Return Date: September 30, 2009 at 10:30 a.m.
Response Due: August 26, 2009
Reply Due: September 23, 2009

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ATTORNEYS FOR WILMINGTON TRUST COMPANY

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re **MOTORS LIQUIDATION COMPANY *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), **Plaintiff *Pro Se*,** **v.** **GENERAL MOTORS CORP. *et al*.,** **Defendants.**	Adversary Proceeding No. 09-00501 (REG)

SUPPLEMENTAL DECLARATION OF DAVID J. KERSTEIN IN FURTHER SUPPORT OF DEFENDANT WILMINGTON TRUST COMPANY'S MOTION TO DISMISS PLAINTIFF'S ADVERSARY COMPLAINT

DAVID J. KERSTEIN, an attorney duly licensed to practice law in the State of New York and in the Southern District of New York, hereby declares under penalty of perjury, pursuant to 28 U.S.C. § 1746, that the following is true and correct:

1. I am associated with Gibson, Dunn & Crutcher LLP, counsel for Defendant Wilmington Trust Company ("**WTC**") in this action.

2. I submit this supplemental declaration in further support of Defendant Wilmington Trust Company's Motion to Dismiss Plaintiffs' Adversary Complaint, filed June 16, 2009.

3. Attached hereto as Exhibit 16 is a true and correct copy of the Endorsed Order Granting Radha Bhavatarini Devi Narumanchi Permission to Withdraw as a *Pro Se* Plaintiff, entered on July 28, 2009 (the "**July 28, 2009 Endorsed Order**").

4. Attached hereto as Exhibit 17 is a true and correct copy of the following unreported judicial decision: *Narumanchi v. Foster*, No. 02-CV-6553 (JFB)(LB), 2006 WL 2844184 (E.D.N.Y. Sept. 29, 2006).

5. Attached hereto as Exhibit 18 is a true and correct copy of the following unreported judicial decision: *Narumanchi v. Am. Home Assurance Co.*, 317 F. App'x 56 (2d Cir. 2009).

6. Attached hereto as Exhibit 19 is a true and correct copy of the following unreported judicial decision: *In re HHG Corp.*, No. 01-B-11982 (ASH), 2006 WL 1288591 (Bankr. S.D.N.Y. May 2, 2006).

7. Attached hereto as Exhibit 20 is a true and correct copy of the following unreported judicial decision: *Bay Harbour Mgmt., L.C. v. Lehman Bros. Holdings Inc. (In re Lehman Bros. Holdings, Inc.)*, Nos. 08 Civ. 8869(DLC), 08 Civ. 8914(DLC), 2009 WL 667301 (S.D.N.Y. Mar. 13, 2009).

8. Attached hereto as Exhibit 21 is a true and correct copy of the following unreported judicial decision: *Paul J. Schieffer, Inc. v. Coan (In re Paul J. Schieffer, Inc.)*, No. 3:08cv12 (JBA), 2008 WL 4186944 (D. Conn. Sept. 11, 2008).

9. Attached hereto as Exhibit 22 is a true and correct copy of plaintiff's Notice of Appeal on 7-6-2009 Decision of Honorable Judge Robert E. Gerber, on Debtors' Motion for approval of Sec. 363 Sale of Assets, etc. to New GM, filed on July 10, 2009 ("**Pl.'s Notice of Appeal**").

10. Attached hereto as Exhibit 23 is a true and correct copy of plaintiff's Statement of Issues and Designation of Documents related to my 7-7-2009 Notice of Appeal on 7-5-2009 Decision of Honorable Judge Robert E. Gerber, [on Debtors' Motion for approval of Sec. 363 Sale of Assets, etc. to Motors Liquidation Company et. al. (Formerly General Motors Corp. et. al.)], filed on July 21, 2009 ("**Pl.'s Statement of Issues**").

I declare under penalty of perjury, pursuant to 28 U.S.C. § 1746, that the foregoing is true and correct.

