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Return Date and Time:
March 25, 2010 at 9:45 a.m.

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re MOTORS LIQUIDATION COMPANY,
f/k/a GENERAL MOTORS CORP., *et al.*,

Debtors,

KELLY CASTILLO, NICHOLE BROWN,
BRENDA ALEXIS DIGIANDOMENICO,
VALERIE EVANS, BARBARA ALLEN,
STANLEY OZAROWSKI, and DONNA
SANTI,

Plaintiffs,

v.

GENERAL MOTORS COMPANY, f/k/a NEW
GENERAL MOTORS COMPANY, INC.,

Defendant.

Chapter 11
09-50026 (REG)
Jointly Administered

Adv. Proc. No. 09-00509

MOTION TO DISMISS COUNTERCLAIMS

Plaintiffs Kelly Castillo, Nichole Brown, Brenda Alexis Digiandomenico, Valerie Evans, Barbara Allen, Stanley Ozarowski, and Donna Santi, as class representatives on behalf of a certified class, by and through class counsel and the undersigned attorneys, pursuant to Federal Rule of Bankruptcy Procedure 7012 and Federal Rule of Civil Procedure 12(b)(6), for their

Motion to Dismiss, state as follows:

1. Defendant General Motors LLC (“New GM”) filed putative Counterclaims against Plaintiffs, coupled with apparent cross-claims (improperly denominated as counterclaims) against counsel for the Plaintiffs in this Adversary Proceeding.¹ The Counterclaims fail to state a claim upon which relief may be granted, and should be dismissed pursuant to Fed.R.Civ.P. 12(b)(6).

2. Both of New GM’s counterclaims are premised on the assertion that Plaintiffs have violated the injunctive provisions of this Court’s order approving the 363 sale between Old GM and New GM (the “Sale Approval Order”) (Doc. No. 2968). This is demonstrably false by mere reference to the documents relied upon in New GM’s counterclaims. The conduct in which Plaintiffs are alleged to have engaged—*i.e.*, seeking a declaratory judgment in this adversary proceeding—is simply not prohibited by the plain language of the Sale Approval Order, as further explained below.

3. Plaintiffs’ claims in this Adversary Proceeding are predicated on the contention that their final judgment in a class action lawsuit constitutes an “Assumed Liability” under the Amended and Restated Master Sale and Purchase Agreement (“ARMSPA”) between Old GM and New GM. Plaintiffs have not sought to enforce the judgment or to execute on that liability—instead, they first seek a judicial declaration as to the proper interpretation of the term “Assumed Liability” under the ARMSPA.

4. New GM alleges a violation of two separate sections of the Sale Approval Order,

¹ Plaintiffs note that (1) no motion for joinder of third parties has been filed, (2) no summonses have issued as to Robert W. Schmieder II, Mark L. Brown, or LakinChapman, LLC, (3) service has not been effected as to cross-claim defendants, and (4) cross-claim defendants have not entered their appearance other than as counsel for Plaintiffs in this Court. Rules 19 and 20 of the Federal Rules of Civil Procedure apply in Adversary Proceedings. Fed. R. Bankr. P. 7019; 7020. Accordingly, the cross-claim defendants are not required to respond at this time.

i.e., Paragraphs 8 and 47 thereof. Paragraph 8 provides in pertinent part:

Except as expressly permitted or otherwise specifically provided by the MPA or this Order, all persons and entities . . . **holding liens, claims, encumbrances, and other interests of any kind or nature whatsoever, including rights or claims based on any successor or transferee liability**, against or in a Seller or the Purchased Assets . . ., arising under or out of, in connection with, or in any way relating to, the Sellers, the Purchased Assets, the operation of the Purchased Assets prior to the Closing, or the 363 Transaction, are forever barred, estopped, and permanently enjoined . . . from asserting against the Purchaser, its successors or assigns, its property, or the Purchased Assets, **such persons' or entities' liens, claims, encumbrances, and other interests, including rights or claims based on any successor or transferee liability**.

(Doc. 2968 ¶ 8) (emphasis added).

