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**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

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In re	: Chapter 11 Case No.
	:
MOTORS LIQUIDATION COMPANY, <i>et al.</i>,	: 09-50026 (REG)
f/k/a General Motors Corp., <i>et al.</i>	:
	:
Debtors.	: (Jointly Administered)
	:
-----X	

**MOTORS LIQUIDATION COMPANY GUC TRUST'S REPLY TO RESPONSE TO
DEBTOR'S OBJECTION TO PROOF OF CLAIM NO. 45631 FILED BY STEVEN
NEWMAN ON BEHALF OF THE ESTATE OF MICHAEL GREEN**

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TO THE HONORABLE ROBERT E. GERBER,
UNITED STATES BANKRUPTCY JUDGE:

The Motors Liquidation Company GUC Trust (the “**GUC Trust**”), formed by the above-captioned debtors (collectively, the “**Debtors**”)¹ in connection with the Debtors’ Second Amended Joint Chapter 11 Plan, dated March 18, 2011 (as may be amended, supplemented, or modified from time to time, the “**Plan**”), respectfully represents:

Background

1. On April 5, 2011, the Debtors filed an objection (the “**Objection**”)² (ECF No. 10048) pursuant to section 502(b) of title 11 of the United States Code (the “**Bankruptcy Code**”) and Rule 3007(a) of the Federal Rules of Bankruptcy Procedure (the “**Bankruptcy Rules**”), seeking entry of an order disallowing and expunging Proof of Claim No. 45631 (the “**Newman Claim**”) filed by Steven Newman (“**Claimant**”) on behalf of the estate of Michael Green.³

2. Following a hearing and correspondence between the parties and the Court, on September 20, 2011, the Court entered an order (ECF No. 10910) adjourning the objection, directing Claimant to file a response to the Objection no later than seven (7) calendar days from entry of the order (the “**Final Response Deadline**”), and directing that if a response was filed by the Final Response Deadline, the deadline for the Debtors and the GUC Trust to respond would be October 14, 2011.

¹ The Debtors are Motors Liquidation Company (f/k/a General Motors Corporation) (“**MLC**”), MLCS, LLC (f/k/a Saturn, LLC), MLCS Distribution Corporation (f/k/a Saturn Distribution Corporation), MLC of Harlem, Inc. (f/k/a Chevrolet-Saturn of Harlem, Inc.), Remediation and Liability Management Company, Inc. (“**REALM**”), and Environmental Corporate Remediation Company, Inc. (“**ENCORE**”).

² While the Objection was filed by the Debtors, this Reply is being filed by the GUC Trust because, pursuant to the Plan, the GUC Trust now has the exclusive authority to prosecute and resolve objections to Disputed General Unsecured Claims (as defined in the Plan).

³ Capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the Objection.

3. On September 26, 2011, Mr. Newman served a response to the Objection (the “**Response**”) on counsel for the GUC Trust asserting that the Newman Claim should not be disallowed and expunged and urging that “[t]his Court should not retain jurisdiction and should submit the claim for trial to liquidate the claim and then return it to the Bankruptcy Court.” (Response ¶ 23.) A hearing to address the Objection and the Response has been scheduled for October 28, 2011 at 9:45 a.m. (Eastern Time).

**The Bankruptcy Court Should Retain Jurisdiction
to Disallow and Expunge the Newman Claim**

4. This Court has the constitutional authority to disallow and expunge the Newman Claim as such decision “would necessarily be resolved in the claims allowance process.” *Stern v. Marshall*, 131 S. Ct. 2594, 2618 (2011) (holding that in determining whether a bankruptcy court has the constitutional authority to enter a final judgment in an action, “the question is whether the action at issue stems from the bankruptcy itself or would necessarily be resolved in the claims allowance process.”). Congress has granted the Bankruptcy Court jurisdiction over the “allowance or disallowance of claims against the estate . . . and estimation of claims or interests.” *See* 28 U.S.C. § 157(b)(2)(B).

