

Clerk of the Court

Hearing Date: 9-30-2009; Time: 10.30 a.m.
Plaintiff's Response Due: 8-26-2009

United States Bankruptcy Court
Southern District of New York
One Bowling Green
New York, N.Y. 10004-1408

Lead Case # 09-50026

In Re:)	
)	Chapter 11
GENERAL MOTORS CORP., et. al.,)	<u>Case # 09-0950026</u>
)	(Gerber)
Debtors)	Jointly Administered

ADVERSARIAL COMPLAINT

Radha Ramana Murty Narumanchi ("Murty")	Plaintiff) Adversarial Complaint
	<u>Pro Se</u>) # <u>09-00501 (Reg)</u>
)
vs.)
)
General Motors Corporation (GM), et al.)
	DEFENDANTS) <u>Date: August 17, 2009</u>

PRO SE PLAINTIFF'S OPPOSITION TO FEDERAL DEFENDANTS'
7-21-2009 MOTION TO DISMISS

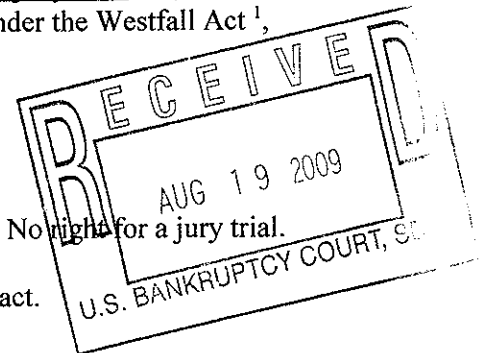
Comes now the adversarial complaint *pro se* Plaintiff "Murty" and submits his opposition to the 7-21-2009 Motion of five (5) "Federal Defendants" to dismiss them from the complaint. There are also other defendants, namely "Debtor Defendants" and "Indenture Trustee Defendant", whose motions are being answered separately.

PART ONE - EXECUTIVE SUMMARY

1.1 This adversarial complaint had clearly **demande** in bold letters a jury trial. So, it should have been clear to the Federal Defendants that this case is not being brought under the Westfall Act ¹, but, rather under 28 USCA § 2679(b)(2)(A) and (B)² plus *Bivens* claims.

¹Exhaustion of administrative remedies is *sine quo non* under this Act. No right for a jury trial.

²Exhaustion of administrative remedies is **not** *sine quo non* under this act.



1.2 The case also falls under *Biven* claims³ .

1.3 In the Lead case, Plaintiff was positively precluded by this Court from participating in the pre-evidentiary hearing discovery process, and notwithstanding such preclusion, any papers filed by Plaintiff therein are meant to preserve his rights on appeal, and nothing else. So, a full-scale discovery is called for at this stage.

1.4 Once the full scale discovery is over, with regard to his allegations, Plaintiff will no doubt amend his complaint suitably to conform to facts discovered.

1.5 This adversarial complaint was filed on **6-16-2009**. Anything that had happened in the lead case # 09-50026 subsequently, where evidentiary hearings took place on 6-30-2009 and on 7-1-2009, and final briefings on 7-2-2009, without a full and fair discovery, presentation, and hearing on Plaintiff's points of view, that culminated in the 363 Sale decision by the court on **7-5-2009**, does not become *res judicata* or *claim preclusion* on this adversarial case.

1.6 An evidentiary hearing is warranted on U.S. Attorney's certification, after proper discovery, and the court may also have to rule before hand, on who (the plaintiff or the defendant) has the burden of proof.

1.7 Plaintiff is aware of the doctrine of "equitable mootness". Hence, anything other than the money damage claims against the defendants may be abandoned.

PART TWO – DISCUSSION

2.1 The five "Federal Defendants" want to be out of this case, because they claim that they are/were federal employees and that they were acting within the scope of their employment. Mr Joseph N. Cardero, Assistant United States Attorney for SDNY had issued a Declaration dated 7-21-2009 pursuant to 28 USCA § 1740.

