

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 14, 2017
Defendants.	.	2:03 p.m.
.....	.	

TRANSCRIPT OF ADVERSARY PROCEEDING: 09-00504-mg  
MOTORS LIQUIDATION COMPANY AVOIDANCE ACTION TRUST V.  
JPMORGAN CHASE BANK, N.A. ET AL, TELEPHONIC HEARING, ON THE  
RECORD, REGARDING TRIAL WITNESS  
**BEFORE THE HONORABLE MARTIN GLENN**  
**UNITED STATES BANKRUPTCY COURT JUDGE**

TELEPHONIC APPEARANCES CONTINUED

Audio Operator: Jeanelle, ECRO

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TELEPHONIC APPEARANCES (Continued):

For Motors Liquidation      Binder & Schwartz, LLP  
Company Avoidance          By: ERIC B. FISHER, ESQ.  
Action Trust:                366 Madison Avenue, 6th Floor  
New York, NY 10017  
(212) 933-4551

For JPMorgan Chase  
Bank, N.A.:                 Wachtell, Lipton, Rosen & Katz  
By: MARC WOLINSKY, ESQ.  
51 West 52nd Street  
New York, NY 10019-6150  
(212) 403-1000

For Certain Term Loan  
Lenders:                    Jones Day  
By: BRUCE BENNETT, ESQ.  
555 South Flower Street, 50th Floor  
Los Angeles, CA 90071  
(213) 243-2382



1 (Proceedings commence at 2:03 p.m.)

2 THE COURT: All right. This is Judge Glenn. We're  
3 on the record in Motors Liquidation Company Avoidance Action  
4 Trust v. JPMorgan Chase Bank, et al. It's adversary proceeding  
5 number 09-00504.

6 All right. I have a list of the appearances. Who  
7 wants to start?

8 MR. WOLINSKY: Good afternoon, Your Honor. It's Marc  
9 Wolinsky.

10 THE COURT: Okay. Go ahead, Mr. Wolinsky.

11 MR. WOLINSKY: Good afternoon, Your Honor. It's Marc  
12 Wolinsky. I'm just a little bit surprised we're having this  
13 call. As you'll recall --

14 THE COURT: Mr. Wolinsky, are you on a speaker  
15 because your voice is breaking up?

16 MR. WOLINSKY: Okay. Is that better?

17 THE COURT: That's better.

18 MR. WOLINSKY: Okay. Your Honor, as I said, I'm a  
19 little bit surprised to be having this conference on a Friday  
20 afternoon. As you'll recall, we made a motion to exclude parol  
21 evidence, and in that motion, we specifically had a point  
22 heading that the fact witnesses identified on this issue should  
23 be excluded, and we specifically identified Richard Duker by  
24 name in that motion.

25 The plaintiff opposed the motion, identified some



1 testimony from Mr. Duker's deposition to the effect that in  
2 2006, GM was considering closing plants. It was basically a  
3 page and a half of testimony. And then, as you know, the Court  
4 ruled granting our motion, stating, quote:

5 "Whether characterized as parol evidence or simply as  
6 evidence of Old GM's and JPMorgan's intent at the  
7 time the term loan agreements were executed, the  
8 proposed testimony is improper."

9 And then, you continued. So we -- after the Court's  
10 ruling, we tried to confirm with the plaintiff that Mr. Duker  
11 would not be called by them as a witness, and we have not been  
12 able to get that. We've actually been told to the contrary,  
13 and we've asked them to identify what they think Mr. Duker can  
14 say that's admissible in light of the Court's ruling, and we  
15 haven't gotten an answer.

16 The reason why I'm pressing this issue rather just  
17 letting it just simmer, Your Honor may have seen our motion to  
18 seal. I won't address the substance of the motion to seal, but  
19 for those reasons, we really would like to get this issue  
20 resolved and again to trial so we don't need to impose on  
21 Mr. Duker next week.

22 THE COURT: Mr. Fisher.

23 MR. FISHER: Good afternoon, Your Honor. Eric  
24 Fisher. I'm also surprised to be on the phone with you on  
25 Friday afternoon, and my view, Your Honor, is that this call is



1 entirely unnecessary. What we've told the defendants is that  
2 we would wait until the close of their case and we would then  
3 assess whether or not Mr. Duker's testimony was necessary.

4 And Mr. Duker is the managing director of JPMorgan  
5 who was responsible for the term loan from its inception right  
6 up until the GM bankruptcy filing. He also is the person at  
7 JPMorgan who monitored GM and its credit for JPMorgan. And we  
8 think he has testimony that's potentially relevant on valuation  
9 issues.

10 For example, he specifically criticizes or indicates  
11 as unreliable certain kinds of valuations. There's  
12 correspondence he has with another JPMorgan employee where he  
13 agrees that JPMorgan's not entitled to any enterprise value  
14 associated with GM. There's other information he has about GM  
15 received in his capacity as the managing director responsible  
16 for credit that are potentially relevant to valuation issues.  
17 And, of course, whether or not we need his testimony will  
18 depend in part on how the defendant's case comes in.

19 He also has other information that is relevant to the  
20 commercial reasonableness of JPMorgan's position on fixtures.  
21 We think that there is a lot of evidence that we can get from  
22 Mr. Duker showing that, you know, the notion that almost  
23 everything in an automotive plant is a fixture is completely at  
24 odds with the commercial realities as Duker understood them at  
25 the time.



1           So that's where things stand. I'm not -- I'm  
2 actually not familiar with -- or haven't seen the sealing  
3 motion that Mr. Wolinsky's referring to, but we have indicated  
4 to Mr. Wolinsky that in the event that we have to call  
5 Mr. Duker, we will make every effort to minimize burdens on him  
6 and be sensitive to any issues we need to be sensitive to.

