UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

In re:	:	
	:	Chapter 11
MOTORS LIQUIDATION COMPANY, et:	:	
al., f/k/a General Motors Corp., et al.	:	Case No. 0950026 REG)
	:	
Debtors	:	

OBJECTION TO STIPULATION AND AGREED ORDER RESOLVING MOTION OF SARAJIJAN GILVARY FOR RELIEF FROM THE AUTOMATIC STAY TO CONTINUE A SEPARATE LITIGATION

Pompey Dodge, Inc. ("Pompey Dodge"), by its undersigned attorney, hereby files this Objection to the proposed Stipulation and Agreed Order Resolving Motion of Sarajuan Gilvary for Relief from the Automatic Stay to Continue a Separate Litigation.

Pompey requests the Court sustain Pompey's Objection to this Stipulation and ***reject*** the Agreed Order as this Court has no jurisdiction over the matter which is pending in the Court of Common Pleas of Philadelphia County, Pennsylvania.

I.
BACKGROUND

1. The state court matter[1] involves personal injuries suffered in a single vehicle accident on April 16, 2005. Plaintiff contends that she was the front passenger in a 1995 Buick Regal owned and driven by Richard Gross. On that day, Plaintiff avers that the driver Richard Gross fell asleep at the wheel and lost control of the car. A copy of the state court docket is attached hereto as Exhibit A.

2. Plaintiff, in the passenger seat that she claims was in the reclined position, claims that she was injured in the single vehicle accident. Plaintiff argues that the vehicle

was defective in that it failed to have proper warnings within the vehicle to warn of the dangers of occupying the passenger seat in a reclined position while the vehicle is in motion.

3. Plaintiff has brought a strict liability, negligence and breach of warranty claims against General Motors and strict liability and breach of warranty (no negligence claim) against Defendant Pompey Dodge. Pompey Dodge is but one seller in a chain of eight sales of the vehicle at issue.

- 1995 vehicle is manufactured by General Motors
- April 15, 1995, vehicle sold to and registered by John Doe Rental Company
- March, 1996, vehicle sold by John Doe Rental Company at auction.
- Vehicle owned by private individual March 6, 1998 through March, 2003
- March 18, 2003, vehicle sold by Brush & Palette Auto to Frank Iorio's Auto Sales
- March 25, 2003, vehicle sold by Frank Iorios Auto Sales to Pompey Dodge
- April 22, 2003, vehicle sold by Pompey Dodge to private individual
- January 13, 2005, vehicle traded-in at Pompey Dodge
- January 25, 2005, vehicle sold by Pompey Dodge through Northeast Auto Auction, Inc. to Susquehanna Auto Sales
- February 7, 2005, vehicle sold by Susquehanna Auto Sales to America's Choice Cars & Credit
- March 25, 2005, vehicle sold by America's Choice Cars & Credit to Richard Gross
- Date of accident - April 16, 2005

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[1] Plaintiff filed an action the Court of Common Pleas of Philadelphia County, Pennsylvania on March 29, 2007 in the matter of *Gilvary v. General Motors Corporation, et al.* March Term, 2007 No. 3736.

4. Pompey Dodge did not sell the vehicle to Richard Gross. The vehicle was purchased by Richard Gross from America's Choice Cars & Credit and Richard Gross was the registered owner on the day of the accident.

5. It is undisputed that Pompey Dodge, a dealership affiliated with Chrysler Corporation, did not manufacture or design this GM vehicle or any of its systems. Defendant Pompey Dodge made no change to the vehicle while it was in its possession. Pompey Dodge's inclusion in this matter is solely based on its pass through position as a seller of an allegedly defective vehicle. As such, Pompey Dodge has requested complete indemnification from the manufacturer General Motors. The only theory of liability against Pompey Dodge is as a seller of a defectively designed and/or manufactured GM vehicle.

6. General Motors sought bankruptcy protection under Chapter 11 on June 1, 2009. Pursuant to 11 U.S.C.A. Section 362, an automatic stay was imposed on all claims against General Motors Corporation. The automatic stay was noticed on the state court docket on June 11, 2009.

7. By Motion filed on September 8, 2009 in the state court action, Plaintiff Sarajuan Gilvary requested the state court to sever General Motors from the action so that Plaintiff could proceed against Pompey Dodge. A copy of the Motion filed by Plaintiff is attached hereto as Exhibit B.

8. On September 25, 2009, Pompey Dodge filed a response to the Plaintiff's Motion in state court. A copy of that response is attached hereto as Exhibit C.

9. By Order dated October 21, 2009, the state court **denied** Plaintiff's Motion to sever General Motors from the state court action. A copy of the Order is attached hereto as Exhibit D.

10. Plaintiff now seeks relief from the automatic stay in this bankruptcy case to proceed against Pompey Dodge only in the state court action when the state court has already ruled on the issue.

11. In essence, Plaintiff Sarajuan Gilvary, not happy with the decision of the state court, which has proper jurisdiction over the issue, brings the matter to this Bankruptcy Court that has no jurisdiction over the Defendant Pompey Dodge to seek relief that was already denied by the state court.

12. The automatic stay pursuant to 11 U.S.C.A. Section 362 is in place in the state court. This Bankruptcy Court has no other involvement in the state court case as the state court has continued that stay in the state court action.

II.

THE MATTER HAS BEEN DECIDED BY THE STATE COURT AND IS NOT PROPERLY BEFORE THIS BANKRUPTCY COURT

In essence, Plaintiff seeks herein to do an "end around" the Order issued by the state court judge that she did not like by requesting this Bankruptcy Court to approve a Stipulation and Agreed Order under the guise of "relief" from the automatic stay. There is no "relief" and what Plaintiff seeks is an Order severing GM from the state court action from this Bankruptcy Court when the state court that has jurisdiction over the issue has already denied her request.

The issue of severance of General Motors from the state court action in *Gilvary v. GM, et al*, Court of Common Pleas Philadelphia County, Pennsylvania March Term,

2007 No. 3736 is a matter to be decided by the state court pursuant to application of state law. In this case, the matter has been decided by Order dated October 21, 2009 wherein the Court of Common Pleas, Manfredi, J. denied Plaintiff Gilvary's request to sever GM from the state court action. Plaintiff Gilvary cannot now come to this Bankruptcy Court seeking another order that is contrary to that which is already of record. This Bankruptcy Court has jurisdiction over the Debtor only - General Motors. As part of the bankruptcy that was filed, the automatic stay pursuant to Section 362 of the Bankruptcy Code was put into effect. Any relief from the stay that may be considered by this Court is relief that deals only with the Debtor.

The relief requested by Plaintiff Gilvary herein and which is the subject of the Stipulation and Agreed Order is not specifically directed to relief from the automatic stay pursuant to Section 362 of the Bankruptcy Code. The Debtors acknowledge in the Stipulation *"WHEREAS, the Debtors do not believe that relief from the automatic stay is necessary to proceed with the Litigation solely against non-debtor co-defendant Pompey Dodge...."*

This is a matter that is not properly before this Bankruptcy Court. This is a matter that is properly before the state court and which Plaintiff Gilvary acknowledges is properly before the state court as she filed her original motion to sever with that Court. Then being dissatisfied with the Order handed down by the state court, she chooses to ignore the state court's position and file the same Motion with this Court.

III
CONCLUSION

Pompey objects to the Stipulation and Agreed Order as proposed and requests this Court ***reject*** the Stipulation and proposed Agreed Order as it is not a proper request for relief from the automatic stay pursuant to Section 362 of the Bankruptcy Code.

Respectfully Submitted,
KENNEDY, CAMPBELL, LIPSKI & DOCHNEY

NANCY E. CAMPBELL, ESQUIRE
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Direct Dial: 215 430-6385

EXHIBIT "A"

Docket Report

Case Description

Case ID: 070303736
Case Caption: GILVARY VS GENERAL MOTORS CORP ETAL
Filing Date: Thursday , March 29th, 2007
Location: CH - City Hall
Case Type: 2P - PRODUCT LIABILITY
Status: CLDBR - DEFERRED - BANKRUPTCY

Related Cases

No related cases were found.

Case Event Schedule

No case events were found.

Case Parties

Seq #	Assoc	Expn Date	Type	ID	Name
1			ATTORNEY FOR PLAINTIFF	A66003	ZAJAC, ERIC G
Address:	ZAJAC & ARIAS, LLC 1818 MARKET STREET 30TH FLOOR PHILADELPHIA PA 19103 (215)575-7615 (215)575-7640 - FAX		**Aliases:**	*none*	
2	1		PLAINTIFF	@5703974	GILVARY, SARAH
Address:	834 LINDEN ST AVOCA PA 18641		**Aliases:**	*none*	
3	10		DEFENDANT	I148	GENERAL MOTORS CORP
Address:	C/O CT CORP 1635 MARKET ST		**Aliases:**	*none*	

	PHILADELPHIA PA 19103				
4	9		DEFENDANT	@5703978	POMPEY DODGE INC
Address:	303 WYOMING AVE KINGSTON PA 18704		**Aliases:**	*none*	
5		03-MAY-2007	TEAM LEADER	J359	TERESHKO, ALLAN L
Address:	231 CITY HALL PHILADELPHIA PA 19107 (215)686-7324		**Aliases:**	*none*	
6			ATTORNEY FOR DEFENDANT	A28246	GRAY, EDWARD A
Address:	ECKERT SEAMANS CHERIN MELLOTT TWO LIBERTY PLACE 50 S 16TH STREET 22ND FLOOR PHILADELPHIA PA 19102 (215)851-8400 (215)851-8383 - FAX		**Aliases:**	*none*	
7		13-MAY-2008	ATTORNEY FOR DEFENDANT	A76437	WALKER, DYLAN J
Address:	ECKERT SEAMANS CHERIN MELLOTT TWO LIBERTY PLACE 50 S 16TH STREET 22ND FLOOR PHILADELPHIA PA 19102 (215)851-8400 (215)851-8383 - FAX		**Aliases:**	*none*	

8			TEAM LEADER	J280	MANFREDI, WILLIAM J
Address:	510 CITY HALL PHILADELPHIA PA 19107 (215)686-3718		**Aliases:**	*none*	
9			ATTORNEY FOR DEFENDANT	A36247	CAMPBELL, NANCY E
Address:	1818 MARKET STREET SUITE 2510 PHILADELPHIA PA 19103 (215)430-6385 (215)430-6351 - FAX		**Aliases:**	*none*	
10			ATTORNEY FOR DEFENDANT	A56344	KINKOPF, MICHAEL P.
Address:	ECKERT SEAMANS CHERIN MELLOTT TWO LIBERTY PLACE 50 S 16TH STREET 22ND FLOOR PHILADELPHIA PA 19102 (215)851-8400 (215)851-8383 - FAX		**Aliases:**	*none*	

Docket Entries

☐ **Check for Threaded Docket**
This feature will reduce the docket to motion related entries only.

Filing Date/Time	Docket Type	Filing Party	Disposition Amount	Approval/ Entry Date
29-MAR-2007 04:13 PM	ACTIV - ACTIVE CASE			29-MAR-2007 04:20 PM
Docket Entry:	*none.*			

29-MAR-2007 04:43 PM	CIVIJ - COMMENCEMENT CIVIL ACTION JURY	ZAJAC, ERIC G		02-APR-2007 12:00 AM
Docket Entry:	*none.*			
29-MAR-2007 04:43 PM	WRSUM - PRAE TO ISSUE WRIT OF SUMMONS	ZAJAC, ERIC G		02-APR-2007 12:00 AM
Docket Entry:	PRAECIPE TO ISSUE WRIT OF SUMMONS FILED. WRIT OF SUMMONS ISSUED.			
29-MAR-2007 04:45 PM	CLWCM - WAITING TO LIST CASE MGMT CONF	ZAJAC, ERIC G		02-APR-2007 12:00 AM
Docket Entry:	*none.*			
30-MAR-2007 04:43 PM	SSCG2 - SHERIFF'S SURCHARGE 2 DEFTS	ZAJAC, ERIC G		02-APR-2007 12:00 AM
Docket Entry:	*none.*			
30-MAR-2007 04:46 PM	JURYT - JURY TRIAL PERFECTED	ZAJAC, ERIC G		02-APR-2007 12:00 AM
Docket Entry:	*none.*			
11-APR-2007 04:08 PM	AFDVT - AFFIDAVIT OF SERVICE FILED			11-APR-2007 12:00 AM
Docket Entry:	OF WRIT OF SUMMONS BY PERSONAL SERVICE UPON GENERAL MOTORS CORPORATION ON 04-02-07.			
27-APR-2007 03:09 PM	ENAJD - ENTRY OF APPEAR/JURY DEMAND	GRAY, EDWARD A		30-APR-2007 12:00 AM

Docket Entry:	ENTRY OF APPEARANCE OF EDWARD GRAY FILED ON BEHALF OF DFT GENERAL MOTORS CORP.

27-APR-2007 03:09 PM	RULEP - RULE TO FILE COMPLAINT	GRAY, EDWARD A		30-APR-2007 12:00 AM
Docket Entry:	PRAECIPE AND RULE FILED UPON PLAINTIFF(S) TO FILE A COMPLAINT WITHIN TWENTY (20) DAYS OR SUFFER JUDGMENT OF NON PROS FILED BY GENERAL MOTORS CORP.			
21-MAY-2007 04:43 PM	CMPLT - COMPLAINT FILED NOTICE GIVEN	ZAJAC, ERIC G		22-MAY-2007 12:00 AM
Docket Entry:	COMPLAINT WITH NOTICE TO DEFEND WITHIN TWENTY (20) DAYS AFTER SERVICE IN ACCORDANCE WITH RULE 1018.1 FILED.			
31-MAY-2007 09:16 AM	CLLCM - LISTED FOR CASE MGMT CONF			31-MAY-2007 09:16 AM
Docket Entry:	*none.*			
02-JUN-2007 12:01 AM	CLNGV - NOTICE GIVEN			02-JUN-2007 12:01 AM
Docket Entry:	*none.*			
11-JUN-2007 03:27 PM	JURYT - JURY TRIAL PERFECTED	GRAY, EDWARD A		12-JUN-2007 12:00 AM
Docket Entry:	*none.*			
11-JUN-2007 03:27 PM	ANCOM - ANSWER TO COMPLAINT FILED	GRAY, EDWARD A		12-JUN-2007 12:00 AM
Docket Entry:	ANSWER TO PLAINTIFF'S COMPLAINT WITH NEW MATTER FILED BY DEFENDANT GENERAL MOTORS CORP.			
20-JUN-2007 02:32 PM	CLCCC - CASE MGMT CONFERENCE	PELLETREAU, CHARLES		20-JUN-2007 02:32 PM

	COMPLETED			
Docket Entry:	*none.*			
20-JUN-2007 02:32 PM	CMOIS - CASE MANAGEMENT ORDER ISSUED			20-JUN-2007 02:32 PM
Docket Entry:	CASE MANAGEMENT ORDER COMPLEX TRACK - AND NOW, 20-JUN-2007, it is Ordered that: 1. The case management and time standards adopted for complex track cases shall be applicable to this case and are hereby incorporated into this Order. 2. All discovery on the above matter shall be completed not later than 06-OCT-2008. 3. Plaintiff shall identify and submit curriculum vitae and expert reports of all expert witnesses intended to testify at trial to all other parties not later than 03-NOV-2008. 4. Defendant and any additional defendants shall identify and submit curriculum vitae and expert reports of all expert witnesses intended to testify at trial not later than 01-DEC-2008. 5. All pre-trial motions shall be filed not later than 01-DEC-2008. 6. A settlement conference may be scheduled at any time after 05-JAN-2009. Prior to the settlement conference all counsel shall serve all opposing counsel and file a settlement memorandum containing the following: (a) A concise summary of the nature of the case if plaintiff or of the defense if defendant or additional defendant; (b) A statement by the plaintiff or all damages accumulated, including an itemization of injuries and all special damages claimed by categories and amount;(c) Defendant shall identify all applicable insurance carriers, together with applicable limits of liability. 7. A pre-trial conference will be scheduled any time after 02-MAR-2009. Fifteen days prior to pre-trial conference, all counsel shall serve all opposing counsel and file a pre-trial memorandum containing the following:(a) A concise summary of the nature of the case if plaintiff or the defense if defendant or additional defendant;(b) A list of all witnesses who may be called to testify at trial by name and address. Counsel should expect witnesses not listed to be precluded from testifying at trial;(c) A list of all exhibits the party intends to offer into evidence. All exhibits shall be pre-numbered and shall be exchanged among counsel prior to the conference. Counsel should expect any exhibit not listed to be precluded at trial;(d) Plaintiff shall list an itemization of injuries or damages sustained together with all special damages claimed by category and amount. This list shall include as appropriate, computations of all past lost earnings and future lost earning capacity or medical expenses together with any other unliquidated damages claimed; and (e) Defendant shall state its position regarding damages and shall identify all applicable insurance carriers, together with applicable limits of liability;(f) Each counsel shall provide an estimate of the anticipated length of trial. 8. It is expected that the case will be ready for trial 06-APR-2009, and counsel should anticipate trial to begin expeditiously thereafter. 9. All counsel are under a			

	continuing obligation and are hereby ordered to serve a copy of this order upon all unrepresented parties and upon all counsel entering an appearance subsequent to the entry of this order. ...BY THE COURT: WILLIAM J. MANFREDI, J.			
20-JUN-2007 02:32 PM	CLLSC - LISTED FOR SETTLEMENT CONF			20-JUN-2007 02:32 PM
Docket Entry:	*none.*			
20-JUN-2007 02:32 PM	CLLPT - LISTED FOR PRE-TRIAL CONF			20-JUN-2007 02:32 PM
Docket Entry:	*none.*			
20-JUN-2007 02:32 PM	CLLTR - LISTED FOR TRIAL			20-JUN-2007 02:32 PM
Docket Entry:	*none.*			
02-AUG-2007 03:16 PM	ENAJD - ENTRY OF APPEAR/JURY DEMAND	CAMPBELL, NANCY E		03-AUG-2007 12:00 AM
Docket Entry:	ENTRY OF APPEARANCE OF NANCY E. CAMPBELL, ESQ. FILED ON BEHALF OF DFT. POMPEY DODGE, INC.			
11-OCT-2007 10:26 AM	ANCOM - ANSWER TO COMPLAINT FILED	CAMPBELL, NANCY E		12-OCT-2007 12:00 AM
Docket Entry:	ANSWER TO PLAINTIFF'S COMPLAINT WITH NEW MATTER FILED BY DEFENDANT POMPEY DODGE INC.			
19-DEC-2007 03:25 PM	ORDER - ORDER ENTERED/236 NOTICE GIVEN	MANFREDI, WILLIAM J		19-DEC-2007 12:00 AM
	UPON CONSIDERATION OF DEFENDANT'S MOTION TO COMPEL PLAINTIFF'S ANSWERS TO ITS INTERROGATORIES AND REQUEST FOR PRODUCTION OF DOCUMENTS, IT IS HEREBY ORDERED THAT SAID MOTION IS GRANTED AND PLAINTIFF			

