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February 3, 2017

VIA HAND, E-MAIL 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., Case No. 09-00504 (MG) (Bankr. S.D.N.Y.)

Dear Judge Glenn:

We and our co-counsel Kelley Drye & Warren LLP represent JPMorgan Chase Bank, N.A. ("JPMorgan") in the above-captioned adversary proceeding. We write jointly with the other members of the Defendants' Steering Committee (Jones Day, Munger Tolles, Hahn &

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Hessen, Kasowitz Benson, and Davis Polk), to provide the Court with an update on the parties' discussions regarding a protocol for judicial plant visits and apprise the Court of two remaining disputes.

The Defendants' Steering Committee continues to believe that a judicial site visit would immeasurably aid the Court in its resolution of the fixture issue. Our understanding is that the Motors Liquidation Avoidance Action Trust (the "AAT") is not opposed to a visit. Indeed, at his recent deposition, plaintiff's proposed "fixture" expert, David Goesling, agreed that his visit was very useful in developing an understanding of the assets:

Q. Now, in – you have given some fairly detailed testimony about this asset. **Did the visit to the facility enable you to give the kind of detailed testimony and develop the understanding of the asset that you have provided today?**

A. That played a part in it, yes.

Q. Was it useful?

A. **Very useful, yes.**¹

One of defendants' fixture experts, Eric Stevens (GM's former head of global manufacturing engineering), has likewise noted in his expert report that "it is difficult for someone who has not been inside a modern U.S. automotive manufacturing facility to conceive of the sheer immensity, integration, and customization of such a facility." Expert Report of Eric Stevens, Dec. 12, 2016 at 19.

To that end, the parties have developed a protocol for the visits. The protocol envisions a two-day trip, with a flight from New York City to Detroit the morning of day one, a

¹ Deposition of David Goesling, Jan. 24, 2017 at 591:17-25 (emphasis added).

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visit to GM Warren Transmission to view the 11 representative assets there on the afternoon of day one, a visit to GM Lansing Delta Township to view the 21 representative assets there on day two, with a flight from Detroit to New York City the evening of day two. The protocol provides that the parties will agree upon a description of each representative asset and its role in the manufacturing processes, which will be read when the group reaches each representative asset. The parties also agree that the visits will be audio-recorded, with the recording transcribed following the inspection, and that the Court will have the opportunity to ask counsel questions during the plant inspections and instruct a photographer to take any photographs or videos that it requests.

Because the parties have made such substantial progress in designing a protocol for the Court's site visit, only two issues remain: (1) whether the site visit should occur before or after the in-court presentation of evidence; and (2) whether an expert for each party should be present to answer any questions the Court may have.

The defendants believe that the touchstone in setting the protocol should be usefulness to the Court. The site visits represent a unique opportunity for the Court to gain an understanding of the key issues at trial. For the reasons explained below, defendants strongly believe that this goal is best accomplished if the site visit occurs before the in-court presentation of evidence, and if an expert for each side is present to answer any questions the Court may have.

1. Timing of visit. As we stated at the December 20, 2016 conference, we believe that the judicial site visits should take place before the trial. The visits will provide context that will be invaluable when hearing and evaluating the evidence presented in the

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courtroom. Delaying the visits until after trial would deny this benefit to the Court. Delaying the visits until after trial would also raise practical issues, because if the Court is given any erroneous or incomplete information during the visit or questions occur to the Court about the assets or the GM manufacturing processes after the site visit, the parties would have no opportunity to introduce evidence correcting the record or answering the Court's questions.

The AAT believes the judicial site visits should occur after the trial, but in advance of closing arguments, on the ground that the Court will have a better understanding of the assets when it visits the plants. We think this places the cart before the horse, as it will be much easier for the Court to fully understand and engage with the evidence presented in-court if it has observed the assets on site first. Nonetheless, we have addressed the AAT's concern by providing in the proposed Order that the visits would take place after the submission of pretrial briefs and written expert direct testimony on the fixture issue but before the first day of trial. We believe that with the aid of those materials, the Court will have a basic understanding of the assets in question and the parties' respective positions, information that will make the visits extremely productive.

The AAT has also expressed concerns that conducting the visits before trial would interfere with trial preparation. We disagree, as we view the site visits as part of the trial, not a distraction from it. Indeed, we believe the visits will streamline the trial, as the Court will have a much better understanding of the nature of the assets and their role in the manufacturing process before the experts provide their testimony. Based on our experience following the parties' joint plant inspections last year, we are certain that the Court will be in a far better position to

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understand and engage with the evidence presented in-court if it has previously observed the assets in place.

