

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,	.	
	.	
Plaintiff,	.	
v.	.	
	.	One Bowling Green
JPMORGAN CHASE BANK, N.A.,	.	New York, NY 10004
et al,	.	
	.	Monday, August 22, 2016
Defendants.	.	2:05 p.m.
.....	.	

TRANSCRIPT OF TELEPHONE CONFERENCE ON THE RECORD
BEFORE THE HONORABLE MARTIN GLENN
UNITED STATES BANKRUPTCY COURT JUDGE

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1 (Proceedings commence at 2:05 p.m.)

2 THE COURT: All right. Court is in session. We're
3 here in Motors Liquidation Company, 09-00504, Motors
4 Liquidation Avoidance Trust v. JP Morgan Chase. This is in
5 connection with a discovery dispute.

6 The Court has received the letters from Wachtell and
7 from Binder & Schwartz. They are at ECF Docket Numbers 708 and
8 709. I'm familiar with those. I've been given a list of
9 people making telephone appearance. Who is going to argue for
10 the plaintiff?

11 MR. BINDER: Your Honor, this is Neil Binder with
12 Binder & Schwartz on behalf of the avoidance action trust.

13 THE COURT: Okay. Go ahead, Mr. Binder.

14 MR. BINDER: Sure. So thank you, Your Honor, for
15 making yourself available on such short notice. As set out in
16 our papers, we are -- the avoidance action trust is seeking to
17 depose 12 former GM employees who have factual knowledge
18 concerning the assets that are going to be the subject of the
19 trial before the judicial court. Unlike your standard expert,
20 who's a stranger to the underlying facts and acquires knowledge
21 of the case through their review of documents and depositions
22 that are provided to them by the lawyers and in the process
23 become available to all parties, they're disclosed during fact
24 discovery, these witnesses, these former GM employees, have
25 factual knowledge that has not been shared because they



1 obtained it in their capacity as either actors or viewers of
2 General Motors. These are former plant managers, people who
3 had very specific roles with respect to a lot of the assets
4 that are at issue before the Court.

5 Because they have discoverable information and
6 defendants may rely on this information to support their
7 defenses, these are witnesses who should have been disclosed as
8 part of defendants' initial disclosures, but were not. I think
9 had that happened, it would have been apparent that these are
10 ordinary fact witnesses who should be deposed during fact
11 discovery. The defendants, however, have taken the position
12 that because they have retained them, the factual information
13 that these individuals possess from their time at GM is off
14 limits until fact discovery closes. So in other words, we
15 believe that they are seeking to shield their witnesses from
16 the ordinary discovery process by retaining them for their
17 opinion.

18 The rules for disclosures for experts taken as a
19 whole simply don't permit this type of maneuvering and, in
20 fact, work to ensure the opposite outcome. That is, fact
21 witnesses are deposed during fact discovery. If that witness
22 has training or experience sufficient to give opinion testimony
23 under 702 concerning the underlying fact, the time to depose
24 them is now. A party is not permitted to prevent the witness
25 from being deposed on facts within their knowledge on which



1 they may rely simply by retaining them. If it were otherwise,
2 basic facts at issue and then they prove to be in dispute will
3 not be fully developed during fact discovery. That's why we
4 think it's important and appropriate that they be deposed now.

5 Now, the defendants have said that they'll provide
6 expert reports, at least for those witnesses among those
7 they've identified who will testify, and at that time, we'll
8 know what facts that they're going to rely on and we can take
9 depositions then at that time, but this is insufficient. It's
10 inconsistent with the rules, and it would prejudice the trust
11 because the facts in the case will not be subject to any
12 further discovery at that time.

13 To the extent that these witnesses are able to
14 provide opinion testimony under 702, they're what's known as
15 hybrid fact/expert witnesses. Those are witnesses whose
16 testimony is going to be based on what they knew and observed.
17 Under these circumstances, the rules and the advisory notes
18 spell this out very expressly and provide that an expert whose
19 information was not acquired in preparation for trial, but
20 rather because he was an actor or viewer with respect to
21 transactions or occurrences that are part of the subject matter
22 of the lawsuit should be treated as an ordinary witness.
23 Otherwise, we miss this opportunity to develop a factual record
24 to respond to what we think are going to be facts that they're
25 going to be using as the basis of their defense, providing to



1 other experts who are using as part of their own sort of
2 presentation.

