UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK
Case No. 09-50026(REG)
- -x
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

May 17, 2011
9:48 AM

B E F O R E:
HON. ROBERT E. GERBER
U.S. BANKRUPTCY JUDGE

HEARING re Status Conference - NCR Corporation v. General Motors Corporation, et al., Adv. Proc. No. 11-09400 (REG)

HEARING Debtors' Objection to Administrative Claim No. 70792 Filed by John Mealer

HEARING re Motion of Post-Effective Date Debtors for Entry of Order Pursuant to 11 U.S.C. § 365 Authorizing Debtors to Assume and Assign Certain Dealer-Related Agreements to General Motors LLC

HEARING re Debtors' 219th Omnibus Objection to Claims (Contingent Co-Liability Claims)

HEARING re Debtors' 220th Omnibus Objection to Claims (Contingent Co-Liability Claims)

HEARING re Debtors' Objection to Claim Nos. 67121 and 67122

HEARING re Debtors' Fifteenth Omnibus Objection to Claims (Amended and Superseded Claims)

Transcribed by: Lisa Bar-Leib

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

WEIL GOTSHAL & MANGES LLP
Attorneys for the Debtors and Debtors-in-Possession
767 Fifth Avenue
New York, NY 10153

BY: JOSEPH H. SMOLINSKY, ESQ.

WEIL GOTSHAL & MANGES LLP
Attorneys for the Debtors and Debtors-in-Possession
1300 Eye Street, NW
Suite 900
Washington, DC 20005

BY: BRIANNA N. BENFIELD, ESQ.

ARNSTEIN & LEHR LLP

Attorneys for Sentry Insurance & Sentry Select Insurance Company

120 S. Riverside Plaza

Suite 1200

Chicago, IL 60606

BY: DAVID A. GOLIN, ESQ.

(TELEPHONICALLY)

HANGLEY ARONCHICK SEGAL & PUDLIN

Attorneys for NCR Corporation

One Logan Square

18th & Cherry Streets

27th Floor

Philadelphia, PA 19103

BY: MATTHEW A. HAMERMESH, ESQ.

(TELEPHONICALLY)

HONIGMAN MILLER SCHWARTZ & COHN LLP
Special Counsel to the Debtors and Debtors-in-Possession
660 Woodward Avenue
2290 First National Building
Detroit, MI 48226

BY: SETH A. DRUCKER, ESQ.
(TELEPHONICALLY)

ALSO APPEARING:
JOHN L. MEALER, CREDITOR/CLAIMANT
6333 Gardenia Lane
Show Low, AZ 85901

BY: JOHN MEALER, PRO SE
(TELEPHONICALLY)

P R O C E E D I N G S

THE COURT: Morning. Have seats, please. Okay. We're here on GM, Motors Liquidation Corporation. Mr. Smolinsky, good morning. How would you like to proceed?

MR. SMOLINSKY: Good morning, Your Honor. Joseph Smolinsky of Weil Gotshal & Manges for the debtors and post-reorganization debtors -- post-confirmation debtors, I should say. We have a fairly short calendar today. I think the first matter on the calendar is a status conference for the NCR adversary proceeding. We're happy to start there. And my colleague, Brianna Benfield, will address those matters.

THE COURT: Okay. Ms. Benfield?

MS. BENFIELD: Good morning, Your Honor. Brianna Benfield from Weil Gotshal & Manges on behalf of the debtors and post-confirmation debtors, Motors Liquidation Company. As Your Honor is aware, the parties have already entered into a scheduling order in the NCR adversary proceeding. The debtors agreed to the terms of that scheduling order setting forth various discovery deadlines in fulfillment of our obligations under the federal rules --

THE COURT: Pause, please, Ms. Benfield. I need to keep the air conditioning on to keep the courtroom comfortable. But you're talking over a fan that's right behind you or at least between you and me. Can you speak very loudly into the microphone, please?

MS. BENFIELD: Yes. Is this better?

THE COURT: Much.

MS. BENFIELD: Okay.

THE COURT: You can angle that microphone. Maybe that'll meet you halfway. Continue.

MS. BENFIELD: Okay. As I was saying, the debtors entered into the scheduling order in fulfillment of their obligations under the federal rules but the debtors also have to fulfill their obligations as fiduciaries of the estate and to conserve estate resources. And so, for that reason, we'd like to discuss the appropriate scope of discovery in this matter with you today.

It's the debtors' --

THE COURT: Well -- pause, please. You have an adversary? I mean, where is your adversary on this?

MS. BENFIELD: I believe NCR's counsel is on the phone, Mr. Hamermesh.

THE COURT: Mr. Hamermesh, are you on the phone?

MR. HAMERMESH (TELEPHONICALLY): Hello, Your Honor. Yes.

THE COURT: Okay. Go ahead.

MS. BENFIELD: Okay.

THE COURT: Ms. Benfield, back to you, please.

MS. BENFIELD: It's the debtors' hope that the full six months of discovery contemplated under the scheduling order

won't be necessary in this case because the debtors think that the relevant issues in this case are relatively narrow and straightforward. So what I'd like to do this morning in this pretrial conference is just briefly discuss the relevant issues to the debtors, some of the issues relating to discovery, and then we would welcome Your Honor's views as to the appropriate scope of discovery in this matter.

So first, as to the relevant issues in this case, this is really just a dispute about the priority of payment. NCR Corporation claims that they're owed approximately 2.3 million dollars for past environmental remediation costs that they paid relating to a site called the Valleycrest Landfill in Dayton, Ohio. And NCR overpaid its fair share of those costs and then, back in 2007, GM reached an agreement with NCR whereby to compensate NCR for its past overpayment, GM would pay NCR's fair share of the cleanup costs going forward.

The debtors don't dispute that GM made that agreement or that promise to pay NCR's past overpayments. But the debtors don't see this as anything more than a mere promise to pay giving rise to a standard debtor/creditor relationship and a general unsecured claim.

NCR's counsel -- or NCR in their complaint, however, contends that this gives rise to a constructive trust or an expressed trust in the amount of the overpayment. The debtors view the trust issue really as a question of law and one about

which extensive discovery isn't really necessary. As to the constructive trust, the debtors view this as an issue of law because there's significant case law in this circuit and in others to the effect that constructive trusts are a disfavored remedy in liquidating bankruptcy cases because the creation of a constructive trust really wreaks havoc on the distribution scheme and really ends up depriving other deserving creditors of their share of the estate proceeds.

Additionally, there is a requisite element to establish a constructive trust whereby it must be shown that the purported trustee, the party obtaining the property, did so with some sort of wrongful conduct or fraudulent conduct. And that element isn't present here nor is it claimed to be present here. The debtors simply failed to pay NCR's share of the cleanup costs going forward because of the bankruptcy, that that's certainly not fraudulent or wrongful conduct; it was required under the Bankruptcy Code.

So the debtors think that, as a matter of law, they would prevail on the constructive trust claim and there really isn't any need for extensive discovery on that issue.

As for the express trust issue, an essential element to establish an express trust, and also a constructive trust as well, is that there must be the existence of a trust race. Here, the debt -- and that trust race must have been conveyed to the purported trustee.

Here, the debtors, from our initial investigation, don't think that that element is satisfied as a matter of law either because the way this payment system worked, NCR had been paying its cleanup costs to an outside consultant and then later in 2007, the parties agreed that going forward, GM would pay NCR's cleanup costs. But there was never any money or property conveyed to GM for that purpose. GM just paid the cleanup costs out of its general account.

Certainly, some discovery as to the existence of a trust race would probably be helpful in this case. But the debtors really think that that's the sole issue on which discovery is needed in this case.

It's important for the debtors to really focus on the key dispositive issues here because extensive discovery would significantly burden the estate given that MLC, the debtors, are in possession of approximately 3 to 4,000 boxes of documents that were transferred to them from what's now New GM relating to environmental liabilities. These are in a warehouse out in Pontiac, Michigan. And to require the debtors to search through all of these documents for anything that might be related to this Valleycrest Landfill site, or NCR, would really be an unnecessary burden given that the majority of the case can be disposed of as a matter of law.