5. As set forth in the Objection, by filing a proof of claim in the bankruptcy cases, Claimant has rendered the resolution of the Newman Claim a core proceeding pursuant to 28 U.S.C. § 157 and submitted himself to the “equitable power of the bankruptcy court to disallow [the] claim.” *See In re Manville Forest Prods. Corp.*, 896 F.2d 1384, 1389 (2d Cir. 1990); *see also S.G. Phillips Constructors, Inc. v. City of Burlington (In re S.G. Phillips Constructors, Inc.)*, 45 F.3d 702, 703 (2d Cir. 1995) (finding that “when a creditor files a proof of claim, the bankruptcy court has core jurisdiction to determine that claim, even if it was a prepetition contract claim arising under state law.”). Here, Mr. Green already liquidated his

personal injury and product liability claims in the Green Lawsuit, therefore, this is not a personal injury or wrongful death suit and the Court has the authority to liquidate or estimate the claim for purposes of allowance of disallowance.

6. Bankruptcy courts have broad equitable powers to “tailor claims to meet the requirements of justice.” *Continental Sec. Corp. v. Shenandoah Nursing Home P’ship*, 188 B.R. 205, 214 (W.D. Va. 1995) (citing *Pepper v. Litton*, 308 U.S. 295, 304 (1939)). In *Pepper v. Litton*, the Supreme Court held that bankruptcy courts “are essentially courts of equity, and their proceedings inherently proceedings in equity.” 308 U.S. at 304 (internal quotations omitted). “In the exercise of its equitable jurisdiction the bankruptcy court has the power to sift the circumstances surrounding any claim to see that injustice or unfairness is not done in administration of the bankrupt estate.” *Id.* at 307-8. “Since the power of disallowance of claims, conferred on the bankruptcy court by § 2 of the [prior Bankruptcy] Act embraces . . . the rejection of claims ‘in whole or in part, according to the equities of the case,’ the court may undoubtedly require limitation of the amount of claims in view of equitable considerations.” *Mfts. Trust Co. v. Becker*, 338 U.S. 304, 310 n.7 (1949) (quoting *Pepper v. Litton*, 308 U.S. at 304-5).

7. Equity jurisdiction “permits a [bankruptcy] court to make exceptions to a general rule when justified by particular facts.” *United States v. Noland*, 517 U.S. 535, 540-41 (1996).⁴ The Court, therefore, “may disallow or subordinate any claim for punitive damages

⁴ In *Noland*, the Supreme Court held that a bankruptcy court could not use its equitable power to categorically subordinate tax penalty claims under section 510(c) in “derogation of Congress’s scheme of priorities.” See 517 U.S. at 536 (emphasis added). The holding in *Noland* does not alter the Court’s equitable power to disallow or subordinate individual claims for punitive damages where supported by the facts and circumstances at issue and equities of the case. See *id.* at 540-41 (emphasis added); *In re Infiltrator Sys.*, 248 B.R. at 711-12.

only in light of all of the relevant facts and circumstances presented in the matter before it.” *In re Infiltrator Sys.*, 248 B.R. 707, 711 (Bankr. D. Conn. 2000) (citing *Noland*).

8. In the present case, where Mr. Green’s estate already has been made whole by the prior judgment, the totality of the damages sought are effectively punitive, rather than remedial, damages, the allowance of which is highly questionable on legal and equitable grounds. As such, it would not be an efficient use of judicial or estate resources to conduct a lengthy jury trial necessitating 123 fact witnesses and eight (8) experts⁵ only to return to the Bankruptcy Court to determine whether such claims ultimately should be allowed under federal bankruptcy law. In the interest of judicial economy and efficiency and in order to preserve the estate’s resources for distribution to similarly-situated creditors, the Bankruptcy Court should retain jurisdiction to consider the disallowance of the Newman Claim.

