

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE:	.	Case No. 09-50026-mg
	.	
MOTORS LIQUIDATION COMPANY,	.	Chapter 11
et al., f/k/a GENERAL	.	
MOTORS CORP., et al,	.	(Jointly administered)
	.	
Debtors.	.	
.	
MOTORS LIQUIDATION COMPANY	.	Adv. Proc. No. 09-00504-mg
AVOIDANCE ACTION TRUST, by and	.	
through the Wilmington Trust	.	
Company, solely in its capacity	.	
as Trust Administrator and	.	
Trustee,	.	
	.	
	.	
Plaintiff,	.	
v.	.	
	.	
JPMORGAN CHASE BANK, N.A.,	.	
individually and as	.	
Administrative Agent for	.	
Various lenders party to the	.	One Bowling Green
Term Loan Agreement described	.	New York, NY 10004
herein, et al.,	.	
	.	
	.	Thursday, January 10, 2019
Defendants.	.	2:03 p.m.
.	

TRANSCRIPT OF ADVERSARY PROCEEDING: 09-00504-mg
MOTORS LIQUIDATION COMPANY AVOIDANCE ACTION TRUST V.
JPMORGAN CHASE BANK, N.A. ET AL, MOTION FOR PARTIAL
SUMMARY JUDGMENT DISMISSING DEFENDANT'S EARMARKING DEFENSE
(DOC. NO. 1128); ADVERSARY PROCEEDING: 09-00504-mg
MOTORS LIQUIDATION COMPANY AVOIDANCE ACTION TRUST V.
JPMORGAN CHASE BANK, N.A. ET AL, PLAINTIFF'S MOTION FOR PARTIAL
SUMMARY JUDGMENT ON ASSETS AT SHREVEPORT PLANT (DOC. NO. 1089)
BEFORE THE HONORABLE MARTIN GLENN
UNITED STATES BANKRUPTCY COURT JUDGE

APPEARANCES CONTINUED

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1 (Proceedings commence at 2:03 p.m.)

2 THE CLERK: All rise.

3 THE COURT: All right. Please be seated. We're here
4 in Motors Liquidation Company Avoidance Action Trust v.
5 JPMorgan Chase Bank, N.A., et al. It's adversary proceeding
6 number 09-00504. Let me have the appearances, please, first
7 for the plaintiff.

8 MR. FISHER: Good afternoon, Your Honor. Eric Fisher
9 from Binder & Schwartz on behalf of the avoidance action trust,
10 and I'm here today with my colleagues, Neil Binder, Lindsay
11 Bush, and Lauren Handelsman.

12 THE COURT: Thank you very much.

13 MR. WOLINSKY: Good afternoon, Your Honor. Marc
14 Wolinsky from Wachtell, Lipton, Rosen & Katz. I'm here today
15 with Harold Novikoff, Amy Wolf, Benjamin Lander (phonetic),
16 Joseph Celentino, and our friend at -- and colleague, Lee
17 Wilson, who's now at Jones Day but is still representing
18 JPMorgan and so presently he's at the table with us. He'll be
19 handling the presentation at times.

20 THE COURT: Thank you very much.

21 Okay. Let's start with the earmarking motion that's
22 first on the calendar.

23 MR. FISHER: Eric Fisher from Binder & Schwartz for
24 the avoidance action trust.

25 Your Honor, we seek to dismiss as a matter of law the



1 affirmative defense of earmarking that's been asserted by
2 numerous defendants in this case. Basically, the defendants'
3 argument is that the debtor's post-petition payment to the term
4 lenders cannot be recovered under any circumstances because the
5 payment was earmarked for payments to the term lenders alone.

6 Before I directly address the elements of earmarking,
7 I think it's helpful to start with the final DIP order in this
8 case. And, Your Honor, I think that really the answer to the
9 question of whether the earmarking defense can stand requires
10 looking at the DIP order, and I think the Court could stop
11 right there. There are, of course, two critical provisions in
12 the final DIP order. Paragraph 19(a) of the final DIP order --

13 THE COURT: I happen to have it right here, yeah.

14 MR. FISHER: -- is the paragraph, Your Honor, that
15 directs, requires the debtors to pay off all of Old GM's
16 secured debt, including the term loan, and then paragraph 19(d)
17 is the paragraph that carves out this action and says that the
18 creditors' committee will have automatic standing to bring this
19 action.

20 Taken together, Your Honor, those two paragraphs, we
21 think, make quite clear that at the time that the payment was
22 made to the term lenders and at the time that the DIP loan was
23 approved, the funds used to pay the term lenders were actually
24 -- not only were they not earmarked, they were whatever the
25 opposite of earmarked is, meaning what 19(d) in the DIP order



1 does is it flags that specific payment for possible recovery in
2 this very action. At the time that the DIP order was approved
3 and at the time that this post-petition payment was made,
4 everyone that was party to that knew that the payment was being
5 made subject to our right -- first, it was the creditors'
6 committee, and then, of course, the action was transferred to
7 the avoidance action trust's right to recover that payment for
8 the estate to the extent that in this litigation, we succeeded
9 in proving that all or some of it was a payment that the term
10 lenders were not legally entitled to.

11 And, Your Honor, not only was everyone on notice that
12 those were the terms of this post-petition payment, the term
13 lenders, themselves, agreed to these terms. The final DIP
14 order was negotiated, and it reflects a compromise among all of
15 the competing interests that were at the table at the time. On
16 the one hand, the term lenders wanted to be paid their
17 \$1.5 billion in full. On the other hand, at the point in time
18 at which the final DIP order was up for approval, it was known
19 that this UCC-3 termination statement had been filed and that
20 there were questions about whether or not the loan was fully
21 secured. The DIP lenders, on the other hand, wanted -- they
22 wanted to pay off --

23 THE COURT: When did the parties become aware of the
24 UCC-3?

25 MR. FISHER: In June, Your Honor.



1 THE COURT: And when was the loan repaid?

2 MR. FISHER: June 30.

3 THE COURT: Okay. So none of the parties knew of the
4 lien release -- UCC-2 releases --

5 MR. FISHER: Yes, Your Honor.

6 THE COURT: -- before the loan was repaid?

7 MR. FISHER: Correct. And that's exactly why all of
8 the parties negotiated for paragraph 19(d), which accommodated
9 everyone's interest insofar as it allowed, on the one hand, the
10 term lenders to be paid in full, notwithstanding the fact that
11 there was a question as to whether they were legally entitled
12 to that full payment. And on the other hand, it preserved for
13 the creditors' committee for the estate this cause of action to
14 potentially recover that amount to the extent that it can be
15 proven in this litigation that they weren't entitled to that
16 full payment.

17 And so, Your Honor, the DIP order itself, as I said
18 before, signals that the payment was a payment that was being
19 made subject to potential recovery in this action. And Your
20 Honor recognized exactly this point earlier in this case when,
21 following remand, there was an omnibus motion to dismiss the
22 complaint brought by many of the term lenders, and they
23 directly attacked and claimed that there wasn't a prima facie
24 case made to recover under Section 549 of the Bankruptcy Code,
25 and the Court wrote that the DIP order provided, quote:



1 "Provisional authorization, provisional authorization
2 of the post-petition transfers. If the trust is
3 successful in challenging the post-petition transfer,
4 the subject transfers would have been unwarranted and
5 thus unauthorized because the transferees would have
6 been unsecured creditors."

7 THE COURT: Where did I write that?

8 MR. FISHER: Your Honor, it's in 552 B.R. 253. It's
9 at pages 276 to 277, and that's -- that is Court's 2016
10 decision on that motion to dismiss.

11 And before Your Honor's decision, when Judge Gerber
12 was overseeing this case, he similarly wrote, in a different
13 context -- the context there was Judge Gerber's decision in
14 connection with the dispute between unsecured creditors and the
15 DIP lenders as to who was entitled to proceeds of this
16 litigation, but Judge Gerber wrote that the DIP order, quote,
17 "provided for the payment of Old GM's pre-petition secured debt
18 with proceeds from the DIP financing, subject to recapture."

19 THE COURT: And what's the cite on that?

20 MR. FISHER: 460 B.R. --

21 THE COURT: 460?

22 MR. FISHER: 460, 4-6-0, B.R. 603 at page 612, and
23 that's a 2011 decision, Your Honor.

24 THE COURT: Okay.

25 MR. FISHER: So we think that -- to the extent the



1 term lenders ever had any concerns or ever thought that these
2 -- this payment was earmarked, the time to raise those concerns
3 was before the DIP order was approved on June 30, 2009. And
4 once the DIP order was approved and once the term lenders
5 accepted that one-and-a-half-billion-dollar payment, they knew
6 that they were accepting it subject to this litigation, and we
7 think that in and of itself, that resolves their earmarking
8 defense and means it ought to be dismissed as a matter of law.

9 Another sort of more big-picture point that I'd like
10 to make about the weakness of the earmarking defense is that
11 the defendants have not identified a single case in which a
12 court has ever found that proceeds of a DIP loan were earmarked
13 and therefore beyond the avoidance power. And I think that the
14 reason, Your Honor, that there are no cases that we're aware of
15 and no cases that the defendants have cited for that
16 proposition is fairly straightforward, and I think it's
17 resolved by the text of the Bankruptcy Code itself.

18 Earmarking is essentially an equitable doctrine that
19 courts construe fairly narrowly, and it's an exception to the
20 idea of property of the estate. It essentially says certain
21 kinds of transfers are not subject to recapture because they're
22 not transfers of property of the estate, which is the language
23 used in 549.

24 Well, I don't think there's any question that DIP
25 loan proceeds are property of the estate. Section 541 of the



1 Bankruptcy Code, and specifically 541(a)(7), makes very clear
2 that property that comes into the estate post-petition is
3 property of the estate. And I'm not aware of any court finding
4 that DIP loan proceeds were earmarked and could not be subject
5 to recapture. All of the cases that they cite involve -- there
6 are very few of them involving post-petition transfers at all.
7 There are no cases in this district involving even
8 post-petition transfers that are subject to earmarking, let
9 alone DIP loan proceed transfers.

10 And there's one Eastern District of New York case
11 that does recognize the applicability of earmarking in a 549
12 context. It's called In re Westchester. But in that case, the
13 Court was dealing with checks that had been written directly by
14 the third-party creditor to another creditor, and the question
15 was whether those were or were not subject to earmarking. But
16 in getting there, the Court made clear that other transfers,
17 which involved transfers of DIP proceeds, obviously were not
18 subject to earmarking because they clearly were property of the
19 estate. That's the touchstone of whether earmarking applies,
20 Your Honor.

21 I want to turn very briefly to address some of the
22 elements of earmarking and show why, as a matter of law, they
23 can't be satisfied here. First, the term lenders would need to
24 show that the Old GM bankruptcy estate has not been diminished
25 by the transfer to them. Here, it is the case, and the Court



1 -- this Court approved the 9019 motion with regard to who's
2 going to get the proceeds of this litigation, that any monies
3 recovered from the term lenders are going to be distributed to
4 unsecured creditors and to the DIP lenders. And so there's no
5 question that to the extent that they were not legally entitled
6 to a portion of the \$1.5 billion that they were paid, that's
7 money that is subject to recapture for distribution to the
8 estate's creditors, and therefore the estate has been
9 diminished --

10 THE COURT: Well, they pay it back. They get to
11 share as an unsecured creditor.

12 MR. FISHER: That's right, Your Honor. Yes, they
13 would.

14 And the other element that courts, including In re
15 Flanagan, the Second Circuit decision, have considered in
16 deciding whether earmarking should apply is the issue of
17 whether the debtors have control over the proceeds. Here, the
18 DIP credit agreement, pursuant to which these proceeds were
19 advanced to the debtor, makes clear that the debtor was the
20 beneficiary of that loan, and the money was funded into Old
21 GM's bank accounts. It wasn't escrowed in any way. And it
22 actually was -- the transfer -- the post-petition transfer that
23 was made to the term lenders was made from what GM calls a
24 "concentration account," which was sort of a roll-up account
25 that was used for all sorts of business purposes.



