UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re	:	**Chapter 11 Case No.**
MOTORS LIQUIDATION COMPANY, *et al.*, f/k/a General Motors Corp., *et al.*	:	**09-50026 (REG)**
Debtors.	:	**(Jointly Administered)**
KELLY CASTILLO, NICHOLE BROWN, BRENDA ALEXIS DIGIAN DOMENICO, VALERIE EVANS, BARBARA ALLEN, STANLEY OZAROWSKI, AND DONNA SANTI,	:	**Adv. Proc. No. 09-00509**
	:	**Return Date: March 25, 2010**
	:	**Time: 9:45 a.m.**
Plaintiffs,	:	
v.	:	
General Motors Company, f/k/a New General Motors Company, Inc.,	:	
Defendant.	:	
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.	:	

NEW GM'S MEMORANDUM IN OPPOSITION
TO PLAINTIFFS' MOTION TO DISMISS COUNTERCLAIMS

Defendant and Counterclaimant General Motors LLC ("New GM") respectfully submits this memorandum in opposition to plaintiffs' motion to dismiss its counterclaims ("Motion").

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PRELIMINARY STATEMENT

New GM has asserted two counterclaims against plaintiffs and their counsel. The first seeks (a) a declaration that New GM has no responsibility or liability whatsoever under the pre-petition Settlement between plaintiffs and Motors Liquidation Company ("MLC"), formerly known as General Motors Corporation, and (b) a permanent injunction forbidding plaintiffs and their counsel from continuing to prosecute their pre-petition claims under the MLC Settlement against New GM. The second counterclaim seeks compensation for New GM's attorneys' fees and costs incurred in defending this case which plaintiffs are prosecuting contumaciously in flat violation of the injunctive provisions of the Sale Approval Order.

Plaintiffs have moved to dismiss both counterclaims on the erroneous ground that the MLC Settlement is an "Assumed Liability" under the ARMSPA and, if they are wrong, on the alternative grounds (1) that they are seeking only declaratory as opposed to coercive relief so that, supposedly, they are not seeking to "enforce" the Settlement against New GM and (2) that the ARMSPA and Sale Approval Order do not clearly and unambiguously bar the prosecution of this proceeding. These arguments ignore the narrow and very clear definition of the standard warranty obligations which are the only warranty liabilities which New GM assumed under section 2.3(a)(vii)(A) of the ARMSPA. As confirmed by paragraph 56 of the Sale Approval Order, this definition does not include the Settlement as an "Assumed Liability." Plaintiffs also are ignoring the equally clear and unambiguous terms of paragraphs 8 and 47 of the Sale Approval Order, which bar the assertion of *any* claims against New GM based on the pre-petition Settlement, whether the relief sought is declaratory, coercive or otherwise.

ARGUMENT

I. THE SETTLEMENT OBVIOUSLY IS NOT AN "ASSUMED LIABILITY"

In response to plaintiffs' far-fetched claim that the Settlement is an Assumed Liability under ARMSPA § 2.3(a)(vii)(A), New GM does not repeat, but instead incorporates by reference pertinent portions of its memorandum in support of its summary judgment motion (pp. 3-8) and its opposition to plaintiffs' motion for partial summary judgment (pp. 1 - 8). The Settlement

under the clear terms of the ARMSPA and Sale Approval Order is not one of the standard warranty obligations which New GM assumed. The Settlement therefore remains the exclusive responsibility of MLC. There is simply no room for any reasonable dispute in this regard. Thus, New GM is entitled to a declaratory judgment and permanent injunction protecting it against any liability or future defense costs in this or any related proceeding. And, as discussed below, because the Settlement so clearly is *not* an Assumed Liability, New GM also is entitled to recover its attorneys' fees and costs incurred in defending this contumacious proceeding.

II. THE SALE APPROVAL ORDER ENJOINS PLAINTIFFS' CLAIMS, REGARDLESS OF THE FORM OF RELIEF THEY SEEK

As a fallback, plaintiffs argue that, even if the Settlement is not an Assumed Liability, the injunctive provisions of the Sale Approval Order do not bar their prayer for an "interpretation" of pertinent provisions of the ARMSPA.

They are wrong.