THE COURT: Pause, please, Ms. Benfield. If NCR were asking for an unsecured claim instead of asserting claims of

trust, constructive or express, would GM be still contesting this claim?

MS. BENFIELD: No, not really, Your Honor. I think -- in conversations with counsel, we've essentially indicated to them that we would be open to allowing this as a general unsecured claim. We think that we're very close on the numbers. We may be essentially in complete agreement on the numbers. We would, of course, now have to consult with the GUC trust, the general unsecured claims trust, as to whether or not we could allow this claim. But that's essentially been our position in the past. We don't contend that this is a debt that the debtors owed.

THE COURT: You don't contend that -- say that again.

MS. BENFIELD: We don't dispute that this is a debt that the debtors owed --

THE COURT: Okay.

MS. BENFIELD: -- that they have this obligation to pay NCR's cleanup costs going forward and, but for the bankruptcy, they would have.

So, in conclusion, we would just welcome Your Honor's views as to what the key dispositive issues here would be that are appropriate for the scope of discovery. The debtors propose that discovery be limited solely to the issue of whether or not there is the existence of a trust race. And what we would propose is that the parties begin discovery as to

appropriate issues under the scheduling order that's currently in place and that maybe we then set this matter for another status conference in forty-five days or so. And we can revisit any discovery issues at that time and we can discuss whether or not summary judgment might be appropriate at that point after a bit of discovery has been completed.

THE COURT: All right. Mr. Hamermesh, do you want to be heard?

MR. HAMERMESH: Yes, Your Honor. I don't disagree with a lot of what Ms. Benfield said. I think there isn't a great need to dig through 3,000 or how ever many boxes out in Pontiac. In our view, there are really a couple of issues. I don't know if Your Honor had a chance to look at the complaint. But the basic issue is there was a settlement agreement and a consent order issued by the Court in Ohio who was presiding over the case. Our position is that -- well, the documents say themselves that there's something called the total overage which is the amount of the overpayment. And it says that that is something that it belongs to NCR but it's held by GM. Our position, first of all, is that's dispositive on our claim that there is something held in trust.

And really, I think the two odd areas of discovery that we think need to be pursued are, one, this issues Ms. Benfield points out about a trust race; and, second of all, generally the negotiations of and drafting of the settlement

agreement and consent order I mentioned. I don't think if those were principally, as I understand it, negotiated between outside counsel for NCR and outside counsel for GM then we would want documents from them and depose them. I think that's maybe four or five depositions total.

And then, I think really the bigger part of discovery is discovery concerning whether there's a trust race. So I don't agree that that's a dispositive issue. But obviously, it's one we would need to look into and I don't think Ms. Benfield disagrees with that. And as I outlined to her previously, I think the germane issues we would be looking at on that are bank records relating to GM's account and accounting records concerning this total overage. You know, those are a substantial number of documents but I think they're different documents than the boxes that are out in Pontiac. And I think that, by their nature, they're documents, I would hope, that the debtor would have ready access to and, if not the debtors then New GM who, I understand, we may need to seek discovery from.

THE COURT: Pause, please, Mr. Hamermesh.

MR. HAMERMESH: Yes.

THE COURT: I understand the point that you made about not needing to see all those boxes in Michigan. But I'm puzzled about the discovery as to whether or not there's a trust race. It would have seemed to me that if there were a

trust race, your client would already know about it.

MR. HAMERMESH: Your Honor, I would have hoped that would be the case and that would make the case a lot easier for us. But the fact of the matter is that we just don't know. We entered into an agreement with GM and then they went off and did what they did. And now we're trying keep that -- to enforce that position. Given that, we need productive discovery to find out what money -- how the account was formed for this, whether there was a separate account set up, whether there was a specific account from which the payments were made. And, frankly, Your Honor, our position would be that, for example, if there were payments that were made on this overage before the bankruptcy -- not a lot, a couple of hundred thousand dollars maybe. So, for example, I think if the debtors, as part of their deficiency, had paid -- made all of those payments from a specific account and that account always has more money in it than the amount of the overage than the amount of the overage, I think that would be strong evidence in our support. But we just don't know that. That's what we need to look into.

THE COURT: All right. Ms. Benfield, do you wish to -- or, forgive me. Mr. Hamermesh, did you finish?

MR. HAMERMESH: (No audible response)

THE COURT: Mr. Hamermesh?

MR. HAMERMESH: I'm sorry. I didn't -- hello?

THE COURT: Yes. Did you finish -- did you have further comments?

MR. HAMERMESH: No. I was done.

THE COURT: Okay. Ms. Benfield, any further thoughts?

MS. BENFIELD: I think that the parties are essentially in agreement that some discovery as to the existence of a trust race and the accounting records is reasonable. We think that these can probably be obtained from New GM, General Motors LLC.

As to the depositions of four or five individuals involved in the past negotiations of this, I don't see how that's particularly relevant and it imposes somewhat of a burden because this happened years ago, these counsel are no long with their firms and whatnot. And it just doesn't seem highly relevant. The settlement agreement and the district court judgment essentially entering the settlement agreement speak for themselves. So I think that the debtors would just --

THE COURT: Ms. Benfield, didn't what the two lawyers said to each other -- isn't that classic material that is at least potentially relevant to the construction of a document if a Court finds any ambiguities in it?

MS. BENFIELD: Yes, I think so. But I think that we would say that the absence of a trust race here would be

dispositive anyway, regardless of the parties' intent to create a trust. If there's no trust race, there cannot be a trust.

THE COURT: Well, you may win on that when summary judgment is determined. But each side is entitled to get the evidentiary underpinnings for trying its case as it wants to, isn't it?

MS. BENFIELD: I think that we can -- what we should do is what I propose which is allow discovery to begin and then, if we could come back in forty-five days or thereabouts and discuss whether or not summary judgment would be appropriate at that time with the idea that perhaps the parties could move for summary judgment before full blown, you know, six months of discovery and a number of depositions.

THE COURT: All right. Both sides had a chance to now be heard fully?

MR. HAMERMESH: Yes, Your Honor.

THE COURT: All right. We're going to slice and dice the issues in this way. I see no need at this point, if ever, to have any discovery on the underlying environmental violations or cured-of efforts. I think you're aware, Mr. Hamermesh, of the difficulty of establishing a constructive trust and, for that matter, an express trust in the southern district of New York --

MR. HAMERMESH: Yes, Your Honor.

THE COURT: -- and in the Second Circuit. But you're

entitled to your opportunity to get any evidence that you need to lay out your position satisfactorily.

I am strongly inclined to allow a motion for summary judgment on this. But I do believe that, consistent with what used to be Rule 56(f) -- I think the numbering has been changed -- you're entitled to the usual stuff that might be relevant to the summary judgment issue.

So you and Ms. Benfield are to come together to arrange for discovery on each of the two general areas for which you want discovery and which I haven't carved out, those being the existence vel non of a trust race and the negotiation and drafting of the document which provides the underpinnings for your claims. Attorneys may be deposed. The fact that they're attorneys, by that alone, does not give them a get-out-of-jail-free card from the duty to be deposed. But, of course, they will have the usual rights to assert privilege. It seems to me that what is potentially important, assuming you get past the issue of whether or not there's ambiguity, is what each attorney said to the other side rather than what he or she was secretly thinking or communicated to the client. This is freshman contracts. But I am not closing the door to depositions or to attorney depositions at this point.

I want you guys to make it happen, get the discovery complete. And then I will permit a motion for summary judgment and consider the requirement for a pre-motion conference on

summary judgment waived or satisfied.

Not by way of reargument, are there any questions, either side?

MR. HAMERMESH: No, Your Honor.

MS. BENFIELD: No, Your Honor.

THE COURT: All right. Let's make it happen, folks.

MS. BENFIELD: Thank you.

THE COURT: Right.