The Newman Claim is by its Nature a Punitive Damages Claim

9. Although the Newman complaint and the Newman Claim are unclear as to which claims are for compensatory damages and which seek punitive damages, Claimant now asserts in the Response that the “[the] Newman claim consists of mostly compensatory claims, not punitive damages, which even under the Debtor’s interpretation of the law are not subject to dismissal.” (Response ¶ 2.) The Response attempts to recharacterize the nature of the claims asserted as a means to avoid the arguments set forth in the Objection with respect to disallowance of punitive damages.

10. Claimant’s argument that additional compensatory damages are warranted ignores the undisputed facts of this case. The Green Lawsuit initially went to trial on January

⁵ The final pretrial order in the Newman Lawsuit includes 43 fact witnesses for the plaintiff, 80 fact witnesses for the defendant, four (4) expert witnesses for the plaintiff, four (4) expert witnesses for the defendant. *See Smolinsky Dec., Ex. 1* at pp 23/62 to 33/62.

19, 1993. On February 16, 1993, following a full trial, a mistrial was declared when the jurors reported that they could not agree on a verdict. (Smolinsky Dec., Ex. 1 ¶ 56.) Following additional discovery, the Green Lawsuit was retried before a jury beginning on February 8, 1996 and ending on March 5, 1996 (*Id.* ¶¶ 61, 63) with a verdict in favor of Green. Mr. Green's damages were assessed and judgment was entered in the amount of \$17,767,175.35, exclusive of prejudgment interests, costs and certain credits. The damages awarded included: \$13,000,000 for future medical expenses, \$149,315 for loss of past income, \$305,860.35 for loss of future income, and \$4,000,000 for pain and suffering, as well as stipulated damages for Green's past medical expenses of \$312,000.00. *See Green v. Gen. Motors Corp.*, 709 A.2d 205, 207 (N.J. Sup. Ct. App. Div. 1998). Together with prejudgment interest and costs, and a credit for a settlement with other defendants included, the verdict totaled \$25,110,484.90. *Green v. General Motors Corp.*, 709 A.2d 205, 207 (N.J. Sup. Ct. App. Div. 1998).

11. The damages awarded were based on Mr. Green's then-projected life expectancy of approximately 48 years (to age 77). (Obj. ¶ 3.) Mr. Green died on March 18, 2001, 46 years prior to the life expectancy upon which is future damages were based. (*Id.*)

12. GM appealed the award and the appellate court affirmed the jury's finding of liability and modified and affirmed the damages verdict except for the award of post-judgment medical expenses and earnings which were remanded with directions that the trial judge "enter a remittitur after further argument, with or without proofs, reflecting the present value of those awards." (Smolinsky Dec., Ex. 1 ¶ 73) (quoting *Green*, 709 A.2d at 225). Following the denial of certification by the New Jersey Supreme Court and the mandated remand proceedings, on May 2, 1999, an amended final judgment was ultimately entered in Green's favor in the amount of \$14,126,013.83. (Smolinsky Dec., Ex. 1 ¶ 75.) With interest, GM paid Mr. Green and his attorneys nearly \$22 million. (Obj. ¶ 3.)

13. Sometime after the appellate briefs had been filed, the parties learned that certain GM documents produced in a Tennessee state court action, captioned *Johnson v. GM*, had not been produced in discovery in the Green Lawsuit. (*Id.* ¶¶ 67-68.) Following an order entered in *Johnson v. GM* on December 17, 1997, the relevant documents were provided to Green's attorneys. (*Id.* ¶¶ 67-68.) The Newman Lawsuit was filed in November 2001, and the claim asserted underlie the Newman Claim at issue here.

