

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 09-50026-reg

Adv. Case No. 10-05008-reg

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In the Matter of:

MOTORS LIQUIDATION COMPANY, et al.

f/k/a General Motors Corporation, et al.,

Debtors.

- - - - -x

United States Bankruptcy Court

One Bowling Green

New York, New York

September 17, 2010

9:52 AM

B E F O R E:

HON. ROBERT E. GERBER

U.S. BANKRUPTCY JUDGE

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HEARING re Objection by Dale Earnhardt, Inc. to Transfer of
Claim No. 70347 to The Seaport Group LLC [Docket 6613]
(WITHDRAWN Doc # 6964)

HEARING re Motors Liquidation Company's Partial Motion to
Dismiss MCM Management Corp.'s Counterclaim in the Motors
Liquidation Corporation v. MCM Management Corp. Adversary
Proceeding No. 10-05008-reg [Docket No. 16]

HEARING re Pre-trial conference in the Motors Liquidation
Corporation v. Bayerische Motoren Werke Aktiengesellschaft
Adversary Proceeding No. 10-05006-reg

HEARING re Debtors' Ninth Omnibus Motion Pursuant to 11 U.S.C.
Section 365 to Reject Certain Executory Contracts and Unexpired
Leases of Nonresidential Real Property ("Debtors' Rejection
Motion") [Docket No. 4437]

Transcribed by: Maya Spinner

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A P P E A R A N C E S :

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ALSO APPEARING TELEPHONICALLY:
Niali Sheeham, Interested Party

P R O C E E D I N G S

1
2 THE COURT: Have a seat, please. I have Motors
3 Liquidation Corporation.

4 MR. LEDERMAN: Good morning, Your Honor, Evan
5 Lederman, Weil, Gotshal & Manges for the debtors. We have a
6 very light agenda this morning before Your Honor. All matters
7 except one have either been resolved or adjourned. The sole
8 remaining matter is the pre-trial conference and MCM Management
9 versus Motors Liquidation Corporation. Ms. Kovsky-Nap (sic),
10 debtors' local counsel from Pepper Hamilton I believe is on the
11 line and will take this matter.

12 THE COURT: Sure.

13 MS. KOVSKY-APAP: It's Kovsky-Apap and we're from
14 Pepper Hamilton on behalf of the debtor.

15 THE COURT: Just a minute Ms. Kovsky-Apap I'm having a
16 lot of trouble hearing you.

17 MR. LEDERMAN: I'm sorry I'm trouble hearing you as
18 well. There's a lot of static on the line.

19 THE COURT: My phone volume is on maximum, my sound
20 system is on maximum, why don't you try turning off the air
21 conditioning.

22 All right, try again, please, Ms. Kovsky-Apap. Try to
23 keep your voice up also.

24 MS. KOVSKY-APAP: I'll do that, Your Honor. I just
25 had the question whether Mr. Cataldo is also on the line?

1 MR. CATALDO: I am, good morning everyone.
2 Christopher Cataldo for MCM Management.

3 THE COURT: Okay, Mr. Cataldo.

4 MS. KOVSKY-APAP: Your Honor, I believe the only
5 reason that we're here this morning is to get some
6 clarification regarding the ADR injunction and the standard ADR
7 procedures order. And this adversary proceeding has been
8 designated for ADR.

9 THE COURT: Okay.

10 MS. KOVSKY-APAP: I think there's some confusion
11 because the ADR injunction seems to be drafted contemplating
12 that the matter would be sent to ADR before the start of
13 litigation which didn't happen in this case. So what we have
14 here is some discovery that's pending and also the ADR
15 injunction appears only to bind the designated claimants and
16 not the debtor. So we were hoping to get some clarification
17 from Your Honor as to the effect of the ADR injunction on any
18 discovery that was pending at the time that the matter was
19 designated for ADR as well as, I guess, it's binding nature on
20 the debtor as well as the claimant.

21 THE COURT: Well folks, since I assume that if the
22 order had been sufficiently helpful you would be asking me to
23 rely on specific language in the document. Let me tell you
24 what I think has historically been proven to be the most
25 effective in advancing ADR and see if that meets your needs and

1 concerns and if you need to agree to disagree I'll give you a
2 ruling.

3 But it seems to me that ADR is most effective when a
4 certain threshold exchange of information has been
5 accomplished, most significantly document production. And you
6 don't necessarily need to have deposition testimony and the
7 whole purpose of the game is to keep your litigation cost down.
8 So if I were managing it as a plenary litigation and then
9 sending it to mediation on my own what my tentative would be,
10 subject to parties rights to be heard, would be to have you
11 engage in document exchanges and making sure that you're on a
12 relatively level playing field in terms of information as to
13 the underlying controversy but that you not run up a lot of
14 expenses in depositions that might turn out to be unnecessary.