7           THE COURT: First, with respect to the sealing  
8 motion, I haven't read it, so I can't consider anything that's  
9 in it because I haven't read it.

10           Do you want to respond, Mr. Wolinsky?

11           MR. WOLINSKY: Yes, Your Honor. I mean, I think half  
12 of what Mr. Fisher -- maybe 90 percent of what Mr. Fisher  
13 refers to is covered by Your Honor's motion. We talked about  
14 the commercial reasonableness of what GM -- JPMorgan considers  
15 to be a fixture, what JPM considered to be machinery and  
16 equipment at the time. All of that is covered by Your Honor's  
17 ruling.

18           In terms of evidence that Mr. Duker has on -- to  
19 guide the collateral, it's complete news to me, never been  
20 identified, not covered in any expert report, not covered in  
21 their pretrial brief, and frankly, I don't believe it's covered  
22 in the deposition itself. So I can't completely respond to it  
23 other than to express surprise because it's never been part of  
24 the case.

25           THE COURT: Mr. Fisher --



1 MR. WOLINSKY: It's not part of our affirmative case,  
2 Your Honor.

3 THE COURT: Mr. Fisher, let me ask. On what basis do  
4 you believe Mr. Duker can provide valuation testimony?

5 MR. FISHER: So, for example, there is -- as I think  
6 I indicated, there is deposition testimony where Mr. Duker  
7 comments on an email that he received from a colleague, and in  
8 that email, he agrees with his colleague that in connection  
9 with the collateral return of a term loan, there's no  
10 enterprise value that should be included in valuing the  
11 collateral. So we think that that is potentially helpful in  
12 rebutting elements of the defendant's valuation case.

13 Again, I'm not saying that we absolutely will call  
14 him, but my sense is that that may become an issue of  
15 contention at the trial, and we think it's perfectly reasonable  
16 to have the person at JPMorgan most knowledgeable about these  
17 issues and most involved in these issues on our witness list.

18 THE COURT: Is -- do you contend that Mr. Duker is an  
19 expert on valuation?

20 MR. FISHER: We would not be calling him as an  
21 expert. No, of course not, Your Honor. He's a fact witness,  
22 and I think it goes to the credibility of JPMorgan's position.  
23 They're going to put forward a valuation position that's  
24 completely at odds --

25 THE COURT: Well, they're going to put forward



1 valuation experts. I'm going to have to listen to the  
2 testimony and the conflicting expert testimony.

3 Well, what I'm going to do for today is --

4 MR. WOLINSKY: Your Honor --

5 THE COURT: Stop, Mr. Wolinsky?

6 MR. WOLINSKY: Can I just?

7 THE COURT: No. No.

8 MR. WOLINSKY: I'm sorry, I didn't mean to interrupt  
9 you.

10 THE COURT: No.

11 MR. WOLINSKY: Thank you.

12 THE COURT: I don't see any reason that I need to  
13 rule on this now. I mean, what I'm going to require is since  
14 what Mr. Fisher has said, they won't make a decision whether  
15 they want to call Mr. Duker until the defendant -- defendants,  
16 plural, have completed putting on their case, I'm going to  
17 require that before you call Mr. Duker, you're going to have to  
18 make a proffer to the Court as to what he's going to testify,  
19 and if there are exhibits you're going to use, you're going to  
20 have to -- and I want that at least three business days before  
21 you intend to call him.

22 And let me make that -- when in your case would you  
23 anticipate calling him, Mr. Fisher?

24 MR. FISHER: We've shared with the other side our  
25 proposed order of witnesses, and I think he's listed as the





1 third or fourth witness.

2 THE COURT: I'm sorry, you're cutting in and out, as  
3 well, if you're on the speakerphone.

4 MR. FISHER: I'm sorry. I think he's the third or  
5 fourth witness when we get to our part of the case, and we've  
6 shared our witness order with the other side, Your Honor.

7 THE COURT: Well, then, I'm going to require that  
8 before you start your case, you make a proffer to the Court.  
9 Provide Mr. Wolinsky with any documents you intend to use, and  
10 you'll have to make a proffer to the Court. I'll decide at  
11 that time whether I'll permit him to testify.

12 I'm quite skeptical about it. You know, the  
13 valuation issues are going to be covered by both sides'  
14 experts. And from the -- you know, it's a little hard for me.  
15 I haven't seen the deposition testimony that you're referring  
16 to or the email. I don't know if it's deposition testimony. I  
17 haven't seen the email that you're referring to. Have you  
18 shared that email, Mr. Fisher, with Mr. Wolinsky?

19 MR. FISHER: The email was marked as an exhibit at  
20 the deposition, Your Honor.

21 THE COURT: All right. So in any event, my ruling  
22 for now is I'm deferring any ruling on whether Mr. Duker will  
23 be permitted to testify. At the close of the defendant's case  
24 -- they are going first -- you're going to need to make a  
25 proffer to the Court, and -- first, confer with Mr. Wolinsky



1 then, and if you still disagree, you'll make a proffer to the  
2 Court and show me what the exhibit is that you're planning to  
3 use, and I'll decide then whether I'm going to permit Mr. Duker  
4 to testify, but I'm not going to decide that question now. I  
5 don't have enough of a record to make the decision.

6 So that's going to be the ruling for today.

7 MR. WOLINSKY: Very good. Thank you, Your Honor.

8 THE COURT: Have a good weekend everybody. We're  
9 adjourned.

10 MR. FISHER: Yes. Thank you, Your Honor.

11 (Proceedings concluded at 2:13 p.m.)

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

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

Alicia J. Jarrett

ALICIA JARRETT, AAERT NO. 428  
ACCESS TRANSCRIPTS, LLC

DATE: November 14, 2018

