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February 3, 2017

**VIA ECF AND FEDERAL EXPRESS**

The Honorable Martin Glenn  
United States Bankruptcy Court  
Southern District of New York  
One Bowling Green, Courtroom 523  
New York, New York 10004

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

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Dear Judge Glenn:

We write on behalf of plaintiff Motors Liquidation Company Avoidance Action Trust (the “Trust” or “Plaintiff”) concerning potential judicial site visits to view the representative assets selected by the parties that will be the subject of the upcoming trial (the “Representative Assets”) located at the GM Warren Transmission plant, the GM Lansing Delta Township Assembly plant, and the GM Lansing Regional Stamping plant (the “Site Visits”). As the Court is aware, Defendants have been urging this Court to participate in Site Visits. Plaintiff’s view is that if the Court concludes that viewing some of the Representative Assets would be helpful to the Court, Plaintiff does not object. However, the proposal advanced by Defendants is designed to do more than provide the Court an opportunity to view some of the Representative Assets. It is an effort to offer testimony of former GM employees whom they seek to qualify as experts without the opportunity to subject them to cross-examination and without other important pretrial and trial protections. In addition, the Defendants’ proposal that the Site Visits occur before trial raises significant due process concerns and would be inefficient.

First, Defendants’ proposal to have experts from each side attend the Site Visits and provide testimony in response to questions from the Court would violate Rule 5001(b) of the Federal Rules of Bankruptcy Procedure, which provides that “[a]ll trials and hearings shall be conducted in open court and so far as convenient in a regular courtroom.”<sup>1</sup> Rule 5001(b) also provides that “no hearing, other than one ex parte, shall be conducted outside the district without the consent of all parties affected thereby.” *See generally In re Application to Take Testimony in Criminal Case Outside District*, 102 F.R.D. 521, 523 (E.D.N.Y. 1984) (“In a civil case consent should be obtained before a hearing is held outside the district.”). Plaintiff does not consent, and

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<sup>1</sup> The wording of Bankruptcy Rule 5001 is modestly broader than Rule 77(b) of the Federal Rules of Civil Procedure, which requires that “every trial on the merits” must be conducted in open court and, so far as convenient, in a regular courtroom.

Defendants have offered no authority that would permit an important portion of this hearing to occur outside this district. In fact, in the few instances of site visits to which Defendants have been able to refer us, the courts have been careful to narrowly circumscribe what could be said at such visits and in no instance was testimony permitted.<sup>2</sup>

Further, the proposal is also impractical. These are active, noisy sites and some of the areas where the assets are located are narrow. Thus, even if Defendants' proposal were not barred by Rule 5001(b), it is hard to conceive how the proposal could be implemented in a manner that is orderly and protects the due process rights of the parties. It will be difficult for all involved to hear the questions and answers, and then to potentially follow up with further questioning of the witnesses as necessary. And these same practical considerations create a very real risk that it will not be possible to obtain a reliable transcript of the testimony during the Site Visits. *See, e.g., McLeod v. Allstate Property & Casualty Ins. Co.*, Case No. 13-2321, 2014 WL 12617762, at \*1 (E.D. Pa. Mar. 7, 2014) ("To prevent the visit from becoming overly crowded, however, the parties' experts shall not attend."). Accordingly, Plaintiff objects to the presence of experts and the taking of testimony during the Site Visits on both legal and practical grounds.

Second, the due process concerns raised by Defendants' proposal are particularly acute because Defendants want the Site Visits to occur before the trial commences, and thus before this Court has had an opportunity to rule on the admissibility of testimony from the six former GM employees whom Defendants have retained as experts or an opportunity to hear cross-examination of these witnesses at trial (to the extent their testimony is admitted). This proposed pretrial timing is prejudicial to Plaintiff. Defendants' proposed fixture-classification experts are former GM employees who have never before been qualified as expert witnesses and have no