Dated: New York, New York
September 23, 2009

/s/ David J. Kerstein
David J. Kerstein (DK-7017)

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200 Park Avenue, 47th Floor
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Attorneys for Defendant
Wilmington Trust Company

Chambers of Honorable Judge Robert E. Gerber

Endorsed Order: Permission to withdraw granted. S/RGG USBJ 7/29/09

United States Bankruptcy Court
Southern District of New York
One Bowling Green
New York, N.Y. 10004-1408

Lead Case # 09-50026

In Re:	)	
	)	
	)	Chapter 11
MOTOR LIQUIDATION COMPANY, et. al,,	)	Case # 09-0950026
(formerly General Motors Corp., et al.) Debtors	)	(Gerber)
	)	Jointly Administered

ADVERSARIAL COMPLAINT

Radha Ramana Murty Narumanchi (Murty) & Radha Bhavatarini Devi Narumanchi (Devi)	Plaintiffs *Pro Se*	) Adversarial Complaint **# 09-501**
vs.		)
(1) General Motors Corporation (GM)		)
(2) Wilmington Trust Company (WTC)		)
(3) Timothy F. Geithner (Geithner), Secretary of Treasury, U.S. Govt.		)
(4) Steven Rattner (Rattner), U.S. President's nominee & Head Of Auto Task Force (ATF) in the Treasury Department		)
(5) Ron Bloom (Bloom), Member, ATF		)
(6) Mathew Feldman (Feldman), Member, ATF		) Dated: July 23, 2009
(7) Harry J. Wilson (Wilson), Member, ATF		)
(8) Kent Kresa (Kresa), Chairman of GM		)
(9) Frederick "Fritz" Henderson (Henderson) , President & CEO of GM		)
	DEFENDANTS	)

PERMISSION TO WITHDRAW AS A *PRO SE* PLAINTIFF

My name is Radha Bhavatarini Devi Narumanchi.

On 6-16-2009, as a Creditor of Motors Liquidation Company (formerly General Motors Corporation), I joined my husband, Radha R.M. Narumanchi, as a *pro se* plaintiff in this adversarial complaint. However, my present health condition does not permit me to travel to New York city to attend any of the hearings in this case. In any case, the so-called unsecured

bonds of General Motors Corp. are held by us in our "joint and/or" basis.

Under the circumstances, in anticipation of approval of this honorable court, I would like to have my name removed as a co-plaintiff, from this adversarial complaint.

Respectfully submitted.

Dated at New Haven, Ct. 06513, this 23rd of July, 2009.

Creditors and *Pro Se* Plaintiffs

(Radha B.D. Narumanchi) (Radha R.M. Narumanchi) 7/23/2009

657 Middletown Avenue
New Haven, Ct. 06513
Phone: (203) 562-0536

Certification

This is to certify that a copy of the aforementioned was mailed by first class, postage paid this 23rd day of July, 2009 to:

1) Weil, Gotshal & Manges LLP, Attorneys for Debtors, 767 Fifth Avenue, New York, N.Y. 10153 - Attn: Harvey R. Miller/Stephen Karotkin/Joseph H. Smolinsky;
2) Cadwalader, Wickersham & Taft LLP, Attorneys for the Purchaser, One World Financial Center, New York, N.Y. 10281 - Attn: John J. Rapisardi;
3) Kramer Levin Naftalis & Frankel LLP, Attorneys for the Creditors Committee, Attorneys for the Creditors Committee, 1177 Avenue of the Americas, New York, N.Y. 10036, Attn: Kenneth H. Eckstein;
4) Cleary Gottlieb Steen & Hamilton LLP, Attorneys for the UAW, One Liberty Plaza, New York, N.Y. 10006 - Attn: James L. Bromley;
5) Cohen, Weiss and Simon LLP, Attorneys for the UAW, 330 West 42nd Street, New York, N.Y. 10036 - Attn: Babette Ceccotti;
6) Vedder Price, P.C., Attorneys for Export Development Canada, 1633 Broadway - 47th Floor, New York, N.Y. 10019 - Attn: Michael J. Edelman/Michael L. Schein;
7) Office of the United States Trustee for the Southern District of New York, 33 Whitehall Street, 21st floor, New York, N.Y. 10004 - Attn: Diana G. Adams;
8) U.S. Attorney's General Office, S.D.N.Y., 86 Chambers Street - Third Floor, New York, N.Y. 10007 - Attn: David S. Jones/Matthew L. Schwartz.
9) Courtesy copy to the Chambers of Honorable Judge Robert E. Gerber, United States Bankruptcy Court, Southern Dist of New York, One Bowling Green, New York, N.Y. 10004-1408.

7/23/2009
(Radha R.M. Narumanchi)

Not Reported in F.Supp.2d, 2006 WL 2844184 (E.D.N.Y.)
(Cite as: 2006 WL 2844184 (E.D.N.Y.))

H

Only the Westlaw citation is currently available.

United States District Court,
E.D. New York.
Murty NARUMANCHI & Devi Narumanchi,
Plaintiffs,
v.
Winston FOSTER, Vanessa Scott, & Geico Indemnity Co., Defendants.
No. 02-CV-6553 (JFB)(LB).

Sept. 29, 2006.

Murty Narumanchi, New Haven, CT, pro se.

