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July 11, 2016

VIA E-MAIL AND ECF

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., et al.*, No. 09-00504 (MG)

Dear Judge Glenn:

I write on behalf of defendant and cross-claim defendant JPMorgan Chase Bank, N.A. ("JPMorgan") pursuant to the Stipulation and Order Pursuant to Federal Rule of Evidence 502 [D.I. 623] (the "502(d) Order") and in response to the letter brief submitted by counsel to certain cross-claimants (the "Cross-Claimants") on July 6, 2016 [D.I. 646] (the

"Cross-Claimants' Letter") regarding the scope of waiver of attorney-client privilege and/or work-product protection effected by JPMorgan's assertion of a reliance on counsel defense.

JPMorgan believes that there is far less in dispute than Cross-Claimants' lengthy letter to the Court would appear to suggest. JPMorgan has already agreed to produce the great bulk of the documents that Cross-Claimants have sought. These documents, which are otherwise subject to the attorney/client privilege, relate to the repayment of the Synthetic Lease and to the Term Loan collateral, including the filing, maintenance and termination of the UCC financing statements for the Term Loan transaction.

In addition, as set forth below, JPMorgan will produce otherwise attorney/client privileged materials from 2006 or later, to the extent these materials have not already been produced, relating to: (i) the collateral for the Synthetic Lease (including the filing, maintenance and termination of the UCC financing statements for that transaction dating back to 2006); (ii) the collateral for the Term Loan; (iii) the Synthetic Lease repayment; and (iv) discussions with Simpson Thacher regarding the Term Loan. However, JPMorgan has not agreed to produce documents that were prepared by both outside and in-house litigation counsel after the erroneous UCC-3 filing was discovered. Those documents, which were prepared by counsel in anticipation of litigation, represent classic work product and are not subject to production.[1]

[1] While Cross-Claimants have not asked the Court to engage in any *in camera* review of documents, JPMorgan has no objection to submitting these documents, which are classic work-product, for the Court's review, as well as any other documents on JPMorgan's privilege logs that the Court wishes to review.

I. Background

JPMorgan currently intends to assert a reliance on counsel defense as to the following:

- Reliance on JPMorgan's outside counsel's advice regarding the repayment of the Synthetic Lease, including the preparation and review of documentation related to the release of collateral associated with that transaction. Among other things, JPMorgan relied on its counsel's review and advice that the UCC-3 filings prepared in connection with the repayment of the Synthetic Lease should be filed.
- Reliance on JPMorgan's outside counsel's advice regarding whether it was necessary to perform UCC searches or collateral reviews in advance of the Term Loan amendment or the GM bankruptcy filing.
- Reliance on JPMorgan's outside counsel's advice regarding the drafting, filing and maintaining of the Term Loan UCC-1s.

Consistent with this defense, JPMorgan has already produced hundreds of documents that appeared on the privilege logs prepared in response to the requests made by the Avoidance Action Trust or its predecessor. These newly-produced documents fall into two categories: (i) privileged, non-work product communications relating to the October 2008 Synthetic Lease repayment, and (ii) advice given to JPMorgan regarding the Term Loan collateral between September 2008 (the earliest document on the existing logs) and the discovery of the erroneous UCC-3 termination statement. Prior to the submission of Cross-Claimants' Letter, JPMorgan additionally committed to produce all privileged materials relating to the Term Loan collateral

that are identified by its ongoing review of hundreds of thousands of additional documents in connection with the cross-claims.

Accordingly, the documents that remain on the privilege log are entirely unrelated to JPMorgan's reliance on counsel defense. Those documents include materials relating to fees, covenants, and structural matters unrelated to the collateral, documents concerning separate GM bankruptcy litigation, as well as documents prepared in anticipation of litigation with the GM estate following the June 15, 2009 discovery of the erroneous Term Loan UCC-3.

II. Scope of the Privilege Waiver

Cross-Claimants devote pages to asking the Court to make an amorphous and un-defined ruling that JPMorgan's reliance on counsel as to the UCC financing statements resulted in a "transactional" waiver as to the Term Loan and the Synthetic Lease, presumably meaning that Cross-Claimants would be entitled to a wholesale turnover of counsel's and JPMorgan's files with respect to all aspects of these two large, complex loan transactions which, in the case of the Synthetic Lease, dates back to 2001. There is no legal basis for this position.

