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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re **MOTORS LIQUIDATION COMPANY *et al*.,** **f/k/a General Motors Corp. *et al.*,** **Debtors.**	Chapter 11 Case No. 09-50026 (REG) (Jointly Administered)
RADHA RAMANA MURTY NARUMANCHI (MURTY), **Plaintiff *Pro Se*,** **v.** **GENERAL MOTORS CORP. *et al*.,** **Defendants.**	Adversary Proceeding No. 09-00501 (REG)

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF DEFENDANT WILMINGTON TRUST COMPANY'S MOTION TO DISMISS PLAINTIFF'S ADVERSARY COMPLAINT

September 23, 2009

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PRELIMINARY STATEMENT

Plaintiff has failed to challenge, and thus concedes, that his sole claim against Wilmington Trust Company ("**WTC**"), as indenture trustee,[1] must be dismissed with prejudice because the documents at the heart of plaintiff's claim that WTC allowed General Motors Corporation ("**GM**") to improperly grant certain liens are unambiguous and conclusively show that GM did not in fact do so.[2] In other words, there was no "violation of the covenants of the indenture" for which WTC is the indenture trustee, and WTC did not breach any fiduciary duties, to plaintiff or anyone else. On this ground alone, the complaint against WTC should be dismissed with prejudice.

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[1] WTC is the successor indenture trustee to Citibank, N.A. under two indenture agreements with GM pursuant to which GM issued senior unsecured debt securities: (i) a Senior Indenture, dated as of December 7, 1995, as amended (the "**1995 Indenture**"); and (ii) a Senior Indenture, dated as of November 15, 1990 (the "**1990 Indenture**"). The outstanding series of notes issued pursuant to the 1995 Indenture are represented by CUSIP numbers: 370442AT2; 370442AU9; 370442AV7; 370442AZ8; 370442BB0; 370442816; 370442774; 370442766; 370442758; 370442741; 370442733; 370442725; 370442BQ7; 370442BT1; 370442717; 370442BW4; 370442BS3; 370442121; and 370442691. The outstanding series of notes issued pursuant to the 1990 Indenture are represented by CUSIP numbers: 370442AN5; 370442AJ4; 370442AR6; 37045EAG3; and 37045EAS7. As of June 1, 2009 the principal amount of the debtentures that remained outstanding totaled $21,435,281,912 under the 1995 Indenture and $1,324,590,000 under the 1990 Indenture. Plaintiff's claims against WTC relate only to the 1995 Indenture. *See* Compl. ¶ 3.2 (Ex. 2).

Except where otherwise specified, citations denominated "Ex. __" refer to the sequentially numbered Exhibits to the July 16, 2009 Declaration of David J. Kerstein (Exhibits 1–15) or to the September 23, 2009 Supplemental Declaration of David J. Kerstein submitted herewith (Exhibits 16–23).

[2] On July 27, 2009, this Court granted plaintiff Radha Bhavatarini Devi Narumanchi's request for permission to withdraw as a *pro se* plaintiff from this adversary proceeding. *See* Ex. 16, July 28, 2009 Endorsed Order. Accordingly, WTC refers only to plaintiff Radha Ramana Murty Narumanchi as "**plaintiff**" throughout this Reply Memorandum of Law.

Plaintiff's sole claim against WTC also is barred by the doctrines of *res judicata*, collateral estoppel, and law of the case because this Court already considered and expressly rejected the same "equal and ratable clause" argument advanced by plaintiff (and Oliver Parker, another, similarly situated unsecured bondholder ("**Mr. Parker**")) in the voluntary cases commenced with this Court on June 1, 2009 by GM and certain of its affiliates (the "**Debtors**") under chapter 11 of title 11, United States Code (collectively, the "**GM Bankruptcy**") that plaintiff now raises again in an attempt to get a "second bite at the apple." *See In re Gen. Motors Corp.*, 407 B.R. 463, 517–18 (Bankr. S.D.N.Y. 2009) (the "**Decision**"); *see also* Opening Br. at 7–22.[3] Plaintiff offers two primary arguments against the application of these preclusive doctrines, neither of which has merit. *First*, plaintiff argues that he should not be precluded from re-litigating the "equal and ratable clause" claim because he never received a "full and fair opportunity" to litigate it in the GM Bankruptcy in the first place. *See* Pl. Br. ¶¶ 3.3–3.3.12. *Second*, plaintiff argues that the application of these doctrines is barred by plaintiff's pending appeal of the Sale Order. *See id.* ¶¶ 3.3, 3.3.1, 3.3.8.

But it is clear from the record in the GM Bankruptcy that plaintiff—as well as Mr. Parker—undoubtedly had and exercised a "full and fair opportunity" to raise and litigate the "equal and ratable clause" claim before this Court. *See* Opening Br. at 7–11, 20.