First, apart from the indisputable and, indeed, admitted fact that plaintiffs' ultimate and obviously prohibited goal is to obtain payment from New GM of their pre-petition claims under the MLC Settlement,[1] the injunctive provisions of the Sale Approval Order expressly reach *all* pre-petition claims, regardless of the form of relief being sought.

Most obviously, Paragraph 8 succinctly provides that "***all*** … ***litigation claimants*** … ***holding*** … ***claims*** … ***and other interests of any kind or nature whatsoever*** … ***against*** … ***[MLC]*** … arising under or out of, in connection with, or in any way relating to, [MLC], 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 [New GM]*** … ***such persons' or entities'*** … ***claims*** … ***and other interests***…." Plaintiffs here obviously are "litigation claimants" who are "asserting" against New GM "claims" and "other

[1] *See* Plaintiffs' Memorandum in Support of Motion for Partial Summary Judgment, p. 1 ("As of the date of the Closing, New GM agreed to 'assume ***and thereafter pay or perform*** as and when due, or otherwise discharge, all of the Assumed Liabilities.'" (emphasis added); *see also* Amended Complaint, ¶¶ 38-40, 52 & Recital B at page 19).

interests" which they "hold[] … against … [MLC]," *i.e.*, the Final Judgment which approved and required implementation by MLC of the Settlement. Without more, and regardless of plaintiffs' prayer for declaratory relief (which, if granted, would inevitably lead to coercive relief enforcing the Settlement), they are directly and flagrantly violating the injunction

Plaintiffs' violation of paragraph 47 of the Sale Approval Order is equally clear. It provides in pertinent part as follows:

> Effective upon the Closing …all persons and entities are forever prohibited and enjoined from … (a) commencing or continuing any action or other proceeding pending or threatened against [MLC] as against [New GM]…[or] (b) enforcing … any judgment against [MLC] as against [New GM]…."

This proceeding is obviously an attempt to "continue" the class action "pending … against [MLC] as against [New GM]" and to enforce against New GM the Final Judgment which approved the MLC Settlement. While it is technically true that a declaratory judgment holding that New GM had assumed MLC's liability under the Settlement would not, in and of itself, permit plaintiffs to levy execution on New GM's assets, it would certainly have an exactly equivalent economic effect unless New GM were willing to directly violate the terms of a final and binding judgment (as plaintiffs have chosen to do here) and force plaintiffs to move for a coercive judgment.[2] In this context, the distinction between declaratory and coercive relief lacks any true significance, as plaintiffs' counsel surely appreciate.

There is, therefore, no question that plaintiffs' counsel, perhaps even more clearly than the lay plaintiffs, are directly and flagrantly violating the injunctive provisions of the Sale Approval Order, even after receiving multiple written warnings which they surely understood. If anything, plaintiffs' counsel have an even larger economic interest than class members in the

[2] *See* 28 U.S.C. § 2202, which provides as follows: "Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against an adverse party whose rights have been determined by such judgment.

hoped-for fruits of their violations, having been awarded more than $4.4 million in attorneys' fees under the Final Judgment against MLC. Complaint, Exhibit A, ¶ 11.[3]

III. PLAINTIFFS' CASE AUTHORITIES DO NOT SUPPORT THEIR POSITION

Grasping at straws, plaintiffs cite three cases which supposedly protect them from contempt liability because, assertedly, there is no independent cause of action for civil contempt and the ARMSPA is not sufficiently "clear and unambiguous" in providing that the Settlement is *not* an "Assumed Liability." None of these cases gets plaintiffs anywhere.

Plaintiffs first rely on an out-of-context quotation from *Solow v. Delit*, 93 WL 322838 at *5, 1993 U.S.Dist.LEXIS 11362 at *15 (S.D.N.Y.1993) that "[t]here is no such thing as an independent cause of action for civil contempt," citing *Blalock v. United States*, 844 F.2d 1546, 1550 (11th Cir.1988). Yet *Solow* held that the plaintiffs in that case *could* seek a contempt citation from the court (there, a state court) which had issued the order which the Attorney

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[3] Plaintiffs' counsel initially claimed that they were not required to respond to the counterclaims because they had not been served with summons and because New GM allegedly had not complied with procedural requirements for joining them as parties to this proceeding. Since counsel demanded it, New GM has requested issuance of a summons and will serve them with it as soon as it is issued by the Court.

