

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.,	.	
	.	Friday, April 7, 2017
Defendants.	.	10:04 a.m.
.	

TRANSCRIPT OF ADVERSARY PROCEEDING: 09-00504-mg
MOTORS LIQUIDATION COMPANY AVOIDANCE ACTION TRUST V.
JPMORGAN CHASE BANK, N.A. ET AL, (CC: DOC. NO. DOC# 895)
PRE-TRIAL CONFERENCE;
(CC: DOC. NO. DOC# 864, 865, 866, 867, 893, 894)
MOTION IN LIMINE TO EXCLUDE THE EXPERT REPORT AND
TESTIMONY OF JAMES M. MARQUARDT;
(CONTINUED)

**BEFORE THE HONORABLE MARTIN GLENN
UNITED STATES BANKRUPTCY COURT JUDGE**

APPEARANCES CONTINUED

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TRANSCRIPT OF: (CONTINUED)

ADVERSARY PROCEEDING: 09-00504-mg MOTORS LIQUIDATION COMPANY
AVOIDANCE ACTION TRUST V. JPMORGAN CHASE BANK, N.A. ET AL
(CC: DOC# 869) MOTION IN LIMINE TO EXCLUDE THE
EXPERT REPORT AND TESTIMONY OF ABDUL LAKHANI;
(CC: DOC# 868) MOTION IN LIMINE TO EXCLUDE THE
NON-PARTY RULE 30(B)(6) TESTIMONY OF KPMG AND DELOITTE;
(CC: DOC# 870) MOTION IN LIMINE TO EXCLUDE THE
EXPERT REPORT AND TESTIMONY OF GLENN HUBBARD;
(CC: DOC# 872) MOTION IN LIMINE TO EXCLUDE THE
KPMG REPORT AND ITS SCHEDULES AND WORK PAPERS;
(CC: DOC# 871) MOTION IN LIMINE TO EXCLUDE THE
EXPERT REPORTS AND TESTIMONY OF MARYANN KELLER;
(CC: DOC# 874) MOTION IN LIMINE TO EXCLUDE THE
EXPERT REPORTS AND TESTIMONY OF FORMER GM EMPLOYEES;
(CC: DOC# 873, 875) MOTION TO ALLOW/NOTICE OF THE
TERM LENDERS MOTION IN LIMINE

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1 (Proceedings commence at 10:04 a.m.)

2 THE CLERK: All rise.

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

7 MR. FISHER: Good morning, Your Honor.

8 MR. WOLINSKY: Morning, Your Honor.

9 THE COURT: Okay. We're here for the final pretrial
10 conference -- hopefully, final pretrial conference. All right.
11 So first, with respect to the motions in limine, the orders
12 probably will be filed shortly after the hearing today. One is
13 still being played with. The result is clear, though, on it.
14 So let me go through these very briefly. I always try to
15 decide motions in limine in advance of trial so everybody knows
16 what they have to do to prepare. They're being done in order.
17 Some of them, you know, are five, six, seven pages, some are
18 shorter. All right. I just -- this is no particular order,
19 just what I have them stacked in right now.

20 It's the plaintiff's motion in limine to exclude
21 expert reports and testimony of former GM employees. It was
22 ECF Docket Number 874. The motion is being denied in part and
23 granted in part. The order will speak for itself, but just to
24 briefly summarize.

25 First, the Court concluded that the former GM



1 employees are qualified to serve as experts under Rule 702.
2 Second, concludes that the designated former GM employees'
3 reports are not inadmissible hearsay. Next, the designated GM
4 experts may testify about objective indicators of intent, but
5 not Old GM's subjective intent. Next, Buttermore may opine on
6 GM MFD-Pontiac and GM Powertrain Engineering-Pontiac. So
7 that's just a real quick capsule. The order will get filed
8 shortly after the hearing.

9 The next one I just have in my stack is the term
10 lenders' motion in limine. It's ECF Docket Number 873.
11 Request to exclude the testimony and expert report of Mulhagen
12 (phonetic), exclude certain new opinions from David Gosling
13 (phonetic), prevent the avoidance trust from present parol
14 evidence regarding the meaning of the terms "fixture" and
15 "collateral." I'm going to reserve decision with respect to
16 Gosling. His new opinions, they didn't seem all that exciting
17 to me, frankly, but I'll decide after hearing other direct and
18 cross-examination of the witness.

19 With respect to Mulhagen, Court is excluding
20 Mulhagen's testimony. Mulhagen's only claimed expertise is in
21 real estate generally. His testimony simply regurgitates the
22 First American title search and does nothing to help this Court
23 as the trier of fact. Because Mulhagen did not perform any of
24 the title searches, much less that he's not an expert in title
25 searches, the Court finds that his testimony would not be



1 relevant in assisting its determination of whether the title
2 report would put a purchaser on notice of reported liens on
3 fixtures at the Lansing plants.

4 With respect to parol evidence, the Court concludes
5 that the terms "fixture" and "collateral" are clear on their
6 face and can be defined according to a legal dictionary. TO
7 the extent that a scrivener's error might render the contract
8 hypothetically ambiguous, the parties have stipulated to the
9 correction of that error. Therefore, parol evidence on the
10 meaning and interpretation of the term loan agreements is
11 inappropriate and will be excluded at trial. The order
12 elaborates on what I just described.

13 Next is the motion in limine to exclude the expert
14 report and testimony of James Marquardt. Motion is granted in
15 part and denied in part. Court concludes that Marquardt is
16 qualified as an expert to offer testimony about whether the
17 Eaton County fixture filing would have been identified for
18 inclusion by a real property searcher searching for liens or
19 encumbrances against Lansing plants.

20 Marquardt's report offers two opinions. The first
21 opinion is an opinion that could not and -- the first opinion
22 -- how did I describe that as -- bear with me -- first opinion
23 is that a title search he conducted at the Eaton County
24 Register of Deeds would have identified the Eaton County
25 fixture filing and put a potential purchaser or lender on



1 notice of a lien against the fixtures at the Lansing plants.
2 His second opinion was that the GM facilities known as
3 MFD-Pontiac and Powertrain Engineering-Pontiac were related as
4 they were situated upon the land that was identified by a
5 single tax parcel number and transferred three times using a
6 single deed of conveyance in each instance.

7 The first opinion that a title search he conducted at
8 the Eaton County Register of Deeds would have identified the
9 Eaton County fixture filing and put a potential purchaser or
10 lender on notice, I conclude that that is an admissible
11 opinion. It plainly meets the standard for expert testimony.
12 The Court finds that the first opinion relying on a title
13 search that Marquardt performed himself is relevant and
14 sufficiently describes the process. It elaborates further.
15 Marquardt cannot testify to the standard required under
16 Michigan law, but he can offer relevant testimony whether a
17 secured lender or purchaser would be on notice that the
18 fixtures in the Lansing plants were encumbered by a lien.

19 The Court will permit Marquardt's second opinion, but
20 only in part. Marquardt may offer opinion testimony that GM's
21 facilities known as MFD-Pontiac and Powertrain Engineering
22 Pontiac are situated upon land identified by a single parcel
23 number and were transferred three times using a single deed of
24 conveyance in each instance, but the portion of Marquardt's
25 second opinion that concludes that the facilities were related



1 will be excluded. Whether the facilities are related in a
2 legal sense requires the Court to reach a legal conclusion that
3 the Court is capable of deciding for itself. The term loan
4 lenders failed to meet their burden of showing why this
5 conclusion is beyond the ability of a non-expert to reach.

6 Next is the trust's motion to exclude either portions
7 or the entirety of the non-party Rule 30(b)(6) witness
8 testimony from Patrick Furey and Kevin Voigt from KPMG and
9 Richard Starzecki from Deloitte. The Court's order will grant
10 the motion in part and deny it in part. Each of the witnesses
11 has a different level of personal knowledge regarding the facts
12 underlying their testimony.

13 Furey managed and oversaw important elements of the
14 KPMG report and could have valuable information relating to his
15 involvement in the process. Additionally, Furey is
16 knowledgeable on the policies and processes that went into the
17 report, along with more general matters. While Furey may -- he
18 may have testified in his deposition about things he learned
19 through speaking with others at KPMG after the fact in
20 preparation for his deposition, foreclosing entire portions of
21 his testimony at this juncture would be premature. I don't
22 have the deposition, so I haven't been able to see what he's
23 testified. So at least for now, the Furey motion is denied.

24 As to Voigt, he did not participate in the
25 fresh-start accounting process, did not assist in any way in



1 the preparation of the KPMG report, and did not even discuss
2 the report with anyone at KPMG. Any testimony he would offer
3 would not arise from any work he did in contributing to or
4 assisting with, managing, overseeing, or participating in its
5 preparation. While he may have knowledge of KPMG's practices
6 and policies, Voigt has not been designated as an expert
7 witness, and his fact testimony would all be -- is either
8 hearsay or not relevant on the valuation issues. So with
9 respect to Voigt, his testimony will be excluded.