MR. HAMERMESH: Thank you very much.

THE COURT: Mr. Hamermesh, if you want to get off the phone, you're free to do that.

MR. HAMERMESH: Thank you, Your Honor.

THE COURT: Mr. Smolinsky?

MR. SMOLINSKY: Thank you, Your Honor. Again, Joseph Smolinsky. May I ask, Your Honor, if Mr. Mealer is now on the phone?

THE COURT: Mr. Mealer?

MR. MEALER (TELEPHONICALLY): Yes. Yes, it is, Your Honor.

THE COURT: Okay.

MR. SMOLINSKY: Your Honor, this matter is an objection to Mr. Mealer's 230 million dollar administrative expense claim under theories of respondeat superior asserting various related causes of action including defamation of character, trade libel and interference with Mr. Mealer's

prospective advantage.

I know that, as usual, Your Honor has reviewed the entire record of this matter which is quite voluminous. So I won't burden the Court with going through all of the facts. But I think it would be helpful to highlight a bit of the chronology here.

Mr. Mealer set up a website, I believe in 2009, for the purpose of touting his new automotive technology and his dream of a future automotive company that could rival the current OEMs, Ford, General Motors and Chrysler. His website contained a blog. Mr. Mealer is very knowledgeable about blogs and he spends quite a bit of his time in that activity. On his website, he invites comments to his statements and his vision.

In June 2009, just nine days after the bankruptcy was filed, Kris Kordella, who is a former General Motors employee, posted a comment in reaction to some negative comments allegedly made by Mr. Mealer in Automotive News on Mr. Whitaker who had recently become the CEO of GM.

The comments could only be described as drivel and the type of nonsense that one often sees on the internet. Since it is so important to this, I just want to read the comment that is at the center of this dispute. The posting by Mr. Kordella says to JL -- John L. Mealer, "What a funny guy re your senseless blog to the Automotive News article on Whitaker. Mealer Automobiles? America's next major automobile company??

Hah! And then maybe twelve or fifteen exclamation points. You're a legend in your own head. And notice, I didn't say mind because it's obvious you don't have one. Anyway, I wish you all the worst the world can give to such a self-serving pathetic moron. Good riddance, clown. Sincerely, Kris K." -- and then in parentheses -- " a real engineer of real automobiles." That is the single post by Mr. Kordella.

Mr. Kordella never identifies himself in the posting by name other than to say Kris K. He uses a moniker, Money01. Mr. Mealer suggests that Mr. Kordella professes to be a financial guru and that's why he used that moniker, although his posting certainly doesn't leave one with the impression that he's a financial guru.

Furthermore, Mr. Kordella never identifies himself as a GM engineer. He simply says that he's an engineer.

To the contrary, Mr. Mealer then goes out and investigates Mr. Kordella's ISP, which, I guess, is the internet locator, to determine that it was sent from a GM location which could have been at home or office. And Mr. Mealer himself then identifies Mr. Kordella as a General Motors employee and engineer.

The posting, as I think Your Honor would agree, contains no factual falsehoods or makes any statements about the viability of Mr. Mealer's technology or the viability of his company. It is simply filled with nonsensical personal

attacks, it would appear.

Interestingly, in subsequent pleadings in his reply, Mr. Mealer admits that by highlighting Mr. Kordella's involvement that he was attempting to use the attention of a corporate giant GM -- this is a quote -- "to inspire others to potentially invest in the underdog". So it's clear that Mr. Mealer was using this posting in order to gain interest in his company.

Subsequent to that, Mr. Kordella submitted an apology apologizing for his comments and Mr. Mealer put that up on his site and made some comments that this issue is behind us.

Despite the fact that Mr. Mealer is obviously very computer savvy, he never removes the offending remarks. Those remarks remained on the site throughout 2010 and they may very well still be there. So to the extent that Mr. Mealer believed that these remarks were having a negative impact on his financing activities, he clearly could have mitigated that. And he, in fact, had sole control over his website. It's not as if this was posted on a third party's website.

Over the next several months, Mr. Mealer continues to make postings on his blog through January 2010 where he posts rosy predictions about his ability to raise capital, that money and financing is right around the corner. And in our papers, we cite to those posts.

In October 2009, Mr. Mealer files personal bankruptcy

in Arizona. He never lists a claim against General Motors in his papers, in his schedules of assets and liabilities. And the trustee, who was aware of these claims through subsequent proceedings, never pursues the claim against GM.

Mealer then files an ad --

THE COURT: Pause, Mr. Smolinsky. He didn't schedule the potential claim at the outset. I had thought, rightly or wrongly, that when the deficiency was noted, he amended his schedules.

MR. SMOLINSKY: That's possible, Your Honor. I don't recall that but you may be correct.

THE COURT: All right. Go on. But your point is that the trustee knew about the claim and determined that the trustee did not want to pursue it.

MR. SMOLINSKY: Correct. Whether it was ultimately scheduled or not, this presumably was an estate action and the trustee could have pursued the action but elected not to.

Mr. Mealer then files an adversary proceeding in his bankruptcy case against MLC, Motors Liquidation Company, New GM and GMAC. And in that complaint, he seems to be alleging that the conspiracy is that Motors Liquidation Company assisted GMAC in destroying Mr. Mealer's company in order to be able to foreclose on his house. That conspiracy has obviously now shifted. GMAC is no longer in the picture in terms of his claims. And now he's alleging that it was a GM instigated

conspiracy to destroy his business.

Of course, Your Honor, that action in the bankruptcy court was dismissed. After an unsuccessful filing of a motion in this case in order to establish procedures for pursuing his claim -- and I believe Your Honor may have dismissed that on procedural grounds for failure to state a claim in the way that it was postured -- Mr. Mealer then commenced an action in state court in Arizona against the same parties alleging the same facts as are part of his claim in this court.

The procedural history of that is set out in our papers. But ultimately, that action was removed from state court in Arizona to district court in Arizona and the action was dismissed. An appeal now sits with the Ninth Circuit Court of Appeals of that dismissal. And the Ninth Circuit recently issued an order denying Mr. Mealer's request to proceed in forma pauperis because of a finding by that Court that the appeal was frivolous. The Court also required Mr. Mealer to show cause why the appeal should not be summarily affirmed.

The bottom line is that it is obvious that there is no conspiracy here. There's simply a nonsensical posting on a blog. There's no specific allegations as to what funding was on the verge of being obtained and then was lost as a result of this posting. And it's ludicrous to conclude that a potential investor looking at Mr. Mealer's plan which shows, according to his papers, that by 2018 his company was going to be generating

sixty-three billion dollars of revenue and showing positive net income of over sixty billion dollars. It's ludicrous to assume that an investor serious in investing in a business of that type would draw its interest as a result of this specific blog posting which, as I said, is totally nonsubstantive.

Our reply sets forth various cases which talk about defamation. And we would suggest that those cases clearly indicate that this type of blog posting, particularly on the internet with the typos and the hyperbole, could never be used as a basis for defamation under Arizona law or could it never -- and it could never be taken as a serious statement of fact to be relied upon.

As the district court found in dismissing the claim against Mr. Kordella in the district court action, the Court found that Mr. Kordella could not have known that this harm was likely to be suffered in Arizona because it is simply not likely that any blog posting could cause such a response from serious investors especially if Mr. Mealer's automobile is truly revolutionary.

Equally failing, Your Honor, is Mr. Mealer's assertion of respondeat superior. It is simply not plausible that if GM wanted to destroy Mr. Mealer's company that this is the way that it would go about doing that.

Finally, Your Honor, on the issue of respondeat superior, I would just note -- and I know this has been

addressed in other Courts. But to the extent that it is respondeat superior and Mr. Kordella was acting in the ordinary course of his employment, that would actually be a claim that New GM had assumed as part of the master sale and purchase agreement. I don't think that we necessarily need to get to that issue today. But I just wanted to note for the record that if this was in the ordinary course of GM's business, it would not be the debtors' liability.