2.1.1 With due apologies to Honorable Judge Rosemary Barkett of the 11th Circuit in Atlanta, Georgia, the defense here wants the *pro se* plaintiff to go through the hoops of a "brambley procedural thickets". **Not so fast says the plaintiff.**

2.1.2 Once Attorney General verifies that federal employee⁴ *acted within scope of his employment*⁵ at time of the alleged acts, 28 USCA § 1346(d)(1) applies under normal circumstances,

³No need to exhaust administrative remedies. Seventh amendment right to Jury trial is preserved.

⁴Federal law determines whether person is a federal employee and nature and contours of federal responsibilities. *Aversa v. U.S. C.A.* 1 (R.I.) 1996, 99 F. 3d 1200.

⁵To determine whether federal employee was acting within scope of employment under the Westfall Act, court applies *respondeat superior* law of **state in which alleged tort occurred**, *Wilson v. Libby*, C.A. D.C., 2008, 535 F. 3d 697, 383 U.S. App. D.C. 82, rehearing *en banc* denied, *certiorari* denied, 2009 WL 392853. Therefore this determination involves intensive fact finding by the court in an evidentiary hearing, which obviously must be preceded by extensive discovery for several unconstitutional and tortious acts committed by the five federal defendants. (See *Jasco Tools, Inc. V.*

see *Castro v. U.S.* C.A.2 (N.Y.) 1994, 34 F.3d 106; but if the case is filed in a state court, such verification (certification) establishes ***conclusively*** the scope of office **for the purpose of removal** to the U.S. District Court, 28 USCA § 1346(d)(2).

2.1.3 However, such verification (certification) of Attorney General is ***not*** absolute and conclusive, and if contested by plaintiff in a federal action, the district court may hold an evidentiary hearing and determine⁶:

(A) that the defendants were/are ***not employees of the federal government***, but are independent contractors⁷; or

(B) that federal employees were ***not acting within the scope of their employment*** or the case falls within the exceptions; or

(C) that the federal employees are hauled up before the court for a violation⁸ of the Constitution of the United States⁹, or some other federal statute. 28 USCA § 2679 (b)(2);

Dana Corporation, (Docket # 08-2762-bk, C.A. 2nd, 7-31-2009)

⁶Certification of scope of employment made by United States Attorney and filed with district court does not conclusively determine whether defendant was actually acting within scope of his employment for purposes of substituting United States for defendant, *Pritchett v. Milstid*, S.D. Ala. 1995, 891 F. Supp. 1541.

⁷In determining whether United States should be substituted as the party defendant under Federal Tort Claims Act (FTCA), court must determine whether tort-feasors were acting in the role of employees of the government or independent contractors within meaning of the FTCA and, if they were employees, whether they were acting within the scope of their employment. *B & A Marine Co., Inc. V. American Foreign Shipping Co., Inc.*, C.A. 2 (N.Y.) 1994, 23 F. 3d 709, *certiorari* denied 115 S. Ct. 421, 513 U.S. 961.

⁸Federal Tort Claims Act (FTCA) claim against the government is not the exclusive remedy for the tort of a government employee (1) when an injured plaintiff brings a *Bivens* claim against the government employee, seeking damages for a constitutional violation, or (2) when an injured brings an action under a federal statute that authorizes recovery against a government employee, *Davis v. U.S.* D. Conn. 2006, 430 F. Supp. 2d 67. Also, unlike under the Federal Tort Claims Act (FTCA) and the Westfall Act, no scope-of-employment certification process is available for *Bivens* claims against individual federal officials. *Harbury v. Hayden*, C.A. D.C. 2008, 522 F.3d 413, 380 U.S. App. D.C. 388, *certiorari* denied, 129 S.Ct. 195.

⁹ Once again, with apologies to Judge Stephen Reinhardt of the Ninth Circuit, we may say that these various Federal Defendants (“The Gang of Five” as they are called in some news articles -- reminding us about the anti-social and anti-national elements that have been so designated in China about three decades ago), indulged in a mockery of the careful boundaries drawn and laid down between the powers, duties, and obligations of Congress and the Executive, so much so their actions are a great affront to the framers of our Constitution, where the founding fathers had verily believed that such separation between the three branches of government is so essential to the prevention of tyranny in this

2.1.4 "Burden of proof" (i.e. which party bears the burden of proof) with regard to "within scope of employment" assertion by any federal defendants in any evidential hearing is another important issue. It appears that there is no authoritative decision on this issue by the Second Circuit. In view of the fact that there is a split and a virtual tie among the various federal circuits on this issue (see the discussion in the case of *Williams v. U.S.* 71 F.3d 502, C.A. 5 (Tex.) 1995), we need some preliminary ruling by this court on this issue.

