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By ECF and E-Mail

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)

Dear Judge Glenn:

We represent plaintiff Motors Liquidation Company Avoidance Action Trust ("Plaintiff") in the above-referenced action. We submit this letter in support of Plaintiff's objection to the admission into evidence of exhibits prepared by Defendants' expert witnesses. As set out below, an exhibit is not admissible as evidence pursuant to F.R.E. 1006 if it contains inadmissible hearsay or summarizes the underlying source materials in a non-neutral or prejudicial manner. To the extent such documents may be used at trial, they may only be used as demonstrative exhibits not admitted as evidence pursuant to F.R.E. 611(a), and only if the underlying documents were previously admitted.

1. Summary Exhibits Under Federal Rule of Evidence 1006

Federal Rule of Evidence 1006, an exception to the best evidence rule, "refers to the admission into evidence of charts, summaries, or calculations to prove the contents of voluminous writings, recordings or photographs." *United States v. Bradley*, 869 F.2d 121, 123 (2d Cir. 1989) (citing 5 *Weinstein's Evidence* ¶ 1006[07], at 1006-15 (1988)). Charts or summaries admitted under Rule 1006 must reflect the contents of the documents they summarize and are substitutes in evidence for the voluminous originals. *United States v. Milkiewicz*, 470 F.3d 390, 398 (1st Cir. 2006). There are several preconditions to admitting a Rule 1006 summary chart as evidence, each of which must be established by the proponent of the summary exhibit. *See United States v. Irvin*, 682 F.3d 1254, 1262 (10th Cir. 2012).

First, "[e]vidence admitted under Rule 1006 must otherwise be admissible . . . subject to the usual objections under the rules of evidence" because it is taken as evidence in lieu of the underlying documents. *Milkiewicz*, 470 F.3d at 396. Thus, "Rule 1006 evidence normally is objectionable if the voluminous source material on which it is based is inadmissible." *Id.* (citation omitted)*; see also Master-Halco, Inc. v. Scilla, Dowling & Natarelli*, 3:09-cv-1546 (MRK), 2010 WL 1553784, at *3 (D. Conn. Apr. 19, 2010) ("'[A] chart, summary, or calculation is inadmissible if it is based on inadmissible hearsay' or other inadmissible

evidence." (quoting 6 *Weinstein's Federal Evidence* § 1006.08[2])); 31 Charles Alan Wright & Victor James Gold, *Fed. Prac. & Proc.* § 8043 (1st ed. 2000).

Second, the proponent of the summary exhibit must demonstrate that "the voluminous source materials are what the proponent claims them to be and that the summary accurately summarizes the source materials." *Milkiewicz*, 470 F.3d at 396; *U.S. v. Janati*, 374 F.3d 263, 272 (4th Cir. 2004). As such, "they must fairly represent the underlying documents and be 'accurate and nonprejudicial.'" *Milkiewicz*, 470 F.3d at 398 (quoting *United States v. Bray*, 139 F.3d 1104, 1111 (6th Cir. 1998)). As the Sixth Circuit explained, "the document [must] summarize[] the information contained in the underlying documents accurately, correctly, and in a nonmisleading manner. Nothing should be lost in the translation. It also means, with respect to summaries admitted in lieu of the underlying documents, that the information on the summary is not embellished by or annotated with the conclusions of or inferences drawn by the proponent, whether in the form of labels, captions, highlighting techniques, or otherwise." *Bray*, 139 F.3d at 1110. As described in a recent case in this District, a Rule 1006 exhibit is "a summary of voluminous data prepared in a rote, non-discretionary way by a non-expert. In such instances, a paralegal might (for example) create a chart of phone calls to or from a particular number, drawn from far more voluminous data. In such a situation, there is typically a 1:1 correlation between the underlying data and the chart. There is little to no discretion applied." *Estate of Jacquez v. Flores*, 10-cv-2881 (KBF), 2016 WL 1060841, at *9 (S.D.N.Y. Mar. 17, 2016) (citation omitted).

Third, the documents underlying the chart must be so "voluminous" that they "cannot conveniently be examined in court" by the trier of fact. Fed. R. Evid. 1006; *see also United States v. Buck*, 324 F.3d 786, 790 (5th Cir. 2003).

Fourth, the proponent of the summary must also have made the documents underlying the summary "available for examination or copying, or both, by other parties at a reasonable time or place." Fed. R. Evid. 1006.

2. The Use of Demonstratives Under Federal Rule of Evidence 611(a) Versus Summary Exhibits

The Second Circuit and other courts have cautioned that "[c]are should be taken to distinguish between the use of summaries or charts *as evidence* pursuant to Rule 1006, and the use of summaries, charts or other aids *as pedagogical devices* to summarize or organize testimony or documents which have themselves been admitted into evidence." *Bradley*, 869 F.2d at 123 (quoting 5 Weinstein's Evidence ¶ 1006[07]. At 1006-15 (1988) (emphasis in original)); *see also Baugh ex rel. Baugh v. Cuprum S.A. DE C.V.*, 730 F.3d 701, 707 (7th Cir. 2013) ("Thus when considering the admissibility of exhibits of [summary] nature, it is critical to distinguish between charts or summaries *as evidence* and charts or summaries *as pedagogical devices*." (quoting *United States v. Wood*, 943 F.2d 1048, 1053 (9th Cir. 1991) (emphasis in original, internal alterations omitted)).