My only other point -- and then I'll sit and let Mr. Mealer have his time to argue. When looking at whether this is an administrative expense claim and looking at Section 503 of the Bankruptcy Code, I would just suggest that a finding that these damages are an actual necessary cost and expense of preserving the estate has no basis in the law. Typically, I would understand an argument that if a tort is committed in the course of a business and there's benefit to running that business that that could give rise to an administrative expense claim, certainly. But I don't think that this blog posting is the kind of activity that is tied to the preservation of the debtors' automotive business. Thank you, Your Honor.

THE COURT: All right. Mr. Mealer?

MR. MEALER: Yes, sir. Yes, Your Honor.

THE COURT: I'll hear your argument now.

MR. MEALER: Okay. I could barely make out anything that the opposing counsel said but I'll assume it's the same

arguments they've been using the entire time.

The incident that occurred on June 9th with Mr. Kordella entering my website with two other GM employees that was goading him on because they were simultaneously on the website --

THE COURT: Just a minute, please, Mr. Mealer. Adi (ph.), turn -- just a minute, please. Turn off that blower.

(Pause)

THE COURT: Continue, please, Mr. Mealer.

MR. HAMERMESH: Oh, yes, sir. Your Honor, as seen on our website that was clearly outlined in his website, was for my prospective funding. Mr. Kordella's comments were a direct attack upon me to interfere with my prospective funding in such a manner as to tell my prospective investors and clients that I was insane or without a mind, a moron. Later on, he followed up with e-mails saying I could not be trusted. I was a liar; I was a fraud. And this was all done through GM's equipment where -- that was assigned specifically to Mr. Kordella where he was trained.

I've provided plenty of case law that shows that GMAC -- or GM -- sorry -- is liable because of the type of equipment and the agreement that Mr. Kordella made with GM or GM made with Mr. Kordella. And any such private apology such as he sent to me by e-mail that I had cut and paste and put on my website in trying to patch up with my prospective investors

that has received Mr. Kordella's comments through the RSS feed which even your Court allows RSS feed.

The damage was done immediately and I tried to patch it up by pretending and playing it off like, oh, Mr. Kordella and I -- hey, we've worked it out. But the damage had already been done. There was nothing I could do to take back what damage was already caused. I believe GM's counsel, Mr. --

THE COURT: Is there a reason -- pause, please, Mr. Mealer. Is there a reason if you believe that the damage had already been caused that you said what you said instead of saying it's too late for apologies or words to that effect?

MR. MEALER: Well, no. The damage has been done. But I was attempting to undo any damage that would have continued from this from -- by, you know, posting Mr. Kordella's private apology. What I wanted was a GM public apology. And GM, of course, refused that. I just believe that if I played it off as if it was, you know, company to company banter, I might be able to salvage some of my investors. But some of Mr. Kordella's comments combined with whatever natural effects chased them away.

THE COURT: Go on.

MR. MEALER: It's not like I made this up where I could make him do this to me. This is what happened. And the result is my company is dead. And essentially, this was just not what I intended. I'd rather be building automobiles than

arguing with General Motors, a company that I admire.

THE COURT: Further points, Mr. Mealer?

MR. MEALER: And whether I was building, you know, the tri -- the three-wheel vehicles or was able to get the full scale manufacturing which is what I was going for, my business would exist. My name would not be blackened out, would not be known as the moron and the non-engineer to everyone because GM told them I was. In fact, my engineers -- a couple of them actually came from GM. And they have threatened to take this out on me. I hope they weren't referring to legal matters because I promised them we're going to be going full steam here in the full of 2009 when funding was settled in the summer of 2009.

And everybody's waiting to watch the outcome of this and, I don't know. I just wish I had a lawyer to do this for me because I'm lost here in court. I tried to put together good documents for you. I apologize if they weren't smooth flowing but --

THE COURT: All right. Anything else?

MR. MEALER: And as I said, I could barely make out any of the words that GM was just saying.

THE COURT: Well, I heard him okay, Mr. Mealer. Is there a reason why, if you couldn't hear him or if he sounded mumbled, you didn't say something at the time?

MR. MEALER: The telephonic conference information

says do not interrupt so I did not want to interrupt him and step out of line. It says don't interrupt when somebody else is talking. So I was really just trying to listen carefully.

THE COURT: All right.

MR. MEALER: I'm going to assume that it's just the same thing they've been telling me or telling the Court which has all been argued in my complaint and all the other documents I attached and sent to the Court, emergency addition, response and clarification.

You know, the signed confession from Mr. Kordella, of course, with Mr. Burgel and Ms. Garwood -- obviously, I couldn't charge them or say anything because they were only on the website at the exact same time as Kordella was and on the same pages that he was on. But they didn't actually type the claim themselves as the real engineer of real automobiles. Probably didn't do the typing.

And I don't know who was standing next to Mr. Kordella, I don't know if it was a -- I don't know who was standing next to him goading him or discussing any of this 'cause I can't get disclosure one way or the other from GM. I guess it's all moot because they probably threw away all their old equipment. Not meaning to sound rude but I don't know what they've done, subsequent site, that is.

THE COURT: All right. Mr. Mealer, we've had a lot of pauses. Do you have any -- and this is just the most recent

of them. Do you have any further comments?

(Pause)

THE COURT: Mr. Mealer?

MR. MEALER: I'm trying to -- we're breaking up, too. I thought you were -- somebody else was talking. I believe I spelled out everything in my complaint fairly clearly. I believe my case law is there. I'm not a lawyer. I'm not familiar with pressing a federal case or even a local case. I just hope this stands on what was done to me, relieve some of the damages that were done to me, to my company, and that GM is held accountable for what they've done. Other than that, I have nothing else to say except I appreciate your time.

THE COURT: Okay. Thank you.

MR. MEALER: Thank you, Your Honor.

THE COURT: Mr. Smolinsky, reply?

MR. SMOLINSKY: Thank you, Your Honor. Mr. Mealer has obviously gone through some difficult times of late and we certainly sympathize with his difficulties. But it doesn't --

THE COURT: Pause, please, Mr. Smolinsky. Mr. Mealer, I assume you can now hear Mr. Smolinsky?

MR. MEALER: I can hear you, yes.

THE COURT: No. Did you hear Mr. Smolinsky when he was speaking?

MR. MEALER: Oh, no. No, I did not hear him, Mr. Smolinsky.

THE COURT: Well, I heard you fine, Mr. Smolinsky, but take that microphone, bring it close to your mouth and I'm giving you permission to scream.

MR. SMOLINSKY: Mr. Mealer, can you hear me now?

MR. MEALER: Yes. Now I can.

MR. SMOLINSKY: Okay. Mr. Mealer has obviously had some difficult times of late and we're certainly sympathetic with that. But I just want to reiterate that it was Mr. Mealer who called Mr. Kordella out as a GM employee. Mr. Mealer posted subsequent postings after this where he indicated that financing was right around the corner. In his response papers, he suggests that he only did that to try to rekindle the interest that was lost. But to the extent that he was falsifying his e-mail postings to reflect the fact that there was financing when, in fact, there wasn't, these are the same types of falsehoods that he's alleging GM committed.

Nowhere in Mr. Mealer's comments did he talk about any specific financing, any letter of intent, any financing proposal that was pulled off the table as a result of this comment. And again, I find it hard to believe that that would ever happen in our current -- the current financial world in which we live where almost every new idea is criticized. Here, the idea wasn't even criticized; it was just a personal attack. We just don't see how that could possible have led to the damage that is alleged. And I just want to reiterate the fact

that there are no specific facts about any financing that was lost as a result of this. Thank you.

THE COURT: All right. We're going to take a recess until approximately a quarter to 11. And that's a quarter to 11 Eastern time. And, Mr. Mealer, you just stay on the phone. We're in recess.

(Recess from 10:33 a.m. until 11:01 a.m.)

THE COURT: Have seats, please. I apologize for keeping you all waiting. Mr. Mealer, are you still with us?

