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November 28, 2018

By Hand, ECF, and Email

The Honorable Martin Glenn
United States Bankruptcy Court
Southern District of New York
One Bowling Green
New York, New York 10004

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

Dear Judge Glenn:

We are writing in advance of tomorrow's discovery conference regarding deposition subpoenas that plaintiff recently served on six people: three current or former employees of JPMorgan (Donald Benson, Joseph Lillis, and John Shen), two former employees

of Old GM (Rocky Gupta and Teresa Hilado), and one former attorney at Cravath, Swaine & Moore LLP (Jonathan Corsico). The testimony that plaintiff seeks from these six individuals is irrelevant as a matter of law given this Court's prior rulings, and therefore the subpoenas should be quashed.

Background

Plaintiff's position as to why it is seeking these depositions has changed during our discussions. Plaintiff initially informed us that it subpoenaed the depositions of these six individuals because they were heavily involved in the negotiation of the Term Loan, including the negotiation of what collateral would secure the Term Loan. We responded that the Court, as discussed below, previously excluded parol evidence as to the meaning of the Term Loan and Collateral Agreements after finding that the agreements were unambiguous in relevant part, and therefore we questioned the relevance of these depositions.

Plaintiff then instead stated as follows:

> Evidence from these witnesses is likely to support our position that, contrary to Defendants' contention, CWIP, land and buildings, and Fairfax assets were not part of the grant of collateral with respect to the Term Loan. We do not seek evidence about the parties' understanding or intent at the time of entering into the Term Loan Agreement (although we reserve our right to ask deposition questions on that topic by way of context and background), but about the course of dealing and course of performance between and among the parties to the Term Loan Agreement and Collateral Agreement.

Email from Eric B. Fisher to C. Lee Wilson (Nov. 19, 2018 at 8:39 AM). We responded by directing plaintiff to well-established New York law, again discussed further below, that course of dealing and course of performance are irrelevant when a contract is unambiguous.

Plaintiff then changed its position yet again, taking the position that it is "unambiguous" that "the Term Loan Agreement and Collateral Agreement grant collateral only

in Machinery & Equipment and Special Tooling . . . [and *not* in] fixtures that GM did not classify as M&E and Special Tooling." Email from Eric B. Fisher to C. Lee Wilson (Nov. 26, 2018 at 10:12 AM). Despite its position that the agreements are "unambiguous on this point," plaintiff says it is seeking the six depositions at issue here in case "the Court find[s] that the agreements are ambiguous" on this point, so that it can "introduce extrinsic evidence, including but not limited to course of dealing and course of performance evidence." *Id.* We responded that plaintiff's position misconstrues both the Collateral Agreement and the Court's prior order, and reached out to the Court to schedule a discovery conference.

Discussion

Even with all these shifts in focus, plaintiff's subpoenas inevitably run headlong into the Court's April 7, 2017 Order granting defendants' *in limine* motion as to the interpretation of the Term Loan Collateral Agreement. Dkt. 947 (attached hereto as Ex. A) at 8-9. In that Order, the Court held that parol evidence relating to the term "fixture" in the Term Loan Collateral Agreement was inadmissible, that "any testimony regarding JPMorgan's understanding of what 'fixture[s]' the Term Loan Agreements referred to is irrelevant," and that any "testimony regarding Old GM's understanding of the term 'fixture' *after* [assets] were already installed . . . is also not useful to the Court." *Id.* at 9. The Court explained that the "sections of the Term Loan Agreements at issue [were] not ambiguous" and therefore concluded that any testimony regarding its interpretation was "unwarranted." *Id*. In short, the Court ruled that the Collateral Agreement is clear that it covers "fixtures," a term "clear on [its] face [that] can be defined according to a legal dictionary." *Id.* at 8.

Given the plain language of both the Collateral Agreement and the Court's prior order, there is no basis for plaintiff to resurrect its argument that the Collateral Agreement is ambiguous, let alone to claim that the Collateral Agreement — which defines "Fixture" as "all 'Fixtures' as such term is defined in Section 9-102 of the UCC as in effect on the date of this Agreement" and defines "Collateral" to include "all Fixtures" at U.S. Manufacturing Facilities — unambiguously restricts the Collateral to "fixtures" GM classified as "Machinery & Equipment and Special Tooling."