The fundamental question raised by JPMorgan's advice-of-counsel defense is whether, in light of the productions that JPMorgan has made and will make, that defense "in fairness" requires examination of still more privileged communications. *Bowne of New York City, Inc.* v. *AmBase Corp.*, 150 F.R.D. 465, 488-89 (S.D.N.Y. 1993).[2] In cases where advice of

[2] With regard to choice of law, the advisory committee notes to Federal Rule of Evidence 501 state that "the Federal law of privileges should be applied with respect to pendent State law claims when they arise in a Federal question case." Fed. R. Evid. 501 advisory committee's note; *accord Newmarkets Partners, LLC* v. *Sal. Oppenheim Jr. & Cie. S.C.A.*, 258 F.R.D. 95, 99

(footnote continued)

counsel relating only to certain aspects of a transaction is at issue, waiver may be appropriately limited to those elements of the transaction. *See id.* at 486-87, 489 (in litigation relating to failure to timely close stock purchase transaction, listing particular topics as to which defendant had waived privilege); *In re Pioneer Hi-Bred Int'l, Inc.*, 238 F.3d 1370, 1374-75 (Fed. Cir. 2001) (where party to merger transaction relied on counsel solely with respect to expected "tax consequences of the merger," reliance did not waive attorney-client privilege regarding other aspects of merger, including negotiations, "financial benefits of the merger," and "effect of the merger on intellectual property rights"); *Santander Holdings USA, Inc. & Subsidiaries* v. *United States*, 2012 WL 3218535, at *1 (D. Mass. Aug. 6, 2012) (where party put at issue advice as to whether to enter into the transaction, other advice, including as to the unwind of the transaction, was not within "the scope of the subject matter implicated by the assertion of the defense"); *see also Carl Zeiss Jena GMBH* v. *Bio-Rad Labs. Inc.*, 2000 WL 1006371, at *1 (S.D.N.Y. July 19, 2000) (where plaintiff put advice of counsel at issue to combat willful infringement claim, limiting waiver to narrow topics rather than all advice given as to the patent).

The cases cited by Cross-Claimants do not support the proposition that JPMorgan has put "at issue" *all* documents concerning *any* aspect of either the Synthetic Lease or the Term Loan. The lead case cited by Cross-Claimants for the "transactional approach" purportedly

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(footnote continued)

n.2 (S.D.N.Y. 2009). However, regardless of whether state or federal law applies, New York law is sparse on the precise scope of waiver, and it is therefore appropriate for the Court to look to federal precedent for additional guidance. *See GPA Inc.* v. *Liggett Grp., Inc.*, 1996 WL 389288, at *2 (S.D.N.Y. July 10, 1996) (considering federal waiver law "in view of the relative sparseness of case law in New York on some of the precise waiver issues in question").

adopted by New York courts uses the term "transactions" generically in reference to a series of events — not a commercial transaction — and sheds no light on how the relevant "transaction" should be defined. *See Vill. Bd. of Vill. of Pleasantville* v. *Rattner*, 130 A.D.2d 654, 655 (2d Dep't 1987) (referring to "transactions" with respect to reliance on counsel by government body accused of selective enforcement of laws in civil rights action; no commercial deal at issue). Cross-Claimants' other cases cite *Rattner* for its general statement of this "rule" but likewise offer no guidance on what it means to waive privilege as to a "transaction." *Miteva* v. *Third Point Mgmt. Co.*, 218 F.R.D. 397, 398 (S.D.N.Y. 2003) (citing *Rattner* but concluding that party had not waived privilege); *Arkwright Mut. Ins. Co.* v. *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 1994 WL 510043, at *12 (S.D.N.Y. Sept. 16, 1994) (same).

In sum, none of Cross-Claimants' cases suggests that reliance on counsel with respect to *one* aspect of a complex commercial financing (*e.g.*, the loan payoff) operates as a waiver of attorney-client privilege with respect to *all* attorney-client communications relating to the entire life of a "transaction," let alone a "transaction" that was in place for seven years.