2.2. This adversarial complaint was filed on **6-16-2009**, whereas the 363 sale order took place on **7-5-2009** after an evidentiary hearing on 6-30-2009, 7-1-2009, and 7-2-2009. Hence, it is illogical to say that this adversarial action is a re-hash of what took place in the first week of July 2009. To the extent some of the requests made in the complaint, such as a declaratory judgment etc. may be moot, at this point in time (under the theory of "equitable mootness") and will be excised in an amended complaint.

2.3 Federal Rules of Civil Procedure **Rule 15** in part states that "Otherwise a party may amend the party's pleadings only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. So, plaintiff hereby requests the Court to grant him permission to amend his complaint, after discovery is completed."¹⁰

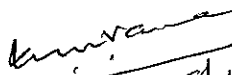
PART THREE - CONCLUSIONS AND REQUESTS

3.0 It is needless to say that this case does not deserve to be dismissed on a motion by federal defendants. The court shall set up a pre-trial schedule of discovery etc.

Respectfully submitted.

Dated this 17th day of August 2009, at New Haven, Connecticut.

Plaintiff *Pro Se*


8/17/2009
(Radha R.M. Narumanchi)

657 Middletown Avenue

New Haven, Conn. 06513

Phone: (203) 562-0536

Email: rrm_narumanchi@hotmail.com

Certification


This is to certify that a copy of the aforementioned was mailed by first class mail, postage paid

country and hence so harmful to our democracy.

¹⁰This also means that the court has to establish an adequate pre-trial schedule.

this 17th day of August, 2009 to:

- 1) Weil, Gotshal & Manges LLP, Attorneys for Debtors, 767 Fifth Avenue, New York, N.Y. 10153 - Attn: Harvey R. Miller/Stephen Karotkin/Joseph H. Smolinsky;
- 2) Cadwalader, Wickersham & Taft LLP, Attorneys for the Purchaser, One World Financial Center, New York, N.Y. 10281 - Attn: John J. Rapisardi;
- 3) Kramer Levin Naftalis & Frankel LLP, Attorneys for the Creditors Committee, Attorneys for the Creditors Committee, 1177 Avenue of the Americas, New York, N.Y. 10036, Attn: Kenneth H. Eckstein;
- 4) Cleary Gottlieb Steen & Hamilton LLP, Attorneys for the UAW, One Liberty Plaza, New York, N.Y. 10006 - Attn: James L. Bromley;
- 5) Cohen, Weiss and Simon LLP, Attorneys for the UAW, 330 West 42nd Street, New York, N.Y. 10036 - Attn: Babette Ceccotti;
- 6) Vedder Price, P.C., Attorneys for Export Development Canada, 1633 Broadway - 47th Floor, New York, N.Y. 10019 - Attn: Michael J. Edelman/Michael L. Schein;
- 7) Office of the United States Trustee for the Southern District of New York, 33 Whitehall Street, 21st floor, New York, N.Y. 10004 - Attn: Diana G. Adams;
- 8) U.S. Attorney's General Office, S.D.N.Y., 86 Chambers Street - Third Floor, New York, N.Y. 10007 - Attn: David S. Jones/Matthew L. Schwartz;
- 9) Gibson, Dunn & Crutcher, LLP, 200 Park Avenue, 47th Floor, New York, N.Y. 10166, Attn: Adam Offenhartz/David Feldman,
- 10) Cravath, Swaine & More LLP, 825 Eighth Avenue, New York, N.Y. 10019, Attn: Robert D. Joffee; &
- 11) Courtesy Copy to the Chambers of Honorable Judge Robert E. Gerber, United States Bankruptcy Court, Southern District of New York, One Bowling Green, New York, N.Y. 10004-1408


8/17/2009
(Radha R.M. Narumanchi)