1 THE COURT: So the DIP loan was a superpriority
2 secured loan. Is that correct?

3 MR. FISHER: Yes.

4 THE COURT: And whatever the term lenders may have
5 thought before the bankruptcy, their loan was either unsecured
6 or secured by -- only by fixtures. Someday, we may actually
7 find out what the value of the fixtures is. Does that satisfy
8 the diminishment of the estate? You've -- they've -- what's
9 happened is the substitution of a unsecured or undersecured
10 claim with a superpriority secured claim --

11 MR. FISHER: On those -- well, except that, Your
12 Honor, this particular action was carved out, and --

13 THE COURT: But just put that -- I understand the
14 section -- I understand your argument that the final DIP order
15 specifically carved out this action. Let's put that argument
16 to the side. Let's assume that that -- we didn't have that.
17 In Flanagan, Judge Cardamone -- this is at 503 F.3d 185, 186.
18 He says the following:

19 "There is nonetheless an important limitation on the
20 earmarking doctrine. The doctrine will only protect
21 a transfer from avoidance to the extent it did not
22 diminish the debtor's estate, Glinka. Where a debtor
23 replaces an unsecured obligation with a secured
24 obligation, the payment is avoidable to the extent of
25 the collateral transferred by the debtor."



1 Isn't that what happened here? Their unsecured or
2 undersecured claim was replaced with a secured superpriority
3 secured DIP loan? I'm sure Mr. Wolinsky will correct me why
4 I'm wrong in thinking that.

5 MR. FISHER: Your Honor, the secured portion of their
6 claim --

7 THE COURT: Let's assume that we're -- they had no --
8 assume for the sake of discussion that it was totally unsecured
9 as a result of the release of the lien.

10 MR. FISHER: But, Your Honor, there's no reason why
11 they would have been paid as anything other than an unsecured
12 creditor to start with. In other words, there's no reason why
13 --

14 THE COURT: Well, nobody what it -- well, you said
15 they didn't know it, that people were aware that there was an
16 issue about the release of the lien.

17 MR. FISHER: Yes, Your Honor. And paying that in
18 full was a way to -- subject to recapture, was a way to defer
19 exactly that fight, which otherwise, among other things, could
20 have bogged down the bankruptcy and possibly jeopardized the
21 363 sale.

22 THE COURT: So was the result -- the payment of an
23 undersecured or unsecured claim with money from a superpriority
24 secured loan?

25 MR. FISHER: Well, this -- the DIP proceeds was a



1 superpriority secured loan, and to the extent that the term
2 lenders are unsecured or undersecured, they were paid with
3 those proceeds, but there would be no -- unlike Flanagan, which
4 as the Court, I'm sure, is aware is a preference case, not a
5 post-petition payment case, there would be no reason, and
6 certainly the DIP lenders never would have authorized a payment
7 of DIP loan proceeds to unsecured creditors in a way that was
8 inequitable and ahead of other unsecured creditors.

9 THE COURT: So when -- you know, critical vendor
10 payments do exactly that, and -- you know, the Kmart decision
11 from the Seventh Circuit obviously takes a dim review of
12 critical vendor payments than perhaps lower court decisions in
13 this circuit, but Jevic, Justice Breyer, recognizes that that
14 may be -- that there is the possibility of critical vendor
15 payments. There's no question, I think, that critical vendor
16 payments pay claims of unsecured creditors while other
17 unsecured creditors are not receiving money, but there are very
18 limited circumstances where that should happen. But that --
19 and critical vendor payments are typically made from DIP
20 proceeds.

21 MR. FISHER: So, Your Honor, I understand the
22 comparison, and I think we're engaged here somewhat in
23 counterfactuals, but to go down that road --

24 THE COURT: Well, it's hypothetical.

25 MR. FISHER: -- to go down that road a little bit,



1 for one thing, the term lenders were not critical vendors.

2 THE COURT: I understand that.

3 MR. FISHER: But if -- to take an analogy to a
4 critical vendor, if the term lenders had said, and succeeded in
5 saying, well, if you don't pay us in full, not subject to any
6 qualification, that we'll just tie up this bankruptcy and tank
7 the 363 sale, and they were paid in that way and the DIP order
8 made clear that that's it, that the payment's approved
9 notwithstanding whatever questions there may be about their
10 lien, then this would be a whole other case. And that's
11 analogous to a critical vendor type situation where they have
12 the leverage to cause a lot of harm to the reorganization, and
13 so they get paid ahead of others who might otherwise be
14 similarly situated. But that's exactly the negotiation that
15 happened here.

16 They tested their leverage and said, we will tie up
17 this bankruptcy if we don't get paid in full, and the
18 resolution is reflected in the final DIP order. Okay. We'll
19 pay you in full ahead of everyone else as though you're fully
20 secured, but we're not going to forfeit this litigation.

21 THE COURT: Let me ask you this. Is there anything
22 in a transcript that shows that Judge Gerber was aware that the
23 circumstances of the lien release had been disclosed and the --
24 I mean, there usually is a challenge period in every order I've
25 ever entered, whether the committee knows about a basis for



1 challenging the priority of a lien, the validity or priority of
2 the lien. There's a challenge provision that goes in.

3 MR. FISHER: So, Your Honor --

4 THE COURT: Was Judge Gerber aware when he signed the
5 final DIP order that facts had come to light of the UCC lien
6 releases?

7 MR. FISHER: I don't have a transcript cite at my
8 fingerprints, Your Honor, but I believe that he was, and I'm --
9 and the reason I say that is because the issue of the filing of
10 the mistaken UCC-3 termination statement was something that, at
11 that point in time, was known to everyone and was the subject
12 of discussion.

13 THE COURT: Is there a pleading? Is there a piece of
14 paper that was filed with the Court, or is there a reference in
15 a transcript that Judge Gerber was aware when he signed the
16 final DIP order that facts had come to light about a UCC-3
17 releasing -- that appeared to release the lien on the
18 one-and-a-half-billion-dollar term loan.

19 MR. FISHER: Your Honor, I don't have the answer at
20 my fingertips, but if I may, I'd like to come back to that.

21 THE COURT: Go ahead with your argument. Sure.

22 MR. FISHER: I think where we -- the last point I
23 wanted to make, Your Honor, is to respond to their windfall
24 argument. Basically, their argument is that --

25 THE COURT: I didn't understand it. I think



1 Mr. Wolinsky will explain it to me, but you can debunk it now.

2 MR. WOLINSKY: I do understand it, but Mr. Novikoff
3 is going to do this one.

4 THE COURT: You're letting him argue, Mr. Wolinsky?

5 MR. WOLINSKY: Yes.

6 THE COURT: Or is he -- I shouldn't say it that way,
7 but you do put his name first on the pleadings.

8 MR. WOLINSKY: Trading up.

9 THE COURT: Yeah.

10 MR. WOLINSKY: Trading up.

11 MR. FISHER: Your Honor, maybe then I'll mostly let
12 Mr. Novikoff explain it and reserve some time to respond to it.

13 THE COURT: All right. We'll --

14 MR. FISHER: But I did --

15 THE COURT: -- do that.

16 MR. FISHER: Okay. Thank you, Your Honor.

17 THE COURT: All right. Thanks very much.

18 MR. NOVIKOFF: Harold Novikoff, Wachtell, Lipton
19 Rosen & Katz, for JPMorgan Chase Bank.

20 THE COURT: Good afternoon.

21 MR. NOVIKOFF: And first, let me thank you, Your
22 Honor, for providing a perfect segue.

23 So before discussing the applicable law on
24 earmarking, particularly the Flanagan case that was mentioned
25 before, I want to show why this is a compelling case for an



1 equitable defense, and that's because there is a windfall here.
2 The application of the earmarking doctrine is necessary here to
3 prevent that windfall that would occur if the AAT was able to
4 strip from the --

5 THE COURT: The fact that your client -- not your
6 clients, the banks, the participants and the like, all
7 recovered 100 percent of their loan when unsecured creditors
8 have not even come close, you think you've not gotten a
9 windfall?

10 MR. NOVIKOFF: In a transaction in which -- because
11 of the transaction, the unsecured creditor recovery was
12 enhanced, as well. In a transaction --

13 THE COURT: What percentage have unsecured creditors
14 recovered?

15 MR. NOVIKOFF: To date, they have recovered 29.6
16 percent out of the GUC Trust and is in reserve for them and an
17 amount that will probably bring about another 1.4 percent.

18 THE COURT: And your clients recovered -- not your
19 clients because you represent JPMorgan -- the banks recovered
20 100 percent. The unsecured creditors recovered 29 percent, and
21 maybe that'll increase a little bit.

22 MR. NOVIKOFF: Right.

23 THE COURT: But that disparity is not a windfall.

24 MR. NOVIKOFF: No, it isn't, Your Honor.

25 THE COURT: Go ahead.



1 MR. NOVIKOFF: Because of the unusual attribute of
2 the DIP loan that you asked about before, this is a situation
3 in which using the DIP loan proceeds to repay the term lenders
4 actually enhanced the recovery of the general unsecured
5 creditors, and what I'd like to do is show -- with some slides,
6 explain what Mr. Wolinsky says he now understands but has left
7 to me to explain. And it's not easy --

8 THE COURT: How long did it take you to get him to
9 understand?

10 MR. NOVIKOFF: A lot longer than it's going to take
11 me to get you to understand.

12 THE COURT: You think so?

13 MR. NOVIKOFF: I hope so.

14 THE COURT: I don't know. Mr. Wolinsky's pretty
15 smart, so --

16 MR. NOVIKOFF: He is. He is. He is, but I think
17 you're better at math.

18 THE COURT: Flattery will not get you very far, I
19 think.

20 MR. NOVIKOFF: Okay. But -- so we're going to use a
21 hypothetical, and the numbers are rounded, but they're going to
22 sound kind of familiar. And I've done it simplified.

23 THE COURT: Thank you.

24 MR. NOVIKOFF: And the results that are going to
25 produce are actually going to be pretty close to the results we



1 just talked about.

2 So here, we have a hypothetical secured creditor with
3 a one-and-a-half-billion-dollar loan. The value of its
4 collateral exceeds 1.5 billion, but its lien is unperfected.
5 And as Your Honor suggested, just to simply things, we're going
6 to just say the whole thing is unperfected. Hopefully, that
7 gets Mr. Fisher excited. Therefore, we have a
8 one-and-a-half-billion-dollar potential avoidance action
9 clawback.

10 Other general unsecured creditors in the case total
11 \$30 billion, rounded off, and in this case, the entire --

12 THE COURT: Mr. Weisfelner wants to get that number
13 up above 35 billion, but --

14 MR. NOVIKOFF: Yeah, he does. I understand that.
15 That's -- ultimately, if you agree with me, Your Honor, this
16 will not help Mr. Weisfelner in that aim.

17 But here, again to simply things, what's available
18 for unsecured creditors is \$9 billion, a rounded number,
19 available to the estate from a 363 sale, and that 363 sale
20 included the secured creditors' collateral free and clear of
21 liens. So -- next slide, please.

22 So this is a classic avoidance case where there's no
23 earmarking using that hypothetical, and this is what the
24 Bankruptcy Code intends when you avoid a lien. So the secured
25 creditor is paid one-and-a-half-billion dollars from the sale



1 proceeds that were otherwise available for general unsecured
2 creditors, and that reduced the amount available for general
3 unsecured creditors from nine billion to 7.5 billion. Okay.

4 After that, the unperfected lien is then avoided.
5 One and a half billion goes back to the estate, so it results
6 in a one-and-a-half-billion-dollar estate recovery. And as a
7 result, the total unsecured claims increased by one-and-a-half
8 billion because now the secured creditor has become unsecured
9 to a total of 31.5 billion. So we end up with nine billion of
10 assets being shared evenly over 31.5 billion of claims for a
11 28.5-percent recovery. Okay.