2. Presence of experts. We believe that the fixture experts should attend the site visits and that the Court should have discretion to ask questions of them during the visit as this will make the visits even more informative for the Court. As the AAT's proposed expert Mr. Goesling testified:

Q. Do you believe that a layperson would get a much better understanding of the factory, how it works and how the asset works in the – work together in the factory and how it attached and adapted to the facility by actually seeing it?

...

A. Perhaps and perhaps not. I think that I have the ability to look at specific aspects of the equipment and characteristics of the equipment that a layperson might not recognize as being important in this classification process.

Q. So do you think a layperson, with the benefit of your presence, would get a lot more out a visit than a layperson just walking through by him or herself?

...

A. I think they probably could.²

On this point, Mr. Goesling was right. Denying the Court the ability to ask questions of experts during the site visits will be stilted and frustrating to the Court and will make the visits far less productive and informative than they otherwise could be. The AAT's position that the parties' experts should not attend the inspections and, as a consequence, that the Court should not be permitted to ask questions of them during the inspections, would greatly diminish their value.

² Deposition of David Goesling, Jan. 24, 2017 at 592:12-593:7 (emphasis added).

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Especially with the experts present and available to the Court, the site visits will both give the Court a better understanding of the assets and, just as importantly, their operation in the context of the plants as a whole. We cannot imagine that there is any disagreement on the latter point since, under the case law, the manner in which an asset is used at its location is relevant to two of the three factors the Court will need to assess in determining whether an asset is a fixture: adaptation and intent. *See, e.g., Wayne Cnty v. William G Britton & Virginia M. Britton Trust*, 454 Mich. 608, 618 (1997) (adaptation present where there is “relationship between the chattel and the use which is made of the realty to which the chattel is annexed”); *Michigan National Bank, Lansing v. City of Lansing*, 293 N.W.2d 626, 628 (Mich. Ct. App. 1980), *aff’d*, 322 N.W.2d 173 (Mich. 1982) (finding “intent to permanently affix” in part because “the present use of these buildings is dependent on the presence of these items”).

* * *

In short, there is no real dispute that the Court’s decision on the fixture issue will be aided by having the opportunity to familiarize itself with the assets in person. A proposed Order embodying our proposal is enclosed for the Court’s convenience. We are available for a conference to discuss this matter further.

Respectfully submitted,


Marc Wolinsky

cc: Counsel of Record (by email)

Enclosure

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

In re:

MOTORS LIQUIDATION COMPANY, *et al.*,

Debtors.

**MOTORS LIQUIDATION COMPANY
AVOIDANCE ACTION TRUST**

Plaintiff,

v.

JPMORGAN CHASE BANK, N.A., *et al.*

Defendants.

Chapter 11

Case No. 09-50026 (MG)

Adversary Proceeding

Case No. 09-00504 (MG)

(PROPOSED) PROTOCOL FOR GM SITE VISITS

1. The Court will conduct site visits (the “Site Visits”) of the following General Motors Corporation (“GM”) manufacturing facilities: (a) GM Warren Transmission; and (b) GM Lansing Delta Township (collectively, the “Locations”).

2. The Site Visits will take place following the submission of written direct testimony concerning fixtures but before the start of the April 24, 2017 trial. The Site Visits will take place over a two day period, with the first visit to commence the afternoon of the first day at GM Warren Transmission, and the second visit to commence the morning of the second day at GM Lansing Delta Township. The parties will confer with GM and the Court to establish a mutually agreeable date for the Site Visits.

3. The purpose of the Site Visits is to: (a) familiarize the Court with the physical and functional characteristics of the assets that are the subject of the Representative Asset trial that presently are or formerly were located at the Locations; and (b) generally familiarize the Court with the manufacturing processes conducted by GM at the Locations.

4. The Site Visits will be guided by one or more representatives of GM knowledgeable with respect to the Representative Assets that were or still are located at the Locations and manufacturing conducted at the Locations. The guides will be selected by GM.

5. In the interests of safety and in order to minimize disruption of GM's operations, in addition to the personnel selected by GM, the number of participants in the Site Visits will be limited as follows: (a) the Court plus one Law Clerk or Courtroom Deputy as the Court directs (together, "Court Personnel"); (b) one lawyer representing plaintiff, one lawyer representing JPMorgan Chase Bank, N.A. ("JPMorgan") and one lawyer representing the Defendants' Steering Committee other than JPMorgan; (c) one testifying expert for each of plaintiff and the defendants, it being understood that defendants may designate a single, different testifying expert for different portions of the GM Lansing Delta Township plant; (d) a technician ("Technician") jointly-retained by the parties to handle audio, video, and photographic recording of the plant inspection (collectively, the "Site Visit Group").