5. Plaintiffs' pursuit of a declaration interpreting the term "Assumed Liability" within the meaning of the ARMSPA does not implicate Paragraph 8 of the Sale Approval Order for at least two obvious reasons. First, Plaintiffs are not at this point asserting against New GM the liens, claims, encumbrances, or interest that they hold against Old GM. They are not at this point attempting to collect on their judgment against Old GM, nor are they asserting against New GM any claim based on the traditional common law notions of successor liability. Rather, they simply seek a declaration as to the meaning of the ARMSPA. Second, Paragraph 8 only applies "[e]xcept as expressly permitted . . . by the MPA or this Order." As explained below, Plaintiffs' claims for declaratory judgment are specifically permitted by Paragraph 47 of the Sale Order.

6. Paragraph 47 of the Sale Order provides in pertinent part:

Effective upon the Closing . . ., all persons and entities are forever prohibited and enjoined from commencing or continuing in any manner any action or other proceeding . . . against the Purchaser, its present or contemplated members or shareholders, its successors and assigns, or the Purchased Assets, with respect to any (i) claim against the Debtors **other than Assumed Liabilities**. . . .

(Doc. 2968 ¶ 47) (emphasis added).

7. By specifically carving claims pertaining to Assumed Liabilities out of the

injunction in Paragraph 47, this provision obviously authorizes claims relating to Assumed Liabilities and, at the very minimum, would permit an interested party to request the Court to confirm what is meant by the term “Assumed Liabilities.” Indeed, why else would the Court have indicated its willingness to resolve disputes arising under the ARMSPA, had it not contemplated that interpretational disputes would arise? (*See* Doc. 2968 ¶ 71.)

8. New GM’s First Counterclaim purports to sound in “Declaratory Judgment” and “Injunction.” The request for an additional injunction is premised on the assertion that New GM has suffered and will suffer injury as a result of Plaintiffs’ alleged violations of the injunctive provisions of the Sale Approval Order. As explained above, this claim fails because Plaintiffs’ request for an interpretation of the ARMSPA does not violate the plain language of the injunction in the Sale Approval Order.

9. New GM’s request for a declaratory judgment fails as a matter of law because New GM’s interpretation of the term “Assumed Liability” under the ARMSPA is incorrect as a matter of law, for the reasons detailed in Plaintiffs’ Complaint herein. The proper interpretation of this term is the ultimate issue for resolution by the Court and is the subject of the parties’ cross-motions for summary judgment, which currently are scheduled for hearing before the Court on March 25, 2010.

10. Finally, New GM’s Second Counterclaim seeks money damages for “Contempt.” This claim fails for the same reasons as the first Counterclaim (explained above) and for the additional reason that “[t]here is no such thing as an independent cause of action for civil contempt.” *Solow v. Delit*, 1993 WL 322838, *5 (S.D. N.Y., August 16, 1993) (citing *C.W. Blalock, Jr. v. United States*, 844 F.2d 1546, 1550 (11th Cir. 1988)). Even assuming *arguendo* that civil contempt could form the basis of a separate cause of action, New GM has not pleaded

and could not demonstrate that the provisions of the ARMSPA upon which it relies are so unambiguous as to warrant a contempt sanction. *See In re Safety-Kleen*, 331 B.R. 605 (Bankr. D. Del. 2005) (dismissing contempt claim where sale order did not clearly and unequivocally bar pursuit of declaration of assumed liability). Indeed, even New GM has now requested a declaration as to the proper interpretation of the ARMSPA. Accordingly, New GM's Second Counterclaim should be dismissed.

WHEREFORE, Counter-Defendants respectfully request that the Court dismiss New GM's Counterclaims, and that it grant such further relief as deemed appropriate.

Dated: December 18, 2009

Respectfully submitted,

By: /s/ Mark L. Brown

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CERTIFICATE OF SERVICE

I hereby certify that on December 18, 2009, I electronically filed Motion to Dismiss Counterclaims with the Clerk of Court using the CM/ECF system, which will send notification of such filings(s) to the following:

Gregory Oxford
goxford@icclawfirm.com

By: /s/ Mark L. Brown

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