

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK

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In re: )  
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)  
MOTORS LIQUIDATION COMPANY, )  
f/k/a General Motors Corp., *et al.*, )  
)  
Debtors. )  

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Chapter 11  
Case No. 09-50026 (REG)  
Jointly Administered

KELLY CASTILLO, NICHOLE BROWN )  
BRENDA ALEXIS DIGIAN DOMENICO, )  
VALERIE EVANS, BARBARA ALLEN, )  
STANLEY OZAROWSKI, AND DONNA )  
SANTI, )  
Plaintiffs, )  
v. )

Adversary Proceeding

GENERAL MOTORS COMPANY, f/k/a New )  
General Motors Company, Inc., )  
)  
Defendant. )  

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Case No. 09-00509 (REG)

GENERAL MOTORS LLC, )  
)  
Counterclaimant, )  
)  
v. )

KELLY CASTILLO, NICHOLE BROWN )  
BRENDA ALEXIS DIGIAN DOMENICO, )  
VALERIE EVANS, BARBARA ALLEN, )  
STANLEY OZAROWSKI, DONNA SANTI, )  
LAKINCHAPMAN LLC, ROBERT W. )  
SCHMIEDER, II, AND MARK L. BROWN, )  
)  
Counterdefendants. )  

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The following constitute the Court's rulings on Plaintiffs' Objections to Defendant's Testimony and Other Evidence (ECF # 46).

Rulings on Objections to Statements in the Direct Testimony Declaration of Lawrence S. Buonomo:

1. In April of 2009, [Treasury] (which all agreed was the only available source of financing for a successful bankruptcy reorganization) informed Old GM that in the event of a bankruptcy filing its preference would be a sale of Old GM's assets to a new company free and clear of Old GM's liabilities pursuant to Section 363 of the Bankruptcy Code.

Overruled.

2. [Treasury] insisted that only those liabilities of Old GM that were deemed essential to the future successful operations of what would become New GM should be assumed.

Overruled.

3. Thus, from its conception, the fundamental structure of the 363 Sale was that New GM would acquire all assets of Old GM except those specifically excluded, but would assume only those liabilities specifically designated for assumption. All other liabilities were to be retained by Old GM. These principles were consistent with, and driven by the need for, the creation of the strongest possible New GM going forward in the expectation that the New GM stock to be distributed eventually to Old GM's creditors would provide them with as much consideration as possible.

Sustained.

4. the basic stance of the [Treasury] was that New GM should not assume Old GM's liabilities unless there was a specific reason why the assumption of a particular liability or category of liabilities was considered commercially necessary to the future successful operations of New GM.

Overruled.

5. See Direct Testimony Declaration of Harry Wilson, June 25, 2009, ¶ 19 ("As a purchaser seeking to buy assets that will enable New GM to be as competitive as possible, New GM negotiated the 363 Transaction to limit to the maximum extent its successor liabilities, as advised by counsel. New GM has only voluntarily assumed liabilities *where it sees a necessary and compelling business purpose for doing so.*") (emphasis added); Testimony of Harry Wilson, 363 Sale Approval Hearing, July 1, 2009, p. 111 ("We focused on which assets we wanted to buy and which liabilities were *necessary for the commercial success of New GM.*")

Overruled.

6. the intent underlying the entire structure of the 363 transaction, as detailed more fully below, was that only specifically identified liabilities would be assumed,

Sustained.

7. and the Castillo settlement was never specifically identified as a liability to be assumed by New GM.

Overruled.

8. At that time, it was assumed that all litigation liabilities on the balance sheet, including the reserve GM had established for the Castillo case, would be left behind in Old GM.

Sustained, without prejudice to offering evidence of what Treasury and/or GM said, and who said it.

9. I recall that litigation settlements again were mentioned during this call as one type of negative executory contract that could and should be rejected.

Overruled.

10. it fell into this category and the parties' intent to reject executory contracts like this was clear in the context of all of the parties' relevant discussions.

Sustained.

11. From the onset of the discussions , Old GM recommended and [Treasury] agreed that New GM's assumption of Old GM's obligations under its standard express written warranties ("**standard repair warranties**") was commercially necessary in order to promote/retain customer goodwill and support New GM's vehicle sales business going forward.

Overruled.

12. This agreement was ultimately reflected in **MSPA** § 2.3(a)(vii)

Overruled.

13. Old GM did not recommend and [Treasury] did not agree that New GM would assume any responsibilities beyond the very specific obligations set forth in the standard repair warranties.

Overruled.

14. the parties to the MSPA did not intend that New GM would assume liabilities associated with pre-petition litigation.

Sustained.

15. In contrast with New GM's limited assumption of standard repair warranties, neither Old GM nor [Treasury] believed that New GM's assumption of litigation and product liabilities was commercially necessary or desirable. Accordingly,

Sustained, without prejudice to offering evidence of what Treasury and/or GM said, and who said it.