Moreover, it is well-settled that plaintiff's pending appeal of the Sale Order is not a bar to the application of these preclusive doctrines, even more so in light of the fact that the jurisdiction

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[3] "**Opening Br.**" and "**Opening Brief**" refer to WTC's Memorandum of Law in Support of Its Motion to Dismiss Plaintiffs' Adversary Complaint, filed with this Court on July 16, 2009. "**Pl. Br.**" and "**Opposition Brief**" refer to *Pro Se* Plaintiff's Opposition to Both WTC's and GM's Motions to Dismiss the Adversary Complaint, filed with this Court on September 2, 2009.

of the district and appellate courts prevents any reconsideration of this Court's rejection of plaintiff's and Mr. Parker's "equal and ratable clause" claim because plaintiff failed to seek and obtain a stay of the Sale Order before it closed. Indeed, the notion that an appeal does not prevent a plaintiff from being collaterally estopped from attempting to re-litigate issues already decided against him should come as no surprise to the plaintiff here. Just three years ago, plaintiff was collaterally estopped by the United States District Court for the Eastern District of New York from re-litigating claims already decided against him. *See Narumanchi v. Foster*, No. 02-CV-6553 (JFB)(LB), 2006 WL 2844184 (E.D.N.Y. Sept. 29, 2006) (Ex. 17), *aff'd sub nom. Narumanchi v. Am. Home Assurance Co.*, 317 F. App'x 56 (2d Cir. 2009) (Ex. 18). This Court should do the same.

Accordingly, the complaint as it relates to WTC should be dismissed with prejudice.

ARGUMENT

A. Plaintiff Does Not Contest And Thus Concedes That The LSA Does Not Trigger The Equal And Ratable Clause Of The 1995 Indenture

Plaintiff's sole claim against WTC is that as indenture trustee under the 1995 Indenture, WTC owed duties to certain unsecured GM bondholders, and that WTC breached those duties by failing to take action against GM for purportedly violating that 1995 Indenture. More specifically, plaintiff alleges that, as collateral for pre-petition loans GM received from the U.S. Department of the Treasury ("**Treasury**"), GM improperly encumbered certain properties, triggering an "equal and ratable clause" (the "**Equal and Ratable Clause**") in the 1995 Indenture and entitling unsecured bondholders to a security interest in certain of GM's assets.

However, as WTC argued in detail in its Opening Brief, the clear and unambiguous language of the very documents referenced in plaintiff's complaint conclusively establish that § 4.01 ("**Section 4.01**") of the Loan and Security Agreement (the "**LSA**") between GM and

Treasury was carefully drafted to—and does—avoid actually triggering the Equal and Ratable Clause. *See* Opening Br. at 22–23. Indeed, the clear and unequivocal language of the LSA and 1995 Indenture specifically prevents the execution of the LSA from triggering the Equal and Ratable Clause. Thus, the basis underlying plaintiff's claim does not exist, and WTC has not breached any potential fiduciary duties that it may have.

In his Opposition Brief, plaintiff does not offer a single argument to rebut or contest the argument that Section 4.01 did not trigger the Equal and Ratable Clause, and thus he has conceded the point. For this reason alone, plaintiff's sole claim against WTC must be dismissed with prejudice.

B. Plaintiff's Sole Claim Is Also Barred By The Preclusive Doctrines Of *Res Judicata*, Collateral Estoppel, And Law Of The Case: This Court Has Already Specifically Addressed And Rejected Plaintiff's Claim

In addition, and as previously described in WTC's Opening Brief at 12–22, this Court has already considered and, after its extensive litigation by plaintiff and Mr. Parker, expressly rejected plaintiff's Equal and Ratable Clause argument in its Decision granting Debtors' motion (the "**GM Sale Motion**") to approve the Treasury-sponsored section 363 sale transaction pursuant to 11 U.S.C. §§ 105, 363(b), (f), and (m), and 365, and Federal Rules of Bankruptcy Procedure 6004 and 6006 (the "**363 Transaction**"). *See In re Gen. Motors Corp.*, 407 B.R. at 517–18. Therefore, plaintiff's sole claim against WTC must be dismissed with prejudice for the additional reason that re-litigation of plaintiff's claim is barred by the preclusive doctrines of *res judicata*, collateral estoppel, and law of the case.

As described in WTC's Opening Brief at 12–18, *res judicata* precludes plaintiff's claim because the Sale Order, which incorporated this Court's decision on the Equal and Ratable Clause claim, is a final judgment on the merits for *res judicata* purposes, both WTC and plaintiff were parties in the GM Bankruptcy, this Court is clearly a court of competent jurisdiction

pursuant to 28 U.S.C. §§ 157 and 1334, there is a clear identity of claims, and a different judgment in this proceeding would undoubtedly impair or destroy rights or interests established by the judgment entered in the GM Bankruptcy by throwing into question the entire Decision.