Docket Entry:	SHALL SERVE ANSWERS TO DEFENDANT'S INTERROGATORIES AND RESPONSES TO DEFENDANT'S REQUEST FOR PRODUCTION OF DOCUMENTS WITHIN TWENTY (20) DAYS FROM THE DATE HEREOF OR SUFFER THE APPROPRIATE SANCTIONS UPON FURTHER APPLICATION TO THE COURT. BY THE COURT..... MANFREDI, J. 12-18-2007

31-DEC-2007 12:41 PM	RPNMP - PLTF REPLY TO NEW MATTER FILED	ZAJAC, ERIC G		02-JAN-2008 12:00 AM
Docket Entry:	PLAINTIFF(S) REPLY TO NEW MATTER OF DEFENDANT(S) POMPEY DODGE INC FILED.			

22-APR-2008 03:05 PM	CERTI - CERTIFICATION FILED			28-APR-2008 12:00 AM
Docket Entry:	CERTIFICATE PREREQUISITE TO SERVICE OF SUBPOENAS PURSUANT TO RULE 4009.22 FILED.			

13-MAY-2008 03:51 PM	WTAPP - WITHDRAWAL/ENTRY OF APPEARANCE	KINKOPF, MICHAEL P.		15-MAY-2008 12:00 AM
Documents:	WTAPP_25.pdf			
Docket Entry:	WITHDRAWAL OF APPEARANCE OF DYLAN WALKER, ESQ. AND ENTRY OF APPEARANCE OF MICHAEL P. KINKOPF, ESQ. ON BEHALF OF DFT. GENERAL MOTORS CORPORATION FILED.			

12-JUN-2008 03:20 PM	RPNMP - PLTF REPLY TO NEW MATTER FILED	ZAJAC, ERIC G		13-JUN-2008 12:00 AM
Documents:	RPNMP_26.pdf			
Docket Entry:	PLAINTIFF(S) REPLY TO NEW MATTER OF DEFENDANT(S) GENERAL MOTORS CORP FILED.			

04-AUG-2008 10:10 AM	CERTI - CERTIFICATION FILED			04-AUG-2008 12:00 AM
Documents:	CERTI_27.pdf			
Docket Entry:	CERTIFICATE PREREQUISITE TO SERVICE OF SUBPOENAS PURSUANT TO RULE 4009.22 FILED.			

22-AUG-2008 09:43 AM	CERTI - CERTIFICATION FILED			22-AUG-2008 12:00 AM
Documents:	CERTI_28.pdf			
Docket Entry:	CERTIFICATE PREREQUISITE TO SERVICE OF SUBPOENAS PURSUANT TO RULE 4009.22 FILED.			
22-SEP-2008 10:54 AM	MTEXR - MOT-FOR EXTRAORDINARY RELIEF	GENERAL MOTORS CORP,		23-SEP-2008 12:00 AM
Documents:	MTEXR_29.pdf			
Docket Entry:	05-08096705 RESPONSE DATE: 10/02/08			
26-SEP-2008 10:55 AM	CERTI - CERTIFICATION FILED			26-SEP-2008 12:00 AM
Documents:	CERTI_30.pdf			
Docket Entry:	CERTIFICATE PREREQUISITE TO SERVICE OF SUBPOENAS PURSUANT TO RULE 4009.22 FILED.			
30-SEP-2008 04:21 PM	CERTI - CERTIFICATION FILED			30-SEP-2008 12:00 AM
Documents:	CERTI_31.pdf			
Docket Entry:	CERTIFICATE PREREQUISITE TO SERVICE OF SUBPOENAS PURSUANT TO RULE 4009.22 FILED.			
03-OCT-2008 04:17 PM	CERTI - CERTIFICATION FILED			09-OCT-2008 12:00 AM
Documents:	CERTI_33.pdf			
Docket Entry:	CERTIFICATE PREREQUISITE TO SERVICE OF SUBPOENAS PURSUANT TO RULE 4009.22 FILED.			
03-OCT-2008 04:35 PM	MTASN - MOTION ASSIGNED			03-OCT-2008 04:35 PM
Docket Entry:	05-08096705 MOT-FOR EXTRAORDINARY RELIEF ASSIGNED TO JUDGE: MANFREDI, WILLIAM J. . ON DATE: OCTOBER 03, 2008			

23-OCT-2008 11:11 AM	ORDER - ORDER ENTERED/236 NOTICE GIVEN	MANFREDI, WILLIAM J		23-OCT-2008 11:11 AM
Docket Entry:	05-08096705 UPON CONSIDERATION OF PETITION FOR EXTRAORDINARY RELIEF AND ANY RESPONSES THERETO, IT IS HEREBY ORDERED AND DECREED THAT THE PETITION IS GRANTED, IN PART, AND DEADLINES FOR DISCOVERY, EXPERT DISCOVERY AND MOTIONS ARE EXTENDED THIRTY (30) DAYS. ALL OTHER DEADLINES IN THE CASE MANAGEMENT ORDER SHALL REMAIN UNCHANGED. BY THE COURT...MANFREDI, J. 10/23/08			
03-NOV-2008 03:08 PM	CERTI - CERTIFICATION FILED			10-NOV-2008 12:00 AM
Documents:	CERTI_35.pdf			
Docket Entry:	CERTIFICATE PREREQUISITE TO SERVICE OF SUBPOENAS PURSUANT TO RULE 4009.22 FILED.			
18-NOV-2008 12:50 PM	ORDER - ORDER ENTERED/236 NOTICE GIVEN	PANEPINTO, PAUL P		18-NOV-2008 12:00 AM
Documents:	ORDER_36.pdf			
Docket Entry:	UPON CONSIDERATION OF PLAINTIFF SARAH GILVARY'S MOTION TO COMPEL WRITTEN RESPONSE; AND UPON CONSIDERATION OF DEFENDANT'S RESPONSES THERETO, IT IS HEREBY ORDERED AND DECREED THAT PLAINTIFF'S MOTION IS GRANTED. SEE ORDER FOR TERMS. ....BY THE COURT: PANEPINTO, J. 11-18-08			
20-NOV-2008 02:15 PM	CERTI - CERTIFICATION FILED			20-NOV-2008 12:00 AM
Documents:	CERTI_37.pdf			
Docket Entry:	CERTIFICATE PREREQUISITE TO SERVICE OF SUBPOENAS PURSUANT TO RULE 4009.22 FILED.			
26-NOV-2008 02:22 PM	MTEXR - MOT-FOR EXTRAORDINARY RELIEF	ZAJAC, ERIC G		26-NOV-2008 02:23 PM

Documents:	Motion_CoverSheet_MTEXR_38.pdf MTEXR_38.pdf
Docket Entry:	70-08112070 RESPONSE DATE 12/08/2008. (FILED ON BEHALF OF SARAH GILVARY)

26-NOV-2008 04:11 PM	PRATT - PRAECIPE TO SUPPL/ATTACH FILED	ZAJAC, ERIC G		26-NOV-2008 04:58 PM

Documents:	PRATT_39.pdf
Docket Entry:	70-08112070 PRAECIPE TO SUPPLEMENT/ATTACH RE: MOT-FOR EXTRAORDINARY RELIEF FILED. (FILED ON BEHALF OF SARAH GILVARY)

09-DEC-2008 05:13 PM	MTANS - ANSWER (MOTION/PETITION) FILED	KINKOPF, MICHAEL P.		10-DEC-2008 10:26 AM

Documents:	Motion_CoverSheet_MTANS_40.pdf MTANS_40.pdf
Docket Entry:	70-08112070 ANSWER IN OPPOSITION OF MOT-FOR EXTRAORDINARY RELIEF FILED. (FILED ON BEHALF OF GENERAL MOTORS CORP)

12-DEC-2008 12:23 PM	MTASN - MOTION ASSIGNED			12-DEC-2008 12:23 PM

Docket Entry:	70-08112070 MOT-FOR EXTRAORDINARY RELIEF ASSIGNED TO JUDGE: MANFREDI, WILLIAM J. . ON DATE: DECEMBER 12, 2008

18-DEC-2008 04:07 PM	CLLSC - LISTED FOR SETTLEMENT CONF			18-DEC-2008 04:07 PM

Docket Entry:	*none.*

18-DEC-2008 04:07 PM	CLCDS - CONFERENCE DATE SET			18-DEC-2008 04:07 PM

Docket Entry:	*none.*

20-DEC-2008	CLNGV - NOTICE			20-DEC-2008

12:01 AM	GIVEN			12:01 AM
Docket Entry:	*none.*			
24-DEC-2008 12:07 PM	ORDER - ORDER ENTERED/236 NOTICE GIVEN	MANFREDI, WILLIAM J		24-DEC-2008 12:07 PM
Documents:	ORDER_45.pdf			
Docket Entry:	70-08112070 IT IS ORDERED THAT THE PETITION FOR EXTRAORDINARY RELIEF IS GRANTED, AND ALL DEADLINES ARE EXTENDED SIXTY (60) DAYS. A NEW CASE MANAGMENT ORDER WILL ISSUE. ...BY THE COURT; MANFREDI, J. 12-23-08			
29-DEC-2008 10:46 AM	RVCMO - REVISED CASE MGMT ORDER ISSUED			29-DEC-2008 12:00 AM
Documents:	RVCMO_46.pdf			
Docket Entry:	REVISED CASE MANAGEMENT ORDER - Be advised that the Case Management Order issued for the above-captioned action has been revised as follows: All discovery shall be completed not later than 01-DEC-2008. Plaintiff shall submit expert reports not later than 05-JAN-2009. Defendant shall submit expert reports not later than 02-FEB-2009. All pre-trial motions shall be filed not later than 02-FEB-2009. A settlement conference will be scheduled any time after 02-MAR-2009. A pre-trial conference will be scheduled at any time after 04-MAY-2009. It is expected that this case shall be ready for trial by 01-JUN-2009. All other terms and conditions on the original Case Management Order will remain in full force and effect. ...BY THE COURT: WILLIAM J. MANFREDI, J.			
29-DEC-2008 10:56 AM	CLRBC - CASE RESCHEDULED BY COURT			29-DEC-2008 10:56 AM
Docket Entry:	*none.*			
29-DEC-2008 10:56 AM	CLLSC - LISTED FOR SETTLEMENT CONF			29-DEC-2008 10:56 AM
Docket Entry:	*none.*			

08-JAN-2009 02:29 PM	MTSJD - MOTION FOR SUMMARY JUDGMENT	KINKOPF, MICHAEL P.		08-JAN-2009 03:59 PM
Documents:	Motion_CoverSheet_MTSJD_49.pdf MTSJD_49_001.pdf MTSJD_49.pdf			
Docket Entry:	47-09010547 RESPONSE DATE 02/09/2009. (FILED ON BEHALF OF GENERAL MOTORS CORP)			
23-JAN-2009 02:56 PM	MTEXR - MOT-FOR EXTRAORDINARY RELIEF	ZAJAC, ERIC G		26-JAN-2009 12:40 PM
Documents:	Motion_CoverSheet_MTEXR_50.pdf MTEXR_50.pdf			
Docket Entry:	04-09012104 RESPONSE DATE 02/05/2009. (FILED ON BEHALF OF SARAH GILVARY)			
27-JAN-2009 09:51 PM	CLLSC - LISTED FOR SETTLEMENT CONF			27-JAN-2009 09:51 PM
Docket Entry:	*none.*			
27-JAN-2009 09:51 PM	CLCDS - CONFERENCE DATE SET			27-JAN-2009 09:51 PM
Docket Entry:	*none.*			
28-JAN-2009 11:14 AM	MTANS - ANSWER (MOTION/PETITION) FILED	KINKOPF, MICHAEL P.		28-JAN-2009 11:30 AM
Documents:	Motion_CoverSheet_MTANS_53.pdf MTANS_53.pdf			
Docket Entry:	04-09012104 ANSWER IN OPPOSITION OF MOT-FOR EXTRAORDINARY RELIEF FILED. (FILED ON BEHALF OF GENERAL MOTORS CORP)			
29-JAN-2009 12:01 AM	CLNGV - NOTICE GIVEN			29-JAN-2009 12:01 AM

Docket Entry:	*none.*

02-FEB-2009 04:22 PM	MTSJD - MOTION FOR SUMMARY JUDGMENT	KINKOPF, MICHAEL P.		02-FEB-2009 04:33 PM
Documents:	Motion_CoverSheet_MTSJD_55.pdf MTSJD_55.pdf			
Docket Entry:	36-09022836 RESPONSE DATE 03/04/2009. (FILED ON BEHALF OF GENERAL MOTORS CORP)			

09-FEB-2009 04:58 PM	MTANS - ANSWER (MOTION/PETITION) FILED	ZAJAC, ERIC G		10-FEB-2009 12:07 PM
Documents:	Motion_CoverSheet_MTANS_57.pdf MTANS_57_014.pdf MTANS_57_013.pdf MTANS_57_012.pdf MTANS_57_011.pdf MTANS_57_010.pdf MTANS_57_009.pdf MTANS_57_008.pdf MTANS_57_007.pdf MTANS_57_006.pdf MTANS_57_005.pdf MTANS_57_004.pdf MTANS_57_003.pdf MTANS_57_002.pdf MTANS_57_001.pdf MTANS_57.pdf			
Docket Entry:	47-09010547 ANSWER IN OPPOSITION OF MOTION FOR SUMMARY JUDGMENT FILED. (FILED ON BEHALF OF SARAH GILVARY)			

10-FEB-2009 11:10 AM	MTASN - MOTION ASSIGNED			10-FEB-2009 11:10 AM
Docket Entry:	04-09012104 MOT-FOR EXTRAORDINARY RELIEF ASSIGNED TO JUDGE: MANFREDI, WILLIAM J. . ON DATE: FEBRUARY 10, 2009			

12-FEB-2009 10:21 AM	MRDUD - MOTION RESPONSE DATE UPDATED			12-FEB-2009 10:21 AM
Docket Entry:	47-09010547 MOTION FOR SUMMARY JUDGMENT MOTION RESPONSE DATE UPDATED TO 03/04/2009.			