10 As to Starzecki, like Furey, he was deeply involved
11 in the fresh-start accounting processes at KPMG while it was
12 taking place and was personally involved in Deloitte's audit
13 process. While he may have spoken with others at Deloitte in
14 preparation for his deposition, he certainly has firsthand,
15 direct personal knowledge regarding Deloitte's audit and the
16 fresh-start accounting work performed by Deloitte on this
17 engagement and other relevant aspects of the valuation work in
18 this case. Accordingly, it would be premature to foreclose
19 entire portions of Starzecki's testimony at this time. If
20 there are objections during his testimony, I'll certainly hear
21 it.

22 The last order that'll be entered is denying
23 plaintiff's motion to exclude the KPMG report and testimony of
24 Maryann Keller, Glenn Hubbard, and Abdul Lakhani. I want to
25 make clear that I have some real problems about the KPMG



1 fresh-start accounting report, and what I'm saying now is not
2 necessarily going to be expressed directly in the order that
3 it's going to be in. I want to make clear to everybody I have
4 some real reservations about the relevance of the KPMG
5 fresh-start accounting for the issues that'll have to be
6 decided at this trial. They did not do an asset-by-asset
7 valuation. I'm dealing here with determining whether 40
8 representative assets are fixtures, and if so, how they should
9 be valued.

10 I also think that the defendants are cherry-picking
11 from the KPMG report. They like part of it and totally dislike
12 another part of it. So most of the testimony they're going to
13 offer really is to show what KPMG got wrong. Well, we'll see.
14 So I'm denying the motion in limine. I want to hear the
15 testimony, but I've got some real reservations about it.

16 So that's the ruling on the motions in limine. And
17 as I said, the orders will be entered sometime this morning.

18 So I've reviewed the joint pretrial order, and I'll
19 hear from both sides about it. I'll just make some preliminary
20 comments now.

21 I guess from a procedural standpoint, the parties
22 have agreed to deviate, at least in part, from the normal order
23 of presentation at trial. At page 24 of the joint pretrial
24 order, it provides that the parties have agreed that defendants
25 shall present their witnesses first, goes on to the extent that



1 if the plaintiff is calling a witness the defendants are also
2 calling, plaintiff shall take its direct testimony of that
3 witness immediately following or as part of its
4 cross-examination.

5 I'm satisfied with deviating from the normal. The
6 parties have agreed to do that. I think it makes some sense in
7 the context of the case. And we'll just see -- and I think --
8 you reflected -- I think I probably said it at an earlier
9 point. I typically only want to hear witnesses once if
10 possible, so I don't sustain objections to beyond the scope.
11 If the defendants call witnesses first and Mr. Fisher wants to
12 -- he should do his full examination of them when they're
13 called. So that's fine.

14 And I see that parties have agreed not to present
15 opening statements. That's fine with me. I've already read
16 the trial briefs and I had some comments and questions when we
17 get through this, based on reading the trial briefs.

18 I guess where the parties seem to disagree is whether
19 I'll first hear witnesses on what's a fixture and then issues
20 on valuation. I want to hear the parties on that. I guess my
21 initial reaction was -- I'm not bifurcating, but I'm also
22 willing to provide some flexibility on the order of
23 presentation, but I do want to hear -- that seems to be an area
24 of disagreement between the parties, and I do want to hear from
25 them on it.



1 I guess one -- and I got, I guess from Wachtell, a
2 corrected Exhibit C in the -- to the pretrial order. I have
3 that with me. I have a -- you know, from the descriptions of
4 the exhibits, I really don't know what's what. I have one
5 observation. I mean, you've got a lot of witnesses designated.
6 I don't know. And I think one thing you really do need to
7 address for me is how long you really -- if you've talked about
8 how long you think this trial is going to last because you've
9 got a lot of witnesses.

10 Mr. Fisher, let me hear from you first.

11 MR. FISHER: Your Honor, Eric Fisher from Binder &
12 Schwartz on behalf of the plaintiff. Let me begin by just
13 addressing the bifurcation question that Your Honor raised. So
14 to begin with, of course, you noted that defendants will be
15 presenting their evidence first, and that is because we have
16 agreed, also reflected in the joint pretrial order, that the
17 defendants bear the burden in this case, although there is a
18 remaining dispute as to whether -- who bears the burden with
19 respect to the Lansing fixture filing issue.

20 In terms of bifurcation, our view is that we don't
21 see the efficiencies to be gained by that. Defendants bearing
22 the burden should go first and should present the entirety of
23 their case, and then we should have the opportunity to respond
24 to the entirety of their case. And more specifically, I think
25 at least the way we think about our case presentation, we think



1 that that would be hampered in some way by bifurcation. As the
2 Court is aware, we have a single expert witness, Mr. Gosling,
3 who addresses both fixture classification and valuation issues,
4 and there are areas of overlap.

5 To provide just a few very quick examples, the
6 question of whether or not there was a secondary market for the
7 sale of some of these assets for reuse is important to
8 Mr. Gosling's opinion, both in terms of how it weighs in his
9 opinion about how the assets ought to be classified, but also,
10 of course, in terms of looking for market comparables, which
11 bears on his valuation opinion. Similarly, the question of
12 what's the useful life of some of these assets is relevant,
13 both to the questions of was there intent for the asset to be
14 permanently installed and is also important to the rate at
15 which the asset is depreciated for valuation purposes.
16 Industry trends, market data, those -- that kind of information
17 provides the backdrop for both some of his classification
18 opinions and also his valuation opinions.

19 So we're opposed to bifurcating. The issue was
20 raised casually to us weeks ago as something that the
21 defendants were thinking about, and it was only on March 30th,
22 I think -- or I'm sorry, March 29th, two days before the joint
23 pretrial order was due, that the defendants told us that this
24 is something they want to do, and that's why -- that's how that
25 dispute came to be reflected in the joint pretrial order.



1 So that's our position on bifurcation. I don't know
2 if Your Honor wants to hear from the defendants on --

3 THE COURT: I do. Let me hear from the other side on
4 that.

5 MR. FISHER: Okay.

6 MR. WOLINSKY: Your Honor, Marc Wolinsky. On
7 bifurcation, the thought was simply it would be better for you.
8 If it's not better for you, then we're not pushing the issue.

9 THE COURT: I don't think it's better for me.

10 MR. WOLINSKY: Then so be it.

11 THE COURT: Okay. We've got that resolved.

12 MR. WOLINSKY: Okay.

13 THE COURT: Let me -- I left some notes inside.
14 Thought I was all organized and everything. Just let me go get
15 my notes. Everybody stay seated while I come back in. Okay?
16 (Pause) Okay. What I wanted to raise and -- you know, I got
17 Mr. Wolinsky's April 6th letter about wanting to add the
18 witness. In fact, it raised an issue which I was going to --
19 already going to raise today.

20 So obviously, we're doing a trial with respect to 40
21 so-called representative assets with 199,960, at least, in
22 reserve. And so from the start, I viewed -- the goal of this
23 exercise, and I think it's reflected in your pretrial order, is
24 to try and provide greater guidance, obviously deciding not
25 advisory opinions, but specifically as to the 40 representative



1 assets.

2 So ordinarily, I don't go looking for issues that the
3 parties haven't identified in their pretrial papers. And as I
4 said, I read the briefs, read the pretrial order, read motions
5 in limine. And it may be that I'm -- have the wrong questions
6 in mind on some issues, but let me put it this way. Let me
7 find in my notes specifically what I was looking for.

8 Okay. So the issue that I had given some thought
9 about and which maybe Mr. Wolinsky's letter was aiming at
10 something else, but I started with this proposition. The
11 Michigan cases, I think the Ohio cases make clear that if it's
12 a fixture, it becomes part of the real property. And it raised
13 the question in my mind, who owns the real property? Who owns
14 the equipment? Is it the same party? I haven't read every
15 case you've cited in your briefs, but I've read a lot of them
16 already, and I didn't find any cases that dealt with an issue
17 about where the equipment was owned by one entity and the real
18 estate by another entity. Maybe I missed the case,
19 Mr. Wolinsky. Okay.

20 So you're raising the issue and you want to offer --
21 you want to add a witness who's going to testify about
22 ownership of property. But in your brief -- and this is, in
23 part, what triggered my question. So, you know, I wrote a
24 question to myself, which entity purchased each of the
25 representative assets? Does each of those entities still



1 reflect ownership of the representative assets in its books and
2 records, I guess as of the date of the transaction? Does the
3 ownership of each of the representative assets coincide with
4 the ownership of each of the real properties where the
5 representative assets are located?

6 In connection with another argument made by the
7 defendants in their brief at page 75, the brief states that,
8 quote:

9 "On each of three separate occasions between July
10 26th, 2000 and March 23, 2007, title to the entire
11 parcel covering both facilities was transferred from
12 one Old GM affiliate to another. Each time, a single
13 deed of conveyance transferred title to all of the
14 land where both MFD-Pontiac and Powertrain
15 Engineering-Pontiac are located."

