

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE:	.	Case No. 09-50026-mg
	.	
MOTORS LIQUIDATION COMPANY,	.	Chapter 11
et al., f/k/a GENERAL	.	
MOTORS CORP., et al,	.	(Jointly administered)
	.	
Debtors.	.	
.....	.	
MOTORS LIQUIDATION COMPANY	.	Adv. Proc. No. 09-00504-mg
AVOIDANCE ACTION TRUST, by and	.	
through the Wilmington Trust	.	
Company, solely in its capacity	.	
as Trust Administrator and	.	
Trustee,	.	
	.	
	.	
Plaintiff,	.	
v.	.	
	.	
JPMORGAN CHASE BANK, N.A.,	.	
individually and as	.	
Administrative Agent for	.	
Various lenders party to the	.	One Bowling Green
Term Loan Agreement described	.	New York, NY 10004
herein, et al.,	.	
	.	
	.	Monday, December 12, 2016
Defendants.	.	2:00 p.m.
.....	.	

TRANSCRIPT OF ADVERSARY PROCEEDING: 09-00504-mg
MOTORS LIQUIDATION COMPANY AVOIDANCE ACTION TRUST V.
JPMORGAN CHASE BANK, N.A. ET AL, IN PERSON CONFERENCE REGARDING
EXPERT DISCOVERY DISPUTE
BEFORE THE HONORABLE MARTIN GLENN
UNITED STATES BANKRUPTCY COURT JUDGE

APPEARANCES CONTINUED

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1 (Proceedings commence at 2:00 p.m.)

2 THE COURT: Please be seated. We're here in Motors
3 Liquidation Company Avoidance Action Trust v. JPMorgan Chase
4 Bank, N.A., et al. It's adversary proceeding 09-00504.

5 We're here in connection with a dispute regarding the
6 defendant's expert reports. I reviewed the letters dated
7 December 8th and December 9th, respectively, and then today,
8 first this morning, a large box showed up with parts of the
9 first -- the joint expert report, and then a little while ago,
10 the -- and I guess I saw -- I had saw an email with the
11 proposed Eric Stevens expert report, and then the exhibits to
12 that showed up in chambers a little while ago. I have not read
13 every page of it.

14 Mr. Fisher, let me hear from you first, okay?

15 Actually, let me get the appearances. You first, Mr.
16 Fisher.

17 MR. FISHER: Eric Fisher from Binder & Schwartz, Your
18 Honor, on behalf of the Motors Liquidation Company Avoidance
19 Action Trust. I'm here with my colleague, Neil Binder.

20 THE COURT: Thank you very much.

21 MR. WOLINSKY: Marc Wolinsky from Wachtell Lipton for
22 JPMorgan with Lee Wilson and Kevin Jonke.

23 THE COURT: Okay. Thank you very much.

24 Go ahead, Mr. Fisher.

25 MR. FISHER: Your Honor, we exchanged expert reports



1 on November 23rd, the eve of Thanksgiving, and we received from
2 the defendants six reports. Five reports deal with
3 valuation-related issues, and then we received the joint
4 report, which is the subject of this dispute. The joint report
5 concerns fixture classification issues, and by its terms, the
6 joint report was the work of 11 different experts, and the
7 joint report identifies six different experts who will testify
8 regarding these fixture issues.

9 We engaged in a dialogue with JPMorgan's counsel,
10 along with the defendant, steering group, letting them know
11 that for a number of reasons, the report that we received, the
12 joint fixture report, did not comply with Federal Rule of Civil
13 Procedure 26. In particular -- or chiefly, I should say, that
14 the report simply failed to identify which expert was offering
15 which opinion and what that expert's basis of expertise was,
16 how that expertise was being applied to the problem at hand,
17 and what facts the expert was relying on in reaching that
18 opinion, and the expert's reasoning.

19 None of that really was disclosed in any kind of
20 clear way, and I think, Your Honor, that that was really by
21 design because the expert process really involved an
22 amalgamation of facts and opinions shared across teams and
23 subteams of experts and then was presented as the joint work.
24 We quoted in our letter, Your Honor, that the report reflects
25 -- they say, these are our opinions -- it reflects more than



1 150 years of experience. They simply failed to isolate out
2 which expert was offering which opinion and what the basis was
3 for that opinion.

4 THE COURT: I mean, they did identify which of the
5 testifying witnesses would give opinion testimony with respect
6 to specifically identified assets among the 40. Isn't that
7 true?

8 MR. FISHER: Yes, Your Honor. They told us which
9 expert would testify as to which assets, but then when you look
10 at the report, it became quite clear that that expert's
11 testimony was based on work that he had done with his subgroup
12 of experts.

13 THE COURT: Yeah, but, you know, in any big case I
14 ever worked on as a litigator or that I've had here, I've never
15 seen an expert report that reflects the work of only a single
16 person. In valuation reports, there's usually -- if it's a
17 complicated valuation assignment, there's been a team. And
18 there's one person who's had overall responsibility and who's
19 been the testifying expert, but that's common. Don't you agree
20 with that?