MR. MEALER: Yes, sir, Your Honor.

THE COURT: Okay.

MR. MEALER: Your Honor, if I may?

THE COURT: Mr. Mealer, I'm about to rule. Do you have some comment you want to make before I do?

MR. MEALER: Yes, sir. Sorry. Yes, sir, Your Honor. I heard the opposing counsel mention that I falsified something. To be clear, I falsified nothing and not quite certain what he was referring to. I just want to make it clear that honesty is all I've got. I do not falsify anything.

THE COURT: What Mr. Smolinsky's point, Mr. Mealer, is that when you filed your petition and the schedules and statements upon which you are required to show your assets that you failed to show the right to sue GM as a result of Kordella's actions. And I think the facts are undisputed that you didn't show the existence of that cause of action in your

schedules. Is it your position that there should be a dispute as to that or that you cured that deficiency later or what?

MR. MEALER: Oh, Your Honor, I did mention that. That was ruled upon by the Arizona district -- or the Arizona bankruptcy court because it was an abandoned claim once I listed it.

THE COURT: Once you listed it.

MR. MEALER: Of course, I don't have the document in front of me because I wasn't prepared for this. That was listed and the trustee abandoned that claim and it reverted back to me --

THE COURT: All right.

MR. MEALER: -- what was ruled upon.

THE COURT: All right. Mr. Mealer, I'm now ready to rule if you'll allow me to.

In this contested matter in the jointly administered Chapter 11 cases of Motors Liquidation Company, formerly General Motors Corporation, which I'll refer to as Old GM or the debtors, the debtors object to the 230 million dollar administrative proof of claim filed by John M. Mealer. Mr. Mealer's claim seeks recovery on underlying causes of action against the debtors for negligent entrustment defamation, intentional interference with business relations and trade libel arising out of actions taken by Kris Kordella, an employee of General Motors.

The debtors assert that Mr. Mealer's proof of claim must be disallowed because the debtors cannot be held liable for Mr. Kordella's actions under a theory of respondeat superior because Mr. Mealer's proof of claim and the underlying complaint failed to state a claim upon which relief can be granted because his claim is barred by the doctrine of accord and satisfaction and because any liability of the debtors for these claims was assumed by New General Motors if, in fact, they had been ordinary course activities.

While all of these defendants might well have -- excuse me. While all of these defenses might well have merit if ultimately addressed, even without considering how the showing made here could justify an award of 230 million dollars, I need address only a few of them. I find that the debtors cannot be held vicariously liable for defamation, intentional interference with business relations and trade libel or for any other tort claim that Mr. Mealer might assert arising out of Mr. Kordella's actions at issue here.

In addition, I find that Mr. Mealer has failed to state a claim for negligent entrustment, a tort that would be associated with or result from a direct liability.

I also find that the claims failed to meet the plausibility requirements imposed by the United States Supreme Court in its Bell Atlantic v. Twombly and Ashcroft v. Iqbal decisions. My findings of fact and conclusions of law follow.

Turning first to my findings of fact. Mr. Mealer is the principal of Mealer Companies LLC, an alternative fuel automobile manufacturing company. In 2009, Mr. Mealer began soliciting funding for his company to begin production of alternative fuel automobiles. In May of that year, he mailed the Mealer Companies' "funding request summary" to various prospective investors and set up the website mealerscompanies.com to garner funding and support for his company.

On June 1st, 2009, the debtors filed Chapter 11 petitions in this court. Sometime after the commencement of the Chapter 11 cases, in early June 2009, Mr. Mealer commented about Old GM's bankruptcy filing on an Automotive News blog. Kris Kordella, an engineer employed by GM at the time, saw Mr. Mealer's comments and, on June 9, posted a response on mealercompanies.com. Mr. Kordella's post said, and I'm quoting, "To JL, What a funny guy re: your senseless blog to the Automotive News article on Whitaker. Mealer Automobiles? America's next major automobile company?? HAH!"-- and then about a dozen exclamation points. "You're a legend in your own head. And notice I didn't say mind because it's obvious you don't have one. Anyway, I wish you ALL the worst the world can give to such a self-serving pathetic MORON. Good riddance, clown. Sincerely, Kris K." (a real engineer of real automobiles)."

I note, in connection with the language I just quote, that Mr. Kordella did not say that he was acting in any way on behalf of GM or even mention GM.

According to Mr. Mealer, this post was made using a General Motors computer. Mr. Mealer also states that the post was sent out to anyone who subscribed to the mealercompanies.com RSS feed. Mr. Mealer also alleges that Mr. Kordella sent e-mails from within GM offices "via inter-corporate secured ISP equipment to Mealer's prospective advantageous parties".

On June 15, 2009, Mr. Kordella sent an apology to Mr. Mealer explaining that as an employee of General Motors, he was upset by the recent bankruptcy and by Mr. Mealer's posts on the Automotive News blog. Furthermore, Mr. Kordella stated, "The bottom line is I shouldn't have resorted to the knucklehead name-calling in my blog and inferring your auto company isn't legit, because I'm sure it is. Please consider this my apology for the aforementioned actions. Additionally, I wish you and your company great success in the future as any company that can help the United States get more GREEN is a noble company and should be commended for their work. Wishing you the best of luck in the future."

That same day, June 15, Mr. Mealer acknowledged Mr. Kordella's apology on his website, stating, and I'm quoting, "Finally, GM's senior engineer, Kris Kordella allowed this

final comment and we can mend fences....we are good to go and I wish GM and Mr. Kordella luck in all aspects."

Mr. Mealer did not say, although he argued today that the damage was already done. And that the apology was insufficient in any way.

On August 22, 2009, Mr. Mealer posted a website -- a notice on his website responding to and soliciting interest in employment with his company. He wrote, and I'm quoting, "Quite a few people have inquired about opportunity with Mealer Companies, LLC. Funding is not one hundred percent yet. But as we get to that point, we will need hundreds of people for immediate help within the company plus the hundreds in the construction industry as well as thousands more in the companies related to our manufacturing end products."

On September 26th and again on October 24, 2009, Mr. Mealer posted notices on his website indicating that the business had been progressing rapidly, that "If all goes well, you will see our bridge vehicle hitting the market in the next eighteen months" and that "We expect to begin making major advances to bringing our product to manufacturing and to market by fall 2010."

Then on January 1, 2010, Mr. Mealer posted on his website that "Mealer Companies, LLC has a quite (sic) a bit going for the company this year. Funding is just around the corner...."

According to Mr. Mealer, he was, at some point, in discussions with several prospective investors interested in providing 200 million of funding and with prospective dealers interested in purchasing about thirty million dollars worth of automobiles. Those two numbers presumably provide the basis for the 230 million dollars he now wishes to recover from Old GM and its creditors.

On October 4, 2009, Mr. Mealer filed a voluntary Chapter 7 petition in the United States Bankruptcy Court for the District of Arizona. It is alleged that the Chapter 7 trustee, in his individual Chapter 7 case in Arizona, who would otherwise have the ability to assert those claims on behalf of Mr. Mealer's Chapter 7 estate, abandoned those claims. Of course, we know as a matter of Chapter 7 law, that a Chapter 7 trustee is entitled to abandon claims that the trustee deems to be of negligible value to the estate. And I assume for the purpose of this analysis that the claims thus reverted back to Mr. Mealer.

On March 12, 2010, Mr. Mealer filed with this Court a motion to approve procedures for administering claims under Section 503 of the Code seeking tort relief from the debtors. I denied that motion for failure to show a prima facie entitlement to relief.

On March 30, 2010, Mr. Mealer commenced an adversary proceeding against both Old GM and New GM in his Arizona

Chapter 7 case. The complaint filed in that proceeding alleged causes of action for, among other things, intentional interference with prospective economic advantage and defamation, claims similar to those that Mr. Mealer asserts here.