16 And that certain suggested that ownership of GM
17 properties was held in different names at different times. And
18 so it raised the questions in my mind, how was title to the
19 alleged fixtures reflected in the books and records? Was title
20 to the fixtures transferred when property was transferred? Did
21 the deeds also report to transfer ownership of fixtures? If
22 the books and records show that different entities owned the
23 real property on the one hand and the alleged fixtures on the
24 other hand, do such facts rebut any argument that GM intended
25 for the property to become fixtures?



1 So your letter suggested, Mr. Wolinsky, that
2 everything was owned by General Motors Corporation but your
3 brief, at last at the one reference that I've quoted to you
4 from page 75, suggested otherwise. And I didn't -- maybe I
5 missed it. I didn't see anything in either side's trial briefs
6 that addressed the issue. I didn't see anything in the
7 pretrial order that addressed the issue. I had intended to
8 raise it even if I hadn't received your letter. Ordinarily,
9 I'd just let, you know, the parties tell me what the issues are
10 and what their witnesses are and go forward and, you know, if
11 it results in a failure of proof, well, that's tough luck, I
12 guess. But there's another 199,000-plus assets. And I don't
13 -- I just may be totally off-base, and when I first thought
14 about the issue, I thought, well, maybe I'm wrong, but then I
15 got to page 75 of your brief. That only addressed one
16 property. I don't know whether the same issue arises with
17 respect to multiple properties.

18 So at a couple of places -- and let me say, I really
19 found the site visit earlier this week to be very valuable, and
20 I appreciated the opportunity to be able to see it. It was
21 very well organized by -- and I commend both sides -- all
22 sides. I guess it was more than two, but -- for making the
23 arrangements, and I found it very useful.

24 In the -- I mean, the descriptions of the
25 representative assets that were viewed included the reference



1 to what the original cost was for each of them and when it was
2 put in service. There were a few assets that moved, and they
3 were identified. And so when an asset is moved, was it a
4 fixture where it came from? Does it become a fixture when it
5 moves?

6 One other thing I noted from your pretrial order, the
7 Delaware UCC-1 had a -- at page 9 of the pretrial order at
8 paragraph 48, a UCC-1 financing was filed with the Secretary of
9 State of Delaware, which perfected the term lenders' security
10 interest in all collateral, quote, "now owned or any hereafter
11 acquired," closed quote. Well, I've seen after-acquired
12 property clauses. But when you talk about the fixture filings,
13 you don't reference any after-acquired property clauses.
14 Whether that was an oversight or not, I don't know, but when I
15 get to page 11 of the pretrial order, the Eaton County fixture
16 filing, you quote, "All fixtures" -- a quote from paragraph 61,
17 quote, "all fixtures located on the real estate described in
18 Exhibit A."

19 So because assets moved, for fixture purposes, if
20 there's no after-acquired clause in the fixture filing -- well,
21 if the fixture filing was done when the original loan was
22 granted, then you moved more equipment to the site, I don't --
23 you know, you're going to have to convince me that somehow it
24 became a fixture despite the fact that there's no
25 after-acquired fixture -- property clause. And I guess what



1 I'm describing, these things sort of, in my view, link
2 together. It may be that was just an oversight, that there is
3 an after-acquired property clause in the fixture filings, I
4 don't know, but the least -- you made a point of referencing it
5 when you dealt with the UCC-1 in Delaware, but did not when you
6 dealt with the fixture filings. And I don't know whether all
7 -- whether some fixture filings included after-property --
8 after-acquired property clauses and some didn't. I don't know.

9 I don't know whether you've done discovery with
10 respect to who owns what, is there common ownership of both --
11 you know, if, for example, the -- during the site visit, I
12 didn't bring that out, but the sheets that you gave me
13 describing the assets that we were going to be viewing, they
14 were -- I saw at least references to two different types of
15 fixed asset ledgers, one an e-filed ledger and one other -- I
16 forget what it was called, but a different ledger. So I know
17 that any large company keeps books and records of what property
18 it owns, equipment, machinery, these -- you know, these are
19 expensive machines, right? And I don't know what -- I don't
20 know whether you've marked -- I assume you've marked these
21 ledgers as exhibits. I don't know. I can't discern it from
22 the exhibit list. And I don't know whether those ledgers
23 reflect which corporate entity owned what asset, when they were
24 acquired. Some of them were, you know, I mean,
25 multimillion-dollar pieces of equipment. I don't know who



1 owned them. And maybe you'll find -- maybe there are cases I
2 just didn't read yet. I didn't read every case you've cited,
3 but I read a lot of the cases of -- mostly Michigan cases at
4 this point since we're going to Michigan, but I read some of
5 the Ohio cases, as well.

6 So that's an issue I wanted to raise because it does
7 seem to me -- I let you try your own case, but then if this
8 becomes, you know, the other 199,000-plus of assets, this could
9 be very relevant. It seems I may have the wrong analysis of
10 it, but, you know, when I read the cases and they say if you
11 get -- if you buy equipment and you install it and you satisfy
12 the three tests, it becomes part of the real property. Well,
13 does that mean title shifts and if, for example, a different GM
14 entity acquired it and continued to reflect that entity as
15 owning the asset on its books and records at the time of the
16 bankruptcy, that could very well indicate there was no intent
17 to have it become a fixture. Let me stop there. I don't know.
18 Any of you can address that. It wasn't -- I know it wasn't on
19 your plans to talk about today, but --

20 MR. WOLINSKY: Your Honor, Marc Wolinsky. You're
21 right. It's not an issue the parties focused on because I
22 think, frankly, it's a non-issue.

23 THE COURT: Okay. Tell me why.

24 MR. WOLINSKY: Non-issue because the grand tour of
25 the security interest with General Motors Corporation. General



1 Motors Corporation had the power to grant the term lenders the
2 security interest in all of the fixtures that it owned
3 regardless of what legal entity below General Motors.

4 THE COURT: Where do you draw that from?

5 MR. WOLINSKY: Excuse me? Where did I draw that
6 from?

7 THE COURT: Where do you -- yeah.

8 MR. WOLINSKY: I think it's kind of basic.

9 THE COURT: Is it?

10 MR. WOLINSKY: General Motors has the power and
11 represented to the term lenders in the collateral agreement.

12 THE COURT: You think that if XYZ subsidiary
13 continued to reflect the asset on its books and records as
14 being owned by it that the fact that GM may have had the power
15 to grant it, but if up until the time of the bankruptcy, a
16 particular affiliate recorded it as its property, you think
17 that would be trumped by -- I have to be careful about using
18 that term -- that it would -- you know, that it -- the fact
19 that GM may have had the power, there would be an argument
20 whether it exercised the power.

21 MR. WOLINSKY: Again, I think that's covered by the
22 contract. I could go back -- obviously, I didn't reread the
23 collateral agreement, but GM, in the collateral agreement,
24 represented that it had the power, granted the security
25 interests, expressed no limitations. The fixture filings



1 themselves are made by General Motors Corporation.

2 THE COURT: Is there an after-acquired property
3 clause in the fixture filings?

4 MR. WOLINSKY: No. And that -- there's not. And
5 that raises -- you know, it's an interesting question. If
6 something was moved in or out after June 1 -- after the date of
7 the fixture filing, it will be an interest question.
8 Ultimately, though, you know our position. Things don't move.

9 THE COURT: Well, but you -- even with the
10 representative assets we looked at --

11 MR. WOLINSKY: Yes.

12 THE COURT: -- there were things that moved.

13 MR. WOLINSKY: There were things -- that's something
14 that we actually haven't gotten into. The -- as you know,
15 there were 20 and 20 from each side.

16 THE COURT: Yes.

17 MR. WOLINSKY: We didn't delineate for you, Your
18 Honor, who picked which --

19 THE COURT: Yeah.

20 MR. WOLINSKY: -- but there's a reason why you saw
21 some assets that were moved, because that's the plaintiff's
22 theory, things moved. We picked things that hadn't moved. If
23 you look at -- when you hear the evidence at trial, you'll see
24 that the incidence of assets moving is infinitesimal, but the
25 kinds of assets that we saw almost never. So movement is a



1 nice theoretical issue in the framework in which Your Honor has
2 posited, but in terms of deciding the other 199,000, it's not
3 going to be a substantive issue, at least from our perspective.

4 THE COURT: Okay.

5 MR. WOLINSKY: It goes to the issue, from the
6 plaintiff's perspective, of whether things are a fixture if
7 they can be moved, but it doesn't go -- it will not disrupt the
8 ability to take Your Honor's ruling and apply it to the other
9 199,000. And going back to the original point that you raised,
10 no party focused on this issue, no party raised this issue, and
11 there's a reason, and I think the reason is because General
12 Motors represented and did exercise -- represented that it had
13 the power --

14 THE COURT: The --

15 MR. WOLINSKY: -- and exercised the power to grant
16 security interest in all of its collateral.

17 THE COURT: The fixture filings don't define what's
18 include. It's just -- it's, you know, all fixtures. We'll
19 that's good. We'll figure out what the fixtures are.