21 MR. FISHER: Yes, Your Honor, and we're not holding
22 them to that kind of standard. Of course, their testifying
23 expert is entitled to be assisted by a team. What's quite
24 different here is that this is being -- the testimony is going
25 to come from one witness, but the opinion is being presented as



1 the collective opinions of --

2 THE COURT: Let me ask you this because there's been
3 some movement from -- I understand what your initial objection
4 was, and I guess I find it unnecessary to conclude whether
5 there -- a joint report was deficient for the reasons that you
6 identify because the defendants have come forward and agreed to
7 do individual reports. They provided me today with, as I said
8 earlier, the -- it's styled Expert Report of Eric Stevens, and
9 two separate volumes of backup material provided with it. Just
10 focusing on Stevens --

11 MR. FISHER: Yes.

12 THE COURT: And I know you haven't had much chance to
13 look at it. Have you been able to review the Stevens proposed
14 expert --

15 MR. FISHER: See, Your Honor, we received it shortly
16 before noon. I've had a chance to skim it, and I think that I
17 can at least identify for the Court, at a high level, why it is
18 that we thought when they first proposed essentially, we'll
19 break our report into six different pieces, why we thought that
20 wouldn't solve the problem, why that's what we're looking at
21 here today, and why we felt it was very important to seek this
22 Court's assistance at this point in the schedule.

23 So just by way of example, if Your Honor has the
24 cover section of the new Stevens report --

25 THE COURT: Yeah, and I read the Stevens report.



1 MR. FISHER: Okay. So paragraph 22 --

2 THE COURT: Let me just flip through, okay. Yes, go
3 ahead.

4 MR. FISHER: So what the chart that's included in
5 paragraph 22 shows is that for each of the assets about which
6 Mr. Stevens is going to testify, he has an expert opinion that
7 one ought to depart from the useful lives for those assets that
8 were arrived at by KPMG and that are reflected in GM's
9 accounting records. The adjustments are always upwards, and
10 this is presumably in support of the argument that these assets
11 were meant to be long-lived and that presumably supports a
12 fixture characterization.

13 If you look at the heading, and I think it's quite
14 significant, the normal useful life. So that is the opinion
15 portion of this chart. So the opinion that, you know, a BS
16 Weld bus duct has a useful life of 30 years as opposed to 15
17 years is reflected as an expert consensus. Whose opinion is
18 it? And Mr. Stevens doesn't -- again, I haven't --

19 THE COURT: It's going to be Mr. Stevens's opinion.
20 He's going to be the one who testifies about it.

21 MR. FISHER: Well, but Mr. Stevens doesn't describe
22 that he has any experience doing that kind of work or what his
23 process was for saying that that particular asset, just as an
24 example, has a mechanical useful life of more than two times
25 what the accounting records show.



1 THE COURT: Well, I assume you'll take his deposition
2 and you'll try and beat him up on the point, but -- this --
3 look, first, Mr. Fisher, I'm not hearing motions in limine to
4 preclude an expert report because of problems with methodology
5 or that the expert isn't qualified to be an expert in the field
6 in which he is testifying. And so I assume -- I'm not giving
7 you a preview now, if you choose to make a motion in limine,
8 for example, with respect to this first report -- I say the
9 first report, the Stevens standalone report. You know, if you
10 make a motion in limine, the other side will respond to it, and
11 I will rule on it.

12 The one thing. I'm not making any decisions. I
13 don't -- you know, there was a lot of material that was
14 submitted to me, and today is my first day back in New York
15 after more than a week away. I received the request for the
16 conference today while I was out of the country, and it's set
17 up for today. You know, an expert can be qualified by
18 experience. He doesn't have to be qualified by education, and
19 I know from the -- it's certainly the defendant's position that
20 each of the testimonial witnesses will qualify as an expert by
21 their many years -- you know, their experience. They either
22 will or they won't. I'm not prejudging that now. But you'll
23 -- and sometimes it goes to the weight and not to the
24 admissibility of it, but I'm not ruling on motions in limine
25 now, so don't think that, you know, you're going to get this



1 hearing today.

2 You had a very valid concern when you were dealing
3 with the joint reports. I've had joint reports before, and I'm
4 always a little wary, but I'm always -- it's always been clear
5 to me who the testimonial witness on each subject. The fact
6 that -- you know, so you're objecting to the expert consensus
7 that it's in parentheses on the table that appears on page 8,
8 and, you know, it may be that a portion of life testimony won't
9 be admissible as -- you know, I want to hear what Mr. Stevens's
10 expert opinion is. Certainly, he's entitled to rely on -- you
11 know, experts frequently rely on what other experts have done
12 in connection with a case, so the fact that there's a team and
13 that Stevens, if he qualifies as an expert, has relied on
14 opinions or facts provided by other people doesn't make it
15 inadmissible. He can rely on hearsay. He can't -- you know,
16 there are limits to it. I -- one of you cites my recent
17 Lyondell opinion on it. You can't use it as a -- an expert
18 report as an excuse to get in hearsay that's not otherwise
19 competent, but I don't -- my quick read of this is it didn't do
20 that.

