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April 25, 2017

By Hand and Email

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., Adv. Pro. No. 09-00504 (MG)*

Dear Judge Glenn:

We represent defendant JPMorgan Chase Bank, N.A. in the above-captioned adversary proceeding and write in response to plaintiff's letter-brief dated April 24, 2017 on the subject of summary exhibits.

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Despite the Court having clearly posed the question upon which it requested letter-briefing — “Let’s talk specifically. . . . Tell me why you don’t believe DDX 5 satisfies the requirements of Rule 1006” (4/24/17 Tr. 126) — plaintiff’s letter-brief never addresses the basis, if any, for its position that Rule 1006 is not satisfied by DDX 5. Indeed, plaintiff’s letter-brief never so much as mentions DDX 5 (or any other exhibit) at all. DDX 5 is admissible under Rule 1006 as a summary of voluminous data; it is also admissible under Rule 703 because it reflects facts or data normally relied upon by an expert in forming an opinion on this subject.

BACKGROUND

DDX 5 was offered by defendants and conditionally admitted by the Court during Mr. Stevens’ testimony concerning his rebuttal of the “movement analysis” performed by plaintiff’s expert, Mr. Goesling, from which Mr. Goesling erroneously inferred that assets regularly moved at GM. The file used by Mr. Goesling to perform this “movement analysis” contains 10,598 rows of data, and Mr. Stevens integrated data an order of magnitude greater in volume before performing an informed analysis resulting in the correct conclusion that assets similar to those at issue very rarely moved at GM.

DDX 5 IS ADMISSIBLE UNDER RULE 1006 AND RULE 703 AS PART OF MR. STEVENS’ EXPERT OPINION

There is no doubt that the data underlying Mr. Stevens’ calculations is quite voluminous.¹ There is also no dispute that the underlying documents have been made available.

¹ The principal source for DDX 5 is an excel workbook containing two spreadsheets — one with 10,598 rows of data, and the other with 254,636. *See* DX-344, Stevens Written Direct Testimony Ex. D. As to the spreadsheet with 10,598 rows, in open court on April 25, 2017, Mr. Fisher put the underlying Goesling spreadsheet on the screen and asked Mr. Stevens to focus on

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And plaintiff has raised no issue about the admissibility of the underlying data, nor any question about the accuracy of the summary of the source materials. From this data, DDX 5 sets out one step in Mr. Stevens' multi-part analysis of the movement of assets at GM. It is plainly a summary of voluminous data admissible under Rule 1006. Rule 703 provides a basis for the admission of the chart quite apart from Rule 1006, as the chart contains the sort of facts and data an expert would normally rely upon in performing an analysis of the type Mr. Stevens presented regarding the movement of GM assets.

The fact that DDX 5 also contains Mr. Stevens' expert opinion on the (in)validity of Mr. Goesling's movement analysis does not provide a basis for excluding DDX 5. To the contrary, as the Court recognized in overruling plaintiff's parallel objections to the charts reflecting the other steps in Mr. Stevens' analysis — contained on page 36 (paragraph 88) and page 39 (paragraph 93) of Mr. Stevens' direct testimony — charts of this type are "admi[ssible] as part of [Mr. Stevens'] opinion testimony." 4/24/17 Tr. 133:9-134:1; *id.* at 130:5-131:21. Accordingly, as Judge Weinstein's treatise on federal evidence law makes clear, "[a]n exhibit prepared by an expert as summary evidence is almost never excluded under Rule 1006, since the expert will usually testify that the basis complies with Rule 703." Weinstein & Berger, *Weinstein's Federal Evidence* § 1006[08] (emphasis added).

United States v. DeSimone, 488 F.3d 561 (1st Cir. 2007), in which the court upheld admission of a summary chart prepared by an IRS Agent, is instructive. Citing *United States v. Milkiewicz*, 470 F.3d 390 (1st Cir. 2006) (cited in plaintiff's letter), to consider the

one row. The Court asked Mr. Fisher to submit some sort of excerpt, since it was "not practical for [the Court] to start searching through this giant spreadsheet."