16. Thus, to the extent that any ambiguity could be perceived in individual provisions of the MSPA, the clear intent of the parties based on the discussions in which I participated with UST was that liabilities falling within these categories would not be assumed by New GM.

Sustained, without prejudice to offering evidence of what Treasury and/or GM said, and who said it.

17. Indeed, until the **First Amendment to the Master Sale and Purchase Agreement (GM Exhibit 3)**, it was understood that *all* Product and Litigation Liabilities were to be retained by Old GM, since it was common ground between the parties that, as a conceptual matter, litigation exposures were not in any sense positive for the future business of New GM and assuming them was fundamentally inconsistent with the entire premise for pursuing a bankruptcy-based restructuring.

Sustained, without prejudice to offering evidence of what Treasury and/or GM said, and who said it.

18. This was certainly the case for the Castillo settlement which, like other class action settlements, the [Treasury] and Old GM explicitly understood would remain with Old GM.

Sustained, without prejudice to offering evidence of what Treasury and/or GM said, and who said it.

19. Although I did not personally focus on the specific terms of the Stipulation of Settlement in 2009, it is apparent that Old GM believed that the Stipulation of Settlement was an executory contract in the classic sense, with the agreed exchange of class member releases and GM's performance of its obligation to pay class members' eligible claims not having occurred before June 1, 2009.

Sustained.

20. These steps were not taken precisely because, based both on discussions with [Treasury] in which I personally participated and on discussions internal to Old GM prior to July 10, 2009, the parties to the MSPA did not intend for New GM to assume Old GM's liabilities under litigation settlements generally and the Stipulation of Settlement in particular.

Overruled as to discussions with Treasury. Sustained as to discussions internal to Old GM.

21. It was the position of the [Treasury], voiced repeatedly and monitored by [Treasury] personnel, that Old GM should be vigilant in identifying contracts that represented net liabilities, should decline to assume such contracts, and should designate them for rejection.

Overruled.

22. The fundamental tenant of the MSPA that New GM should not undertake obligations to perform under any contract representing a net liability

Sustained, but Counsel may argue as inference to be drawn from other testimony or documents.

23. in order to guard against inadvertent assumption of liabilities by New GM under contracts that were potentially transferable to it and might not be found to be subject to the assumption and rejection procedure set forth in Section 365 of the Bankruptcy Code and the Sale Procedures Order.

Overruled if on voir dire testimony is offered that Treasury agreed. Otherwise sustained.

24. [Treasury's] insistence that Old GM be vigilant and systematic in its efforts to identify contracts representing net liabilities,

Overruled.

25. The overall intent of the MSPA's provisions regarding contracts was to assign to New GM contracts which were assets, but to avoid assigning it contracts which effectively constituted liabilities ("**negative contracts**") *without* having to separately resolve the issue of whether each individual contract was "executory" within the meaning of Section 365 of the Bankruptcy Code. Thus,

Sustained without prejudice to offering evidence of what Treasury and/or GM said. Counsel may argue as inference to be drawn from other testimony or documents.

26. the critical objective was to avoid inadvertently assuming unwanted liabilities. As regards this matter, Old GM's designation of the Stipulation of Settlement for rejection constituted a clear expression of Old GM's intent to reject the Stipulation of Settlement as a negative contract – whether or not the Court ultimately were to determine that it is executory under Section 365 of the Bankruptcy Code.

Sustained. Counsel may argue as inference to be drawn from other testimony or documents.

27. the applicable provisions concerning “Excluded Contracts” reflect the parties’ intent that the liability represented by the Stipulation of Settlement would not be assumed by Old GM and/or assigned to New GM but would stay with Old GM as a Retained Liability.

Sustained. Counsel may argue as inference to be drawn from other testimony or documents.

28. Consistent with the clear intent of the parties to the MSPA that the Stipulation of Settlement was to be retained by Old GM,

Sustained.

29. As the result of these discussions,

Overruled.

30. Harry Wilson of the [Treasury] agreed with this concern

Overruled.

31. and the decision was made not to expand New GM’s assumption of “warranty liability” beyond the four corners of Old GM’s (and Saturn’s) standard repair warranty.

Overruled.

32. these representatives and other third parties perceived an ambiguity in New GM’s agreement and intent to assume liability only within the four corners of Old GM’s and Saturn’s standard repair warranties. This potential ambiguity appears to have arisen largely from the many different ways that the word “warranty” is used in both common and legal parlance.

Overruled.

33. For that reason, . . . the parties to the MSPA agreed to

Overruled.

34. The specific purpose of this language was to clarify the agreement of the parties to the MSPA, i.e., [Treasury] and Old GM, set forth in Section 2.3(a)(vii)(A) of that contract, that New GM was not assuming liability for claims like those asserted in the litigation underlying the Stipulation of Settlement, i.e., claims that Old GM was responsible for alleged vehicle defects under any theory other than the obligations of repair or replacement of products found defective in materials or workmanship during the warranty period, i.e., the obligations spelled out in Old GM's and Saturn's standard repair warranties, subject to the express conditions and limitations contained therein.