On April 29, 2010, the debtors filed a motion in the Arizona bankruptcy case to dismiss the adversary complaint on the grounds that (1)it violated the automatic stay as to Old General Motors; (2)Mr. Mealer lacked standing to bring the adversary proceeding because a standing was transferred to an appointed trustee when he filed his Chapter 7 case and the trustee had not then abandoned the claims; and (3)that adversary complaint failed to state a claim on which relief could be granted.

New GM also filed a motion to dismiss arguing that it didn't assume liability for those claims under the sale agreement and that my court, the Chapter 11 Court with jurisdiction over GM's -- Old GM's Chapter 11 case, retained jurisdiction to determine all issues related to the sale agreement.

On June 2, 2010, the Arizona bankruptcy court granted both motions to dismiss without leave to amend "based on the orders entered by the bankruptcy court and the injunctions or retention of jurisdiction provisions therein".

On June 8, 2010, Mr. Mealer then filed a complaint in

Arizona state court against the debtors, New General Motors and Mr. Kordella. The complaint in state court was never served on the debtors. New GM removed the action to federal court. And both New GM and Mr. Kordella filed motions to dismiss. Notwithstanding my court's exclusive jurisdiction to enforce and implement the sale order and sale agreement, the Arizona federal district court ruled on the motion, that New GM's motion to dismiss was granted because GM did not assume successor liability. The Court also granted Mr. Kordella's motion to dismiss.

In that connection, the Arizona district court ruled "Mr. Mealer believes that Mr. Kordella's comments intimidated numerous potential investors and ultimately kept his 200 million dollar stream from materializing. Mr. Kordella could not have known that this harm was likely to be suffered in Arizona because it is simply not likely that any blog posting could cause such a response from serious investors, especially if Mr. Mealer's automobile is truly revolutionary."

On February 5th, 2011, Mr. Mealer then filed an administrative proof of claim in the Chapter 11 cases before me seeking 230 million dollars for a defamation of character, trade libel and intentional interference with Mr. Mealer's prospective advantage. His proof of claim and attached documents state that his claims are for "respondeat superior" and allege that "General Motors Corporation engineering

employee, Mr. Kris J. Kordella" visited claimant's website "using a GM computer and IP address...and posted various injurious falsehoods about Mr. Mealer and the Mealer automobile thus unlawfully destroying growth funding and the 'rival' business of Mealer's Companies, LLC."

Mr. Mealer asserts that Mr. Kordella's actions caused him "to lose prospective funding to the tune of 200 million dollars" and "prospective sales [worth] 30 million dollars".

I turn now to my conclusions of law. As a preliminary matter, I find that the Court has subject matter jurisdiction to hear this matter and that this matter is a core proceeding under which a bankruptcy judge in contrast to a district judge can decide not only disputed issues of law but also disputed issues of fact.

28 U.S.C. Section 1334 vests in the district court a broad grant of subject matter jurisdiction over all bankruptcy related matters. And it's fundamental that a motion for allowance of administrative expense invokes all three of the arising-in, arising under and related-to prongs of 28 U.S.C. 1334. District courts may, as the district court in this district has under Judge Ward's well known order, refer all matters to which it -- the district court has jurisdiction to, under 1`334, to bankruptcy courts and that is the basis upon which we bankruptcy judges, in lieu of district judges, decide claims allowance matters.

Generally, under 28 U.S.C. Section 157(b), a bankruptcy judge may only hear and finally determine core bankruptcy proceedings. Including in the list of such core proceedings is the allowance or disallowance of claims against the estate. However, the list of core proceedings under 157(b)(2) specifically excludes personal injury, tort and wrongful death claims. It further provides, that is, 157 provides in its subsection (b)(5) that district courts shall order that personal injury, tort and wrongful death claims should be tried in the district court rather than in the bankruptcy court.

As my colleague, Judge Lorraine Weil from the bankruptcy court in the district of Connecticut explained, "Personal injury tort claim" is not defined in either the Bankruptcy Code, Title 11, or the Judicial Code, Title 28, and there's almost no helpful legislative history. See her decision in In re Ice Cream Liquidation Ltd., 281 B.R. 154, 160 (Bankr. Dist. Conn. 2002).

Further, she noted, Courts have adopted two different definitions of the term. The broad view is that the term "personal injury tort claim" applies to "any injury which is an invasion of personal rights." Id.

Judge Schwartzberg, the late Judge Schwartzberg of this court, adopted the broad view in deciding that a defamation claim brought by a preschool bus driver alleging

that the debtors told other parents that the driver has molested their child was a personal injury tort claim. See In re Goidel, 150 B.R. 885 (Bankr. S.D.N.Y. 1993). Judge Schwartzberg determined that it was appropriate to abstain from deciding whether the defamation claim fell within the exception to discharge for willful and malicious injury until after the state court had rendered judgment in the defamation proceeding. Thus, he lifted the automatic stay to allow the defamation claim to proceed in state court.

The narrow view of "personal injury tort claim" is that the term only applies to torts involving trauma or bodily injury. Late Judge Charles Brieant of this court adopted the narrow position in concluding that state ante discrimination law claims were not personal injury tort claims. See In re Cohen, 107 B.R. 453 (S.D.N.Y. 1989), that being a decision of the district court in the Southern District of New York.

Neither Judge Brieant's decision nor Judge Schwartzberg's decision, which tend to cut in opposite directions, is binding on me. But for reasons I'll state, it doesn't matter. Ultimately, I agree with Judge Weil's analysis.

In the Ice Cream Liquidation decision, Judge Weil criticized the narrow view and eventually concluded that the sexual harassment claims at issue were personal injury tort claims even though no physical bodily injury was involved.

However, she also declined to fully accept the broad view explaining that in enacting 157(b)(5), "Congress cannot have intended...that financial business or property tort claims...could be withdrawn from the bankruptcy system." 281 B.R. at 161. She explained that "In cases where it appears that a claim might be a personal injury tort claim under the broader view but has earmarks of a financial, business or property tort claim, or a contract claim," it would be appropriate for a Court "to resolve the personal injury tort claim issue by (among other things) a more searching analysis of the complaint." Id. See also Harwood's v. Alloy Automotive Company, 992 F.2d 100, 103 (7th Cir. 1993) (noting that "business torts" should not be "shoehorned" into the category of "personal injury tort claim" under Section 157(b).

Using Judge Weil's analysis as a guide, analysis that I find thoughtful and persuasive, I find that the claims that Mr. Mealer asserts here are not personal injury tort claims. Mr. Mealer alleges that Mr. Kordella made defamatory statements about Mealer Companies and about Mr. Mealer in a professional capacity and that Mr. Kordella intentionally interfered with Mealer Companies' prospective business relations.

He further asserts that General Motors, a potential competitor of Mealer Companies is liable for the actions of Mr. Kordella, Old GM's employee. These claims are clearly financial or business tort claims. Although in Goidel, Judge

Schwartzberg determined that the defamation claims at issue were personal injury tort claims. The alleged defamatory statements in Goidel involved accusations of sexual molestation whereas the alleged defamatory statements here are alleged to have had a negative effect on Mealer Companies' business acumen and potential for financial success. The defamation claim here is therefore distinguishable.

In addition, unlike the plaintiff in Goidel, Mr. Mealer is also asserting claims for trade libel and intentional interference with prospective business relations which a traditional economic or business torts.

For these reasons, I find that Mr. Mealer's claims are not personal injury tort claims as that term is used in 28 U.S.C. Section 157(b). Therefore, the adjudication of Mr. Mealer's claims in the bankruptcy court is a core proceeding.

I also note that although, in noncore matters, a bankruptcy court may not enter final judgment, it still has authority to issue proposed findings of fact and conclusions of law which are reviewed de novo by the district court. See Marshall v. Marshall, 547 U.S. 293 at 302 (2006) citing 157(c)(1).

Moreover, because the debtors' claims objection is treated as a motion to dismiss, all of the facts alleged by Mr. Mealer are taken to be true and I'm not making findings on disputed issues of fact. My rulings, rather, are on matters of

law which are reviewed de novo anyway. Therefore, even if Mr. Mealer's claims were deemed to be personal injury tort claims and this were deemed not to be a core proceeding, I'd still be empowered to make the legal determinations that I'm making here.

