values resulting from Mr. Goesling's OLV methodology: for the 28 Representative Assets that were assigned liquidation values both by Mr. Goesling and by KPMG and that were found by this Court to be fixtures, Mr. Goesling's values are on average nine times higher than KPMG's. Wilson Decl. Ex. A.[1]

As shown below, this is a textbook case for judicial estoppel. At the 2017 trial, the Avoidance Trust — which overall sought to discredit KPMG's work — made the strategic decision to sponsor Mr. Goesling's methodology and values rather than KPMG's. The

[1] Exhibits are contained in the accompanying Declaration of C. Lee Wilson submitted herewith. For the Court's convenience, all references to the Trial Transcript are contained in Wilson Decl. Ex. B.

Avoidance Trust prevailed on the issue, defeating the higher liquidation valuations established by defendants' expert. Indeed, even when this Court after the close of evidence directed submission of a chart containing "an array" of all "available" values contended by either side to be potentially applicable, and even when the Court focused on the question of how its valuation decision could be applied to the remaining assets, the Avoidance Trust chose not to present the KPMG OLV values — not even in a footnote.[2] *See* Wilson Decl. Ex. C. Having prevailed upon this Court to adopt Mr. Goesling's methodology and values, the Avoidance Trust should now be barred from taking a different, inconsistent position.

BACKGROUND

A. The parties proposed and the Court adopted a Representative Assets Trial so that the Court could make determinations that could be applied to the remaining tens of thousands of assets.

As the Court is aware, the parties, with the Court's active assistance, charted a course in 2016 aimed at resolving this dispute: a trial of 40 assets chosen by the parties to be representative, to determine fixture status and value so that the parties could then use this Court's decision as the template for the remaining assets.

The Representative Assets Trial took place in April and May 2017, with closing arguments on June 5. Thirty-one witnesses — seventeen fact and fourteen expert — testified either live or by deposition or written statement. Over a thousand exhibits were entered into evidence. Adv. Pro. Docket No. 1029 (Exs. C, D).

Twenty-one of the thirty-one witnesses testified concerning valuation. There was also a wealth of documentary evidence offered on valuation, including the lengthy report of KPMG, which KPMG had produced to "provide New GM with 'individual opinions of value'

[2] Trial Tr. 3545:8-3546:2.

with respect to each of the hundreds of thousands of individual assets that New GM purchased." Op. 159. As described in the same KPMG report, KPMG also valued tens of thousands of assets that were not sold to New GM on an orderly liquidation value basis. DX-0141 at DX-0141-0140.

Despite being fully aware of KPMG's OLV values, the Avoidance Trust at the conclusion of trial "urge[d] the Court to look to Mr. Goesling's liquidation value" as "the appropriate method of valuation" — and asserted "there's no basis to even use KPMG" for any purpose. Trial Tr. (Mr. Binder) 3771:2-14. The Avoidance Trust touted that Mr. Goesling's OLVIE analysis applied an "18-month time frame, which he considered to be reasonable both in light of how things would actually work in a bankruptcy and to get reasonable values for the assets he was valuing." *Id.* at 3700:6-11. The Avoidance Trust emphasized that Mr. Goesling had "*looked to considerable market transactions*," and "*made adjustments where appropriate*." *Id.* at 3701:21-25 (emphasis added).

Plaintiff did not even mention KPMG OLV values in its 476-page Post-Trial Brief. Rather, it chose to put all its eggs in Mr. Goesling's basket. *See* Plaintiff's Post-Trial Br. at 414-23. Indeed, as noted, even when this Court at the close of trial directed the parties to submit a chart containing an "array" of *all* "available" values that either side contended the Court might consider applying, the Avoidance Trust chose not to include the KPMG OLV values among the options that the Court could adopt. Trial Tr. 3545:14-16; Wilson Decl. Ex. C.

