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By Email and Hand Delivery

The Honorable Martin Glenn  
United States Bankruptcy Court  
Southern District of New York  
One Bowling Green, Courtroom 523  
New York, New York 10004

Re: Motors Liquidation Company Avoidance Action Trust v. JPMorgan Chase Bank,  
N.A., Case No. 09-00504 (MG)

Dear Judge Glenn:

We represent plaintiff Motors Liquidation Company Avoidance Action Trust in the above-referenced adversary proceeding and write to request that the Court compel Defendants to provide individual expert reports that comply with Rule 26(a)(2)(B) of the Federal Rules of Civil Procedure for each of the former GM employees identified as a testifying expert in the “Expert Report of John Buttermore, Daniel Deeds, Max Miller, Eric Stevens, John Thomas and Steve Topping” (the “**Joint Report**”).<sup>1</sup> The Joint Report offers opinions about whether certain assets are fixtures or not, but it does not set out the area of each individual’s expertise, the nature of each individual’s opinion, and the basis and reason for each opinion. *See generally Great White Bear, LLC v. Mervyns, LLC*, No. 06 Civ. 13358 (RMB) (FM), 2008 WL 2220662, at \*2 (S.D.N.Y. May 27, 2008) (citing Fed. R. Civ. P. 26(a)(2)(B) advisory committee note). Thus, the issue is not one of technical non-compliance but a failure to satisfy the fundamental requirement of Rule 26(a)(2)(B)(i) that an expert report contain “a complete statement of all opinions the witness will express and the basis and reasons for them.”<sup>2</sup> (A copy of the Joint Report, which has been marked Confidential pursuant to the Amended Agreed Protective Order (Doc. No. 489), is being provided separately to the Court.)

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<sup>1</sup> In addition to the six former GM employees identified as experts, Defendants have identified five other experts who will testify at trial. Those additional five experts have each provided their own reports and are not the subject of this dispute.

<sup>2</sup> The parties met and conferred on December 5 and 6, 2016, but were unable to resolve this dispute. After the Court set a time for a hearing, Defendants offered to “split the report” into six separate reports. It is apparent from our conversations with Defendants during the meet and confer process that Defendants think they can comply with Rule 26 by dividing the Joint Report into six separate reports without changing the analysis. We do not believe this proposal resolves the parties’ dispute.



Though the Joint Report identifies six testifying experts, it is framed and structured as the combined expertise and analysis of eleven former GM employees. It states that the opinions are based on the “collective experience” of six former GM employees who will be testifying, Joint Report ¶ 1, assisted by “five additional former GM engineers, plant managers, and executives,” *id.* ¶ 8 n.2, and it refers to all opinions in the plural without qualification, *id.* ¶ 25 (“In every case, we have applied *our* 150+ years of cumulative experience with auto-manufacturing equipment to reach *our* opinion.”) (emphasis added). Exhibit 1 to the Joint Report sets out the process used by the former GM employees to reach their conclusions:

In order to complete the analysis of all of the representative assets located in [the Defiance, Warren and Lansing Delta Township plants], we assembled a diverse and multi-faceted group of experts who have experience with the specific assets in dispute or similar assets from their time at GM and in the automotive industry. Our fixture classification analysis team for [each plant] has functional experience with the operation, installation, or maintenance of the representative assets or similar assets, as well as senior level management experience at General Motors with experience in setting long term corporate strategy, managing divisions, and assessing the planned use and return on manufacturing assets like those at [each plant]. *Based on a combination of their experience and training, site visits, their review of site-visit photographs, and GM’s document productions they were able to conduct the attachment, adaption and intent analysis for [each plant’s] representative assets.*

Joint Report, Exhibit 1 (Fixture Factor Analysis) at 9, 50, 118 (emphasis added); *see also* Joint Report ¶ 32 (setting out a sub-team for each asset). Defendants have advised us that each testifying expert has not relied on the opinion of any other expert, but this representation is at odds with the express language and structure of the Joint Report and the process described in it. Further, even with such representation, the group nature of the Joint Report makes it impossible to assess each individual’s qualification to offer an opinion and the basis or reason for such opinion. Every aspect of the Joint Report suffers from the failure to provide this basic information, from discussions of each and every asset to unsubstantiated assertions about GM that are essential to the ultimate opinions.

Because the process described in the Joint Report is one in which a team of experts pooled their factual knowledge from their time at GM and reached a conclusion based on their combined experience, the Joint Report nowhere provides the basis for each expert’s opinion, including the expert’s relevant expertise, how this expertise was brought to bear on the issue at hand, and the nature of any reliance on the opinions of or facts supplied by others.<sup>3</sup> In fact, the entire section setting forth the basis of the former GM employees’ opinions is as follows:

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<sup>3</sup> At this stage, Plaintiff is not challenging any asserted expertise, although we reserve the right to do so as part of a motion in limine. We also note that much of the report appears to be an improper attempt to present hearsay from fact witnesses in the form of expert opinions. We also anticipate addressing this issue in limine.