I now turn to the merits. Mr. Mealer asserts that Mr. Kordella's actions give rise to claims for defamation, trade libel and intentional interference. His claims against the debtors present two theories of liability. First, he asserts a direct claim that the debtors are directly liable for the tort of negligent entrustment. Second, he asserts that the debtors are vicariously liable for any tort for which Mr. Kordella might have been liable based on the doctrine of respondeat superior.

First, I find that Mr. Mealer has failed to state a claim for negligent entrustment. Section 502(b)(1) of the Code states that when an objection has been made to a proof of claim, the Court, after notice and a hearing, shall allow the claim "except to the extent that such claim is unenforceable against the debtor and property of the debtor under any agreement or applicable law for a reason other than because such claim is contingent or unmatured". Section 502 instructs Courts to rely on nonbankruptcy law to determine whether claims are enforceable for bankruptcy purposes. See In re Combustion Engineering, Inc., 391 F.3d 190, 245, note 66 (3rd Cir. 2005)

citing Collier. "A claim against the bankruptcy estate will not be allowed in a bankruptcy proceeding if the same claim would not be enforceable against the debtor outside of bankruptcy." Id.

A motion to disallow a claim under Section 502(b)(1) is treated as a motion to dismiss and the Court must accept as true all well-pleaded factual allegations by the claimant. See In re GI Holdings, Inc., 443 B.R. 645, 664 (Bankr. Dist. N.J. 2010). But that requirement still requires the allegations to be well pleaded invoking the doctrine of Bell Atlantic v. Twombly, 550 U.S. 544, that the factual allegations must be sufficient to raise a right to relief above the speculative level. Also, they are subject to the plausibility requirements of Ashcroft v. Iqbal, 129 S.Ct. 1937 (2009).

I'll come back to the plausibility requirements of those cases, especially those of Iqbal, momentarily. But now I turn to the underlying deficiencies that appear whether or not the allegations pass muster under the plausibility test.

A federal court sitting in New York will apply New York's choice of law rules to determine which state's substantive law applies. See In re OPM Leasing Services, Inc., 40 B.R. 380, 398 (Bankr. S.D.N.Y. 1984). Courts applying New York choice of law rules have generally held that laws regarding defamation and similar torts are "governed by the law of the place where the tort occurred, which is the place where

plaintiff's injuries occurred." (See Hitchcock v. Woodside Literary Agency, 15 F.Supp. 2nd 246, 251 (E.D.N.Y. 1998)) and that "when the defendant's negligent conduct occurs in one jurisdiction and the plaintiff's injuries are suffered in another...the locus in this case is determined by where the plaintiff's injuries occurred." Schultz v. Boy Scouts of America, Inc., 480 N.E.2d 697 (N.Y. 1985).

Mr. Mealer resides in Arizona and his company, Mealer Companies, LLC, is registered and operated in Arizona. Any alleged injury occurred in Arizona and Arizona law applies.

Under Arizona law, "It is negligence to use an instrumentality whether a human being or a thing which the actor knows or should know to be so incompetent, inappropriate or defective that its use involves an unreasonable risk of harm to others." Quinonez v. Andersen, 144 Ariz. 193, 197 quoting Section 307 of Restatement (Second) of Torts. However, "an employer will not be liable for an act of an employee that was not foreseeable." Pruitt v. Pavelin, 141 Ariz. 195, 202. Generally, when an employer is found liable for negligent entrustment or hiring, the employer knew or could have learned through reasonable investigation something about the employee or the employee's past that made the employee's harmful conduct foreseeable. For example, in a case cited in Pruitt, the Minnesota Supreme Court found that a tenant who had been raped by the manager of an apartment had a cause of action against

the owner of the apartment because the owner had trusted the manager with pass keys without first investigating his background.

Here, Mr. Mealer does not allege anything about Mr. Kordella's or Mr. Kordella's past that, if known, would have made it foreseeable that Mr. Kordella would use his computer to post disparaging remarks about Mr. Mealer or his company. And if Mr. Mealer did have a record of using computers to post disparaging remarks on the internet, Mr. Mealer does not allege that Old GM knew or should have known that. It was entirely unforeseeable to Old GM, based on this date of the record, that Mr. Kordella would use his computer to post comments on Mr. Mealer's website and Old GM has not been alleged to have been shown to be negligent in entrusting him with a computer under the facts as pleaded here. Therefore, Mr. Mealer's claim for negligent entrustment fails as a matter of law.

Next, I find that even if Mr. Kordella's actions gave rise to legally cognizable claims, that is, if Mr. Kordella himself had taken action which gave rise to legally cognizable claims, the debtors cannot be held vicariously liable for any such causes of action, again, as a matter of law.

Vicarious liability or respondeat superior is a rule of loss allocation under New York choice of law rules. See, for example, Zatuchny v. Doe, 825 N.Y. Supp. 2d 458, 459 (1st Dep't 2006). Here, the alleged tortious action, the internet

posting by Mr. Kordella occurred in Michigan and the alleged harm from such action occurred in Arizona where Mr. Mealer resides and where his business is registered. Because the doctrine of respondeat superior under Arizona law and Michigan law is sufficiently similar, the Court needn't undertake a choice of law analysis as to the respondeat superior determination.

Under the doctrine of respondeat superior in both Michigan and Arizona, an employer may be vicariously liable for an employee's intentional or unintentional torts committed within the scope of his employment. However, an employer is not liable for acts committed by an employee outside the scope of employment. See Rogers v. J.B. Hunt Transport, Inc., 466 Mich. 645, 651 (2002); Faul v. Jelco Inc., 122 Ariz. 490, 492.

Under Arizona law, "An employee is acting within the scope of his employment while he is doing any reasonable thing which his employment expressly or impliedly authorizes to do or which may reasonably be said to have been contemplated by that employment as necessarily or probably incidental to the employment." Ray Korte Chevrolet v. Simmons, 117 Ariz. 202, 207.

Similarly, under Michigan law, "Vicarious liability may arise even where the employee's action was not specifically authorized if the act is nevertheless so similar to or incidental to the conduct that is authorized taking into

consideration such matters as to whether the act is commonly done by the employee." Bryant v. Brannen, 180 Mich App 87, 98-99.

While the issue of whether the employee was acting within the scope of his employment is generally, for the tryer of fact, "where the facts are not in dispute and where no conflicting inferences may reasonably be drawn therefrom, the determination of whether the employee was acting within the scope of his employment is for the Court." Rowe v. Colwell, 67 Mich App 543, 550. See also Olson v. Staggs-Bilt Homes, Inc., 23 Ariz. App. 574, 577 (finding that the employee was acting outside the scope of his employment as a matter of law).

In this case, I find that even if all of the facts alleged by Mr. Mealer are true, Mr. Kordella was not acting in the scope of his employment as a matter of law and that Mr. Mealer has failed to allege facts establishing that the web post was engaged in -- within the scope of Mr. Kordella's employment.

He was employed by GM as an engineer to work on the design and manufacture of vehicles. He was not employed by General Motors in a communications capacity. Nor was he employed for the purpose of making posts on the internet. Posting on the internet or disseminating his own or anyone else's views was not a task that he was asked or authorized to perform as a part of his engineering employment nor was it

incidental or in any way similar to any task he was authorized to do as part of his employment. Therefore, even assuming arguendo that Mr. Kordella's actions gave rise to an actionable tort, finding that is itself negated if not wholly foreclosed by the Arizona district court's findings, the debtors cannot be held liable for any such torts because his actions weren't alleged, or at least satisfactorily alleged, to be within the scope of his employment.

Mr. Mealer argues that the debtors are vicariously liable for Mr. Kordella's conduct because GM "trained", "had the right to control", and "supplied the computer equipment" that Mr. Kordella used. Even if true, these facts do not establish that Mr. Kordella was acting in the scope of his employment when he posted on Mr. Mealer's website.