Devi Narumanchi, New Haven, CT, pro se.

John W. Kondulis, Bilello & Walisever, Westbury, NY, Thomas A. Pavano, Jeffrey H. Arnold & Associates, West Hartford, CT, Donald S. Neumann, Jr., Montfort, Healy, McGuire & Salley, Garden City, NY, Michael T. McCormack, Tyler Cooper & Alcorn, Hartford, CT, for Defendants.

MEMORANDUM AND ORDER

JOSEPH F. BIANCO, District Judge.

***1** In this diversity case, *pro se* plaintiffs bring this action against defendants alleging personal injuries resulting from a vehicle accident on July 15, 2000. Defendants move for summary judgment pursuant to Fed.R.Civ.P. 56 based on the affirmative defense of collateral estoppel. For the reasons that follow, the motion is granted and this case is dismissed.

I. Background and Procedural History

This action arises out of a motor vehicle accident on July 15, 2000. Plaintiff Murty Narumanchi owned and operated a vehicle that collided with a vehicle owned and operated by defendants Winston Foster and Vanessa Scott. Plaintiff Murty Narumanchi alleges in this case that a stroke he suffered two weeks after the collision was caused by the collision. Plaintiff Devi Narumanchi seeks damages from defendants for loss of consortium.

Plaintiff Murty Narumanchi filed a separate suit against his own insurance carrier seeking no-fault benefits for the treatment of his stroke. *See Narumanchi v. American Home Assurance Co.*, No. 03-CV-2342 (LB) (E.D.N.Y.) The defendant in that case filed an answer denying Narumanchi's allegations. (*See* Answer, Docket Entry # 5). A trial in that action resulted in a finding in a special verdict that Narumanchi failed to "prove by a preponderance of the evidence that the car accident on July 15, 2000, was a substantial cause of plaintiff's stroke on July 29, 2000." (*See* Ct. Ex. 2 "Special Verdict Sheet," dated Aug. 24, 2005). The resulting judgment dismissed the action against Narumanchi's insurance carrier. Plaintiff appealed the verdict and judgment in that case, and that appeal is pending in the Second Circuit.

B. PROCEDURAL HISTORY

Plaintiffs' commenced this action in the District of Connecticut, and it was transferred on December 9, 2002, to the Eastern District of New York. The case was assigned to the Honorable Nicholas G. Garafus. Plaintiffs filed an amended complaint at some point prior to January 21, 2004, and defendants filed an amended answer on January 21, 2004. Discovery commenced, and on August 31, 2004, this case was reassigned to the Honorable Sandra L. Townes. Thereafter, on February 21, 2006, the case was reassigned to this Court. On March 23, 2006, defendants moved to amend their answer to add the affirmative defense of collateral estoppel. This Court granted defendants' motion on March 31, 2006. Defendants moved for summary judgment on August 3, 2006. Oral argument was held on September 13, 2006.

II. DISCUSSION

A. Failure of Defendants to Comply with Local Civil Rule 56.2

As a threshold matter, defendants failed to comply with Local Rule 56.2. The relevant part of that Rule, entitled "Notice to Pro Se Litigants Opposing Summary Judgment," requires:

> Any represented party moving for summary judgment against a party proceeding *pro se* shall serve and file as a separate document, together with the papers in support of the motion, a "Notice To Pro Se Litigant Opposing Motion For Summary Judgment" in the form indicated below....
>
> ***2** The defendant in this case has moved for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. This means that the defendant has asked the court to decide this case without a trial, based on written materials, including affidavits, submitted in support of the motion. THE CLAIMS YOU ASSERT IN YOUR COMPLAINT MAY BE DISMISSED WITHOUT A TRIAL IF YOU DO NOT RESPOND TO THIS MOTION by filing your own sworn affidavits or other papers as required by Rule 56(e).... The full text of Rule 56 is attached.

Local Civil R. 56.2. "[T]he Second Circuit has cautioned that a district court may grant [summary judgment] only if the *pro se* party has received notice that failure to respond to the motion 'will be deemed a default.' " *Gillum v. Nassau Downs Regional Off Track Betting Corp. of Nassau*, 357 F.Supp.2d 564, 568 (E.D.N.Y.2005) (quoting *Champion v. Artuz*, 76 F.3d 483, 486 (2d Cir.1996); *see also Arum v. Miller*, 304 F.Supp.2d 344, 349 (E.D.N.Y.2003) (denying motion for summary judgment without prejudice for failure to comply with Local Rule 56.2). At oral argument, the Court provided *pro se* plaintiffs with a copy of Rule 56, as well as discussed in detail with *pro se* plaintiffs the importance and significance of opposing a motion for summary judgment. In addition, the Court issued an order that provided the notice contemplated by Local Civil Rule 56.2, and gave *pro se* plaintiffs additional time to review the Rule, and submit additional materials. Plaintiffs filed an additional affidavit and exhibits, and they have been considered in connection with this motion. (*See* Docket Entry # 92.); *see Nelson v. Beechwood Organization*, No. 03 Civ. 4441(GEL), 2006 WL 2067739, at *3 (S.D.N .Y. July 26, 2006) ("After the motion was fully briefed it came to the Court's attention that [defendant] failed to comply with Local Rule 56.2.... The Court issued an order incorporating such notice ... and provided *[pro se* plaintiff] with an opportunity to submit ... addition materials....").