3 They say that this information is available from
4 other witnesses, but that's really besides the point. It's not
5 information in the abstract. It's the information that they
6 intend to rely on, and that is the information that we need to
7 understand now. So what we tried to do -- and there's a
8 suggestion that all this is available from GM. I think -- our
9 point is that it really doesn't make a difference whether we
10 could obtain whatever it is they may say and what the
11 defendants may rely on elsewhere, but as a matter of fact, we
12 don't even think that's possible. New GM has made very clear
13 in a lot of conversations that we've had and the defendants
14 have had, too, that they very much intend to limit the number
15 of individuals deposed. Our approach was designed to order
16 discovery to minimize the burden on New GM by taking the
17 discovery of the former GM employees first. That way, we
18 subpoenaed them for September. We were hoping to have this
19 started as early as, I think, maybe September 9th or even
20 earlier. The goal was to take these depositions, understand
21 the basis or types of facts that they have that may be used by
22 the defendants. And then, if there were issues that arose
23 concerning those facts and we felt we required more
24 information, wanted to get a better understanding, thought were
25 incorrect, then we could work with New GM to obtain additional



1 discovery, identify appropriate witnesses to the extent
2 necessary to do so, and we could target it to the issues that
3 are going to be germane to the case.

4 THE COURT: Can you tell me when does fact discovery
5 close and when does expert discovery close?

6 MR. BINDER: Fact discovery closes October 14th, and
7 I believe in the middle of January, there's -- I think the
8 first reports are due in mid November, and then rebuttal is, I
9 don't remember exactly, four or five weeks later, and then we
10 sort of jump a little bit over Christmas and finish in mid
11 January.

12 THE COURT: All right. Thanks, Mr. Binder.
13 Let me hear from -- who's going to argue for
14 defendants?

15 MR. WOLINSKY: Your Honor, this is Mark Wolinsky. My
16 colleague, Lee Wilson, will be presenting for us today.

17 THE COURT: Thank you very much.

18 MR. WILSON: Hi, Your Honor. This is Lee Wilson on
19 behalf of JPMorgan. This is not a dispute regarding whether or
20 not plaintiffs will have the opportunity to take, you know,
21 factual discovery from the 12 former GM experts that we've
22 retained and the defendants have been working with for about a
23 year now. It's just a question of timing. And in our view,
24 the federal rules are clear. You know, F.R.C.P. 26(b)(4)(A)
25 very clearly states that, you know, when a report is going to



1 be required from an expert, as will be the case with our
2 experts here, the deposition may be conducted only after the
3 report is provided.

4 That's the issue here. It's a question of timing,
5 and in our letters to you, we cite two cases that expressly
6 address this issue. The In re Texas Eastern Transmission case
7 and the Pralinsky v. Mutual of Omaha case both involve
8 situations where there were, quote/unquote, "hybrid experts,"
9 where an expert had some factual knowledge, but had been
10 retained as an expert to provide a report, and in both cases,
11 you know, despite the fact that the expert had pre-retention
12 factual knowledge, the Court applied the rules and held that
13 the deposition of the expert should occur once and should occur
14 after the expert report is provided.

15 In preparing for this, we did some additional
16 research and came across another case from the Northern
17 District of Ohio, Sanford v. Stewart. It's an unrecorded case,
18 Case Number 11-CV-2360 from April 26, 2013, Docket Number 61,
19 have to provide the case afterwards, and it deals with exactly
20 the argument that plaintiff here makes. In fact, it references
21 the language that they make, and plaintiff in that case argued
22 that it should be allowed to depose a treating physician -- the
23 expert -- the physician who actually treated, you know, the
24 juvenile who was alleged to have been injured in the case who
25 was, after that treatment, retained as an expert by the



1 defendants and had unique knowledge as to the treatment that
2 had been done as a factual matter. Plaintiff argued in that
3 case that they would only want to depose that expert as to,
4 quote, "only those matters regarding her personal knowledge as
5 an actor or viewer regarding the events related to the subject
6 matter of the lawsuit and not to any expert opinions," and the
7 Court rejected that argument and the Court held specifically
8 plaintiff cannot take the deposition of Dr. Volk until after
9 she has provided her expert report as required by Rule
10 26(a)(2)(B) and (b)(4)(A) of the F.R.C.P.

