BINDER & SCHWARTZ

Eric B. Fisher
Binder & Schwartz LLP
366 Madison Avenue, 6th Floor, New York, NY 10017
Tel 212.510.7031 Fax 212.510.7299
efisher@binderschwartz.com

April 15, 2016

By ECF and Hand Delivery
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 represent plaintiff in the above adversary proceeding and write respectfully to submit plaintiff's proposed case management order for the Court's consideration, a copy of which is attached hereto as Exhibit A.

Fixture/Non-Fixture Classification

As we anticipated when we wrote to the Court on April 5, 2016, plaintiff's exchange of asset ledgers with JPMorgan last week, our analysis of those ledgers in consultation with plaintiff's experts, and our discussions with JPMorgan's counsel have led us to a proposal to streamline the dispute about fixture classification. Our proposal, described below and incorporated into the proposed, comprehensive case management order attached hereto, focuses on 150 assets from among the approximately 170,000 assets that the ledger-exchange with JPMorgan shows to be in dispute.

As an initial matter, to give the Court a sense of the magnitude of the asset classification dispute, based on the ledger-exchange JPMorgan appears to contend that approximately 73% of the assets at the various GM plants are fixtures (184,911 assets out of the 253,553 assets on the ledger). It defies common sense to think that such a high percentage of the "goods" delivered to a plant become so "related to the real property that an interest in them arises under real property law." UCC § 9-102(A)(41). As a basis for comparison, we contend, based upon our asset-by-asset review to date, that approximately 6% of the assets on the ledger are fixtures. We expect fact and expert discovery to bear out that most of the assets that JPMorgan is labeling as "fixtures" are not fixtures under the UCC, but rather equipment.[1] The 184,911 assets designated

[1] JPMorgan's fixture classifications are so sweeping as to be wrong on their face in thousands of instances. For example, JPMorgan designates trucks, portable equipment and software as "fixtures."

by JPMorgan as fixtures are located in nine different states and can be divided and subdivided into more than a hundred asset categories and subcategories.

To efficiently approach the dispute about which assets are fixtures and which are not, we propose the following:

1. Plaintiff will select 150 assets from among the 184,911 assets that JPMorgan contends are fixtures. The selected assets will be chosen from across twelve different asset categories used by GM with a greater number of sample assets chosen in categories that have a greater overall number of assets and/or that appear to account for a more significant portion of the value dispute. The selected assets will be distributed across the GM-denominated categories as follows:

Asset Category	**Proposed Number of Selected Assets**
Other Production Equipment	25 assets (out of a total of 54,365 assets)
Processing Equipment	15 assets (out of a total of 18,453 assets)
Press Metal Equipment	15 assets (out of a total of 2,635 assets)[2]
Robots/Similar Devices	15 assets (out of a total of 36,269 assets)
Cap Main/Repair M&E	10 assets (out of a total of 2,762 assets)
Machine Tools	10 assets (out of a total of 5,261 assets)
Special Machine Tools	10 assets (out of a total of 3,320 assets)
Power Trans Equipment	10 assets (out of a total of 1,815 assets)
General Plant Equipment	10 assets (out of a total of 7,246 assets)[3]
Foundry Equipment	10 assets (out of a total of 2,068 assets)
Power Plant Equipment	10 assets (out of a total of 1,536 assets)
Plant Service/Maint	10 assets (out of a total of 2,321 assets)

[2] Although the asset count in this category is relatively low, our analysis suggests that JPMorgan will contend that the fixtures in this category account for approximately 10% of the overall value of the surviving collateral.

[3] Although the asset count in this category is relatively high, our analysis suggests that JPMorgan will contend that the fixtures in this category account for approximately 2% of the overall value of the surviving collateral.

Following one RACER Trust plant inspection and three GM plant inspections, which based on discussions with GM earlier this week we believe are likely to be able to all proceed in May, and any depositions related to the fixture-classification issue, the parties will complete discovery as to the 150 assets as follows:

4/27/16	Plaintiff to identify 150 assets from among the assets that JPMorgan has designated as fixtures
5/27/16	Parties to complete inspections and discovery as to the 150 assets
6/6/16	Defendants to submit brief and expert reports/declarations in support of their classification of the 150 assets as fixtures
6/28/16	Plaintiff to submit its opposition brief and expert reports/declarations
7/6/16	Defendants to submit their reply
TBD	The Court will hold a hearing to adjudicate the fixture/non-fixture classification in a manner to be proposed by the parties and determined by the Court.
TBD	Parties to apply the Court's rulings across all of the assets within two weeks of the rulings