20 MR. WOLINSKY: Yes. So what's wrong with that?
21 That's commercially practical --

22 THE COURT: Fixtures, the intent of having it
23 permanent is a required element of that.

24 MR. WOLINSKY: Intent at the time of installation,
25 yes.



1 THE COURT: Yes, correct.

2 MR. WOLINSKY: And permanent obviously --

3 THE COURT: Well, we'll see. I raise the issue --

4 MR. WOLINSKY: Yeah.

5 THE COURT: I was -- particularly when I saw page 75
6 of your brief that reflected how many times title changed on
7 property.

8 MR. WOLINSKY: Title changed for the property. The
9 fixtures -- unless separately, fixtures can be disassociated
10 from the property by contract. That happens. But unless
11 there's a separate provision in the contract disassociating the
12 fixtures from the property --

13 THE COURT: Was there any requirement in the contract
14 that GM had to give notice to the lenders before it disposed of
15 any of the -- some of the equipment is multimillion dollars, so
16 --

17 MR. WOLINSKY: Yeah.

18 THE COURT: I mean, look, frankly, what -- it made
19 perfectly good sense. It looks like that JPMorgan used a belt
20 and suspenders approach to its security interest, okay. The
21 UCC-1 in Delaware, I saw it quoted --

22 MR. WOLINSKY: Right.

23 THE COURT: -- says fixtures. Okay. And then, you
24 know, the contract provided that you would file in the counties
25 -- fixture filings in the counties where major assets were, and



1 it made perfect sense. The only problem is the belt broke, and
2 now the question is do the suspenders hold it up.

3 MR. WOLINSKY: Right.

4 THE COURT: And so it wasn't important at the time
5 that the agreement was written and signed as to what was a
6 fixture and what was not because you had it covered either way,
7 at least as to the 26 places where there were fixture filings,
8 but now it's an issue. I'm sorry, you were going to say
9 something.

10 MR. WOLINSKY: No, no, I wasn't. I'm listening.

11 THE COURT: Did GM have --

12 MR. FISHER: My understanding --

13 MR. NOVIKOFF: Yeah, okay.

14 THE COURT: Yeah, go ahead. Did GM have to give
15 notice to the lenders before it disposed of equipment?

16 MR. WOLINSKY: Let me look that -- one of my
17 colleagues can look that up.

18 THE COURT: Okay. Sure. All right.

19 MR. WOLINSKY: Let me just -- someone hand --
20 Mr. Novikoff handed up to me the rep and warranty in the
21 collateral --

22 THE COURT: Sure.

23 MR. WOLINSKY: -- collateral agreement. This is a
24 rep and warranty by General Motors Corporation, the ultimate
25 parent, section 3.01. So GM represented to the term lenders



1 the collaterals owned by such grantor free and clear of any
2 lien, such grantor, A, is the record and beneficial owner of
3 the collateral pledged by it pursuant to this agreement; and B,
4 has rights in and title to the collateral owned by it and has
5 full power and authority to grant to the agent the security
6 interest granted herein.

7 THE COURT: Well, we'll find out whether they were
8 record and beneficial owner. I may -- you know, I don't know.

9 MR. WOLINSKY: Your Honor, I think for these
10 purposes, it doesn't matter.

11 THE COURT: It's boiler -- well --

12 MR. WOLINSKY: No, I really --

13 THE COURT: -- maybe it does and maybe it doesn't.
14 We'll see.

15 MR. WOLINSKY: Well, okay.

16 THE COURT: Let me ask you another question.

17 MR. WOLINSKY: Yeah.

18 THE COURT: Were there mortgages on the real property
19 and who held them?

20 MR. WOLINSKY: By and large, not. No, this was done
21 to -- there were no mortgages, and the reason why they did it
22 the way they did it is because GM didn't want mortgages. They
23 were -- it was a machinery and equipment loan, so there were no
24 mortgages. I think Saturn may have had a mortgage, but not
25 meaningful here.



1 THE COURT: All right. Well --

2 MR. WOLINSKY: To answer your other question --

3 THE COURT: -- maybe wrong place.

4 MR. WOLINSKY: Your Honor had a question. I think
5 there just was one ledger, the eFast ledger. That's the --

6 THE COURT: What you gave out to me in Michigan had
7 references to two different ledgers.

8 MR. WOLINSKY: If it did, it was mistaken. There is
9 only one ledger, one official asset ledger at General Motors,
10 the eFast ledger.

11 THE COURT: Is that an exhibit?

12 MR. WOLINSKY: It was maintained by Old GM, taken
13 over by New GM.

14 THE COURT: Is that an exhibit?

15 MR. WOLINSKY: Yes, it is. It -- well, the whole
16 thing is like this, so we gave you the relevant parts.

17 One other thing Your Honor said, you know, is -- you
18 made the observation, was it a fixture when it was put in and
19 was it a fixture when it was moved to the new location. And
20 the answer is yes because all -- if you go back to the basic
21 issue of property law, a fixture is -- starts its life as
22 personal property. The stamping machine that we saw in --

23 THE COURT: Warren?

24 MR. WOLINSKY: No, the stamping machine in Lansing
25 was created in Germany. When it was on the boat, coming



1 across, coming down the St. Lawrence to Michigan and offloaded
2 on the boat, it was personal property up until the time it was
3 installed.

4 THE COURT: Yes. But --

5 MR. WOLINSKY: If it was de-installed, it loses its
6 character as personal property --

7 THE COURT: And --

8 MR. WOLINSKY: -- but then it's reinstalled, which it
9 doesn't really happen --

10 THE COURT: Well, so one of the assets we saw was
11 moved from Canada. I don't remember which one.

12 MR. WOLINSKY: Yeah, the Liebherr hob St. Catharine's
13 was installed in Canada, a fixture in Canada, at least in our
14 world, moved to Lansing --

15 THE COURT: But does the -- it's a fixture in your
16 world, but was there a fixture filing in Canada?

17 MR. WOLINSKY: No, probably not. It was a U.S. loan.

18 THE COURT: Okay.

19 MR. WOLINSKY: This loan was the U.S. loan.

20 THE COURT: Then why was it a fixture in Canada if --

21 MR. WOLINSKY: We're getting into the date issue, so
22 that's the issue Your Honor's pointing to. When was it moved
23 into place and was it in place in Lansing on the date of grant?
24 Off the top of my head, I don't know that. Yeah.

25 THE COURT: I don't remember either. I didn't bring



1 out papers.

2 MR. WOLINSKY: But if it wasn't, fine, you know,
3 maybe we lose that one asset, but for purposes of the
4 representative asset trial, again, I don't think that's going
5 to affect the utility of exercise. Because as I started
6 alluding to, the plaintiff, for their reasons, picked, in our
7 view, idiosyncratic assets to make a point, but they picked
8 idiosyncratic assets. We saw the Liebherr hob machine, that's
9 one of probably 3- or 400 milling machines that we saw in
10 Warren. They picked the one that moved from Canada, so they're
11 going to point to the one and we're going to point to the
12 299 --

13 THE COURT: Well, I think somebody pointed to another
14 one on the floor that was like it, but --

15 MR. WOLINSKY: Yeah, yes, we -- yeah. So they're
16 going to point to the one, we're going to point to the 299, and
17 we're going to say the exception proves the rule, and they're
18 going to say the exception is the rule. And that's really a
19 big part of what the trial's going to be about.

20 THE COURT: All right. Mr. Fisher.

21 MR. FISHER: Eric Fisher. Your Honor, on the
22 ownership issue, we did take discovery that we thought was
23 relevant to the ownership issues that were of concern to the
24 plaintiffs. So, for example, we sought and obtained and marked
25 as exhibits all kinds of tax information from GM, including,



1 importantly for our purposes, personal property tax returns,
2 indicating whether the representative assets were classified as
3 personal property. We took discovery of leases. Some of the
4 largest presses at issue were leased assets, and according to
5 the terms of the lease, GM was not permitted to convert these
6 presses into fixtures, and they had to retain the
7 characteristics of personal property. So Your Honor has
8 raised --

9 THE COURT: Who owned the assets?

10 MR. FISHER: Not GM in those instances under the
11 lease.

12 THE COURT: Not the lease situation. You said that
13 you took discovery of -- what was that term?

14 MR. FISHER: Of the personal property tax returns,
15 Your Honor?

16 THE COURT: Yes.

17 MR. FISHER: It was the General Motors entity filing
18 the return, in those instances, that owned the property
19 indicated on the return. This issue of ownership, though, as
20 it came up literally yesterday -- and that gets to the issue, I
21 think, about the belated designation of this additional
22 witness. There was no discovery about the question that
23 Mr. Wolinsky raised with me yesterday concerning ownership of
24 the different plants. And the only discovery that I'm aware of
25 that the defendant sought on that topic is they sent us



1 requests for admission back in February, asking us to concede
2 ownership questions related to the specific facilities, and we
3 denied their request for admission on the grounds that we don't
4 know. And as Your Honor has indicated, it can be a fairly
5 complicated question in terms of exactly which entity owned
6 which plant and under what terms. And the reality is that
7 there has been no discovery on that.