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interrelationship of Rules 1006 and 703, as well as Rule 611(a) governing demonstratives, the First Circuit held that: “The rules are not mutually exclusive and often may be read together in a common sense manner.” *DeSimone*, 488 F.3d at 576. The court found Rule 703 to be “dispositive in validating admission of the chart” at issue “without necessarily discounting the relevance of Rules 1006 and 611(a).” *Id.* The court thus held that the chart, which “listed complicated transactions from many sources,” was properly admitted as “facts or data” underlying the expert’s opinion, “and such material may be presented in the form of a summary chart.” *Id.* at 576-77; *see also United States v. Bray*, 139 F.3d 1104, 1112 (6th Cir. 1998) (cited by plaintiff) (summaries that “are not prepared entirely in compliance with Rule 1006 and yet are more than mere pedagogical devices designed to simplify and clarify other evidence in the case” can also be admitted into evidence if useful to the court).

Plaintiff appears to take the view that DDX 5 is inadmissible because it is merely a “pedagogical device” “used to aid the jury in its understanding of the evidence that has already been admitted.” *United States v. Janati*, 374 F. 3d179, 263 (4th Cir. 2004) (cited in plaintiff’s brief). This is plainly inaccurate. Mr. Stevens’ various charts, including DDX 5, summarize underlying voluminous data to which he has applied his expertise as well as the expert conclusions he drew from his analysis of that data.²

² Although not mentioned in plaintiff’s letter-brief, in arguing his objection to the Court, plaintiff’s counsel asserted that DDX 5 should not be admitted into evidence because it “embodies arguments, positions, expert positions including, for example, how the various parties characterize assets.” 4/24/17 Tr. at 125. For example, plaintiff objects to the use of the term “fixture” as a description of a column on DDX 5 because there is disagreement over which assets are fixtures. But the column says “categorized by [the] defense as fixtures” — so it is accurate and even-handed. In any event, admission of the chart into evidence will not convert defendants’ contentions into fact; the Court well understands that the chart is part of Mr. Stevens’ expert

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Moreover, while there are cases that emphasize a need for neutrality in the terminology used on a summary chart, all of the cases to which plaintiff cites involve juries, where there is obviously a concern about possible confusion and prejudice. *See, e.g., United States v. Milkiewicz*, 470 F.3d at 398. Any such concern is obviously not present in this bench trial. And even for cases tried before juries, plaintiff's insistence that Rule 1006 requires total neutrality of presentation is misplaced. For example, *United States v. Buck*, 324 F.3d 786, 791 (5th Cir. 2003), another authority relied on in plaintiff's letter-brief, states: "Under rule 611 or rule 1006, 'the essential requirement is not that the charts be free from reliance on any assumptions, but rather that these assumptions be supported by evidence in the record.'" As did the criminal defendant in that case, plaintiff here will have "ample opportunity to present evidence" supporting its view of what is and is not a fixture and had "the chance to cross-examine the summary witness." *Id.* at 792.

The law in the Second Circuit is no different. *See, e.g., United States v. Kohlman*, 469 F.2d 247, 252 (2d Cir. 1972) (it was within trial judge's discretion to admit an expert's chart explaining the expert's opinion, including references to American Psychiatric Association classifications). Accordingly, district courts in this Circuit have readily admitted charts prepared by experts. *See, e.g., Nat'l Ass'n. for the Advancement of Colored People v. A.A. Arms, Inc.*, 2003 WL 2004557, at *2 (E.D.N.Y. Apr. 28, 2003) ("Exhibits in the form of charts, summaries, and calculations used during the testimony of [the expert] are admissible, among other grounds, as summaries under Federal Rule of Evidence 1006."); *Gill v. Arab Bank, PLC*, 893 F. Supp. 2d

testimony and the headings it employs are meant to facilitate the communication of the point being made by the chart.

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523, 536 (E.D.N.Y. 2012) (permitting the admission of charts providing summary of analysis by expert witness); *Granite Partners, L.P. v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 2002 WL 826956, at *7 (S.D.N.Y. May 1, 2002) (same).

In sum, defendants believe that DDX 5 is admissible, whether as part of Mr. Stevens' expert testimony under Rule 703, under Rule 1006, or both.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'M. Wolinsky', with a small dot at the end of the line.

Marc Wolinsky