15 With that said, I recognize that some disputes require
16 more discovery and I would be disinclined to make parties do
17 without any discovery in the absence of some pretty good
18 reason. Now what I do have to confess to you folks is that
19 with so many matters on my watch I've forgotten the specifics
20 of the underlying issues in this particular controversy so I'm
21 going to give each of you the opportunity to tell me whether
22 you believe that my general approach works or is unhelpful
23 under the facts here.

24 MR. CATALDO: Your Honor, this is Christopher Cataldo
25 here for MCM and your approach is very helpful. We had a

1 written document request to the debtor and we had written
2 document requests subpoenaed out to third parties pending prior
3 to the service of the ADR notice. And I think getting that
4 information would be helpful to us in getting to the level
5 playing that the Court just mentioned. So in terms of my issue
6 I believe that the Court's guidance has been extremely helpful.

7 THE COURT: Ms. Kovsky-Apap, do you have the same or a
8 different perspective?

9 MS. KOVSKY-APAP: Well I just want to correct the
10 record. The document request that we received were actually
11 served after the service of the ADR notice. I think that an
12 exchange of documents would certainly be helpful in this case.
13 We did not provide documents until this hearing because we
14 weren't certain if we were supposed to or not pursuant to the
15 ADR injunction.

16 Provided that the debtor has the same opportunity to
17 obtain documents from MCM I think that's a very sensible
18 approach.

19 THE COURT: Well, presumptively what's sauce for the
20 goose is sauce for the gander in my cases. So here's what
21 we're going to do, to the extent that I need to give you the
22 green light for exchanging document demands and complying with
23 them, you've got that. And I said demands I would hope that --
24 you know I was a litigator for twenty years before -- or almost
25 twenty years before I went into the bankruptcy business and I

1 know how discovery can take a life on its own.

2 My druthers, especially now that you're in ADR would
3 be that you either use old document request or that anything
4 being simply a letter from Mr. Cataldo to Ms. Kovsky-Apap and
5 vice-versa saying dear opponent here's the list of what I need.
6 And you keep it real clean and real short and you not run up a
7 lot of your client's money. Then you've traded documents and
8 that should hopefully give you what you need to have a
9 productive ADR process.

10 But this request will then envision a stop, look and
11 listen before either side asks for depositions. I'm not saying
12 yes I'm not saying no to them I just don't know if they're
13 going to be necessary and depositions materially increase the
14 cost of a litigation to the parties involved and they don't
15 always help that much. So you're going to go forward with
16 depositions -- excuse me, document exchanges and then if either
17 of you believes that you really need more to either get the
18 matter resolved consensually or to put it through the ADR
19 process we can arrange for another conference call.

20 MR. CATALDO: Fair enough.

21 THE COURT: All right.

22 MS. KOVSKY-APAP: Thank you, Your Honor, I have one
23 further question just for clarification. At our last status
24 conference you had set a discovery schedule for us and it
25 contemplated six months for discovery in the litigation and we

1 were hoping to get some clarification, I think, on if this
2 matter does not resolve through ADR and/or we choose not to go
3 to arbitration but rather to resume the litigation would we
4 then come back to you to reset a discovery schedule?

5 THE COURT: I think that's the best way to do it and
6 it appears to me that the original schedule I set is now
7 obsolete and that ADR is a dramatically better way of dealing
8 with it. If we need to we'll set a new date then, it may not
9 be as long as the six months because I'll hope you've
10 accomplished stuff in the meantime. But I'll give a fresh look
11 to it then.

12 Mr. Cataldo, I didn't give you a chance to be heard
13 but do you have any problems with that approach?

14 MR. CATALDO: I do not, Your Honor, but I do have one
15 further point of clarification that I'd like to arrange with
16 the Court, if I may.

17 THE COURT: Go ahead.

18 MR. CATALDO: On the point that you just raised and
19 addressed, I'm very clear on your approach.

20 THE COURT: I beg your pardon?

21 MR. CATALDO: I'm very clear on your approach with
22 respect to the scheduling order on what you just laid out --

23 THE COURT: Okay.

24 MR. CATALDO: -- I believe it's reasonable.

25 THE COURT: But I take it you had a third matter you

1 want to put on the table as well?