Because the approach to asset selection that we propose is tied to different asset categories and involves substantially more assets than defendants' twenty-asset proposal, we believe that our proposal will encompass assets that reflect the diversity of assets, both within each asset category and across all of the major categories. Within the group of 150 assets, in addition to diversity based on the nature of the asset itself and its installation, plaintiff will also include assets chosen to present to the Court instances where there are potentially outcome-determinative differences based on variations in the law in the different states where assets are located. Plaintiff will also include assets to present for adjudication the question of whether the surviving collateral includes assets that were not owned by GM at the time of the bankruptcy, but rather are subject to different kinds of leases. In short, plaintiff's approach will allow the Court to address enough of the variety of issues embedded in this enormous asset-classification dispute that the rulings will offer meaningful guidance to the parties that may then be applied across the entirety of the assets to minimize, and perhaps resolve, the dispute.

Defendants' twenty-asset proposal is too small, and too arbitrary, of a sample to accomplish this task. The assets range across hundreds of categories and subcategories and have extremely diverse modes of installation, varying by asset type. Even within a single asset type there are different modes of installation that depend upon multiple factors. Some assets are clearly portable, mobile or unattached to the real estate, while others are fixtures because they have been attached in a fashion that makes them an integral part of the real property. Between these two extremes are tens of thousands of assets that have been attached in a manner that stabilizes the asset during use, but also allows for removal without damage to the asset or the real estate. The law of fixtures turns on the particular facts pertaining to the particular assets.[4] Defendants' approach rests on the fiction that, if the Court rules that one kind of asset is a fixture, then we will be able to agree that this Court would categorically rule that all assets called by that name or a similar name are fixtures. But this is not so and is inconsistent with the law of fixtures. Fixture classification, for UCC purposes, happens along a spectrum that considers all aspects of the asset, the plans for and history of its use, and the nature of its installation. It is not the binary, abstract approach that JPMorgan implicitly posits.

To take the example of "Robots/Similar Devices," an enormous category (more than 36,000 assets) that includes numerous different kinds of robots and robot-related assets, there are many facts relevant to fixture status to be considered: some robots are not attached to the realty at all; some are attached to the realty with bolts or other modes of attachment, but may be easily detached; some may be installed into a framework that, in turn, is permanently installed into the factory floor and, while the framework may be a fixture, the robots themselves are not; and some assets that are described in the ledgers as robots are really bundles of assets some of which may

---

[4] For example, in *Michael Yundt Co. v. Nat'l Bank of Detroit (In re Voight-Pros't Brewing Co.),* 115 F.2d 733, 735-36 (6th Cir. 1940), which concerned property located in Michigan, the court affirmed the lower court's ruling that a brick panel was not a fixture based on detailed evidence:

> The evidence shows that the brick panel can be removed and replaced without disturbing the headers across its top or the basic pilasters or otherwise substantially damaging the building. Giraridy, who had brought the machinery in and contracted to remove it, testified that it "just rests on the floor of its own weight." Fisk, who had actually installed it, testified that "The machine rests on the concrete floor by jack-screws resting on plates . . . . There is no bolting of the screws to the floor in any way at all. It rests on the floor with its own weight only." The contention that removal of the machinery would suspend operations of the brewery is immaterial in determining whether it has become a part of the freehold.

(internal citations omitted); *see also 174 Second Equities, Corp. v. Hee Nam Bae*, 869 N.Y.S.2d 433, 434 (1st Dep't 2008) (machinery is not a fixture unless "it is installed in such manner that removal would result in material damage to it or the realty, or [if] the building in which it is housed was specially designed for that purpose, or [if] there is other evidence that its installation was of a permanent nature") (citing *In re Whitlock Ave. in City of New York,* 278 N.Y. 276, 281-82 (1938)); *In re Park Corrugated Box Corp.*, 249 F. Supp. 56, 58-59 (D.N.J. 1966) (45,000-pound machine anchored in place with screws and connected to electrical line not a fixture because of particular facts concerning machine's installation and possible removal).

be fixtures and some not. Defendants' broad-brush approach basically treats all robots the same, classifying virtually all assets that are called robots (more than 95% of them) as fixtures. This flawed approach leads defendants to the mistaken view that if the Court rules that a particular robot is, or is not, a fixture, then that ruling may be applied easily to tens of thousands of different robot assets. This approach is insufficiently faithful to the law of fixtures or attentive to the diversity of assets in dispute.