21 MR. FISHER: So, Your Honor, we are very sensitive to
22 the fact that we are not here on an in limine or Daubert
23 motion. We really have thought a lot about what we need under
24 Rule 26 --

25 THE COURT: Sure.



1 MR. FISHER: -- in order to be able to take an
2 efficient deposition.

3 THE COURT: I agree with that.

4 MR. FISHER: And I think the point here really is
5 that even though this is characterized as a separate report and
6 the opinions of Eric Stevens, it is still a piece of a joint
7 process. And what makes it different from a discovery point of
8 view is they're supposed to disclose to us the facts on which
9 the expert relied. Mr. Stevens explains that what he relied on
10 are meetings with other experts. They describe it as a
11 peer-review process. And what's important about that is that
12 it's not really a peer-review process because these are not
13 experts in the same discipline. This is Mr. Stevens talking to
14 another expert on the JPMorgan team who brings a different lens
15 to the problem and together create a composite picture as to
16 which only Mr. Stevens is going to offer the opinion.

17 THE COURT: So they -- you know, along with this
18 separate Stevens report, there was something called Exhibit 2,
19 facts and data considered. Mostly, it's just charts with Bates
20 numbers. I haven't got a clue what it's referring to. But --

21 MR. FISHER: And, Your Honor, I suspect that much of
22 the information considered by Mr. Stevens is conversations with
23 his team of experts, and I also suspect that Exhibit 2, which
24 is nothing more than a list of documents, is the same exhibit
25 we're going to get for the other five testifying experts.



1 THE COURT: Are you suggesting that it's improper for
2 different experts to rely on the same group of exhibits or
3 documents?

4 MR. FISHER: Of course not, if they all rely on the
5 same group, but I think that there are six different experts
6 testifying about different groups of assets, and what we're --
7 what I suspect we're going to get from them is that they all
8 relied on all of the same documents, which is -- in other
9 words, no effort to differentiate among the different experts.
10 If they have an expert who's an engineer, who's going to offer
11 this Court an engineering perspective on how an asset functions
12 or how it's installed, then we should get an engineering report
13 and that engineer should say, I'm an engineer and these are the
14 things I typically consider as an engineer and these are the
15 things I typically rely on and here's my opinion. If we're
16 getting -- if Mr. Stevens, as a GM executive with a lot of
17 experience, is going to testify about his experience, then we
18 should explain -- he should explain how he's applying that to
19 the problem in a way that's different from the engineer.

20 THE COURT: When you take his deposition, you're
21 going to ask him about each fact he considered, not just that I
22 rely on, you're entitled to know what facts he considered,
23 whether he relied on them or not, but you'll go through, and to
24 the extent they're meetings, I assume -- I don't know whether
25 you've already asked whether there are any notes from any of



1 the meetings that Stevens or the others had that reflect any
2 facts that he's considered in rendering his expert opinion.

3 MR. FISHER: Your Honor, on the topic of notes --

4 THE COURT: Go ahead.

5 MR. FISHER: -- I mean, the -- JPMorgan has drawn a
6 very opaque veil over this expert process. On the topic of
7 notes, what we have received are composite notes. I'm
8 presuming they were put together by McKenzie. Basically, all
9 11 experts feed their individual notes to McKenzie, McKenzie
10 synthesizes them into one consistent document, and then that's
11 what we get. So we haven't even had a chance yet to ask for
12 the underlying notes, but they haven't been provided, and
13 that's because the problem here is that the way the process was
14 designed will thwart our ability to take appropriate discovery.
15 And they're talking about six testifying experts, but it's
16 actually a team of 11, and to get to the bottom of what they've
17 done, we're actually going to have to take the depositions of
18 all 11 --

19 THE COURT: Well, I don't know whether you --

20 MR. FISHER: -- because we're going to find out they
21 all had conversations with each other.

22 THE COURT: I don't know whether you will or you
23 won't want to or have to take the depositions of all 11, but
24 all I can say is, I mean, in the recent Lyondell trial, there
25 were two experts that had a joint report. They had discrete



1 subjects they did, but each had teams. I dare say they were
2 probably more than 11 people in the aggregate on the teams.
3 What -- that's -- you know, in my experience as a lawyer in
4 complicated cases, that wasn't unusual. If I had valuation --
5 if I had a valuation expert, they typically had a team of
6 people supporting their efforts, crunching the numbers. They
7 checked them over. They did --

8 MR. FISHER: Right.

9 THE COURT: They're entitled to rely on others who
10 provide -- if it's the type of information an expert will
11 ordinarily rely on, it's proper to do it. So the fact that you
12 tell me that there were 11 people that support the opinions of
13 the six, my reaction is --

14 MR. FISHER: Your Honor -- I'm sorry.

15 THE COURT: -- that doesn't seem problematic to me.

16 MR. FISHER: It's not a numbers game. Presumably,
17 there were 50 people supporting these experts. That's not the
18 issue. The issue is that --

19 THE COURT: Yeah. The 11 probably had -- each of
20 them had people helping them.

21 MR. FISHER: Eleven had their own opinions and shared
22 those opinions so that we end up with a consensus opinion, and
23 then we're given one witness who's supposed to be the
24 testifying expert about some consensus opinion.

