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By Email and FedEx

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 (the “**Avoidance Action Trust**”) in the above-referenced adversary proceeding and write to request the Court’s assistance in resolving a dispute concerning the timing of depositions of twelve fact witnesses who are former General Motors employees (“**GM Employee Witnesses**”).¹ The GM Employee Witnesses include former plant managers for facilities that contain Representative Assets, as well as individuals whom Defendants have described as “the guy who’s world-renowned as the number one [paint] shop expert at General Motors,” Adv. Pro. Dkt. No. 655 (June 28, 2016 Tr.) at 7, and the former CFO for Global Product Development for GM who, according to Defendants, was responsible for “any capital project in excess of a hundred million dollars,” *id.* at 7-8.

Defendants have advised us that they may rely for their defenses on factual information obtained by these GM Employee Witnesses in the course of their work at GM. Nevertheless, Defendants have taken the position that because they have retained the GM Employee Witnesses as experts, the Avoidance Action Trust may not depose these individuals prior to expert discovery, *even with respect to facts known to these witnesses prior to their being retained by Defendants in this action*. As set out below, these witnesses should be deposed during fact discovery and should have been (but were not) identified in Defendants’ Rule 26(a)(1) disclosures. *See* Fed. R. Civ. P. 26(a)(1) (requiring parties to provide “the name . . . of each individual likely to have discoverable information—along with the subjects of that information—that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment”). (Defendants’ Steering Committee’s Initial FRCP 26(a)(2)(A) Expert Disclosures is attached as Ex. A.)

¹ The parties have met and conferred on these issues.



As witnesses with relevant factual information, the GM Employee Witnesses are proper subjects for fact discovery. In objecting to such depositions, Defendants have taken the position that because there are hundreds, if not thousands, of GM employees—current and former—who have similar levels of factual knowledge of the Representative Assets or similar assets as the GM Employee Witnesses, the Avoidance Action Trust may not depose these witnesses during fact discovery. This argument misconstrues one of the key purposes of fact discovery: Rule 26 is structured around the idea that parties should have access to the facts on which the other side may rely and should not be ambushed by undisclosed evidence. *See, e.g., Fitzpatrick v. Am. Int'l Grp., Inc.*, No. 10 Civ. 0142 (MHD), 2013 WL 5652629, at *7 (S.D.N.Y. Oct. 15, 2013).

A party may not shield fact witnesses from fact discovery by hiring them as experts, *see* 8A Charles Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2033 (3d ed. 2016 update) and thus deprive an adversary of an opportunity to take further discovery that may be necessary in light of the disclosed facts. For instance, suppose Defendants' expert relies on the statement of a GM Employee Witness that a particular Representative Asset was installed with the intention to be made permanent based on conversations within GM at the time the asset was installed. If this asserted fact is not disclosed until after fact discovery, the Avoidance Action Trust will not have the opportunity to seek additional discovery to test the accuracy of such a statement by deposing others with knowledge of the alleged fact, seeking relevant documents, etc. Further, the Avoidance Action Trust's experts should have access to the same facts concerning the Representative Assets that are available to Defendants' experts where such information was obtained by a GM Employee Witness as an "actor or a viewer."

If it turns out that GM Employee Witnesses through their work at GM also have relevant expertise with respect to the Representative Assets sufficient to qualify them as experts, then they will be "hybrid experts." Someone who is a "fact witness," in the sense that he or she has firsthand knowledge of relevant facts, and also has the training, skill, education, and experience that would qualify him or her to give opinion testimony under Federal Rules of Evidence 702 is properly treated as a hybrid fact/expert witness under Rule 26. *See, e.g., Mezu v. Morgan State Univ.*, 269 F.R.D. 565, 578-79 (D. Md. 2010). Because of the factual basis for their opinions, discovery of these witnesses occurs "through the ordinary discovery channels." *R.J. v. McKinney Indep. Sch. Dist.*, No. 4:05CV257, 2006 WL 5111119, at *1 (E.D. Tex. Mar. 20, 2006); *see also Socha v. 110 Church, LLC (In re World Trade Ctr. Lower Manhattan Disaster Site Litig.)*, No. 21-mc-102, 2014 WL 5757713, at *1 (S.D.N.Y. Nov. 5, 2014).² The prototypical hybrid witness is a treating physician, a witness who knows facts gained from his or her role as an "actor or viewer" and also can provide an expert opinion based on these facts.