Ultimately, expending substantial effort litigating too few assets risks setting this litigation back, instead of propelling it forward. If the parties are to put enormous effort into visiting GM facilities and inspecting assets, analyzing documents, taking depositions, and preparing expert reports, then the assets should be selected to maximize the likelihood that they will create an adequate record to facilitate global resolution of this dispute. If the assets turn out to be too few and insufficient to capture the diversity of the assets, then the parties are at risk of having to then redo the entire process to capture a broader sample of assets. JPMorgan's twenty-asset proposal assumes that its abstract, categorical approach to fixture-classification (which is at odds with the law of fixtures as it has developed in the relevant states) is the right approach. If, however, JPMorgan's approach turns out to be wrong or if the result turns out to be somewhere in-between, then rulings on twenty assets cannot possibly get the parties where they need to go in order to resolve this dispute, and we will all have to go back to the drawing board. The additional incremental work associated with completing discovery relating to 150 assets (as opposed to 20) is relatively small, especially compared to the cost of doing it twice, which would include, among other things, having to revisit the same GM plants that all parties and their experts had previously visited. We believe that our proposal to take discovery of 150 assets is an efficient and practical approach that does not pose the risk that the parties will have to conduct discovery twice on the very same issue.

Finally, we expect that once we have had an opportunity to take full discovery of 150 assets, the parties can come together and work toward an approach to adjudication that reduces the Court's burden, including potential staging of the presentation of assets to the Court.

Valuation

When it comes to the issue of valuation, our proposal adheres to the existing schedule. Under the existing schedule, all expert discovery on valuation, including expert depositions, will conclude in approximately six months (October 31, 2016). In a case of this size, that is already an aggressive schedule, particularly in light of the fact that no depositions have proceeded and document productions by important non-parties are not yet complete (or in the case of the DIP Lenders and their advisors, not yet started). We have thought through different ways to potentially accelerate the valuation schedule, but we do not think that there is a shortcut that affords plaintiff the time it needs to responsibly conclude its valuation analysis.

We have been working closely with our valuation and accounting experts in order to be able to meet the deadlines in the current case management order. Our valuation and accounting experts advise us that the KPMG "fresh start" values are not a reliable proxy to value the surviving collateral. KPMG performed a purchase-price accounting project for GM that allocated the value of the government sale price without ever considering what a willing buyer would pay a willing seller for the assets. Based on our ongoing analysis, as one would expect, it does not appear to our experts that there is any consistently meaningful correlation between values derived by KPMG and the value of any specific asset. KPMG's project was never intended to be so granular as to be a reliable indicator of value at the asset level, an assertion that we believe will be borne out clearly as discovery progresses. Nonetheless, JPMorgan appears to want to pluck out of KPMG's spreadsheets specific values for specific assets and then adjust those values in its favor.[5] Instead, a methodologically sound valuation of the collateral for purposes of this action will have to consider the many factors typically considered by valuation experts in disputes about collateral value, including the appropriate discount rate, the cost of capital and numerous other factors that require continued factual development. There are other weighty, interesting issues to sort through that are mixed questions of law and fact, including, as just one example, whether value specifically associated with the government-subsidization of GM should properly inure to the benefit of a group of secured creditors who were paid off even before the Section 363 sale was approved. These valuation issues deserve proper factual development in discovery, and the careful attention of counsel and experts, and, ultimately, this Court. In that regard, as reflected in the attached proposed order, we respectfully request that the expert deadlines in the operative scheduling order remain in place with respect to the issue of valuation.

Conclusion

As plaintiff, we support the goal of expeditious resolution. We respectfully submit that our 150-asset proposal on the classification issue should dramatically narrow this dispute and promote resolution. In and of itself, the classification issue will require significant effort and resources of all parties and the Court. In our view, trying to accelerate the valuation issue at the same time, even as there is much discovery on the valuation topic still to be taken, is counter-productive and will not yield the thoughtful, comprehensive valuation evidence that the issue requires. JPMorgan's proposal offers the illusion of expeditious resolution, but poses a substantial risk of chaotic proceedings that do not materially advance resolution and do not present the full factual record that this Court will need to rule on these substantial disputes.

[5] While JPMorgan purports to commit to the KPMG values, it should be noted that, in reality, JPMorgan seeks to lock into the KPMG values as a floor from which it will then argue for upward adjustments. This is not consistent with JPMorgan's argument that the KPMG values are a reliable neutral's determination of value.

We look forward to addressing any questions the Court may have about this proposal and thank the Court for its attention to this request.

