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December 9, 2016

By Hand and ECF

The Honorable Martin Glenn
United States Bankruptcy Court, Southern District of New York
One Bowling Green
New York, NY 10004-1408

Re: *Motors Liquidation Company Avoidance Action Trust v. JPMorgan Chase Bank, N.A., et al.*, Adv. Pro. No. 09-00504 (MG)

Dear Judge Glenn:

We are co-counsel with Kelley Drye & Warren LLP to defendant JPMorgan Chase Bank, N.A. We respectfully submit this letter on behalf of JPMorgan and the Defendants' Steering Committee in response to plaintiff's December 8, 2016 letter (Dkt. No. 809) ("Plaintiff's Letter"), which requests that defendants make changes to the November 23, 2016 "Expert Report of John Buttermore, Daniel Deeds, Max Miller, Eric Stevens, John Thomas and Steve Topping" (the "Fixture Report" or the "Report").

Plaintiff's application should be rejected out of hand. Although defendants continue to believe that the Fixture Report as originally prepared complies with the Federal Rules, on Wednesday, *defendants agreed to provide plaintiff exactly what plaintiff had requested* — a separate expert report from each of Messrs. Buttermore, Deeds, Miller, Stevens, Thomas and Topping. Each report will set forth each expert's qualifications, all the opinions that expert will express, and the basis for that expert's opinions. Plaintiff acknowledges defendants' agreement in footnote 2 of its letter, but asserts that it "do[es] not believe this proposal resolves

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the parties' dispute." However, plaintiff has never explained why agreeing to do exactly what it has asked does not moot its application.

Defendants agreed to give plaintiff six reports covering the same matter as one because this dispute was always one in which plaintiff was seeking to exalt form over substance: the original Fixture Report provided plaintiff with everything it needs and is entitled to under the Federal Rules and more. The Fixture Report assigned each of the 40 Representative Assets to one testifying expert, and disclosed, asset-by-asset, the opinions that Messrs. Deeds, Miller, Stevens, Thomas and Topping have each reached as to whether the 40 Representative Assets meet each factor of the applicable fixture test (attachment, adaptation and intent). Fixture Report at ¶ 23. The Report then provides in exhaustive asset-by-asset detail the basis for each expert's opinions. *Id.* at Ex. 1.¹

The qualifications of Messrs. Deeds, Miller, Stevens, Thomas and Topping are disclosed at the outset of the Report (*id.* at ¶¶ 3-8), and each expert's resume accompanies the Report (*id.* at Ex. 5). Each expert has decades of experience at General Motors that involved, in the case of every expert, working closely and repeatedly over many years with GM manufacturing equipment similar or identical to some or all of the 40 Representative Assets. And, indeed, plaintiff has already deposed each of these experts in the fact phase of discovery. Thus, plaintiff has far, far more insight into the opinions, expertise, backgrounds and factual knowledge of each witness than would normally be the case.

The majority of Plaintiff's Letter is not devoted to plaintiff's stated concerns about the unified Fixture Report, or imagined concerns about the separate reports that it has not yet even seen, but instead represents a premature challenge to the qualifications of defendants' experts and sufficiency of their testimony. These are issues that plaintiff never raised in any of our meet and confers, and are devoid of any merit, particularly given the history of this case.

As to expertise, for example, plaintiff questions how Eric Stevens can testify as to the attributes of pits and trenches, robots, and conveyors at Lansing Delta Township, given that he "was a GM executive who 'retired as Vice President – Global Manufacturing Engineering.'" Plaintiff's Letter at 3. But it is difficult to see how anyone could be *more* qualified to opine on how GM manufacturing assets are attached to the facility, adapted to use in the facility, and intended to be permanently installed. As disclosed, in that position, Mr. Stevens "oversaw the design, installation, and major upgrades of all manufacturing assets at General Motors worldwide." *Id.* Prior to being promoted to that executive role, over his long career at GM, Mr. Stevens served in numerous other roles that also brought him into direct contact with manufacturing equipment similar to the eleven Lansing Delta Township assembly assets he will be testifying on, from Executive Director of GM International Operations with responsibility for the start-up of assembly facilities worldwide, to plant manager of GM's largest assembly

¹ We are delivering separately a copy of the Fixture Report, which has been marked as Confidential pursuant to the Amended Agreed Protective Order (Dkt. No. 489), due to the extensive analysis therein of materials marked as Confidential by third parties to this action. We also expect to deliver to the Court the first of the separate reports defendants have agreed to provide in advance of Monday's conference.

