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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re: MOTORS LIQUIDATION CORP, *et al.*, f/k/a GENERAL MOTORS CORP., *et al.*, Debtors.	Chapter 11 Case No. 09-50026 (REG) (Jointly Administered)
RADHA RAMANA MURTY NARUMANCHI (Murty) and RADHA BHAVATARINI DEVI NARUMANCHI (Devi), Plaintiffs, - against - GENERAL MOTORS CORPORATION, *et al.*, Defendants.	Adversary Proceeding No. 09-00501 (REG)

UNITED STATES OF AMERICA'S REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF ITS MOTION TO DISMISS THE CLAIMS AGAINST THE FEDERAL DEFENDANTS

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The United States of America, by its attorney Preet Bharara, United States Attorney for the Southern District of New York, respectfully submits this reply memorandum in further support of its motion to dismiss the claims of *pro se* plaintiff Radha Ramana Murty Narumanchi against the Federal Defendants.[1]

PRELIMINARY STATEMENT

1. Plaintiff cites a host of law in his opposition to the Government's motion to dismiss, but he does not explain how any of it applies to the facts of this case. Plaintiff apparently contends that (i) the Court has subject matter jurisdiction over the Federal Defendants because his claims arise under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), or a federal statute other than the FTCA; (ii) the Acting United States Attorney's scope certification of the Federal Defendants was incorrect; and (iii) the complaint is not barred by *res judicata* because it was filed before the Court issued its 363 Sale Order. These arguments are meritless. *First,* the complaint contains no allegations of either a constitutional violation giving rise to a *Bivens* claim, or any non-FTCA statutory violation. *Second,* plaintiff cites no fact that would tend to call the scope certification into question. *Third,* the timing of the complaint *vis-à-vis* the Sale Order is irrelevant with respect to the doctrine of *res judicata* because the claims at issue in the adversary proceeding already were litigated and decided in the context

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[1] By Endorsed Order entered July 28, 2009, the Court granted former plaintiff Radha Bhavatarini Devi Narumanchi's application to withdraw from the case. *See* Adv. Proc. Docket No. 19. Unless otherwise specified, capitalized terms have the same meaning as in the Government's Opening Motion to Dismiss (cited herein as "Gov't Motion"), dated July 21, 2009. *See* Adv. Proc. Docket No. 17.

of the Sale Motion. Accordingly, the Court should grant the Government's motion to substitute the United States as defendant in place of the Federal Defendants, and to dismiss plaintiff's claims against the United States.

ARGUMENT

I. PLAINTIFF'S CLAIMS ARISE ONLY UNDER THE FTCA AND ARE BARRED BY SOVEREIGN IMMUNITY

2. Plaintiff argues first that his claims against the Federal Defendants do not arise under the FTCA because he demands a jury trial under 28 U.S.C. § 2679(b)(2)(A) and (B), and *Bivens*. *See Pro Se* Plaintiff's Opposition to Federal Defendants' 7-21-09 Motion to Dismiss ("Opposition") ¶ 1.1. This is presumably an attempt to establish the Court's subject matter jurisdiction over his claims under some authority other than the FTCA, which permits only bench trials and is the exclusive remedy for suits arising out of the alleged negligent or wrongful acts or omissions of Government employees. *See* 28 U.S.C. §§ 2679(a) (citing 28 U.S.C. § 1346(b)), 2402. As shown below, plaintiff's argument is unsuccessful.

3. An exception to the FTCA exclusivity rule involves claims brought against an employee of the United States "for a violation of the Constitution of the United States" or "for a violation of a statute of the United States under which such action against an individual is otherwise authorized." 28 U.S.C. § 2679(b)(2)(A), (B) (cited in Opposition ¶ 1.1). Neither provision applies here. With respect to section 2679(b)(2)(B), plaintiff has not cited in his complaint or his opposition any particular statute that the Federal Defendants allegedly violated, or that authorizes his suit against them.