12 Can you give me the next slide, please?

13 This is the classic earmarking case. So in this
14 case, instead of leaving the original creditor in place, a new
15 lender comes in, making a new unsecured loan, the proceeds of
16 which are earmarked to pay off the existing creditor, the one
17 with the underperfected lien. So in other words, a
18 refinancing. So the existing creditor is paid 1.5 billion from
19 earmarked funds loaned by the new unsecured creditor and
20 releases its lien.

21 Under the earmarking doctrine, the funds paid to the
22 existing secured creditor are not treated as estate funds due
23 to the earmarking, so there's no recovery by the estate on an
24 avoidance action. So the total general unsecured creditor
25 claims, including the new general unsecured creditor claims,



1 total 31.5 billion. The old one came out. The new one came
2 in. So again, we are sharing \$9 billion across 31.5 billion of
3 claims, and it's the same recovery, 28.57 percent.

4 This is the classic earmarking case. The estate's
5 not diminished. So earmarking --

6 THE COURT: You're substituting one debt for another.

7 MR. NOVIKOFF: Right. That's right. That's what
8 earmarking does in that circumstance. So the general unsecured
9 creditors' recovery is the same. There's no diminution of the
10 estate. And note in this situation, had it been identified
11 right -- had there been no new lender and had it been
12 identified at the very beginning that the secured creditor had
13 a defective lien and was treated as unsecured at the beginning,
14 you'd still have the same result, same \$9 billion across
15 31.5 billion of unsecured claims for 28.57-percent recovery.

16 The math in our case is different. This is why
17 there's a windfall. And the key to that is the question that
18 you asked before, which deals with the attributes of the DIP
19 loan.

20 So what happened in our case is that the new loan not
21 only was not a -- not only was not a unsecured loan, it's a
22 loan that was nonrecourse to the proceeds that the general
23 unsecured creditors got. So the deal in this case was the
24 general unsecured creditors -- and this was from a negotiation
25 that actually predated the filing of the petition. The



1 unsecured creditors would get 10 percent of the equity of New
2 GM plus warrants to get an additional 15 percent of the equity.
3 The deal was that's what the general unsecured creditors were
4 going to get. The DIP loan, the government's DIP loan, was
5 nonrecourse to that recovery.

6 So what happened at the end of the day is this
7 incremental one-and-a-half billion that was funded to pay the
8 term loan was never paid. The government ended up with over
9 11 billion of unpaid DIP loans.

10 So what happened in this case was the term lenders
11 would pay one-and-a-half billion of earmarked funds loaned by
12 the DIP lenders and release their lien, but the DIP lenders had
13 no recourse to the nine billion of 363 sale proceeds. So their
14 one-and-a-half-billion claim does not dilute the general
15 unsecured creditors' recovery. So when we look at it, if
16 earmarking applies -- so if there's no additional recovery to
17 the AAT and there's no avoidance clawback, the estate will
18 consist of nine billion of 363 sale proceeds, and the total
19 amount of the general unsecured claims will remain at
20 \$30 billion. So the recovery is not 28.5 percent. Recovery is
21 30 percent. That's what's happened as a result of the payment
22 of the earmarked funds post-petition in this case to the term
23 lenders. Whether the term lenders were secured, unsecured, or
24 something in the middle, the recovery to general unsecured
25 creditors went up. That payment allowed the collateral to



1 become available to the DIP loan free and clear of liens. It
2 allowed the 363 sale transaction to go forward. And it got rid
3 of the one-and-a-half-billion term loan, a potential unsecured
4 claim that could have shared in the proceeds. It got rid of
5 it, paid it in full at no cost to the general unsecured
6 creditors. So the unsecured creditors were enhanced by the
7 very transaction that they're now challenging and trying to
8 capture for themselves. That's the windfall.

9 So can we have the next slide, please?

10 So this is what they want. They want avoidance on
11 steroids. They want an effect that's in no way contemplated by
12 the Bankruptcy Code and is exactly the type of thing that
13 earmarking is intended to prevent. So let's just take a look
14 what happens if there's a recovery now.

15 As before, in this slide, the term lenders would pay
16 one-and-a-half billion of earmarked funds loaned by the DIP
17 lenders, and they release their lien, and the DIP lenders have
18 no recourse to the 363 sale proceeds. So again, the
19 one-and-a-half billion of new claims don't share in the nine
20 billion. So now, look what happens against that background if
21 the AAT is allowed to claw back the one-and-a-half-billion
22 dollars and earmarking is not applied.

23 In that case, the avoidance action results in a
24 one-and-a-half-billion dollar clawback, so the first time in
25 these slides, the general unsecured creditors share in 10.5



1 billion of proceeds instead of nine billion. The term lender
2 unsecured claims come back in then, so it brings the total to
3 31.5, but now the total recovery for general unsecured
4 creditors is 33.33 percent. So they've already been enhanced
5 by the transaction that actually occurred, and now they would
6 get the windfall of an additional 1.5 billion that was never
7 intended for them to come into the pot, and they end up with a
8 33.33-percent recovery, something that is inequitable,
9 unwarranted, and is exactly the type of result that the Second
10 Circuit and other circuits have developed earmarking law --
11 earmarking doctrine to deal with.

12 The notion is that the one-and-a-half billion only
13 came on the scene because of the need that the government had
14 to get rid of the term lenders early in the case. The case was
15 running up a cash burn of roughly a billion dollars a week, and
16 the government did not want to get into a priming fight with
17 the term lenders, so they decided it would be better to just
18 pay them off. And the term lenders --

19 THE COURT: And they did so knowing that --

20 MR. NOVIKOFF: Yes --

21 THE COURT: -- the UCC-3 had been filed releasing the
22 -- apparently releasing the collateral on the one-and-a-half --

23 MR. NOVIKOFF: It had been disclosed prior to that,
24 yes.

25 THE COURT: Okay. Was it disclosed to Judge Gerber?



1 MR. NOVIKOFF: I believe it was. I believe it was.
2 I can't point to something in the transcript saying that.

3 THE COURT: Okay.

4 MR. NOVIKOFF: But --

5 THE COURT: I didn't see -- I looked at the whole DIP
6 order today, and I couldn't find anything in there that would
7 have entitled the DIP lenders to reduce the amount of the DIP
8 loan if one-and-a-half billion of the proceeds was not used to
9 pay the term lenders.

10 MR. NOVIKOFF: No, that's because the order --

11 THE COURT: Could just --

12 MR. NOVIKOFF: -- flatly required --

13 THE COURT: No, no, no, no. Is it -- look -- but I
14 -- what if Judge Gerber had concluded that the lien release was
15 effective, the term lenders were unsecured. I didn't see
16 anything in the DIP loan that would have entitled the DIP
17 lenders to reduce the amount of the DIP loan. Is there?

18 MR. NOVIKOFF: No, there isn't because the payment of
19 the -- of both the term loan and there's a revolver, as well,
20 was flatly required by the order. Paragraph 19(a) --

21 THE COURT: Were the DIP lenders, U.S. Government and
22 Export Canada, were they -- had it been disclosed to them that
23 the UCC-3 had been filed releasing -- apparently releasing the
24 lien on the one-and-a-half-billion dollars?

25 MR. NOVIKOFF: My understanding is that it had been



1 disclosed to everybody involved in the case. And -- but that's
2 the point. Even though that --

3 THE COURT: So what's the purpose --

4 MR. NOVIKOFF: -- had been disclosed --

5 THE COURT: Mr. Novikoff?

6 MR. NOVIKOFF: Yeah?

7 THE COURT: What then -- if what you're saying is
8 correct, why the provision, the very clear provision, on the
9 challenge period? It doesn't say challenge subject to whatever
10 defenses the term lenders may have. It just -- it provides the
11 challenge period, which they exercised. So aren't you writing
12 out the provision of paragraph 19(d) that explicitly provides
13 the challenge period?

14 MR. NOVIKOFF: Not at all, Your Honor.

15 THE COURT: All right. Tell me -- explain that more.

16 MR. NOVIKOFF: Not at all, Your Honor. We don't
17 challenge the fact that the committee and now the AAT has
18 standing to bring an action, which is what it says. They have
19 the standing. They can bring it. We don't say that the order
20 cut it off.

21 THE COURT: You're saying it was a loser from the
22 start because despite the fact that the final DIP order in
23 paragraph 19(d) has this very explicit language, it's the
24 proviso, "Provided, however, that such relief shall not apply
25 to the committee with respect only to the protection of the



1 first-priority liens of the pre-petition senior" -- goes on,
2 okay.

3 MR. NOVIKOFF: Can I have Exhibit K?

4 Your Honor, we have -- you're looking at a very
5 heavily negotiated --

6 THE COURT: Reserve -- it's defined as reserved
7 claims.

8 MR. NOVIKOFF: You're looking at a very heavily
9 negotiated provision.

10 THE COURT: I understand that, but I'm reading the
11 four corners of this document.

12 MR. NOVIKOFF: Right.

13 THE COURT: And the four corners of this document, ti
14 seemed unequivocally to give the committee, now the AAT, the
15 right to challenge the validity of the liens, and they've done
16 that.

17 MR. NOVIKOFF: It does. It says they can bring an
18 action. It does not contain any waiver of any defenses that
19 the term lenders would have to the action. In one of the cases
20 that Mr. Fisher mentioned before, the Westchester Tank case, in
21 that case in the Eastern District, Judge Feller actually had
22 the opportunity to consider waiver in the context of an
23 earmarking defense, and he ruled that a waiver has to be
24 knowing and intentional, and citing a Second Circuit case, he
25 said it has to be express or through conduct that's so



1 inconsistent with retaining the defense that you can't overcome
2 any reasonable inference.

3 There was no waiver in this case. What it said is
4 they could bring an action. It didn't specify the action.
5 Presumably, it'd be some action under the Bankruptcy Code.
6 They chose to bring an action under Section 549, and therefore
7 they would be subject to whatever defenses an action under 549
8 would have. And I know Your Honor has had the opportunity to
9 consider -- well, 549's based on authorization, and you came up
10 with the notion of the provisional authorization, but the
11 requirement of payment was absolute and not provisional. But
12 this is not the original language.

13 THE COURT: So the lenders could hold the debtor
14 hostage to repay a billion and a half dollars when the lien had
15 been released and say, we'll fight about that later, okay, and
16 be able to say, sorry, we preserve an earmarking defense and
17 you can't assert it, so too bad.

18 MR. NOVIKOFF: That's -- well, so far as I can tell,
19 Your Honor, I have not seen anything in the documents that
20 indicated anybody, including Judge Gerber, thought about the
21 existence of an earmarking defense at the time, but had it come
22 up, I'm quite confident everybody would have said -- because
23 they were just trying to get a deal done. They were trying to
24 get a 363 sale done.

25 THE COURT: You know, I can't speak for Judge Gerber.



1 You know, equality of distribution is such an important
2 fundamental principle of bankruptcy that I think Judge Gerber
3 would have had -- I would have had a very hard time swallowing
4 the notion that assuming that the term lenders were unsecured,
5 that they get 100 percent while other creditors require --
6 recover considerably less.

7 MR. NOVIKOFF: Your Honor, could I approach?

8 THE COURT: Yes, of course.

9 MR. NOVIKOFF: What I'm handing you is a copy of
10 Exhibit K. This is an exhibit that was attached to
11 Mr. Celentino's declaration that was filed in connection with
12 our opposition to this motion, and what you're looking at is an
13 early draft of the interim DIP financing order. And I would
14 bring Your Honor's attention to paragraph 18(e).