14. In New Jersey, compensatory damages are defined as “damages intended to make good the loss of an injured party, and no more.” N. J. Stat. Ann. § 2A:15-5.10. Therefore, once an injured parties loss as been compensated, additional damages no longer compensate the plaintiff, and instead serve to “penalize and provide additional deterrence against a defendant to discourage similar conduct in the future.” *Id.* Claimant's attempt to characterize the claims as compensatory damages ignores the fact that Mr. Green's estate has already been made whole by the judgment which compensated Mr. Green for future medical expenses, past medical expenses, loss of past income, loss of future income, pain and suffering, and certain prejudgment interest and costs. In fact, Mr. Green's estate was *overcompensated* due to Mr. Green's untimely death.⁶

15. In the Response, Claimant asserts the following claims for compensatory damages: (i) claims for “lost” punitive damages that would have been awarded in the first trial; (ii) attorneys' fees and costs of the second trial in the Green Lawsuit; (iii) income and interest from the anticipated judgment in January 1993 to the date of final payment in the second trial; and (iv) Green's pain and suffering from January 1993 until payment of the final judgment

⁶ If Claimant were to have its way and be permitted to relitigate the state court action to determine whether punitive damages would have been awarded, the Debtors should be entitled to reimbursement for the additional 46 years worth of life care costs that were not used for Mr. Green's care.

because of lack of proper medical care. This Reply responds to each of these alleged “compensatory” damages claims as well as Claimant’s statutory and punitive damage claims, in detail below:

A. Damages for “Lost” Potential Punitive Damages

16. The Newman complaint asserts a claim that “Green was deprived of the opportunity to seek and recover punitive damages in the trial of his personal injury cause of action.” (Obj., Ex. A, Complaint ¶ 27.) In the Response, Claimant now argues that he is “not seeking an award of punitive damages” based on this cause of action, and is instead seeking compensatory damages based upon “the deprivation of the right to have asserted and prevailed on a punitive damage claim in the underlying *Green* case.” (Response ¶ 9, 16.)

17. Claimant’s argument is purely semantic and cannot overcome the substance of the underlying demand.⁷ A claim for damages based upon the alleged inability to seek punitive damages in the initial *Green* Lawsuit, is at its core, a claim for punitive damages, no matter how it is packaged. As the saying goes, “you can paint stripes on a horse and call it a zebra, but it is still a horse.” Even if the Court were to find that these “lost” potential punitive damages claims are compensatory, the same justifications exist for equitable disallowance as would for punitive claims, as detailed in paragraph 26 through 29 below.

B. Damages for Pain and Suffering/Medical Care

18. The Newman complaint also asserts a cause of action because “Green was deprived of a judgment and damage award and thus of necessary medical care for the three years

⁷ Notably, Claimant references no precedent or statutory authority to support the proposition that an action for the deprivation of a plaintiffs’ right to seek punitive damages is a recognized “measure of the quantum of compensatory damages.” See Response ¶ 16 (stating without support “[t]his is not just wordplay, but substantive law.”).

that elapsed between the first and second trials.” (Obj., Ex. A, Complaint ¶ 27.) In the Response, Claimant characterizes this as a compensatory damages claim for:

Green’s pain and suffering from [the commencement of the first trial in] January 1993 to payment of final judgment [in 1999] due to lack of proper medical care and necessary life care apparatus and equipment together with permanent deficits suffered as a result of failure to receive proper and necessary medical care such as physical therapy.

(Response ¶ 12.)⁸

19. Any purported recovery due for such damages for the three years between the first and second trials would be duplicative of the judgment previously paid by the Debtors, in particular, the \$312,000.00 for past medical expenses and the \$4 million awarded for pain and suffering as part of the original judgment. The jury assessed damages based on the facts and circumstances that existed at the time of the second trial, not the first. There is no basis for a plaintiff to recover post-trial pain and suffering due to delays of payment caused by pending appeals. As set forth above, if anything, the Debtors have *overcompensated* the Green estate for an additional 46 years worth of life care costs given Mr. Green’s untimely death. To allow additional funds for Mr. Green’s estate which has already been compensated in full, while other personal injury claimants (who are still alive and requiring care) are not recovering in full on their claims contravenes the bankruptcy principle that similarly-situated claimants receive equal treatment.