18-FEB-2009 10:48 AM	PRATT - PRAECIPE TO SUPPL/ATTACH FILED	ZAJAC, ERIC G		18-FEB-2009 11:33 AM
Documents:	PRATT_59.pdf			
Docket Entry:	47-09010547 PRAECIPE TO SUPPLEMENT/ATTACH RE: MOTION FOR SUMMARY JUDGMENT FILED. (FILED ON BEHALF OF SARAH GILVARY)			
23-FEB-2009 12:12 PM	ORDER - ORDER ENTERED/236 NOTICE GIVEN	MANFREDI, WILLIAM J		23-FEB-2009 12:12 PM
Documents:	ORDER_60.pdf			
Docket Entry:	04-09012104 IT IS ORDERED THAT THE PETITION FOR EXTRAORDINARY RELIEF IS GRANTED, IN PART, AND DEADLINES FOR EXPERT DISCOVERY AND MOTION ARE EXTENDED SIXTY (60) DAYS. ALL OTHER DEADLINES IN THE CASE MANAGEMENT ORDER SHALL REMAIN UNCHANGED. ...BY THE COURT; MANFREDI, J. 2-23-09			
23-FEB-2009 02:14 PM	REPLM - MOTION/PETITION REPLY FILED	KINKOPF, MICHAEL P.		23-FEB-2009 02:31 PM
Documents:	Motion_CoverSheet_REPLM_61.pdf REPLM_61.pdf			
Docket Entry:	47-09010547 REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT FILED. (FILED ON BEHALF OF GENERAL MOTORS CORP)			
05-MAR-2009 09:56 AM	MTANS - ANSWER (MOTION/PETITION) FILED	ZAJAC, ERIC G		05-MAR-2009 10:52 AM
Documents:	Motion_CoverSheet_MTANS_62.pdf MTANS_62_003.pdf MTANS_62_002.pdf MTANS_62.pdf			
Docket Entry:	36-09022836 ANSWER IN OPPOSITION OF MOTION FOR SUMMARY JUDGMENT FILED. (FILED ON BEHALF OF SARAH GILVARY)			
09-MAR-2009	MTASN - MOTION			09-MAR-2009

10:19 AM	ASSIGNED			10:19 AM
Docket Entry:	36-09022836 MOTION FOR SUMMARY JUDGMENT ASSIGNED TO JUDGE: MANFREDI, WILLIAM J. . ON DATE: MARCH 09, 2009			
09-MAR-2009 10:19 AM	MTASN - MOTION ASSIGNED			09-MAR-2009 10:19 AM
Docket Entry:	47-09010547 MOTION FOR SUMMARY JUDGMENT ASSIGNED TO JUDGE: MANFREDI, WILLIAM J. . ON DATE: MARCH 09, 2009			
13-MAR-2009 12:27 PM	CLLPT - LISTED FOR PRE-TRIAL CONF			13-MAR-2009 12:27 PM
Docket Entry:	*none.*			
13-MAR-2009 12:27 PM	CLCDS - CONFERENCE DATE SET			13-MAR-2009 12:27 PM
Docket Entry:	*none.*			
16-MAR-2009 04:41 PM	CLSCC - SETTLEMENT CONF COMPLETED	MANFREDI, WILLIAM J		16-MAR-2009 04:41 PM
Docket Entry:	*none.*			
17-MAR-2009 12:01 AM	CLNGV - NOTICE GIVEN			17-MAR-2009 12:01 AM
Docket Entry:	*none.*			
07-APR-2009 10:59 AM	REPLM - MOTION/PETITION REPLY FILED	KINKOPF, MICHAEL P.		07-APR-2009 11:18 AM
Documents:	Motion_CoverSheet_REPLM_69.pdf REPLM_69.pdf			
Docket Entry:	36-09022836 REPLY IN OPPOSITION OF MOTION FOR SUMMARY JUDGMENT FILED. (FILED ON BEHALF OF GENERAL MOTORS			

	CORP)

05-MAY-2009 04:38 PM	CLPCC - PRETRIAL CONFERENCE COMPLETED	MANFREDI, WILLIAM J		05-MAY-2009 04:38 PM
Docket Entry:	*none.*			

05-MAY-2009 04:38 PM	CLWTR - WAITING TO LIST FOR TRIAL	MANFREDI, WILLIAM J		05-MAY-2009 04:38 PM
Docket Entry:	*none.*			

05-MAY-2009 04:38 PM	CLLTR - LISTED FOR TRIAL			05-MAY-2009 04:38 PM
Docket Entry:	*none.*			

07-MAY-2009 12:01 AM	CLNGV - NOTICE GIVEN			07-MAY-2009 12:01 AM
Docket Entry:	*none.*			

29-MAY-2009 11:01 AM	ORDER - ORDER ENTERED/236 NOTICE GIVEN	MANFREDI, WILLIAM J		29-MAY-2009 11:01 AM
Documents:	ORDER_74.pdf			
Docket Entry:	36-09022836 IT IS ORDERED THAT DEFENDANT, GENERAL MOTORS CORPORATION'S MOTION FOR PARTIAL SUMMARY JUDGMENT IS DENIED. ...BY THE COURT; MANFREDI, J. 5-29-09			

29-MAY-2009 11:02 AM	ORDER - ORDER ENTERED/236 NOTICE GIVEN	MANFREDI, WILLIAM J		29-MAY-2009 11:02 AM
Documents:	ORDER_75.pdf			
Docket	47-09010547 IT IS ORDERED THAT DEFENDANT, GENERAL MOTORS CORPORATION'S MOTION FOR SUMMARY JUDGMENT			

Entry:	IS DENIED. ...BY THE COURT; MANFREDI, J. 5-29-09			
08-JUN-2009 10:18 AM	CLDBR - DEFERRED - BANKRUPTCY	KINKOPF, MICHAEL P.		08-JUN-2009 10:22 AM
Documents:	CLDBR_76.pdf			
Docket Entry:	PRAECIPE TO DEFER CASE DUE TO PENDING BANKRUPTCY ACTION UNDER CASE NUMBER: 09-50026 (REG) (FILED ON BEHALF OF GENERAL MOTORS CORP)			
11-JUN-2009 02:10 PM	CLECD - EVENT CANCELLED-CASE DEFERRED			11-JUN-2009 02:10 PM
Docket Entry:	*none.*			
08-SEP-2009 06:04 PM	MTREI - MOTION TO REINSTATE	ZAJAC, ERIC G		09-SEP-2009 12:54 PM
Documents:	Motion_CoverSheet_MTREI_78.pdf MTREI_78.pdf			
Docket Entry:	68-09091068 RESPONSE DATE 09/29/2009. (FILED ON BEHALF OF SARAH GILVARY)			
11-SEP-2009 11:36 AM	SNRQI - DEFERRED CASE/REQUEST FOR INFO	MANFREDI, WILLIAM J		11-SEP-2009 12:00 AM
Docket Entry:	*none.*			
16-SEP-2009 12:01 AM	CLNGV - NOTICE GIVEN			16-SEP-2009 12:01 AM
Docket Entry:	*none.*			
25-SEP-2009 03:13 PM	MTANS - ANSWER (MOTION/PETITION) FILED	CAMPBELL, NANCY E		28-SEP-2009 09:35 AM
Documents:	Motion_CoverSheet_MTANS_81.pdf MTANS_81.pdf			

Docket Entry:	68-09091068 ANSWER IN OPPOSITION OF MOTION TO REINSTATE FILED. (FILED ON BEHALF OF POMPEY DODGE INC)			
30-SEP-2009 04:00 PM	MTANS - ANSWER (MOTION/PETITION) FILED	ZAJAC, ERIC G		01-OCT-2009 11:35 AM
Documents:	Motion_CoverSheet_MTANS_82.pdf MTANS_82.pdf			
Docket Entry:	68-09091068 ANSWER IN OPPOSITION OF MOTION TO REINSTATE FILED. (FILED ON BEHALF OF SARAH GILVARY)			
02-OCT-2009 01:50 PM	MTASN - MOTION ASSIGNED			02-OCT-2009 01:50 PM
Docket Entry:	68-09091068 MOTION TO REINSTATE ASSIGNED TO JUDGE: MANFREDI, WILLIAM J. ON DATE: OCTOBER 02, 2009			
08-OCT-2009 09:13 AM	MTANS - ANSWER (MOTION/PETITION) FILED	CAMPBELL, NANCY E		08-OCT-2009 11:20 AM
Documents:	Motion_CoverSheet_MTANS_84.pdf MTANS_84.pdf			
Docket Entry:	68-09091068 ANSWER IN OPPOSITION OF MOTION TO REINSTATE FILED. (FILED ON BEHALF OF POMPEY DODGE INC)			
09-OCT-2009 06:38 PM	CLSRR - STATUS RESPONSE RECEIVED			09-OCT-2009 12:00 AM
Documents:	CLSRR_85.pdf			
Docket Entry:	*none.*			
21-OCT-2009 03:03 PM	ORDER - ORDER ENTERED/236 NOTICE GIVEN	MANFREDI, WILLIAM J		21-OCT-2009 03:03 PM
Documents:	ORDER_86.pdf			
Docket Entry:	68-09091068 UPON CONSIDERATION OF PLAINTIFF'S MOTION TO SEVER GENERAL MOTORS AND THE RESPONSES THERETO, IT IS HEREBY ORDERED AND DECREED THAT SAID MOTION IS DENIED. BY THE COURT...MANFREDI, J. 10/21/09			

EXHIBIT "B"

PHILADELPHIA COURT OF COMMON PLEAS
PETITION/MOTION COVER SHEET

FOR COURT USE ONLY	
ASSIGNED TO JUDGE:	ANSWER/RESPONSE DATE: 09/29/2009

Do not send Judge courtesy copy of Petition/Motion/Answer/Response.
Status may be obtained online at http://courts.phila.gov

CONTROL NUMBER: 09091068

(RESPONDING PARTIES MUST INCLUDE THIS NUMBER ON ALL FILINGS)

March Term, 2007
Month *Year*
No. 03736

GILVARY VS GENERAL MOTORS CORP ETAL

Name of Filing Party:
SARAH GILVARY-PLF

INDICATE NATURE OF DOCUMENT FILED:
☐ Petition *(Attach Rule to Show Cause)* ☒ Motion
☐ Answer to Petition ☐ Response to Motion

Has another petition/motion been decided in this case? ☒ Yes ☐ No
Is another petition/motion pending? ☐ Yes ☒ No
If the answer to either question is yes, you must identify the judge(s):
JUDGE MANFREDI

TYPE OF PETITION/MOTION *(see list on reverse side)*	PETITION/MOTION CODE *(see list on reverse side)*
MOTION TO REINSTATE	MTREI

ANSWER / RESPONSE FILED TO (Please insert the title of the corresponding petition/motion to which you are responding):

I. CASE PROGRAM

DAY FORWARD/MAJOR JURY PROGRAM

Name of Judicial Team Leader: JUDGE WILLIAM MANFREDI
Applicable Petition/Motion Deadline: N/A
Has deadline been previously extended by the Court: N/A

II. PARTIES *(required for proof of service)*
(Name, address and ***telephone number*** of all counsel of record and unrepresented parties. Attach a stamped addressed envelope for each attorney of record and unrepresented party.)

NANCY E CAMPBELL
1818 MARKET STREET SUITE 2510 ,
PHILADELPHIA PA 19103
ERIC G ZAJAC
ZAJAC & ARIAS, LLC 1818 MARKET STREET
30TH FLOOR , PHILADELPHIA PA 19103
EDWARD A GRAY
ECKERT SEAMANS CHERIN MELLOTT TWO
LIBERTY PLACE 50 S 16TH STREET 22ND
FLOOR , PHILADELPHIA PA 19102
MICHAEL P. KINKOPF
ECKERT SEAMANS CHERIN MELLOTT TWO
LIBERTY PLACE 50 S 16TH STREET 22ND
FLOOR , PHILADELPHIA PA 19102

III. OTHER

By filing this document and signing below, the moving party certifies that this motion, petition, answer or response along with all documents filed, will be served upon all counsel and unrepresented parties as required by rules of Court (see PA. R.C.P. 206.6, Note to 208.2(a), and 440). Furthermore, moving party verifies that the answers made herein are true and correct and understands that sanctions may be imposed for inaccurate or incomplete answers.

(Attorney Signature/Unrepresented Party)	September 8, 2009 *(Date)*	ERIC G. ZAJAC *(Print Name)*	*(Attorney I.D. No.)*

The Petition, Motion and Answer or Response, if any, will be forwarded to the Court after the Answer/Response Date.
No extension of the Answer/Response Date will be granted even if the parties so stipulate.

30-1061B E-File# 0909010810
09-SEP-09 12:54:35

FILED
08 SEP 2009 06:04 pm
Civil Administration
A. LEBRON

SARAH GILVARY	:	IN THE COURT OF COMMON PLEAS
	:	PHILADELPHIA COUNTY
v.	:	
	:	MARCH TERM, 2007
GENERAL MOTORS CORPORATION	:	NO. 3736
and	:	
POMPEY DODGE, INC.	:	JURY TRIAL DEMANDED

ORDER SEVERING CLAIMS AGAINST GENERAL MOTORS CORPORATION AND LIFTING BANKRUPTCY STAY

AND NOW, this day of September, 2009, upon consideration of Plaintiff's Motion to Sever Claims against General Motors Corp. from All Other Claims, and upon consideration of any response, it is ORDERED and DECREED as follows:

1. The STAY imposed on or about June 8, 2009 is LIFTED;
2. All claims against General Motors Corporation are SEVERED;
3. The Prothonotary is directed to assign a new Court Term and Number to all claims against General Motors Corporation;
4. An Order scheduling a new Pretrial Conference will be issued shortly.

BY THE COURT:

_____
J.

Case ID: 070303736
Control No.: 09091068

ZAJAC & ARIAS, LLC

By: Eric G. Zajac, Esquire
Identification No.: 66003
1818 Market Street, 30th Floor
Philadelphia, PA 19103
215.575.7615
215.575.7640 (Fax)
email: Eric@TeamLawyers.com

COUNSEL FOR: PLAINTIFF

SARAH GILVARY	:	IN THE COURT OF COMMON PLEAS
	:	PHILADELPHIA COUNTY
v.	:	
	:	MARCH TERM, 2007
GENERAL MOTORS CORPORATION	:	NO. 3736
and	:	
POMPEY DODGE, INC.	:	JURY TRIAL DEMANDED

PLAINTIFF'S MOTION TO SEVER CLAIMS AGAINST DEFENDANT GENERAL MOTORS CORPORATION

Plaintiff Sarah Gilvary ("Plaintiff"), by and through her undersigned attorney, Eric G. Zajac, Esquire, ZAJAC & ARIAS, LLC, hereby moves this Honorable Court for an Order Severing Claims Against Defendant General Motors Corporation and in support thereof, avers as follows:

1. This is a product liability action.
2. Plaintiff alleges that a 1995 Chevrolet Lumina is defective primarily in two respects: (1) inadequate warnings against the risks of reclining the front passenger seat while the vehicle is in motion; and (2) failure to design the vehicle in such a way as to actively warn (such as with a bell or light) that the front passenger seat is reclined while the vehicle is in motion, or to mechanically prevent the front passenger seat from reclining while the vehicle is in motion. See generally reports of Ken Laughery and William Muzzy, attached as Exhibit A.

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Control No.: 09091068

3. Plaintiff alleges that as a result of these defects, she was rendered a quadriplegic at the age of 19.
4. In Pennsylvania, a dealership or distributor is liable for design defects as though it were the manufacturer.[1] See Plaintiff's Memorandum of Law.
5. Co-Defendant Pompey Dodge, Inc. admits that it was an intermediate seller of the subject vehicle. See Exhibit B, Title Documents.
6. The design defects summarized in Paragraph 2, above, could have been brought against Defendant Pompey Dodge only.
7. Although bankrupt Defendant General Motors Corp. was self-insured, Defendant Pompey Dodge is insured to ten million dollars through multiple carriers.
8. This litigation progressed all the way through a Pretrial Conference, and trial was scheduled to commence in late June, 2009.
9. Defendant Pompey Dodge identified no experts and refused to make any settlement offers, despite wide-spread public expectation that General Motors would go bankrupt.
10. On or about June 9, 2009, shortly after the Pretrial Conference, Defendant General Motors Corp. filed a Suggestion of Bankruptcy, and this action was placed in deferred status.
11. On or about July 1, 2009, Defendant General Motors Corp. emerged from bankruptcy.
12. As part of the federal bankruptcy proceedings, all existing causes of action against Defendant General Motors for product liability were DISCHARGED.
13. Accordingly, for the reasons set forth below, Plaintiff moves this Honorable Court for an Order severing claims against Defendant General Motors Corp., or in the alternative,

---

1 Approximately thirty of the fifty states of the Union have similar laws.

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Control No.: 09091068

dismissing Defendant General Motors Corp. without prejudice, so that either way, the remaining claims against the remaining insured Defendant can proceed.

14. Defendant General Motors Corporation filed a Voluntary Petition (Chapter 11) in Bankruptcy on or about June 1, 2009, in the U.S. Bankruptcy Court for the Southern District of New York, Case No. 09-50026.

15. On June 2, 2009, the bankruptcy court entered its Order (a) Approving Procedures for Sale of Debtors' Assets Pursuant to Master Sale and Purchase Agreement; (b) Scheduling Bid Deadline and Sale Hearing Date; (c) Establishing Assumption and Assignment Procedures; and (d) Fixing Notice Procedures and Approving Form of Notice (Docket #274).

16. The June 2, 2009 Order of the bankruptcy court approved bidding procedures for the sale of substantially all of the Debtors' tangible, intangible and operating assets between and among Vehicle Acquisition Holdings LLC (the purchaser), and General Motors Corporation and its Debtor subsidiaries. The purchaser is hereafter referred to as "New GM."

17. The authorized sale of assets to New GM is to be free and clear of all liens, claims, encumbrances, rights, remedies, restrictions, interests, liabilities and contractual commitments of any kind or nature whatsoever, whether arising before or after the Petition Date, whether at law or in equity, including all rights or claims based on any successor or transferee liability.