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<sup>2</sup> In our discussions about the Site Visits, Defendants have asserted that they modeled the protocol for the Site Visits after the protocol that governed Judge Rhodes' site visit to certain locations in connection with the City of Detroit bankruptcy case. However, unlike Defendants' proposal in this case, the *In re City of Detroit* protocol provided for a visit by the Court and counsel only, and further provided that "no statements by the Site Visit Counsel shall be permitted" other than agreed-to statements identifying each location and statements by counsel in response to questions from the Court. Proposed Protocol for Site Visit at 2, ECF No. 5250-7, *In re City of Detroit*, Case No. 13-53846 (SWR) (Bankr. E.D. Mich. June 6, 2014). (A copy of the site visit protocol is attached hereto as Exhibit A.) Further, *In re City of Detroit* based its protocol on an order permitting a site visit to a property at issue in *In re Charles Street African Methodist Episcopal Church of Boston*, Case No. 12-12292 (FJB) (Bankr. E.D. Mich.). In *In re Charles Street AME*, however, the order permitting the site inspection required that the judicial tour would be "without commentary," and that "no statements by counsel shall be permitted other than statements by Debtor's counsel identifying the name of each room visited in the Church." Agreed Order Regarding Debtor Charles Street AME's Motion in Limine to Exclude Appraisal Reports or, in the Alternative, For Judicial Site Visit of the Roxbury Renaissance Center ¶ 4, ECF No. 420, *In re Charles Street AME*, Case No. 12-12292 (FJB) (Bankr. E.D. Mich.). (A copy of the order is attached hereto as Exhibit B.) Judicial site visits are rare, and, as these examples show, courts take measures to ensure that site visits are carefully controlled to protect the transparency of the evidentiary record and the rights of all parties.

prior experience classifying assets. While there may be certain limited opinions that some of these former GM employees are qualified to offer based on their experience with the Representative Assets, Plaintiff has significant objections to most if not all of their proposed testimony. In addition to lack of expertise, the proffered opinions suffer from other significant defects. For example, in many instances the former GM witnesses are conduits for impermissible hearsay, offering purported expert opinions based on something they were told by other GM employees or merely summarizing documents they have been asked to read by counsel or by JPMorgan Chase, N.A.'s consultant, McKinsey & Co. In other instances, portions of the testifying experts' opinions were written by other experts who are not being called to testify. Also, with regard to many of their assertions, the former GM witnesses are really serving as hired percipient fact witnesses, not experts. Plaintiff respectfully submits that it should be afforded a full and fair opportunity to challenge the admissibility of the proposed experts' opinions and to cross-examine these witnesses in a proper trial setting. Defendants' proposal is an effort to short-circuit all of these protections and have the Court hear from their proposed experts before they are thoroughly vetted by this Court.

The Site Visits are also prejudicial to Plaintiff to the extent that they occur before the trial record on the question of what is a fixture is fully developed. According to Defendants' proposed expert reports, as a categorical rule, virtually every "fixed manufacturing asset" in every GM facility is a fixture, even if the asset's attachment and adaptation to the realty is not extensive or even non-existent (as, for example, in the case of software). Plaintiff will argue that Defendants' consistently broad view of what constitutes a fixture cannot be squared with the case law, which shows significant variation about what kinds of assets constitute fixtures depending upon the specific context and the weight assigned to different considerations in the particular case.<sup>3</sup> It will be more productive for the Court, and less prejudicial to Plaintiff, for the Court to view the assets after it already has a fully developed record, in order to ensure that the Court has a proper evidentiary and legal frame in place to serve as a guide for the Court. Further, a number of assets may be held not to be surviving collateral based on facts to be presented at trial that do not require that the asset be viewed at all, for example, leased assets that were excluded as collateral under the loan documents. Thus, it will be more efficient for the Court to make a determination after trial as to what assets, if any, it would benefit the Court to view.

Further, given the press of trial and all of the pretrial deadlines, it is maximally disruptive for these Site Visits to occur shortly before the trial, particularly in light of the Passover holiday, which begins on the evening of April 10 and concludes on the evening of April 18. For all of these reasons, Plaintiff objects to conducting the Site Visits before the trial.

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<sup>3</sup> Defendants' persistence about site visits is apparently driven by the belief that it will advance their broad-brush approach to fixtures if, before trial, the Court already has viewed and has in mind a long, operating assembly line that is integral to GM's manufacturing process. *See, e.g.*, Apr. 18, 2016 Status Conference Tr. 85:21-24 (Mr. Wolinsky: The Court "should reserve [decision on whether to visit the sites] because at the end – frankly, Your Honor, when I walked into a plant, I said, wow, this place is filled with fixtures. That's – right. That's where I'm coming from.").