4. Nor has plaintiff stated a claim under Section 2679(b)(2)(A), which preserves the right to bring a *Bivens* action against an individual federal officer for a violation of the Constitution. *See United States v. Smith,* 499 U.S. 160, 166-67 (1991). *See generally Higazy v. Templeton,* 505 F.3d 161, 169 (2d Cir. 2007) ("A *Bivens* action is a judicially-created remedy designed to provide individuals with a cause of action against federal officials who have violated their constitutional rights."). While plaintiff suggests that the Federal Defendants committed "unconstitutional and tortious acts," *see* Opposition ¶ 1.2, 2.1.2 n.5, 2.1.3 n.8, his complaint contains no specific allegations of constitutional violations committed by any Federal Defendant, or of any personal involvement by a Federal Defendant in an alleged constitutional violation. *See Ashcroft v. Iqbal,* 129 S. Ct. 1937, 1949 (2009) (*Bivens* action in which the Court held that a complaint is insufficient if it "tenders 'naked assertion[s]' devoid of 'further factual enhancement'") (quoting *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 557 (2007)); *Thomas v. Ashcroft,* 470 F.3d 491, 496 (2d Cir. 2006) ("[P]laintiff must allege that the individual defendant was personally involved in the constitutional violation."). The complaint thus contains no jurisdiction-conferring *Bivens* claims insofar as the Federal Defendants are concerned—and even if the complaint could be broadly read to contain *Bivens* claims against these defendants, these claims would have to be dismissed under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief may be granted.

5. At bottom, plaintiff's claims against the Federal Defendants boil down to nothing more than intentional tort claims—all of which fall within the ambit of

the FTCA. *See* Gov't Motion ¶ 10. On July 15, 2009, the Acting United States Attorney certified pursuant to the FTCA that the Federal Defendants were acting within the scope of their employment at the Treasury Department during the time period relevant to the complaint. *See* Declaration of Joseph N. Cordaro, dated July 21, 2009 (Adv. Proc. Docket No. 16), Ex. A. The Court thus should dismiss the Federal Defendants and substitute the United States as defendant. *See* Gov't Motion ¶ 11 (citing 28 U.S.C. § 2679(d)(1)).

6. Plaintiff tries to circumvent this problem by challenging the scope certification itself. He claims that the Federal Defendants may not have been Government employees or acting within the scope of their employment during the relevant time period, and that discovery is needed to flesh out this issue. *See* Opposition ¶¶ 1.6, 2.1.3(A)-(B). Plaintiff is correct to suggest that on the question of substitution of the United States as defendant, a scope certification "is the first, but not the final word." *Gutierrez de Martinez v. Lamagno,* 515 U.S. 417, 432 (1995). But even though a scope certification "is subject to *de novo* review . . . 'such review is triggered by opposition from the plaintiff "alleg[ing] *with particularity* facts relevant to the scope-of-employment issue" as read in the light most favorable to the plaintiff.'" *De Masi v. Schumer,* 608 F. Supp. 2d 516, 522 (S.D.N.Y. 2009) (emphasis supplied) (quoting *Marley v. Ibelli,* 203 F. Supp. 2d 302, 308 (S.D.N.Y. 2001) and *McHugh v. Univ. of Vt.,* 966 F.2d 67, 74 (2d Cir. 1992)). Here, plaintiff has alleged *no* particular facts that call the scope certification into question.

7. In fact, as discussed in the Government's opening brief, plaintiff's allegations of wrongdoing are not directed at the individual Federal Defendants, but at the Treasury Department and the Presidential Task Force on the Auto Industry. *See, e.g.,* Compl. ¶ 3.3.5 ("U.S. Treasury (under the leadership of defendant Geithner) and ATF have committed an actionable tort in making aiding abetting [sic] GM to breach its indenture . . . ."); *see also* Gov't Motion ¶¶ 5, 11 n.5. Plaintiff's allegations against the Federal Defendants thus *depend* on these defendants' status and actions as Government employees. *Cf. De Masi,* 608 F. Supp. 2d at 522 (finding United States Attorney's scope certification of Senator Charles E. Schumer proper under FTCA because, *inter alia*, "Plaintiff's [tort] allegations depend[ed] on Senator Schumer's status and conduct as a United States Senator"; substituting United States as defendant for Senator Schumer; and dismissing FTCA claim on sovereign immunity grounds). Because plaintiff's challenge to the scope certification is plainly baseless, there is no need for the Court to order discovery or hold an evidentiary hearing on the validity of the certification.

8. In light of the foregoing, the Court should dismiss the Federal Defendants and substitute the United States in their place. *See supra* ¶ 5. The claims against the United States then should be dismissed for lack of subject matter jurisdiction because the law is clear—and plaintiff does not dispute—that Congress excluded the intentional tort claims at issue in this case from the Government's waiver of sovereign immunity under the FTCA. *See* Gov't Motion ¶ 12 (citing 28 U.S.C. § 2680(h)).