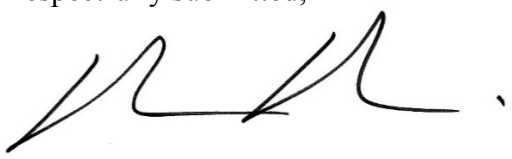
Moreover, in light of the Court's prior ruling that the Collateral Agreement is unambiguous in relevant part, plaintiff's focus on the parties' alleged course of performance and alleged course of dealing is irrelevant as a matter of law. The Collateral Agreement is governed by New York law (JX-0002 at 13), and under well-established New York law, evidence of course of performance and course of dealing is not relevant in cases where the contract at issue is unambiguous. *See, e.g.*, *S. Rd. Assocs., LLC* v. *Int'l Bus. Machs. Corp.*, 4 N.Y.3d 272, 278 (2005) (where the meaning of a contract term "is clear and unambiguous . . . extrinsic evidence such as the conduct of the parties may not be considered"); *Continental Cas. Co.* v. *Rapid-Am. Corp.*, 80 N.Y.2d 640, 651 (1993) ("Evidence of practical construction may only be referenced where the [contract] provisions are ambiguous."); *Tian Long Fashion Co.* v. *Fashion Ave. Sweater Knits, LLC*, 2016 WL 4097801, at *5 (S.D.N.Y. 2016) ("[I]f a contract is not ambiguous the Court may not consider extrinsic evidence, including the parties[']course of dealing.") (citing *Meda AB* v. *3M Co.*, 969 F. Supp. 2d 360, 378 (S.D.N.Y. 2013)); *In re Waterscape Resort LLC*, 2014 WL 1389762, at *11 (Bankr. S.D.N.Y. 2014) ("Where a contract is unambiguous, extrinsic evidence concerning the parties' course of conduct is irrelevant.").

As the New York Court of Appeals has recognized, evidence of course of performance and course of dealing is especially out of place where, as here, an agreement requires any "[a]mendments [to be] in [w]riting" and provides that "[n]one of the terms or provisions of this Agreement may be waived, amended, supplemented or otherwise modified except in a writing signed by all parties hereto . . . ." JX-0002 at 11; *Slatt* v. *Slatt*, N.Y.2d 966, 967 (1985) (examination of the conduct of the parties inappropriate in absence of ambiguity, and particularly so where "the contract provided that modifications required a writing").

Given that the testimony plaintiff seeks from these six depositions is "irrelevant" as a matter of New York law, the depositions are improper under Federal Rule of Civil Procedure 26(b), which limits discovery to "nonprivileged matter that is *relevant* to any party's claim or defense and proportional to the needs of the case." Emphasis added. Courts routinely quash subpoenas that seek testimony that is not relevant. *See, e.g.*, *Sanofi-Synthelabo* v. *Apotex Inc.*, 2009 WL 5247497, at *2-3 (S.D.N.Y. 2009) (granting motion to quash and protective order prohibiting noticed depositions because discovery seeking extrinsic evidence of contract's meaning was irrelevant given court's holding that contract terms were unambiguous); *Kirschner* v. *Klemons*, 2005 WL 1214330, at *2 (S.D.N.Y. 2005) (granting motion to quash, in part, where "[t]here is no indication that calling . . . individuals to testify . . . would add anything relevant"); *Allison* v. *Clos-ette Too, L.L.C.*, 2015 WL 136102, at *9 (S.D.N.Y. 2015) (granting motion to quash testimonial subpoena in part because the party sought "irrelevant information").

We request that the Court quash the six subpoenas at issue here as well, allowing the parties to focus their limited time available for discovery on information that may be relevant at the upcoming trial.

Respectfully submitted,



Marc Wolinsky

CC: Counsel of Record (by ECF and email)

Enclosure

EXHIBIT A

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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

ORDER GRANTING IN PART DEFENDANTS' MOTION IN LIMINE

Before the Court is the *Notice of the Term Lenders' Motion in Limine* (the "Motion," ECF Doc. # 873) which includes the Term Loan Lenders' requests to (i) exclude the testimony and expert report of Robert Mollhagen; (ii) exclude certain "new opinions" from expert David Goesling; and (iii) prevent the Avoidance Trust from presenting parol evidence regarding the meaning of the terms "fixture" and "collateral" in the Term Loan Collateral Agreement and the Term Loan Credit Agreement (together, the "Term Loan Agreements"). A Memorandum in support has been filed under seal (the "Memo"). The Avoidance Trust has filed a Memorandum of Law in opposition (the "Opposition"). The Term Loan Lenders have filed a reply (the "Reply").

For the reasons below, the Motion is **GRANTED IN PART**.