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Should the Court conclude that viewing some or all of the Representative Assets located at any of these three plants would be beneficial, Plaintiff of course would like to accommodate the Court and would not object to such visits provided that (i) no testimony is taken during the Site Visits, and (ii) the Site Visits occur as the final phase of the trial on the Representative Assets and after the taking of all testimony. To that end, Plaintiff proposes that any Site Visits occur after the conclusion of the two-week trial (anticipated May 5, 2017) and before closing arguments on May 26, 2017. This three-week window is an appropriate time for these Site Visits. Immediately following the trial, the Court will be in the best position to determine the extent to which the Site Visits will be helpful and will be able to focus the visits on those assets the Court thinks it would be most productive to view. There will be no need for testimony during the Site Visits because the Court will already have the benefit of a complete evidentiary record with regard to each of the assets, including many photographs and detailed explanations of the assets. To the extent that the Court has questions occasioned by the Site Visits, the Court could direct the parties to address those issues in post-trial submissions and at closing arguments.

We thank the Court for its attention to this matter.

Respectfully,

/s/ Eric B. Fisher

Eric B. Fisher

cc: All Counsel of Record (via ECF)

# Exhibit A

UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

In re

CITY OF DETROIT, MICHIGAN,

Debtor.

Chapter 9

Case No. 13-53846

Hon. Steven W. Rhodes

**PROPOSED PROTOCOL FOR SITE VISIT**

On the first day of the Confirmation Hearing, the Court<sup>1</sup> shall conduct a site visit (the “Site Visit”) of the locations set forth on Exhibit A hereto, filed under seal.

Counsel for the Debtor<sup>2</sup> and counsel for the Objectors<sup>3</sup> (the “Site Visit Counsel”) shall be permitted to participate in the Site Visit.

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<sup>1</sup> The Court will be accompanied by a court reporter, videographer and such U.S. Marshals or other security personnel as may be required.

<sup>2</sup> Counsel for the Debtor may include up to 3 attorneys.

<sup>3</sup> Counsel for the Objectors shall consist of one attorney per Objector. For purposes of this Order, “Objectors” shall mean and include Financial Guaranty Insurance Company, Syncora Guaranty Inc., National Public Finance Guarantee Corporation, Assured Guaranty Municipal Corp., the Trustee for the Detroit Water and Sewerage Department (“DWSD”) Bondholders, the Ad Hoc Committee of DWSD Bondholders, a representative of the COPs Holders, the non-settling Public Safety Unions, and any retiree association or retirement system that, after conclusion of balloting, becomes an objecting party.

The Debtor shall arrange, at its sole expense, a tour bus sufficient to accommodate the Court and the Site Visit Counsel.

The tour bus shall meet the Court and the Site Visit Counsel on the first day of the Confirmation Hearing, at a time and place to be pre-determined by the Court and Site Visit Counsel. To avoid possible disruption of the Site Visit, the time and place from which the tour bus will depart shall not be made public.

The Court and the Site Visit Counsel shall tour the locations set forth on Exhibit A by driving to and stopping in front of each such location to permit a viewing of the exterior of the location; *provided, however*, that the Court in its discretion may elect to exit the tour bus and conduct a walkthrough of any of the locations, accompanied by the court reporter, videographer and the Site Visit Counsel; *and provided further* that the Court and the Site Visit Counsel shall conduct a walkthrough of the Detroit Institute of Arts according to the schedule set forth on Exhibit A.

The duration of the Site Visit shall be three hours, subject to extension in the discretion of the Court.

During the Site Visit, no statements by the Site Visit Counsel shall be permitted other than (1) statements by Debtor's counsel identifying each location and the purpose for which the Debtor included such location as part of the Site Visit, and (2) answers to any questions posed by the Court.

Counsel for the Debtor and counsel for the Objectors shall agree in advance on the language to be used by Debtor's counsel to describe each location included in the Site Visit.

A stenographic and video record of statements made during the Site Visit shall be taken. The transcript of the stenographic record and the video of the Site Visit shall be admitted in evidence.

All Site Visit Counsel shall maintain the same silence and decorum on the tour bus as they would do in the courtroom.

Time spent on the Site Visit shall not count against any party's allocated time at the Confirmation Hearing.