All opinions set forth in this report are based on our consideration of the materials, facts and data referenced in Exhibits 1 through 4 hereto, as well as our more than 150 years of collective experience designing, approving, purchasing, installing, operating, and maintaining asset systems at GM and other auto manufacturing companies.

Joint Report ¶ 13.

The failure to provide the required information is apparent in comparing the analysis of each asset with the background of each testifying expert. For instance, Eric Stevens is identified as the expert who will testify about assets at Lansing Delta Township, such as pits & trenches, robots, and conveyors. Joint Report ¶ 32. Mr. Stevens was a GM executive who “retired as Vice President – Global Manufacturing Engineering at General Motors after 35 years of experience in multi-plant manufacturing, quality, operations, and engineering leadership assignments around the world.” *Id.* ¶ 6. The Joint Report does not set out the area of Mr. Stevens’ expertise. If Mr. Stevens does have expertise, it should be expressly identified, and the manner in which his particular expertise was applied in each instance should be explained.

Similarly, John Thomas, a former plant manager at GM Powertrain sites, Joint Report ¶ 8, is identified as the testifying witness with respect to the Emissions System #4 Cupola from Defiance, *id.* ¶ 32. The Joint Report does not set out what expertise Mr. Thomas has that would permit him to provide, for example, the opinion that “[t]he flexibility of the system and the regulatory requirements pertaining to the operation of foundries in the US suggest that the asset will be used for the foreseeable future.” *Id.*, Ex. 1 at 40. Further, even if Mr. Thomas had relevant expertise, there is nothing in the Joint Report that reflects an explanation by Mr. Thomas of the basis of and reasons for each of the conclusions concerning this asset.

Although the Joint Report states that only one expert will testify as to each asset, it does not clarify which expert will testify to general statements made about GM. For example, the Joint Report states that “[o]ur opinions as to the useful lives of the 40 Representative Assets are based on our knowledge and experience that GM carefully maintains assets to keep them in excellent operating condition.” Joint Report ¶ 26. As an initial matter, the statement that “GM carefully maintains assets to keep them in excellent operating condition” is an alleged fact about GM’s maintenance practices, not an expert opinion. If this is a fact on which a testifying expert is going to rely, Plaintiff is entitled to know the basis for the purported fact, including which former GM employee is making the assertion.

Further, based on this alleged fact about GM’s maintenance practices, the Joint Report provides an opinion that the useful life for each and every asset should be adjusted upwards, yet does not specify which expert made the adjustment, what expertise was employed in doing so, how the expertise was applied, and what facts were considered. Joint Report ¶ 25. This information is necessary to permit Plaintiff to test, among other things, whether the former GM employees are really experts; whether they employed acceptable methodologies; whether the information on which each relied is reliable; whether the expert is expressing his own opinion or

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is simply offering “conduit testimony from an expert on a matter outside his field of expertise,” *Faulkner v. Arista Records LLC*, 46 F. Supp. 3d 365, 384 (S.D.N.Y. 2014) (quotations omitted); and whether the Joint Report is little more than an improper recitation of hearsay facts, *Weisfelner v. Blavatnick (In re Lyondell Chem. Co.)*, 558 B.R. 661, 666-67 (Bankr. S.D.N.Y. 2016).

To take another example, the Joint Report states that “in our experience, GM typically designs its new plants around the contemplated manufacturing process.” Joint Report ¶ 40. Again, this is not an expert opinion but a statement of fact, and the Joint Report does not specify the basis for it, including what experience is being referenced from which of the former GM employees. The experience of each former GM employee is very particular, and the nature and application of any expertise is in no way explained. For instance, among the former GM employees who will testify, one had responsibility for “the expansion of GM’s footprint in China, Korea, India, Thailand, Australia, Russia, Uzbekistan, northern Africa, and South Africa,” *id.* ¶ 3 & Exhibit 5 (Expert Resumes); one was an engineer who “spent 39 years at GM Powertrain,” *id.* ¶ 4 & Ex. 5; and another spent the last 17 years of his GM career “as the plant manager of four stamping facilities,” *id.* ¶ 5 & Ex. 5. It is apparent from the highly varied employment experience of each expert that at minimum the basis of and reason for each purported expert’s opinion must be different. *See, e.g.*, Joint Report ¶ 25 (“[I]n our experience, a robot installed in a high-heat area of a foundry plant . . . may have a shorter useful life”), ¶ 48 (“In our experience, during new product programs, no expenditures were typically budgeted for new stamping equipment, new paint shop equipment, new milling equipment, or new conveyor equipment”).

As these examples illustrate, and as is apparent from the express statements in the Joint Report, the Joint Report is a collective effort that combines the various views of the eleven former GM employees. The Joint Report does not provide the reasons for or basis of any individual expert’s opinion. Defendants should be compelled to provide reports for their proposed experts that comply with the Federal Rules.

We thank the Court for considering this request.

Respectfully,

/s/Eric B. Fisher

Eric B. Fisher

cc: Counsel of Record (by email *via* MasterServiceList@TermLoanAvoidanceAction.com)