18. Only liabilities for negligence, strict liability, design defect, manufacturing defect, failure to warn or breach of the express or implied warranties or merchantability or fitness for a particular purpose to third parties for death or personal injury arising out of products

delivered to a consumer, lessee or other purchaser of a product at or after the closing are assumed by the New GM.

19. Liabilities, including consumer litigation claims and personal injury claims such as that of the plaintiffs, would remain with "Old GM." It is expected that any liquidation of assets would take two or more years and result in pennies on the dollar, if any money at all, for claimants.

20. Notwithstanding the filing of a bankruptcy petition by a defendant manufacturer, pending products liability suits involving the manufacturer's products may be continued against codefendants who have not gone into bankruptcy. 11 U.S.C. § 362(a), providing for the automatic stay of judicial proceedings against the debtor, does not mandate a stay of proceedings against joint tortfeasors who are the debtor's codefendants. The Chapter 11 debtor is not an indispensable party under Fed. R. Civ. P. 19 in whose absence the products liability suit against solvent joint tortfeasors would have to be stayed.

CONTINUATION OF SUITS AGAINST JOINT TORTFEASORS NOT IN BANKRUPTCY, Am. L. Prod. Liab. 3d § 59:11 (May 2009 ed.) (citations & footnotes omitted).

21. Both the interests of justice and judicial economy will be best served by this Court permitting Plaintiff to proceed against the remaining Defendants as opposed to staying the entire case indefinitely pending the lifting of the bankruptcy stay as to Defendant General Motors. *See, e.g., Wedgeworth v. Fibreboard Corp.*, 706 F.2d 541 (5th Cir. 1983):

> We join those courts concluding that the protections of § 362 neither apply to co-defendants **nor preclude severance.**
>
> * * * * *
>
> We are persuaded that the requisite balancing of the competing interests involved in these cases weighs in favor of allowing the remaining actions to proceed. The realities of the hardship of a stay on the plaintiffs . . . is substantial and, in some instances, permanent. The grim reaper has called while judgment waits. Just as obviously, the bankruptcy proceedings are not likely to conclude in the immediate future. A stay hinged on completion of those proceedings is manifestly "indefinite." *Id.* at 544; 545 (emphasis added).

22. Plaintiff thus moves this Court, pursuant to Pennsylvania Rule of Civil Procedure 213, to sever this action -- severing the claims against debtor General Motors Corporation from those claims against the insured co-Defendant.

23. This court retains jurisdiction to determine if the automatic stay applies to Plaintiff's Motion. *Wilds v. Heckstall,* 2009 WL 1351773 (N.Y.Sur., 2009); *In re Baldwin-United Corp. Litig.,* 765 F.2d 343 (2nd Cir., 1985).

24. The automatic stay does not apply to deciding this Motion, as severance would not affect the rights of debtor General Motors Corp. and would hold in abeyance all claims against General Motors Corp.. *Wedgewood v. Fireboard Corp., 706 F.2d 541 (C.A.La., 1983); Wllford v. Armstrong World industries, Inc., 715 F.2d 124 (C.A.N.C., 1983).*

25. The automatic stay applicable to debtor General Motors Corp. does not stay the action against the insured co-defendant. To the contrary, claims against those defendants can, and should move forward, requiring severance of the action. *Wedgewood v. Fireboard Corp., 706 F.2d 541 (C.A.La., 1983); Wllford v. Armstrong World industries, Inc., 715 F.2d 124 (C.A.N.C., 1983).*

26. Philadelphia trial courts have used severance as a means of allowing plaintiffs to timely proceed against solvent co-defendants in the event of a bankruptcy of one or more defendants in the course of the litigation. *Westerby v. Johns-Manville Corp.*, 32 Pa.D.&C.3d 163 (Phila. Cty., 1982); *McMillan v. Johns-Manville et. al.,* 15 Phila. Cty. Rptr. 650 (1987); *Matthews v. Johnsmanville Corp.,* 33 Pa.D.&C.3d 233, 236-237 (Phila. Cty., 1982).

27. Further, even if Defendant General Motors were not indemnifying co-Defendant Pompey Dodge, "nothing precludes the solvent [defendants]... from obtaining contribution from

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the bankrupts when (and if) they emerge from reorganization proceedings. To hold otherwise would be to require an exercise in futility, for any finding of fault against the bankrupt manufacturers would be unenforceable under the automatic stay provisions of the Bankruptcy Code." *Ottavio v. Fibreboard Corp.*, 421 Pa. Super. 284, 293 (1992)

WHEREFORE, Plaintiff respectfully request that this Court grant the relief requested in the attached proposed order.

ZAJAC & ARIAS, L.L.C.

BY: ERIC G. ZAJAC, ESQUIRE
Attorney for Plaintiff

DATED: September 8, 2009

ZAJAC & ARIAS, LLC

By: Eric G. Zajac, Esquire
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215.575.7615
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COUNSEL FOR: PLAINTIFF

SARAH GILVARY	:	IN THE COURT OF COMMON PLEAS
	:	PHILADELPHIA COUNTY
v.	:	
	:	MARCH TERM, 2007
GENERAL MOTORS CORPORATION	:	NO. 3736
and	:	
POMPEY DODGE, INC.	:	JURY TRIAL DEMANDED

PLAINTIFF'S MEMORANDUM OF LAW
IN SUPPORT OF HER MOTION TO SEVER CLAIMS AGAINST
DEFENDANT GENERAL MOTORS CORPORATION

I. MATTER BEFORE THE COURT

Presently before the Court is Plaintiff's Motion to Sever Claims Against Defendant General Motors Corporation.

II. STATEMENT OF QUESTION INVOLVED

Whether claims against bankrupt Defendant General Motors Corp. should be severed so that claims against Pompey Dodge, which is insured for ten million dollars, should proceed?

SUGGESTED ANSWER: yes

III. RELEVANT FACTS

Plaintiff alleges that a 1995 Chevy Lumina is defective primarily in two respects: (1) inadequate warnings against the risk of reclining the front passenger seat while the vehicle is in motion; and (2) failure to design the vehicle in such a way to actively warn (such as with a bell or light) that the front passenger seat is reclined while the vehicle is in motion, or to

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mechanically prevent the front passenger seat from reclining while the vehicle is in motion. See generally reports of and, attached as Exhibit A. Plaintiff alleges that as a result of these defects, she was rendered a quadriplegic at the age of 19.

Co-Defendant Pompey Dodge, Inc. admits that it was an intermediate seller of the subject vehicle. See Exhibit B, Title Documents. Although bankrupt Defendant General Motors Corp. was self-insured, Defendant Pompey Dodge is self-insured to ten million dollars.

This litigation progressed all the way through a Pretrial Conference, and trial was scheduled to commence in late June, 2009.

Defendant Pompey Dodge identified no experts and refused to make any settlement offers, despite wide-spread public expectation that General Motors would go bankrupt.

On or about June 9, 2009, Defendant General Motors Corp. filed a Suggestion of Bankruptcy, and this action was placed in deferred status. On or about July 1, 2009, Defendant General Motors Corp. emerged from bankruptcy. As part of the federal bankruptcy proceedings, all existing causes of action against Defendant General Motors for product liability were DISCHARGED.

IV. STATEMENT OF LAW AND ARGUMENT

A. Summary of Argument

The bankruptcy filing of defendant General Motors Corp. imposes the automatic stay of § 362(a) on all claims pending against it. However, General Motors Corp.'s bankruptcy does not stay Plaintiff's claims in this action against the other, solvent defendant, Pompey Dodge. In order to expedite and resolve those claims, Plaintiff has filed this Motion to sever her action, removing General Motors Corp. from the other claims, allowing for a resolution, by trial if necessary, against the remaining defendant.

This is a sensible and approved way of dealing with the situation created by the automatic stay. However, to delay the litigation, the solvent co-defendants is likely to oppose Plaintiff's motion and attempt to require the resolution of claims against it to await the far distant resolution of the General Motors Corp. bankruptcy. If so, Defendant's position is baseless and Plaintiff is entitled to have her Motion for severance granted. Several considerations demand this conclusion.

First, Plaintiff has a direct claim against Pompey Dodge. Her claims are neither derivative nor ancillary. As such she is entitled to have those claims decided expeditiously, regardless of General Motors Corp.'s bankruptcy.

Second, this Court enjoys the power and authority to grant Plaintiff's motion. This Court's jurisdiction is not impaired by the automatic stay. As severance would not affect the rights of bankrupt defendant General Motors Corp., an order severing General Motors Corp. from the other defendant would not violate the automatic stay and is within the competency of this Court.

Third, the automatic stay applicable to Defendant General Motors Corp. does not stay any action against the solvent co-defendant. To the contrary, claims against that Defendants can, and should, move forward, requiring a severance of the action.

Fourth, claims for indemnification or contribution against General Motors Corp. do not stay the proceeding. To the contrary, those claims, like Plaintiff's direct claims against General Motors Corp. are stayed pending resolution of the bankruptcy.

Fifth, complications in the pursuit of discovery caused by General Motors Corp.'s bankruptcy are not a basis for denying Plaintiff's Motion or staying the actions against the solvent co-defendant. Case-law holds that the stay does not shield General Motors Corp. from

responding to discovery directed toward claims against the other defendants. There is no indication that discovery will be in any way hampered by General Motors Corp.'s bankruptcy. In fact, discovery had closed before the stay was imposed. And even if inconveniences in discovery are created by the bankruptcy, case-law holds that this is not a basis for denying Plaintiff's Motion or staying the claims against Pompey Dodge.

Finally, Pennsylvania case-law favors severance as a mechanism for allowing Plaintiff to continue her claims against Pompey Dodge, while holding in abeyance all claims against the debtor General Motors Corp..

Each of these issues is discussed in more detail below.

B. Plaintiff's Claims against Pompey Dodge are Direct Claims and are not Derivative or Ancillary to Plaintiff's Claims against General Motors Corp.

It is anticipated that Pompey Dodge will claim that any action against it is ancillary or derivative to any action against the manufacturer and therefore the case against it is stayed by General Motors Corp.'s bankruptcy. However, that claim is neither factually nor legally correct. Plaintiff has a distinct and separate claim against every seller of the product, including Pompey Dodge -- the car dealership that admittedly and undeniably was in the chain of distribution of the vehicle.

Pennsylvania adopted section 402A of the Restatement (Second) of Torts in *Webb v. Zern*, 422 Pa. 424, 220 A.2d 853 (1966) and has consistently applied that section in product liability cases. 402A speaks strictly in terms of liability for "sellers". Indeed, the word manufacturer is never used in that section. 402A refers to "One who **sells** any product in a defective condition...", if "the **seller** is engaged in the business of **selling** a product" *Restatement (Second) of Torts, § 402A* (1965)(*emphasis added*).

Shortly after *Webb,* the Pennsylvania Supreme Court made clear that 402A applied to all **sellers** of a product, not just the manufacturer. In a case involving an allegedly defective automobile tire, the court writes, "Goodrich, the manufacturer, Gulf Tire, the wholesaler, and Keller, the retailer and immediate vendor, would all be considered 'sellers' (Comment f., Section 402A). Liability, if it exists, arises from Section 402A." *Forry v. Gulf Oil Corp.*, 428 Pa. 334, 340, 237 A.2d 593, 597 (1968).

Comment f to 402A explains, "The rule stated in this Section applies to any person engaged in the business of selling products for use or consumption. It therefore applies to any manufacturer of such a product, to any wholesale or retail dealer or distributor..." Comment c to 402A explains the rational for applying liability to any and every member of the chain of distribution: "On whatever theory, the justification for the strict liability has been said to be that the **seller**, by marketing his product for use and consumption, has undertaken and assumed a special responsibility toward any member of the consuming public who may be injured by it." *Restatement (Second) of Torts, § 402A, Comment c (emphasis added).*

Citing Comments c and f, the Pennsylvania Supreme Court writes; "We have also stated [402A's] applicability to sellers as well as manufacturers in a number of factual settings, adopting comment f and applying the rule to cases involving suppliers other than sellers as well." *Coyel by Coyel v. Richardson-Merrell, Inc.,* 526 Pa. 208, 212, 584 A.2d 1383, 1385 (1991); *see also Francioni v. Gibsonia Trucking Company,* 472 Pa. 362, 372 A.2d 736 (1977) (citing comment f to support holding that plaintiff had a right of action against the lessor of a product).

That Plaintiff's claims against Pompey Dodge are neither ancillary nor derivative of claims against General Motors Corp. is demonstrated by a simple test. In this action, Plaintiff could have originally filed against Pompey Dodge only, without ever naming General Motors

Corp. as a defendant. Plaintiff has a direct action against Pompey Dodge that is not derivative. While Pompey Dodge may find the bankruptcy of General Motors Corp. inconvenient, its inconvenience is no different from that of the Plaintiff, and there is no basis for delay of the resolution of claims against Pompey Dodge.

C. The Automatic Stay Does not Strip this Court of Jurisdiction, and the Court has the Power to Decide Plaintiff's Motion for Severance.

Pompey Dodge may claim that the trial court has no authority to do anything, as one party to the litigation is now subject to the automatic stay. However, trial courts are not stripped of jurisdiction by the automatic stay. To the contrary, the trial court has authority to determine if the stay is applicable to any action taken in its court. If the court finds that action does not violate the stay, the trial court has authority to continue the action. As a severance of the present action would not affect the debtor, General Motors Corp., and does not violate the automatic stay, this Court enjoys jurisdiction to sever the action and to allow the litigation to continue as to Pompey Dodge.

The principle has been stated, "The law is clear that the non bankruptcy court has jurisdiction to determine the applicability of the automatic stay to litigation before it. 'The court in which the litigation claimed to be stayed is pending has jurisdiction to determine...whether the proceeding before it is subject to the automatic stay.'" *Wilds v. Heckstall,* 2009 WL 1351773, 3 (N.Y.Sur., 2009) (quoting *Sawalski v. NLRB,* 158 BR 971 (Bkry.Ct., E.D.Mi., 1993).

Chao v. Hospital Staffing Services, Inc., 270 F.3d 374 (6th Cir., 2001) describes jurisdiction between the bankruptcy court and another court in which an action is pending as "concurrent". *Chao* states, "[T]he exclusivity of the bankruptcy court's jurisdiction reaches only as far as the automatic stay provisions of 11 U.S.C. § 362. That is, if the automatic stay applies to an action directed at the debtor or its property, jurisdiction is exclusive in the bankruptcy

court. If the automatic stay does not apply- *e.g.*, if an exception to the stay covers the action in question- the bankruptcy court's jurisdiction is concurrent with that of any other court of competent jurisdiction." *Id. at* 383.

Chao continues, "Not surprisingly, courts have uniformly held that when a party seeks to commence or continue proceedings in one court against a debtor or property that is protected by the stay automatically imposed upon the filing of a bankruptcy petition, the non-bankruptcy court properly responds to the filing by determining whether the automatic stay applies to (*i.e.*, stays) the proceedings. Assuming its jurisdiction is otherwise sound, the non-bankruptcy court may enter orders not inconsistent with the terms of the stay and orders entered by the bankruptcy court respecting the stay." *Id. at* 384 (citations and quotations omitted). *See also In re Baldwin-United Corp. Litig.,* 765 F.2d 343, 347 (2nd Cir., 1985) ("Whether the stay applies to litigation otherwise within the jurisdiction of a district court or court of appeals is an issue of law within the competence of both the court within which the litigation is pending...and the bankruptcy court."); *Hunt v. Bankers Trust Co.,* 799 F.2d 1060, 1069 (5th Cir., 1986) ("other district courts retain jurisdiction to determine the applicability of the stay to litigation pending before them, and to enter orders not inconsistent with the terms of the stay.").

Vasile v. Dean Witter Reynolds, Inc., 20 F.Supp.2d 465, 499 (E.D.N.Y., 1998) quotes *In re Baldwin-United, supra.,* to conclude, "The court in which the litigation claimed to be stayed is pending has jurisdiction to determine not only its own jurisdiction but also the more precise question whether the proceedings pending before it is subject to the automatic stay." *See also S.E.C. v. Bilzerian,* 131 F.Supp.2d 10 (D.D.C., 2001) (court where action is pending has authority to determine if the automatic stay is applicable.); *Covanta Onondaga, Ltd. V. Onondaga County Resource Recovery Agency,* 283 B.R. 651, 654 (N.D.N.Y., 2002) ("The court

in which the litigation claimed to be stayed is pending and has jurisdiction to determine not only its own jurisdiction, but also the more precise question whether the proceeding pending before it is subject to the automatic stay.")

While much of the published opinions deal with the federal district courts' jurisdiction, the principle is equally applicable to state tribunals. *See In re Ivani,* 308 B.R. 132, 135 (Bkrtcy. E.D.N.Y., 2004) ("[T]he majority rule finds that federal and state courts have concurrent jurisdiction over the matter.").