15 THE COURT: Yeah, it's highlighted here.

16 MR. NOVIKOFF: Okay. So this is an early
17 formulation.

18 THE COURT: Let me read it. Hold on, let me read it.
19 Okay. Go ahead.

20 MR. NOVIKOFF: Okay. So this is an early
21 formulation. As you can tell, it did not make it into the
22 final DIP order in this form. But this doesn't say they just
23 go and bring an action. This says if you show that the term
24 lenders were undersecured and that the -- and the repayment
25 unduly advantaged the term lenders, then they have to give the



1 money back. It doesn't say go bring an action under 549,
2 whatever section. This describes what has to be shown and the
3 consequences of it, and had this been the language, I don't
4 think we could assert an earmarking defense.

5 But this is not the language that made its way -- and
6 by the way, Your Honor, there is Exhibit L, has similar
7 language. It got cleaned up a little bit, but another draft,
8 but ultimately didn't make it in, and after a lot of
9 negotiation, the parties came to a different approach, which is
10 that they bring an action. There's no waiver of defenses.
11 Doesn't specify exactly what action would be brought. The
12 committee decided to bring an action under 549, and it should
13 be subject to whatever defenses we have to an action under 549.

14 And those actions exist not because of anything in --
15 you know, that the order sort of created. They existed because
16 of the totality of the circumstances. This is a circumstance
17 in which the new lender --

18 THE COURT: The circumstance is you're arguing term
19 lenders had extreme leverage that they could apply to assure
20 they were repaid in full while unsecured creditors recovered
21 maybe a quarter of their claims. That's -- essentially, you're
22 arguing that the leverage of the banks, even though it was
23 disclosed that the lien had been released, was such that they
24 had the ability to get paid in full, even though it was quite
25 apparent early on that unsecured creditors would recover a



1 fraction of their claims. That's your basic position.

2 MR. NOVIKOFF: And understand that a result of that
3 leverage is not that the general unsecured creditors were worse
4 off. The result was that they were better off, but because --

5 THE COURT: I bet they don't feel better off.

6 MR. NOVIKOFF: Well, they should because had it been
7 known -- let's say everybody says right at the beginning -

8 THE COURT: Let me ask you this, Mr. Novikoff. Let's
9 assume the billion and a half is recovered. What will the
10 results be for unsecured creditors? And I'm assuming you're --
11 the holders of the participations, you know, will have their --
12 they'll have unsecured claims. And isn't your -- what is their
13 -- what's the recovery?

14 MR. NOVIKOFF: It should be in the range of 33
15 percent, something like that.

16 THE COURT: Okay. SO the unsecured creditors who now
17 have only recovered 28 percent, their recovery will go up to
18 about 33 percent if Mr. Fisher is successful in the clawback
19 action.

20 MR. NOVIKOFF: No, let's get that straight.

21 THE COURT: Okay.

22 MR. NOVIKOFF: Had it been known right at the outset
23 that --

24 THE COURT: No, I want to deal with it as of today.

25 MR. NOVIKOFF: Okay. So as of today, they've gotten



1 about 30 percent, which is better than where they would have
2 been, and it would go up another few percent.

3 THE COURT: So the unsecured creditors, other than
4 the term lenders, were assuming -- you know, Mr. Wolinsky's
5 trying to convince me that the fixtures are worth a
6 billion-and-a-half dollars, but -- so let's assume that it
7 wasn't worth anything. The unsecured -- all of the other
8 unsecured creditors, their recovery will go up by 3 to 5
9 percent if Mr. Fisher is successful in this recovery action,
10 correct?

11 MR. NOVIKOFF: That's correct.

12 THE COURT: Okay.

13 MR. NOVIKOFF: Okay. But -- and, look, we all know
14 about equality of distribution, and we know the impact that
15 avoidance of a lien has. And I showed that in the earlier
16 slides where it would -- in the typical case, it would increase
17 the recovery to the general unsecured creditors because of
18 that. What's happened here, though, is because of this
19 transaction and the unusual terms of the DIP loan, not only
20 were the term lenders made whole as a result of the earmarked
21 payment, but the general unsecured creditors benefitted, as
22 well. And what the Second Circuit says is in a circumstance
23 where you -- and this is the Flanagan case. In a circumstance
24 where a creditor -- and it's an unsecured creditor. In a
25 circumstance where an unsecured creditor gets paid in full from



1 earmarked funds that would not otherwise have been available
2 for distribution to general unsecured creditors, that we treat
3 those earmarked funds as not being property of the estate, and
4 therefore it's not subject to avoidance.

5 THE COURT: Do you agree --

6 MR. NOVIKOFF: And --

7 THE COURT: Go ahead, finish your sentence.

8 MR. NOVIKOFF: And look, there's an equitable
9 decision being made there. You could say that whatever the
10 circumstances were that allowed that unsecured creditor to get
11 the earmarked payment, I don't want to let them have that
12 payment and get 100 cents while general unsecured creditors are
13 getting a lower recovery. That happens in every earmarking
14 case. The Second Circuit says in that situation, the way we
15 view the equities law is that the creditor who is in the
16 position to get the earmarked funds that otherwise wouldn't
17 have been available for general unsecured creditors, the
18 earmarking doctrine from the Second Circuit, the Flanagan case,
19 says the creditor who was paid off in the earmarking funds gets
20 to keep them.

21 Now, is that contrary to equality of distribution and
22 writ large, of course, it is. Of course, it is. But that's
23 the law because we're talking about funds that otherwise never
24 would have been available to the general unsecured creditors,
25 so there's no diminution of the estate. Mr. Fisher says, of



1 course, there's diminution of the estate because the estate
2 would be larger if we got the avoidance recovery in. But
3 that's not the test. The test is whether the estate was
4 diminished as a result of the new financing and the repayment
5 through earmarked funds of the old creditor. And in this case,
6 not only was the estate not diminished from it. It actually
7 got enhanced by it. This is better than the usual earmarking
8 case.

9 THE COURT: Anything else you want to add?

10 MR. NOVIKOFF: Excuse me?

11 THE COURT: Anything else you wish to add?

12 MR. NOVIKOFF: Yeah. I wanted to touch upon one
13 other point that Mr. Fisher made, which is dealing with the
14 fact that this is a post-petition transaction. Earmarking
15 certainly developed in the context of Section 547, but in 549,
16 we have the same concept. We're talking about transfers of
17 property of the estate. The two statutes use them slightly
18 differently, but they're pretty much interchangeable. So
19 there's no principled reason why it should not be applied in
20 549, and in the Eastern District in the Westchester Tank case,
21 it was so applied.

22 It's a little interesting to talk about the facts,
23 though, of that case, if I could for just a moment.
24 Westchester Tank actually involved a post-petition loan that
25 apparently wasn't disclosed to the court because it was not



1 authorized by the court. And the loan proceeds were paid over
2 to the debtor, who then paid them over to the landlord to avoid
3 eviction. And in that case, notwithstanding the fact we're
4 talking about unauthorized transactions, which is usually what
5 happens in a 549 case, Judge Feller applied the earmarking
6 doctrine to allow the landlord to keep the proceeds of the
7 earmarked loan. At the same time, by the way, the landlord
8 received some additional checks that came from the debtor's
9 post-petition operations and recovered those, but the earmarked
10 funds were retained.

11 But the important thing, though, is, you know,
12 Mr. Fisher says, but we can't point to any case in which a
13 court-approved DIP loan involved earmarked funds. Well, in
14 549, when are you ever going to have a transaction where a
15 court-approved DIP loan makes court-approved payments and 549
16 applies. 549 only applies in this very unusual case because of
17 the provisional authorization.

18 But take a look at what happened in Westchester Tank.
19 The court wasn't told about the loan. The money went out.
20 Neither the loan nor the payment was court-approved, but the
21 earmarking doctrine was applied anyway because we were talking
22 about money that otherwise wouldn't have been available to the
23 estate and satisfied a creditor and therefore left the other
24 creditors in an undiminished situation.

25 So we should be no worse off than that where, in this



1 situation, obviously the loan was court-approved and the
2 payment to the term lenders was required.

3 THE COURT: The loan was court-approved, and it had a
4 provision about payment of the term lenders, but it had the
5 challenge period and the right of the committee to bring an
6 action to recover it.

7 MR. NOVIKOFF: It did, to bring an action. They've
8 brought an action, and we have not challenged --

9 THE COURT: And you read that as to say that they can
10 bring the auction but it's subject to this defense.

11 MR. NOVIKOFF: To whatever defenses we have, such as
12 we're secured.

13 THE COURT: Were there any drafts of that provision
14 that included language either saying it's subject to or not
15 subject to defenses -- whatever defenses, particularly
16 equitable? You know, the Code -- it's obvious, and you don't
17 dispute it, the Code -- earmarking is a judge-made doctrine.
18 There's nothing in the Code about earmarking. And when I read
19 these earmarking cases, and I've read a lot of them, I don't
20 see any of those cases saying that these are the conditions and
21 only conditions that can ever apply with respect to an
22 earmarking defense, and so a bankruptcy judge applying this
23 equitable defense cannot decide that the defense should not
24 apply where a DIP order includes, expressly includes, the
25 challenge period and the -- that's in this agreement. Why --



1 what is it -- do you have a case that would say that a
2 bankruptcy court cannot decide that an additional limitation or
3 restriction to the application of earmarking is this case,
4 where it was -- where the lenders were the 900-pound gorillas
5 and said, we'll tie you up in knots, yes, there was a lien
6 release, but you know, unless you agree to pay us back, you're
7 never going to get this transaction closed, you'll be
8 litigating for a year and GM won't exist. And you're saying
9 that assume those are the circumstances, that a bankruptcy
10 court cannot decide that this equitable defense not set forth
11 in the Code should be limited in circumstances like this.

12 MR. NOVIKOFF: On page 185 of Flanagan --

13 THE COURT: Let me -- I have Flanagan right here.
14 Let me open it up. Go ahead.

15 MR. NOVIKOFF: I'm paraphrasing a little bit, but it
16 says where a debtor receives funds subject to a clear --

17 THE COURT: Let me -- where -- I want to see where
18 you're at. I've got the page open, so --

19 MR. NOVIKOFF: Here? I -- can I approach? I'll show
20 it to you where --

21 THE COURT: I -- just read the first sentence of that
22 paragraph. I think we're on the --

23 MR. NOVIKOFF: We have long recognized.

24 THE COURT: Hold on. Yes, go ahead.

25 MR. NOVIKOFF: Okay. So the -- I think it's second



1 sentence starts:

2 "We have held that where a debtor receives funds
3 subject to a clear obligation to use that money to
4 pay off a preexisting debt, and the funds are in fact
5 used for that purpose, those funds do not become part
6 of the estate and the transfer cannot be avoided in
7 bankruptcy."

8 THE COURT: And then, what I read further on that
9 page, the last -- starting the last paragraph, "There is" --
10 and this is after it goes through, after the Court has gone
11 through -- I've got the language you just read highlighted, as
12 well, but the last paragraph on the page:

13 "There is, nonetheless, an important limitation on
14 the earmarking doctrine. The doctrine will only
15 protect a transfer from avoidance to the extent it
16 did not diminish the debtor's estate."

17 MR. NOVIKOFF: Correct.

18 THE COURT: So I read that as suggesting -- you know,
19 Judge Cardamone has laid out a bunch of tests, but sort of the
20 ultimate one is if the estate is diminished, it doesn't apply.

21 MR. NOVIKOFF: But the estate was not diminished by
22 the transaction. As I showed, because of the unusual
23 attributes of this DIP loan --

24 THE COURT: I understand your argument.

25 MR. NOVIKOFF: -- the estate was enhanced.



1 THE COURT: Okay. I understand your argument. Okay.

2 MR. NOVIKOFF: Thank you, Your Honor.

3 THE COURT: Thank you, Mr. Novikoff.

4 Mr. Fisher?

5 MR. FISHER: Eric Fisher for the AAT.

6 THE COURT: Are you persuaded?

7 MR. FISHER: I'm not, Your Honor.

8 THE COURT: Okay. Tell me why.

9 MR. FISHER: I'll be very brief. But I'd like to
10 address windfall, and I only need one hypothetical assumption.
11 I think Mr. Novikoff's windfall argument has many hypothetical
12 assumptions built into it about what would have happened had
13 certain things happened that didn't. So just assume for the
14 sake of argument that we're able to show in this litigation
15 that the term lenders were \$500 million undersecured and
16 nonetheless received a one-and-a-half-billion-dollar payment.