C. Costs of the Second Trial in Green Lawsuit

20. In the Newman complaint, Claimant also seeks damages on the basis that “Green was required to absorb the costs of a second trial which would not have been necessary

⁸ Claimant even goes so far as to assert, without support, that Green’s “shortened life expectancy” was attributable to “GM’s fraud and spoliation.” (*Id.* ¶ 8.) Claimant has presented no evidence sufficient to demonstrate that GM’s failure to produce documents led to Mr. Green’s shortened life expectancy.

had the full facts bearing on GM's liability been presented at the first trial." (Obj., Ex. A. Compl. ¶ 27.) In the Response, Claimant asserts that the "compensatory damages" for attorneys' fees and costs of the second trial were approximately \$2 million over the past 18 years. (Response ¶ 12.)

21. Claimant has failed to make any showing as to causation on this claim and the claim seems more in line with sanctions than a compensatory damages claim. In order to succeed on this claim, Claimant would need to show that there would not have been a second trial *but for* GM's failure to produce the documents at issue. Indeed, Green was able to prevail in the second trial *without* the documents in question and was awarded nearly \$18 million in damages. (*Id.* ¶ 3.) Claimant has made no showing that the second trial in the Green Lawsuit was the result of GM's failure to produce the documents prior to the first trial and is not entitled to the costs of the second litigation.

D. Income and Interest from First Green Trial Through Date of Payment

22. Claimant also seeks "income and interest from the anticipated judgment in January 1993 to the date of the final payment of the second trial judgment [in 1999]." (Response ¶ 12.) For the reasons set forth in paragraphs 20 to 21 above, Claimant has failed to make any showing that the second trial was necessitated by GM's failure to produce the documents. Claimant similarly has failed to demonstrate that the delay of judgment from January 1993 through the completion of the second trial on March 5, 1996 was caused by GM's failure to produce documents. In fact, the New Jersey appellate court held that the interest between February 1994 and February 1996 "was caused by plaintiff being required to obtain a new liability expert after his initial expert suffered incapacitating strokes." *Green*, 709 A.2d at 219. Moreover, the appellate court affirmed the trial court's decision "not to suspend prejudgment

interest for this two-year period.” *Id.*⁹ Therefore, in addition to being punitive damages, any attempt by Claimant to seek interest from February 1994 through February 1996 would constitute an impermissible double recovery.

E. Actual Punitive Damages Claim

23. In addition to the claimed compensatory damage claims set forth above, Claimant concedes that the Newman Claim asserts a “separate and actual” claim for punitive damages “for GM’s willful [*sic*] and wanton failure to disclose and provide pertinent and relevant discovery; violation of court orders; fraud and disruption of the underlying litigation.” (Response ¶¶ 10, 12.) In the Response, Claimant argues that such punitive damages are warranted in order “to sanction the Debtor for the fraudulent concealment/spoliation of the ‘smoking gun’ evidence.” (*Id.* ¶ 10.) As set forth in the Objection, there is no basis to award punitive damages claims if there is no deterrent effect, and given the liquidation of the Debtors that goal will not be accomplished.

⁹ The appellate court did, however, vacate the prejudgment interest on the awards for future medical expenses and future lost income which it likened to punitive damages. *Green*, 709 A.2d at 219, n.16 (stating that “interest on future medical expenses and earnings has been upheld solely on the basis of an inducement to settle, and constitutes a *quasi*-punishment for not settling, it stands on a similar footing to a punitive damage award.”) (emphasis added).

F. Treble Damages Under New Jersey RICO Statute

24. The remainder of the Newman Claim is based upon statutory damages under the New Jersey RICO statute, “premised upon GM’s transmission of fraudulent discovery material and information through the mail or during telephone calls” for which Claimant seeks “treble the compensatory damages awarded in the Newman matter, together with attorneys fees and cost of the Newman litigation.” (Response ¶ 11, 17-18.)