25 THE COURT: I don't know. Maybe you haven't gotten



1 this far with Mr. Wolinsky. Are they going to resist your
2 effort to take depositions of the 11 people? Have you
3 discussed that?

4 MR. FISHER: We haven't, Your Honor. And I also hope
5 that we don't have to take 11 depositions because part of the
6 part -- point of Rule 26 is actually to cut down on the need
7 for expert depositions by improving the quality of disclosure.
8 I mean, the aspiration, I think, is to, in certain
9 circumstances, make it such that expert depositions may not
10 even be necessarily. I understand that in a complicated like
11 -- case like this, a certain number of expert depositions will
12 be necessary, but if we had gotten compliant reports, I think
13 discovery would look very different.

14 THE COURT: I'm not sure about that, but -- let me
15 hear from Mr. Wolinsky, and then I'll give you a chance to
16 respond, Mr. Fisher.

17 MR. FISHER: Thank you, Your Honor.

18 MR. WOLINSKY: Good afternoon, Your Honor. Frankly,
19 my reaction is the same as yours.

20 THE COURT: State your name for the record so it's
21 clear.

22 MR. WOLINSKY: Marc Wolinsky, Wachtell Lipton.

23 THE COURT: Thank you.

24 MR. WOLINSKY: My reaction is -- before this started
25 and after this started, are the same as yours. This is --



1 THE COURT: Well, my reaction -- I will be honest
2 with you, my reaction originally when I saw -- when I read the
3 joint report was that it was problematic what had been -- what
4 was being done and left too much uncertain as to what Mr.
5 Fisher and his colleagues were supposed to do in discovery.

6 MR. WOLINSKY: Right.

7 THE COURT: But you came forward with an alternative
8 proposal. I don't know what you're -- you provided me with the
9 report of one Eric Stevens.

10 MR. WOLINSKY: Right.

11 THE COURT: When are you going to be in a position to
12 provide the other individual reports?

13 MR. WOLINSKY: We expect by the end of the week, Your
14 Honor.

15 THE COURT: Okay.

16 MR. WOLINSKY: We thought the original report was
17 fine because it identified who was going to testify on each
18 subject, and to the extent it used the word "we" to express an
19 opinion, it expressed an opinion that all of them individually
20 had.

21 THE COURT: Let me --

22 MR. WOLINSKY: But that said --

23 THE COURT: And I really told --

24 MR. WOLINSKY: -- really split it apart --

25 THE COURT: I really said to Mr. Fisher, I'm going to



1 take, as the starting point, the proposal to provide individual
2 reports and not -- I don't find it necessary to rule on whether
3 the joint report complied with the rules, okay.

4 MR. WOLINSKY: Understood.

5 THE COURT: At a minimum, you're going to have to
6 provide the individual reports. And as I said to Mr. Fisher, I
7 don't know, he may well have motions in limine, they may be
8 well taken, and you may run the risk that some will get, you
9 know, excluded in whole or in part, but we'll -- I'm going to
10 -- this is not a hearing on --

11 MR. WOLINSKY: Right.

12 THE COURT: -- motions in limine.

13 MR. WOLINSKY: Your Honor, just to be very direct,
14 paragraph 25 of Mr. Stevens's new report, he identifies who he
15 worked with to come to his conclusions, but then if you look at
16 the carryover paragraph on page 10, "While my analysis of each
17 asset was informed by and peer reviewed by various members of
18 my team, all the opinions expressed herein are my own." And
19 that is what you're going to see at trial, and that's what
20 they're going to hear at deposition.

21 Mr. Stevens is uniquely qualified to testify.
22 Frankly, Mr. Stevens could probably testify as to the whole
23 case, given the breadth of his experience, but since his focus
24 was on stamping and assembly, we decided to allow him to cover
25 stamping and assembly, and people who have managed and built



1 foundries to testify about foundries, people who have managed
2 and built powertrain assets will testify about that. So that
3 is why you have the five experts testifying about the five
4 basic processes in an auto manufacturing plant, and each of
5 them will testify from their own -- on the basis of their own
6 personal knowledge and on the base of the evidence that's been
7 collected, on the base of the pictures as to their opinions.

8 So I think this is all maybe premature, maybe not.
9 Then we were happy -- when the issue bubbled up, you know, I
10 did consult with my team. I decided our time is valuable, your
11 time is valuable, let's split it into six so that we can moot
12 this issue.

