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September 7, 2018

By Hand, ECF, 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.*, Case No. 09-00504 (MG)

Dear Judge Glenn:

I write on behalf of JPMorgan Chase Bank, N.A., with the concurrence of the Defendants' Steering Committee. Per the Court's instructions at the August 9, 2018 pre-motion conference, the parties have engaged in extensive negotiations as to an expedited schedule for

ongoing proceedings in this action that the parties believe will allow this matter to be finally resolved by the end of next summer. A copy of that proposed schedule has been filed separately at Docket Number 1075 (the "Proposed Scheduling Stipulation").

While the parties have been able to reach agreement on nearly all elements of the Proposed Scheduling Stipulation, there are four remaining disputes shown on the schedule, along with proposals from both sides. As to each, we believe that the Court should adopt defendants' proposal for the reasons below.

A. Selection of Additional Representative Assets

One goal of the Proposed Scheduling Stipulation is to expedite an initial trial on key disputes so that, with the Court's additional guidance, the parties will be better able to consensually resolve the remaining disputes and avoid the necessity of a final trial. In order to realize that goal, the parties agree that the Court should decide whether a small number of additional, disputed representative assets are fixtures. The parties, however, disagree as to how those assets should be selected.

Defendants' proposal is that the parties should work together to select seven additional representative assets from among the disputed assets immediately, and that the parties should reserve the right to seek the Court's permission to identify a small number of additional representative assets after the parties conclude their scheduled mediation sessions in mid-October 2018. Currently, the most significant fixture classification disputes dividing the parties are:

(a) Whether approximately 12,000 disputed assets worth over $270 million are fixtures or non-fixture "real property." These include power systems inside GM's plants, air handling units and other HVAC components, fire protection systems, lighting systems, dock

systems, chilled water systems, heating systems, and other similar assets. Based on the Court's ruling with respect to the CUC and the Paint Circulation Electrical System (Representative Asset No. 5), defendants believe that the Court has already held that most if not all of the assets of this type are fixtures. And in its pretrial brief, plaintiff argued that the portions of the CUC that benefitted the building (as opposed to manufacturing processes) are fixtures.[1] Notwithstanding its pretrial position and the Court's rulings on the CUC and Paint Circulation Electrical System, plaintiff now asserts that the portions of the CUC that benefit the building and thousands of other similar assets of this type are not fixtures because they are ordinary building materials.

(b) Whether approximately 4,500 assets worth over $80 million that GM categorized on its fixed asset ledger as "CAP MAINT/REPAIR" are fixtures. In general, these assets represent upgrades to fixtures that added significant value to the underlying asset, were capitalized by GM as fixed assets per GM's accounting policies, and were valued by KPMG as part of its fresh start accounting project like all other fixed assets. Nonetheless, plaintiff asserts that these assets are "intangible" assets.

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[1] *See* Plaintiff's Pretrial Br. 91 ("The remaining components of [the CUC] consist of both fixtures and non-fixtures, depending on whether the particular assets benefit any productive use of the building for any hypothetical purpose, or are specific to GM's manufacturing processes. *See, e.g.*, *Perez Bar & Grill* v. *Schneider*, No. 11CA010076, 2012 WL 6105324, at *8 (Ohio Ct. App. Dec. 10, 2012) (finding that a large air conditioning unit on the roof that was attached to the HVAC system and benefited the entire building was a fixture); *See G&L Investments*, 1998 WL 553213 (finding that a heating system, although specifically selected for the needs of the business, was a fixture as any subsequent buyer would have been able to utilize the heating system); *Atlantic Die Casting Co.* v. *Whiting Tubular Products, Inc.*, 337 Mich. 414 (1953) (finding that even if portions of heating equipment was removable, one inspecting the property would assume that all of the heating equipment were equally necessary to heating the building and maintained for use of the building) (citing *Nadolski* v. *Peters*, 332 Mich. 182, 185 (1952)).").