17 THE COURT: He was ready to concede a billion and a
18 half, but for the purpose of --

19 MR. FISHER: I figured I would be generous the -- I'd
20 be reciprocal, Your Honor. So that's the only assumption.
21 What's crystal clear in that situation is that someone has
22 gotten a windfall, and that's the term lenders. They've
23 received a \$500 million windfall because they have been paid
24 more money than any other unsecured creditor.

25 THE COURT: That's the issue that I started out by



1 talking about, equality of distribution. Mr. Novikoff says all
2 well and good, but the result here is that the unsecured
3 creditors have actually benefitted.

4 MR. FISHER: Well, and Your Honor, of course, our
5 position is we know they haven't, and there's an inescapable
6 issue that now needs to be dealt with, which is what do you do
7 with the \$500 million. And the term lenders' argument is very
8 simple, let us keep it. That's it. And the consequence of
9 that is that the secured creditors get paid more than the value
10 of their lien, and the consequence of that is that paragraph
11 19(d) is effectively defeated.

12 So, Your Honor, there was -- if, at the end of the
13 day, we prove that their lien was undersecured, there is a
14 windfall that needs to be allocated in some way. The Court, in
15 numerous rulings, has already determined that that -- to the
16 extent there's a recovery in that case, it will be allocated to
17 unsecured creditors and also 30 percent to the DIP lenders,
18 which is something that all of Mr. Novikoff's arguments failed
19 to take account of. There's no possible windfall argument with
20 respect to the DIP lenders. All the arguments focused on the
21 unsecured creditors, and we dispute all of those. But his
22 hypothetical can't account for the fact that this litigation is
23 also being prosecuted for the benefit of U.S. Treasury and
24 Export Development Canada.

25 THE COURT: Well, that's only because you struck a



1 deal with them to obtain funding to prosecute the action.

2 MR. FISHER: Well, but, Your Honor --

3 THE COURT: Isn't that true?

4 MR. FISHER: No. I mean, that was the context in
5 which everyone agreed on the 70/30 split, but at the outset of
6 this case, it was the DIP lenders' position that they're
7 entitled to all the proceeds and it was the unsecured
8 creditors' position that they're entitled to all the proceeds,
9 and then that was compromised.

10 THE COURT: Remind me, I only vaguely remember. What
11 was the DIP lenders' theory as to why they'd be entitled to the
12 proceeds?

13 MR. FISHER: Just that this was not carved out from
14 their superpriority lien.

15 THE COURT: Okay.

16 MR. FISHER: And, Your Honor, at the end of the day,
17 you know, much of this windfall analysis is somewhat new, but I
18 don't think it matters because what all the cases say is where
19 the funds are earmarked, that they're not subject to recovery.
20 So you can't just make some argument about windfall and say,
21 therefore, the Court should use earmarking to prevent the
22 avoidance action trust from getting a recovery. You actually
23 have to satisfy the elements of the earmarking defense, which
24 they can't do here.

25 THE COURT: Well, Mr. Novikoff argues that the DIP



1 order entered by Judge Gerber specifically required that DIP
2 proceeds be used to repay the term lenders. Do you agree with
3 that?

4 MR. FISHER: Yes.

5 THE COURT: Okay. Doesn't that satisfy the first
6 prong of the earmarking test?

7 MR. FISHER: Perhaps, but I'm not -- but not with --

8 THE COURT: Well, why not? You say perhaps, but
9 doesn't it satisfy the first prong of the test?

10 MR. FISHER: Yes.

11 THE COURT: Okay.

12 MR. FISHER: Yes. The --

13 THE COURT: So which is the prong of the Flanagan
14 test that's not satisfied?

15 MR. FISHER: The diminution of the estate, Your
16 Honor. And also, courts have --

17 THE COURT: And that's an independent -- that was --
18 you know, when I read -- I've read Flanagan over about five
19 times, okay. And so it was unclear to me on first reading
20 whether Judge Cardamone was saying that, you know, even if you
21 had the clearest document that said pay X, if a diminishment --
22 diminution of the estate results, earmarking doesn't apply. Is
23 that the rule in the Second Circuit?

24 MR. FISHER: That is how I read it, Your Honor, yes.
25 And I come back to where I started, which is -- just a response



1 to the waiver point. I don't think --

2 THE COURT: Yes. That -- I was going to ask you, so
3 go ahead and do that.

4 MR. FISHER: I don't think we need to prove that they
5 waived the defense. They've asserted their defense, and we've
6 now moved for summary judgment that it fails as a matter of
7 law. It fails as a matter of law because they can't satisfy
8 the elements of earmarking, and it fails as a matter of law --

9 THE COURT: Tell me which -- just so I'm clear, tell
10 me which elements of the earmarking defense, as applied in the
11 Second Circuit, have they failed to satisfy.

12 MR. FISHER: They would need to show that there's
13 been no diminution of the estate. Also, in this circuit, some
14 cases have articulated as an element of earmarking that you
15 need to show that the debtors lacked control over the proceeds.

16
17 THE COURT: Although, you know, when I read these
18 cases over control, they seem kind of mushy to me because the
19 money can go into a debtor's account and nevertheless still
20 satisfy the control test. Do you agree with that?

21 MR. FISHER: I agree.

22 THE COURT: It's not so clear-cut.

23 MR. FISHER: It frequently turns on facts, Your
24 Honor.

25 THE COURT: Right.



1 MR. FISHER: And just to come back to the first
2 element --

3 THE COURT: Well, your -- so this is a summary
4 judgment motion.

5 MR. FISHER: Yes.

6 THE COURT: And all inferences and intendments of the
7 facts are to be drawn in favor of the defendants. Which is the
8 element -- what is the -- what are the facts that you believe
9 are uncontroverted that support summary judgment in favor of
10 the AAT?

11 MR. FISHER: I understand that they're making an
12 argument that the estate was not diminished, but I think that
13 that is based on sheer speculation, which is not enough to
14 defeat a summary judgment motion, Your Honor. So I think that
15 there has been diminution of the estate.

16 THE COURT: So the crucial issue of fact is the issue
17 of diminution?

18 MR. FISHER: That -- yes. And I want to come back,
19 though, Your Honor, to something that I just conceded and I
20 want to clarify.

21 THE COURT: Go ahead.

22 MR. FISHER: Which is that you asked whether we would
23 agree that the payment was made subject -- that the payment was
24 required, that there was a clear agreement that the funds would
25 be used to pay the term lenders. And I think here, what makes



1 this case different, I don't think that there -- is it 19(a),
2 yes, it's mandatory language, but 19(d) makes clear that it --
3 as the Court's already recognized, that it's a conditional
4 payment. So a conditional payment is not the same as the kind
5 of payments where courts have previously found --

6 THE COURT: Okay. The thing that I will -- and maybe
7 it's in the papers and I didn't spot it before. It wasn't
8 clear to me before, both sides seemed to acknowledge this, that
9 at the time the final DIP order was entered, the parties -- I'm
10 still waiting to find out whether Judge Gerber knew, but that
11 the parties knew that the UCC-3 lien release for the collateral
12 for the one-and-a-half-billion-dollar term loan had been filed
13 and that there was going to be, in all likelihood, a challenge.

14 MR. FISHER: Yes, Your Honor.

15 THE COURT: Okay. I -- that had escaped me before.

16 MR. FISHER: All right. So those of us who lived
17 through that, when this came to light, there was much
18 discussion between the parties. There was an affidavit that
19 was supplied by a partner at Mayer Brown explaining the
20 circumstances of the filing. All of that happened before the
21 June 30 2009 --

22 THE COURT: Did the affidavit get filed with Judge
23 Gerber?

24 MR. FISHER: I don't think so, Your Honor. I'd be
25 happy to check the docket to try to get to a more precise



1 answer to the Court's question.

2 THE COURT: You know, I'm -- I guess I would request
3 a letter from both sides -- letters from both sides or an
4 agreement from both sides as to whether there was disclosure of
5 the facts to Judge Gerber, is there either a pleading that was
6 filed because he'd read every piece of paper that got filed, or
7 something in a transcript that would show that when he entered
8 the final DIP order, he was aware that there was going to be a
9 fight, that, in effect, the DIP -- the term lenders were being
10 paid under protest, essentially. That's what I -- I really
11 would like to know that.

12 MR. FISHER: Your Honor, we will, of course, follow
13 up on that. But the one thing that I know for sure is that the
14 only reason paragraph 19(d) is there is because this issue with
15 their lien was known.

16 THE COURT: I'm surprised you say that because I
17 think every DIP order I've entered in the last 12 years has had
18 a challenge provision in it. Every committee wants the
19 ability, you know, to challenge the validity, perfection,
20 et cetera, either maybe a fight -- you know, there may be a
21 negotiation of how long the challenge period's going to be and
22 -- you know, so I've had disputes where the committee and it
23 may be lengthened from what the DIP lenders or the pre-petition
24 lenders want to clock.

25 I mean, the other thing that -- and I tried to look



1 at some cases earlier. In some ways, you know, the two
2 analogies that sort of were running through my head, one, were
3 the critical vendor payments, okay, where you're clearly
4 preferring some creditors over others. And Kmart, you know,
5 Judge Easterbrook's opinion, and Justice Breyer in Jevic, leave
6 something alive on critical vendor payments. Roll-ups --
7 roll-ups are frequently paying -- you know, if it's a defensive
8 DIP and it's the pre-petition lender, the -- from the Court's
9 standpoint, part of the problem with roll-ups is you're
10 enhancing the protection for the pre-petition lender. Here, it
11 was not the pre-petition lender was providing the DIP, but
12 particularly if it was known at the time that Judge Gerber
13 signed the order that there was going to be a fight as to
14 whether they had security interest, you have enhanced their
15 priority by paying them dollar for dollar on their claim and
16 substituting it with a superpriority secured loan.

17 Those are the two -- you know, when I started
18 thinking this through, that was part of the thing that I was
19 thinking about because that -- despite Mr. Novikoff's
20 presentation, it does seem to me that the banks', the term loan
21 lenders', position has been enhanced, like, at 100 percent
22 while other creditors got 28 percent, something like that. And
23 if the money's clawed back, they'll share equally with the
24 other unsecured creditors.

25 MR. FISHER: I have nothing further, Your Honor.



1 THE COURT: Okay. Thank you.

2 MR. NOVIKOFF: Your Honor, could I be heard briefly?

3 THE COURT: Very briefly.

4 MR. NOVIKOFF: Just two things. First, on diminution
5 of the estate, in Flanagan, the diminution issue was relatively
6 straightforward. The debt being paid off was totally
7 unsecured. The new debt was partially secured, so the estate
8 was treated as diminished to the extent of the value of that
9 collateral.

10 Here, the new loan that was put in place was actually
11 at less rights in the 363 sale proceeds than the term loan
12 would have had had it been simply treated as unsecured. So
13 it's no diminution of the estate in that respect. But there's
14 a lurking -- and I want to be clear about this in dealing with
15 that third prong, the diminution of the estate. There is a
16 lurking factual issue, which is it's our position that had the
17 term lenders not been there, you know, with their filing,
18 which, you know, at least was partially defective, but had they
19 not been there and had there not been this need on the
20 government's part to get this case out of Chapter 11 very
21 quickly -- so had they not been there, the 1.5 million [sic]
22 would not have been loaned.

