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May 3, 2017

BY HAND AND E-MAIL

The Honorable Martin Glenn
United States Bankruptcy Court
Southern District of New York
One Bowling Green, Courtroom 523
New York, NY 10004-1408

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

Dear Judge Glenn:

We represent defendant JPMorgan Chase Bank, N.A. ("JPMorgan") in the above-captioned adversary proceeding. At the Court's direction, we submit this letter, on behalf of JPMorgan and all defendants that have appeared in this adversary proceeding, concerning the admissibility of the title search report of First American Title Insurance Company (the "First American Report") and the Declaration of Penny Bagby (the "Bagby Declaration"), which have been collectively offered into evidence by plaintiff as PX-0217. The First American Report is

unreliable and inadmissible hearsay, and the Bagby Declaration fails to save it from exclusion. Indeed, the Bagby Declaration goes beyond a traditional records certification and offers hearsay descriptions of First American's title plant and search process that too are inadmissible. Accordingly, PX-0217 should not be admitted into evidence.

BACKGROUND

The First American Report was initially requested by plaintiff's proposed witness, Robert Mollhagen, in December 2016. PX-0572-0001.[1] Mr. Mollhagen provided the parameters for the search, purchased the report for $350, and proffered it with his report. *See id.*

Defendants moved to exclude Mr. Mollhagen's testimony and the First American Report, arguing that the report is hearsay that expressly disclaims its own reliability and that Mr. Mollhagen lacked expertise in the subjects of his testimony and was merely being offered as a conduit for the inadmissible First American Report. The Court granted defendants' motion in part and excluded Mr. Mollhagen, finding that he improperly "regurgitat[ed]" the First American Report as his own opinion. Order Granting in Part Defendants' Motion in Limine (ECF No. 947) at 2*,* 6-8. The Court's decision, however, did "not reach the hearsay objection" as to the report itself. *Id.* at 8.

In briefing the motion in limine on March 22, plaintiff "reserve[d] its right to seek [the First American Report's] admission as a business record." Plaintiff's Mem. of Law in Opposition to Defendants' Motion in Limine (ECF No. 940) at 14. Plaintiff did not take any action to do so for more than a month, however. Even after the Court's April 7 ruling that Mr. Mollhagen could not sponsor the First American Report, plaintiff did nothing.

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[1] Marked for identification only, and neither offered nor admitted into evidence.

It was not until this trial was well underway — on Sunday afternoon, April 30 — that plaintiff provided defendants with a copy of the Bagby Declaration, which had been executed on April 26, four days earlier. This left defendants with only 24 hours to review the Bagby Declaration before James Marquardt, the witness through whom plaintiff attempted to introduce PX-0217 in evidence, took the stand.

PX-0217 IS UNRELIABLE AND INADMISSIBLE HEARSAY

As set forth in the motion in limine briefing, the First American Report is unreliable and inadmissible hearsay. It states, succinctly and repeatedly, in two different sets of disclaimers on its first page, that it is not to be relied upon. *See* PX-0217-0004 (stating the report is "not to be relied upon as evidence of title" and not represented to be "complete or free from error," among other disclaimers). First American limits its liability for the contents of the report to the $350 purchase price. *Id.* And, on its face, the report fails to describe what records were searched, what parameters were used, or how the search was conducted.

Critically, as Mr. Marquardt explained in his written testimony, the search here was as of a historical date and uncommon for a title company to perform, thus requiring a greater understanding of its details to assure its reliability. *See* Marquardt Direct Testimony (Apr. 7, 2017) at ¶¶ 76-80. At trial, Mr. Marquardt elaborated that "maybe the most important and worrisome part about this search is that it's a historical search," because some "companies that have a database will keep track of liens, and when a lien is subsequently extinguished, they delete – they go back, and in their database the original lien is deleted, as if it never was." Trial Transcript (May 2, 2017) ("Tr.") at 77. As a result, Mr. Marquardt explained, there is a "big risk when one orders a – what I might call a historical search" that "it might not pick up a lien that was in place during the period of time that you're asking to be searched but was terminated later

on in a date outside of your search date." *Id.* Mr. Marquardt could not tell from PX-0217 "whether First American's tract plant does or does not have the same attribute." *Id.*at 78.

With the Bagby Declaration, plaintiff attempts to qualify the First American Report as a business record under Fed. R. Evid. 803(6) and Fed. R. Evid. 902(11).[2] Rule 803(6) provides that a document falls outside the hearsay rule if "(A) the record was made at or near the time by . . . someone with knowledge; (B) the record was kept in the course of a regularly conducted activity of a business . . . [and] (C) making the record was a regular practice of that activity."[3] Rule 902(11) permits a document to be qualified as a business record with the certification of sections A through C of Rule 803(6) by a custodian, but only if "*[b]efore the trial or hearing*, the proponent must give an adverse party *reasonable written notice* of the intent to offer the record — and must make the record and certification available for inspection — so that the party has a *fair opportunity to challenge* them." Fed. R. Evid. 902(11) (emphasis added).

