

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

In re:	:	Chapter 11 Case
MOTORS LIQUIDATION COMPANY, <i>et al.</i> ,	:	Case No. 09-50026 (MG)
Debtors.	:	(Jointly Administered)
MOTORS LIQUIDATION COMPANY AVOIDANCE ACTION TRUST, by and through the Wilmington Trust Company, solely in its capacity as Trust Administrator and Trustee,	:	Adversary Proceeding
Plaintiff,	:	Case No. 09-00504 (MG)
vs.	:	
JPMORGAN CHASE BANK, N.A., individually and as Administrative Agent for various lenders party to the Term Loan Agreement described herein, <i>et al.</i> ,	:	
Defendants.	:	

**ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF’S MOTION IN  
LIMINE TO EXCLUDE THE NON-PARTY RULE 30(b)(6) TESTIMONY OF KPMG  
AND DELOITTE**

Before the Court is the Motors Liquidation Company Avoidance Action Trust’s (the “Trust” or “Plaintiff”) motion to exclude either portions or the entirety of the non-party Rule 30(b)(6) witness testimony of Patrick Furey (“Furey”) and Kevin Voigt (“Voigt”) from KPMG, and Richard Starzecki (“Starzecki”) from Deloitte. In support of its motion (the “Motion”), the Trust filed a declaration which included a number of exhibits, including subpoenas, correspondence, and excerpts from depositions. JPMorgan Chase Bank, together with the other defendants (collectively, the “Defendants”), filed a response in opposition (the “Opposition”),

and the Trust subsequently filed a reply (the “Response”). Each of these pleadings was filed under seal.

For the reasons set forth below, the Motion is **GRANTED IN PART AND DENIED IN PART**.

## I. BACKGROUND

### A. General Background<sup>1</sup>

Furey, Voigt, and Starzecki were designated by KPMG and Deloitte to testify on topics set forth in subpoenas from both the Trust and the Defendants, which demanded the production of witnesses to testify on each firm’s “Fresh Start Accounting” work on behalf of GM. For KPMG, these topics included the scope and purpose of KPMG’s engagement in connection with the Fresh Start Valuation of GM’s assets, the principles and assumptions that KPMG used, and the basis and calculation for different aspects of KPMG’s work, including the value of certain tangible and intangible assets, equity, liabilities, goodwill, and estimates of economic and functional obsolescence. (Opposition at 3.) For Deloitte, topics included the purpose, scope, and methods of Deloitte’s Fresh Start Accounting audit, the substance of this audit, and the substance of Deloitte’s audit procedures to verify the outcomes of KPMG’s Fresh Start Accounting. (*Id.* at 3–4.)

Importantly, while the Plaintiff has attached certain deposition excerpts from these witnesses to the Motion, the Court currently does not have the designations from each party for the underlying deposition testimony.

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<sup>1</sup> Background information relating to the commencement of the Fresh Start Accounting process and the genesis of the KPMG Report are not discussed herein. These terms are defined in the Motion, Opposition, and Response.

**B. The Witnesses**

According to the Defendants, Furey was generally able to testify on topics related to KPMG's valuation of tangible assets, including the procedures, bases for, and calculation of "Replacement Cost New" value, physical deterioration, and functional obsolescence, given that Furey himself had actually worked on aspects of the Fresh Start Accounting project for KPMG, which led to the KPMG Report. (Opposition at 4.) Additionally, however, in preparation for his deposition, Furey discussed the KPMG Report and other topics more generally with other individuals at KPMG regarding items on which Furey did not have direct personal knowledge.

Voigt, on the other hand, testified on topics related to KPMG's valuation of intangible assets, the scope of KPMG's engagement, and the principles, assumptions and data KPMG utilized in determining the fresh start value, but Voigt himself held no part whatsoever in actually conducting the Fresh Start Accounting analysis for GM or in preparing the KPMG Report. (Motion at 4 (At deposition, Voigt explained that, with respect to the GM fresh-start accounting exercise that KPMG was retained to provide, "[he] had no role in that engagement.")) Voigt did not even consult with any of the individuals that worked on the report, and only reviewed the KPMG Report itself in preparing to testify. (Motion at 5.)

Starzecki, of Deloitte, was the audit partner personally responsible for Deloitte's Fresh Start Accounting audit work, and he oversaw procedures performed as part of Deloitte's audit. (Motion at 6.) He spoke with others at Deloitte in preparation for his deposition, and the Trust maintains that the designations put forward by the Defendants primarily relate to facts on which Starzecki has no direct personal knowledge. (Motion at 6.)

### C. The Parties' Arguments

Through the Motion, the Plaintiff argues that nearly all of the deposition designations for these Rule 30(b)(6) witnesses are inadmissible as hearsay.<sup>2</sup> The crux of the Trust's Motion is that these corporate representatives, particularly Voigt, have no personal knowledge on the details of their deposition testimony, as their knowledge about the specifics involved in conducting the actual analyses for GM came through conversations with other individuals at their respective companies or through the KPMG Report. Plaintiff argues that Defendants seek to improperly introduce testimony about the specific valuation work done by various KPMG employees in the preparation of the KPMG Report through these 30(b)(6) witnesses. Plaintiffs seek to exclude all hearsay testimony given by Furey and Starzecki, and to exclude the testimony of Voigt in its entirety.