13 THE COURT: May I ask this? So you have six proposed
14 testimonial witnesses.

15 MR. WOLINSKY: There are five on the fixture/non-
16 fixture. One is on a very discrete issue.

17 THE COURT: And there are 11 additional people who
18 supported the work of the six?

19 MR. WOLINSKY: Yes. And all -- no, not 11
20 additional. There's a total of 11.

21 THE COURT: Total of 11.

22 MR. WOLINSKY: And all of them -- all of --

23 THE COURT: Six of the 11 are testimonial, five more
24 worked on it --

25 MR. WOLINSKY: Right.



1 THE COURT: -- who are not testimonial.

2 MR. WOLINSKY: And all of them, under Your Honor's
3 prior ruling, have been deposed as fact witnesses.

4 THE COURT: Let me just address that briefly because
5 that was part of, Mr. Fisher, your letter. That was one of the
6 issues that was sort of teed up.

7 It happens that, here, the experts are also
8 knowledgeable about the facts. If they can testify competently
9 about the facts, it doesn't preclude them from being an expert.
10 And certainly, they can rely on their own knowledge of the
11 facts. They can rely on it as hearsay, even if it wasn't their
12 own, but here, they have the ostensible advantage of having
13 personal knowledge about it. So the fact that experts are
14 basing their opinions on information received from others,
15 reviewed in documents, that's permissible. And to the extent
16 that they're percipient fact witnesses, that's proper -- a
17 proper basis for expert opinions, too.

18 And, you know, there was -- there used to be much
19 more of a big deal about so-called "in-house experts" who also
20 were fact witnesses, as well. And earlier on in this case, I
21 know you had -- there was some disagreement about the parties,
22 whether they had to provide expert reports for the employees or
23 former employees. We're beyond that. You've got expert
24 reports.

25 THE COURT: Go ahead, Mr. Wolinsky. I cut you off.



1 MR. WOLINSKY: Yes. Your Honor, look, I think the
2 issue is covered. There are other issues, since we're all
3 here, that I was going to raise, but I have nothing else to
4 talk -- to discuss on the expert reports.

5 THE COURT: We can do that. Let me see if Mr. Fisher
6 --

7 Is there anything else you want to add?

8 MR. FISHER: Just one moment, Your Honor.

9 THE COURT: Sure, go ahead.

10 MR. FISHER: On this issue, nothing further, Your
11 Honor.

12 THE COURT: Okay.

13 Mr. Wolinsky, what else did you want to raise?

14 MR. WOLINSKY: Yes. Your Honor, you touched on it
15 before. We're happy to provide the five witnesses, the six
16 witnesses. We're happy to have all 11 re-deposed. They've
17 already had, I think, 11 or 12 days of depositions with these
18 same group of people. Five of them have now put forward -- six
19 of them have now put forward expert reports. They're certainly
20 entitled to take six days of depositions to cover the substance
21 of those reports.

22 They have one witness covering the breadth of the
23 entirety of that subject matter, covered in 300-plus pages of a
24 400-plus page report. We have asked for five days with Mr.
25 Gosling (phonetic) to cover both his fixture opinion and his



1 valuation opinion, and so far we've only been offered one day
2 on each subject. We think given the history of their deposing
3 all of our people once already and their ability to depose as
4 many as 11 again, we would like to have at least four days on
5 fixture/non-fixture with Mr. Gosling. If it takes more, so be
6 it. I think we can be efficient. It gets -- after a while, it
7 gets repetitive, I think, I hope, but that's our request, and
8 we have not been able to come to agreement with the other side
9 on that.

10 THE COURT: Mr. -- I'm sorry, Mr. Fisher, I'm going
11 to hear from you.

12 MR. FISHER: So, Your Honor, first, the notion that
13 we already took the depositions of these experts is really a
14 diversion because we -- the line between --

15 THE COURT: My focus is what's a reasonable length of
16 deposition for your expert witness, not whether you got to take
17 --

18 MR. FISHER: Right.

19 THE COURT: -- their people as fact witnesses, and
20 now you're going to depose them as experts. It's really what's
21 a reasonable period of time to depose your expert. You're
22 using one expert for the entire --

23 MR. FISHER: Yes. For both the fixture
24 classification, and he also appraises each of the assets. So
25 we did agree to a multi-day deposition. We did agree to depart



1 from the seven-hour rule, and we offered 14 hours, which we
2 thought was a lot for one individual witness, and we thought
3 that the 35 hours was simply excessive. They're not offering
4 each of their witnesses for multiple days. What I heard was an
5 offer that we could depose each of those witnesses for one day.
6 We offered our witness for two days, Your Honor.

7 THE COURT: How long is the expert report that's been
8 submitted?

9 MR. FISHER: This is the entire expert report.

10 THE COURT: How many issues is the -- he's giving an
11 opinion on each of the 40 assets --

12 MR. FISHER: Yes. He classifies each --

13 THE COURT: -- both as to whether it's a fixture and
14 also as to valuation?

15 MR. FISHER: Yes. It's approximately 400 pages, Your
16 Honor, with all the exhibits.

17 THE COURT: Does the expert apply different valuation
18 methodologies for different assets?

19 MR. FISHER: There are two approaches, cost and
20 market approach, that he applies to the assets, Your Honor.

21 THE COURT: Same approach -- those two approaches for
22 all 40 assets?

23 MR. FISHER: Yes. It depends what data is available,
24 you know, as to whether or not he's able to apply both in every
25 case, but essentially, yes.