Moreover, while the Avoidance Trust's position now is that KPMG's OLV analysis provides a ready method for valuing tens of thousands of assets, the Court itself pressed the Avoidance Trust on the question and, in response, the Avoidance Trust did not mention, let alone advocate for, KPMG's analysis. Rather, the Avoidance Trust assured the Court at the close of trial

that if it adopted Mr. Goesling's approach as the "correct way" to value the assets to be ascribed liquidation value, it would have a way of replicating it across the remaining assets:

> Some of the questions the Court is asking relate to questions of mass appraisal. When you just can't value each and every asset on an asset-by asset basis, what's the best way to do it. We have ideas about that for purposes of mediation. We think that for purposes of a trial outcome, though, that it would be helpful to the parties to know what this Court thinks is a correct way.
>
> — Trial Tr. (Mr. Fisher) 3548:16-3549:2.

This was no accident. The Avoidance Trust offered no evidence of KPMG OLV values, and assiduously avoided arguing in favor of them, as part of a trial strategy. The Avoidance Trust sought to discredit the reliability of all of KPMG's work at every turn. It did not advocate for the liquidation values determined by KPMG because it made the strategic decision not to argue for adoption of KPMG's valuation work *for any purpose*. And as part of this litigation strategy, the Avoidance Trust criticized defendants for embracing the portions of the KPMG report that they liked, and disowning the part that they did not. *See, e.g.*, Plaintiff's Post-Trial Br. 430-31, 440-41 (criticizing defendants' "cherry-picked criticisms of KPMG"; "Defendants describe KPMG's 'extraordinary' effort in preparing their report. Then, in an attempt to obtain values for the Representative Assets that are actually twice as high as those actually determined by KPMG, Defendants seek to discredit and dismantle a portion of the KPMG Report"). Plainly, the Avoidance Trust did not want to appear to undercut this argument by doing the same thing itself.

B. This Court decided to adopt the methodology and valuation figures of the Avoidance Trust's expert Mr. Goesling for assets not sold to New GM.

In its comprehensive decision, the Court adopted the Avoidance Trust's position that, for those assets to be ascribed liquidation value, "Goesling's OLVIE analysis is the best available valuation." Op. 185. In making that determination, the Court laid out Mr. Goesling's valuation

analysis in detail and explained at considerable length why it was the "best available valuation" for assets not sold to New GM. Op. 172-78, 185, 195 and Table A.

Yet in the wake of the Court's decision, the Avoidance Trust has sought to change tack: now, the Avoidance Trust wants to take the position that KPMG OLV values should instead be assigned to the assets not sold to New GM. The KPMG OLV values it now wishes to sponsor were just as known and available to the Avoidance Trust at the time of the Representative Assets Trial. The Avoidance Trust has now apparently made a different strategic decision. For the reasons set forth below, the Court should order that the Avoidance Trust is judicially estopped from doing so.

ARGUMENT

THE COURT SHOULD JUDICIALLY ESTOP THE AVOIDANCE TRUST FROM TAKING THE POSITION THAT ASSETS LEFT WITH OLD GM BE ASCRIBED KPMG OLV VALUES

The problem of litigants deliberately changing positions based on the exigencies of the moment is not a new one. The method by which courts address the problem is well established.

As the unanimous Supreme Court recognized in *New Hampshire* v. *Maine*, quoting a Supreme Court decision from the nineteenth century, "[w]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position." 532 U.S. 742, 749 (2001) (*quoting Davis* v. *Wakelee*, 156 U.S. 680, 689 (1895)). The doctrine of judicial estoppel thus "prohibit[s] parties from deliberately changing positions according to the exigencies of the moment." *New Hampshire*, 532 U.S. at 750. *See also In re Adelphia Recovery Tr.*, 634 F.3d 678, 696 (2d Cir. 2011).

The purpose of the judicial estoppel doctrine is "to protect the integrity of the judicial process." *New Hampshire*, 532 U.S. at 749 (internal quotation marks omitted).

"Because the rule is intended to prevent improper use of judicial machinery, judicial estoppel is an equitable doctrine invoked by a court at its discretion." *Id*. at 750.

While "[t]he circumstances under which judicial estoppel may appropriately be invoked are probably not reducible to any general formulation," courts have relied on "several factors [that] typically inform the decision whether to apply the doctrine in a particular case." *New Hampshire*, 532 U.S. at 750. *See also Adelphia Recovery Tr.* v. *Goldman, Sachs & Co.*, 748 F.3d 110, 116 (2d Cir. 2014).