" 'A district court has broad discretion to determine whether to overlook a party's failure to comply with local court rules.' " *Ostroski v. Town of Southold*, 443 F.Supp.2d 325, 2006 WL 2053761, at *3 (E.D.N.Y. July 21, 2006) (quoting *Holtz v. Rockefeller & Co., Inc.*, 258 F.3d 63, 73 (2d Cir.2001) (citations omitted)); *see, e.g., Gilani v. GNOC Corp.*, No. 04-CV-2935 (ILG), 2006 WL 1120602, at *2 (E.D.N.Y.Apr.26, 2006) (exercising court's discretion to overlook the parties' failure to submit statements pursuant to Local Civil Rule 56.1). In exercise of this broad discretion, the Court refrains from denying defendants' motion based upon defendants' failure to adhere with Local Civil Rule 56.2. Any prejudice to *pro se* plaintiffs has been cured, as discussed *supra*. Further, the Court afforded *pro se* plaintiffs additional time, and considers the supplemental paperwork submitted by plaintiffs in connection with this motion. *See Nelson*, 2006 WL 2067739, at *3.

B. Applicable Law

***3** A court may dismiss a claim on res judicata or collateral estoppel grounds on either a motion to dismiss or a motion for summary judgment. *See Sassower v. Abrams*, 833 F.Supp. 253, 264 n. 18.

(S.D.N.Y.1993) ("Therefore, the defense of res judicata or collateral estoppel may be brought, under appropriate circumstances, either via a motion to dismiss or a motion for summary judgment."); *See Salahuddin v. Jones,* 992 F.2d 447, 449 (2d Cir.1993) (affirming dismissal of claims under Rule 12(b) on grounds of res judicata); *Day v. Moscow,* 955 F.2d 807, 811 (2d Cir.), *cert. denied,* 506 U.S. 821 (1992). In addition, the relevant facts for this motion, namely the trial and jury verdict in the related action, are public documents subject to judicial notice, and are not in dispute. *See Jacobs v. Law Offices of Leonard N. Flamm,* No. 04 Civ. 7607(DC), 2005 WL 1844642, at *3 (S.D.N.Y. July 29, 2005) ("In cases where some of those factual allegations have been decided otherwise in previous litigation, however, a court may take judicial notice of those proceedings and find that plaintiffs are estopped from re-alleging those facts."). Nevertheless, the Court treats this motion as it was filed, as one for summary judgment under Fed.R.Civ.P. 56. *See Ramos v. New York City Dep't of Corr .,* No. 05-CV-223 (JFB)(LB), 2006 WL 1120631, at *2 (E.D.N.Y. Apr. 26, 2006).

Pursuant to Federal Rules of Civil Procedure 56(c), a court may not grant a motion for summary judgment unless "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." FED.R.CIV.P. 56(c); *Globecon Group, LLC v. Hartford Fire Ins. Co.,* 434 F.3d 165, 170 (2d Cir.2006). The moving party bears the burden of showing that he or she is entitled to summary judgment. *See Huminski v. Corsones,* 396 F.3d 53, 69 (2d Cir.2005). The court "is not to weigh the evidence but is instead required to view the evidence in the light most favorable to the party opposing summary judgment, to draw all reasonable inferences in favor of that party, and to eschew credibility assessments." *Amnesty Am. v. Town of W. Hartford,* 361 F.3d 113, 122 (2d Cir.2004); *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986) (stating that summary judgment is unwarranted if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party"). Once the moving party has met its burden, the opposing party "must do more than simply show that there is some metaphysical doubt as to the material facts.... [T]he nonmoving party must come forward with specific facts showing that there is a *genuine issue for trial."* *Caldarola v. Calabrese,* 298 F.3d 156, 160 (2d Cir.2002) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586-87 (1986)). "[W]hen the meaning of the contract is ambiguous and the intent of the parties becomes a matter of inquiry, a question of fact is presented which cannot be resolved on a motion for summary judgment." *Postlewaite v. McGraw-Hill, Inc.,* 411 F .3d 63, 67 (2d Cir.2005).