II. PLAINTIFF'S CLAIMS ARE BARRED BY *RES JUDICATA*

9. Even assuming *arguendo* that the Court had subject matter jurisdiction over plaintiff's claims against the Federal Defendants, those claims should be dismissed under the doctrine of *res judicata. See* Gov't Motion ¶¶ 16-25. Plaintiff suggests that *res judicata* should not apply because the adversary proceeding was filed before the Court issued the Sale Order. *See* Opposition ¶ 2.2. Plaintiff might have the beginnings of an argument if he had no knowledge of his fraud allegations when he was litigating the previously filed Sale Motion. *See, e.g., Lawrence v. Wink (In re Lawrence),* 293 F.3d 615, 620-21 (2d Cir. 2002) (declining to decide whether *res judicata* bars collateral attack on bankruptcy sale when the plaintiffs had no knowledge of their fraud allegations during the sale proceeding). This argument is unavailable here because plaintiff's objection to the Sale Motion contained several allegations of Government misconduct. *See* Gov't Motion ¶ 23. The Court then issued the Sale Order, which (i) was a final judgment on the merits, that (ii) involved the same parties, and (iii) involved the claims at issue in the adversary complaint. The claim preclusion aspect of *res judicata* therefore applies. *See* Gov't Motion ¶ 16 (citing *Monahan v. New York City Dep't of Corr.,* 214 F.3d 275, 284-85 (2d Cir.), *cert denied,* 531 U.S. 1035 (2000)).

10. Even if plaintiff's claims were not subject to claim preclusion, they are barred by issue preclusion, as well as the closely-related law-of-the-case doctrine, which provides that "a decision on an issue of law made at one stage of a case becomes binding precedent to be followed in subsequent stages of the same

litigation." *Liona Corp. v. PCH Assocs. (In re PCH Assocs.),* 949 F.2d 585, 592 (2d Cir. 1991). "The doctrine applies to all issues decided expressly or by necessary implication." *Ulster Savings Bank v. Kizelnik (In re Kizelnik),* 190 B.R. 171, 180 (Bankr. S.D.N.Y. 1995) (citing *In re Chateaugay Corp.*, 136 B.R. 79, 83 (Bankr. S.D.N.Y. 1992)). These doctrines apply because the adversary complaint contains the same claims that the Court already addressed in the Sale Decision and Sale Order. *See* Gov't Motion ¶¶ 20-24. To the extent plaintiff contends that he was not afforded a full and fair opportunity to litigate the Sale Motion, *see* Opposition ¶¶ 1.3, 1.5, this unsupported argument is belied by plaintiff's own submission in opposition to the motion and his participation at the hearing. *See* Gov't Motion ¶ 18.[2]

III. PLAINTIFF SHOULD NOT BE GIVEN LEAVE TO REPLEAD

11. Plaintiff suggests that he be allowed to amend his complaint after a period of discovery. *See* Opposition ¶ 2.3. While "[t]he court should freely give leave [to amend a pleading] when justice so requires," Fed. R. Civ. P. 15(a)(2), "leave to amend may be denied if the amendment would be futile." *In re Am. Express Co. S'holder Litig.,* 39 F.3d 395, 402 (2d Cir. 1994) (citing *Foman v. Davis,* 371 U.S. 178, 182 (1962) and *Leonelli v. Pennwalt Corp.,* 887 F.2d 1195, 1198 (2d Cir. 1998)). This decision lies within the sound discretion of the Court. *Foman,* 371 U.S. at 182. Here, amendment of plaintiff's claims against the Government would be pointless

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[2] Plaintiff argues in his opposition to the motions to dismiss by GM and WTC that the doctrine of *res judicata* is inapplicable because the Sale Order is on appeal to the District Court. *See Pro Se* Plaintiff's Opposition, dated Sept. 1, 2009 (Adv. Proc. Docket No. 22) ¶ 3.3.8. This is plainly wrong. *See Petrella v. Siegel,* 843 F.2d 87, 90 (2d Cir. 1988) (judgment pending appeal entitled to *res judicata* effect) (citing *Huron Holding Corp. v. Lincoln Mine Operating Co.,* 312 U.S. 183, 189 (1941)).

because the Court lacks jurisdiction over them. The claims against the Federal Defendants thus should be dismissed with prejudice. *See, e.g., Chan v. Reno,* 916 F. Supp. 1289, 1302 (S.D.N.Y. 1996) ("An amendment is considered futile if the amended pleading fails to state a claim or would be subject to a successful motion to dismiss on some other basis.").

CONCLUSION

For the foregoing reasons, as well as those discussed in the Government's opening brief, plaintiff's claims against the Federal Defendants should be dismissed.

Dated: New York, New York
September 23, 2009

Respectfully submitted,

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