Respectfully,

/s/ Eric B. Fisher

Eric B. Fisher

Encl.

cc: Counsel of Record (via ECF)

EXHIBIT A

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re	
	Chapter 11
MOTORS LIQUIDATION COMPANY, *et al.*,	
	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 Case No.: 09-00504 (MG)
Plaintiff.	
	CASE MANAGEMENT & SCHEDULING ORDER
-against-	
JPMORGAN CHASE BANK, N.A., *et al.*,	
Defendants.	

This Case Management and Scheduling Order is entered by the Court, following a Scheduling Conference held on April 18, 2016, in accordance with Fed. R. Civ. P. 16(b) and 26(f), and supersedes the existing Case Management Order entered on August 17, 2015 (ECF No. 153).

1. To the extent not already served, initial disclosures pursuant to Fed. R. Civ. P. 26(a)(1) shall be completed not later than 14 days from the date of this Order.

Fact Discovery

2. All document discovery shall be completed by **April 15, 2016**.

3. With respect only to the determination as to which assets constitute collateral for the Term Loan (the "Surviving Collateral") in which the Term Loan

Lenders had a perfected security interest as of June 1, 2009 (the "Collateral Identification Issues"), in an effort to streamline the discovery relating thereto, the following schedule shall apply:

a. On **April 27, 2016**, Plaintiff shall submit to Defendants a list of 150 assets (the "Selected Assets") that Defendants have designated as Surviving Collateral[1], which will be selected from the following General Motors Corporation ("GM") asset categories:

Other Production Equipment	25 assets
Processing Equipment	15 assets
Press Metal Equipment	15 assets
Robots/Similar Devices	15 assets
Cap Main/Repair M&E	10 assets
Machine Tools	10 assets
Special Machine Tools	10 assets
Power Trans Equipment	10 assets
General Plant Equipment	10 assets
Foundry Equipment	10 assets
Power Plant Equipment	10 assets
Plant Service/Maint	10 assets

b. All plant inspections to inspect the Selected Assets shall be completed no later than **May 27, 2016**;

c. On **June 6, 2016**, Defendants shall file a motion, with an accompanying expert report, setting forth the basis for Defendants' classification of the Selected Assets as Surviving Collateral;

d. On **June 28, 2016**, Plaintiff shall file its papers in opposition to Defendants' motion, including its expert report;

e. On **July 6, 2016**, Defendants shall file their reply papers, if any, to the motion;

f. On _____, the Court shall hold a hearing to adjudicate the Collateral Identification Issues in a manner to be proposed by the parties and determined by the Court.

[1] On April 6, 2016, Plaintiff and Defendant JPMorgan exchanged asset listings that provided each party's then current views as to which assets of GM were Surviving Collateral.

g. Two weeks following the Court's ruling on the Collateral Identification Issues, the parties shall exchange revised asset lists implementing the Court's ruling.

4. All fact discovery (including fact depositions and additional plant inspections) shall be completed no later than **July 31, 2016**.

5. The parties are to conduct discovery in accordance with the Federal Rules of Civil Procedure ("Civil Rules"), Federal Rules of Bankruptcy Procedure ("Bankruptcy Rules") and the Local Rules of the Bankruptcy Court for the Southern District of New York ("Local Bankruptcy Rules").

Expert Discovery

6. On **August 12, 2016**, the parties must serve their expert reports on issues other than the Collateral Identification Issues;

7. On **September 14, 2016**, the parties must serve rebuttal expert reports on issues other than the Collateral Identification Issues;

8. All expert discovery on issues other than the Collateral Identification Issues, including depositions, shall be completed no later than **October 31, 2016**.

After Close of Discovery

9. All counsel must meet face-to-face to discuss settlement within fourteen (14) days after the close of fact discovery. Counsel shall advise the Court promptly if they agree to use ADR to try to resolve some or all of the claims in the case. The use of any ADR mechanism does not stay or modify any date in this Order unless the Court agrees on the application of any party.

10. Counsel shall submit a proposed Joint Pretrial Conference Order within thirty (30) days after the close of expert discovery. The proposed Joint Pretrial

Conference Order shall be prepared using the form of order that will be provided to counsel by my Courtroom Deputy or law clerks.

11. The next Case Management Conference is scheduled for _____.

12. This Order may not be modified or the dates herein extended, except by further Order of this Court for good cause shown. Any application to modify or extend any deadline established by this Order shall be made in a written application no less than five (5) days prior to the expiration of the date sought to be extended.

Dated: [date]
New York, New York

_____
Martin Glenn
United States Bankruptcy Judge