Indeed, Pennsylvania trial courts have exercised their authority to sever cases pursuant to Pennsylvania Rule of Civil Procedure 213(b), where one or more defendant has filed for bankruptcy during the pendency of the litigation. *See Westerby v. Johns-Manville Corp.*, 32 Pa.D.&C.3d 163 (Phila. Cty., 1982); *McMillan v. Johns-Manville et. al.,* 15 Phila.Cty. Rptr. 650 (1987); *Matthews v. Johnsmanville Corp.,* 33 Pa.D.&C.3d 233, 236-237 (Phila. Cty., 1982). In so doing, these courts allowed litigation to continue against solvent co-defendants, while claims against the debtor were held in abeyance by the automatic stay. Accordingly, this Court may and should exercise its power to sever the instant action. As stated in *Arnold v. Garlock,* 278 F.3d 426, 436 (5th Cir., 2001), "[W]e join [the cited courts] in concluding that the protections of § 362 neither apply to co-defendants **nor preclude severance**." (emphasis added).

D. The Automatic Stay Applicable to a bankrupt Defendant Does not Stay Any Action against a Solvent Co-defendant.

It is anticipated that Pompey Dodge will argue that the action against it, too, is stayed by the bankruptcy filing of General Motors Corp.. However, case-law is abundantly clear that an action stayed as to a bankrupt defendant is not stayed as to any solvent co-defendant.

This argument -- that the automatic stay applies to a solvent co-defendant -- was rejected in *Wedgeworth v. Fireboard Corp.*, 706 F.2d 541 (C.A. La., 1983). There the appellate court writes:

> We begin our inquiry by examining the plain language of the statute. That language clearly focuses on the insolvent party. There are repeated references to *the debtor*. The stay envisioned is "applicable to all entities," § 362A, but only in the sense that it stays all entities proceeding against the debtor. To read the "all entities" language as protecting co-debtors would be inconsistent with the specifically defined scope of the stay "against the debtor," § 362(a)(1). Continuing, we note that the remaining clauses of § 362(a) carefully list the kinds of proceedings stayed, in each instance explicitly or implicitly referring to "the debtor".
> *Id. at* 544.

In upholding the trial court's decision to allow the matter to proceed against solvent defendants, the *Wedgeworth* court recognizes that bankruptcy proceedings would not likely conclude in the near future and to require the plaintiff to wait would be manifestly unjust. Nor did the court give any credence to the argument that discovery would be difficult because of the bankruptcy of a defendant, finding this to be one inconvenience incumbent to litigation.

Similarly, in *Willford v. Armstrong World Industries, Inc.*, 715 F.2d 124 (C.A.N.C., 1983) the court declined to countenance arguments that the stay applies, or, by discretion should apply, to solvent co-defendants when the action is stayed as to one defendant as a result of a bankruptcy filing. That court writes:

> In concluding that the remaining co-defendants cannot avail themselves of the automatic stay provisions of 11 U.S.C. § 362(a), applicable to those defendants under the protection of the bankruptcy court, we need only examine the plain wording of the statute itself. It provides only for an automatic stay of any judicial proceedings "against the debtor". Section 362(a)(1). The words "applicable to all entities" denotes that the stay accorded the "debtor" is without limit or exception and that the "debtor" is protected from the pursuit of actions by any party of any character during the period of the stay. That insulation, however, belongs exclusively to the "debtor" in bankruptcy.
> *Id. at* 126.

Nor did the *Wilford* court find reason to extend the stay to the solvent co-defendants. It dismissed arguments of "piecemeal litigation", finding it a matter imbedded in the bankruptcy

procedure. It likewise dismissed arguments of complications in discovery. The court states, "In any event, the position in which the appellants find themselves, while taxing and burdensome, does not constitute a sufficient offset to the plaintiff's rights to have his case resolved without undue delay." *Id. at* 128.

In *Lynch v. Johns-Manville Sales Corp.,* 710 F.2d 1194 (C.A., Ohio, 1983) another circuit court reached the same result. The *Lynch* court reviews not only the language of § 362(a), but the legislative history as well, finding no intention on Congress' part to extend the stay to solvent co-defendants. "Nothing in the legislative history counsels that the automatic stay should be invoked in a manner which would advance the interests of some third party, such as a debtor's co-defendants, rather than the debtor or its creditors." *Id. at* 1196.

The *Lynch* court likewise rejects arguments that duplicative or multiple litigation could form a basis for extending the stay. The *Lynch* court simply acknowledges that this is a by-product of bankruptcy proceedings. *Id. at* 1199.

Gold v. Johns-Manville Sales Corp., 723 F.2d 1068 (3rd Cir., 1983) is a Third Circuit case reaching the same result. Applying the same reasoning cited in the cases above, the *Gold* court found that the automatic stay did not apply to solvent co-defendants. In upholding the trial court's refusal to impose a discretionary stay, the court found the burden on the plaintiff took precedence to any burden to the co-defendants.

In *Gold,* the defendants argued that Johns-Manville was the primary defendant, and, as such, bore the burden of defense for all defendants. The court responds, "The decision to allocate such responsibility to Johns-Manville was part of a consciously chosen trial strategy, and while we do not find fault with petitioners for dividing the tasks of trial preparation, it would be

unfair to burden plaintiff with the unexpected and untoward consequences of defendants' decisions." *Id. at* 1076.

The *Gold* court concludes, "We are not persuaded that the hardship imposed on defendants by proceeding to trial without Johns-Manville or our legitimate interest in judicial economy is sufficient to force these plaintiffs to forebear until the bankruptcy defendants emerge from the reorganization proceedings. The defendants may be seriously inconvenienced by the resumption of the actions against them; under the standard announced in *Landis* [*v. North American Co.*, 299 U.S. 248, 57 S.Ct. 163, 81 L.Ed. 153 (1936)], however, the balance of hardship weighs in favor of the injured plaintiffs." *Id. at* 1076.

Defendants will maintain that as the facts and proofs surrounding the various claims are inter-related, the stay somehow applies to all defendants, or that the trial court should stay the action until the bankruptcy is resolved. *Wilds v. Heckstall,*2009 WL 1351773 (N.Y.Sur., 2009) is a recent case in which this argument was pursued by defendants but rejected by the trial court. Although unreported, the reasoning of the *Wilds* opinion is applicable here. "Thus, when there are multiple parties to the litigation, the action may continue against the other parties, even though the action is stayed against the debtor. This is so even if the action against the non-debtors has a similar legal or factual connection to the debtor's property." *Id. at* 3 (citing *Croyden Assocs. V. Alleco, Inc.*, 969 F.2d 675 (8th Cir., 1992) and *Maritime Electric Co. v. United Jersey Bank,* 959 F.2d 1194 (3rd Cir., 2009)).

Ample case law supports a conclusion that, in this action, Plaintiff is not stayed from pursuing claims against Pompey Dodge, and that the action should be severed to permit the Plaintiff to move forward against it. *See Fortier v. Dona Anna Plaza partners,* 747 F.2d 1324 (C.A.N.M., 1984); *Integrity Stainless Corp. v. Keystone Surplus Metals, Inc.*, 2009 WL 385583

(N.D.Ohio, 2009); *GATX Aircraft Corp. v. Safety Guide of Alabama, LLC*, 2008 WL 5045065 (M.D.Ala., 2008); *Arnold v. Garlock,* 278 F.3d 426 (5th Cir., 2001); *Seiko Epson Corp. v. Nu-Kote Intern., Inc.,* 190 F.3d 1360 (C.A.Cal., 1999).

E. Claims for Indemnification or Contribution against the Bankrupt Defendant do not Stay the Action as to Pompey Dodge or Prevent Severance of the Action.

Common law claims for indemnification by Pompey Dodge against the debtor, General Motors Corp., do not preclude severance of the action or prevent Plaintiff from pursuing claims against Pompey Dodge during the pendency of General Motors Corp.'s bankruptcy. Courts have consistently held that the stay of claims of indemnification against the bankrupt party is not grounds for a stay of plaintiff's claims as to solvent co-defendants. Rather, Pompey Dodge's claims for indemnification are simply stayed, as are Plaintiff's direct claims, until the stay is lifted.

In ruling that the trial court had correctly refused to stay an action against bankrupt's co-defendants, a federal circuit court held that considerations of co-defendants' claims for indemnification were not a basis for staying the action against the debtor's co-defendants. The court, in *Lynch v. Johns-Manville Sales Corp.,* 710 F.2d 1194, 1199 (C.A.Ohio, 1983), writes; "Confronting these arguments, it is initially observed that any duplicative or multiple litigation which may occur is a direct by-product of bankruptcy law. As such, the duplication, to the extent that it may exist, is congressionally created and sanctioned. More importantly, however, any benefits which may derive to the solvent co-defendants from a stay are clearly outweighed by the countervailing interests of the plaintiffs."

Arguments that claims of indemnification against the bankrupt party should preclude the action from proceeding against other defendants were also rejected in *Wedgeworth v. Fireboard Corp.,* 706 F. 2d 541 (C.A.La., 1983). *Wedgeworth* states:

> Questions of contribution, indemnity and apportioned liability are serious issues which will neither self-destruct nor disappear. They will have to be confronted and resolved at some time in some forum. Defendants have not shown that any hardship complained of is the result of proceeding to trial now. Nor is there any showing that the difficulties inherent in the general situation, including potential judicial inefficiency, constitute a sufficient offset to the plaintiffs' rights to proceed without inordinate delay to a resolution of their claims.
> *Id. at* 546.

Williford v. Armstrong World Industries, Inc., 715 F.2d 124 (C.A.N.C., 1983 reaches the same conclusion. That court writes:

> Piecemeal litigation no doubt will result from the absence of the defendants now in bankruptcy court. Conceivably, certain of the claims may need to be relitigated in that court or elsewhere. However, we are convinced that the requisite balancing of the competing interests of the plaintiff and the non-bankrupt defendants in this case weighs in favor of permitting the trial to proceed against appellants. We can discern no clear case of hardship or inequity in requiring the appellants (the remaining defendants below) from proceeding to trial. The defendants protected by the shield of a stay under § 362(a) will in time in some forum have the allegations of the complaint against them and any claims they may have against co-defendants fully litigated. The results of the litigation in bankruptcy will not be squandered.
> *Id. at* 128.

As discussed in *Austin v. UNARCO Industries, Inc.*, 705 F.2d 1, 5 (C.A.Me., 1983) claims for indemnification or contribution are simply claims like the plaintiff's direct claim against the bankrupt defendant. They are stayed by the bankruptcy petition, but are not an impediment to resolving plaintiff's claims directly against Pompey Dodge. As such, claims against Pompey Dodge in this case should be severed from claims against the bankrupt General Motors Corp., those being both Plaintiff's direct claims and any claims for indemnification or contribution. These claims must await resolution of the bankruptcy. However, that does not prevent severance and resolution of all claims against the solvent co-defendants.

F. <u>The Automatic Stay does not Shield the Debtor, General Motors Corp., from the Requirement of Responding to Discovery, and Inconveniences in the Discovery Process Engendered by a Bankruptcy is not a Basis for Refusing to Sever the Case.</u>

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Defendant Pompey Dodge may claim that the action should not be severed because it would still require discovery directed to debtor General Motors Corp.. However, courts have repeatedly held that discovery directed to a debtor is not stayed, if that discovery is related to a claim against a non-debtor party, even where that discovery might later be used in a claim against the debtor. Further, courts have repeatedly held that any inconvenience caused by a bankruptcy is not grounds to stay an action.

In re Richard B. Vance and Co., 289 B.R. 692, 697 (Bkrtcy., C.D.Ill., 2003) states this concisely; "[I]t is now generally accepted that discovery pertaining to claims against the bankrupt's co-defendants is not stayed, even if the discovery requires a response from the debtor, and even if the information discovered could later be used against the debtor." *See also Peter Rosenbaum Photography Corp.* 2004 WL 2973822, 2 (N.D.Ill., 2004) (holding that discovery as to the debtor was no basis for a stay for solvent co-defendants).

Rosenbaum cites *In re Miller*, 262 B.R. 499 (9th Cir. BAP, 2001) for the established proposition that the automatic stay does not protect the debtor from complying with discovery requests pertaining to claims against the other non-debtor defendants. Indeed, in this case there is no indication that discovery from General Motors Corp. will be in anyway impeded. Discovery had been closed, experts reports had been exchanged, a Pretrial Conference had been conducted, and the case was only a couple weeks from trial when the stay was imposed. Even if the bankruptcy creates some inconvenience, courts have consistently held that that is no basis for a stay as to solvent co-defendants.

This issue was examined at length in *Wedgeworth v. Fireboard Corp.,* 706 F.2d 541 (C.A.La., 1983) with the trial court and then the circuit court rejecting inconveniences of discovery as a basis for staying the action against non-bankrupt defendants. In *Wedgeworth* the

bankruptcy court had, in fact, imposed restrictions on discovery directed to the debtor, Johns-Manville, a factor not present here. Still the court rejected this as a basis for a stay as to other defendants. *Id. at* 545.

The same result was reached by the circuit court in *Willford v. Armstrong World Industries, Inc.*, 715 f.2d 124 (C.A.N.C., 1983). That court found that, "[T]here is no specific meaningful complaint by any of the appellants that discovery has been thwarted, or that specific problems exist." *Id. at* 128. So too, in this action there is no indication that discovery from "old" General Motors Corp. or "new" General Motors Corp. would be in any way impeded. Even if that were so, case-law shows that such impediment is not a basis for a stay as to solvent co-defendants. As the *Wilford* court wrote, "In any event, the position in which the appellants find themselves, while taxing and burdensome, does not constitute a sufficient offset to the plaintiff's right to have his case resolved without undue delay." *Id. at* 128.

Because discovery directed to a bankrupt is not stayed as to claims against other defendants, because discovery had long been closed, and because, even if the bankruptcy creates some impediments to discovery, inconvenience in discovery is not a basis for staying claims against solvent co-defendants, this action should be severed to allow Plaintiff to pursue claims against Pompey Dodge.

G. Pennsylvania Caselaw Favors Severance of this Action.

While, as would be expected, most written opinions dealing with severance and continuation of a lawsuit against co-defendants in a case in which one defendant files for bankruptcy, appear in federal courts, it is apparent that severance is permitted and approved in Pennsylvania state courts.

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In *Ottavio v. Fireboard Corp.*, 421 Pa. Super. 284, 617 A.2d 1296 (1991) the Superior Court upheld the trial court in allowing the case to go to the jury as to all non-bankrupt defendants. Noting that Pennsylvania has adopted the Uniform Contribution Among Joint Tort-feasors Act at 42 Pa.C.S. § 8321 *et. seq.*, the court concluded that remaining claims for contribution could and must wait the resolution of the bankruptcy and the lifting of the automatic stay.

Pennsylvania trial courts have exercised their discretion under Pa.R.C.P. 213(b) to sever claims against non-bankrupt co-defendants from those of the debtor. Rule 213(b) provides:

> (b) The court, in furtherance of convenience or to avoid prejudice, may, on its own motion or on motion of any party, order a separate trial of any cause of action, claim, or counterclaim, set-off, or cross suit, or of any separate issue, or of any number of causes of action, claims, counterclaims, set-offs, cross-suits, or issues.

In *Westerby v. Johns-Manville Corp.*, 32 Pa.D.&C.3d 163 (Phila. Cty., 1982) the court recounts that the action was severed on motion of the plaintiff to allow the action to proceed to trial against only non-bankrupt defendants, following the bankruptcy filing of two defendants. That court writes:

> We held that while the stay remained effective as to Johns-Manville and UNARCO, nothing in the bankruptcy laws hinders the presentation or continuation of an individual plaintiff's claims against the remaining co-defendants. Therefore, assuming we retained jurisdiction in the instant case and Mr. Westerby thereafter elected to sever the bankrupt-debtors, plaintiff would be able to proceed only against the non-bankrupt defendants, and, pursuant to the bankruptcy laws, any claims he had against Johns-Manville and UNARCO would be held in abeyance until such time as the statutory stay was lifted. *Westerby at* 181-182.

Likewise in *McMillan v. Johns-Manville et. al.,* 15 Phila. Cty. Rptr. 650 (1987) the trial court, on motion by the plaintiff, severed claims against non-bankrupt co-defendants from the same claims against the bankrupt defendant, and permitted that case to proceed to trial.

Reaching the same decision, the trial court in *Matthews v. Johnsmanville Corp.,* 33 Pa.D.&C.3d 233, 236-237 (Phila. Cty., 1982) writes:

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> The plain language of the above section, its legislative history and the relevant caselaw charting its contours and scope point to the inescapable conclusion that the § 362(a) automatic stay is designed solely as a mechanism for the protection of the debtor-bankrupt and the property of the bankruptcy estate; not for the benefit of related but independent co-defendants. Congress did not intend, and the express language of the statute does not provide a windfall benefit to non-bankrupt co-defendants.

And in *Brown v. Philadelphia Asbestos Corp.*, 443 Pa. Super. 131, 639 A.2d 1245 (1994), a Pennsylvania appellate court exercised its discretion by severing an appeal following bankruptcy of some defendants. The court notes, "As Keene's appeal arises from an action brought against Keene before the filing of his bankruptcy petition, we must stay Keene's appeal pending the conclusion of the bankruptcy proceedings. Moreover, as the automatic stay applies only to the bankrupt debtor, we must severe Keene from the instant appeal." *Brown at* 135, 639 A.2d at 1247. The court concludes that even if it were disposed to find in favor of Keene on the pending appeal, it is still stayed from any action, but not stayed from deciding the appeals of co-defendants. *See also DiDio v. Philadelphia Asbestos Corp.*, 434 Pa. Super. 191, 642 A.2d 1088 (1994) *and Murray v. Philadelphia Asbestos Corp.*, 433 Pa. Super. 206, 640 A.2d 446 (1994) (reaching the same result in related cases.)