# Exhibit B

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MASSACHUSETTS  
EASTERN DIVISION

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**In re** : **Chapter 11**  
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**CHARLES STREET** : **Case No. 12-12292 (FJB)**  
**AFRICAN METHODIST EPISCOPAL** :  
**CHURCH OF BOSTON** :  
:
  
**Debtor.** :  
:
  
-----X

**AGREED ORDER REGARDING DEBTOR CHARLES STREET AME’S MOTION IN LIMINE TO EXCLUDE APPRAISAL REPORTS OR, IN THE ALTERNATIVE, FOR JUDICIAL SITE VISIT OF THE ROXBURY RENAISSANCE CENTER**

Upon the motion (the “Motion”) of Debtor Charles Street African Methodist Episcopal Church of Boston (“Charles Street AME” or the “Debtor”) and it appearing that this Court has jurisdiction to consider the Motion pursuant to 28 U.S.C. §§ 157 and 1334; and it appearing that venue of the Motion in this district is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and it appearing that the Motion is a core proceeding pursuant to 28 U.S.C. § 157(b); and it appearing that proper and adequate notice of the Motion has been given; and the parties having agreed to a resolution of the Motion;<sup>1</sup>

IT IS HEREBY AGREED AND ORDERED THAT:

1. The Motion is GRANTED in part as follows:

<sup>1</sup> Capitalized terms defined in the Debtor’s Fifth Modified First Amended Plan of Reorganization, and not otherwise defined herein, are used herein with the meanings so defined.

a. On Tuesday, November 6, 2012, the Court shall conduct a site visit of the Church Building, the RRC Property, the Storefronts, the Milton Parsonage House, the Old Parsonage House, and the Parking Lot.

b. The Court, counsel<sup>2</sup> for the Debtor, and counsel for OneUnited Bank shall meet in the lobby of the Church Building, located at 551 Warren Street, Roxbury, Massachusetts, at 10:30 a.m. on Tuesday, November 6, 2012.

c. The Court, counsel for the Debtor and counsel for OneUnited Bank shall tour the lobby of the Church Building, then the Sanctuary, then the Sarah Gorham Society Room, and then the anteroom adjoining the Lobby.

d. The Court, counsel for the Debtor, and counsel for OneUnited Bank shall proceed to the RRC Property. The walkthrough of the RRC Property shall proceed according to the schedule set forth in Exhibit A to this order.

e. Upon completion of the walkthrough of the RRC Property, the Court, counsel for the Debtor, and counsel for OneUnited Bank shall proceed to the Storefronts. The walkthrough of the Storefronts shall proceed according to the schedule set forth in Exhibit A to this order. In lieu of a walkthrough of the *basement* of the Storefronts, a set of photographs taken on the afternoon of October 2, 2012 and previously exchanged among counsel shall be admitted in evidence.

f. The Court, counsel for the Debtor and counsel for OneUnited Bank shall then proceed to the Old Parsonage House and tour it without commentary. The Court, counsel for the Debtor and counsel for OneUnited Bank shall then proceed to the Parking Lot, and then to the Milton Parsonage House, again touring (as guided by the text of Exhibit A) without commentary.

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<sup>2</sup> As used in this Order, "counsel" shall include a paralegal.

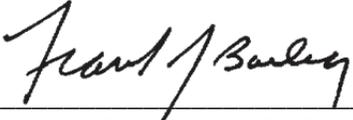
g. During the site visit, no statements by counsel shall be permitted other than statements by Debtor's counsel identifying the name of each room visited in the Church Building, the RRC Property and the Storefronts. The name of each room to be visited in the RRC Property and the Storefronts is listed on the schedules set forth in Exhibit A to this Order. The only rooms to be announced in the Church Building are the Lobby, the Sanctuary, the Sarah Gorham Society Room and the anteroom.

h. Casual dress (*i.e.*, work clothes, not business casual) not suited to the courtroom is allowed.

i. A stenographic record of statements made during the site visit shall be taken. The transcript of the stenographic record shall be admitted in evidence.

2. This Court shall retain jurisdiction to hear and determine all matters arising from or related to the implementation and enforcement of this Order.

Dated: October 16, 2012  
Boston, Massachusetts

  
UNITED STATES BANKRUPTCY JUDGE