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complex in the world. Fixture Report Ex. 5. And plaintiff already knows the most granular details regarding Mr. Stevens' background and qualifications, having deposed him for nearly seven hours on October 4, 2016.²

Plaintiff also challenges our experts' reliance on their personal factual knowledge. Plaintiff's Letter at 3-4. The claim is disingenuous at best. As the Court will recall, plaintiff used the fact that our experts have extraordinarily in-depth knowledge as the basis for its successful application to be permitted to have "two-bites-at-the-apple" and depose all of our experts as fact witnesses, in advance of the deadline for initial expert reports. *See* August 19, 2016 Letter from Eric Fisher to Judge Glenn (Dkt. No. 709) ("For instance, suppose Defendants' expert relies on the statement of a GM Employee Witness that a particular Representative Asset was installed with the intention to be made permanent based on conversations within GM at the time the asset was installed."). Especially in light of this history, there is no basis for plaintiff's complaint that it is somehow prejudiced by our "hybrid" expert witnesses relying on their extensive factual knowledge. *Id.*

And it is not the case, as plaintiff suggests, that the Fixture Report is "little more than an improper recitation of hearsay facts." Plaintiff's Letter at 4. To the contrary, defendants' experts' analysis is based on the experts' application of their extensive expertise and knowledge to information collected during plant inspections, photographs taken during the plant inspections, documents produced by New GM, and public information — all of which is expressly cited in the Fixture Report, and which plaintiff's expert, David Goesling, also references and relies upon in his report. The fact is that any one of defendants' experts has a far greater basis for assisting the Court in deciding the issues in this case than plaintiff's expert, a "jack-of-all-trades" appraiser who has never designed, installed, operated or managed an auto manufacturing facility.

While defendants' experts at times do rely on their own and each other's personal factual knowledge, that is permitted under the Federal Rule of Evidence. *See* FRE 703 ("An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed."). And, indeed, plaintiff's expert, Mr. Goesling, likewise notes at the outset of his report that he "consulted with" two other experts at his firm, particularly with respect to "all assets [during the plant inspections that Mr. Goesling] did not personally observe." Goesling Report at 20 n.23.³ This is standard when a team of experts works together in a complex case.

² *See Faulkner v. Arista Records LLC*, 46 F. Supp. 3d 365, 384 (S.D.N.Y. 2014) (cited Plaintiff's Letter at p. 4) ("Courts within the Second Circuit have liberally construed expert qualification requirements. A witness's qualifications can only be determined by comparing the area in which the witness has superior knowledge, skill, experience or education with the subject matter of the witness's testimony"); *General Electric Capital Corp. v. Nichols*, 2011 WL 1638048 (D. Conn. 2011) (holding a witness who was not an appraiser nonetheless had "more than sufficient" experience to testify as an expert on the value of concrete pumps given his 16 years of industry background).

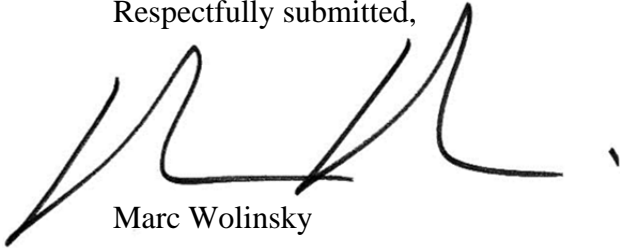
³ We are also delivering separately a copy of Mr. Goesling's report, which plaintiff marked as Confidential pursuant to the Amended Agreed Protective Order (Dkt. No. 489).

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And, again, here plaintiff has already deposed all of the experts who provided personal factual knowledge on their factual knowledge.

We look forward to discussing this issue with the Court on Monday, at which time we expect to informally advise the Court with respect to two issues that we are still attempting to resolve with plaintiff's counsel: (a) their failure so far to produce the analytic work supporting a number of Mr. Goesling's assertions; and (b) their failure so far to commit to provide Mr. Goesling for a multi-day deposition on his fixture analysis.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'M. Wolinsky', with a long horizontal stroke extending to the right.

Marc Wolinsky

cc: Counsel of Record (by ECF and email)