8 THE COURT: Well, then, as I said, I pointed at page
9 75 of the brief, which was the only place I saw any reference
10 to -- talk about seven transfers, but very relevant property
11 we've got a big dispute about. Do you agree with Mr. Wolinsky
12 that the issue of which entity owned the property is not
13 relevant to whether the term lenders have a security agreement
14 in equipment that's determined to be a fixture?

15 MR. FISHER: I think that the ownership issue very
16 well may be relevant to that question, Your Honor. And it's --
17 again, I think, this gets --

18 THE COURT: You're only saying that because I raised
19 the question.

20 MR. WOLINSKY: Yeah.

21 MR. FISHER: No, I -- so to be absolutely --

22 THE COURT: I could be way off base on this. I had
23 not focused -- I don't have the underlying documents yet, so I
24 wasn't able to look at the --

25 MR. FISHER: So to be absolutely forthright, it has



1 -- it's always been my understanding in trying to guess why
2 this ownership issue was important to the defendants that what
3 they were trying to do is support this presumption that you
4 find in --

5 THE COURT: Sure.

6 MR. FISHER: -- certain trial court cases. I don't
7 think there's any controlling authority, and I don't think this
8 presumption's consistently applied, but there are cases that
9 refer to a presumption that when an owner installs equipment,
10 there's a presumption of fixture status that that needs to be
11 rebutted. That's always been my understanding of why they're
12 seeking this ownership information. I frankly had not -- have
13 not given sufficient attention to the question that Your Honor
14 raised this morning and the other way in which the ownership
15 question could affect important issues in the case. And
16 there's been no discovery on that.

17 THE COURT: Did General Motors Corporation own the
18 land and buildings where the 40 representative assets were
19 located?

20 MR. FISHER: I am not certain. I cannot stipulate to
21 that. The defendants seem quite certain of it, and I'm happy
22 to continue to discuss this with them. If the proof is
23 overwhelming, then I suppose we'll agree. Or if the proof is
24 overwhelming, they can put it on and prove it.

25 THE COURT: How many witnesses do you want to depose,



1 Mr. Wolinsky? There going to be a 30 -- because you wanted to
2 take another deposition.

3 MR. WOLINSKY: Oh, no, Your Honor, you misread.

4 THE COURT: I misread?

5 MR. WOLINSKY: Yeah, no, we --

6 THE COURT: I thought if they weren't willing to
7 stipulate, you wanted --

8 MR. WOLINSKY: They were willing -- they're not
9 willing to stipulate -- the eFast ledger, turns out, has a
10 field in it which designates who the owner of the land is.
11 Surprise, surprise, General Motors is the owner of the land.
12 So, you know, we're going to call Colleen Charles --

13 THE COURT: Well, if the eCast [sic] ledger is
14 correct about it. I don't know, they may just put --

15 MR. WOLINSKY: But --

16 THE COURT: Did it say General Motors Corporation or
17 did it say just General Motors?

18 MR. WOLINSKY: I --

19 THE COURT: It could be a -- just a generic term
20 for --

21 MR. WOLINSKY: I don't know that off the top of my
22 head.

23 THE COURT: You, yourself, put in this -- you know,
24 on page 75 of the brief were very relevant property --

25 MR. WOLINSKY: Right.



1 THE COURT: -- that's very much an issue here. I
2 don't know who owns it. You talk about seven transfers. I
3 don't know between which entities.

4 MR. WOLINSKY: Between and among General Motors
5 entities.

6 THE COURT: Well, that --

7 MR. WOLINSKY: And it's --

8 THE COURT: -- that' precisely the point. I mean, do
9 you know which one owns it? Do you know which one owns it at
10 the time of the bankruptcy?

11 MR. WOLINSKY: Standing here, no, obviously not.

12 THE COURT: Do you know which one owned it at the
13 time of the collateral agreement?

14 MR. WOLINSKY: Today, I can't say I know that. No,
15 Your Honor. And for very good reason. The collateral
16 agreement covers that. Collateral agreement is General Motors
17 -- let's go back in history. Long time ago, this was an
18 agreement between General Motors and the term lenders. The
19 creditors were not -- you know, this group of people were not
20 involved. As between General Motors and the term lenders,
21 General Motors represented, warranted, that it had the
22 authority, filed a fixture filing in -- with its full authority
23 in the relevant counties, and for -- and it -- frankly, it
24 strikes me as odd that these people who are standing in the
25 shoes of General Motors can now say, well, that contract is



1 irrelevant and --

2 THE COURT: Well, you read me language from the
3 collateral agreement that may or may not be accurate, the
4 representation. I don't have the --

5 MR. WOLINSKY: No, no. It's clearly accurate that
6 General Motors, the corporate entity, owned these properties.
7 It may own it --

8 THE COURT: Is that clear?

9 MR. WOLINSKY: It may own it --

10 THE COURT: That's -- wait a minute, stop.

11 MR. WOLINSKY: Yeah.

12 THE COURT: Okay. You say General Motors owned the
13 property, but, you know, page 75 of your brief, at least as to
14 some very important property, suggests there were lots that
15 wasn't -- that's not an accurate statement, at least for some
16 of the years.

17 MR. WOLINSKY: But it's also the beneficial owner.
18 That was also the representation. No doubt that they're the
19 beneficial owner, and no doubt that they have the power to
20 cause their subsidiary to grant a security interest, which is
21 what they represented to us that they did.

22 THE COURT: Because their subsidiary -- is there a
23 certificate from the subsidiary that owned the property to
24 grant a security interest?

25 MR. WOLINSKY: I don't --



1 THE COURT: Usually, corporate formalities actually
2 count.

3 MR. WOLINSKY: I don't know the answer to that now.

4 THE COURT: They may have had the power to do it, to
5 cause their subsidiary to do it, but it doesn't mean it was
6 done. It doesn't mean that -- if it wasn't done that the
7 security interest is effective or not. I don't know.
8 Formalities can make a difference.

9 MR. WOLINSKY: Your Honor, I don't know the answers
10 to those questions because no one focused on it.

11 THE COURT: What is it that you would like? I
12 thought your --

13 MR. WOLINSKY: Yeah.

14 THE COURT: -- letter was saying since they won't
15 stipulate, you wanted to take some discovery.

16 MR. WOLINSKY: No, no. Since they don't stipulate,
17 Ms. Charles will be a two-minute witness.

18 THE COURT: Okay.

19 MR. WOLINSKY: This is the eFast ledger, this is what
20 it says, this field means that GM owns the property.

21 THE COURT: Do you have a copy of the eFast ledger
22 with you? A relevant page of it?

23 MR. WOLINSKY: No, we don't have it.

24 THE COURT: My concern is if it just says General
25 Motors, that's generic. That doesn't say which General Motors



1 entity owned the property. Just says General Motors. Does it
2 say General Motors for the lease property, too?

3 MR. WOLINSKY: For the lease property?

4 THE COURT: Yes.

5 MR. WOLINSKY: I don't know that, Your Honor, off the
6 top of my head. But again, as to the lease property, we're not
7 claiming the security interest in the leased assets, in the
8 leased stamping presses because that, by contract, is carved
9 out of the collateral agreement.

10 THE COURT: Yes, but you're --

11 MR. WOLINSKY: So that --

12 THE COURT: The CUC exhibits.

13 MR. WOLINSKY: CUC, yes.

14 THE COURT: And you're claiming a security interest
15 in that.

16 MR. WOLINSKY: Yes, because the -- because there,
17 there was -- GM had the power to grant the security interest
18 notwithstanding the lease, and we think when you parse it
19 through.

20 THE COURT: What does the eCast [sic] ledger reflect
21 with respect to ownership? I mean, if it just had General
22 Motors next to CUC, what would that -- that would be -- you
23 would have to acknowledge that that's not accurate. They're
24 the lessee. One of the --

25 MR. WOLINSKY: Yeah.



1 THE COURT: Some GM entity is the lessee, but not the
2 lessor or the owner.

3 MR. WOLINSKY: I can't answer that, you know,
4 standing here.

5 THE COURT: Mr. Fisher.

6 MR. FISHER: Your Honor --

7 THE COURT: You're fine there. You're fine. You can
8 speak from there.

9 MR. FISHER: Just in terms of the eFast question that
10 you asked, as Mr. Wolinsky indicated, the eFast ledger is an
11 exhibit. For example, it's Proposed Plaintiff's Exhibit 231.
12 It has a column that refers to ownership, but unfortunately
13 it's not a very helpful --

14 THE COURT: What does it say?

15 MR. FISHER: -- data because it -- I don't have it
16 for the specific asset that you asked about, but in general, it
17 describes the ownership by identifying a plant name. It
18 doesn't identify a corporate entity. So the plants were not
19 organized themselves as entities. I don't think it's
20 technically correct to say the plant owned the property.

21 THE COURT: All right.

22 MR. FISHER: But the point is that this is a fairly
23 large issue about which I think defendants have conceded
24 there's been no discovery, so the idea of having them call
25 in --



1 THE COURT: I guess we'll all hear about it at the
2 same time then.

3 MR. FISHER: Well, but we oppose and continue to
4 oppose the designation of witnesses yesterday on issues about
5 which there's been no discovery to come here and testify.