For much the same reasons, and also as described in the Opening Brief at 18–22, the doctrines of collateral estoppel and law of the case also preclude plaintiff from re-litigating its claim against WTC. The identical issue now raised here was already raised, litigated, and decided previously in the context of the plaintiff's objections to the GM Sale Motion, plaintiff had a full and fair opportunity to litigate the issue, the Court's decision on this issue was necessary to reach a valid and final judgment on the merits, and there is no compelling basis to justify this Court's reconsideration of its prior ruling on this issue, which prior ruling should continue to govern plaintiff's sole claim here.

C. Plaintiff's Two Arguments—(1) That He Did Not Have A Full And Fair Opportunity To Previously Litigate His Claim, And (2) That His Pending Appeal Of This Court's Previous Decision Bars Application Of These Preclusive Doctrines—Are Both Unavailing

Plaintiff appears to offer two primary arguments against the operation of the doctrines of *res judicata*, collateral estoppel, and law of the case to bar his re-litigation of the Equal and Ratable Clause claim—neither of which has merit.[4]

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[4] Plaintiff offers several other arguments in opposition to WTC's motion to dismiss, but none of these arguments has any relevance to WTC's motion. First, plaintiff appears to argue that the bankruptcy court is unconstitutional and, thus, is without authority to approve the Sale Order. *See* Pl. Br. ¶¶ 2.0–2.6. This allegation is not worthy of a detailed response other than to reiterate, as WTC argued in its Opening Brief, that there is no doubt that the Sale Order "constituted a final judgment on the merits by a court of competent jurisdiction." *HSBC Bank USA, Nat'l Ass'n v. Adelphia Commc'ns Corp.*, Nos. 07-CV-553A, 07-CV-555A, 07-CV-554A, 2009 WL 385474, at *11 (W.D.N.Y. Feb. 12, 2009) (Ex. 15); *see also* Opening Br. at 15. Second, plaintiff offers a host of unsupported theories regarding GM's alleged financial irregularities, including: (a) that there are other, unspecified indentures, aside from

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First, plaintiff argues that these preclusive doctrines do not apply here because neither he nor Mr. Parker had a full and fair opportunity to litigate the Equal and Ratable Clause claim. *See* Pl. Br. ¶¶ 3.3–3.3.12. Yet, these hollow arguments are belied by the record of plaintiff's and Mr. Parker's extensive participation in the GM Bankruptcy, as well as by this Court's Decision on the GM Sale Motion.

Second, plaintiff argues that these preclusive doctrines cannot be applied where, as here, an appeal of the original decision is pending, and thus, in effect, that the Court's Decision is not a final one.[5] *See id.* ¶¶ 3.3, 3.3.1, 3.3.8. However, as plaintiff must know, this is not the law. Under well-settled federal law, the pendency of an appeal does not in fact diminish the collateral estoppel or *res judicata* effect of a judgment rendered by a federal court. *See, e.g.*, *Hunt v. Liberty Lobby, Inc.*, 707 F.2d 1493, 1497 (D.C. Cir. 1983); *Narumanchi*, 2006 WL 2844184, at *5. Plaintiff does not cite any case law to the contrary. Moreover, and in any event, although plaintiff has appealed this Court's Decision, plaintiff's failure to seek and obtain a stay of the Sale Order prior to the sale's closing has left the district and appellate courts without jurisdiction to review this Court's prior decision on the Equal and Ratable Clause claim. *See, e.g.*, *United States v. Salerno*, 932 F.2d 117, 123 (2d Cir. 1991) (holding that, because the "consummation of the sale was not stayed" and "the sale closed," 11 U.S.C. § 363(m) ("**Section 363(m)**") dictated that

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the 1995 Indenture, that plaintiff guesses may contain their own "equal and ratable clauses" that may have been triggered by unspecified liens, *see* Pl. Br. ¶ 4.1; and (b) that "debtor GM was involved in creating fraudulent so-called 'synthetic leases' so that any liabilities (that are material to financial statements) are kept off the books," *id.* ¶ 4.2 (footnote omitted). These allegations are nowhere pled in his complaint, and in any event are entirely irrelevant to WTC's motion to dismiss the adversary complaint.

[5] Plaintiff's Notice of Appeal was entered on the CM/ECF docket on July 21, 2009, five days after WTC filed its motion to dismiss. *See* GM Bankruptcy, Case No. 09-50026(REG), Docket Entry No. 3265.

it was "beyond the power of th[e] Court to rewrite the terms of the . . . sale of the assets"). Accordingly, plaintiff's appeal of the Sale Order has no bearing whatsoever on the preclusive effect of this Court's prior decision on the Equal and Ratable Clause claim. *See, e.g.*, *In re HHG Corp.*, No. 01-B-11982 (ASH), 2006 WL 1288591, at *3 (Bankr. S.D.N.Y. May 2, 2006) (Ex. 19).

For all these reasons, and all those discussed in detail in the Opening Brief, plaintiff's sole claim asserted against WTC should be dismissed with prejudice.