In *Temtex Products, Inc. v. Kramer*, 330 Pa. Super. 183, 479 A.2d 500 (1984) the appellate court upheld the trial court's refusal to stay an action where a named defendant filed for bankruptcy. Finding that the named defendant had no actual ownership interest in the disputed property, the action was permitted to move forward despite the stay.

V. CONCLUSION

Because Rule 213(b) allows severance, because Plaintiff has a direct action against the non-bankrupt co-defendants, and because matters of indemnification can be resolved, this matter should be severed to allow the action to proceed against Pompey Dodge.

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WHEREFORE, Plaintiff respectfully request that this Court grant the relief requested in the attached proposed order.

ZAJAC & ARIAS, L.L.C.

BY: ERIC G. ZAJAC, ESQUIRE
Attorney for Plaintiff

DATED: September 8, 2009

CERTIFICATION OF SERVICE

I do hereby certify that the service of a true and correct copy of the within Motion was made on the 8th day of September, 2009, to the counsel below named via e-filing and First Class Mail, postage prepaid.

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BY: **Eric G. Zajac, Esquire**
Attorney for Plaintiff

DATED: September 8, 2009

EXHIBIT "C"

PHILADELPHIA COURT OF COMMON PLEAS

PETITION/MOTION COVER SHEET

FOR COURT USE ONLY	
ASSIGNED TO JUDGE:	ANSWER/RESPONSE DATE:

Do not send Judge courtesy copy of Petition/Motion/Answer/Response.
Status may be obtained online at http://courts.phila.gov

CONTROL NUMBER:
09091068

(RESPONDING PARTIES MUST INCLUDE THIS NUMBER ON ALL FILINGS)

March Term, 2007
Month *Year*
No. 03736

GILVARY VS GENERAL MOTORS CORP ETAL

Name of Filing Party:
POMPEY DODGE INC-DFT

INDICATE NATURE OF DOCUMENT FILED:
☐ Petition *(Attach Rule to Show Cause)* ☐ Motion
☒ Answer to Petition ☐ Response to Motion

Has another petition/motion been decided in this case? ☐ Yes ☐ No
Is another petition/motion pending? ☐ Yes ☐ No
If the answer to either question is yes, you must identify the judge(s):

TYPE OF PETITION/MOTION *(see list on reverse side)*	PETITION/MOTION CODE *(see list on reverse side)*
ANSWER (MOTION/PETITION) FILED	MTANS

ANSWER / RESPONSE FILED TO (Please insert the title of the corresponding petition/motion to which you are responding):
MTREI - MOTION TO REINSTATE

I. CASE PROGRAM

DAY FORWARD/MAJOR JURY PROGRAM

Court Type: JUDGE WILLIAM MANFREDI
Applicable Petition/Motion Deadline: N/A
Has deadline been previously extended by the Court: N/A

II. PARTIES *(required for proof of service)*
(Name, address and ***telephone number*** of all counsel of record and unrepresented parties. Attach a stamped addressed envelope for each attorney of record and unrepresented party.)

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III. OTHER

By filing this document and signing below, the moving party certifies that this motion, petition, answer or response along with all documents filed, will be served upon all counsel and unrepresented parties as required by rules of Court (see PA. R.C.P. 206.6, Note to 208.2(a), and 440). Furthermore, moving party verifies that the answers made herein are true and correct and understands that sanctions may be imposed for inaccurate or incomplete answers.

(Attorney Signature/Unrepresented Party)	*(Date)*	*(Print Name)*	*(Attorney I.D. No.)*
	September 25, 2009	NANCY E. CAMPBELL	

The Petition, Motion and Answer or Response, if any, will be forwarded to the Court after the Answer/Response Date.
No extension of the Answer/Response Date will be granted even if the parties so stipulate.

30-1061B E-File# 0909038880
28-SEP-09 09:35:55

FILED
25 SEP 2009 03:13 pm
Civil Administration

SARAH GILVARY v. GENERAL MOTORS COPRORATION, and POMPEY DODGE, INC.	PHILADELPHIA COUNTY COURT OF COMMON PLEAS MARCH TERM 2007; NO.: 3736 TRIAL BY JURY OF 12 DEMANDED

ORDER

AND NOW, this _____ day of _____, 2009, upon consideration of Plaintiff's Motion to Sever General Motors, and the responses thereto, it is hereby ORDERED and DECREDD that said Motion is DENIED.

BY THE COURT,

_____
J.

SARAH GILVARY v. GENERAL MOTORS COPRORATION, and POMPEY DODGE, INC.	PHILADELPHIA COUNTY COURT OF COMMON PLEAS MARCH TERM 2007; NO.: 3736 TRIAL BY JURY OF 12 DEMANDED

ORDER

AND NOW, this _____ day of _____, 2009, upon consideration of the Defendant Pompey Dodge's New Matter Request for Leave to File a Joinder Complaint, same is GRANTED.

BY THE COURT,

_____
J.

Case ID: 070303736
Control No.: 09091068

SARAH GILVARY v. GENERAL MOTORS COPRORATION, and POMPEY DODGE, INC.	PHILADELPHIA COUNTY COURT OF COMMON PLEAS MARCH TERM 2007; NO.: 3736 TRIAL BY JURY OF 12 DEMANDED

ORDER

AND NOW, this _____ day of _____, 2009, upon consideration of Defendant Pompey Dodge's New Matter Motion to Transfer, same is GRANTED. The Prothonotary is directed to transfer this matter to Luzerne County, all costs to be paid by Defendant.

BY THE COURT,

_____
J.

Case ID: 070303736
Control No.: 09091068

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POMPEY DODGE, INC.

SARAH GILVARY v. GENERAL MOTORS COPRORATION, and POMPEY DODGE, INC.	PHILADELPHIA COUNTY COURT OF COMMON PLEAS MARCH TERM 2007; NO.: 3736 TRIAL BY JURY OF 12 DEMANDED

RESPONSE OF DEFENDANT POMPEY DODGE, INC. TO PLAINTIFF'S MOTION TO SEVER CLAIMS AGAINST DEFENDANT GENERAL MOTORS CORPORATION AND NEW MATTER MOTION FOR LEAVE TO JOIN AND MOTION FOR LEAVE TO TRANSFER

1. It is admitted that the Complaint filed by Plaintiff sets forth product liability claims.

2. It is admitted only that the reports of Ken Laughery and William Muzzy are writings that speak for themselves.

3. Denied as stated. Defendant Pompey Dodge has insufficient knowledge to admit or deny the allegations contained in this paragraph. By way of further response, it is admitted that Plaintiff claims injuries based on the claims set forth in her Complaint which is a writing that speaks for itself.

4. Denied. This is a conclusion of law to which no response is required. By way of further response, this statement is a misstatement of the law. See Defendant's Memorandum of Law attached hereto.

5. Denied as stated.

6. Denied as stated.

7. Denied as stated.

8. It is admitted that a Pre-Trial Conference was held in this case.

9. Denied as stated. Defendant herein did list witnesses.

10. It is admitted that General Motors Corporation filed for bankruptcy on June 1, 2009 and this matter was placed into deferred status upon the filing of a Suggestion of Bankruptcy.

11. Denied. It is specifically denied that General Motors Corp came out of bankruptcy on July 1, 2009. On the contrary, General Motors is still in bankruptcy. On July 1, 2009, certain assets of the company were sold with the proceeds brought into the bankruptcy proceedings.

12. Denied. On the contrary, claims have been made for causes of action existing at the time of the bankruptcy in the bankruptcy proceeding. These claims include individuals such as Plaintiff herein. It should be further noted that General Motors has sold and continues to sell assets that are generating funds into the bankruptcy proceeding. The status of the tort claimants who have filed claims with the bankruptcy court are unresolved as they continue to pursue remedies against the old General Motors.

13. Denied. Plaintiff cannot be permitted to sever only General Motors and not Pompey Dodge. As outlined in the attached Memorandum of Law which is incorporated herein by reference, the protection of the bankruptcy stay must be extended to Pompey Dodge because it has an absolute right of indemnity against the debtor General Motors and in light of legitimate equitable concerns for judicial economy. Moreover, Plaintiff's

motion is premature given the ongoing proceeding in the bankruptcy court which is just a little over 90 days old.

14. Admitted.

15. Admitted.

16. Denied as stated. The order is a writing that speaks for itself.

17. Denied. The final order of the sale of certain assets from the old GM to the new GM was entered on July 2, 2009. This is a 95 page order that outlines the assets and liabilities to be sold. *See* Decision On Debtors' Motion For Approval Of (1) Sale Of Assets To Vehicle Acquisition Holdings LLC; (2) Assumption And Assignment Of Related Executory Contracts; And (3) Entry Into UAW Retiree Settlement Agreement. (Docket #2967) Attached hereto as Exhibit A are pages 1 through 25 of the decision. The full 95 page decision will be supplied to the Court upon request.

18. Denied as stated. The decision of the Bankruptcy Court is a writing that speaks for itself.

19. Denied as state. It is admitted that certain liabilities were retained by the old GM. By way of further response, for the reasons set forth in the attached Memorandum of Law, which is incorporated herein by reference, General Motor's bankruptcy has been specifically tailored for brevity and has thus far proceeded at an expedited pace. There is simply no reason to believe that it will not continue to do so and thus Plaintiff's statements that any liquidation of assets would take two years or more is unfounded.

20. Denied. Plaintiff cannot be permitted to sever only General Motors and not Pompey Dodge. As outlined in the attached Memorandum of Law which is incorporated herein by reference, the protection of the bankruptcy stay must be extended to Pompey

Dodge because it has an absolute right of indemnity against the debtor General Motors and in light of legitimate equitable concerns for judicial economy. Moreover, Plaintiff's motion is premature given the ongoing proceeding in the bankruptcy court which is just a little over 90 days old.

21. Denied. Plaintiff cannot be permitted to sever only General Motors and not Pompey Dodge. As outlined in the attached Memorandum of Law which is incorporated herein by reference, the protection of the bankruptcy stay must be extended to Pompey Dodge because it has an absolute right of indemnity against the debtor General motors and in light of legitimate equitable concerns for judicial economy. Moreover, Plaintiff's motion is premature given the ongoing proceeding in the bankruptcy court which is just a little over 90 days old.

22. Denied. Plaintiff cannot be permitted to sever only General Motors and not Pompey Dodge. As outlined in the attached Memorandum of Law which is incorporated herein by reference, the protection of the bankruptcy stay must be extended to Pompey Dodge because it has an absolute right of indemnity against the debtor General motors and in light of legitimate equitable concerns for judicial economy. Moreover, Plaintiff's motion is premature given the ongoing proceeding in the bankruptcy court which is just a little over 90 days old.

23. Denied. This is a conclusion of law to which no response is required.

24. Denied. This is a conclusion of law to which no response is required.

25. Denied. This is a conclusion of law to which no response is required. Moreover, Plaintiff cannot be permitted to sever only General Motors and not Pompey Dodge. As outlined in the attached Memorandum of Law which is incorporated herein by reference,

the protection of the bankruptcy stay must be extended to Pompey Dodge because it has an absolute right of indemnity against the debtor General motors and in light of legitimate equitable concerns for judicial economy. Moreover, Plaintiff's motion is premature given the ongoing proceeding in the bankruptcy court which is just a little over 90 days old.

26. Denied. This is a conclusion of law to which no response is required. Moreover, Plaintiff cannot be permitted to sever only General Motors and not Pompey Dodge. As outlined in the attached Memorandum of Law which is incorporated herein by reference, the protection of the bankruptcy stay must be extended to Pompey Dodge because it has an absolute right of indemnity against the debtor General motors and in light of legitimate equitable concerns for judicial economy. Moreover, Plaintiff's motion is premature given the ongoing proceeding in the bankruptcy court which is just a little over 90 days old.

27. Denied. This is a conclusion of law to which no response is required. Moreover, Plaintiff cannot be permitted to sever only General Motors and not Pompey Dodge. As outlined in the attached Memorandum of Law which is incorporated herein by reference, the protection of the bankruptcy stay must be extended to Pompey Dodge because it has an absolute right of indemnity against the debtor General motors and in light of legitimate equitable concerns for judicial economy. Moreover, Plaintiff's motion is premature given the ongoing proceeding in the bankruptcy court which is just a little over 90 days old.

WHEREFORE, Defendant Pompey Dodge respectfully requests this Honorable Court deny Plaintiff's Motion to Sever the Claims Against General Motors and to enter the Order as submitted by Defendant Pompey Dodge.

NEW MATTER DEFENDANT'S PETITION FOR LEAVE TO JOIN ADDITIONAL DEFENDANT

28. On May 21, 2007, Plaintiff filed a Civil Action Complaint, alleging personal injuries and damages from a single vehicle accident. A true and correct copy of the Plaintiff's Complaint is attached hereto as Exhibit B.

29. More specifically, Plaintiff alleges that she was injured due to a defective condition of the vehicle. Exhibit B.

30. Defendant Pompey Dodge's inclusion in this lawsuit is as a seller of the vehicle in a chain of eight sales. There is no independent tort claim asserted against Defendant Pompey Dodge.

31. Co-Defendant General Motors Corporation defended the claim as the manufacturer through June 1, 2009 when it filed for bankruptcy. That bankruptcy continues to move forward in the Bankruptcy Court.

32. This matter was deferred on June 8, 2009.

33. Without waiving the arguments set forth above in opposition to Plaintiff's Motion to Sever General Motors and without waiving Defendant Pompey's arguments to extend the bankruptcy stay as to it, Defendant Pompey requests this Court grant its request for leave to join other sellers of the vehicle in question.

34. The vehicle in question was sold by America's Choice Cars and Credit, 391 Kidder Street, Wilkes Barre, PA 18702. See Exhibit C.

35. The vehicle in question was sold by Susquehanna Auto Sales, Route 92, Harding, Pittston, PA. See Exhibit C.

36. The vehicle in question was sold by Frank Iorio's Auto Sales, 68-70 E. Main Street, Wilkes Barre, PA 18705. See Exhibit C.

37. The vehicle in question was sold by Brush & Palette Auto, 598 Owego Road (Rte 96), Candor, NY 13743. See Exhibit C.

38. The vehicle in question was sold by John Doe Rental Company of South Carolina.

39. The liability of each seller in the chain of the sale of this vehicle is the same as Defendant Pompey.

40.. Defendant Pompey hereby seeks leave of court to join America's Choice Cars and Credit, Susquehanna Auto Sales, Frank Iorio's Auto Sales, Brush & Palette Auto and John Doe Rental Company as an Additional Defendants in this action to preserve its right to seek indemnity and/or contribution in the event that it is found liable to Plaintiff.

41. If the allegations of Plaintiff's Complaint are proven, Defendant Pompey believes and therefore avers that proposed Additional Defendants are jointly and/or severally liable with Defendant Pompey on Plaintiff's cause of action, and/or liable over to Defendant by way of contribution, any liability on the part of Defendant Pompey being expressly denied.

42. Defendant has filed this Petition promptly after the bankruptcy filing of General Motors puts into issue the complete indemnification required of General motors as the vehicle manufacturer.

43. Neither the Plaintiff nor the proposed Additional Defendants will be prejudiced by the proposed joinder.

44. The proposed Additional Defendants will not be prejudiced by the proposed joinder as the relief sought is in the nature of indemnity and/or contribution.

45. The allowance of this Petition will permit the liabilities and rights of the various parties to be heard and determined at the same time, thereby avoiding a multiplicity of cases and fostering judicial economy.

46. Defendant Pompey will be adversely prejudiced by the denial of this Petition as it has a good and meritorious action for indemnity and/or contribution against the proposed Additional Defendants which can be adjudicated at the same time as Plaintiff's case against Defendant Pompey.

WHEREFORE, Defendant Pompey respectfully requests that this Honorable Court grant its Petition for Leave to Join Additional Defendants America's Choice car and Credit, Susquehanna Auto Sales, Frank Iorio's Auto Sales, Bush & Palette Auto and John Doe Rental Company and enter an Order permitting Defendant to file a the Joinder Complaint against Additional Defendants.

NEW MATTER MOTION OF DEFENDANT POMPEY TO TRANSFER VENUE TO LUZERNE COUNTY COURT OF COMMON PLEAS PURSUANT TO PENNSYLVANIA RULE OF CIVIL PROCEDURE 1006(d)(1)

47. Plaintiff commenced this suit in Philadelphia County as Defendant General Motors Corporation regularly conducts business in Philadelphia County. Specially, Plaintiff alleged in her Complaint:

> 1. Jurisdiction is proper in this Court because the Defendant GENERAL MOTORS CORPORATION, is present in the county of Philadelphia, can be given notice here, has purposefully availed itself to do business in the county of Philadelphia, and was in fact served with process here.

2. Venue is proper in this Court because the Defendant, GENERAL MOTORS CORPORATION, regularly conducts business activities in the county of Philadelphia.