The Defendants, on the other hand, argue that the witness testimony here is proper as (1) the testimony is all within the respective "corporation's knowledge," (2) the testimony of these representatives is actually based on personal knowledge (either directly through personal involvement in the Fresh Start Accounting process and in formulating the KPMG Report, or through conversations with other personnel at their respective companies in accumulating "corporate knowledge"), (3) the testimony is not hearsay as it is based on or related to admissible business records (namely, the KPMG Report), and accordingly, (4) at this stage the Trust has failed to meet its burden of establishing that this testimony is "clearly inadmissible on all potential grounds." (Opposition at 4 (citing *U.S. v. Paredes*, 176 F. Supp. 2d 179, 181 (S.D.N.Y. 2001).))

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<sup>2</sup> Again, the Court does not have the deposition testimony designations at this time.

## II. LEGAL STANDARD

Federal Rule of Civil Procedure 30(b)(6) “requires an organization subject to a subpoena to ‘designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf . . . .’” *MF Global Holdings Ltd. v. PricewaterhouseCoopers LLP*, 2017 WL 663565, at \*8 (S.D.N.Y. 2017) (citing FED. R. CIV. P. 30(b)(6)). Under Federal Rule of Evidence 602, however, “[a] witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.” FED. R. EVID. 602. Federal Rule of Civil Procedure 32(a) governs the use of deposition testimony at trial, and under Rule 32(a)(1), deposition testimony may only be introduced if “it would be admissible under the Federal Rules of Evidence if the deponent were present and testifying,” and the use is allowed under the circumstances listed in Rule 32(a)(2) through (8).

## III. DISCUSSION

The Motion covers three different witnesses, but each witness has a different level of personal knowledge regarding the facts underlying their testimonies. Accordingly, each witness will be discussed briefly in turn.

### A. Furey

Furey, who the Defendants maintain will give live testimony at trial, have also designated portions of his deposition testimony in the event that he is unavailable, possesses relevant, personal, and direct knowledge of at least some aspects of the actual preparation of the KPMG Report, which Furey helped create. (Opposition at 11–12.) Furey also managed or oversaw important elements of the report, and could have valuable information relating to his involvement in the process. Additionally, Furey is knowledgeable on the policies and processes that went into the report, along with other more general matters. (Opposition at 13.)

While Furey may have testified as to things he learned through speaking with others at KPMG after the fact and in preparation for his deposition, foreclosing entire portions of his testimony at this juncture would be premature. Indeed, the Court does not have the deposition designations at this time, and preemptively barring testimony at this time is inappropriate. As such, the Motion with respect to Furey is **DENIED**.

**B. Voigt**

Voigt, on the other hand, did not participate in the Fresh Start Accounting process, did not assist in any way in the preparation of the KPMG Report, and did not even discuss the report with anyone at KPMG. Yet, according to the Motion and the exhibits attached thereto, Voigt testified at deposition on topics regarding the KPMG Report, and the assumptions and principles relied on in its preparation. (Motion at 11.) Accordingly, any testimony that he may offer on the KPMG Report itself would not arise from any work he did in contributing to or assisting with, managing, overseeing, or participating in its preparation.

Voigt may have knowledge of KPMG's practices and policies, the Fresh Start Accounting process generally, and the valuation of tangible and intangible assets generally by virtue of his knowledge and experience while at KPMG. However, Voigt has not been designated as an expert in fresh start accounting or valuation, and as such, the Court will not permit his after the fact testimony.

Accordingly, the Court **GRANTS** the Motion with respect to Voigt, and Voigt's deposition testimony will be excluded.

**C. Starzecki**

Starzecki, like Furey, was deeply involved in the Fresh Start Accounting process at KPMG while it was taking place, and was personally involved in Deloitte's audit process. (See

Motion, Exhibit J [Starzecki Deposition Excerpt at 11] (Starzecki explaining that his role with the fresh-start accounting was to “oversee the auditing of the fresh-start accounting and then in that capacity to focus on certain areas within the broad spectrum of work.”)

While Starzecki may have spoken with others at Deloitte in preparation for his deposition, he certainly has first-hand, direct personal knowledge regarding Deloitte’s audit, the Fresh Start Accounting work performed by Deloitte on this engagement, and other relevant aspects of the valuation work in this case. Accordingly, it would be premature to foreclose entire portions of Starzecki’s testimony at this time.

Accordingly, for largely the same reasons discussed with Furey’s testimony, the Motion is **DENIED** with respect to Starzecki’s deposition testimony.

#### **IV. CONCLUSION**

For these reasons, the Motion is **GRANTED IN PART AND DENIED IN PART**. The Court declines to grant the Motion with respect to the deposition designations of Furey and Starzecki at this time. The deposition designations of Voigt are excluded in their entirety.

**IT IS SO ORDERED.**

Dated: April 7, 2017  
New York, New York

*Martin Glenn*  
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MARTIN GLENN  
United States Bankruptcy Judge