1 THE COURT: It does strike me that -- Mr. Wolinsky,
2 that if he uses two approaches for valuation, you don't need --
3 you're going to be re-plowing the same -- yes, you'll have
4 questions about specific assets, no doubt, how, you know, the
5 valuation, but it just strikes me it may be more -- it's likely
6 to be more complicated in how he characterized the assets as
7 fixtures --

8 MR. WOLINSKY: Yes.

9 THE COURT: -- or not, and there, the trial is going
10 to be about 40 assets, and you're going to probably want to go
11 through, if not all 40, a lot of them, but as to if he's using,
12 you know, the same valuation methodologies for all 40, I'm not
13 sure you're going to -- yes, you'll have questions about
14 specifics, but --

15 MR. WOLINSKY: I think you're right, Your Honor. Our
16 focus is -- my focus is on the 40 assets. We asked for a total
17 of five days. I think valuation will consume one of those five
18 days. The substance of the -- the real problem is the 40
19 assets, going through each one, you know, is it attached, is it
20 not attached, why do you say it's attached, why do you say it's
21 not attached, why do you say it's GM's intent. And just
22 mechanically, we're going to have to go through 40 assets, and
23 I don't think it can be done in seven hours.

24 THE COURT: I would -- I think I agree with that, but
25 when -- and again, it's -- look, I'm doing this completely in



1 the dark. I haven't looked at the expert report that Mr.
2 Fisher's expert has provided. Five days seems like a very long
3 deposition to me. It may be that that's appropriate. I think
4 -- have you scheduled the deposition yet?

5 MR. FISHER: No, Your Honor. And I -- this dovetails
6 with, I think, another issue that's at least worth raising,
7 which is just how this will all affect the schedule because --

8 THE COURT: We're holding to the schedule. I'm
9 telling you right now --

10 MR. FISHER: Yes.

11 THE COURT: -- we're going to trial -- what was it,
12 April 24th?

13 MR. FISHER: Yes.

14 THE COURT: You know --

15 MR. FISHER: And --

16 THE COURT: -- that's when the trial's going to be
17 held.

18 MR. FISHER: And that's exactly why we're here on
19 this now, Your Honor, so that nothing derails that. We are
20 supposed to submit our rebuttal expert reports on December
21 21st. Each side had a month to prepare their rebuttal expert
22 reports. In the case of these fixture reports, we're now
23 getting their opening reports on December 16th. Mr. Gosling is
24 going to have to prepare a rebuttal to now six fixture reports
25 that are coming in almost a month late.



1 THE COURT: Well, I would -- my answer to that is a
2 quick yes and no because the joint report had its problems.
3 It's going to be replaced with separate reports, but I don't --
4 I have a box full of exhibits that support the joint report
5 that was done. I don't think -- yes, your experts are entitled
6 to see the separate reports before they submit their rebuttal
7 reports, but they have not been left helpless in preparing
8 rebuttal reports. The joint report and its exhibits go a long
9 way to giving them the information they need.

10 If you have -- I think you can fairly raise the issue
11 of whether you should have more time for the rebuttal reports
12 in light of the fact it was -- it started out with this joint
13 report and you've only gotten one of the separate reports. I
14 want the two of you to work that out. I can't -- I assume
15 you're going to be able to work that issue out, either with a
16 staggered schedule on, you know, rebuttal reports as to each of
17 these individual reports.

18 Okay. With respect to the length of the deposition,
19 I'm not going to rule on it today. It does strike me, just
20 listening to you, without having seen the report that you have,
21 that you've produced to them, that one day on valuation is
22 probably enough on that. How many days on each of the 40
23 assets, I don't --

24 Mr. Wolinsky, I don't know what's in the expert
25 report. It may well be just as in your expert report. You



1 provided your experts with a set of principles that should be
2 applied in identifying what's a fixture, and those same
3 principles were being applied, as I understand it, to all 40 of
4 the assets. If the plaintiff's expert had used the same basic
5 approach, these are the principles that I apply, yes, you've
6 got 40 assets to go through, but I'm not sure that you're not
7 going to duplicate everything as to every one of those 40
8 assets. So I want the two of you to talk again and try and
9 resolve it. If you can't, we'll have a telephone conference,
10 not an in-court hearing.

11 And I can certainly understand the defendant's
12 position that more than two days will be required to cover all
13 40 -- for the valuation and then all 40 assets, but I'm just
14 recoiling at the notion that somebody's going to sit for five
15 days of deposition. Try again to work it out. If you can't,
16 you'll arrange a telephone conference.

17 And I guess what I would ask you to do, Mr. Fisher,
18 is to provide the Court with a copy of your expert report.
19 Just submit it. Obviously, it's not going to be filed.
20 There's confidential -- do I have it already?