In the Second Circuit, "[t]ypically, judicial estoppel will apply if: (1) a party's later position is 'clearly inconsistent' with its earlier position; (2) the party's former position has been adopted in some way by the court in the earlier proceeding; and (3) the party asserting the two positions would derive an unfair advantage against the party seeking estoppel." *In re Adelphia*, 634 F.3d at 695-96 (internal quotation marks omitted). *See also Clark* v. *AII Acquisition, LLC*, 886 F.3d 261, 266 (2d Cir. 2018); *Lia* v. *Saporito*, 541 F. App'x 71, 73 (2d Cir. 2013); *Intellivision* v. *Microsoft Corp.*, 484 F. App'x 616, 619 (2d Cir. 2012); *Sewell* v. *1199 Nat'l Ben. Fund for Health & Human Servs.*, 187 F. App'x 36, 40 (2d Cir. 2006).

Further, "[b]ecause the doctrine is primarily concerned with protecting the judicial process, relief is granted only when the risk of inconsistent results with its impact on judicial integrity is certain." *Adelphia Recovery Tr.*, 748 F.3d at 116 (internal quotation marks omitted). The court applying judicial estoppel "is the 'judicial actor … better positioned' to determine whether the criteria for invoking judicial estoppel have been met within the particular factual context of a given case," so whether to invoke the doctrine is squarely within the trial court's discretion. *Clark*, 886 F.3d at 265.

Here, the factors governing invocation of judicial estoppel are plainly met. This Court should exercise its discretion to do so.

A. The Avoidance Trust's new position that this Court should assign KPMG OLV values to the assets left with Old GM is clearly inconsistent with its prior position.

In its pre-motion letter addressing this motion, the Avoidance Trust sought to argue that judicial estoppel should not apply because its present position is consistent with its prior one. That is not the case.

The proof is in the pudding. The results from applying the methodology the Court adopted and the one that the Avoidance Trust now wants to sponsor are remarkably different. Starting with the two Representative Assets retained by Old GM:

Asset No.	Asset Description	Court Determined Value	KPMG OLV Value
29	GG-1 Transfer Press (Grand Rapids)	$261,000	$120,000
30	TP-14 Transfer Press (Mansfield)	$800,000	$50,800

— Op. Table A.; Wilson Decl. Ex. A.

Thus, for Representative Asset 29, KPMG's OLV methodology resulted in a value that was *less than half* what this Court determined based on Mr. Goesling's testimony. For Representative Asset 30, the disparity is even more stark: KPMG's OLV value of $50,800 is barely *one-sixteenth* of the value determined by Mr. Goesling and adopted by the Court.

It is no answer to this clear inconsistency that the Avoidance Trust would not seek to change the value of these *two specific assets*, but only to apply the KPMG OLV values to the remaining assets. What would it say for "the integrity of the judicial process," *New Hampshire*, 532 U.S. at 749, that the TP-14 Transfer Press (Representative Asset 30) is valued at $800,000,

but an identical press right next to it would be valued at one-sixteenth that figure? The whole point of the Representative Assets Trial was to establish principles that could be applied broadly across the remaining universe of assets. Allowing the Avoidance Trust to switch gears on a point that it won would undermine the entire purpose of the trial.

And the dramatic disparity is not confined to these two Representative Assets. Mr. Goesling and KPMG both assigned liquidation values to 28 of the Representative Assets that the Court determined to be fixtures in its September 2017 decision. Mr. Goesling valued these assets at $3,283,400 on an OLVIE basis. KPMG valued those same assets at just $368,310 on an OLV basis. Thus, across a spectrum of 28 assets agreed by the parties to be representative, Mr. Goesling's values are nearly *nine times* KPMG's. Indeed, for the majority — 17 of 28 — KPMG's value compared to Mr. Goesling's is less than *four pennies* on the dollar. *See* Wilson Decl. Ex. A.