See Plaintiff's Complaint attached hereto as Exhibit B.

48. With respect to Pompey Dodge, Plaintiff admits that Pompey has its principal place of business where it was served with process at 303 Wyoming Avenue, Kingston, Luzerne County, PA. See Plaintiff's Complaint attached hereto as Exhibit B, paragraph 5.

49. In her Complaint, Plaintiff alleges, *inter alia,* that the subject accident occurred as a result of a defective vehicle which was involved in a single vehicle accident on SR 309, Luzerne County, Pennsylvania.

50. Plaintiff's Complaint sets forth causes of action against Defendant Pompey based on theories of strict liability and breach of warranty.

51. With respect to the moving Defendant, Pompey, Plaintiff alleges that it sold the vehicle as part of the chain of distribution.

52. Pursuant to Pa.R.C.P. 2179(a)(1), venue is proper for Defendant Pompey in Luzerne County.

53. Pennsylvania Rule of Civil Procedure 1006(d)(1) permits the transfer of a case from one county to another "(f)or the conveniences of the parties and witnesses."

54. The transfer of this case to Luzerne County is clearly warranted under the criteria established in Cheeseman v. Lethal Exterminator, Inc., 701 A.2d 156 (Pa. 1997), because a Luzerne County venue will provide much easier access to witnesses and other sources of proof.

55. More specifically, the transfer of this case to Dauphin County will provide the parties with easier access to the fact witnesses to the accident who reside in Luzerne and Lackawanna Counties, all of who have been deposed in Luzerne County during the discovery of this case.

56. Pursuant to Pennsylvania Rules of Civil Procedure 1006 and 2179, Luzerne County is the appropriate venue for this action.

WHEREFORE, Defendant Pompey respectfully requests that this Court grant this Motion to transfer and to order this case transferred to the Luzerne County Court of Common Pleas.

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POMPEY DODGE, INC.

SARAH GILVARY v. GENERAL MOTORS COPRORATION, and POMPEY DODGE, INC.	PHILADELPHIA COUNTY COURT OF COMMON PLEAS MARCH TERM 2007; NO.: 3736 TRIAL BY JURY OF 12 DEMANDED

MEMORANDUM OF LAW OF DEFENDANT POMPEY DODGE, INC. IN OPPOSITION TO PLAINTIFF'S MOTION TO SEVER CLAIMS AGAINST DEFENDANT GENERAL MOTORS CORPORATION

I. MATTER BEFORE THE COURT

Defendant Pompey Dodge (hereinafter Pompey) opposes Plaintiff's Motion to Sever the claims of General Motors Corporation and submits this Memorandum of Law in support of its position.

II. STATEMENT OF QUESTION INVOLVED

1. Whether the automatic stay of this proceeding under 11 U.S.C. Section 362 as to the claims against Defendant General Motors (the old GM) should be extended to Defendant Pompey because the interests of Pompey and the old GM are so intertwined that allowing Plaintiff to separate the claims of the two would offend judicial economy?

Suggested Answer: Yes

2. Whether Plaintiff's Motion to Sever is premature as the General Motors bankruptcy proceedings are just a little over ninety into the proceedings?

Suggested Answer: Yes

III. STATEMENT OF THE CASE

This matter involves personal injuries (plaintiff is a quadriplegic) suffered in a single vehicle accident on April 16, 2005. Plaintiff was the front passenger in a 1995 Buick Regal owned and driven by Richard Gross. On that day, Plaintiff avers that the driver Richard Gross fell asleep at the wheel and lost control of the car. In the process, Plaintiff who se passenger seat was in the reclined position, claims that she was injured in the single vehicle accident. Plaintiff argues that the vehicle was defective in that it failed to have proper warnings within the vehicle to warn of the dangers of occupying the passenger seat in a reclined position while the vehicle is in motion. Plaintiff has brought a strict liability and breach of warranty claim only against Defendant Pompey. Pompey is but one seller in a chain of eight sales of the vehicle at issue.

- 1995 vehicle is manufactured by General Motors
- April 15, 1995, vehicle sold to and registered by John Doe Rental Company
- March, 1996, vehicle sold by John Doe Rental Company at auction.
- Vehicle owned by private individual March 6, 1998 through March, 2003
- March 18, 2003, vehicle sold by Brush & Palette Auto to Frank Iorio's Auto Sales
- March 25, 2003, vehicle sold by Frank Iorio's Auto Sales to Pompey Dodge
- April 22, 2003, vehicle sold by Pompey Dodge to private individual
- January 13, 2005 vehicle traded-in at Pompey Dodge
- January 25, 2005, vehicle sold by Pompey Dodge through Northeast Auto Auction, Inc. to Susquehanna Auto Sales

- February 7, 2005 vehicle sold by Susquehanna Auto Sales to America's Choice cars & Credit
- March 25, 2005, vehicle sold by America's Choice Cars & Credit to Richard Gross
- Date of accident - April 16, 2005

Pompey did not sell the vehicle to Richard Gross. The vehicle was purchased by Richard Gross from America's Choice Cars & Credit and he was the registered owner on the day of the accident.

It is undisputed that Pompey did not manufacture or design this GM vehicle or any of its systems. Defendant Pompey made no change to the vehicle while it was in its possession. Pompey's inclusion in this matter is solely based on its pass through position as a seller of an allegedly defective vehicle. As such, Pompey has requested complete indemnification from the manufacturer General Motors. The only theory of liability against Pompey is as a seller of a defectively designed and/or manufactured vehicle.

General Motors sought bankruptcy protection under Chapter 11 on June 1, 2009. *See*, In re Motorist Liquidation Company, Case No. 09- 50026 (S.D.N.Y.). Pursuant to 11 U.S.C.A. Section 362, an automatic stay was imposed on all claims against General Motors Corporation. Plaintiff now seeks to severe General Motors from this case and to proceed against Pompey. Given the facts of this case and the legal claims made by Plaintiff, there will be a judicial waste and risk of inconsistent adjudications inherent in the maintenance of separate actions against Pompey and General Motors. Moreover, this Motion is premature as the old GM bankruptcy proceeds with expediency.

IV. ARGUMENT

A. The automatic stay of this proceeding under 11 U.S.C. Section 362 as to the claims against Defendant General Motors (the old GM) should be extended to Defendant Pompey because the interests of Pompey and the old GM are so intertwined that allowing Plaintiff to separate the claims of the two would offend judicial economy

Pompey requests this Court extent the bankruptcy stay entered on behalf of the old GM to include Pompey. This request is supported by caselaw. Plaintiff contends that the vehicle manufactured by General Motors and sold by Pompey, as one of several sellers, was defective and caused her to suffer the injuries outlined in her Complaint. Plaintiff further contends that Pennsylvania law permits her to sue anyone in the chain of distribution including Pompey, one of eight sellers, for design and manufacturing defects despite the fact that it had no active role in the design or manufacture of the vehicle involved. However, Pennsylvania law gives the seller an absolute right of indemnity against the manufacturer when the seller's liability is predicated simply on its sale and not a separate theory of liability. Here it is undisputed that the theory of liability against Pompey is simply that it sold the vehicle as part of several sales of the vehicle. Plaintiff even admits that Pompey did not sell the vehicle to the person who owned the vehicle at the time of the accident.

It is this relationship between seller and manufacturer which supports Pompey's inclusion in the stay for several reasons and distinguishes the cases on which the Plaintiff relies in support of her request for severance. Courts have recognized the need to include those with indemnity rights against the debtor in bankruptcy stays. Moreover, Plaintiff is maintaining her action against General Motors. She has not dismissed it. She has not petitioned the Bankruptcy Court to lift the Stay so she can pursue it. At some point,

either the stay will be lifted by the bankruptcy court or the Plaintiff's claim against General Motors will be tried in the Bankruptcy Court. Plaintiff has every right to protect her claim with the bankruptcy court and to pursue her claim once the stay is lifted. Plaintiff seeks herein to assert the same theory of liability, namely a defect in the vehicle, against Pompey and General Motors separately, which is contrary to any judicial economy.

While an automatic stay under 11 U.S.C.A. Section 362(a)(1) typically extends only to the debtor in the bankruptcy, this application is not without exception. *See, e.g.*, A.H. Robins Co. v. Piccinin, 788 F.2d 994 (4th Cir. 1986). Where an extension of such a stay to solvent co-defendants has been considered, the courts have often cited to circumstances that involve a third-party who is entitled to absolute indemnity by the debtor on account of any judgment that is rendered against them. *See, id.* at 999. ("to refuse application of the statutory stay in that case would defeat the very purpose and intent of the statute.") "(E)ven in the absence of an explicit indemnification agreement, an action by a creditor against a guarantor of a debtor's obligation will necessarily affect that creditor's status vis a vis other creditors and the administration of the estate therefore depends on the outcome of that litigation." *See, e.g.*, In re Bretano's, 27 Bankr. 90 (S.D.N.Y. 1983).[1]

In the case at bar, Pompey cannot be excluded from the benefit of the stay as Plaintiff requests. Plaintiff continues to maintain her claim against General Motors. There has been not request to dismiss the action against General Motors. Plaintiff acknowledges that her claim against Pompey is based solely on Pompey having sold the

allegedly defective vehicle to someone other that the owner at the time of her accident. Plaintiff admits that her claims that the vehicle is defective are directed against General Motors who designed and manufactured the vehicle. The only cause of action against Pompey is one in which it would be entitled to complete indemnity from General Motors. General Motors would bear primary responsibility as the designer and manufacturer for the any successful claim made by Plaintiff. There is no allegation that Pompey breached a duty separately owed to Plaintiff. If Pompey is found liable to Plaintiff, Pompey would only be secondarily liable and would have an absolute right of indemnity against General motors. These points are uncontested and Plaintiff's concession in this regard is paramount because it eliminates any doubt of Pompey's right to indemnity from General Motors under the law and thus should be considered absolute. *See, e.g.*, Mixter v. Mack Truck, Inc., 308 A. 2d 139 (Pa. Super. 1973); Sochanski v. Sears, Roebuck & Co, 689 F.2d 45 (#rd Cir. 1982). The inseparability inherent in the relationship between a product manufacturer and a seller who does nothing more than sell an allegedly defective product has been recognized in other circumstances. *See,* Sochanski, supra, (release in favor of product manufacturer also releases retailer who is only secondarily liable as a mere conduit between the manufacturer and purchaser.) Therefore, the automatic stay under Section 362(a)(1) must extend to Pompey as well and Plaintiff cannot be permitted to sever General Motors only.

Pompey concedes that Plaintiff could have brought this action against Pompey only or solely against General Motors, or as she did here, against both. However, Plaintiff is not permitted to divide what are clearly identical claims as between General

[1] In contrast, *See*, In re Metal Center, 31 Bankr 458 (D. Conn. 1983) which held that where a solvent co-defendant's liability stems from his own breach of an independent duty, he would not be entitled to receive

Motors and Pompey and pursue them separately. By filing this motion, this is precisely what Plaintiff seeks. Plaintiff's claims against Pompey and General Motors are all based on common theories of strict liability.[2] The legal issues as to General Motors and Pompey are the same. Moreover, Plaintiff admits that her claims against Pompey and General Motors are based on one set of facts - proof that the vehicle was defective. Plaintiff seeks to prove that the General Motors vehicle was defective and further seeks to recover from Pompey the damages which resulted from that defect. The claims against Pompey and General Motors are identical.

Granting Plaintiff's Motion herein would in essence lead to piecemeal litigation that would waste both party and court resources. The result would be two trials of the same legal theories based on the same set of facts and evidence in front of different fact-finders. This would lead to two separate adjudications and even separate appeals for inconsistent judgments that a severance would invite. The greater interests of judicial economy are served with a denial of this motion. *See,* In re the Loewen Group, Inc. Sec. Litig., 98-6740, 2001 U.S. Disct LEXIS 6482, at *10-13 (E.D. Pa 2001)(staying entire action because "fragmentation of such claims and discovery will waste judicial resources and may result in prejudice to the rights of the solvent co-defendants.")

Plaintiff has cited many cases from the asbestos claims which address the severance issue in the context of multiple defendant manufacturers of various asbestos products that caused injury to claimants. In those cases, mostly involving the bankruptcies of Johns-Manville and UNARCO, the remaining solvent manufacturers sought to gain protection of the bankruptcy stay on the claims against the bankrupt

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protection of the stay.

parties. Plaintiff's reliance on these cases herein is misplaced because the parties that sought the benefit of the stay in those cases were co-defendant **manufacturers.** The basis for their liability was independent of the liability of the bankrupt defendants. Walton v. Atco, 610 A.2d 454 (Pa. 1992). None of those cases applies to the facts here. Pompey's relationship to General Motors is one where Pompey has an automatic right of indemnity under the law because it can only be secondarily liable for what is the debtor's primary responsibility. "(T)here is such identity between the debtor and the third-party defendant that the debtor may be said to be the real party defendant and that a judgment against the third-party defendant will in effect be a judgment or finding against the debtor." A.H. Robins Co. 788 F.2d at 999.

B. Plaintiff's Motion to Sever is premature as the General Motors' bankruptcy proceedings are just a little over ninety into the proceedings

This Motion is premature. The bankruptcy matter continues and this Court should wait for the pending bankruptcy proceeding to further clarify. The General Motors bankruptcy is not typical. At this point, the bankruptcy proceedings are a little over ninety days old and many assets have already been sold. Events continue to move swiftly. Plaintiff's contention that the bankruptcy will continue for two years or more is not supported by the proceeding to date. Therefore, there is no prejudice to Plaintiff in waiting for the bankruptcy to run its course and the moneys brought in through the sale of assets to be distributed.

Plaintiff is a member of a coalition of tort claimants known as the Ad Hoc Committee of Consumer Victims of General Motors who have maintained claims against General Motors. This Committee continues to maintain a presence in the bankruptcy

[2] Plaintiff has not asserted any negligence claims against Pompey and since Pompey did not sell the vehicle

proceedings. Moreover, there is still action that could be taken by the Obama Administration or the United States legislature. A bill was recently filed by House of Representatives member Andrew Carson, D-Ind. that seeks to force the newly emerged General Motors to cover product defect claims for those products manufactured by the now bankrupt debtor. Given the relationship between Pompey and General Motors on the facts of this case, allowing the severance of General Motors so early into the bankruptcy proceeding would be premature, especially in light of the unresolved status of the tort claimants. Additional time should be allowed to see what continues to move through the bankruptcy courts as well as the legislature.

V. CONCLUSION

Pompey requests this Honorable Court extend the bankruptcy stay given its absolute right to indemnity against General Motors and in light of the legitimate equitable concerns for judicial economy. In the alternative, Plaintiff's Motion is premature given the character of the unprecedented bankruptcy proceeding in the General Motors bankruptcy and at the very least, Plaintiff's Motion should be denied as premature.

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S NEW MATTER PETITION FOR LEAVE TO JOIN ADDITIONAL DEFENDANTS

I. MATTER BEFORE THE COURT

Pursuant to Pa.R.C.P. 2253(a), Defendant Pompey seeks leave to file a joinder complaint against Additional Defendants identified as other sellers of the vehicle at issue.

to the owner at the time of the accident, Pompey has denied any warranty claims.

II. STATEMENT OF QUESTION INVOLVED

Whether this Court should permit Defendant Pompey leave to file a joinder complaint against Additional Defendants identified as other sellers of the vehicle at issue?

Suggested Answer: Yes

III. STATEMENT OF FACTS

See the Statement of Facts listed above. Specifically, Pompey is but one seller in a chain of eight sales of the vehicle at issue.

- 1995 vehicle is manufactured by General Motors
- April 15, 1995, vehicle sold to and registered by John Doe Rental Company
- March, 1996, vehicle sold by John Doe Rental Company at auction.
- Vehicle owned by private individual March 6, 1998 through March, 2003
- March 18, 2003, vehicle sold by Brush & Palette Auto to Frank Iorio's Auto Sales
- March 25, 2003, vehicle sold by Frank Iorio's Auto Sales to Pompey Dodge
- April 22, 2003, vehicle sold by Pompey Dodge to private individual
- January 13, 2005 vehicle traded-in at Pompey Dodge
- January 25, 2005, vehicle sold by Pompey Dodge through Northeast Auto Auction, Inc. to Susquehanna Auto Sales
- February 7, 2005 vehicle sold by Susquehanna Auto Sales to America's Choice cars & Credit
- March 25, 2005, vehicle sold by America's Choice Cars & Credit to Richard Gross
- Date of accident - April 16, 2005

Pompey did not sell the vehicle to Richard Gross. The vehicle was purchased by Richard Gross from America's Choice Cars & Credit and he was the registered owner on the day of the accident.

IV. ARGUMENT

Pa.R.C.P. 2252 provides that a defendant may join as an additional defendant any person, whether a party or not, who may be:

(1) solely liable on the plaintiff's cause of action, or

(2) liable over to the joining party on the plaintiff's cause of action, or

(3) jointly or severally liable with the joining party on the plaintiff's cause of action, or

(4) liable to the joining party on any cause of action arising out of the transaction or occurrence or series of transactions or occurrences upon which the plaintiff's cause of action is based.

