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By Email, 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 10004-1408

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

Dear Judge Glenn:

We represent plaintiff Motors Liquidation Company Avoidance Action Trust (the "Avoidance Action Trust" or "Plaintiff") and write to the Court with respect to the proposed schedule for the next phase of the litigation. As reflected in the Stipulation and Order Amending and Superseding Certain Prior Orders Regarding Discovery and Scheduling (the "Proposed Order") (Adv. Pro. Dkt. No. 1075), there are disagreements among the parties as to which we seek resolution from the Court. As explained below, Defendants' proposals discussed herein disregard this Court's rulings at the August 9, 2018 pre-motion conference and will lead to the unauthorized proliferation of unproductive, expensive, and burdensome motion practice.

Constructive Trust and Earmarking

Defendants propose to move for summary judgment on the affirmative defenses of earmarking and constructive trust, and further propose expert discovery on those issues. *See* Proposed Order, par. 3 (green-highlighted text). This belated request should be denied for the reasons set forth below.

At the August 9, 2018 pre-motion conference, the Court authorized the Avoidance Action Trust's request to move for summary judgment seeking dismissal of Defendants' affirmative defenses of constructive trust and earmarking, following a brief period for focused discovery. Defendants had opposed the Avoidance Action Trust's request for leave to file these motions claiming trial of the issues was warranted. *See* Response to Plaintiff's Pre-Motion Letter, dated August 7, 2018, Adv. Pro. Dkt. No. 1067 at 10 ("Although discovery needs to be completed, based on the record to date, the Term Lenders believe that this issue would most appropriately be decided *on the basis of a trial*.") (emphasis added).[1]

[1] With respect to earmarking in particular, Defendants stated during the pre-motion conference that they might drop the defense altogether, implying that they questioned its merits. It is thus hard to understand

Even more to the point, Defendants have never sought authorization to file summary judgment motions on these issues, although their pre-motion letter sought leave of the Court with respect to five other proposed motions. Defendants' Pre-Motion Letter, dated July 31, 2018, Adv. Pro. Dkt. No. 1061 at 2.

In advance of the August 9, 2018 pre-motion conference, the Court also was very clear in requiring the parties to specify any discovery that they claimed to be necessary. Order Setting Date for Pre-Motion Conference, dated August 2, 2018, Adv. Pro. Dkt. No. 1062 at 2. Defendants now contemplate expert reports and expert discovery regarding the defenses of constructive trust and earmarking. Defendants have never proposed any need for expert testimony on these issues and to date have never articulated any basis for requiring expert testimony with respect to either of these defenses. These defenses do not present genuine expert issues; rather, defendants' proposal appears tactically motivated to continue to impose enormous litigation costs and burdens on the Avoidance Action Trust.

In sum, Defendants' request to move for summary judgment and provide expert testimony with respect to earmarking and constructive trust should be denied because: (i) Defendants have failed to comply with Local Bankruptcy Rule 7056-1(a), requiring a pre-motion conference; (ii) Defendants represented to the Court that these affirmative defenses required a trial and have never before asserted that these defenses were capable of being resolved in their favor on summary judgment; and (iii) Defendants have never before identified a need for expert testimony and discovery with respect to these defenses.

Defendants' Estoppel Motion

In paragraph 4 of the Proposed Order, Defendants propose a briefing schedule for an estoppel motion seeking to bar the Avoidance Action Trust from presenting evidence concerning Orderly Liquidation Values in Exchange ("OLVIE") determined by KPMG for many of the assets in dispute that were not purchased by New GM. This proposed motion should not be permitted because it is, at best, premature, and this Court did not grant leave to bring such a motion.

As set out in our August 7, 2018 letter and discussed at the pre-motion conference, the proposed estoppel motion would be unproductive and would not contribute to resolution of the case. Plaintiff intends to put forward evidence of the OLVIE of the more than 40,000 assets using a methodology that is consistent with that approved by the Court. In determining the best approach for a valuation of such a large number of assets, the Avoidance Action Trust is evaluating whether to rely on KPMG's OLVIE valuation of those very assets. To that end, the Court has permitted Plaintiff to take discovery of KPMG, and Plaintiff has already served

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how they can now assert that there is a basis to move for summary judgment in their favor on the defense of earmarking. Defendants have never offered any explanation for this turnabout.

document requests and noticed a deposition on this issue. Even were judicial estoppel available here—and we do not think that it is—any argument about whether the KPMG valuation is consistent with the OLVIE method adopted by the Court at the Representative Trial must await discovery about the manner in which KPMG conducted its OLVIE valuation and a submission by the Avoidance Action Trust concerning the values it proposes for these assets and the basis therefor. As with constructive trust and earmarking, but even more so because leave to file this motion was sought and not granted, Defendants' proposed estoppel motion should not be permitted because it is premature and not authorized.

Identification of Issues for Trial

Pages 4 and 5 of the Proposed Order specify numerous, consequential issues for trial. Considering the Court's guidance at the pre-motion conference, the parties have been able to reach agreement on identifying all of those issues except for a remaining disagreement as to one. At the pre-motion conference and in the letters that were filed in advance of that conference, the parties addressed their dispute concerning assets that have variously been referred to as "real property assets," "building system assets," and "ordinary building materials." With respect to these assets, Defendants argued that, because of their high dollar value, resolution of this discrete category would meaningfully advance the case. The Court ordered a representative trial on a small number of real property assets that the parties would select.

Now, in addition to real property assets, Defendants propose a trial on other representative assets that relate to entirely different areas of dispute, including robot controllers and "capital repair" assets, and further reserve the right to identify even more assets. These issues were never raised in Defendants' pre-motion letters and were not addressed during the August 9 hearing. In the event that Defendants are belatedly permitted to expand the categories of assets for trial beyond real property assets, then the Avoidance Action Trust would seek to add a limited number of additional assets of its own, including weld controllers and measurement machines that are not installed in concrete pits. In short, Defendants' expansive approach to asset selection would lead to an inevitable reprise of the kind of asset trial that the Court wished to avoid. Accordingly, consistent with the direction provided by the Court at the pre-motion conference and Defendants' own request to this Court in its pre-motion letter, the parties should be required to focus on the real property category.

Scheduling

The parties have been able to negotiate an overall trial schedule to within one month of each other. Plaintiff's proposed schedule concludes all discovery on February 28, 2019, and Defendants' proposed schedule concludes all discovery on January 25, 2019. The difference between the schedules mostly relates to the positioning of the expert discovery period.

Defendants' proposal provides for initial expert reports to be provided on December 18, 2018, and, ignoring the intervening Christmas/New Year period, provides for rebuttal reports to be exchanged on January 15, 2018. Based on the prior Representative Assets trial, the

Avoidance Action Trust expects Defendants to provide an extraordinary number of initial expert reports to which the Avoidance Action Trust will have to respond. Defendants' proposed schedule is unrealistic and threatens unfair prejudice to the Avoidance Action Trust.

In contrast, Plaintiff's proposed schedule contemplates the exchange of initial expert reports on January 11, 2019, and a rebuttal expert report deadline of February 1, 2019. Plaintiff has been mindful of the Court's admonitions about the need to provide an expedited schedule, and its proposed schedule shaves one month off the already fast-paced schedule previously proposed by Defendants. We respectfully request that the Court order the parties to proceed in accordance with the schedule proposed by Plaintiff.

We thank the Court for its attention to the issues addressed in this letter.

Respectfully,

s/ Eric B. Fisher
Eric B. Fisher

cc: All counsel of record (via ECF)