21 MR. FISHER: I believe the --

22 THE CLERK: Yes, you do, Your Honor.

23 MR. FISHER: -- defendant's counsel submitted a copy
24 of our expert report.

25 THE COURT: Okay. There's a big box sitting on the



1 floor --

2 MR. FISHER: Yes.

3 THE COURT: -- and I pulled out some of it, and then
4 more stuff came this afternoon. Okay. If I have that, I have
5 it. Don't -- one's enough, one's enough. Okay. If you have a
6 dispute about it, I will resolve it after I -- I will look at
7 that report. I didn't look at that report. Okay.

8 Okay. I wanted to raise another issue with all of
9 you, and that has to do with confidentiality and sealing when
10 we get to trial. I have no problems about everything being
11 exchanged between you, subject to the protective order and
12 confidentiality, but I don't have closed trials. This issue
13 just came up in Lyondell because all the expert reports were
14 marked "confidential" and subject to protective order, and I
15 made clear that we were not having, you know, closed trial. I
16 encouraged the parties to work it out, and they did. Nothing
17 was submitted to the Court in evidence as a sealed exhibit.
18 All testimony was on the record during the trial.

19 I recognize here that there are third-party interests
20 that are involved, New GM, which is making use of all or much
21 of the 40 assets, but I -- all I'm doing today is telling you
22 that you need to confer and try and get this resolved because I
23 don't want -- I'm not closing the trial. I think once before
24 where I had a trial, all the testimony came in live. There
25 were -- the exhibits don't get filed on ECF, and sometimes that



1 doesn't present a problem. What I don't want to have to do is
2 seal portions of the transcript, so -- but I'm not ruling on it
3 now. I recognize each case is different, but I just -- when I
4 saw all the expert reports, I got concerned about it. Okay?

5 MR. FISHER: Understood, Your Honor.

6 THE COURT: And that may mean that you need -- people
7 need to talk to New GM to make sure that they're not -- and if
8 they're going to argue for sealing and confidentiality, they're
9 going to have to come before me, okay, because I'll just unseal
10 everything otherwise. So they're going to have to come and
11 state their position on it.

12 Okay. Anything else either of you want to raise?

13 MR. WOLINSKY: Your Honor, you're right. It's a New
14 GM issue. They have concerns about the proprietary nature of
15 the configuration of their plants. That's really the issue.
16 And we'll talk to them, and I don't think they'll care about
17 the testimony. I think they'll care about pictures being
18 displayed in open court, so maybe we show the pictures on a
19 monitor to yourself, to the witness. I don't know. We'll talk
20 to them and see what's going to work for them.

21 THE COURT: Yeah. We'll deal with that when we get
22 closer to trial, but I just wanted to make it clear to
23 everybody. That's an issue for me.

24 MR. WOLINSKY: Your Honor, there's one other issue
25 that we'd put on the agenda for December 20th. I don't know if



1 we need to be here on December 20th since we're all here, so
2 why don't I raise it now.

3 THE COURT: Go ahead.

4 MR. WOLINSKY: In going through KPMG's work papers, I
5 personally actually came across a fact that I was not aware of
6 at the time we were taking the original discovery of GM, which
7 is that GM, at the time of the bankruptcy, has a class of
8 assets called construction work in progress, and it's what it
9 sounds like. It's assets that are in the process of being
10 constructed in a manufacturing plant, but that are not yet in
11 service. The ledgers that New GM gave us of the assets that
12 we've all been working on, the 100,000-plus assets, do not
13 include construction work in process [sic] because they're not
14 in service yet. Turns out, according to the KPMG documents,
15 that there are \$660 million of construction work in progress in
16 General Motors North America alone. And we are -- if it's a
17 brand-new plant, then it wouldn't be covered by an existing
18 fixture filing, but if it's an enhancement to an existing
19 plant, we think there's an argument that it's -- depending on
20 the state of the construction, it's an asset that would secure
21 the loan.

22 So we have been working with GM, New GM, to get --
23 then, they voluntarily worked -- started working with us to
24 help us get into what's behind that \$660 million, but the
25 protective -- the scheduling order literally provides that we



1 don't have a right to issue a subpoena to New GM as to those
2 assets because we're supposed to be focusing only on the 40
3 representative assets. So we would like to modify the existing
4 order so that we can seek documents, if necessary, from New GM
5 as to the composition of the \$660 million of construction work
6 in progress. The plaintiff has not agreed to the modification
7 order.

8 THE COURT: Let me ask this. I want to make sure I
9 understand. Do you know whether any of that construction in
10 progress specifically related to any of the 40 representative
11 assets that have been submitted?

12 MR. WOLINSKY: No. By definition, it doesn't.

13 THE COURT: Then I don't -- then -- we're having a
14 trial on 40 assets.

15 MR. WOLINSKY: Yes, Your Honor, but we are otherwise
16 taking discovery in the background so that the parties are in a
17 position to settle once we get the 40 representative assets
18 determined. So what we'd like to get is documents, just
19 documents, from New GM so we can see what's behind that \$660
20 million. We think, based on, you know, our work with our
21 consulting experts, that there are at least three plants where
22 there were meaningful projects underway that would be fixtures.