Cross-Claimants are already in possession of numerous documents reflecting advice given to JPMorgan in October 2008 in connection with the Synthetic Lease repayment, including communications showing that JPMorgan requested that its counsel review the repayment documentation and sought assurances that the documentation was in order. Although JPMorgan believes this is a substantially complete account of the advice provided, any additional materials from that period uncovered in connection with the ongoing cross-claim discovery will likewise be produced. But waiver as to this defined subject matter does not, as a matter of fairness, necessitate Cross-Claimants' review of every single communication relating to a seven-year loan in

order to test the reasonableness of the relevant, confined advice that was provided in October 2008.[3]

Nonetheless, as noted, based on further understanding of Cross-Claimants' position, JPMorgan will make available all otherwise attorney/client privileged materials relating to the perfection and termination of the liens on the Synthetic Lease collateral dating back to January 1, 2006 — the date range encompassed by the parties' agreed-upon search protocol to date and covered by the vast majority of Cross-Claimants' document requests — subject to reasonable search terms and custodians to be agreed upon.[4]

Cross-Claimants' lengthy explanation as to why they purportedly require an even broader "transactional" waiver in fact demonstrates the opposite — there is no reason for the waiver to be expanded beyond documents relating to the liens supporting the two loans. Indeed, it is not even comprehensible what relevance documents that stray beyond the subjects of the Term Loan and Synthetic Lease collateral could possibly have. Cross-Claimants' only argument is that they need documents demonstrating the "purpose" for which Simpson Thacher was

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[3] Similarly, in view of JPMorgan's stated willingness to produce all privileged communications relating to the collateral for the Term Loan (subject to the negotiated custodians and search criteria agreed upon by the parties), Cross-Claimants have entirely failed to justify their demand for a much broader waiver as to *every* aspect of the Term Loan. Indeed, Cross-Claimants' Letter, which focuses almost entirely on their pursuit of Synthetic Lease documentation, largely ignores this separate, extremely burdensome request.

[4] In the absence of document requests and search terms, JPMorgan does not believe the scope of any production of documents dating back to 2001 presents an issue that is ripe for this Court's consideration. To the extent the parties may negotiate this issue, JPMorgan notes that retrieving documents from 15 years ago would be costly and time-consuming, and disputes that the substantial burden of production is justified.

retained. JPMorgan, however, has already informed Cross-Claimants that there was no engagement letter with Simpson Thacher, and that Simpson Thacher was not specifically retained to provide legal services with respect to the Term Loan. To the extent that JPMorgan communicated with Simpson Thacher regarding the Term Loan, JPMorgan has already produced and will continue to produce those documents.

Two additional issues raised by Cross-Claimants merit response. First, Cross-Claimants complain that JPMorgan's definition of its waiver "has shifted and changed multiple times," and therefore no topic-based waiver could be reliably administered. Not true. JPMorgan's original productions of privileged materials represented its good-faith effort to address the issues as to which JPMorgan has asserted reliance. When Cross-Claimants demanded *additional* materials, JPMorgan undertook to make additional productions of materials that are tangentially related to these core matters.

Accordingly, it is simply disingenuous for Cross-Claimants to use JPMorgan's good-faith compliance with their own evolving requests to suggest that JPMorgan has acted in an unprincipled manner. In any event, contrary to Cross-Claimants' assertion, JPMorgan's proposed waiver would not be difficult to administer: if a privileged, non-work-product document or communication from 2006 or later relates to (i) the collateral for the Synthetic Lease, (ii) the collateral for the Term Loan, (iii) the Synthetic Lease repayment, or (iv) discussions with Simpson Thacher regarding the Term Loan, it is encompassed in the waiver.

Second, Cross-Claimants assert that JPMorgan cannot object to their proposed waiver as overbroad because JPMorgan refused to characterize any category of previously logged documents as "irrelevant." That position is untenable as well. All of the documents on

JPMorgan's privilege logs were identified as responsive to document requests issued by the Avoidance Action Trust or its predecessor. That is why those documents were specifically logged in the first place. Accordingly, JPMorgan stated that even if it and the Cross-Claimants agreed that those documents were "irrelevant," the plaintiff Avoidance Action Trust would still presumably insist on their production if JPMorgan agreed they were within the scope of JPMorgan's waiver. In any event, as JPMorgan went on to explain, none of the remaining logged documents, which are unrelated to the Synthetic Lease repayment and the Term Loan collateral in the pre-bankruptcy period, are relevant to *JPMorgan's reliance on counsel* — the appropriate issue with respect to scope of waiver.