I. BACKGROUND

A. Goesling

The Avoidance Trust offers David Goesling as an expert on both fixture and valuation issues. The Motion seeks to exclude three "new" opinions from Goesling that: (i) "many businesses cannot anticipate what will happen in the future" and so GM must not have intended its assets to be permanently affixed; (ii) because the collateral makes up such a small part of the business enterprise of GM and could not sustain its own business enterprise, going-concern valuation is inappropriate; and (iii) he did not value the Representative Assets using fair market value because it would have taken "a very extended period of time" to sell the assets at fair market value, during which time "holding costs" would cause a seller to "realize less than in an orderly liquidation sale." (Memo at 4 6.) These "new" opinions were articulated by Goesling during his depositions. (*Id.*) The Term Loan Lenders argue that these opinions are outside the scope of Goesling's reports (*id.* at 2), while the Avoidance Trust argues that Goesling merely "elaborate[ed] on views already disclosed in [his] reports." (Opp'n at 4.)

B. Mollhagen

The Motion seeks to exclude the testimony of Robert Mollhagen on two grounds: (i) Mollhagen's report is "hearsay" that "expressly disclaims its [own] reliability," and (ii) Mollhagen is not an expert in this subjects of his testimony. (Memo at 1.) He opines that a potential purchaser of, or lender secured by, the GM Lansing Delta Township plant ("LDT") would not discover the LDT fixture filing at issue here in the official land records kept by the Register of Deeds in Eaton County, Michigan, where the plant is located. (*Id.*) Mollhagen bases this opinion on a title report that he commissioned from First American Title Insurance Company ("First American") at a cost of $350. (*Id.*)

The Plaintiff argues that Mollhagen is qualified to render an opinion on the standard of care of a prospective purchaser or secured lender, and that he has the required experience. (Opp'n at 10.) Mollhagen has taught at the law school level, worked as a real estate attorney, and authored textbooks on Michigan Land Title Standards. (Opp'n at 10–11.) The Defendants claim that his "wide" experience is not relevant, because Mollhagen has never performed title search work on behalf of a title insurance company that the title insurance company then provided to one of its clients; has only done one company's search of a tract index in the late 1970s; and before this case, did not conduct a search of the register of deeds grantor-grantee index. (Memo at 12–13.) Further, he did not know how First American conducted its retrospective title search here (the "First American Title Search") or even what it had searched, and did not follow up to inquire into or assess those details. (*Id.* at 14.)

C. Parol Evidence

The Defendants seek to exclude "parol evidence" offered by two witnesses: Richard Duker of JPMorgan and Ram Burshtine of Weil, Gotshal & Manges. (Memo at 15.) The Avoidance Trust characterizes this evidence not as "parol evidence" regarding the terms of the Term Loan Agreements, but as testimony regarding the contracting parties' "mutual understanding of which kinds of assets were fixtures and which were not." (Opp'n at 16.)

II. LEGAL STANDARD

A. Motions *in Limine*

"The purpose of an in limine motion is to aid the trial process by enabling the Court to rule in advance of trial on the relevance of certain forecasted evidence, as to issues that are definitely set for trial, without lengthy argument at, or interruption of, the trial." *Highland Capital Mgmt., L.P. v. Schneider*, 379 F. Supp. 2d 461, 467 (S.D.N.Y. 2005) (quoting *Palmieri v. Defaria*, 88 F.3d 136, 141 (2d Cir.1996)). "However, evidence should be excluded on a

motion in limine only when the evidence is clearly inadmissible on all potential grounds." *MBIA Ins. Corp. v. Patriarch Partners VIII, LLC*, No. 09 CIV. 3255, 2012 WL 2568972, at *2 (S.D.N.Y. July 3, 2012) (internal quotation marks and citations omitted). Further, the Court may reserve judgment on the motion until the appropriate factual context is developed at trial. *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. L.E. Myers Co. Grp.*, 937 F. Supp. 276, 287 (S.D.N.Y. 1996).

B. Rule 702

Rule 702 of the Federal Rules of Evidence (the "Rules") permits opinion testimony from a "witness who is qualified as an expert by knowledge, skill, experience, training, or education." FED. R. EVID. 702. As the Supreme Court has explained, expert testimony admissible under Rule 702 "rests on a reliable foundation and is relevant to the task at hand." *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 597 (1993). The standard in *Daubert* applies to all expert testimony. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147 (1999). Testimony must be reliable, which requires the Court to perform "a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and whether that reasoning or methodology properly can be applied to the facts in issue." *Daubert*, 509 U.S. at 592–93. In assessing reliability, "the district court should consider the indicia of reliability identified in Rule 702, namely, (1) that the testimony is grounded on sufficient facts or data; (2) that the testimony is the product of reliable principles and methods; and (3) that the witness has applied the principles and methods reliably to the facts of the case." *United States v. Williams*, 506 F.3d 151, 160 (2d Cir. 2007). Testimony must also be relevant, which means it must "assist the trier of fact to understand the evidence or to determine a fact in issue." *Id.* at 591–92. Still, the inquiry is a flexible one and it is not necessary to evaluate every specific factor in every case. *Id.*