11 And so it's not an issue that seems to come up a lot,
12 but when it does come up on the timing issue, courts hold that
13 if an expert has to provide a report, the deposition needs to
14 occur after the report's been provided. None of the cases that
15 plaintiff cite in their letters and -- deal with this question
16 at all. They only deal with the question of, you know, there
17 are experts who are hybrid experts, but that's not the question
18 here. The question is not whether or not plaintiff can access
19 the factual information. It's whether they need to do so after
20 the expert report has been submitted. And in fact, the more
21 federal practice Moore's Federal Practice treatise that they
22 cite references the same rule that I was just referencing and
23 says that, you know, the purpose of the restriction is to
24 reduce or eliminate the need for deposition. And that is the
25 case here.



1 I mean, that's what they're effectively asking for.
2 Defendants would be prejudiced if they were allowed to go
3 forward and take depositions of our 12 experts now. It's a
4 tight discovery schedule. Fact discovery is scheduled to end
5 on October 14th, and then initial reports come thereafter on
6 November 7th. They're basically asking to take potentially two
7 depositions of all of our 12 experts. That's going to be
8 eating the time that our experts have to analyze the
9 depositions that are occurring and documents that are still
10 being produced and incorporate that into their expert reports,
11 which are due on November 7th.

12 And then, you know, we're also going to be prejudiced
13 because these are not individuals who were engaged like a
14 treating physician even. Treating physicians have been held to
15 only be deposed after they provide their expert reports, but
16 here, these individuals were not people who, as part of their
17 ordinary course, were analyzing fixture or non-fixture
18 valuation. We worked with them extensively over the past year
19 to analyze documents as they've come in. You know, they've
20 come with us on the plant inspections that the Court ordered
21 and have refreshed themselves extensively as to the assets
22 involved, and allowing plaintiffs to take depositions during
23 fact discovery would effectively give them a preview of our
24 expert analysis and, you know, inevitably disclose the aspects
25 of such analysis, which you know, is simply not fair before



1 expert reports begin.

2 Mr. Wilson, let me just -- I just want to clarify one
3 point. Do you agree that none of these 12 witnesses had, as
4 part of the regular -- as a regular part of the employees'
5 duties, providing expert testimony?

6 MR. WILSON: None of them, as a regular part of their
7 business at GM, provided expert testimony. That's correct.

8 THE COURT: Okay. All right. Does anybody else wish
9 to be heard?

10 (No audible response.)

11 THE COURT: All right. I'm going to rule.

12 MR. BINDER: Your Honor --

13 THE COURT: I'm sorry, who was that?

14 MR. BINDER: It's Neil Binder, Your Honor, for the
15 avoidance action trust. I was going to respond briefly or --

16 THE COURT: It's not necessary yet. I've read the
17 papers. I'm familiar with the case law, and I'm prepared to
18 rule. I'm going to read a ruling, and then I'll enter an order
19 to the same effect.

20 A discovery dispute has arisen between counsel for
21 plaintiff and counsel for JPMCB whether plaintiff's counsel may
22 take the deposition during the fact discovery period of 12
23 former GM employees that the defendants have designated as
24 expert witnesses. Plaintiff's counsel argues that he should be
25 permitted to take the depositions during fact discovery.



1 JPMCB's counsel argues that the depositions should only be
2 permitted during expert discovery. Both counsel submitted
3 letters to the Court setting forth their positions and legal
4 authority. See ECF Docket Numbers 708 and 709. The dispute
5 here is when these witnesses will have to sit for their
6 depositions, now during the fact discovery period or later
7 during the expert discovery period. The Court had a telephone
8 hearing concerning dispute on August 22, 2016 and now enters
9 this order resolving the issues.

10 The 12 witnesses, former employees of GM, appear to
11 have knowledge of facts relevant to the claims and defenses in
12 this case, obtained or learned before the witnesses were
13 retained as experts by defendants. It remains unclear whether
14 defendants will seek to use these witnesses as testifying
15 experts or solely as consulting experts. These experts can
16 fairly be characterized as hybrid witnesses, having both
17 knowledge of facts relevant to the dispute obtained during
18 their prior GM employment and facts they have learned since
19 their retention as experts and the opinions they have formed as
20 experts.

21 Problems presented by hybrid witnesses are
22 particularly acute whereas here, the expert is a former
23 employee of the party about whom testimony is sought unless
24 giving expert testimony was part of the employee's regular
25 duties. None of these 12 witnesses have been identified as



1 employees whose duties included, as a regular part --
2 testifying as a regular part of the employees' duties.