Then I further determine that the claims here fail to meet the requirements of Bell Atlantic v. Twombly and Ashcroft v. Iqbal. While over the years, I have rarely invoked the plausibility requirement to find claims insufficient to state claims upon which relief can be granted, this case is a poster child for Iqbal relief. The notion that the childish name-calling that went on here would have resulted in the 230 million dollars in damages that underlie this administrative claim is wholly implausible, as noted in the Arizona action. It simply is not likely that any blog posting could cause such a response from serious investors especially if Mr. Miller's

automobile were truly revolutionary.

Moreover, there were no credible -- not credible -- satisfactorily pleaded of investor action based on the name-calling either before or after the retraction. They were insufficient allegations of what was in the wings that was lost as a consequence of the post. Moreover, it is not plausible that the words that were used by Mr. Korella (sic) would be those upon which any otherwise serious prospective investors would rely. There is no showing that investor interest rose to the level at which the alleged statements could be found to have chilled that interest nor that the requisite causation, the statements chilling investor interest that otherwise was in place, was established under the allegations here.

For the foregoing reasons, the debtors are to settle an order disallowing the claim. The time to appeal this determination will run from the time of the entry of the resulting order and not from the time of this dictated decision. We're adjourned.

MR. SMOLINSKY: Your Honor, we have additional matters on the calendar.

THE COURT: Oh. You have the undisputed matters. Very well. Mr. Mealer, you're free to stay on the phone or leave, as you prefer.

MR. MEALER: Thank you, Your Honor.

MR. SMOLINSKY: Your Honor, Joe Smolinsky for the

debtors. The first uncontested matter is a motion seeking authorization to assume and assign approximately forty-five contracts to New GM. This will be the last motion to assume or assume or assign contracts. We were permitted under the plan for a period of time after the effective date to continue to utilize 365 to assign contracts. And we are doing so with the request of New GM.

These forty-five contracts all relate to dealer agreements that were assumed and assigned much earlier in this case. New GM realized that these ancillary agreements were critical to continuing the dealer relationship and they asked us to assume and assign those contracts. MLC nor the GUC trust have any need for these agreements nor do they want to take the risk of any rejection damage claims caused by an unexpected rejection.

We received no objection to the relief requested and we'd ask that the Court approve the assumption and assignment of these contracts.

THE COURT: Of course. It's approved.

MR. SMOLINSKY: Thank you, Your Honor. The next matter is debtors' 219th omnibus objection to claims. These are contingent co-liability claims. We received five responses which, as usual, we will try to continue to work out consensually. We received no other responses and we'd request that the motion be granted -- or the objection be granted with

respect to the defaulting parties.

THE COURT: Yes. Granted.

MR. SMOLINSKY: Next, Your Honor, is an objection on the same grounds. It's the debtors' 220th omnibus objection. Again, we received five responses which we will adjourn. And we'd ask for disallowance of the claims that have not responded.

THE COURT: Yes. Granted.

MR. SMOLINSKY: The next matter is debtors' objection to claim number 67121 and 67122. These claims were filed by Superior Industries. We are now at the point that we have a stipulation which we will be able to submit to the Court for approval. And that stipulation would expunge the claims.

THE COURT: Sure.

MR. SMOLINSKY: Next we have the debtors' fifteenth omnibus objection to claims. The last remaining claim on that objection is the Birdsall claim. We have a stipulation resolving that claim as well which we can submit for consideration.

THE COURT: Okay.

MR. SMOLINSKY: That takes care of the uncontested matters for this morning. I know that there's a matter this afternoon with respect to New GM. We don't anticipate appearing.

Just as one housekeeping matter, we have, as Your

Honor knows, a number of omnibus claim objections where we have one or two remaining claims and we've been unable to resolve those consensually. I think we're at the point now where we need to start bringing those to Your Honor for your consideration. Typically, we contact your chambers and figure out what Your Honor has time to address in any particular hearing. With respect to these motions -- or objections that have been carried time and time again, I think we have to take on this a little bit more proactively so we give other parties a sufficient amount of time to prepare for the hearings. We think we should give them at least a week or more to notify them that their objection is now going forward. So we'll be speaking to chambers unless Your Honor has any ideas on how we can manage the calendar to meet your needs and our needs to start moving forward on more of these remaining matters.

THE COURT: Do they involve disputed issues of fact, matters of law or some combination?

MR. SMOLINSKY: I think it's a mixed bag, Your Honor. There are some that we believe should be very easily disposed of such as objections to equity claims. And then there are others that we'll have disputes.

THE COURT: Well, if they're objections to equity claims, you could to it with a one-page piece of papers. If you're talking about something where facts are in dispute, you're going to have to agree with your opponent on providing

either side with any desired discovery. And then if it really involves issues of fact, you're going to have to do direct testimony affidavits. If it involves expert testimony, I'm going to need expert reports, the whole drill on a disputed issue of fact, evidentiary hearing on contested matters. So don't expect to get those resolved without you guys having done all your homework first. And only then would it be appropriate to set it for trial.

If it involves an agreed upon set of facts and a determination of law then you got to agree with your opponent on a briefing schedule. This isn't the kind of thing you do on ten days' notice.

MR. SMOLINSKY: Would it be better for Your Honor, unless it's a very simple straightforward matter, that we use the next hearing date during one of our omnibus hearings to kind of stage it and determine whether a separate trial date should be set?

THE COURT: You can use the next hearing date as a status conference to talk about the procedures for teeing them up. But if it's anything major, you're going to have to allow sufficient lead times to get it teed up.

MR. SMOLINSKY: Well, we'll work with chambers, Your Honor. But we're going to have to speak well before the hearings in order to make sure that Your court -- the Court has time to address what we need.

THE COURT: Yes, you will, because although my largest cases now have confirmed plans, I am astounded by the continuing litigiousness on claims matters and adversaries that seems to be lingering on in each of them. And at this point, each of GM, Lyondell, BearingPoint, Chemtura, not to mention some of the older blasts from the past, such as Ames and Adelphia, has issues that at least seemingly are not going away.

MR. SMOLINSKY: We will do our best to ease your burden, Your Honor.

THE COURT: All right.

MR. SMOLINSKY: Thank you.

THE COURT: Okay. We're adjourned.

(Whereupon these proceedings were concluded at 12:02 p.m.)

I N D E X

R U L I N G S

DESCRIPTION	PAGE	LINE
Ruling on discovery issues re adversary proceeding 11-09400, NCR v. GMC is as follows: No need for discovery on underlying environmental violations but discovery is to take place re existence of a trust race and negotiation and drafting of the settlement documents via attorney depositions which may then be followed by a motion for summary judgment	17	17
Debtors' objection to Mr. Mealer's 230 million dollar administrative expense claim under doctrine of respondeat superior asserting various related causes of action including defamation of character, trade libel and interference with Mr. Mealer's prospective advantage sustained; debtors to settle an order disallowing the claim	53	14

I N D E X, cont'd

R U L I N G S

DESCRIPTION	PAGE	LINE
Debtors' motion seeking authorization to assume and assign approximately forty-five contracts to New GM granted	54	18
Debtors' 219th omnibus objection to claims (contingent co-liability claims) sustained with respect to defaulting parties	55	1
Debtors' 220th omnibus objection to claims sustained with respect to parties who have not responded	55	7
Debtors' objection to claim numbers 67121 and 67122 filed by Superior Industries sustained; claims will be expunged pursuant to stipulation reached between the parties	55	13
Debtors' fifteenth omnibus objection to claims sustained as to the Birdsall claim which was resolved by stipulation	55	19

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

I, Lisa Bar-Leib, certify that the foregoing transcript is a true and accurate record of the proceedings.

Lisa Bar-Leib

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LISA BAR-LEIB

AAERT Certified Electronic Transcriber (CET**D-486)

Veritext

200 Old Country Road

Suite 580

Mineola, NY 11501

Date: May 19, 2011