25. Claimant is not entitled to damages for an alleged RICO violation. Treble damages under other RICO statutes have been found to be punitive in nature. *See Genty v. RTC*, 937 F.2d 899, 913-14 (3d Cir. 1991) (holding that civil claim brought against municipal corporation under federal RICO statute could not be maintained because “treble damages provision serve[s] a predominantly punitive purpose”); *see also Liberty Mut. Ins. Co v. Land*, 186 N.J. 163, 186 (N.J. 2006) (holding that under the New Jersey Punitive Damages Act definition of compensatory and punitive damages, “only one part of a treble damages award covers compensatory damages, whereas the other two parts comprise punitive damages.”). In addition, courts in New Jersey have held that awarding punitive damages as well as treble damages “presents the likelihood of some duplication of exemplary or punitive consequence” and have reduced the amount of a New Jersey RICO award to reflect the duplicative punitive aspect of the overall award. *See St. James v. Future Fin.*, 342 N.J. Super. 310, 343 (N.J. Sup. App. Div 2001). These cited cases are not bankruptcy cases, in the bankruptcy context it would appear inherently inequitable to award one creditor three times its damages, while other creditors get a single claim.

The Court Should Disallow The Newman Claim

26. As an initial matter, Claimant cannot meet the heavy burden required for a punitive damages claim under New Jersey law, which requires a plaintiff to establish:

[B]y clear and convincing evidence, that the harm suffered was the result of the defendant's acts or omissions, and such acts or omissions were actuated by actual malice or accompanied by a wanton and willful disregard of persons who foreseeably might be harmed by those acts or omissions. This burden of proof may not be satisfied by proof of any degree of negligence including gross negligence.

N.J. Stat. Ann. § 2A:15-5.12(a).

27. Claimant has failed to make any showing that GM's failure to produce the documents at issue was "actuated by actual malice" or "accompanied by a wanton and willful disregard." *Id.* Indeed, Claimant has stipulated to facts which demonstrate that the failure to produce the documents in the Green Lawsuit resulted from a series of innocent errors by paralegals and lawyers working on the case. (Smolinsky Dec., Ex. 1; Obj. ¶ 11.) Even if Claimant could show that GM negligently concealed evidence, the statute makes clear that negligence, in any degree, is not sufficient to satisfy the burden of proof for punitive damages.

N.J. Stat. Ann. § 2A:15-5.12(a).

28. "[I]t is clear that even though Chapter 11 of the Bankruptcy Code does not specifically provide for the treatment of claims based on a fine, penalty or punitive damages, the bankruptcy courts traditionally have not favored such claims." *Jim Walter Homes, Inc. v. Adams (In re Hillsborough Holdings Corp.)*, 146 B.R. 1015, 1022 (Bankr. M. D. Fla. 1992). Chapter 11 of the Bankruptcy Code does not specifically address punitive damages. However, under a chapter 7 liquidation, punitive damages are given fourth priority, and may only be paid after other unsecured claims are paid in full. 11 U.S.C. § 724(a)(4); *see also In re Roman Catholic Archbishop*, 339 B.R. 215, 227 (Bankr. D. Or. 2006).

29. The GUC Trust cannot compensate personal injury claimants for punitive damages and still treat all similarly-situated general unsecured claimants equitably. Allowing Claimant to receive additional remedial damages when the Green estate already has been made whole by the prior judgment while hundreds of other personal injury claimants are not recovering in full on their claims essentially forces impaired creditors to cover the cost of the remedial damages set forth in the Newman Claim. *See In re Celotex Corp.*, 204 B.R. 586, 613 (Bankr. M.D. Fla. 1996) (“Consequently, payment of punitive damages would prevent the fair and equitable treatment of the holders of [general unsecured] Claims, would frustrate the fair distribution of the Trust Assets, and would subvert the stated purposes of the Plan and of public policy.”).

Conclusion

WHEREFORE, for the reasons set forth above, the GUC Trust respectfully requests that the Court disallow and expunge the Newman Claim and grant such other and further relief as is just.

Dated: New York, New York
October 14, 2011

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