UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re: MOTORS LIQUIDATION COMPANY, f/k/a GENERAL MOTORS CORPORATION, *et al.*, Debtors.	Chapter 11 Case No. 09-50026 (MG) (Jointly Administered)
MOTORS LIQUIDATION COMPANY AVOIDANCE ACTION TRUST, by and through the Wilmington Trust Company, solely in its capacity as Trust Administrator and Trustee, Plaintiff, against JPMORGAN CHASE BANK, N.A., *et al*., Defendants.	Adversary Proceeding Case No. 09-00504 (MG)

ORDER RESOLVING DISPUTE ABOUT TIMING OF DEPOSITIONS OF TWELVE FORMER GM EMPLOYEES

A discovery dispute has arisen between counsel for plaintiff and counsel for JPMorgan Chase Bank, N.A. ("JPMCB") whether the plaintiff's counsel may take the deposition during the fact discovery period of 12 former GM employees that the defendants have designated as expert witnesses. Plaintiff's counsel argues that he should be permitted to take the depositions during fact discovery. JPMCB's counsel argues that the depositions should only be permitted during expert discovery. Both counsel submitted letters to the Court setting forth their positions and legal authority. See ECF Doc ##'s 708 and 709. The dispute here is when these witnesses will

have to sit for their depositions – now, during fact discovery; or later, during expert discovery, or, perhaps, twice. The Court had a telephone hearing concerning the dispute on August 22, 2016, and now enters this Order resolving the dispute.

The 12 witnesses, former employees of GM, appear to have knowledge of facts relevant to the claims and defenses in this case obtained or learned before the witnesses were retained as experts by defendants. It remains unclear whether defendants will seek to use these witnesses as testifying experts or solely as consulting experts.

These experts can fairly be characterized as "hybrid witnesses," having both knowledge of facts relevant to the dispute obtained during their prior GM employment, and facts they have learned since their retention as experts and the opinions they have formed as experts. Problems presented by hybrid witnesses are particularly acute where, as here, the "experts" are former employees of the party about whom testimony is sought to be obtained unless giving of expert testimony was a part of the employee's regular duties. None of these 12 witnesses has been identified as an employee for whom expert testimony was a regular part of the employee's duties.

A witness' knowledge of facts learned through his or her regular work is clearly fair game for discovery. This is true whether the witness is subsequently identified as a consulting or testifying expert witness. A witness' opinions, however, stand on different footing.

All 12 witnesses here have been identified as "retained" experts. This makes Rule 26(a)(2) (B) applicable – meaning that the witness must prepare an expert report if he or she is going to testify as an expert witness at trial. Rule 26(b)(4) (A) provides that such a witness may not be deposed until the report is prepared, and this certainly applies to the facts upon which the expert's opinions are based, facts the expert considered in reaching opinions, and the opinions

themselves. But the Rule does insulate a witness from discovery during fact discovery of facts learned in the regular course of the employee's duties. Designating witnesses as expert witnesses cannot be used to shield percipient fact witnesses from discovery of facts. Rule 26(b)(4) (D) ordinarily excludes depositions of retained experts employed only for trial preparation, at least insofar as the deposition seeks facts learned during trial preparation (as opposed to facts known to the witness before being retained as an expert which is discoverable).

It is significant here that defendants acknowledge that they probably will not call all 12 witnesses at trial. Some or all of the 12 witnesses may wind up as "consulting expert witnesses" only. Designating persons who had knowledge of relevant facts before being retained as experts cannot shield the witnesses from giving fact depositions. The Court is concerned that the large number of former GM employees that defendants have cloaked with the label of experts is an effort to prevent timely discovery of relevant and material facts. That plaintiff wants these facts to supply to its experts before they prepare their reports is expected and proper.

The Court is also concerned that the plaintiff is trying to gain an unfair advantage by discovering facts or opinions that it ordinarily would not be entitled to obtain at this stage of the case. Defendants should not have to preview the facts provided to their experts for the purposes of obtaining expert opinions before the reports are prepared and depositions thereafter are taken as provided in the rules.

The Court has discretion in resolving this discovery dispute to specify the timing and permissible topics for deposition discovery. Therefore, based on the arguments of the parties, as set forth in their letters and during the hearing, the Court orders as follows:

Unless the parties agree otherwise, plaintiff's counsel may take depositions of these 12 witnesses during the fact discovery period subject to the following conditions:

1. questions may only seek facts known to the witnesses before they were retained as experts;
2. no opinion testimony may be sought from the witnesses;
3. a witness may not be asked about documents he or she was shown after being retained as an expert witness, with the exception of documents the witness reviewed that the witness had sent or received before being retained as an expert;
4. questioning may seek to elicit facts learned by the witnesses before being retained as experts, even if the witnesses' recollections were refreshed from the review of documents that they sent or received before being retained as experts (but questions may not be asked about documents that they have been shown during preparation that they did not send or receive);
5. if the witnesses are later designated as testifying experts, they may be re-deposed after reports are completed but, absent some other agreement by the parties, plaintiff will be required to compensate the witnesses in connection with their expert depositions. No questions may be asked in a later deposition of a witness designated only as a consulting witness of facts disclosed to the witness after the witness was retained, or of opinions discussed or given, except in the exceptional circumstances that may be permitted by the rules.

IT IS SO ORDERED.

Dated: August 22, 2016
New York, New York

Martin Glenn

MARTIN GLENN
United States Bankruptcy Judge