(c) Whether approximately 7,500 robot controllers worth over $12 million are fixtures or non-fixture "portable" assets. As the Court may recall, two robot controllers were included among the representative assets at trial — they were components of the Core Box Robot (Asset No. 39) at GM Defiance Foundry and the Fanuc Gantry Robot (Asset No. 22) at GM Warren Transmission. The Court ruled that these assets were fixtures, including their robot controller components. Decision at 362-64, 405-06. Plaintiff nonetheless now claims that robot controllers identical to the ones that the Court ruled are fixtures, apparently solely because GM happened to capitalize these particular controllers separately from the highly integrated robots they control. But that accounting decision does not alter the fact that these robot controllers are identical to the ones ruled to be fixtures at trial, were likewise installed at the same time as the robots they control, and remain in place working together with the robots they control — just like the integrated representative robot systems at trial.

Given the relative amounts in dispute, defendants believe the parties should select four additional representative assets from the disputed "real property" bucket, two additional representative assets from the disputed "CAP MAINT/REPAIR" bucket, and one robot controller. Plaintiff, on the other hand, proposes that the parties select six representative assets solely from the "real property" bucket. Defendants believe that plaintiff's proposal will be less effective in providing the guidance the parties need to resolve this case consensually.

First, defendants believe that four representative assets chosen from the "real property" bucket — a power system asset, an air handling system asset, a fire protection system asset, and

a mechanical system asset like a chilled water system — should provide sufficient guidance on the dispute over whether these systems are fixtures or ordinary building materials.

Second, plaintiff has refused to include representative assets from the $80 million category of assets that GM categorized as "CAP MAINT/REPAIR" in the eFast ledger. Again, given the goal of obtaining rulings from the Court that will assist the parties in consensually resolving this action, it is important that we obtain the Court's ruling on this significant dispute as well. We expect plaintiff's position to be that this issue should be deferred until after there has been a mediation of this issue. We believe, however, that the issue should be teed up for litigation now. If the mediation is successful, it can be taken off the table. But if not, the issue should proceed to trial.

Finally, plaintiff has refused to include a representative robot controller. The Court already decided that robot controllers were fixtures, and resolving this $12 million dispute should be straightforward.

For all these reasons, we request that the Court adopt defendants' proposal, which can be found on pages 4-5 of the Proposed Scheduling Stipulation

B. Schedule for Motions on Defendants' Constructive Trust and Earmarking Defenses

The parties have agreed on both an expedited fact discovery schedule for defendants' constructive trust and earmarking defenses, as well as an expedited briefing schedule that will have summary judgment motions on these two defenses teed up for the Court by the end of this year. Plaintiff, however, has (i) refused to agree to a schedule for expert discovery in advance of the motions, and (ii) refused to concede that defendants have the right to cross-move for

summary judgment on these two defenses if, after additional discovery, defendants conclude summary judgment is appropriate.

With regard to expert discovery, defendants have not yet determined that they will submit expert testimony on either of these two defenses. However, defendants believe that the summary judgment process will be most useful to the parties and the Court if it is decided on a complete evidentiary record, so that the Court can determine whether there are disputed issues of fact that preclude summary judgment and require a trial. Defendants reserve the right to submit expert affidavits with their summary judgment papers in accordance with FRCP 56, whether or not expert discovery is provided for in the schedule. However, defendants want to avoid any objection from plaintiff that such expert testimony should not be considered because plaintiff has not had the opportunity to test it, take defendants' expert(s)' deposition(s), or submit competing expert testimony. For that reason, we have provided for expedited expert discovery that will not impact the proposed briefing schedule for these defenses, and believe that both the parties and the Court will benefit from having expert discovery (if any) fully completed in advance of briefing and deciding the motions.

With regard to defendants' right to file cross-motions for summary judgment, defendants explained in their August 7, 2018 letter (Dkt. No. 1067) that, in their view, immediate summary judgment motions on defendants' constructive trust and earmarking defenses were premature. *Id.* at 3. Discovery on these defenses had been stayed and "essential discovery remains outstanding." *Id.* at 4. Once the Court authorized discovery to resume on these issues, on August 16, 2018, we issued a subpoena to New GM for documents and to Mr. Adil Mistry for a deposition. Once discovery is complete, defendants will be in a position to determine if they also

believe that they are entitled to summary judgment on these two defenses. If so, defendants will move for summary judgment as permitted by FRCP 56. If defendants conclude that the defenses need to be resolved through trial, defendants will oppose plaintiff's summary judgment motion. Our proposed schedule simply preserves our rights on this point and has no impact on the agreed upon briefing schedule.