The stark inconsistency in value is not the result of happenstance. Mr. Goesling and KPMG used dramatically different methodologies to establish liquidation values. Thus:

For assets that trade actively in the secondary market (*e.g.*, stamping presses, robots, CNC machining centers, milling machines, broaches, and cranes), Mr. Goesling used the "direct match and comparable match techniques," which involved identifying "actual transactions" and "asking prices for similar assets" that were "most comparable with the property being valued." Wilson Decl. Ex. D. (Goesling Direct) at ¶¶ 407-08. In valuing an asset, Mr. Goesling assumed that Old GM would have had between nine and eighteen months to sell that asset. Op. 180. As his data source for this exercise, Mr. Goesling looked for a "direct match" or a "comparable match" over a ten-year period spanning before and after the Valuation Date, from 2006 to 2016. Wilson Decl. Ex. E. (Goesling Direct, Ex. A) at p. 340, 412. Where necessary, he

made adjustments to the sale price to account for relevant distinctions between the asset that was sold and the asset being valued. Op. 183. That is the approach that the Avoidance Trust persuaded the Court to adopt.

KPMG's approach was quite different. It did not identify a "direct match" or a "comparable match" for an asset. Wilson Decl. Ex. F (Furey Dep.) 518:1-519:11. Instead, for any given asset, KPMG began by calculating its installed cost adjusted for inflation. KPMG then reduced that cost amount by a "liquidation percentage" applicable to all assets in the relevant category. To calculate the "liquidation percentages," KPMG relied exclusively on disposition data from Maynards (GM's exclusive reseller of obsolete equipment) from a period of just three months — March, April and May 2009 — all of which preceded the Valuation Date.

That data included not only auction and other sales that resulted in proceeds for GM, but also scrap dispositions and abandonments — all of which were recorded by Maynards as "zero proceeds" dispositions. *See* Wilson Decl. Ex. F (Furey Dep.) 501:1-502:15. Indeed, nearly 95% of the dispositions — 4,243 out of 4,485 — were "zero proceeds" dispositions, meaning that the liquidation percentages calculated by KPMG were predicated on the notion that no value could be realized for the lion's share of the assets. KPMG's percentages were thus massively reduced based on this flood of zeros in the numerator. Wilson Decl. Ex. G; *see* Wilson Decl. Ex. F (Furey Dep.) 510:12-511:14.

The differences between Mr. Goesling's and KPMG's methodologies are illustrated by their valuations of Representative Asset 36, the Helical Broach milling machine. To value this asset, Mr. Goesling identified two comparable "broaching machines" that sold at auction in August 2010 for $150,000 and $100,000, respectively. He adjusted those sales prices upward by 10% to reflect that the relevant auction sales were "forced liquidation values."

Mr. Goesling then adjusted the sale prices downward by 10% to reflect that the market was better in August 2010 than June 2009, and then he adjusted one of the sales prices upward to reflect that the asset sold at auction was older and of lower capacity than Representative Asset 36. Based on this analysis, Mr. Goesling concluded that the Helical Broach had an OLVIE of $150,000. Wilson Decl. Ex. D (Goesling Direct) ¶¶ 421-25.

KPMG, on the other hand, assigned this same Helical Broach to its "Machine Tools" category of assets. For the "Machine Tools" category, the Maynards data included 337 total dispositions between March and May 2009. Of those 337 dispositions, 283 resulted in "zero proceeds" to Old GM; only 54 resulted in cash receipts. Comparing the inflation-adjusted installed cost of all of these 337 assets to the total proceeds received by Old GM, KPMG determined that on average the liquidation value of these assets was *less than 1%* (just .83%) of their adjusted installed cost. KPMG then applied this .83% "liquidation percentage" to the cost of the Helical Broach, yielding a liquidation value of just $9,630 — less than *one-fifteenth* of Mr. Goesling's value. *See* Wilson Decl. Ex. G; NEWGM000000949 at "Asset Details" sheet; Wilson Decl. Ex. F (Furey Dep.) 521:18-523:16.