² Defendants have referred us to two cases to support delaying depositions until expert discovery. The first, *Vision Ctr. Nw. Inc. v. Vision Value LLC*, No. 3:07-CV-183 RLM, 2007 WL 2904066 (N.D. Ind. Oct. 4, 2007), involved a plaintiff that sought to depose the expert during expert discovery. The only issue before the court was whether the plaintiff would be precluded from seeking fact discovery at that deposition. The other case, *In re Texas E. Transmission Corp. PCB Contamination Ins. Coverage Lit.*, MDL No. 764, 1990 WL 122918 (E.D. Pa. Aug. 21, 1990), granted a motion to delay the deposition of an expert with some factual information until expert discovery, but provides no discussion of the applicable rules.



Fed. R. Civ. P. 26(b)(4) advisory committee note. Similarly, here the GM Employee Witnesses remain as relevant fact witnesses based on information gained from their role as “actors” prior to being retained by Defendants, regardless of whether the GM Employee Witnesses additionally meet the Rule 702 standard. *See Downey v. Bob’s Disc. Furniture Holdings, Inc.*, 633 F.3d 1, 4, 7 (1st Cir. 2011) (discussing the “difference between a percipient witness who happens to be an expert and an expert who without prior knowledge of the facts giving rise to litigation is recruited to provide expert opinion testimony” and thus “comes to the case as a stranger”).

Defendants have pointed us to Rule 26(b)(4)(D) to support their position that the GM Employee Witnesses may not be deposed absent a “showing of exceptional circumstances.” Rule 26(b)(4)(D) is inapplicable because it only applies to non-testifying experts; Defendants have identified each of the GM Employee Witnesses as possible testifying experts. Further, and more fundamentally, the restrictions of Rule 26(b)(4)(D) do not apply “with respect to information that a consultant expert acquired prior to the time he or she was retained by an opposing party.” *Higher One, Inc. v. Touchnet Info. Sys., Inc.*, 298 F.R.D. 82, 87 (W.D.N.Y. 2014) (quoting 6 James W. Moore et al., *Moore’s Federal Practice* § 26.80(2) (3d ed. 2011)); *see also* 8A Charles Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2029 (3d ed. 2016 update) (stating that experts whose information was not acquired in preparation for trial are not included within Rule 26(b)(4) and fact and opinions “may be freely discoverable as with any ordinary witness”). As the advisory notes to subdivision Rule 26(b)(4) state:

[T]he subdivision does not address itself to the expert whose information was not acquired in preparation for trial but rather because he was an actor or viewer with respect to transactions or occurrences that are part of the subject matter of the lawsuit. *Such an expert should be treated as an ordinary witness.*

Fed. R. Civ. P. 26(b)(4) advisory committee note (emphasis added).

Because the GM Employee Witnesses are not strangers to the underlying facts but have factual information as actors and viewers upon which Defendants may rely to defend this action, we respectfully request that the Court order that the GM Employee Witnesses be deposed during the period set for fact discovery.

Respectfully submitted,

/s/ Neil S. Binder
Neil S. Binder

cc: Counsel of Record (by ECF and email)

Exhibit A

respect to the Representative Assets that Defendants Steering Committee may use at trial to present evidence under Federal Rules of Evidence 702, 703 or 705.¹

Defendants Steering Committee reserves the right to retain or consult additional experts, and to supplement, amend, or modify this disclosure and the expert testimony it expects to submit, including without limitation in response to (a) plaintiff's Rule 26(a)(2)(A) expert disclosures or experts otherwise identified by plaintiff's counsel, (b) additional information identified during ongoing discovery, (c) additional arguments made by plaintiff's counsel.

1. Ron Pniewski. Mr. Pniewski is the Owner and President of Ronald Pniewski Consulting, and is a former General Motors employee whose last position at General Motors was CFO for Global Product Development. Mr. Pniewski may submit expert testimony regarding Collateral Identification Issues and Valuation Principles Issues with respect to the Representative Assets, including testimony as to (i) whether some or all of the Representative Assets meet the legal definition of a "fixture," (ii) how some or all Representative Assets or similar assets are affixed, appropriated, maintained, accounted for, used and/or intended to be used, and (iii) the nature, capabilities, and/or purpose of the General Motors facilities in which defendants contend Surviving Collateral is located, including whether such facilities are related or appurtenant to other facilities. If Mr. Pniewski does submit expert testimony, it will be more fully described in an expert report served on September 23, 2016, or a rebuttal expert report served on October 14, 2016, pursuant to the Representative Assets Scheduling Order.