1. Plaintiff And Mr. Parker Had A Full And Fair Opportunity To Litigate These Claims In The GM Bankruptcy By Witness Examinations, Written Submissions, And Oral Argument

Plaintiff argues that the preclusive doctrines identified by WTC do not apply here because neither plaintiff nor Mr. Parker had a full and fair opportunity to litigate the Equal and Ratable Clause claim. *See* Pl. Br. ¶¶ 3.3–3.3.12. Specifically, plaintiff claims that there was an absence of a full and fair opportunity to litigate because of the scope and expedited schedule of discovery, as well as plaintiff's alleged inability to participate in this discovery process. *See id.* ¶¶ 3.3.5, 3.3.7, 3.3.8, 3.3.10.

Yet, as WTC detailed in its Opening Brief, these hollow arguments are belied by the record of plaintiff's and Mr. Parker's extensive participation in the GM Bankruptcy, as well as by this Court's Decision on the GM Sale Motion. *See* Opening Br. at 7–10. In particular, plaintiff advanced and thoroughly litigated his Equal and Ratable Clause claim through written submission to this Court, *see* Ex. 7, Plaintiffs' Objections, at 6–8; and participation in the Sale Hearing, *see* Ex. 8, Plaintiffs' Notice of Participation; Ex. 9, July 2, 2009 Transcript, at 116:17–121:22.

Mr. Parker further litigated the Equal and Ratable Clause claim before this Court in the GM Bankruptcy through written submissions, *see* Ex. 10, Parker Objection; witness

examination, *see* Ex. 11, June 30, 2009 Transcript, at 181:8–199:12, 206:7–207:3; and oral argument before this Court, *see* Ex. 9, July 2, 2009 Transcript, at 76:17–81:19.

In response, this Court discussed and examined the Equal and Ratable Clause claim and any arguments made in opposition to it. *See* Ex. 12, July 1, 2009 Transcript, at 266:23–270:10; Ex. 9, July 2, 2009 Transcript, at 181:4–182:3. On July 5, 2009, this Court issued its Decision, in which it expressly addressed and rejected the Equal and Ratable Clause claim asserted, briefed, and argued by plaintiff and Mr. Parker.[6] *See In re Gen. Motors Corp.*, 407 B.R. at 517–18.

Thus, as the record clearly establishes that plaintiff and Mr. Parker had a "full and fair opportunity" to litigate the Equal and Ratable Clause claim before this Court, the Court's prior decision on this issue should be given preclusive effect, and plaintiff's claim against WTC should be dismissed with prejudice.[7]

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[6] Plaintiff also appears to argue that he did not have a full and fair opportunity to litigate his Equal and Ratable Clause claim because he (but not Mr. Parker) "was deprived of any opportunity" to participate in discovery. Pl. Br. ¶ 3.3.7. Putting aside whether this was in fact the case, discovery was not necessary to resolve his claim in the GM Bankruptcy (nor is it necessary here), and the Court ruled on plaintiff's claim in the Decision by reference to the clear and unambiguous documents upon which plaintiff's claim was (and is still) based. *See In re Gen. Motors Corp.*, 407 B.R. at 517–18.

[7] The cases cited by plaintiff in support of his argument that he did not have a "full and fair opportunity to litigate" offer nothing more than general legal propositions lifted from wholly inapposite contexts, and which WTC does not contest. WTC agrees with the proposition supported by *Turner v. Arkansas* that this Court should decide whether to apply the doctrine of collateral estoppel "through an examination of the entire record." 407 U.S. 366, 368 (1972) (applying collateral estoppel to dismiss a criminal indictment in state court) (internal quotation marks omitted). WTC also agrees with the proposition supported by *Allen v. McCurry* that this Court will find that plaintiff had a "'full and fair opportunity' to litigate th[e] [Equal and Ratable Clause claim] in the earlier" GM Bankruptcy. 449 U.S. 90, 95–105 (1980) (concluding that "[t]he Court of Appeals erred in holding that McCurry's inability to obtain federal habeas corpus relief upon his Fourth Amendment claim renders the doctrine of

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2. Under Well-Settled Federal Law, Plaintiff's Appeal Of The Sale Order Does Not Prevent This Court's Application Of The Doctrines Of *Res Judicata*, Collateral Estoppel, And Law Of The Case

Plaintiff's second argument against the application of the preclusive doctrines of *res judicata*, collateral estoppel, and law of the case rests on the mistaken assertion that these doctrines cannot be applied where, as here, an appeal of the original decision is pending. *See* Pl. Br. ¶¶ 3.3, 3.3.1, 3.3.8. Plaintiff is, simply put, wrong. And plaintiff is well aware, or should be, that this is the law.