For assets that did not actively trade in the secondary market, where Mr. Goesling had the necessary information, he determined "scrap values" on an asset-by-asset basis, based on the weight of the asset.[3] Where he did not have the necessary information, Mr. Goesling determined "scrap values" using "scrap factors" that estimated the scrap value of an asset as a

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[3] *E.g.*, Wilson Decl. Ex. E (Goesling Direct, Ex. A) at p. 407 (estimating the scrap value of a conveyor using its weight, the price of scrap steel, and an adjustment for the cost of removal); *see also* Op. 176.

percentage of replacement cost new — estimating, for example, a 0.64% "Mixed Steel Scrap Factor" and a 6.4% "Electrical System Scrap Factor."[4]

KPMG, on the other hand, did not "perform a scrap value analysis" for individual assets. Wilson Decl. Ex. F (Furey Dep.) 521:10-17. Rather, KPMG applied the same "liquidation percentage" approach described above: it divided the amount received from the few sales that occurred from March to May 2009 by the total inflation adjusted installed cost for all of the assets in the same category to develop a liquidation percentage that was then applied to value the individual assets in the entire category. So, to take conveyors for example, KPMG took the two sales occurring in the March to May 2009 period that netted Old GM money, divided the net proceeds to Old GM of $890 by the $16,041,361 inflation-adjusted installed cost for the 182 conveyors, and came up with a liquidation percentage for the conveyor category of less than .01% (*i.e.*, less than a *dime* per $1,000). Using this same methodology, KPMG estimated a liquidation percentage for electrical equipment and testing equipment at 0%. Wilson Decl. Ex. G; *see generally* Wilson Decl. Ex. F (Furey Dep.) 499-511 (discussing Maynards' "zero proceeds" dispositions).

Any claim that the KPMG OLV values are nothing more than an extrapolation of Mr. Goesling's methodology over a broader set of assets is simply false. For assets where there was sales data, Mr. Goesling's approach is fundamentally a market-based approach that establishes values for individual assets based on comparable positive value sales. Mr. Goesling did not seek or present data on mass dispositions for scrap. For assets that did not sell, Mr. Goesling calculated scrap factors that can readily be applied to the installed costs of a much

[4] Wilson Decl. Ex. E (Goesling Direct, Ex. A) at p. 413 (calculating "scrap factors"); *id*. at p. 406 (estimating the scrap value of a build line by applying a "scrap factor").

larger number of assets. KPMG, relying on "zero proceeds" dispositions, assigned virtually no scrap value to any asset. Moreover, KPMG's analysis rests on limited disposal data. Mr. Goesling's sales data was drawn from a far longer period, covering both before and after the Valuation Date, with the result that he captured more comparable sales for any given asset. Wilson Decl. Ex. E (Goesling Direct, Ex. A) at p. 412. Further, Mr. Goesling assumed Old GM would have an "18-month time frame" for sale — which the Avoidance Trust's counsel represented to the Court at closing argument was "reasonable both in light of how things would actually work in a bankruptcy and to get reasonable values for the assets that he was valuing." Trial Tr. (Mr. Binder) at 3700:6-11. This led Mr. Goesling to make upward adjustments to comparable sales made in a more compressed time frame. *See, e.g.*, Wilson Decl. Ex. E (Goesling Direct, Ex. A) at p. 340, 408. In contrast, KPMG made no such adjustments to the three months of disposal data that it used.

B. The Avoidance Trust's former position has already been adopted by this Court.

The second factor relied upon in the Second Circuit for application of judicial estoppel is also clearly satisfied. As a result of the Representative Assets Trial, this Court explicitly ruled that "[f]or assets whose proposed disposition at the Valuation Date was to remain with the Motors Liquidation estate and be liquidated, Goesling's OLVIE analysis is the best available valuation." Op. 185. Thus, the Court specifically adopted the methodology and numbers sponsored by the Avoidance Trust through Mr. Goesling for assets whose proposed disposition as of the Valuation Date was liquidation.

C. The Avoidance Trust would derive an unfair advantage by switching positions now.

The Term Lenders would be unfairly disadvantaged, both by the sharply lower liquidation values that plaintiff would now be asserting, as well as by the need to re-litigate an issue that has already been decided at great expense and effort by both defendants and the Court.