Pa.R.C.P. 2252(a). A primary purpose behind this procedure is to avoid multiplicity of suits by adjudicating in one suit the rights and liabilities of the parties in a single cause of action. Indeed the rule regarding joinder of parties should be broadly construed to effectuate its purpose of avoiding multiple lawsuits and by settling in one action all claims arising out of the transaction or occurrence which gives rise to Plaintiffs' Complaint. Olson v. Grutza, 428 Pa. Super. 378, 631 A.2d 191 (1993).

Rule 2253 of the Pennsylvania Rules of Civil Procedure provides that an additional defendant may be joined after the sixty day permissive joinder period for good cause shown. The determination of whether good cause has been shown is a matter within the sound discretion of this Honorable Court. Joinder beyond the time permitted by the rules may provide a method of expeditiously litigating disputes involving multiple parties. Riccobono v. Keystone Helicopter Corp., 352 Pa. Super. 186, 507 A.2d 834

(1986). Whether there is sufficient cause to allow late joinder of an additional defendant is a matter within the sound discretion of the trial court. Mutual Industries, Inc. v. Weinberg, 423 Pa. Super. 328, 621 A.2d 140, 143 (1993). Joinder should be granted when it can "simplify and expedite the disposition of matters involving numerous parties without subjecting the original plaintiff to unreasonable delay in the prosecution of his portion of the litigation." Zakian v. Liljestrand, 438 Pa. 249, 264 A.2d 638 (1970).

When requesting the late joinder of an additional defendant, a party must show (1) that the joinder is based on proper grounds, (2) that some reasonable excuse exists for the delay in commencing joinder proceedings, and (3) that the original plaintiff will not be prejudiced by the late joinder. Francisco v. Ford Motor Co., Inc., 406 Pa. Super. 144, 593 A.2d 1277 (1991). Potential prejudice to the potential additional defendant is also considered. Prime Properties Development Corp v. Binns, 397 Pa. Super. 492, 580 A.2d 405 (1990).

The Zakian court noted that the length of the delay after the expiration of the sixty (60) day period specific in Rule 2252 for joinder of additional defendants was not, in and of itself, determinative. Zakian, 264 A.2d at 641-642. Rather, the length of delay is to be viewed in the context of the particular case. Id. at 642.

Joinder Nunc Pro Tunc has been permitted after the expiration of the sixty (60) day period set forth in Rule 2253 on numerous occasions. The Court in Lamoree v. Penn Central, et al., 235 Pa. Super. 380, 385-386, 357 A.2d 595 (1976), held that a delay of 8 1/2 months was excused by the fact that plaintiff's deposition had been continued in two occasions and because of the time involved in obtaining and evaluating Plaintiff's medical records. In response to the potential additional defendant's allegation that he

would be unduly prejudiced by the passage of time, the Lamoree court noted that any possible prejudice was not so severe as to preclude joinder. In reaching its decision to allow late joinder, the court observed that "[more importantly, there is no indication that permitting the joinder of Dr. Salerno at this date will substantially delay and prejudice the disposition of the plaintiffs' cause of action." Id. at 386 [emphasis added]. Likewise, there is no indication that permitting late joinder in the case at bar would substantially prejudice or delay the plaintiff's cause of action.

Late joinder was also permitted in the well-reasoned cause of Azcon Corporation v. Dual State Builders, Inc., in which the Court held that the substantive rights of defendant would not be affected by allowing late joinder after the eighteen (18) month delay. 8 D. & C. 3d 499, 502 (1978). The Azcon court noted the following:

> To be sure, additional defendant will be prejudiced by the joinder. Being joined as parties will ipso facto expose them to a liability and to this extent it may be said that their position is worsened. But, if this were to be the criteria for allowing extension for joinder of a party on cause shown, then there could never be a late joinder and the rule, authorizing the late joinder after 60 days, is a nullity.

Id. at 502-503. See also, Scott v. I. Reindollar & Son, Inc., 87 York 173 (1974). (joinder permitted 22 months but did not preclude joinder).

Here, proper grounds exist for the joinder of America's Choice Cars and Credit, Susquehanna Auto Sales, Frank Iorio's Auto Sales, Brush & Palette Auto and John Doe Rental Company as additional defendants in this action. Plaintiff contends that her injuries were cause by a defect in the vehicle in which she rode as a passenger. Defendant Pompey was joined as one seller in a chain of sellers of the vehicle. The

Plaintiff's claim was against the vehicle manufacturer, General Motors who filed for bankruptcy on June 1, 2009.

The reason for the delay in adding these parties is that each proposed additional defendant is in the same position as Pompey - potentially liable to plaintiff as a distributor/seller of an alleged defective product. But each potential additional defendant is entitled to full and complete indemnity from General Motors, the designer and manufacturer of the allegedly defective product. Joinder of these parties as additional defendants was unnecessary as long as the manufacturer is in the case.

Now that there is an issue as to the ability to secure indemnification from the manufacturer, Defendant Pompey is entitled to seek contribution from others in the chain of distribution. Pompey had no reason to believe that complete indemnification from General Motors would be at issue. Despite the influx of millions of dollars from the federal government, General Motors, one of the largest companies in the Untied States over the last eighty-five years, was forced into bankruptcy.

Neither Plaintiff nor the proposed Additional Defendants will be prejudiced by the joinder of America's Choice Cars and Credit, Susquehanna Auto Sales, Frank Iorio's Auto Sales, Brush & Palette Auto and John Doe Rental Company as Additional Defendants at this stage in the litigation. On the other hand, if joinder is not permitted, Defendant Pompey will be deprived of an opportunity to seek valid and potentially meritorious claims for contribution and indemnity against the other sellers in the chain of sales of the vehicle in question. Accordingly, because the proposed joinder does not cause any prejudice, Defendant's Petition must be granted.

V. CONCLUSION

Defendant respectfully requests that this Honorable Court grant its Petition for Leave to Join Additional Defendants America's Choice Cars and Credit, Susquehanna Auto Sales, Frank Iorio's Auto Sales, Brush & Palette Auto and John Doe Rental Company and enter an Order permitting Defendant to file a Joinder Complaint against Additional Defendants America's Choice Cars and Credit, Susquehanna Auto Sales, Frank Iorio's Auto Sales, Brush & Palette Auto and John Doe Rental Company.

MEMORANDUM OF LAW OF DEFENDANT, POMPEY IN SUPPORT OF ITS NEW MATTER MOTION TO TRANSFER VENUE TO LUZERNE COUNTY COURT OF COMMON PLEAS PURSUANT TO PENNSYLVANIA RULE OF CIVIL PROCEDURE 1006(d)(1)

I. MATTER BEFORE THE COURT

Without waiving the arguments set forth above requesting this Court deny Plaintiff's Motion to Sever Defendant General Motors without waiving the arguments set forth above to extent the bankruptcy stay to include Defendant Pompey, Defendant Pompey files this Motion to Transfer Venue to Luzerne County pursuant to Pennsylvania Rule Civil Procedure 1006(d)(1) should General Motors Corporation be severed from the case.

II. STATEMENT OF QUESTION INVOLVED

1. Whether venue is properly transferred to Luzerne County Court of Common Pleas pursuant to Pa.R.C.P 1006(d)(1)?

Suggested Answer: Yes

III. STATEMENT OF FACTS

See the Statement of Facts above. In addition, Plaintiff's Complaint sets forth its allegation to establish jurisdiction and venue through General Motors Corporation only. There is no allegation in the Plaintiff's Complaint that Defendant Pompey conducts any

business let alone regular business in Philadelphia County. Moreover, Plaintiff states in her Complaint that the accident happened on Rte 309 in Luzerne County. None of the proposed additional defendants have business connections in Philadelphia County.

IV. ARGUMENT

Plaintiff's claims bear no meaningful nexus to Philadelphia County other than her ability to aver that General Motors regularly conducts business in Philadelphia County. The accident giving rise to this lawsuit occurred in Luzerne County. The accident was investigated by the State Police in Luzerne County. All fact witnesses depositions have been of witnesses from Luzerne and Lackawanna County and all of those depositions have been taken in Luzerne County.

While Defendant Pompey argues that General Motors should not be severed from this case at this time, or that the bankruptcy stay should be extended to it, if General Motors is not in the case at trial, it would be oppressive to the Defendant Pompey to try this case in Philadelphia, as it will be difficult and needlessly inconvenient to secure the attendance at a trial in Philadelphia County of key witnesses who are geographically distant from Philadelphia. The key witnesses are located in Luzerne and Lackawanna Counties.

Pennsylvania courts evaluate *forum non conveniens* arguments using the standard set forth in the case of Cheeseman v. Lethal Exterminator, Inc., 549 Pa. 200, 701 A.2d 156 (1997). In the instant case, as demonstrated below, the Cheeseman criteria are clearly satisfied here, and, as a result, this case should be transferred to Luzerne County, Pennsylvania.

Initially, it is noted that this claim is properly venued in Luzerne County. Defendant, Pompey's business was located in Kingston, Luzerne County, Pennsylvania. Pursuant to Pa.R.C.P. 2179(a)(1), venue is proper for Pompey in Luzerne County.

Pennsylvania Rule of Civil Procedure 1006(d)(1) permits the transfer of an action in Pennsylvania from one county to another on the basis of *forum non conveniens*. The *Rule* provides:

> For the convenience of parties and witnesses the court upon petition of any party may transfer an action to the appropriate court of any other county where the action could originally have been brought.

PA. R. CIV. P. 1006(d)(1).

Pennsylvania courts evaluate *forum non conveniens* arguments using the standard set forth in Cheeseman v. Lethal Exterminator, Inc., 549 Pa. 200, 701 A.2d 156 (1997). In Cheeseman, the Pennsylvania Supreme Court established that in order to transfer venue, a defendant must demonstrate, "with detailed information on the record, that the plaintiff's chosen forum is oppressive or vexatious to the defendant." Id., at 213, 701 A.2d at 162. The Court went on to explain the circumstances under which a defendant may demonstrate that the chosen forum is oppressive or vexatious:

> [T]he defendant may meet its burden of showing that the plaintiff's choice of forum is vexatious to him by establishing with facts on the record that the plaintiff's choice of forum was designed to harass the defendant, even at some inconvenience to the plaintiff himself. Alternatively, the defendant may meet his burden by establishing on the record that trial in the chosen forum is oppressive to him; for instance, that trial in another county would provide easier access to witnesses or other sources of proof, or to the ability to conduct a view of premises involved in the dispute.

Id.

As the Cheeseman court explained, a chosen forum may be shown to be oppressive where trial in another county would provide easier access to witnesses or other sources of proof. Id. Subsequent opinions interpreting Cheeseman have, appropriately, given great weight to the location of key witnesses in determining whether transfer of venue is warranted, and Pennsylvania courts have affirmed the transfer of cases based on *forum non conveniens* where key witnesses are located significantly closer to the requested venue than to plaintiff's chosen venue. *See* Wood v. E.I. du Pont de Nemours & Co., 829 A.2d 707, 712-713 (Pa. Super. Ct. 2003), *appeal denied*, 580 Pa. 699, 860 A.2d 124 (2004) (key defense witnesses located 173-190 miles from chosen venue and only several miles from requested venue); Borger v. Murphy, 797 A.2d 309, 312-313 (Pa. Super. Ct. 2002) (many witnesses were either located in requested venue or would only have to travel a short distance to requested venue, while chosen venue was 80 miles or more away); *see also* Mateu v. Stout, 819 A.2d 563 (Pa. Super. Ct. 2003) (litigation of action in requested venue provided easier access to witnesses since medical witness was located within requested venue and all other identified witnesses were located outside of chosen venue).

Transfer of the instant action to Luzerne County would unquestionably provide much easier access to most of the witnesses and other sources of proof upon which Defendant Pompey will rely, since the main fact witnesses identified in the party Pre-Trial Statements, including Plaintiff, who will be providing important information at trial are located in Luzerne and Lackawanna Counties. In fact, all of the depositions of these witnesses were conducted in Luzerne County.

In light of Luzerne County's ease of access to witnesses and other sources of proof, Philadelphia County plainly is an oppressive forum. Cheeseman, supra, at 213, 701 A.2d at 162. Transfer to Luzerne County is, therefore, warranted. Moreover, the transfer of the instant action to Luzerne County at this stage in the litigation is opportune if this Court makes the decision to sever Defendant General Motors Corporation from the case. (Again it is noted that Defendant Pompey argues strongly that General Motors should not be severed or in the alternative that the bankruptcy stay should be extended to it.) Rule 1006(d)(1) imposes no time limit on a party seeking to transfer venue, Wood, supra, 829 A.2d at 710; Zappala v. Brandolini Prop Mgmt., 909 A.2d 1272 (Pa. 2006).

Moreover, Plaintiff's choice of Philadelphia County as the venue for this action is vexatious. The Court in Cheeseman stated that vexation in the choice of venue may be shown by establishing "that the plaintiff's choice of forum was designed to harass the defendant, even at some inconvenience to the plaintiff himself." Cheeseman, supra, at 213, 701 A.2d at 162. In this case, all transactions related to the purchase of the motor vehicle occurred in Luzerne County. Pompey conducts no business in Philadelphia County. Nor does Pompey have any connection with Philadelphia County. In fact, Plaintiff herself is a long time resident of Luzerne County.

Philadelphia County has no interest in the personal injuries caused by the allegedly defective motor vehicle. While it is admitted that venue was proper at the time the case was commenced because of the claims made against Defendant General Motors Corporation, if this Court decides to sever General Motors from this case because of the pending bankruptcy, then venue as to Defendant Pompey becomes improper and Defendant Pompey may bring this Motion to Transfer the matter to Luzerne County.

All of the circumstances warranting transfer of venue to Luzerne County under the doctrine of *forum non conveniens* as expressed in Rule 1006(d)(1)are present in the instant case. As detailed above, the key fact witnesses are located in Luzerne and Lackawanna Counties. In addition, the parties to this case, including Plaintiff, are located in Luzerne County. None of the parties has a physical office in Philadelphia County. Plaintiff's claims bear no connection to Philadelphia County,[3] and Pompey has clearly demonstrated that trial in Philadelphia County would be oppressive to it under the standard set forth in Cheeseman. Moreover, it is apparent that the choice of venue of Philadelphia County was done to harass the Defendants. As such, Defendants have shown that the Plaintiff's choice of venue is vexatious.

V. CONCLUSION

Defendant Pompey thus respectfully requests that this Honorable Court grant its Motion to Transfer Venue to the Luzerne County Court of Common Pleas, pursuant to Pennsylvania Rule of Civil Procedure 1006(d)(1), and enter the proposed Order attached hereto.

KENNEDY, CAMPBELL, LIPSKI & DOCHNEY

NANCY E. CAMPBELL, ESQUIRE
Attorney for Defendant
Pompey Dodge

[3] Although, under Cheeseman, a claim that no significant aspect of a case involves the chosen forum does not amount to a showing that the chosen forum is oppressive or vexatious, courts have nonetheless noted such a lack of connection in their analysis supporting transfer of venue based on *forum non conveniens*. See, e.g., Mateu v. Stout, 819 A.2d 563, 567 (Pa. Super. Ct. 2003) (noting that parties were located outside of chosen forum and defendants were served notice of the action outside of chosen forum); Caiazzo v. North American Specialty Insurance Co., 80 Pa. D. & C. 4th 507, 512, 2007 WL 1453829 (Pa. Com. Pl. 2007) (finding the only connection between the case and plaintiff's chosen forum to be that plaintiff's attorney, an estate administrator, and a guardian of a minor worked or resided there).

VERIFICATION

The undersigned counsel for defendants verifies that the facts contained herein are true and correct to the best of his knowledge, information and belief. The undersigned understands that false statements herein are made subject to the penalties of 18 Pa. C.S. §4904 relating to unsworn falsification to authorities.

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SARAH GILVARY v. GENERAL MOTORS COPRORATION, and POMPEY DODGE, INC.	PHILADELPHIA COUNTY COURT OF COMMON PLEAS MARCH TERM 2007; NO.: 3736 TRIAL BY JURY OF 12 DEMANDED

CERTIFICATE OF SERVICE

I, Nancy E. Campbell, Esq., do hereby certify that a true and correct copy of the foregoing was mailed via first class mail, postage prepaid to counsel listed below.

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Date: September 25, 2009

Case ID: 070303736
Control No.: 09091068

EXHIBIT "D"

FILED
25 SEP 2009 03:13 pm
Civil Administration

SARAH GILVARY v. GENERAL MOTORS COPRORATION, and POMPEY DODGE, INC.	PHILADELPHIA COUNTY COURT OF COMMON PLEAS MARCH TERM 2007; NO.: 3736 TRIAL BY JURY OF 12 DEMANDED

ORDER

AND NOW, this 21st day of Oct, 2009, upon consideration of Plaintiff's Motion to Sever General Motors, and the responses thereto, it is hereby ORDERED and DECREED that said Motion is DENIED.

BY THE COURT,

J.

DOCKETED
OCT 21 2009
K. GALLAGHER

COPIES SENT
PURSUANT TO P.R.C.P. 236(b)

Gilvary Vs General Moto-ORDER

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Case ID: 070303736
Control No.: 09091068