Under well-settled federal law, the mere pendency of an appeal does not in fact diminish the collateral estoppel or *res judicata* effect of a judgment rendered by a federal court. *See, e.g.*, *Hunt*, 707 F.2d at 1497 (citing *Huron Holding Corp. v. Lincoln Mine Operating Co.*, 312 U.S. 183, 189 (1941) ("[I]n the federal courts the general rule has long been recognized that while appeal with proper supersedeas stays execution of the judgment, it does not—until and unless reversed—detract from its decisiveness and finality.") (dictum)); *see also Dickinson v. Ewing (In re Ewing)*, 852 F.2d 1057, 1060 (8th Cir. 1988) ("[T]he pendency of an appeal does not diminish the *res judicata* effect of a judgment rendered by a federal court.") (internal quotation marks omitted); *Narumanchi*, 2006 WL 2844184, at *5 (same); *Coleco Indus., Inc. v. Universal City Studios, Inc.*, 637 F. Supp 148, 150 (S.D.N.Y. 1986) (same); *Raitport v. Commercial Banks Located Within This Dist.*, 391 F. Supp. 584, 586–87 (S.D.N.Y. 1975) (same); *accord Fidelity Standard Life Ins. Co. v. First Nat'l Bank & Trust Co.*, 510 F.2d 272, 273 (5th Cir. 1975) ("A case pending appeal is res judicata and entitled to full faith and credit unless and until reversed on appeal."); *Straus v. Am. Publishers' Ass'n*, 201 F. 306, 310 (2d Cir. 1912) (noting that, under

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collateral estoppel inapplicable to his § 1983 suit").

New York law, fact that judgment is on appeal "does not suspend the operation of the judgment as an estoppel").[8]

Indeed, only three years ago plaintiff raised the exact same argument in another federal court against the application of the preclusive doctrine of collateral estoppel because of a pending appeal—and his argument was rejected, as it should be here. In *Narumanchi v. Foster*, plaintiff Narumanchi sued his insurance carrier alleging that as a result of a car accident he was involved with, he suffered a stroke two weeks later. 2006 WL 2844184, at *1. After a trial, the court in that case found that Narumanchi had failed to prove that the car accident was a substantial cause of his stroke. *See id*. Thereafter, Narumanchi sued the owners of the other car involved in the accident for allegedly causing his stroke. *See id*. Defendants moved for summary judgment on the grounds that Narumanchi was collaterally estopped from asserting this claim against them as a result of the trial court's findings. *See id*. Narumanchi opposed the motion, arguing that collateral estoppel did not apply because the prior decision of the trial court was still on appeal. *See id*. at *5. The United States District Court for the Eastern District of New York, citing a host of cases, rejected plaintiff Narumanchi's argument and noted that "a decision is 'final' when judgment is entered, even if an appeal is later filed." *Id*.

Plaintiff cites a single case for his proposition that the preclusive doctrines of *res judicata*, collateral estoppel, and law of the case cannot bar the re-litigation of the Equal and

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[8] While some cases—including some of those cited here—suggest that the pendency of an appeal may "suspend the *res judicata* effect of an otherwise final judgment [where] such appeal removes the *entire* action to the appellate court so as to constitute a proceeding *de novo*," this is clearly not the case here. *Neeld v. Nat'l Hockey League*, 439 F. Supp. 446, 450 n.4 (W.D.N.Y. 1977) (emphasis added). As discussed *infra* at 15–18, the district and appellate courts' review of any pending appeal of the Sale Order is jurisdictionally limited to the question of the purchaser's good faith, so there can be no *de novo* review of the entire action preventing the application of *res judicata* here.

Ratable Clause claim. But that case—*Arizona v. California*, 460 U.S. 605 (1983), a water-rights case of original jurisdiction in the Supreme Court—not only is factually inapposite, it does not so hold. Indeed, in *Arizona*, the Supreme Court held that a prior decision should be given preclusive effect and not relitigated because of "the strong res judicata interests involved." 460 U.S. at 626. In so holding, the Supreme Court noted that, "[t]o preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions." *Id.* at 619 (internal quotation marks omitted).[9]

Plaintiff also cites but one case—*United States v. Miller*, 822 F.2d 828 (9th Cir. 1987)—for the notion that the doctrine of law of the case does not apply where the prior decision has been challenged or appealed. But here, again, that case holds nothing of the sort, nor is WTC aware of any other case that so holds.[10]

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[9] Plaintiff apparently cites *Arizona* because, like a number of other cases, it contains the passing remark that "after appeal, the binding finality of *res judicata* and collateral estoppel will attach." 460 U.S. at 619. However, this statement does not speak to the question of the binding nature or finality of a judgment pending appeal, and, as noted above, the law is well-settled that such a pending appeal does not diminish the *res judicata* or collateral estoppel effect of a judgment rendered by a federal court.

[10] *Miller* deals with an entirely different issue than the one present here: whether a party's concession, having become the law of the case by mandate of the appeals court, can be reconsidered by the district court on remand. 822 F.2d at 831. While the Ninth Circuit recognized that "[i]n the interest of finality, economy, and the prevention of repetitious litigation, the law of the case is normally decisive," the court held that, in light of an intervening change in the law, the law of the case should be reconsidered "to correct the substantial injustice that would be done were we to bind the government to its concession." *Id.* at 833. This is nothing like the issue before this Court.