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In contrast to exhibits admitted as evidence under Rule 1006, the use of "pedagogical devices," *i.e.*, demonstratives, is governed by Federal Rule of Evidence 611(a), and they are not admitted as evidence. *Baugh*, 730 F.3d at 707. As the Seventh Circuit explained, "demonstrative exhibits are meant to 'illustrate or clarify a party's position,' and they are by definition 'less neutral in their presentation' and thus are not properly considered evidence." *Id.* (citation, alteration omitted). "These 'pedagogical' devices are not evidence themselves, but are used merely to aid the jury in its understanding of the evidence that has already been admitted. Thus, [they] may include witnesses' conclusions or opinions, or they may reveal inferences drawn in a way that would assist the jury. But . . . in the end they are not admitted as evidence." *Janati*, 374 F.3d at 273 (citations omitted). "While it is proper for pedagogical devices 'to be shown to the jury, to assist in its understanding of testimony and documents that have been produced' they should not be 'admitted as an exhibit or taken to the jury room.'" *United States v. Dolney*, 04-cr-159 (NGG), 2005 WL 2129169, at *4 (E.D.N.Y. Sept. 1, 2005) (quoting *United States v. Buck*, 324 F.3d 786, 791 (5th Cir. 2003) (alteration omitted)).

Demonstratives are not presented as evidence because, unlike exhibits admitted under Fed. R. Evid. 1006, they do not summarize evidence too voluminous to be effectively presented to the jury, but only summarize evidence that has already been presented. *Dolney*, 2005 WL 2129169, at *4. Thus, Rule 611(a) demonstratives typically require the summarized evidence "to be affirmatively *admitted* into evidence." *Irvin*, 682 F.3d at 1263 (emphasis in original) (citing cases)). However, the demonstrative itself is not evidence—it "is instead a persuasive, pedagogical tool created and used by a party as part of the adversarial process to persuade the jury." *Baugh*, 730 F.3d at 706; *see also id.* at 707 (Demonstratives "aim to clarify, color, or organize or aid the jury's examination of testimony or documents which are themselves admitted into evidence to persuade the jury to see the evidence in a certain light favorable to the advocate's client." (quotation marks, citation omitted)).

3. The Use of Summary Exhibits Versus Demonstratives by Expert Witnesses

Because summary exhibits are admitted in lieu of the actual underlying evidence, were a Court to admit expert-created charts and exhibits as evidence, it would be permitting a party to *replace* actual evidence with a document prepared by the party's own expert for the purpose of advancing its position. This is not the neutral summary of a voluminous document that is permitted under Rule 1006.

Although an expert may *rely* upon inadmissible evidence, including hearsay, if experts in the field reasonably rely on such evidence in forming their opinions, *see* Fed. R. Evid. 703, the expert may not "simply transmit that hearsay to the [finder of fact]," whether in the form of testimony or a summary chart. *United States v. Mejia*, 545 F.3d 179, 197 (2d Cir. 2008); *see also Master-Halco*, 2010 WL 1553784, at *3 (citing cases); Advisory Committee notes on the 2000 Amendments to Rule 703 (There is "a presumption against disclosure to the jury of information used as the basis of an expert's opinion and not admissible for any substantive purpose, when that information is offered by the proponent of the expert.").

Accordingly, "experts may permissibly use summaries that meet the requirements [of] Rule 1006 during their testimony, but only insofar as those summaries do not violate Rule 703." *Master-Halco*, 2010 WL 1553784, at *3. Conversely, "experts may use 'pedagogical aids' that meet the requirements of Rule 703, [but] these aids may not be admitted as trial exhibits, as they 'are not evidence themselves.'" *Id.* (quoting 6-1006 Weinstein's Federal Evidence § 1006.08[4]); *see also Baugh*, 730 F.3d at 708-10 (finding it an abuse of discretion to allow a demonstrative used by an expert to go to the jury room); *Janati*, 374 F.3d at 273 ("Whenever pedagogical charts are employed [by experts] . . . the court should make clear to the jury that the charts are not evidence themselves, but are displayed to assist the jury's understanding of the evidence."); *Dolney*, 2005 WL 2129169, at *4-5 (glossary of securities terms used by expert in explaining opinion was not evidence but a device intended to aid jury's understanding of complex subject).

Thank you for your consideration.

Respectfully submitted,

/s/ Eric B. Fisher

Eric B. Fisher

cc: All counsel of record