Finally, Cross-Claimants' Letter faults JPMorgan for withholding documents that Cross-Claimants have not even asked for. For instance, Cross-Claimants purport to have sought all documents relating to the history of the Synthetic Lease transaction, which was originated in 2001. But with certain limited exceptions, Cross-Claimants have not even requested Synthetic Lease documents (or any other documents) dating back to that time. Their broader requests relating to the Synthetic Lease only request documents dating back to 2006.

Furthermore, based on Cross-Claimants' existing document requests, and pursuant to an agreement reached after numerous good-faith discussions between the parties over the past several months, JPMorgan is conducting a search of its e-mail records dating back to January 1, 2006. The heavily negotiated search terms that JPMorgan is currently applying to communications before August 2008 do not even include the term "synthetic lease" — and Cross-Claimants never requested that it be included, despite their numerous other additions and adjustments to the search terms. Accordingly, JPMorgan finds it difficult to respond in the abstract to

new requests made for the first time in the Cross-Claimants' Letter concerning communications prior to 2006.

III. Work Product

Cross-Claimants assert that JPMorgan's reliance on counsel with respect to the filing of the erroneous UCC-3 termination statement results in a privilege waiver that extends to materials prepared in anticipation of the litigation that followed the discovery of that filing. That position is without support in either the law or the facts. With a sole exception, the documents at issue consist of communications with Morgan Lewis (JPMorgan's bankruptcy counsel) and JPMorgan's in-house counsel regarding the possible litigation consequences of the erroneous UCC-3 statement. Those litigation-focused documents are not subject to waiver and production.[5]

When the erroneous UCC-3 was discovered, the DIP financing hearing at which the repayment of the Term Loan would be at issue was 10 days away. Accordingly, JPMorgan and its counsel immediately were aware that litigation with the estate was a virtual certainty — possibly even at the DIP hearing — and undertook to investigate and assess the estate's claims, JPMorgan's defenses, and other potential litigation that might arise. This represents the classic form of work-product that is protected from disclosure except in the most extraordinary

[5] The exception is an email with Peter Pantaleo of Simpson Thacher sharing a draft affidavit prepared in anticipation of litigation regarding the UCC-3. Because Simpson Thacher's and JPMorgan's interests were aligned that the errant UCC-3 statement should not be deemed effective, work-product protection applies. *See In re Sealed Case*, 676 F.2d 793, 809 (D.C. Cir. 1982) ("[T]he work product privilege is not automatically waived by any disclosure to a third party"); *In re Pfizer Inc. Sec. Litig.*, 1993 WL 561125, at *6 (S.D.N.Y. Dec. 23, 1993) ("Disclosure of work product to a party sharing common interests is not inconsistent with the policy of privacy protection underlying the doctrine.").

circumstances, none of which are present here. *See, e.g.*, *Upjohn Co.* v. *United States*, 449 U.S. 383, 399-401 (1981) (emphasizing public policy protecting work product, including material generated in connection with attorney's investigation in anticipation of litigation, and reversing ruling allowing material to be discovered merely on showing of "substantial need"); *United States* v. *Adlman*, 68 F.3d 1495, 1501-02 (2d Cir. 1995) (materials preparing for litigation that has not yet commenced are entitled to work-product protection).

Contrary to Cross-Claimants' assertion, the cases they cite do not hold that mere assertion of an advice-of-counsel defense waives work-product protection. At most, the cases establish that work-product protection is waived where a party seeks to make a selective "testimonial use" of work-product material.[6] Unlike the parties resisting disclosure in those cases, JPMorgan does not intend to make "testimonial use" or otherwise rely on any work product in support of its advice-of-counsel defense.