The party seeking to admit an expert bears the burden of demonstrating admissibility by a preponderance of the evidence. *See id.* at 160–61; *see also Lippe v. Bairnco Corp.*, 288 B.R. 678, 685 87 (S.D.N.Y. 2003), *aff'd*, 99 F. App'x 274 (2d Cir. 2004).

C. Parol Evidence

Contract interpretation begins with the four corners of the document itself, because "[w]hether a contract is ambiguous is a question of law and extrinsic evidence may not be considered unless the document itself is ambiguous." *S. Rd. Assocs., LLC v. Int'l Bus. Machines Corp.*, 4 N.Y.3d 272, 278 (2005). "A contract is unambiguous if the language it uses has a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion." *Greenfield v. Philles Records, Inc.*, 98 N.Y.2d 562, 569 70 (1st Dep't 2002) (internal quotation marks and citation omitted). "[E]xtrinsic and parol evidence is not admissible to create an ambiguity in a written agreement which is complete and clear and unambiguous upon its face." *Id.* If the written document is meant to be a final and total integration of the parties' agreement, then the parol evidence rule bars introduction of any agreements made before the signing of the document. *Schron v. Troutman Sanders*, 20 N.Y.3d 430, 436 (2013).

III. DISCUSSION

A. Goesling

The Court will reserve decision on the motion to exclude Goesling's "new" opinions until offered at trial, after hearing other direct and cross examination of the witness. *See Nat'l Union Fire Ins. Co.*, 937 F. Supp. at 287.

B. Mullhagen

The Court observes that Mollhagen's expertise is not as bare-boned as that of the expert in *Barban v. Rheem Textile Sys., Inc.*, No. 01-CV-8475 (ILG), 2005 WL 387660, at *3

(E.D.N.Y. Feb. 11, 2005), *aff'd*, 147 F. App'x 222 (2d Cir. 2005). In that case, the plaintiff's expert was a "self-proclaimed engineering consultant," and had zero familiarity with the pressing machines at issue in that case. *Id.* Here, it is clear that Mollhagen has general experience with real estate law, but general experience cannot substitute for the specific expertise required by the Federal Rules of Evidence.

Mollhagen has only claimed experience in real estate "generally." (*See* Reply at 13.) However, Mollhagen also admitted that he has never conducted a title search of the land title records maintained by any register of deeds, and did not "know one way or the other how [First American's] title search was conducted." (*Id.* at 14.) His expertise is more akin to that of the proffered expert in *Lippe*, who, while having a breadth of academic experience in the field of business, had never actually performed a valuation and was merely giving a summary of what others had done. Mollhagen may well be an experienced lawyer and knowledgeable in the field of real estate law, but that does not make him qualified to testify about a title search he has never before performed.

Simply "regurgitating" the First American Title Search does nothing to help this Court as trier of fact. *Arista Records LLC v. Usenet.com, Inc.*, 608 F. Supp. 2d 409, 424 (S.D.N.Y. 2009) ("An expert who simply regurgitates what a party has told him provides no assistance to the trier of fact through the application of specialized knowledge."). Of course, an expert can rely on hearsay when forming his opinion, and so the fact that the First American Title Search might be hearsay is not outcome determinative as the Term Loan Lenders contend. However, the expert must be able to do more than simply act as a conduit for the report. Mollhagen seems to simply read the First American Title Search rather than offering any deeper analysis into what went into preparing the report, or the process of conducting a title search, having never done one himself.

(*See* Memo at 13 ("Q. In rendering your opinion with respect to the contents of the title search provided to you by First American, are you doing anything other than reading what items are listed on that report? A. No. I think the report is clear the fixture filing is not listed on there. So I'm looking at the items on there and seeing that it's not there. So that's the basis for the opinion." (quoting Ex. 5 (Mollhagen Dep.) at 106)).) If the Court were to inquire into how the First American Title Search was conducted, Mollhagen's testimony would not be relevant to help the Court understand more than what is on the paper.