In every other respect, plaintiffs' counsel's position is obviously incorrect. As reflected in the Advisory Committee's Notes to the 1966 amendments to Rule 13(h), "a party pleading a counterclaim …or may join additional persons when the conditions for permissive joinder of parties under Rule 20 are satisfied." *See OMOA Wireless, Inc. v. United States*, 244 F.R.D. 303, 305-06 (M.D.N.C.2007) (Rule 13(h) "allows persons other than parties to the original action to be joined to a counterclaim or cross-claim in accordance with Rules 19 and 20, governing party joinder"). Rule 20(a) permits joinder of non-parties "if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all [counterclaim] defendants will arise in the action." Here, where plaintiffs and their counsel are engaged in exactly the same contumacious conduct, Rule 20(a) clearly permits joinder and, contrary to the implication of plaintiffs' motion, New GM clearly is *not* required to obtain leave of Court to join counsel as counterdefendants. *See Vermont Castings, Inc. v. Evans Products Co.*, 510 F. Supp. 940 (D.Vt.1981). Finally, contrary to the charge that New GM's counterclaims are actually "cross claims," they are in fact counterclaims because they are asserted against adverse parties (plaintiffs) rather that "co-parties" (which plaintiffs and their counsel clearly are not). *See Pitcavage v. Mastercraft Boat Co.*, 632 F.Supp. 842, 849 (M.D.Pa. 1985); *Federal Land Bank of St. Louis v. Cupples Bros.*, 116 F.R.D. 63, 65 (E.D.Ark.1987).

Defendants in that case were alleged to have violated, which is exactly what New GM is doing here in seeking to enforce the Sale Approval Order. 1993 U.S. Dist.LEXIS at *14-15.

Blalock is even further afield. The issue in that case was whether the target of a federal grand jury investigation could bring an injunctive proceeding pursuant to Fed.R.Crim.P. 6(e)(2) to remedy an alleged violation of grand jury secrecy. Under compulsion of a prior Fifth Circuit holding, the Eleventh Circuit held per curiam that the target could bring such a proceeding under Rule 6(e)(2), but that he had not made the requisite showing to obtain an injunction.[4] Plaintiffs here quote the per curiam opinion – again, out-of-context – to suggest that New GM cannot initiate a civil contempt proceeding arising out of plaintiffs' violation of the injunctive provisions of the Sale Approval Order. This argument completely misreads *Blalock*. Here is the complete paragraph from which plaintiffs and the *Solow* court selectively quote (words quoted by plaintiffs are in bold italics):

> "Appellant cites *In re Grand Jury Investigation (Lance), 610 F.2d 202 (5th Cir.1980)*, as authority for his contention that, on these facts, Rule 6(e)(2) gives him the right to enjoin the grand jury proceedings. In *Lance*, the Fifth Circuit, ignoring the question whether a target of a grand jury investigation has the right to bring an action under the Rule to enjoin the unauthorized disclosure of grand jury matters, held that a target has the right to ask the district court to require anyone wrongfully disclosing grand jury matters to show cause why he should not be held in civil contempt and sanctioned. In reaching this holding, the *Lance* court necessarily answered in the affirmative the question it chose to ignore-whether Rule 6(e)(2) gives a target a right of action for injunctive relief against the members of the grand jury and the prosecutors assisting them in their investigation. We make this statement because ***there is no such thing as an independent cause of action for civil contempt***; civil contempt is a device used to coerce compliance with an in personam order of the court which has been entered in a pending case. Thus, in holding that a target may seek civil contempt sanctions for a violation of Rule 6(e)(2), *Lance* stands for the proposition that a target may bring suit for injunctive relief against the individuals subject to Rule 6(e)(2) and may invoke the district court's contempt power to coerce compliance with any injunctive order the court grants." 844 F.2d at 1550-51 (citations and footnote omitted).

[4] In a scholarly special concurrence in the judgment, both judges who signed the per curiam opinion (the third judge had recused himself) expressed the view that, if not for the binding *Lance* precedent, the district court should have dismissed the proceeding for civil contempt sanctions under Fed.R.Civ.P. 12(b)(6) because Rule 6(e)(2) only authorizes *criminal* contempt sanctions for violation of grand jury secrecy. 844 F.2d at 1452-62.