We request that the Court adopt defendants' proposed language on this dispute, which can be found on pages 7-8 of the Proposed Scheduling Stipulation.

C. Defendants' Proposed KPMG OLV Motion

At the 2017 representative assets trial, the Court decided that for assets left with Old GM, the "Orderly Liquidation Value in Exchange ("OLVIE")" methodology proposed by the AAT's expert, David Goesling, "is the appropriate valuation method for the assets that were not part of the 363 sale" to New GM. Decision at 449-450. In accordance with the Court's decision, defendants have been working with their experts to apply Mr. Goesling's OLVIE methodology to the assets left with Old GM in an efficient, yet rigorous fashion. Defendants intend to present that analysis at the initial trial provided for in the Proposed Scheduling Stipulation.

Notwithstanding this Court's adoption of Mr. Goesling's OLVIE methodology that plaintiff itself advocated, plaintiff is nonetheless reserving to itself the right to argue that liquidation values KPMG calculated as part of an engagement with Motors Liquidation Company for certain of the assets left with Old GM (the "KPMG OLVs") should be used instead. In order to decide whether to make that argument, plaintiff has issued a document subpoena to KPMG to determine the basis for its liquidation value estimates and also subpoenaed the deposition of a KPMG witness on the subject.

The term lenders' position is that, following that discovery, the term lenders should be permitted to file a summary judgment motion to establish that KPMG's valuation methodology is inconsistent with Mr. Goesling's OLVIE methodology and that plaintiff is therefore barred under the doctrine of equitable estoppel from advancing a new (and, of course, significantly lower) valuation methodology. This doctrine is particularly applicable in the context of this case, where at the conclusion of trial, the Court asked the parties to supply it with a chart showing all of the valuation options, regardless of whether any party had advocated for them during trial. Trial Tr. 3541:17-23. Yet even then, the AAT did not include KPMG's liquidation value estimates on the chart.

Defendants continue to believe that, after plaintiff has had an opportunity to take this discovery, but before the parties spend significant time and effort preparing for trial on how Mr. Goesling's OLVIE methodology should be applied to the approximately 40,000 assets left with Old GM, the Court should decide on motion whether plaintiff is precluded from relying on KPMG liquidation values at all. Plaintiff's position is that this issue should not be resolved until trial.

If the Court waits to make this determination at trial or on the eve of trial, the parties and their experts will inevitably have to waste time and effort assessing how KPMG's methodology should be applied to the remaining approximately 40,000 Old GM assets. But that, of course, was the very purpose of the representative assets trial: to establish guiding principles that can then be applied to the remaining assets. Having prevailed, plaintiff should not be permitted to force the term lenders to re-litigate the issue of what valuation methodology should apply by contending at a second trial that the far lower values generated by KPMG's methodology should

apply. That discrete issue can and should instead be resolved by motion, early in the schedule, so that the parties can focus on the real issues that need to be revolved at trial.

Again, defendants request that the Court adopt their proposed language on this dispute, which can be found on page 8 of the Proposed Scheduling Stipulation. Defendants' proposal would tee up defendants' KPMG OLV motion for decision by the Court in late November 2018.

D. Schedule for Initial Discovery and Trial Issues

Defendants propose a schedule that would permit a trial on the Initial Discovery and Trial Issues in March 2019. Plaintiff proposes a schedule that would permit a trial in April 2019. We acknowledge that this is only a one-month difference. Nonetheless, we believe that plaintiff's proposed schedule would not permit this case to be finally resolved by the end of Summer 2019. Both our schedule and the plaintiff's schedule provide for a brief window, after the Court issues its decision following the initial trial, for the parties to attempt to narrow the issues further and then, if necessary, proceed to a final trial. Defendants' proposed schedule would allow this final trial to be held and the Court to issue a decision by the end of Summer 2019. The schedule proposed by plaintiff would not.

The two options can be found on page 9 of the Proposed Scheduling Stipulation.

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We request that the Court enter the Proposed Scheduling Stipulation, adopting defendants' proposals on the outstanding disputes. We are available to discuss the disputes, or any other questions the Court may have as to the Proposed Scheduling Stipulation.

Respectfully submitted,

Marc Wolinsky

CC: Counsel of Record (by ECF and email)