Sustained unless evidence is introduced that it was stated by or to Treasury. Counsel may argue as inference to be drawn from other testimony or documents.

35. which to the best of my knowledge and belief was inadvertent

Sustained. But if Plaintiffs argue to the contrary, will permit it in rebuttal.

36. section 2.3(a)(vii) was not intended to create any fundamental difference in the scope or treatment of assumed express warranty and Lemon Law obligations.

Sustained without prejudice to offering evidence of what Treasury and/or GM said. Counsel may argue as inference to be drawn from other testimony or documents.

37. the Castillo Stipulation of Settlement and underlying litigation (and other product litigation claims typically bundled as class actions) do not "arise" from Old GM's express limited warranty within the intended meaning of the parties as expressed in Section 2.3(a)(vii).

Sustained.

38. were not intended to be assumed by New GM through the 363 transaction.

Sustained without prejudice to offering evidence of what Treasury and/or GM said. Counsel may argue as inference to be drawn from other testimony or documents.

39. In documenting the 363 transaction, we included a number of provisions that were intended to make this clear.

Sustained without prejudice to offering evidence of what Treasury and/or GM said. Counsel may argue as inference to be drawn from other testimony or documents.

40. The intent was not to include all of the other myriad liability theories that sometimes are asserted by plaintiffs in product litigation.

Sustained without prejudice to offering evidence of what Treasury and/or GM said. Counsel may argue as inference to be drawn from other testimony or documents.

41. The intent of this provision was to confirm that the assumption of liability implemented pursuant to §2.3(a)(vii) did **not** extend to other legal doctrines typically raised in product litigation. If a claim could be asserted without reference to the existence of the express limited warranty, it was not assumed.

Sustained without prejudice to offering evidence of what Treasury and/or GM said. Counsel may argue as inference to be drawn from other testimony or documents.

42. The intent underlying this provision was to confirm that New GM would not assume liability claims premised on Old GM pre-petition conduct.

Sustained without prejudice to offering evidence of what Treasury and/or GM said. Counsel may argue as inference to be drawn from other testimony or documents.

43. the intent was to make clear the general principle that New GM was not assuming the prepetition litigation liabilities of Old GM.

Sustained without prejudice to offering evidence of what Treasury and/or GM said. Counsel may argue as inference to be drawn from other testimony or documents.

44. the purpose was to confirm that the parties' intent in assuming the express limited warranties was very specific and targeted, and did not include all the other potential bases for product litigation claims based on alleged conduct, actions and omissions of Old GM.

Sustained without prejudice to offering evidence of what Treasury and/or GM said. Counsel may argue as inference to be drawn from other testimony or documents.

45. inclusion of this language was intended to confirm that the obligation that New GM had agreed to assume was the obligation to fulfill Old GM's repair obligations going forward.

Sustained without prejudice to offering evidence of what Treasury and/or GM said. Counsel may argue as inference to be drawn from other testimony or documents.

Rulings on Objections to Statements in the Direct Testimony Declaration of L. Joseph Lines, III:

1. Neither Old GM nor New GM ever gave any indication of any intent or agreement that Old GM would assume liability under the Stipulation of Settlement and/or assign such liability to New GM.

Overruled.

2. As detailed in Mr. Buonomo's declaration, Old GM did not follow these procedures with respect to the Stipulation of Settlement because the parties did not intend for Old GM to assume the Stipulation of Settlement and assign it to New GM. To the contrary, Old GM's intent to reject the Stipulation of Settlement

Sustained.

3. continued . . . Old GM's voluntary policy of

Overruled.

4. New GM did not immediately discontinue this goodwill policy after the closing of the 363 Sale because of the intense activity, and the need to prioritize numerous issues, related to the commencement of New GM's operations.

Overruled.

5. discontinued Old GM's voluntary customer satisfaction policy

Overruled.

6. New GM made the decision to discontinue Old GM's policy because it was under no legal obligation to continue this voluntary policy and review of this policy received a higher priority because it was anticipated that Saturn owners would soon become customers of the Penske-owned and operated Saturn as a result of the Penske organization's proposed purchase of the Saturn brand.

Overruled.

7. New GM decided in the interests of satisfying Saturn owners, who now remained as GM customers, to implement an additional and different voluntary outreach to owners of VTi-equipped vehicles.

Overruled.

8. First, all of the VTI reimbursement payments were made voluntarily on a customer satisfaction basis

Overruled.

9. Thus, they were not “warranty” payments but voluntary goodwill payments made in the interest of customer satisfaction.

Sustained.

Dated: New York, New York  
December 14, 2011

/s/ Robert E. Gerber  
United States Bankruptcy Judge