The Supreme Court's 2001 decision in *New Hampshire* v. *Maine* is instructive. Under a 1740 Decree, the boundary line between New Hampshire and Maine was set at "the Middle of the River" (a reference to the Piscataqua River). 532 U.S. at 746. In a Supreme Court proceeding in the 1970s to resolve a dispute along the boundary line, New Hampshire took the position that the phrase "Middle of the River" in the Decree meant the geographic middle, a position the Court adopted. *Id*. at 750-51. Thereafter, in 2001, New Hampshire sought to argue in another boundary dispute based on "official documents and events from the colonial and postcolonial periods" that "Middle of the River" elsewhere on the boundary line meant all the way to the Maine shore, because "New Hampshire, not Maine, exercised sole jurisdiction over shipping and military activities" in that area "during the decades before and after the 1740 decree." *Id*. at 748, 754. The Supreme Court unanimously held that, whatever the merit of the new position, New Hampshire was judicially estopped from asserting it, because "having benefited from [the] prior interpretation," New Hampshire could not "now urge[] an inconsistent interpretation to gain an additional advantage at Maine's expense." *Id*. at 755. *See also Penberthy* v. *Chickering*, No. 15 Civ. 7613, 2017 WL 176312, at *7-8 (S.D.N.Y. Jan. 13, 2017) (creditor who voted to approve bankruptcy plan as non-priority creditor judicially estopped from bringing suit on theory that Confirmed Plan did not discharge debts to her; "unfair detriment" is met since allowing change in position could "expose [defendant] to a judgment . . . of nearly $2 million.")

So too here. The Avoidance Trust sponsored Mr. Goesling's methodology and valuations for the assets to be ascribed liquidation value to defeat the higher liquidation values sponsored by the Term Lenders' expert. By doing so, it sponsored Mr. Goesling's values (which were multiple times KPMG's liquidation values) in an effort to make it appear to the Court that its position was very much in the figurative "middle of the river." It also assiduously avoided arguing for adoption of KPMG's liquidation values as a litigation strategy, so that it could criticize defendants for embracing the portions of the KPMG report that they liked, and disagreeing with the portions they did not like — an argument useful to its efforts to secure the 55% TIC reduction on KPMG's going-concern valuations. Having taken its position and succeeded, it cannot now urge an inconsistent position in an effort to gain an additional advantage at the Term Lenders' expense.

As noted, the very reason this Court held the Representative Assets Trial in the first place was to make rulings that could then be applied to the remaining assets. Allowing the Avoidance Trust now to switch course flies in the face of the very *raison-d'être* of the procedural course the Court charted at the parties' behest.

Thus, even though the Second Circuit has recognized that this third factor for judicial estoppel is not invariably required, *see Adelphia Recovery Tr.*, 748 F.3d at 116, that it is satisfied here makes invocation of judicial estoppel all the more appropriate.

* * *

Therefore, balancing the equities and applying its discretion in the factual circumstances of this case, the Court should apply judicial estoppel.

D. There is no "convenience" exception to judicial estoppel.

As against the compelling considerations calling for invocation of judicial estoppel discussed above, the Avoidance Trust's principal counterargument in its pre-motion

letter could be summed up by one word: convenience. The claim is that it would be simple to assign the KPMG OLV values to the remaining assets not sold to New GM, because those values exist.

It would be equally simple to take the KPMG OLV values and multiply by nine — a rule of thumb that, based on the evidence adduced as to the 28 Representative-Asset fixtures that were assigned liquidation values both by Mr. Goesling and KPMG, would far more closely hew to the outcome of the Representative Assets Trial.

But much more fundamentally, there is no "convenience" exception to judicial estoppel. The integrity of the judicial process that judicial estoppel protects far transcends considerations of convenience.

Moreover, and in any event, the notion that Mr. Goesling's methodology cannot be applied to the broader universe of assets is just not so. Since receiving this Court's September 2017 decision, the Term Lenders have been working with experts to apply Mr. Goesling's methodology to the approximately 43,000 other assets left with Old GM. With Mr. Goesling's direct testimony as a guide, and applying standard economic and appraisal techniques to deal with the larger number of assets, the Term Lenders' experts have been able readily to value the remaining assets left with Old GM; this evidence will be presented at the upcoming 2019 trial.

CONCLUSION

In sum, this is a textbook case for application of judicial estoppel. The Court should protect the integrity of the judicial process and prohibit the Avoidance Trust from asserting the clearly inconsistent valuation methodology based on KPMG's OLV methodology.

Dated: October 26, 2018
New York, New York

Respectfully submitted,

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