23 THE COURT: Billion.

24 MR. NOVIKOFF: Billion, excuse me. The 1.5 billion
25 would not have been loaned.



1 THE COURT: Well, there's nothing in any of the
2 papers I have seen that shows that to be the case. When I said
3 -- when I looked at the DIP order, there's nothing in the DIP
4 order that says, oh, if you don't repay the term loan, the
5 amount of the DIP is reduced by a billion-and-a-half dollars.

6 MR. NOVIKOFF: Right. And in our brief and in our
7 statement of facts, we point to testimony principally from
8 Matthew Feldman, we point to DIP sizing analyses that were
9 obtained through discovery, and other documents which we
10 believe we can use --

11 THE COURT: I read your briefings, okay.

12 MR. NOVIKOFF: Okay. But this is a factual issue.
13 We'd like the opportunity to prove that.

14 The second is that Mr. Fisher characterized the
15 payment as being conditional. In a sense, every payment that
16 anybody makes, unless it's approved by a court in advance, is
17 conditional.

18 THE COURT: Well, you know, you read
19 Judge Easterbrook's opinion in Kmart, and it looks like even
20 though the bankruptcy judge approved it, I'm not sure it wasn't
21 conditional even then. But --

22 MR. NOVIKOFF: Okay. But every 547 case involving
23 earmarking, every 549 case involving earmarking, the payment is
24 made --

25 THE COURT: I've heard enough.



1 MR. NOVIKOFF: -- such --

2 THE COURT: I've heard --

3 MR. NOVIKOFF: Okay.

4 THE COURT: Mr. Novikoff, enough.

5 Okay. Next, we have cross-motions for summary
6 judgment with respect to the Shreveport assets, and you're both
7 jumping up to go first.

8 MR. FISHER: You decide.

9 THE COURT: Mr. Fisher.

10 Since Mr. Novikoff got the last word in something, so
11 I'm going to let Mr. Fisher go, okay?

12 MR. FISHER: So, Your Honor, the issue raised by
13 these two dueling motions about Louisiana law is whether the
14 term lenders were ever granted a security interest under the
15 term loan credit agreement and the collateral agreement in
16 7,801 assets that are located in Shreveport, Louisiana.

17 THE COURT: Approximately 7,801.

18 MR. FISHER: Yes. The defendants say approximately
19 7,800, but if that's what this motion comes down to, I think
20 we'll be able to agree.

21 So, Your Honor, at page 6 of the defendants
22 opposition brief, they write that Louisiana's UCC, quote,
23 "merely disables a party" --

24 THE COURT: Every time I see the word "merely," I --
25 you know, don't put that in your briefs, okay.



1 MR. FISHER: So here's what it "merely" does, Your
2 Honor. It "merely disables a party from creating a valid UCC
3 lien in fixtures after they have been installed," closed quote.
4 Essentially, what that means is it means that the term lenders
5 concede that under the Louisiana UCC, you cannot create a UCC
6 lien in these 7,801 assets. And --

7 THE COURT: And let me -- when I read all these
8 papers on Shreveport and pore over Louisiana law, which I hope
9 I don't have to do again, the issue fundamentally, as I see it,
10 is do the term lenders have -- were they granted a security
11 interest in fixtures in Shreveport Not just what's a fixture
12 because Louisiana law, the way I read it, says if you attach it
13 and it's a fixture but you haven't filed a fixture filing, you
14 don't get a security interest.

15 So when we dealt with Lansing Delta Township and you
16 raised the issue which you lost on in that case over perfection
17 because they had the wrong address, and I ruled against you
18 because I thought your challenge was untimely, but I asked
19 during argument and you agreed during argument, I asked you
20 whether the granting clause gave the term loan lenders a
21 security interest. That was enough under Michigan UCC, but
22 Louisiana's different. To get a security interest, it not only
23 has to be in the granting clause but you have to file a fixture
24 filing before it's attached. Am I wrong on that?

25 MR. FISHER: Not at all. No, you're correct, Your



1 Honor, and just one clarification. Again, I don't think that
2 there's disagreement between the parties about Louisiana law,
3 even though there's been so much briefing back and forth. I
4 think it obscures the fact -- I don't even think you need to
5 look at the fixture filing. I think you can limit your
6 analysis to the date of the collateral agreement, November
7 29th, 2006.

8 THE COURT: I thought when I -- this is where I --
9 and that's what you said in your brief, but I thought when I
10 read Louisiana cases and the statute -- not a lot of cases, but
11 reading the statute, it's not the collateral agreement. It's
12 -- here, there's no question the collateral agreement refers to
13 whatever the UCC is -- and in Louisiana, it's their law. It's
14 the date of the filing -- not the date of the collateral
15 agreement but the date the fixture filing is done.

16 MR. FISHER: So, Your Honor, I think that that's how
17 -- that's a function of how defendants misperceived our
18 position and we made these simultaneous filings. So the reason
19 I say what I say, which is that it doesn't -- the date of the
20 fixture filing is irrelevant. What matters is the date of the
21 collateral agreement.

22 THE COURT: Tell me -- explain to me why.

23 MR. FISHER: And that's what makes this so different
24 from Lansing Delta Township.

25 THE COURT: Explain to me why because it looked to



1 me, when I read the statute -- bear with me. Section
2 10:9-334(a), quote, "A security interest under" -- I'm going to
3 say Chapter 9 -- "may not be created in goods after they become
4 fixtures," closed quote.

5 MR. FISHER: Your Honor, that's exactly the
6 provision.

7 THE COURT: Okay.

8 MR. FISHER: And because it says "created," the
9 security interest is created on the date of the term loan
10 credit agreement and collateral agreement. It's then perfected
11 by the fixture filing.

12 THE COURT: Where -- point me where in the statute
13 that it says that.

14 MR. FISHER: So it's the language the Court just
15 read. A security interest under this chapter may not be
16 created in goods after they become fixtures, meaning you cannot
17 even create a lien, let alone perfect a lien, in goods after
18 they become fixtures, meaning you can't create a -- under
19 Louisiana law, and Louisiana law is strange, it is unique in
20 this regard, you cannot create a security interest in fixtures
21 if those fixtures are already attached on the date that you
22 grant the security interest.

23 THE COURT: So let me ask you this, hypothetically.
24 Let's assume you have a collateral agreement signed today and a
25 fixture filing is made ten days from today, and 12 days from



1 today, the property -- the goods are attached. When does the
2 security interest come about?

3 MR. FISHER: The security interest is created on the
4 date of the collateral agreement. That's what creates the
5 lien. The lien is then perfected ten days later, Your Honor,
6 when the fixture filing is filed. And what we're saying is you
7 don't even need to look at the fixture filing, just look at the
8 collateral agreement --

9 THE COURT: Okay. What -- and tell me what the
10 collateral agreement says here.

11 MR. FISHER: So the collateral agreement -- I'm
12 simplifying because we think it needs to be read together with
13 the term loan agreement and so on, but for purposes of this
14 issue, I think the Court just needs to consider that it grants
15 a lien in equipment and fixtures subject to certain limitations
16 set forth in the term loan agreement, which aren't relevant
17 here. And it incorporates the UCC and that it defines the UCC
18 and it says where attachment of a lien is governed by where the
19 property is located, you look to that UCC. So that -- so
20 everyone agrees Louisiana law applies, and I think everyone
21 agrees on the point that I'm making, which is that under
22 Louisiana law, you can't even create a security interest in
23 fixtures if they're attached on the date that you seek to
24 create that security interest. So, you know, it's really word
25 games for them to say, well, it says "fixtures," so "fixtures"



1 means fixtures. Sure, you know, "fixtures" means fixtures as
2 limited by applicable law on the date that the security
3 interest is created.

4 THE COURT: Well, this is what -- in my mind, the
5 issue as to Shreveport is not whether something is a fixture.
6 It's whether a security interest was granted in it.

7 MR. FISHER: Exactly, Your Honor. Yes. Yes.

8 So based on the language that I read to you from
9 their opposition brief, I don't think it would be disputed.
10 Everyone agrees. They could have created a security interest
11 in these 7,801 assets. The collateral agreement did not create
12 a security interest. And we just seek a ruling as to that
13 exactly, just read the collateral agreement in accord with
14 Louisiana law and apply it to these assets which everyone
15 agrees were installed as of the date of the collateral
16 agreement, November 29, 2006.

17 So what is their argument? We think it boils down to
18 this, that they basically say, we're going to claim a security
19 interest in assets that even as a matter of law, we acknowledge
20 couldn't possibly be part of the original grant of our security
21 interest, and then we're going to argue that you can't say
22 anything about it because you need an adversary proceeding.
23 And, Your Honor, the answer to that is very simple. There is
24 an adversary proceeding, and it's this adversary proceeding.
25 And --



1 THE COURT: Look, to my mind, there are no springing
2 security interests. They either had it or they didn't. If
3 they had a security interest, then the question is, is there a
4 timely challenge, is it a fixture, how do you know? Okay.
5 That's what we had with Lansing Delta Township. Okay. The
6 fact that they'd like to say today that 7,801 assets that were
7 attached before the collateral agreement or the fixture filing,
8 they never -- let's say, today, we get to say that those are
9 fixtures and they're -- you have to offset the value of the
10 7,801 assets against the avoidance claim, and that's what I --
11 Mr. Wolinsky, that's what I have trouble with.

12 MR. FISHER: And, Your Honor, just to go a little bit
13 further down that road, reading the collateral agreement in the
14 first instance and deciding what was the original grant of the
15 lien has always been the starting point in this case. And
16 then, we fight with each other over what survives in the wake
17 of the filing of that termination statement that the Second
18 Circuit ruled was legally effective. But it has to start with
19 what's the document that created the lien, and what is the full
20 scope of your lien as read correctly in light of applicable
21 law? And the Court's done that before.

22 You know, we say "fixture/nonfixture" in this case
23 almost as a kind of shorthand to refer to the issue of
24 surviving collateral, but those aren't the only issues. This
25 Court decided, for example, whether Pontiac Engineering was



1 considered in a pertinent or related facility within the
2 meaning of the collateral agreement, and the Court found that
3 it was not, and therefore they didn't have a security interest
4 at Pontiac Engineering. That's not a fixture/nonfixture issue.
5 That's reading the collateral agreement to figure out what the
6 original grant of their lien was. The Court did the same thing
7 with respect to the leased asset issue, which was a smaller
8 issue but an issue that was nonetheless important and came up
9 at the representative assets trial.

10 Do they or did they not have a lien in leased assets?
11 It's not a fixture/nonfixture issue. It's just reading the
12 collateral agreement to properly construe their lien in the
13 first instance. And that's all we're asking the Court to do
14 with regards to the Shreveport issue, and so for that reason,
15 we think it is squarely part of this adversary proceeding and
16 we're entitled to have the Court construe the collateral
17 agreement in accord with Louisiana law.

18 THE COURT: Okay. Thank you.

19 Mr. Wolinsky.

20 MR. WOLINSKY: I think we're in broad agreement that
21 it -- the issue is ultimately decided by the -- what the
22 collateral agreement says in the granting clause. So some
23 things I think we agree on -- why don't you just move forward,
24 thanks.

25 I think we all agree that if they wanted to challenge



1 the validity, priority, or --

2 THE COURT: Do I have copies of these slides, too?

3 MR. WOLINSKY: I can hand them up to you right --

4 THE COURT: Please.

5 MR. WOLINSKY: Do you -- let's print them now.

6 THE COURT: No, yeah, why don't you give them to me

7 now.

8 MR. WOLINSKY: Sure.

9 THE COURT: I sometimes make notes on them.

10 MR. WOLINSKY: Sure.

11 THE COURT: Thank you.

12 MR. WOLINSKY: We -- should I proceed?

13 THE COURT: Go ahead.

14 MR. WOLINSKY: Thank you.

15 We all agree that if the AAT wanted to challenge the
16 validity, priority, or extent of a lien, it had to do so in the
17 complaint. That's the LDT issue that Your Honor's decided.