Of course, the proper construction of Criminal Rule 6(e)(2) has nothing to do with this case. Moreover, the quoted paragraph if anything supports New GM's position in recognizing the general principle that where an injunction is violated, the victim may call the violation to the attention of the court which issued the injunction and seek civil contempt sanctions. This is the functional equivalent of "a right of action for injunctive relief" against the violator to coerce compliance – precisely the right New GM is asserting here. The special concurrence by both judges who signed the per curiam opinion recognizes this principle even more clearly:

> "***The purpose of civil contempt*** … ***is to force compliance with an injunctive order issued on behalf of the complainant***; … ***The party in whose favor the order has been entered initiates the civil contempt proceeding***. Representing that his opponent has refused to obey the court's order, the party moves the court to invoke its civil contempt power to coerce the opponent's compliance with the order. If the motion makes out a prima facie case of noncompliance, the court issues an order requiring the opponent to show cause why he should not be held in civil contempt and sanctioned … for refusing to obey the underlying order. If the opponent advances no lawful excuse for his disobedience and indicates no willingness to bring himself into immediate compliance with the court's underlying order, the court will adjudge him in civil contempt and impose the sanction most likely to achieve compliance…." 844 F.2d at 1559 (Tjoflat, specially concurring) (emphasis added; citations and footnotes omitted).

By asserting its counterclaims against plaintiffs and their counsel GM is doing is *exactly* what Judge Tjoflat said that a complainant may do when injured by the violation of an injunction.[5]

Finally, citing *In re Safety-Kleen Corp.*, 331 B.R. 605 (Bankr.D.Del.2005), plaintiffs say they cannot be held liable for civil contempt because the ARMSPA and Sale Approval Order were not clear enough in limiting assumed warranty liability to the terms of Saturn's standard warranty. The situation in *Safety-Kleen*, however, was almost the opposite of the facts here. A section 363 purchaser, plaintiff Clean Harbors, sought a declaratory judgment that it *had not*

[5] Although the special concurrence in *Blalock* refers to the sanctions of fine and imprisonment, it is well-settled that civil contempt sanctions may also be compensatory. *See McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 191, 69 S.Ct. 497, 93 L.Ed. 599 (1949) (courts have inherent authority to use the civil contempt power "to enforce compliance with an order of the court or to compensate for losses or damages sustained by reason of noncompliance") (emphasis added); *New York State NOW v. Terry*, 159 F.3d 86, 96 (2d Cir.1998) ("A finding that a contemnor's misconduct was willful strongly supports granting attorney's fees and costs to the party prosecuting the contempt").

assumed the debtor's environmental liabilities in connection with a large Superfund site, as well a contempt citation against the defendants who were asserting that Clean Harbors *had* assumed the subject liabilities. There, in contrast to this case, the language of the acquisition agreement (and weighty extrinsic evidence) pointed clearly to the conclusion that Clean Harbors *had* assumed the liabilities in question. Here, it is plaintiffs' request for a declaration that the section 363 purchaser, New GM, *did* assume the subject liability which clashes with the plain language of the acquisition agreement (the ARMSPA) and the Sale Approval Order showing that the Settlement was *not* an Assumed Liability. Simply put, the Delaware Bankruptcy Court's holdings in *Safety-Kleen*, first, that the language of the Acquisition Agreement was not so "clear and unambiguous" as to support a contempt charge, *see* 331 B.R. 614, and, later, that the defendants were entitled to summary judgment rejecting Clean Harbor's claim that it had not assumed the subject liabilities, *see In re Safety-Kleen Corp.*, 380 B.R. 716 (Bankr.D.Del. 2008), have nothing at all to do with the clarity of the pertinent provisions of the ARMSPA and Sale Approval Order which clearly and unambiguously support the contempt charge here.

CONCLUSION

For all the foregoing reasons, New GM respectfully urges that plaintiffs' motion to dismiss should be denied.

New York, New York
Dated: January 22, 2010

[s] Gregory R. Oxford

ISAACS CLOUSE CROSE & OXFORD LLP
21515 Hawthorne Boulevard, Suite 950
Torrance, California 90503
Telephone: (310) 316-1990
Facsimile: (310) 316-1330

Attorneys for General Motors LLC