2. Eric Stevens. Mr. Stevens is a former General Motors employee whose last position at General Motors was Vice President Global Manufacturing Engineering. Mr. Stevens may submit expert testimony regarding Collateral Identification Issues and Valuation Principles Issues with respect to the Representative Assets, including testimony as to (i) whether some or

¹ As each term is defined in the Representative Assets Scheduling Order.

all of the Representative Assets meet the legal definition of a “fixture,” (ii) how some or all Representative Assets or similar assets are affixed, appropriated, maintained, accounted for, used and/or intended to be used, and (iii) the nature, capabilities, and/or purpose of the General Motors facilities in which defendants contend Surviving Collateral is located, including whether such facilities are related or appurtenant to other facilities. If Mr. Stevens does submit expert testimony, it will be more fully described in an expert report served on September 23, 2016, or a rebuttal expert report served on October 14, 2016, pursuant to the Representative Assets Scheduling Order.

3. Max Miller. Mr. Miller is a former General Motors employee whose last position at General Motors was Plant Manager of MFD Grand Rapids. Mr. Miller may submit expert testimony regarding Collateral Identification Issues and Valuation Principles Issues with respect to the Representative Assets, including testimony as to (i) whether some or all of the Representative Assets meet the legal definition of a “fixture,” (ii) how some or all Representative Assets or similar assets are affixed, appropriated, maintained, accounted for, used and/or intended to be used, and (iii) the nature, capabilities, and/or purpose of the General Motors facilities in which defendants contend Surviving Collateral is located, including whether such facilities are related or appurtenant to other facilities. If Mr. Miller does submit expert testimony, it will be more fully described in an expert report served on September 23, 2016, or a rebuttal expert report served on October 14, 2016, pursuant to the Representative Assets Scheduling Order.

4. Michael Regiec. Mr. Regiec is a former General Motors employee whose last position at General Motors was Manufacturing Chief Engineer for Body. Mr. Regiec may submit expert testimony regarding Collateral Identification Issues and Valuation Principles Issues with respect to the Representative Assets, including testimony as to (i) whether some or

all of the Representative Assets meet the legal definition of a “fixture,” (ii) how some or all Representative Assets or similar assets are affixed, appropriated, maintained, accounted for, used and/or intended to be used, and (iii) the nature, capabilities, and/or purpose of the General Motors facilities in which defendants contend Surviving Collateral is located, including whether such facilities are related or appurtenant to other facilities. If Mr. Regiec does submit expert testimony, it will be more fully described in an expert report served on September 23, 2016, or a rebuttal expert report served on October 14, 2016, pursuant to the Representative Assets Scheduling Order.

5. John Buttermore. Mr. Buttermore is a former General Motors employee whose experience at General Motors includes serving as Vice President of Powertrain Global Manufacturing Operations. Mr. Buttermore may submit expert testimony regarding Collateral Identification Issues and Valuation Principles Issues with respect to the Representative Assets, including testimony as to (i) whether some or all of the Representative Assets meet the legal definition of a “fixture,” (ii) how some or all Representative Assets or similar assets are affixed, appropriated, maintained, accounted for, used and/or intended to be used, and (iii) the nature, capabilities, and/or purpose of the General Motors facilities in which defendants contend Surviving Collateral is located, including whether such facilities are related or appurtenant to other facilities. If Mr. Buttermore does submit expert testimony, it will be more fully described in an expert report served on September 23, 2016, or a rebuttal expert report served on October 14, 2016, pursuant to the Representative Assets Scheduling Order.

6. John Crabtree. Mr. Crabtree is a former General Motors employee whose last position at General Motors was Plant Manager, Flint Engine South. Mr. Crabtree may submit expert testimony regarding Collateral Identification Issues and Valuation Principles Issues with respect to the Representative Assets, including testimony as to (i) whether some or all of the

Representative Assets meet the legal definition of a “fixture,” (ii) how some or all Representative Assets or similar assets are affixed, appropriated, maintained, accounted for, used and/or intended to be used, and (iii) the nature, capabilities, and/or purpose of the General Motors facilities in which defendants contend Surviving Collateral is located, including whether such facilities are related or appurtenant to other facilities. If Mr. Crabtree does submit expert testimony, it will be more fully described in an expert report served on September 23, 2016, or a rebuttal expert report served on October 14, 2016, pursuant to the Representative Assets Scheduling Order.