18 THE COURT: So what they say is, as to 7,801 assets,
19 they're not challenging the validity. They're saying you never
20 got a security interest.

21 MR. WOLINSKY: Correct. That's what they're saying,
22 and I'm going to get to that right now.

23 Move forward. Just move forward.

24 So we all agree that this issue was not raised in the
25 complaint, so we can move right forward. 601 was --



1 THE COURT: I'm familiar with 601. Thank you.

2 MR. WOLINSKY: -- they alluded to. You have dealt
3 with 601, so let's move right through it.

4 Okay. Next.

5 So what we're disputing, I think we all agree, what
6 they can and can't do. They can say that something was never
7 part of the grant, but if it was part of the grant and you
8 filed the wrong piece of paper, had to be done two years ago,
9 and that was the difference between Warren Transmission, Warren
10 -- excuse me --

11 THE COURT: Pontiac.

12 MR. WOLINSKY: -- I meant, the Pontiac and the
13 engineering -- the research facility versus LDT. Now, here,
14 let's go to the collateral agreement. The collateral agreement
15 granted a lien on all fixtures at Shreveport. There was a list
16 of the facilities that were covered, and Shreveport was on the
17 list, as was MFD Pontiac. The issue in MFD Pontiac was whether
18 the research facility was related or pertinent. LDT was on the
19 list. So clearly, the intention as reflected in the document
20 was to grant a security interest in fixtures at Shreveport.

21 So here's the -- and here's the grant of the security
22 interest. Each grantor, which I believe is General Motors
23 parent corporation and Saturn, hereby assigns and transfers to
24 the agent, which is JPMorgan, a security interest in all of the
25 following assets and property now owned or at any time



1 hereafter acquired in all equipment and fixtures. We all agree
2 so far, fixtures is defined with a cross-reference to the UCC,
3 which takes you to the definition of UCC, which as we know
4 means in this case for Michigan assets, you look at Michigan
5 law, for the Ohio, Ohio, Louisiana, you look at Louisiana.

6 But what you're looking for is not -- what you're
7 trying to understand is the scope of the grant. The grant is
8 to fixtures as defined under Louisiana law.

9 THE COURT: Okay.

10 MR. WOLINSKY: Okay? And here's the Louisiana
11 fixture definition: goods that, after placement on or
12 incorporation in an immovable, have become a component part.
13 Okay. That's the definition of fixtures. So the grant is all
14 fixtures located at Shreveport, and "fixtures" means good that,
15 after replacement or incorporation in an immovable, become a
16 component part of such immovable.

17 THE COURT: So tell me what you do with 10:9-334(a).

18 MR. WOLINSKY: Very simple. And then, Louisiana law
19 equates fixtures with component parts, and we can talk about
20 that if you'd like. Here's where the -- and then, there's the
21 carve-out, which is what they're hanging their hat on, right.
22 If a grant of security interest is prohibited by any
23 requirement of law. So there's a carve-out. The grant is all
24 fixtures in Louisiana with a carve-out if the grant is
25 prohibited by local law. Has to be prohibited.



1 So now, let's -- this is their -- where they're
2 misreading the section that we focused on. 9:9-334(a) [sic], a
3 -- and this is the first sentence, we all agree.

4 "A security interest under this Chapter may not be
5 created or perfected in goods after they become
6 fixtures."

7 What they're reading out of this are the words "under
8 this chapter." It is --

9 THE COURT: It's Chapter 9.

10 MR. WOLINSKY: Chapter 9. It is not a blanket
11 prohibition against granting of security interests. It's a
12 blanket -- it's a prohibition against granting them under
13 Chapter 9, which is the equivalent of Article 9 in the UCC.
14 10:9-334(b), the next provision in the same statute, says that:

15 "This Chapter does not prevent the creation of an
16 encumbrance upon fixtures under real property law."

17 THE COURT: And you have to file a mortgage to do
18 that.

19 MR. WOLINSKY: Have to file a mortgage. So the grant
20 is not prohibited. The grant is permitted under Louisiana law.
21 You can't do it with a UCC-1. You have to do it with a
22 mortgage.

23 THE COURT: And did you file a mortgage?

24 MR. WOLINSKY: Did not file a mortgage, which is
25 exactly the -- in my mind, the same as LDT. We filed a UCC-1



1 but with the wrong metes and bounds. We filed the wrong piece
2 of paper. This is exactly the same as LDT. The granting -- go
3 back to -- I think it's pretty simple, it's pretty
4 straightforward. You go to the granting clause. Granting
5 clause says --

6 THE COURT: Is there anything in the granting clause
7 that suggests, hints that it intended to give a mortgage?

8 MR. WOLINSKY: The granting clause -- let's go back
9 to it.

10 Can you go back? There it is.

11 THE COURT: You went too far.

12 MR. WOLINSKY: There it is. Just go to the granting
13 clause. It's unlimited. Doesn't say mortgages, doesn't say
14 anything. "I hereby grant" grants a security interest.

15 THE COURT: So you acknowledge that you were not
16 granted a security interest under Chapter 9 of the Louisiana
17 law.

18 MR. WOLINSKY: We acknowledge that we are granted a
19 security interest --

20 THE COURT: No, answer my question.

21 MR. WOLINSKY: Yeah, I'm trying to --

22 THE COURT: Answer my question, okay. Do you agree
23 that the term lenders were not granted a security interest
24 under Chapter 9 of the Louisiana law?

25 MR. WOLINSKY: I agree that they were not granted an



1 effective security interest under Chapter 9.

2 THE COURT: Well, where --

3 MR. WOLINSKY: Because --

4 THE COURT: -- where -- you've went on to argue that
5 they were granted an unperfected mortgage, but leading up to
6 that, I essentially took you to acknowledge that they were not
7 granted a security interest under Chapter 9.

8 MR. WOLINSKY: They -- I'm not -- maybe I'm not
9 understanding your point.

10 THE COURT: Well, my point is that Chapter 9, unlike
11 Article 9 of the model UCC --

12 MR. WOLINSKY: Right.

13 THE COURT: -- applies to the creation of security
14 interests and goods that are to become fixtures. That's the
15 words that are in the statute, "to become fixtures."

16 MR. WOLINSKY: Right.

17 THE COURT: And if the goods become -- if they're
18 attached, they become real property, and the only way you could
19 protect the interest in real property is through a mortgage.
20 Is that correct so far?

21 MR. WOLINSKY: So far, correct. I'm with you so far.

22 THE COURT: Okay. Okay. The mortgage provision is
23 not in Chapter 9, it's elsewhere.

24 MR. WOLINSKY: Correct, elsewhere in Louisiana law.

25 THE COURT: Okay. And so what the AAT is saying is



1 that you were not granted -- what the collateral agreement
2 necessarily does is point you to the provisions of the
3 equivalent of the UCC, which is Chapter 9, and that you weren't
4 granted a security interest -- any security interest under
5 Chapter 9 because in order to have that, you had to do a
6 fixture filing before it was attached.

7 MR. WOLINSKY: Here's where I disagree with what you
8 just said.

9 THE COURT: Okay.

10 MR. WOLINSKY: The collateral agreement points you to
11 the UCC. Louisiana --

12 THE COURT: Doesn't point you to the mortgage -- the
13 real property law.

14 MR. WOLINSKY: -- points you to the Louisiana UCC for
15 the definition of the term "fixture," period, full stop.

16 THE COURT: Show me anywhere in that collateral
17 agreement that hints, suggests, or otherwise that you rely on
18 to say that the term lenders were granted a mortgage.

19 MR. WOLINSKY: They were granted a security interest.
20 It does not use the M word, agreed. But I don't think that --

21 THE COURT: And it's a different statute in
22 Louisiana. The only reference in the collateral agreement
23 points you to Chapter 9 of the Louisiana law.

24 MR. WOLINSKY: Indirectly.

25 THE COURT: By the reference to the UCC is applicable



1 in the jurisdiction, that's Chapter 9.

2 MR. WOLINSKY: But not for the method of perfection.
3 It points you to the UCC for the definition of what is a
4 fixture. It could point you to the -- take a hypothetical.
5 Let's say, well, it does point you to the New York UCC for
6 definition of what's a fixture of things that are in New York.
7 It points you to make it more concrete. LTD, it points you to
8 the Michigan UCC for the definition of what's a fixture in
9 Michigan. But the UCC that was filed in Michigan, they argue,
10 did not perfect the lien.

11 THE COURT: So do you agree that in order for you to
12 prevail, the Court has to find that the collateral agreement
13 gave you a mortgage on the Shreveport property?

14 MR. WOLINSKY: No, I don't think so, because mortgage
15 goes to whether we were perfected.

16 THE COURT: You can have an unperfected mortgage,
17 too, but -- I would have to conclude that this collateral
18 agreement gave you a mortgage on real property, and you say
19 it's too late for them to challenge the validity of a mortgage.

20 MR. WOLINSKY: Maybe we're speaking past each other.
21 I think all you have to conclude is whether it's within the
22 scope of the grant. My intention was to give you a security
23 interest in fixtures, as defined in the Louisiana UCC. That
24 was my intention. They did it the wrong way, no dispute.
25 Should have been a mortgage. They filed a UCC-1.



1 THE COURT: All right. Go ahead.

2 MR. WOLINSKY: Your Honor, I think that's the --
3 really the essence of it. I think we've hit on it. You
4 started the argument. Mr. Fisher continued the argument. I
5 think the issue begins and ends with the grant in the
6 collateral agreement. The grant in the collateral agreement is
7 expansive.

8 THE COURT: I don't read it the same way you do.

9 MR. WOLINSKY: What limits it? There's no
10 limitation. Security interest is granted in fixtures. The
11 definition of "fixture" is something -- a good that's attached
12 to the property. If you want to perfect your interest, you
13 have to file a mortgage. If it's a -- and they concede the
14 point. They agree that we have a security interest -- I think
15 they agree -- in the 900 assets that were attached after the
16 UCC-1 was filed.

17 THE COURT: Well, they say they're not challenging it
18 now. They put some conditions on that, but this motion doesn't
19 raise the issue -- I didn't know how many it was. It's 900?
20 Okay.

21 MR. WOLINSKY: So by definition --

22 THE COURT: They say -- they're not -- for purposes
23 of this motion, that's not an issue.

24 MR. WOLINSKY: So if the -- it can't be -- well,
25 maybe it can be, but I don't think it's logical to come to the



1 conclusion that the granting clause covered things that were
2 not in existence but the intention was not to cover the things
3 that were in existence.

4 THE COURT: Do you agree that Chapter 9 doesn't apply
5 to the creation of interest in or liens on real property?

6 MR. WOLINSKY: Correct. Yes, I believe that.

7 THE COURT: Okay.

8 MR. WOLINSKY: Yeah. It's a standard UCC provision.
9 So again, Your Honor, going to --

10 THE COURT: And the only reference in the collateral
11 agreement is to the UCC and pointing to the Chapter 9 of the
12 Louisiana law.

13 MR. WOLINSKY: Indirectly, yes, for the definition of
14 what is a fixture. A fixture is a fixture is a fixture. The
15 UCC tells you what's a fixture. They want to -- they're
16 challenging the validity or extent of the lien. To my mind,
17 it's really comparable to LDT.

18 THE COURT: So --

19 MR. WOLINSKY: The wrong piece of paper was filed.

20 THE COURT: Section 10:9-102(a)(41) defines fixtures
21 as goods "after placement on or incorporation in an immovable
22 have become a component part of such an immovable as provided
23 in Civil Code Articles 463, 465, and 466, or that have been
24 declared to be a component part of an immovable under Civil
25 Code Article 467." Right?



1 MR. WOLINSKY: Right. And that doesn't speak to the
2 time. So when that stamping press is in Germany and it's being
3 shipped over, it's a good. When it's attached to realty, it's
4 a fixture.