3. Plaintiff's Appeal Of The Sale Order Also Does Not Prevent This Court's Application Of The Doctrines Of *Res Judicata*, Collateral Estoppel, And Law Of The Case Because The District And Appellate Courts Have No Jurisdiction To Review This Court's Decision On The Equal And Ratable Clause Claim

Even if the law was not well-settled that a pending appeal does not effect the preclusive doctrines discussed above because plaintiff's appeal of the Sale Order here is severely circumscribed, it would not, in any event, prevent the doctrines of *res judicata*, collateral estoppel or law of the case from applying. More specifically, even though plaintiff has attempted to appeal this Court's decision on the Equal and Ratable Clause claim, as described in detail below, the district and appellate courts are without jurisdiction to consider this issue because neither plaintiff nor any other party succeeded in obtaining a stay of the Sale Order, and the sale has since closed. *See, e.g.*, *Salerno*, 932 F.2d at 123; *Bay Harbour Mgmt., L.C. v. Lehman Bros. Holdings Inc. (In re Lehman Bros. Holdings, Inc.)*, Nos. 08 Civ. 8869(DLC), 08 Civ. 8914(DLC), 2009 WL 667301, at *7 (S.D.N.Y. Mar. 13, 2009) (Ex. 20). Thus, as this Court's well-reasoned decision on the Equal and Ratable Clause claim cannot be reviewed in plaintiff's appeal of the Sale Order, that decision should be given preclusive effect to prevent plaintiff from re-litigating it here. *See, e.g.*, *In re HHG Corp.*, 2006 WL 1288591, at *3.

a. Section 363(m) Dictates That Appellate Review Of The Sale Order Is Limited To The Issue Of The Purchaser's Good Faith

Section 363(m) of the Bankruptcy Code dictates that an appeal of a sale order issued pursuant to section 363(b) or (c) "does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease

were stayed pending appeal."[11] 11 U.S.C. § 363(m). "Though this provision in terms states only that an appellate court may not 'affect the validity' of a sale of property to a good faith purchaser pursuant to an unstayed authorization, and can even be read to imply that an appeal from an unstayed order may proceed for purposes other than affecting the validity of the sale, courts have regularly ruled that the appeal is moot." *Licensing by Paolo, Inc. v. Sinatra (In re Gucci)*, 105 F.3d 837, 839 (2d Cir. 1997). Accordingly, "regardless of the merit of an appellant's challenge to a sale order, [the court] may neither reverse nor modify the judicially-authorized sale if the entity that purchased or leased the property did so in good faith and if no stay was granted."[12] *Id.* at 840; *see also In re HHG Corp.*, 2006 WL 1288591, at *3 n.7 ("In the absence of such a stay, . . . any appeal the Movants might have taken would have been rendered moot pursuant to 11 U.S.C. § 363(m), even if, as the Movants suggest, the assets conveyed by the Sale Order did not belong to the Debtor."). Thus, the Court's "'appellate jurisdiction over an unstayed sale order issued by a bankruptcy court is statutorily limited to the narrow issue of whether the property was sold to a good faith purchaser.'" *Paul J. Schieffer, Inc. v. Coan (In re Paul J. Schieffer, Inc.)*, No. 3:08cv12 (JBA), 2008 WL 4186944, at *1 (D. Conn. Sept. 11, 2008) (Ex. 21) (quoting *In re Gucci*, 105 F.3d at 839).

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[11] The only other way to challenge a sale order is by motion to vacate the judgment pursuant to Fed. R. Civ. P. 60(b), as incorporated in Fed. R. Bankr. P. 9024. *See, e.g.*, *Nanak Resorts, Inc. v. Haskins Gas Serv., Inc. (In re Rome Family Corp.)*, 407 B.R. 65, 80 (Bankr. D. Vt. 2009). Plaintiff has not so moved.

[12] "Two policy reasons are recognized for such a rule. First, the rule furthers the policy of finality in bankruptcy sales. Second, the rule allows bankruptcy courts to maximize profits from such sales." *In re Baker*, 339 B.R. 298, 303 (E.D.N.Y. 2005).

Despite this Court's explicit warnings,[13] plaintiff failed to seek or obtain a stay of the Sale Order before the court-imposed deadline of 12:00 noon on July 9, 2009, and the 363 Transaction was closed on July 10, 2009. "As a result, the only issue [the district and appellate courts] may consider on appeal is whether the bankruptcy court committed reversible error in finding that [the purchaser] was a good faith purchaser." *In re Lehman Bros. Holdings, Inc.*, 2009 WL 667301, at *7; *see also Salerno*, 932 F.2d at 123 (holding that, because the "consummation of the sale was not stayed" and "the sale closed," Section 363(m) dictated that it was "beyond the power of th[e] Court to rewrite the terms of the . . . sale of the assets").