6 THE COURT: Would you like to take the witnesses'
7 depositions? It's not a favored -- it wasn't a favored
8 activity of mine when I was a trial lawyer, but I -- more than
9 once, I wound up taking depositions during trial. We're not
10 there yet, so would you like to take the deposition?

11 MR. FISHER: Your Honor --

12 THE COURT: I'm going to permit the witness to
13 testify. If you would like to take the deposition, work out
14 with Mr. Wolinsky when you're going to take the deposition.

15 MR. FISHER: I certainly would like to reserve the
16 right to take the witness's deposition and to continue to talk
17 to Mr. Wolinsky about this issue.

18 THE COURT: All right. I got hung up on an issue
19 that maybe turned out to be a non-issue. The bigger question,
20 in my mind, was -- let me turn to the witness list. Pages 50
21 through 53 of the joint pretrial order, there's a lot of
22 witnesses, some by deposition designation, but --

23 MR. WOLINSKY: Right.

24 THE COURT: How many live witnesses do you propose?
25 Well, the plaintiff has, I think, 20 lives witnesses, and -- 14



1 or 15 for the plaintiff, although I must say because I'm
2 excluding some of the witnesses that are listed on here were to
3 give parol evidence, which I'm excluding. I'm not going to
4 hear parol evidence. So some of these witnesses are going to
5 come off. But it's a lot of witnesses. Have you -- have the
6 two of you talked about how long you anticipate this trial to
7 last?

8 MR. WOLINSKY: Your Honor, I think both parties
9 assumed that the trial would consume the full two weeks.
10 Speaking for ourselves, we think it can be done in the two
11 weeks. The written statements make a huge difference, and
12 frankly, the site visit makes a huge difference, things that we
13 might have covered without the site visit, here's the plant,
14 here's what it does, here's the layout of the plant. We don't
15 need to do that anymore. So really, what the -- what I think
16 the direct testimony is going to wind up on the fixture side is
17 highlights. You know, here are some -- you know, here's
18 something you saw, you may not have noticed this, I'd like to
19 point out the following five things to you. So --

20 THE COURT: Yeah, you're making a record. What we
21 did in the two plants in Michigan is not, you know -- I guess
22 it was -- it's been transcribed if they could hear above the
23 rumble of the machines, but, you know, it wasn't -- but I --
24 you know, I appreciated going on the visit. I think I have a
25 better appreciation of some of the equipment and the context,



1 where it is in the workflow and how large it is and et cetera.
2 I had already looked through the, you know, the picture book,
3 so to speak, before, and you get a much different sense seeing
4 it life.

5 MR. WOLINSKY: Yeah.

6 THE COURT: So I try to have at least six hours of
7 testimony a day. We start at 9. We take one mid-morning
8 break. We obviously break for lunch. We resume generally at
9 two o'clock. Sometimes we adjust the timing a little bit. One
10 afternoon break. And then, you know, it's usually, like, 5:30
11 when we're stopping for the day. If a witness is -- if we can
12 complete a witness's testimony by working even an hour longer,
13 we'll work an hour longer. I'm not averse to having longer
14 days. It's hard on me. It's hard on you.

15 I also have -- have the two of you discussed how much
16 notice you're going to give each other about the order of
17 witnesses? I usually ask the lawyers to try and reach an
18 agreement before I impose a requirement. I do -- I think all
19 sides in this case have been entirely professional throughout,
20 and from my standpoint, it's made it a lot easier, and I
21 appreciate that. And I assume that'll continue in trial.

22 I also am willing to take witnesses out of order.
23 With a lot of witnesses, there's scheduling problems that come
24 up. What I do insist is I don't -- you need to have your next
25 witness available to go on. Sometimes cross-examination is

1 shorter than anticipated. I don't like to find we're at three
2 o'clock and you're out of witnesses for the day. I expect you
3 to have witnesses here and ready to go.

4 I think -- we'll only cover a few more areas, and
5 then I think what I'm going to do is take a very short recess.
6 I'd like the -- it's more than -- the two of you are sort of
7 the lead, but there's a lot of other lawyers in the courtroom.
8 I don't know how many people are going to be participating in
9 the trial. See, I want you to try and agree on giving each
10 other notice of order of witnesses, whether you're -- I don't
11 like to do it every day on taking witnesses out of order, but I
12 do. I mean, in longer trials, it happens, and I'm -- you've
13 got a lot of people coming in from out of town for this, and it
14 creates issues. So I'm certainly willing to try and go along
15 with whatever reasonable agreements the two of you reach. If I
16 have to impose it, I will, but I don't think that's going to
17 happen.

18 Are you going to use -- am I going to have video,
19 PowerPoint? What -- the courtroom is wired, sort of. When I
20 say "sort of," under -- near each counsel table, there is a
21 place where you can plug in computers for PowerPoint. It
22 displays on the witness screen, my -- one of these two screens,
23 the big screen --

24 MR. WOLINSKY: Right.

25 THE COURT: -- that's up there. I think I -- it's



1 sometimes, I think, quite helpful -- I mean, I still have -- I
2 can't believe how much Lyondell paper is still in here. This
3 will be out of here by then, but I still like to have the hard
4 copy to look at, but --

5 So what's your view, Mr. Wolinsky? Are you going to
6 have -- what electronics are you going to have?

7 MR. WOLINSKY: We're planning -- we have a trial
8 consultant that will be -- we'll have somebody sitting in the
9 hot seat. He will display documents. We will have hard-copy
10 documents for yourself, as well. We're planning to use the
11 monitors. I don't know whether we're going to bring in another
12 monitor just to make it easier, but this monitor, your monitor,
13 counsel's monitor is the basics that we'll need. And it'll be
14 very helpful for pictures, especially.

15 THE COURT: Yes. Have you discussed with Mr. Fisher
16 about -- well, I -- after -- you need to talk to our IT people
17 here to make sure that, you know, it's sort of seamless with
18 both of you. Typically, you need to have your IT people come
19 in a day or two before the trial to get everything set up and
20 make sure everything is working properly.

21 MR. WOLINSKY: I could be wrong. I think they've
22 already been -- I know they've been, and I think they talked to
23 Your Honor's --

24 THE COURT: My courtroom deputy?

25 MR. WOLINSKY: Yeah, I think so.



1 THE COURT: And the court's IT people are quite good.
2 So there was an issue -- I don't know if it's still an issue --
3 on summary exhibits, and I regularly -- in larger cases, I
4 frequently have summary exhibits. You know, the Lyondell trial
5 was long, and there were summary exhibits and -- and typically,
6 I don't ask to see the backup unless it becomes an issue among
7 the parties, and I don't know whether you've worked out among
8 yourselves to deal with summary issues. I mean, the rules set
9 out it's clearly permissible. I don't know whether you've
10 requested all the backup for any of the summary exhibits,
11 whether you're sharing them in advance, et cetera.

12 Mr. Fisher.

13 MR. FISHER: So, Your Honor, on summary exhibits, we
14 have reached agreement on numerous summary exhibits, and we
15 have disputes as to others. And I think the nature of the
16 dispute is what is a summary exhibit under Rule 1006 because
17 our view is that many of the kinds of exhibits that the
18 defendants are calling summary exhibits are really
19 demonstratives. They are compare-and-contrast-type documents,
20 graphs, efforts to pull data from lots of different sources,
21 not from some single source and summarize it. So that's the
22 basis of our objection, and what we've told them is to the
23 extent that illustrating that kind of information for the Court
24 is important, you can include it in your written direct subject
25 to our objections, but that we don't think that those are th



1 kinds of summary exhibits that come into evidence. If you're
2 talking about massive spreadsheets and you want to extract it,
3 sum it up, remove columns for ease of reading, all of those
4 kinds of adaptations, we think are helpful to the Court, and
5 we've been able to work out those kinds of issues. That's
6 where our dispute remains, Your Honor.

7 THE COURT: So what -- with demonstratives, I mean,
8 ordinarily, they don't come into evidence, but they certainly
9 can in -- usually with that if there's no objection. It's very
10 important to me that the demonstrative show the sources that
11 they list in the ledger and the sources of the information
12 that's included. I don't know whether that will ease your
13 concerns about it. I find them to be quite efficient, you
14 know, when they're done, and I think -- I'm not going to rule
15 now whether they can come into evidence or not. You'll make
16 objections what you think. I just -- I urge you to see whether
17 you can, with demonstrative exhibits, assuming that they're
18 given to you sufficiently so you're not surprised when it pops
19 up on the screen, clearly they can use it as a demonstrative,
20 but that hopefully this won't become a major issue along the
21 way.

22 I mean, you know, they can put the underlying
23 documents in and use the demonstrative for purposes of
24 illustrating and the testimony comes in, but -- I think it'd be
25 more of an issue in a jury trial than it is in a bench trial.