3 The witnesses' knowledge of facts learned through
4 their pre-petition work is clearly fair game for discovery.
5 This is true whether the witnesses are identified as consulting
6 or testifying expert witnesses. The witnesses' opinions,
7 however, stand on different terrain.

8 All 12 witnesses have been identified as retained
9 experts. This makes Rule 26(a)(2)(B) applicable, meaning that
10 the witness must prepare an expert report if he or she is going
11 to testify, but Rule 26(b)(4)(A) provides that such witness may
12 not be deposed until their report is prepared. Rule
13 26(b)(4)(D) ordinarily excludes depositions of retained experts
14 employed only for trial preparation. Designating witnesses as
15 expert witnesses cannot be sued as a device to shield
16 percipient fact witnesses from discovery.

17 What I find significant here is that defendants have
18 acknowledged that they will probably not call all 12 witnesses
19 at trial. Some or all of the 12 witnesses may wind up as
20 consulting witnesses only. Designation of persons who had
21 knowledge of the facts before they were retained as experts
22 cannot be used to shield the witnesses from giving fact
23 depositions.

24 The Court is concerned that the large number of
25 former GM employees that defendants have cloaked with the label



1 of experts is an effort to prevent timely discovery of relevant
2 and material facts. The plaintiff wants these facts to supply
3 to its experts before they prepare their reports, and that is
4 fully expected and proper.

5 The Court is also concerned, however, that the
6 plaintiff is trying to gain an unfair advantage by getting
7 access to facts or opinions that it ordinarily would not be
8 entitled to obtain at this stage of the case. Defendants
9 should not be required to preview the facts provided to their
10 experts for the purpose of obtaining expert opinions before
11 reports are prepared and depositions thereafter taken as
12 provided in the rules.

13 The Court has discretion how to resolve this
14 discovery dispute and to specify the timing and permissible
15 topics for deposition testimony. Therefore, based on the
16 arguments of the parties as set forth in their letters and
17 during the hearing, the Court orders as follows.

18 If the parties are unable to agree on when the
19 depositions of these witnesses will take place, the depositions
20 of these witnesses may go forward now during fact discovery
21 with the following conditions:

22 One, questions may only seek facts known to the
23 witnesses before they were retained as experts;

24 Two, no opinion testimony may be sought from the
25 witnesses;



1 Three, the witnesses may not be asked about documents
2 they have reviewed since being retained as expert witnesses
3 with the exception of documents that the witnesses sent or
4 received before being retained as experts;

5 Four, questioning may seek to elicit facts learned by
6 the witnesses before being retained as experts, even if the
7 witnesses' recollections were refreshed from the review of
8 documents that they sent or received before being retained as
9 experts, but questions may not be asked about documents that
10 they have been shown during preparation that they did not send
11 or receive;

12 Five, if the witnesses are later designated as
13 testifying experts, they may be re-deposed after reports are
14 completed, but absent some other agreement by the parties,
15 plaintiff will be required to compensate the witnesses in
16 connection with their expert deposition. If a witness is only
17 designated as a consulting expert witness, no opinion testimony
18 can be sought at a later deposition excepting the exceptional
19 circumstances they may be permitted by the rules.

20 That order will be entered, and it will be so
21 ordered. So that's the disposition of -- with respect to this
22 dispute.

23 What I'm hopeful is that you will work out -- it
24 seems to me, frankly, excessive that you want to take the
25 depositions of 12 witnesses. It also seems -- I am highly



1 doubtful that you're actually going to call 12 witnesses as
2 experts, and you ought to try and narrow this group down now.
3 If they're percipient witnesses, yes, they can be deposed about
4 those facts. I'm not going to allow the plaintiff to use this
5 as a back door to gain an advantage that it wouldn't be
6 entitled to receive until expert discovery, but Mr. Binder, if
7 you're going to depose them twice, you're going to pay for that
8 second time.

9 So that's going to be the Court's ruling. I'll
10 prepare a written order that essentially reflects what I've
11 just stated on the record. Okay. We're adjourned.

12 MR. BINDER: Thank you, Your Honor.

13 MR. WILSON: Thank you, Your Honor.

14 (Proceedings concluded at 2:24 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: August 30, 2016
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C E R T I F I C A T I O N

I, Lisa Luciano, 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.

Lisa Luciano

LISA LUCIANO, AAERT NO. 327 DATE: August 31, 2016
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