7. Daniel Deeds. Mr. Deeds is a former General Motors employee whose last position at General Motors was Manufacturing Engineering Director at GM Powertrain Warren Transmission. Mr. Deeds may submit expert testimony regarding Collateral Identification Issues and Valuation Principles Issues with respect to the Representative Assets, including testimony as to (i) whether some or all of the Representative Assets meet the legal definition of a “fixture,” (ii) how some or all Representative Assets or similar assets are affixed, appropriated, maintained, accounted for, used and/or intended to be used, and (iii) the nature, capabilities, and/or purpose of the General Motors facilities in which defendants contend Surviving Collateral is located, including whether such facilities are related or appurtenant to other facilities. If Mr. Deeds does submit expert testimony, it will be more fully described in an expert report served on September 23, 2016, or a rebuttal expert report served on October 14, 2016, pursuant to the Representative Assets Scheduling Order.

8. John Thomas. Mr. Thomas is a former General Motors employee whose last position at General Motors was Plant Manager, Defiance Castings. Mr. Thomas may submit expert testimony regarding Collateral Identification Issues and Valuation Principles Issues with respect to the Representative Assets, including testimony as to (i) whether some or all of the

Representative Assets meet the legal definition of a “fixture,” (ii) how some or all Representative Assets or similar assets are affixed, appropriated, maintained, accounted for, used and/or intended to be used, and (iii) the nature, capabilities, and/or purpose of the General Motors facilities in which defendants contend Surviving Collateral is located, including whether such facilities are related or appurtenant to other facilities. If Mr. Thomas does submit expert testimony, it will be more fully described in an expert report served on September 23, 2016, or a rebuttal expert report served on October 14, 2016, pursuant to the Representative Assets Scheduling Order.

9. Don Wannemacher. Mr. Wannemacher is a former General Motors employee whose last position at General Motors was Senior Manufacturing Engineer (Aluminum) at GM Powertrain Defiance. Mr. Wannemacher may submit expert testimony regarding Collateral Identification Issues and Valuation Principles Issues with respect to the Representative Assets, including testimony as to (i) whether some or all of the Representative Assets meet the legal definition of a “fixture,” (ii) how some or all Representative Assets or similar assets are affixed, appropriated, maintained, accounted for, used and/or intended to be used, and (iii) the nature, capabilities, and/or purpose of the General Motors facilities in which defendants contend Surviving Collateral is located, including whether such facilities are related or appurtenant to other facilities. If Mr. Wannemacher does submit expert testimony, it will be more fully described in an expert report served on September 23, 2016, or a rebuttal expert report served on October 14, 2016, pursuant to the Representative Assets Scheduling Order.

10. Steven Topping. Mr. Topping is a former General Motors employee whose last position at General Motors was Manufacturing Global Subject Matter Engineer Polymer Painted Parts. Mr. Topping may submit expert testimony regarding Collateral Identification Issues and Valuation Principles Issues with respect to the Representative Assets, including testimony as to

(i) whether some or all of the Representative Assets meet the legal definition of a “fixture,” (ii) how some or all Representative Assets or similar assets are affixed, appropriated, maintained, accounted for, used and/or intended to be used, and (iii) the nature, capabilities, and/or purpose of the General Motors facilities in which defendants contend Surviving Collateral is located, including whether such facilities are related or appurtenant to other facilities. If Mr. Topping does submit expert testimony, it will be more fully described in an expert report served on September 23, 2016, or a rebuttal expert report served on October 14, 2016, pursuant to the Representative Assets Scheduling Order.

11. Randy Thayer. Mr. Thayer is a former General Motors employee whose last position at General Motors was Regional Plant Manager for Lansing Assembly and Stamping Operations. Mr. Thayer may submit expert testimony regarding Collateral Identification Issues and Valuation Principles Issues with respect to the Representative Assets, including testimony as to (i) whether some or all of the Representative Assets meet the legal definition of a “fixture,” (ii) how some or all Representative Assets or similar assets are affixed, appropriated, maintained, accounted for, used and/or intended to be used, and (iii) the nature, capabilities, and/or purpose of the General Motors facilities in which defendants contend Surviving Collateral is located, including whether such facilities are related or appurtenant to other facilities. If Mr. Thayer does submit expert testimony, it will be more fully described in an expert report served on September 23, 2016, or a rebuttal expert report served on October 14, 2016, pursuant to the Representative Assets Scheduling Order.

12. Dick Handzo. Mr. Handzo is a former General Motors employee whose experience at General Motors includes serving as Controller of Flint Assembly and Flint Stamping and Tool and Die. Mr. Handzo may submit expert testimony regarding Collateral Identification Issues and Valuation Principles Issues with respect to the Representative Assets,

including testimony as to (i) whether some or all of the Representative Assets meet the legal definition of a “fixture,” (ii) how some or all Representative Assets or similar assets are affixed, appropriated, maintained, accounted for, used and/or intended to be used, and (iii) the nature, capabilities, and/or purpose of the General Motors facilities in which defendants contend Surviving Collateral is located, including whether such facilities are related or appurtenant to other facilities. If Mr. Handzo does submit expert testimony, it will be more fully described in an expert report served on September 23, 2016, or a rebuttal expert report served on October 14, 2016, pursuant to the Representative Assets Scheduling Order.