1 I think I can keep straight what -- you know, what it was, what
2 the source material was. I may have questions, but -- are
3 there other issues, Mr. Fisher, that you had?

4 MR. FISHER: Well, Your Honor, I -- in terms of how
5 much time for the trial and allocation of time, I agree that we
6 all would benefit from talking to each other. I also agree
7 that it is absolutely possible, feasible, even realistic to try
8 this case in two weeks, but I do think it takes a fair amount
9 of coordination. And one concern that I have that I'll just
10 flag as something that I think needs to be worked out among the
11 parties is that most of the defendants' case goes in by written
12 direct because most of the witnesses are under their control in
13 some form or another, whereas most of our case is cross and
14 adverse direct. And so in terms of the allocation of time, we
15 need to work that out.

16 THE COURT: Yeah, it's -- I'll tell you, quite
17 frankly, that's why I didn't do -- what I often do is, in
18 longer cases, is set specific time limits for each side, okay.
19 It seemed to me hard to do here -- for me to do. And so I
20 haven't done that. I'm -- I've got to be careful what I ask
21 for because I might get it. I -- we need to get this trial
22 done -- over and done. You know, if you're moving slow, trial
23 days are going to go until eight or nine o'clock at night. I
24 mean, that's the reality. And this -- I've got a docket behind
25 this, and I carved out -- definitely carved out the two weeks,



1 and I say I usually like to get at least six hours a day of
2 testimony, but -- my good friend and former colleague, Arthur
3 Gonzalez, I mean, he regularly had court until nine, ten
4 o'clock at night during trials. I'd prefer not to do that, but
5 if we have to do it, we've got to do it. We're going to get
6 this case done.

7 Let me ask you, have the two of you discussed whether
8 you're going to have a reporter for daily transcript or not?

9 MR. FISHER: We have, Your Honor --

10 THE COURT: Okay.

11 MR. FISHER: -- and we plan to do that.

12 THE COURT: Okay. And, you know, with the latest and
13 greatest of technology, am I going to have an iPad up here
14 that's going to show the live testimony as it's coming in? And
15 I'm sure you both know that's not the official transcript, but
16 it's very helpful.

17 MR. FISHER: Yes, Your Honor. We've discussed it,
18 and that's something we plan to make available to the Court.
19 Absolutely.

20 THE COURT: Okay. Any other technology issues that
21 you have on your side?

22 MR. FISHER: So in terms of technology, I think our
23 plans are similar to the defendants'. We've already
24 coordinated to a certain extent with chambers. I know, though,
25 that it's important to continue to do that.



1 THE COURT: Right, right. And to make sure that -- I
2 -- if it can go wrong, it does go wrong, and so it's really
3 important to make sure before we start the trial, everything is
4 working.

5 MR. FISHER: Yes. And, Your Honor, in terms of
6 spotting issues, in the pretrial order, there also is another
7 dispute that's reflected about two other witnesses who the
8 defendants have added to their list who've never been
9 identified in discovery before.

10 THE COURT: Okay.

11 MR. FISHER: I don't know whether that's an issue for
12 today or an issue for --

13 THE COURT: Do you want to take their depositions?

14 MR. FISHER: Well, Your Honor, we don't want them to
15 be called at all because these are -- the issue as to which
16 they are supposedly going to speak is an issue that the parties
17 have known about for approximately one year.

18 THE COURT: Is the issue reflected in the pretrial
19 order?

20 MR. FISHER: Yes, it is, Your Honor.

21 THE COURT: Okay.

22 MR. FISHER: The witness names are Martin Apfel and
23 Jay Ewing.

24 THE COURT: And what's the -- what issue are they
25 testifying on, do you anticipate?



1 MR. FISHER: Well, all we've been told is that GM
2 provided information to KPMG, and so we're told that because
3 these two witness names appear on a memo or two memos about
4 which there's been no additional discovery, that they're going
5 to be called to talk about the information that GM supplied to
6 KPMG.

7 THE COURT: Well, one of the -- I think I have this
8 right, that one of the arguments you made in your motion in
9 limine to exclude the KPMG report was that the GM employees are
10 supplied information upon which KPMG relied were unidentified.
11 Am I -- do I have that right?

12 MR. FISHER: Yes, Your Honor.

13 THE COURT: And are these supposed to fill that gap?

14 MR. FISHER: Perhaps, but --

15 THE COURT: Okay. When would you like to take their
16 deposition?

17 MR. FISHER: But just to complete, I mean, the --
18 just the picture on this, Your Honor, again, this issue of the
19 unreliability of this information was raised a year ago. At
20 Mr. Lakhani's deposition, he's the expert who, you know, of
21 course, relies on this. He said that he has no idea about this
22 benchmarking group, so this is now an effort after discovery,
23 after witness lists closed, to backfill an expert report and
24 try to establish after the fact that what Mr. Lakhani relied
25 on, you know, has some reliability. We've -- there has been no



1 discovery about this.

2 THE COURT: Look, the -- from the very first day that
3 this case got transferred to me from Judge Gerber and you first
4 came in here and Mr. Wolinsky raised the issue of the
5 fresh-start accounting, you were very clear from the start
6 about your -- that you had objection. We can get into the
7 details of all of it, but it was very clear that you objected
8 to it, and you do object and continue to object, and the ruling
9 on the motion in limine, while I'm permitting it, I -- while
10 the order may not reflect it, I've made crystal clear I've got
11 a lot of problems with what they're trying to do, and it may
12 ultimately go to the weight, if any, that's given to it. If
13 you wish to take the deposition of these two additional
14 witnesses -- well, additional -- they're on the witness list --
15 arrange with Mr. Wolinsky when the depositions are going to
16 take place. I'm going to clearly take the depositions -- if
17 you want. It's up to you. I assume you'll want to. But --

18 MR. FISHER: Well --

19 THE COURT: You know, look, I'm letting it come in,
20 I'm letting the -- for whatever it's worth, Lakhani will
21 testify. The KPMG report will come in. I'm going to let the
22 witnesses -- we'll see when they come in what questions are
23 asked of them, but I'm not going to allow in speculation and
24 hearsay, but if they -- you know, if these are two people who
25 communicated with KPMG information upon which KPMG relied in



1 preparing the fresh-start accounting and it's information of
2 the type that accountants doing fresh-start accounting would
3 typically, you know, gather the information and rely on the
4 information doing it, it's going to come in.

5 MR. FISHER: Your Honor, just at the risk of
6 belaboring --

7 THE COURT: Go ahead.

8 MR. FISHER: -- the point, it's precisely because
9 this exact issue has been front and center in people's minds
10 since January that I think the notion of putting these
11 witnesses on the list the night before the joint pretrial order
12 is due, long after discovery is closed, is the kind of
13 unfairness that warrant exclusion. I understand this is a
14 bench trial. I understand that a lot of evidence is going to
15 come in. But this is a situation where the defendants were on
16 full notice for a really long time about this issue, and it's
17 just last-minute efforts to put Band-Aids on it. These
18 witnesses are also outside of New York, so --

19 THE COURT: I'll tell you what. If they're going to
20 call them as witnesses, they're going to bring them to New York
21 for deposition. Simple as that, okay? That's -- they want
22 them, they'll bring them here for the deposition. I know
23 you're busy in trial prep. I respect that.

24 And, you know, Mr. Wolinsky, if -- I don't know
25 whether you control them or not, but if you're going to --



1 they're not going to testify at trial unless you bring them to
2 New York for deposition.

3 MR. WOLINSKY: Understood.

4 THE COURT: Okay. Other issues?

5 MR. FISHER: So it's like a punch list before moving
6 in here for two weeks, so closing arguments, Your Honor. You
7 endorsed a letter --

8 THE COURT: You know, they had the cars off the
9 assembly line. They were doing the punch list items on them
10 and making sure they were all perfect.

11 MR. FISHER: Right. So closing arguments, you
12 endorsed a letter to accommodate Mr. Wolinsky's schedule,
13 moving closings to either June 5th, June 6th, or June 7th.
14 When appropriate, I think just everyone would appreciate
15 guidance on which of those three dates will be the closing
16 argument date.

17 THE COURT: Monday, June 5th. Judicial conference --
18 Second Circuit judicial conference starts Wednesday, and I have
19 a trial on Tuesday, so Monday. There's no calendar -- yeah,
20 there is now.

21 MR. FISHER: Okay.

22 THE COURT: Okay?

23 MR. FISHER: Yes. Thank you, Your Honor. I also
24 know Your Honor had asked about how to deal with confidential
25 information.



1 THE COURT: Yes. I didn't want to talk about that.

2 MR. FISHER: So we have --

3 THE COURT: I think I signed the stipulation and
4 order. Hope it works.

5 MR. FISHER: Right. So I think it's Monday when we
6 need to notify all the third parties of exhibits that contain
7 confidential information, and then they have until April 14th
8 to either file a motion or it becomes public, and hopefully
9 that will --

10 THE COURT: All right. Let me -- one thing I do want
11 to be clear about, we will not close the courtroom. We will
12 not -- it will be a public trial. If there are exhibits that
13 have to be maintained as confidential, I expect counsel, in
14 their questioning, to refer to paragraphs or line numbers or
15 whatever you're asking about without -- unless you get
16 clearance from me about disclosing the specific contents. I
17 guess we'll have a better sense of it after you see who comes
18 forward with, you know, with requests for confidentiality.