Here, plaintiff could have provided the certification to defendants any time since the First American Report was commissioned in December or when plaintiff raised the issue of admitting the report as a business record admission in its March 22 brief in opposition to defendants' motion in limine, when there still would have been reasonable time for review and a fair opportunity to challenge it. But instead, plaintiff waited until the eve of the second week of the trial, four days after the Bagby Declaration was executed, to deliver it to defendants, leaving defendants with only a day to review it before the testimony of the witness through whom plaintiff sought to introduce the document.

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[2] As First American maintained its own private title plant and its practice was to "search within the title plant," PX-0217-0002 at ¶ 3, the public records exceptions to the hearsay rule do not apply. *See* Fed. R. Evid. 803(8), 803(14) (records must be of or kept in a "public office").

[3] *See also In re Lyondell Chem. Co.*, 2016 WL 6108526, at *3-4 (Bankr. S.D.N.Y. Oct. 19, 2016) (requiring business records to be "integrated into a company's records and relied upon in its day-to-day operations" not "sporadic" or "unique") (internal quotation omitted).

Admission of the First American Report as a business record should also be denied on the basis that plaintiff cannot satisfy Rule 803(6)(E), which requires that "the opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness." Fed. R. Evid. 803(6)(E). Defendants oppose the admission of this hearsay report on the basis that "the source of information" and "the method or circumstances of preparation indicate a lack of trustworthiness." *Id.* As noted, the First American Report is heavily disclaimed, worth no more than the $350 that was paid for it because of its limitation of liability provisions, and utterly lacking the critical details necessary to understand the search processes that led to the results it lists. *See* Marquardt Direct Testimony (Apr. 7, 2017) at ¶¶ 72-85.[4]

Plaintiff's attempt to fill the holes in the First American Report with the belated Bagby Declaration raises more questions than it answers. While the Bagby Declaration briefly describes First American's "general practice" for producing title searches, it contains no details whatsoever on how this particular search was conducted. As Mr. Marquardt testified, the declaration says a "general name search" was conducted, but it does not provide the name that was searched; it says that First American's title plant was searched, but it does not explain what "data" is in that title plant or how it is "updated"; and — especially significant in this context — the Bagby Declaration does not clarify whether a subsequent discharge of a lien would cause the underlying lien to be reported in a search commissioned years after the event. *See* Tr. at 77-81; PX-0217-0002 at ¶¶ 3-4. Admission of the First American Report as a business record would

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4 *See also FDIC* v. *Inmuebles Metropolitanos, Inc.*, 32 F. Supp. 2d 485, 489 (D.P.R. 1998) (holding title search report was inadmissible hearsay and disclaimer therein demonstrated lack of "trustworthiness"); *In re Stancil*, 2013 WL 1742726, at *2 (Bankr. D.D.C. Apr. 22, 2013) (finding title report "inadmissible as hearsay").

deprive defendants of the ability to cross-examine the maker of the report as to these matters, which are critical to the reliability of the report's findings.

Moreover, the Bagby Declaration itself is hearsay and should be excluded on that basis, leaving the First American Report devoid of foundation for its admissibility. Although purporting to be a certification of the First American Report as a business record, the Bagby Declaration goes well beyond that task in commenting on the First American title plant and general searching practices. *See* PX-0217-0002 at ¶¶ 3-4. No exception to the hearsay rule applies to such out-of-court statements, and without them there is no foundation in the record as to what index First American searched, how it conducted the search, how it addressed the historical nature of the search, what the inputs to the search were or how those inputs may have limited the results obtained. Like the First American Report itself, admission of the Bagby Declaration would prejudice defendants by precluding meaningful cross-examination as to important facts that go directly to the reliability (or lack thereof) of the First American results.

In sum, PX-0217 should not be admitted into evidence, as neither the First American Report nor the Bagby Declaration is admissible. Neither of these documents possesses the hallmarks of reliability demanded for out-of-court statements to be exempted from exclusion as hearsay. To the contrary, both present unverified — and because of the unduly short notice, unverifiable — assertions as to title that defendants cannot fairly challenge. While plaintiff was afforded the opportunity to use PX-0217 as a subject for cross-examination, it cannot and should not be admitted into evidence.

Respectfully submitted,

S. Christopher Szczerban

cc: All counsel of record