6. The testifying experts will be sworn by the Court.

7. During the Site Visits, the GM guides will direct the Site Visit Group to each of the Representative Assets that are still located in the Locations, as well as to the former location of each of the Representative Assets that were located in the Locations but have since been removed. Upon reaching each of the Representative Assets, counsel for one of the parties shall read a brief statement, agreed in advance with the other parties, identifying the asset, providing

its install date and cost, and describing its function. The Court, in its discretion, may ask questions either of counsel or of the testifying experts concerning the Representative Assets and GM's manufacturing operations at the Locations.

8. An audio recording of the portions of the Site Visits consisting of the inspection of the Locations shall be made, with a transcription made by a certified court reporter of the audio recording at the joint expense of the parties. In addition, the Court may direct the photographic or video recording of any feature of the Location. The photographs and audio and video recordings shall be admitted into evidence, according to the terms below.

9. The recording and transcript of the Site Visits, as well as any photographs and video taken during the Site Visits, shall be treated as CONFIDENTIAL under the April 18, 2016 Amended Agreed Protective Order (ECF No. 489). Upon receipt, the parties will provide the recording, transcript and photographs/videos to GM. Unless GM files a motion to seal some or all of the transcript after one week from its receipt thereof, the transcript will cease to be CONFIDENTIAL and the parties will file the transcript of the Site Visits on the Court's electronic docket. The audio and visual recordings (including photographs) from the Site Visits will remain CONFIDENTIAL subject to the terms of the Amended Agreed Protective Order dated April 18, 2016.

10. The parties shall each bear all costs for their respective participants.

11. The travel costs of the Court Personnel shall either be borne by the U.S. Courts or split evenly between the parties, as the Court directs.

12. The parties will split all non-travel related costs associated with the Site Visits, including the costs associated with the Technician.

13. Participants in the GM Warren Transmission Site Visit will meet at Detroit Metropolitan Airport at noon on the first day of the Site Visit. The parties will arrange their participants' own transportation from Detroit Metropolitan Airport to the GM Warren Transmission plant. Court Personnel will travel in a separate car to that plant, to be jointly-arranged by the parties or the Court, as the Court directs.

14. The participants in the GM Lansing Delta Township Site Visit will meet the next morning at the GM Lansing Delta Township visitor center at 7:30 a.m. for a safety briefing, with the visit to follow at 8:00 a.m. The parties will arrange their own transportation to the GM Lansing Delta Township plant. Court Personnel will travel in a separate car, to be jointly-arranged by the parties or the Court, as the Court directs.

15. The parties will arrange their own transportation from GM Lansing Delta Township to Detroit Metropolitan Airport. Court Personnel will travel in a separate car, to be jointly-arranged by the parties or the Court, as the Court directs. The goal will be to conclude the GM Lansing Delta Township Site Visit at a time that will enable the participants to travel back to New York on a flight departing at 6:39 p.m. Further proposed travel details for the Site Visits are included as Addendum A.

16. Casual dress not suited to the courtroom is allowed on the Site Visits. For safety reasons, participants on the Site Visits will follow and abide by all dress requirements specified by GM in advance of the Site Visits.

SO ORDERED:

ADDENDUM A
TRAVEL DETAILS

1. The protocol calls for participants in the GM Warren Transmission Site Visit to arrive at Detroit Metropolitan Airport at noon on the first day of the Site Visit. The parties suggest that the participants in the GM Warren Transmission Site Visit take Delta Flight 955, departing LaGuardia Airport at 9:00 a.m. and arriving at Detroit Metropolitan Airport at 11:14 a.m. on the first day of the Site Visit.

2. The protocol calls for participants in the GM Lansing Delta Township Site Visit to arrive at the GM Lansing Delta Township visitor center at 7:30 a.m. The parties suggest that participants in the GM Lansing Delta Township Site Visit spend the night before at the East Lansing Marriott.

3. The protocol gives the goal of concluding the GM Lansing Delta Township Site Visit at a time that will enable the participants to travel back to New York on a flight departing at 6:39 p.m. The parties suggest that any participants in the GM Lansing Delta Township Site Visit who are traveling to New York book American flight 4642, departing Detroit Metropolitan Airport at 6:39 p.m. and arriving at LaGuardia Airport at 8:30 p.m.