In other words, "statutory mootness forecloses [plaintiff's] arguments beyond the issue of [purchaser's] good faith." *In re Lehman Bros. Holdings, Inc.*, 2009 WL 667301, at *7 (refusing to allow appellants "to escape the limitations imposed by Section 363(m) by arguing . . . that they do not challenge the sale, but only the terms of the sale, which delivered the . . . assets to [purchaser] free and clear of liens" because purchaser "demanded that the sale be free and clear of liens, and without that term no sale would have occurred").

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[13] In the Sale Order, which this Court entered on July 5, 2009 in accordance with the Decision, the Court directed that, pursuant to:

> Fed. R. Bankr. P. 6004(h) and 6006(d), this Order shall not be stayed for ten days after its entry, and instead shall be effective as of 12:00 noon, EDT, on Thursday, July 9, 2009. The Debtors and the Purchaser are authorized to close the 363 Transaction on or after 12:00 noon on Thursday, July 9. *Any party objecting to this Order must exercise due diligence in filing any appeal and pursuing a stay or risk its appeal being foreclosed as moot in the event Purchaser and the Debtors elect to close prior to this Order becoming a Final Order*.

Ex. 14, July 5, 2009 Order, ¶ 70 (emphasis added).

b. Plaintiff's Appeal Of This Court's Decision On The Equal And Ratable Clause Claim Cannot Be Reviewed By The District Or Appellate Courts Because It Is Irrelevant To A Review Of The Purchaser's Good Faith

On July 10, 2009, plaintiff filed a notice of appeal to the Sale Order. *See* Ex. 22, Pl.'s Notice of Appeal. On July 21, 2009, plaintiff filed a detailed list of the issues he was raising on appeal in his "Statement of Issues and Designation of Documents related to my 7-7-2009 Notice of Appeal on 7-5-2009 Decision of Honorable Judge Robert E. Gerber, [on Debtors' Motion for approval of Sec. 363 Sale of Assets, etc. to Motors Liquidation Company et. al. (Formerly General Motors Corp. et. al.)]" ("**Statement of Issues**").[14] In it, plaintiff asserts, *inter alia*, that:

> The lower court's 7-5-2009 ruling and decision on the issue of breach of the 12-7-1995 indenture, triggering automatic equal and joint security interest by the so-called unsecured bondholders, is perfunctory and a plain error in application of proper law and requires a *de novo* ruling on appeal. A proper application of the law would/should result in treating the $27.00 billion debt as 'secured' and, hence, a better and a much higher equity position in the purchaser's UST sponsored corporation.

Ex. 23, Pl. Statement of Issues, at 2.

Even assuming that certain of plaintiff's claims on appeal, as contained in his Statement of Issues, can be read by the district or appellate court to allege that the purchaser was not a good faith purchaser, plaintiff's appeal of this Court's decision on the Equal and Ratable Clause claim is certainly not among them.[15] Plaintiff's Equal and Ratable Clause claim on appeal relates

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[14] A complete version of plaintiff's Statement of Issues was filed with the Court on July 21, 2009, and entered on the docket the same day. *See* GM Bankruptcy, Case No. 09-50026(REG), Docket Entry No. 3266.

[15] "Although 'good faith' is not a well-defined term in this context, courts have looked to 'the equity of the *bidder's* conduct in the course of the sale proceedings' and to whether the purchase was 'for value.'" *In re Paul J. Schieffer, Inc.*, 2008 WL 4186944, at *1 (quoting *Kabro Assocs. of West Islip, LLC v. Colony Hill Assocs. (In re Colony Hill Assocs.)*, 111 F.3d

[Footnote continued on next page]

solely to the alleged conduct of GM and WTC, rather than the purchaser. *See id.* Indeed, in the GM Bankruptcy, it was *GM* that was alleged to have violated the terms of the indenture, and *WTC* that was alleged to have failed to take appropriate action to enforce the terms of the indenture. *See* Opening Br. at 7–10. These allegations in no way relate to the question of whether purchaser was a good-faith purchaser; *i.e.*, whether the purchaser was involved in "fraudulent, collusive actions specifically intended to affect the sale price or control the outcome of the sale." *In re Paul J. Schieffer, Inc.*, 2008 WL 4186944, at *1 (internal quotation marks omitted). Thus, the district and appellate courts are without jurisdiction to consider plaintiff's appeal of this Court's decision on the Equal and Ratable Clause claim, rendering it moot.

c. That The Court's Prior Determination That The Equal And Ratable Clause Was Not Triggered Cannot Be Reviewed On Appeal Only Strengthens The Preclusive Effect Of This Court's Ruling—And Mandates That The Complaint Should Be Dismissed