2 MR. CATALDO: That is correct, Your Honor. Another
3 issue that I'd like to get some guidance on with respect to the
4 procedure, in our response to the debtors' notice we indicated
5 that we would be willing, should the offering accept this
6 procedure in a nonbinding mediation procedure not produce a
7 settlement that we would be willing to submit our -- the entire
8 dispute with the debtor to binding arbitration and direct
9 arbitration if those can't resolve it.

10 And I'm reading the order it doesn't have -- seem to
11 require the debtor to, in effect, respond to that or indicate
12 it's position whether it will arbitrate now. It just simply --
13 seems to be almost like a one-way option the way it's written.
14 I was wondering is that the intent of this or does the debtor
15 now have to come back and tell us if they're going to arbitrate
16 or we're going to litigate.

17 THE COURT: Well, I don't want to stop this conference
18 for the purpose of reviewing the order but it seems to me
19 consistent with my sauce for the goose, sauce for the gander
20 approach, generally and my approach to arbitration, generally.
21 That I -- I will order people to mediate but I will not order
22 them to arbitrate against their will. And I see Mr. Lederman
23 is rising, maybe he wants to weigh in on this but I would not
24 have thought that I would've given one side the ability to
25 direct an arbitration without a corresponding consent aspect on

1 the other side, Mr. Lederman?

2 MR. LEDERMAN: Your Honor, very briefly just to add
3 some clarification I think I can help this matter. Your
4 Honor's exactly right, arbitration has to be agreed to --
5 binding arbitration that is, by both parties.

6 THE COURT: Okay, so Mr. Cataldo let's do it this way.
7 I think that if you can't consensually resolve things
8 arbitration might be constructive and I'll tell you that as a
9 general matter I very much support it and approve it. But I'm
10 not ordering any side to arbitrate against its will.

11 So each of you in a sense has the ability to block it
12 although I'd encourage both sides to proceed with it if you got
13 to. Does that give you the clarification you need?

14 MR. CATALDO: Not entirely because the notice asks us,
15 meaning asks MCM whether it would arbitrate and my question was
16 really -- I totally understand that you can't have an
17 arbitration without both side agreeing whether either there are
18 now some time period in which the debtor has to either say yes
19 or no to arbitrate --

20 THE COURT: What I want you guys to do -- I thought
21 what you guys were going to do is to try to resolve it
22 consensually before you agree to disagree and then take it to
23 either arbitration or litigation, did I misunderstand?

24 MS. KOVSKY-APAP: No, Your Honor, I think that's
25 correct. It's just that the way the ADR notice was setup

1 originally it had a box to check where the claimant just needed
2 to indicate whether or not it wanted to arbitrate in case
3 mediation failed and there was no corresponding box for the
4 debtor to check whether it also wanted to arbitrate. My
5 thinking was that it might make more sense just to see if we
6 can resolve this through mediation and if we can't then at that
7 point revisit the issue.

8 THE COURT: Well, I don't want to over-lawyer this
9 thing, folks. Frankly, I don't care about boxes. You're to
10 have your dialogue. And then if you can't come to an agreement
11 I want the two of you guys to get on the phone and tell each
12 other -- or talk it out and then decide whether the two of you
13 jointly consent to arbitrating, if you do then just paper the
14 deal and arbitrate. And if either side doesn't want to you
15 don't have to. Don't worry about boxes or forms or anything
16 like that, okay?

17 MR. CATALDO: Very good.

18 MS. KOVSKY-APAP: Thank you, Your Honor.

19 THE COURT: All right, thank you. Have a good day.
20 Each of you can drop-off the phone, if you choose to.

21 MR. CATALDO: Okay, thank you very much, Your Honor.

22 MS. KOVSKY-APAP: Thank you.

23 THE COURT: Okay, Mr. Lederman do I have other stuff
24 on the agenda?

25 MR. LEDERMAN: No, Your Honor, that's it for Motors

1 Liquidations.

2 THE COURT: Okay, do I have any other matters on the
3 calendar besides Motors?

4 All right, Mr. Lederman I want you to stay for a
5 minute. Jason, I want you to stop the mach --

6 (Audio ends midsentence)

7 (Proceedings concluded at 10:06 AM)

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C E R T I F I C A T I O N

I, Maya Spinner, certify that the foregoing transcript is a true and accurate record of the proceedings.

Maya Spinner

Digitally signed by Maya Spinner
DN: cn=Maya Spinner, c=US, o=Veritext
Reason: I am the author of this document
Date: 2010.09.20 13:30:02 -04'00'

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Date: September 20, 2010