23
24 So -- and interestingly, you're going to hear a lot
25 about this at trial. KPMG, when it valued the assets, took



1 huge haircuts off of replacement costs to get to their -- the
2 valuation. KPMG did not haircut construction work in progress
3 at all. So this is dollar for dollar -- if you accept, you
4 know, GM's records, this is dollar-for-dollar value that would
5 support the loan.

6 THE COURT: And why, in your view, would it be
7 covered by the fixture filings?

8 MR. WOLINSKY: It's an asset that's intended --
9 that's attached. It's a fixture. I mean, we'll have to
10 litigate whether it's a fixture or we'll have Your Honor's
11 guidance as to whether a fixture, but if it's a fixture in a
12 plant that's covered by a filing, then it secures the loan.
13 And we think there's real money there, and we're not -- we
14 don't -- I don't think it will interfere with the 40
15 representative asset trial one whit because really this is GM
16 producing documents. We think everybody on this side can walk
17 and chew gum at the same time, but we'd like to have those
18 documents so that when we have Your Honor's decision on the 40
19 assets, we're in a position to apply the principles that are
20 set by Your Honor, both as to what's a fixture and valuation --

21 THE COURT: May I ask this, did you tell Mr. Fisher
22 you were going to raise this issue today?

23 MR. WOLINSKY: No. I told him we -- we told him we
24 were going to raise it on December 20th.

25 THE COURT: Okay.



1 Mr. Fisher, if you want to give me your preliminary
2 views. I'm not going to -- on an issue that I consider to be
3 important, I'm not going to require you to take a definitive
4 position when you just heard it for the first time.

5 MR. FISHER: Your Honor, so the -- in that spirit,
6 these are only preliminary views. What's been shared with us
7 is only a fraction of what Mr. Wolinsky just said, and of
8 course, there's a lot of advocacy embedded --

9 THE COURT: Some advocacy.

10 MR. FISHER: -- embedded in that.

11 THE COURT: Now, I'll hear your advocacy.

12 MR. FISHER: Well, I guess advocacy just sounds like
13 looking for spare change in the couch pillows. But --

14 THE COURT: Pretty soon, it adds up to real money.

15 MR. FISHER: But we had a very elaborate negotiation
16 over what is now a fairly complicated discovery schedule that's
17 all about keeping things on track for the 40-asset trial.
18 There's a lot that we gave up in that schedule, including
19 agreeing to stays of discovery as to issues that we would have
20 liked to take discovery on, that we think ultimately will lead
21 to the complete resolution of the case. And so for this to
22 have been raised at the last minute and to reopen discovery
23 just seems to us to be, you know, fairly dangerous in terms of
24 just reopening discovery as to issues and derailing a plan that
25 has a lot of moving parts.



1 THE COURT: All right. I'm not going to rule on the
2 request today. I think it would be unfair to Mr. Fisher to do
3 that. What I would again encourage the two of you to do is see
4 whether you can come to an agreement on phasing of the
5 discovery or whatever. I don't want -- April 24th's going to
6 be here before you know it, and I don't want anybody diverted
7 from getting that done. On the other hand, I think document
8 production, in particular, once the subpoena gets served, I
9 think in the first instance, the work is going to fall to New
10 GM to be able to collect and produce the documents. If we were
11 talking about depositions with respect to the subject, I think
12 that's on a different order.

13 I think that to the extent -- and you may disagree
14 about the relevance -- not -- I just want to be clear, Mr.
15 Wolinsky, was direct in answering it doesn't relate to the 40
16 fixtures -- 40 representative fixtures. I think that to the
17 extent that the parties can agree or I have to rule on document
18 production from New GM, I don't think that's going to divert
19 the attention of the lawyers who have to prepare for and go to
20 trial in April. But I want the two of you to see whether you
21 can resolve that. If you can't, we can deal with it on
22 December 20th. And what I would ask for -- if you can't agree,
23 do short letters that just address this issue.

24 I'm not going to ask you to respond further at this
25 time. You've been -- you know, you didn't have a chance to



1 discuss it with Mr. Wolinsky and understand exactly what he's
2 asking for at this point, so I think we'll leave it at that for
3 today.

4 Do you have any other issues you want to raise, Mr.
5 Fisher?

6 MR. FISHER: No, Your Honor.

7 THE COURT: Okay. Mr. Wolinsky?

8 MR. WOLINSKY: No. Thank you, Your Honor.

9 THE COURT: Okay. So you'll let me know. I'm around
10 if we have to have our -- a telephone conference to resolve how
11 many days of depositions there will be. We can do that very
12 expeditiously. Okay.

13 All right. Thanks very much.

14 MR. WOLINSKY: Good. Thank you.

15 THE COURT: Okay. We are in recess until three o'
16 clock, I think it is.

17 (Proceedings concluded at 2:45 p.m.)

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C E R T I F I C A T I O N

I, Alicia Jarrett, court-approved transcriber, hereby
certify that the foregoing is a correct transcript from the
official electronic sound recording of the proceedings in the
above-entitled matter.

Alicia J. Jarrett

ALICIA JARRETT, AAERT NO. 428 DATE: December 14, 2016
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