5 THE COURT: Okay. I've got your argument.

6 MR. WOLINSKY: That's what, clearly, the intention --
7 it's hard to dispute that the intention ultimately was not to
8 grant --

9 THE COURT: Well, I don't think anybody paid any
10 intention to what Louisiana law was.

11 MR. WOLINSKY: I think that's fair to say. I think
12 that -- but if you look at --

13 THE COURT: If somebody had paid attention to
14 Louisiana law and you thought that the only way you could
15 perfect your security interest was to file a mortgage, you
16 would have done it. Not you, but --

17 MR. WOLINSKY: Correct. And that's why we've come
18 into the two-year limitation. That's why we have the two-year
19 limitation.

20 THE COURT: Right. Okay. Thank you.

21 MR. WOLINSKY: It's pretty simple.

22 THE COURT: Okay.

23 MR. WOLINSKY: I hope.

24 THE COURT: Okay.

25 Mr. Fisher.



1 MR. FISHER: Your Honor, unless the Court has
2 questions, I don't think I have anything to add to what's been
3 argued already.

4 THE COURT: Well, address specifically -- come back
5 to Mr. Wolinsky's point that the granting clause effectively
6 gave a security interest that should have been perfected as a
7 mortgage but was not, even though there's no reference in
8 anywhere in the collateral agreement other than to the UCC.

9 MR. FISHER: So, Your Honor, I think it's quite clear
10 from everything in the collateral agreement that this was a UCC
11 lien. And so in the first instance, the granting clause grants
12 them the broadest possible lien in the assets that are covered
13 by it, subject to applicable law, and Louisiana law tells you
14 that under the UCC, you just can't create a security interest
15 in fixtures. I agree they're called fixtures that are already
16 attached. The only reason that the Louisiana Commercial Code
17 defines fixtures really is to tell you that if they're already
18 attached, you can't have a lien in them under the UCC. You
19 have to look to real property law.

20 THE COURT: All right. Could you all update me on
21 where things stand, other than these motions? And I guess
22 we've put off the effectiveness -- the argument on the
23 effectiveness defense because of Mr. Spiegel's unavailability.
24 That was fine with me.

25 MR. FISHER: Correct, Your Honor, and that's



1 scheduled for January 25th in the morning. A bit of good news,
2 we have agreed to get together and mediate in person again. So
3 we're having an in-person mediation session on Martin Luther
4 King Day, January 21st, which was the only date that everyone
5 was able to make themselves available, and our mediator was
6 kind enough to make himself available, as well. And otherwise,
7 the deadline for fact discovery is coming up quickly. It's
8 January 23rd. And --

9 THE COURT: So there was an issue that was raised by
10 -- I was alerted -- that I extended one deadline, the amount of
11 time it was going to require New GM to produce additional
12 documents. What's the status of that?

13 MR. FISHER: Your Honor, we are all still working
14 with New GM to get the documents that we think each side is
15 entitled to under our subpoenas, and I think that the way we've
16 been approaching it is to get what we need to get, to take fact
17 depositions, if necessary, by agreement outside of that January
18 23rd cutoff if it's not possible to get them done in time, but
19 mindful of the Court's admonition that -- in terms of the --

20 THE COURT: If you agree on dates for the
21 depositions, you do not need to come back to me to --

22 MR. FISHER: And, Your Honor, that's how we -- we
23 haven't gotten to the deadline yet, but I think that that's how
24 we were hoping to proceed. And January 23rd is the cutoff for
25 all fact discovery. Expert reports are due on February 12th.



1 THE COURT: So we're talking about a trial on eight
2 assets, right?

3 MR. FISHER: Plus --

4 THE COURT: You couldn't -- were you able to agree on
5 -- neither of you were able to agree on four, and I said fine,
6 four each. Are we going to have a trial on eight assets?

7 MR. FISHER: Yes, unless, Your Honor. As the Court
8 knows, the Court authorized certain depositions to go forward
9 that relate to the question of whether the original grant of
10 collateral ever included many thousands of assets the term
11 lenders claim to be part of their surviving collateral, even
12 though we claim that a proper reading of the collateral
13 agreement together with the term loan agreement means that they
14 were never granted a secured interest in the first place in
15 those assets.

16 We want to get to the end of that. In fact, there's
17 -- one of the depositions that the Court ordered is going
18 forward tomorrow on that. We want to get to the end of those
19 depositions, and then we may come back to the Court with a
20 proposal for a motion that, if we are right about this, would
21 dramatically curtail the scope of the trial. But I would
22 say --

23 THE COURT: It would curtail the scope of the trial
24 because of what?

25 MR. FISHER: Because many of the specific



1 representative assets that parties currently would plan to
2 litigate were, from the get-go, excluded from the original
3 grant of collateral. And so if we're right about that, we
4 would want to come to the Court probably on a pre-motion letter
5 and present that to the Court and present that issue on an
6 expedited basis.

7 THE COURT: Was I alerted to this issue? I don't
8 remember -- this is something I'm completely drawing a blank
9 about.

10 MR. FISHER: No. I mean, I think Your Honor's been
11 alerted to the issue by virtue of that discovery fight that we
12 had and the Court resolved by phone call. This is the first
13 time that I'm ever speaking to what the potential implications
14 of that could be in terms of the scope of the next
15 representative assets trial.

16 THE COURT: Mr. Wolinsky, you want to be heard?

17 MR. WOLINSKY: Yes, Your Honor. I'm just -- Marc
18 Wolinsky. The pretrial order that we agreed to has a
19 long list of issues that are being litigated. It's not just
20 the eight representative assets. There's a construction work
21 in progress, Fairfax lease. So I didn't -- it's a much bigger
22 task ahead than just the eight assets, which we'll try --
23 obviously try effectively and efficiently, but it's a long
24 list.

25 The issue that Mr. Fisher is alluding to is the issue



1 that we had the teleconference on, parol evidence relating to
2 whether the scope of the collateral agreement encompasses
3 something that GM, in its books and records -- I want to be
4 very concrete. There's a boiler in the basement of a building,
5 the CUC. Sometimes GM capitalized the CUC as -- a CUC as
6 machinery and equipment, sometimes that same unit would be in
7 the buildings and land. They want to argue, based on, we
8 believe, parol evidence, that the intention was never -- that
9 if it was in the books and records as buildings and land, that
10 it was not part of the grant. We have a very simple position.
11 Fixtures is fixtures is fixtures. The grant is fixtures.
12 Doesn't matter how GM ultimately classified it. If it's a
13 fixture, it's part of the grant, it's part of the collateral.

14 The parol evidence issue that they're referring to, I
15 don't think it's one susceptible to resolution on summary
16 judgment. I think -- if you think there's a live issue there,
17 I think it's going to -- it'll be tried.

18 Other than that, I think, you know, we -- I agree
19 with Mr. Fisher. We do have a session to -- a mediation
20 session scheduled for the only day everyone could -- was free,
21 accident of life and history, and history in a very kind of
22 fundamental sense, actually. And expert discovery and fact
23 discovery is proceeding. We have no -- we've really tried very
24 hard to stay out of your courtroom with GM, and to GM's credit,
25 they've tried to stay out of your courtroom. So no issues



1 there. We did want to let you know that some of the dates
2 slipped with GM on document production, but no problems there.

3 THE COURT: What's the deadline for expert reports?

4 MR. FISHER: February 12th, Your Honor.

5 THE COURT: Okay. You're both going to have a very
6 hard time convincing me that there should be additional summary
7 judgment motions and the necessary briefing schedules and times
8 for the Court to consider that before we have a trial, okay.
9 I'm not going to rule in the abstract about it, but I'm
10 determined to have the trial and get it resolved before my
11 three law clerks depart. And I'm quite concerned that
12 additional summary judgment motions, briefing, argument, court
13 consideration, court decision would mean that we don't have a
14 trial while my clerks are here, and I -- new clerks have to
15 learn all this stuff. I'm just making that point right now.

16 MR. WOLINSKY: Your Honor --

17 THE COURT: I've probably said before, I'm not a fan
18 of summary judgment motions, but -- period, because, you know,
19 a lot of times, they get denied and then where are you? You're
20 back having to go ahead with a trial.

21 MR. WOLINSKY: Your Honor, Marc Wolinsky. We're not
22 planning on any motions.

23 THE COURT: Mr. Fisher, this is -- you know, there --
24 we tried 40 representative assets out of over 200,000. How
25 many have been resolved?



1 MR. FISHER: I don't -- in terms of number of assets,
2 I don't have that at my fingertips, but Your Honor, we filed
3 with the Court a stipulation that, to date, reflects that we've
4 agreed to. And I think -- I may have this wrong, but there
5 were 180,000 in dispute to start with. I think we've resolved
6 approximately 80,000 assets. The order of magnitude, that's
7 approximately correct, Your Honor.

8 THE COURT: So we just have a mere 100,000 assets
9 that we have to deal with.

10 MR. FISHER: And we will -- the Court -- I mean --

11 THE COURT: What was the line in my opinion about
12 cars will fly around the moon before all of these get resolved?

13 MR. FISHER: Yes. We are determined --

14 THE COURT: 100,000 would probably -- you know, that
15 statement -- self-driving cars will certainly be -- if not
16 around the moon.

17 MR. FISHER: And Your Honor's been very clear that
18 rather than waiting until cars are flying around Mars, Your
19 Honor wants this resolved before Your Honor's clerks depart.
20 Understood. By way of update and preview -- and I know that
21 the Court prefers for us to raise issues with each other before
22 raising them with the Court, so this is only by way of preview.
23 We will discuss it with the defendants. But we have exchanged
24 initial expert disclosures, and they have disclosed to us 26
25 potential testifying experts. We have three weeks for rebuttal



1 reports. We have three weeks for expert depositions. That's a
2 schedule we've all agreed to. I don't think that that kind of
3 expert disclosure is consistent with the schedule we've
4 proposed to the Court. We'll wait and see how many expert
5 reports we actually get, but based on that disclosure, we're
6 concerned.

7 THE COURT: Twenty-six experts for eight assets?

8 MR. WOLINSKY: No, Your Honor. Marc Wolinsky.

9 That's why I stood up. It's not just that. Construction work
10 in progress, every project. I'm happy if they would fold, but
11 if they want us to -- they want to put us to our proof, we will
12 prove to you that here are the major construction work in
13 progress programs, here are what their status was as of June
14 30th, and that they were 80-percent complete, which means that
15 the stamping press was there, it just hadn't been turned on.
16 Saturn tools, it's a relatively small issue. Orion in Pontiac,
17 we have to prove that -- what the status of those plants were
18 as of June 30th. They say they were idle, we say they weren't.
19 We need to put on witnesses as to that.

20 THE COURT: And --

21 MR. WOLINSKY: Evaluation -- I could go on, but --

22 THE COURT: Do you have any -- assuming all these
23 issues have to be tried as to how long the trial will take?

24 MR. WOLINSKY: Your Honor, I think last -- I haven't
25 put pen to paper. I do think, given the knowledge base that



1 you already have, last time we put on direct testimony on the
2 assets, your choice, your preference, but given your level of
3 familiarity, we may not need to do the direct. We may put in
4 way more evidence in written form and just go right to the
5 cross-examinations, but we haven't discussed that and obviously
6 will be guided by your preference.

7 THE COURT: Okay. Anything else anybody wants to
8 raise?

9 MR. FISHER: Nothing from the AAT, Your Honor.

10 THE COURT: All right. I'm going to take --
11 obviously, take these motions under submission, but your --
12 with respect to earmarking, I did raise some questions that --
13 I'm away next week, so as long as by the end of next week, you
14 get me an answer, if possible -- okay. All right. Thank you
15 very much.

16 Mr. Wolinsky, you can have somebody recover your --
17 it's a very nice screen, you know.

18 (Proceedings concluded at 4:01 p.m.)

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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.

Alicia J. Jarrett

ALICIA JARRETT, AAERT NO. 428 DATE: January 14, 2019
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