Relevance is a low bar, but it still must be satisfied. Here, because Mollhagen did not perform any of the title searches, much less is he an expert in the process of title searching, the Court finds that his testimony would not be relevant in assisting its determination of whether the title report would put a purchaser on notice of the purported liens on the fixtures at the Lansing Plants. Courts have frequently excluded expert reports where the purported expert did not independently perform the test central to his or her testimony, but instead relied on the work of others. *See e.g. In re Rezulin Prod. Liab. Litig.*, 441 F. Supp. 2d 567, 577 (S.D.N.Y. 2006) (excluding expert reports relating to a product's potential effects on liver enzymes, where, the doctor did not measure the liver enzymes or their effects); *see also JRI. Enterprises, Inc. v. Procorp Assocs., Inc.*, 2003 WL 21284020, at *5, *8 (E.D. La. June 3, 2003) (excluding expert who did "no independent analysis" of report he relied on and collecting cases).

Finally, the Avoidance Trust's argument that "this is the type of document typically considered reliable and relied upon by experts in the field, [so] it was appropriate for Mr. Mollhagen to rely on this title search report, and there is no basis to exclude his opinion" completely misses the point. (Opp'n at 2.) The Avoidance Trust is correct in this statement, but *the opinion he formed* must still be relevant and he must have the required expertise. The Court

does not exclude Mollhagen's testimony because he relied on hearsay. Here, the Court determines that he does not have the required expertise, but would simply act as a "conduit" for the title search. For that reason the testimony must be excluded.

On this basis, the Court need not reach the hearsay objection. It appears that Mollhagen's testimony is simply being offered as a way of introducing the First American title report, and that is not permitted by the Rules. *See Wantanabe Realty Corp. v. City of New York*, 2004 WL 188088, at *2 (S.D.N.Y. Feb. 2, 2004), *aff'd*, 159 F. App'x 235 (2d Cir. 2005) ("An expert may not act as a 'mere conduit' for the hearsay of another.").

C. Parol Evidence Regarding the Term Loan Agreements

Both parties agree, and the Court now finds, that the Term Loan Agreements are not ambiguous. (*See* Opp'n at 2, 19, 20; Reply at 7.) Terms such as "fixture" and "collateral" are clear on their face and can be defined according to a legal dictionary. To the extent that a scrivener's error might render the contract hypothetically ambiguous, the parties have stipulated to the correction of that error. (*See* Reply at 10.) Therefore, parol evidence on the meaning and interpretation of the Term Loan Agreements is inappropriate and will be excluded at trial.

The Avoidance Trust argues that the Term Loan Lenders mischaracterize the nature of the evidence it wishes to offer: the Avoidance Trust wishes to offer "testimony from [Old GM and JPMorgan] concerning their mutual understanding of which kinds of assets were fixtures and which were not." (Opp'n at 16.) But the Term Loan Lenders point out that only the *annexor's* intent *at the time of installation* counts for the fixture test under both Ohio and Michigan law: JPMorgan's understanding of the term "fixture" is therefore irrelevant, and the Term Loan Agreements are relevant to the question of Old GM's intent only to the extent they are contemporaneous with the annexation of any given asset. (Reply at 8–9.) *See In re Joseph*, 450 B.R. 679, 694 (Bankr. E.D. Mich. 2011) (annexor's intent at time of installation controls).

Whether characterized as parol evidence or simply as evidence of Old GM's and JPMorgan's intent at the time the Term Loan Agreements were executed, the proposed testimony is improper. The sections of the Term Loan Agreements at issue here are not ambiguous, and parol evidence is therefore unwarranted. Any testimony regarding JPMorgan's understanding of what "fixture[s]" the Term Loan Agreements referred to is irrelevant. Evidence regarding Old GM's intent to permanently affix assets is relevant only at the time of each asset's installation; to the extent the Avoidance Trust wishes to introduce testimony regarding Old GM's understanding of the term "fixture" *after* the Representative Assets were already installed, such testimony is also not useful to the Court.

For the above reasons, the Motion is **GRANTED IN PART.** The Court **DEFERS DECISION** regarding Goesling's testimony. The Motion is **GRANTED** as to Mullhagen's testimony. The Motion is **GRANTED** as to parol evidence regarding the Term Loan Agreements; evidence regarding JPMorgan's understanding of the term "fixture" in the Term Loan Agreements; and Old GM's understanding of the term "fixture" in the Term Loan Agreements, unless contemporaneous with the installation of a Representative Asset.

IT IS SO ORDERED.

Dated: April 7, 2017
New York, New York

Martin Glenn

MARTIN GLENN
United States Bankruptcy Judge