Likewise, there is no legal basis for Cross-Claimants' proposal that JPMorgan "simply redact any attorney opinions or litigation strategy." Letter at 11. Courts do not require this type of parsing absent (i) a showing of "substantial need" by the party seeking production of

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[6] *See BNP Paribas* v. *Bank of New York Trust Co., N.A.*, 2013 WL 2434686, at *3 (S.D.N.Y. June 5, 2013) ("Both the attorney-client privilege and the protection afforded [to] work-product may be waived if the holder of the privilege or protection makes affirmative use of the protected material and fairness requires additional disclosure"); *Coleco Indus., Inc.* v. *Universal City Studios, Inc.*, 110 F.R.D. 688, 691 (S.D.N.Y. 1986) (defendant waived work-product protection by proffering its counsel's affidavit and underlying work product "as a 'testimonial use' of materials otherwise privileged"); *Matsushita Elecs. Corp.* v. *Loral Corp.*, 1995 WL 527640, at *1 (S.D.N.Y. Sept. 7, 1995) (party conceded that advice-of-counsel defense waived work-product protection; only scope of waiver at issue); *Carl Zeiss*, 2000 WL 1006371, at *1 (S.D.N.Y. July 19, 2000) (same).

"factual work product" *and* (ii) a demonstration that the party "cannot, without undue hardship, obtain their substantial equivalent by other means." *See* Fed. R. Civ. P. 26(b)(3)(A)(ii); *accord Vasquez* v. *City of New York*, 2014 WL 6356941 (S.D.N.Y. Nov. 14, 2014). Cross-Claimants do not even attempt to make a showing under this standard. In any event, no such showing could be made here. Cross-Claimants are receiving a contemporaneous record of the advice received, already have the depositions taken of the relevant parties in the AAT's suit, and will have the further opportunity to depose the relevant witnesses in connection with the cross-claims.

Moreover, the cases invoked by Cross-Claimants as support for their redaction proposal involve situations in which, unlike here, reliance on counsel had been asserted as to conduct *during litigation*. Under those circumstances, redaction was understandably necessary to show the contemporaneous advice that was at issue in the case, while still shielding other material relating to litigation strategy. In *Adam Friedman Associates LLC* v. *Media G3, Inc.*, for example, at issue was whether a losing party could vacate an unopposed summary judgment order on the grounds that it was never informed by its former litigation counsel of the deadline for opposing the motion. 2012 WL 1563942, at *4 (S.D.N.Y. May 1, 2012). And in *BNP Paribas*, as noted above, the court held that a defendant had made testimonial use of litigation counsel's work product. Thus, unlike in the present dispute, litigation-related communications with trial counsel were squarely the subject of the waiver in the redaction cases cited by Cross-Claimants.

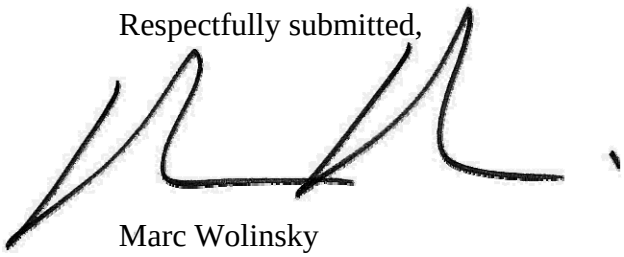
Finally, it bears noting that, contrary to Cross-Claimants' suggestion, parsing of the type sought here is not a "simple" matter. As is common, the presentation of facts within e-mails and memos that were prepared by JPMorgan's counsel is inextricably intertwined with counsel's analysis of the potential claims resulting from the discovery of the erroneous UCC-3,

and with counsel's evaluation of areas that would need to be investigated in connection with the anticipated litigation claims. Cross-Claimants have shown no basis for imposing on JPMorgan the substantial burden of disentangling factual and opinion work product in this case.

In sum, Cross-Claimants' demand that JPMorgan be required to attempt to isolate and then produce the factual components of work product would undermine the fundamental purpose of the work-product protection, which shields communications with litigation counsel regarding counsel's assessment of claims, defenses, *and* facts. *See Bowne*, 150 F.R.D. at 487 (holding that waiver "cannot fairly be read to encompass any communications between [defendant] and its trial counsel in this case, or any work-product developed by or for trial counsel for this lawsuit").

JPMorgan respectfully suggests that Cross-Claimants' request for the Court's intervention at this point is unnecessary and that its positions are unsupported by the facts or the law.

Respectfully submitted,



Marc Wolinsky

cc: All Counsel (By ECF)