13. Abdul Lakhani. Mr. Lakhani is a former Ernst & Young National Office Partner. Mr. Lakhani may submit expert testimony regarding Valuation Principles Issues with respect to the Representative Assets, including the valuation of those assets performed by KPMG. If Mr. Lakhani does submit expert testimony, it will be more fully described in an expert report served on September 23, 2016, or a rebuttal expert report served on October 14, 2016, pursuant to the Representative Assets Scheduling Order.

14. Stuart Gilson. Professor Gilson is a professor of business administration at Harvard Business School. Professor Gilson may submit expert testimony regarding Valuation Principles Issues with respect to the Representative Assets, including the valuation of those assets performed by KPMG, the purchase price paid for the assets of General Motors Corporation sold to General Motors Company (including the Representative Assets), and the value of General Motors Corporation and its assets generally. If Professor Gilson does submit expert testimony, it will be more fully described in an expert report served on September 23, 2016, or a rebuttal expert report served on October 14, 2016, pursuant to the Representative Assets Scheduling Order.

15. Carl Chrappa. Mr. Chrappa is a Senior Managing Director at the Alta Group. Mr. Chrappa may submit expert testimony regarding Valuation Principles Issues with respect to the Representative Assets, including appraised values of those assets. If Mr. Chrappa does submit expert testimony, it will be more fully described in an expert report served on September 23, 2016, or a rebuttal expert report served on October 14, 2016, pursuant to the Representative Assets Scheduling Order.

16. Joseph Herz. Mr. Herz is a Senior Vice President at Hilco. Mr. Herz may submit expert testimony regarding Valuation Principles Issues with respect to the Representative Assets, including appraised values of those assets. If Mr. Herz does submit expert testimony, it will be more fully described in an expert report served on September 23, 2016, or a rebuttal expert report served on October 14, 2016, pursuant to the Representative Assets Scheduling Order.

17. Anthony J. Viviani. Mr. Viviani is a title searcher and real estate attorney. Mr. Viviani may submit expert testimony regarding Collateral Identification Issues with respect to the Representative Assets, including the scope and effect of the fixture filings. If Mr. Viviani does submit expert testimony, it will be more fully described in an expert report served on September 23, 2016, or a rebuttal expert report served on October 14, 2016, pursuant to the Representative Assets Scheduling Order.

18. James M. Marquardt. Mr. Marquardt is a title searcher and real estate attorney. Mr. Marquardt may submit expert testimony regarding Collateral Identification Issues with respect to the Representative Assets, including the scope and effect of the fixture filings. If Mr. Marquardt does submit expert testimony, it will be more fully described in an expert report served on September 23, 2016, or a rebuttal expert report served on October 14, 2016, pursuant to the Representative Assets Scheduling Order.

19. John Coghlan. Mr. Coghlan is a title searcher and real estate attorney. Mr. Coghlan may submit expert testimony regarding Collateral Identification Issues with respect to the Representative Assets, including the scope and effect of the fixture filings. If Mr. Coghlan does submit expert testimony, it will be more fully described in an expert report served on September 23, 2016, or a rebuttal expert report served on October 14, 2016, pursuant to the Representative Assets Scheduling Order.

* * *

Given that these expert disclosures are being made during fact discovery and well in advance of the deadline for submitting written expert reports, Defendants Steering Committee may decide not to submit expert testimony from certain of the individuals identified herein, or only to submit rebuttal expert testimony from certain of the individuals identified herein. Only the individuals named herein that actually submit expert reports on September 23, 2016 or rebuttal expert reports on Oct. 14, 2016 shall be considered experts that Defendants Steering Committee may use at trial to present evidence under Federal Rules of Evidence 702, 703 or 705. Any individuals identified herein that do not submit expert or expert rebuttal reports on September 23, 2016 or October 14, 2016 are experts employed by Defendants Steering Committee only for trial preparation under Federal Rule of Civil Procedure 26(b)(4)(D).

Dated: June 27, 2016
New York, New York

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*Attorneys for Certain Term Loan Investor Defendants
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Marathon CLO II Ltd., Marathon Financing I, B.V.,
Morgan Stanley Senior Funding Inc., Muzinich &
Company (Ireland) Ltd. for the Account of Muzinich
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