19 Let me make clear, I did sign that stipulation and
20 order, but I certainly reserve the right to reject
21 confidentiality claims when -- I'll listen to parties if they
22 -- any parties in interest who have questions about specific
23 documents. You know, this -- there was -- in Lyondell, there
24 were a lot of documents that had been designated as
25 confidential, and when it came time to trial, everything came



1 in, testimony. You know, the exhibits don't get filed on the
2 docket, so even if they're marked as exhibits and discussed,
3 yes, there's a transcript that's prepared, but people do not
4 get access to -- public doesn't have access to the exhibits
5 just because they were used at trial. But I believe in public
6 trials, and so that's, you know, let's see where we are.

7 I think what you ought to do is you need to -- the
8 two of you ought to do a joint status letter after the date,
9 and we'll see what -- how big a problem it is, okay? It's
10 already unusual, and I haven't made -- so many of the briefs
11 that were filed in connection with the motions in limine are
12 under seal, and usually I require redaction. We didn't go
13 through that. It was just too much to do. So we'll see.

14 MR. FISHER: Okay. And, Your Honor, we will shortly
15 be replacing your Lyondell binders with binders for this case.
16 In preparing the joint pretrial order, which was an
17 extraordinarily challenging, but also collaborative effort, I
18 think both sides have discovered mistakes in the exhibit list
19 and in documents, and so we're just trying to work those all
20 out.

21 THE COURT: I'm sure -- look, you're going to get
22 into trial and you're going to discover mistakes, and you're
23 going to work them out. So typically, what -- with -- it's not
24 that I've had that many long trials here, but certainly this
25 recent experience with the Lyondell case, what I asked the



1 lawyers to do, and they did it very well, was at the end of
2 each witness, they would review the exhibits that had been
3 admitted in -- you know, they kept -- basically, they kept the
4 list -- you can talk to my law clerk, she can see what they
5 did. So I would get, every day or every other day depending
6 on, you know, the witnesses -- I think there were only -- it's
7 just a couple of exhibits that there was some disagreement
8 about, but -- and so what I -- and those -- I would enter an
9 order with just the exhibit numbers on it to show that they
10 were admitted in evidence. And if objections were --
11 deposition designations, there were just -- there were orders
12 that went through each of the deposition designations as to
13 which there were objections, and it showed sustained, and I,
14 you know, overruled or whatever. I think -- it worked pretty
15 well there.

16 So talk to my law clerk. She can see what they did.
17 That worked pretty well. Yes, I keep notes and I try to keep
18 track of that exhibit is marked -- well, they're all marked for
19 identification already, but what exhibits have been -- what I
20 don't want is just get to the end of the case and just say, we
21 agree that all of these exhibits, these 25 pages of exhibits
22 come in. If you don't use it, it's -- you know, it's not
23 coming in, okay? Because I do review all the exhibits that are
24 in evidence, and so -- it's the same way with the depositions.
25 I don't allow entire deposition transcripts to get dumped in.



1 We'll -- you know, I don't know whether you've collaborated to
2 mark -- color-code deposition transcripts. That works well,
3 you know, to show the objections and try to rule on them and --

4 MR. FISHER: We have done that. We have done that,
5 Your Honor.

6 THE COURT: Okay. That's very helpful for me. I
7 appreciate that.

8 MR. FISHER: And again, that was a very -- extremely
9 collaborative --

10 THE COURT: Yes.

11 MR. FISHER: -- effort. I think the last issue on my
12 list is, assuming we all make it through the trial, we may --

13 THE COURT: Thanks a lot.

14 MR. FISHER: Speaking about my own level of
15 exhaustion, I suppose. We --

16 THE COURT: I came back from Michigan with a cold,
17 so --

18 MR. FISHER: I'm very sorry to hear that. We have
19 been making, I think, good progress in thinking about what a
20 mediation would look like after Your Honor renders the decision
21 on the 40 representative assets, and I just wanted to report on
22 that very generally. It's still in development.

23 THE COURT: You know, I look around my office, and I
24 have about five boxes with expert reports and motions in limine
25 on 40 assets. If you want to do this on another 199,960,



1 you'll spend the rest of your life doing it. And you're a lot
2 younger than I am, so --

3 MR. FISHER: I think I've nothing further, Your
4 Honor.

5 THE COURT: Mr. Wolinsky, anything else you want to
6 raise?

7 MR. WOLINSKY: No, Your Honor, we're set.

8 THE COURT: Let me -- I do want to ask this. How
9 many lawyers are going to be questioning witnesses because
10 their -- term lenders have lawyers, as well.

11 MR. WOLINSKY: Yeah. No, Your Honor, actually one of
12 the things I did want to do was introduce the people who are
13 going to be handling witnesses at the trial.

14 THE COURT: Okay.

15 MR. WOLINSKY: Chris Szczerban is going to be
16 participating in the trial. Carrie Reilly will be
17 participating in the trial.

18 THE COURT: These your colleagues?

19 MR. WOLINSKY: Yes. Mr. Callagie (phonetic) is my
20 closest colleague.

21 THE COURT: Yes, I know.

22 MR. WOLINSKY: Lee Wilson will be presenting
23 witnesses.

24 THE COURT: Okay.

25 MR. WOLINSKY: And Emil Kleinhaus, I think you know



1 will be presenting witnesses.

2 THE COURT: I do, okay.

3 MR. WOLINSKY: And I'll stand up every once in a
4 while, too.

5 THE COURT: Are the term lenders going to have
6 counsel actively participating in the trial?

7 MR. WOLINSKY: Mr. Bennett, who you know couldn't be
8 here today will be participating in the trial.

9 THE COURT: I don't know, I may exclude him because
10 he's not here today.

11 MR. WOLINSKY: He will be. And I don't know,
12 Mr. Shumaker is here, who is going to be prepared to speak if
13 --

14 THE COURT: Mr. Shumaker, you are from what firm?

15 MR. SHUMAKER: I'm with Jones Day, Your Honor. I'm
16 Mr. Bennett's partner.

17 THE COURT: Okay. All right.

18 MR. SHUMAKER: And my other partner, Erin Burke, may
19 also be presenting witness.

20 THE COURT: Thank you. Okay.

21 Any -- Mr. Wolinsky, anticipate -- is anybody from
22 Munger Tolles going to be participating or -- I'm just --

23 MR. WOLINSKY: Just joking, right? No, we're --

24 THE COURT: I don't know, you know. They've been
25 showing up at hearings, but --



1 MR. WOLINSKY: We have a very warm relationship with
2 Munger Tolles. Sometimes it's heated, sometimes it's
3 collaborative. But their role in life is to --

4 THE COURT: Make your life difficult?

5 MR. WOLINSKY: -- pursue the cross-claims.

6 THE COURT: Okay.

7 MR. WOLINSKY: And our hope is they never get -- they
8 never have to be pursued, but we'll see.

9 THE COURT: All right.

10 Mr. Fisher, how many lawyers do you anticipate are
11 going to be participate?

12 MR. FISHER: Your Honor, it will be some combination
13 of the five of us, my partner, Neil Binder, Lauren Handelsmen,
14 Tessa Harvey, and Lindsey Bush.

15 THE COURT: Okay. All right. Take it for what it's
16 worth. I really appreciate when you get young lawyers or
17 associates having a standup role during a trial. They're not
18 going to handle the biggest witnesses, but you can do what you
19 wish with it, but I'm much nicer to young associates than I am
20 to the partners. So let me just end with that. You should --
21 you know, sometimes lawyers are afraid of having too many
22 lawyers show up in court and do different -- have different
23 speaking roles. Particularly, if the too many are young
24 lawyers, I don't mind at all. So you'll just do as you -- you
25 know, you shouldn't feel that, you know, you can't bring any



1 more -- they may not be here for the whole trial, but they may
2 come in to argue certain things or handle non-controversial
3 witnesses or controversial witnesses, you know. I've got some
4 really fine young lawyers who've appeared before me and done
5 things, so I just say that for your -- because this is a long
6 trial.

7 Okay. All right. If there are other issues that
8 come up that you want to address formally or informally, call
9 my chambers and -- because it's a big case, I usually have any
10 telephone hearings that I've done on the record. I don't
11 necessarily do that in all trials, but you'll -- you can talk
12 to my law clerks and we're usually pretty accommodating in
13 getting things set up quickly. Okay? I look forward to seeing
14 you all.

15 MR. FISHER: Thank you, Your Honor.

16 THE COURT: For those who are observing a holiday
17 starting on Monday night, have a good holiday.

18 UNIDENTIFIED: Thank you, Your Honor.

19 UNIDENTIFIED: Thank you, Your Honor.

20 (Proceedings concluded at 11:34 a.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: April 10, 2017
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