That plaintiff is now bound by the Court's Decision and precluded from re-litigating the issues decided therein is illustrated by *In re HHG Corp.*, where certain parties ("**Movants**") moved to assert interests in intellectual property that previously had been subject to an asset purchaser agreement approved by the Bankruptcy Court. 2006 WL 1288591, at *1–2. In that case, "[n]either the Movants, nor any other party in interest, appealed the entry of the Sale Order, or sought a stay of its implementation," which "affirmatively determined that [the relevant] assets . . . belonged to the Debtor's estate," and that Movants, "which were identified by name, had [no] interest in or claim against the assets conveyed . . . by the Sale Order." *Id.* at *2–3. The

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[Footnote continued from previous page]

269, 276 (2d Cir. 1997)) (emphasis added). "This good-faith requirement prohibits fraudulent, collusive actions specifically intended to affect the sale price or control the outcome of the sale." *In re Paul J. Schieffer, Inc.*, 2008 WL 4186944, at *1 (internal quotation marks omitted).

court concluded that, "if Movants believed themselves to be aggrieved by any of the provisions of the Sale Order, they were obligated to file a timely appeal *and to seek a stay of its implementation*." *Id.* at *3 (emphasis added). "In the absence of such a stay, . . . any appeal the Movants might have taken would have been rendered moot pursuant to 11 U.S.C. § 363(m), even if, as the Movants suggest, the assets conveyed by the Sale Order did not belong to the Debtor." *Id.* at *3 n.7. "Having failed to do so, they are now forever precluded by the doctrine of *res judicata* from relitigating the conclusions reached by the Sale Order." *Id.* at *3.

As discussed above, neither plaintiff nor any of the other parties who appealed this Court's decision succeeded in obtaining a stay of the Sale Order. Accordingly, "[h]aving failed to do so, [plaintiff is] now forever precluded by the doctrine of *res judicata* from relitigating th[is Court's decision on the Equal and Ratable Clause claim expressly included in] the Sale Order." *Id.* at *3.[16]

Similarly, it is well-settled under the law of the case doctrine that "a decision made at a previous stage of litigation, which could have been challenged in the ensuing appeal but was not,

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[16] While there is limited case law suggesting that "the *validity* of an unstayed sale cannot be disturbed on appeal [but that] other relief may be available and hence [the appeal is] not moot," this line of reasoning does not apply to plaintiff's Equal and Ratable Clause claim. *Mission Iowa Wind Co. v. Enron Corp.*, 291 B.R. 39, 41 (S.D.N.Y. 2003) (citing *In re Gucci*, 105 F.3d at 839–40 n.1). For example, in *Mission Iowa Wind Co.*, the court held that Section 363(m) did not moot the appeal because the relief sought by appellants was limited to resolution of a dispute over the allocation of the consideration received by debtors. 291 B.R. at 40–42 (citing various Circuit Court opinions confirming that Section 363(m) does not moot appeals over distribution of the proceeds of a sale). Here, in contrast, the relief sought by plaintiff for reversal of this Court's reasoned decision on the Equal and Ratable Clause claim is "treat[ment of] the $27.00 billion debt as 'secured' and, hence, a better and a much higher equity position in the purchaser's UST sponsored corporation." Ex. 23, Pl. Statement of Issues, at 2. Such relief would "require invalidation of the sale [and] prejudice to the buyer" because the purchase price would be deemed inadequate in light of the newly secured bondholder's vested rights in the sale property. *Mission Iowa Wind Co.*, 291 B.R. at 42. This is precisely the result that Section 363(m) was enacted to prevent.

becomes the law of the case." *County of Suffolk v. Stone & Webster Eng'g Corp.*, 106 F.3d 1112, 1117 (2d Cir. 1997). Because plaintiff chose not to seek a stay of the Sale Order plaintiff is "deemed to have waived the right to challenge" this Court's decision on the Equal and Ratable Clause claim on appeal. *Id.* Thus, this Court's decision is now the law of the case, and plaintiff is barred from re-litigating it in this adversary proceeding.[17]

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[17] If this Court is unwilling to grant preclusive effect to its previous decision on the Equal and Ratable Clause claim while plaintiff's appeal is still pending, WTC respectfully requests that this Court dismiss this claim against WTC on the plain language of the documents referenced in plaintiff's complaint, as argued in Section A, above. Otherwise, WTC respectfully requests that this Court stay its determination of WTC's motion to dismiss as based on the preclusive doctrines of *res judicata*, collateral estoppel, and law of the case until plaintiff's appeal has been decided. *See, e.g.*, *Aerogroup Int'l, Inc. v. Shoe Show, Inc.*, 966 F. Supp. 175, 180–81 (W.D.N.Y. 1997) (discussing the possibility of deferring application of collateral estoppel until after appeal of original decision had run, but declining to do so).

CONCLUSION

For the foregoing reasons, as well as those set forth in the Opening Brief, WTC respectfully requests that this Court dismiss all of the claims against it in plaintiff's Complaint, with prejudice.

Dated: New York, New York
September 23, 2009

Respectfully submitted,

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