C. Application

***4** "Collateral estoppel ... means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Leather v. Eyck,* 180 F.3d 420, 424 (2d Cir.1999) (quoting *Schiro v. Farley,* 510 U.S. 222, 232 (1994)). Under Fed. R. of Civ. P. 8(c), collateral estoppel is an affirmative defenses that must be pleaded by the defendant. *Id.* at 424. If the prior judgment was rendered in federal court, as is the case here, the principles of collateral estoppel require that "(1) the identical issue was raised in a previous proceeding; (2) the issue was actually litigated and decided in the previous proceeding; (3) the party had a full and fair opportunity to litigate the issue; and (4) the resolution of the issue was necessary to support a valid and final judgment on the merits." *Ball v. A.O. Smith Corp.,* 451 F.3d 66, 69 (2d Cir.2006) (quoting *Purdy v. Zeldes,* 337 F.3d 253, 258 & n. 5 (2d Cir.2003)).

The question, therefore, is whether the jury finding in Narumanchi's case against his insurance carrier, that the car accident was not a substantial cause of his stroke, prevents Narumanchi from seeking dam-

ages suffered by his stroke against the insurance carrier, driver and occupant of the other vehicle involved in the car accident. The Court concludes that plaintiff is collaterally estopped from continuing this action.

In this action, plaintiffs contend that defendant Foster was negligent in operating his vehicle. Specifically, the complaint alleges that Foster was speeding. The complaint alleges that as a result of the accident, Narumanchi suffered a stroke. (*See* Compl. ¶ 3.4.) The damages sought by Narumanchi are a result of the stroke. (*See id.* ¶ 3.9 "As a result of the successive strokes ... plaintiff ... has suffered the following monetary losses ...") The only damages sought by Devi Narumanchi is for loss of consortium as a result of defendants' alleged negligence. (*See id.* ¶ 6.3.) To succeed in this case under New York law, plaintiff is required to prove a causal connection between the alleged breach by defendants, and the damages sought by plaintiffs. *See Di Benedetto v. Pan Am World Service, Inc.*, 359 F.3d 627, 630 (2d Cir.2004). Put another way, assuming *arguendo* that defendants negligently caused the accident, plaintiff still must prove that the accident caused his stroke, and the damages that followed. Because a jury found against plaintiff on this very issue in a related case, collateral estoppel prevents him from re-litigating this alleged causal connection in this case. *See Leather*, 180 F.3d at 424. Plaintiffs argue that the theories of proof are different in the two cases. Even if this is true, it does not change the analysis under collateral estoppel. *See Ball*, 451 F.3d at 69. The fact that negligence is alleged in one action, and bad faith is alleged in another action, *see* Aff. in Opp. at 3, both causes of action necessarily require a causal connection between the underlying event (car accident) and the stroke. A jury found no such connection.

***5** For similar reasons, plaintiff Devi Narumanchi's claim fails. A cause of action for loss of consortium cannot exist independent of a viable claim for the spouse's injuries. *Liff v. Schildkrout*, 49 N.Y.2d 622, 632 (1980) ("Nor can it be said that a spouse's cause of action for loss of consortium exists in the common law independent of the injured spouse's right to maintain an action for injuries sustained."). Hence, as Devi Narumanchi's claim necessarily rises and falls with the success of her husband's claims, her claim for loss of consortium is dismissed.

Finally, plaintiffs' argument that collateral estoppel does not apply because the related case is on appeal is also rejected because a decision is "final" when judgment is entered, even if an appeal is later filed. *See Martin v. Malhoyt*, 830 F.2d 237, 264 (D.C.Cir.1987); *Brown v. Hanover Trust Co.*, 602 F.Supp. 549, 551 (S.D.N.Y.1984) ("That the plaintiff is attempting to appeal the ... [related decision] does not affect the outcome of this motion. In New York, the pendency of an appeal does not alter the res judicata effect of the challenged judgment.") (citing cases). Indeed, "[t]he pendency of an appeal ... does not automatically diminish the preclusive effects of a prior adjudication." *Martin*, 830 F.3d at 264. *See also Hunt v. Liberty Lobby, Inc .*, 707 F.2d 1493, 1497 (D.C.Cir.1983) (noting "well-settled federal law" that appeal "does not diminish the res judicata effects of a judgment rendered by a federal court"); Restatement (Second) of Judgments § 13 & comment f (any "sufficiently firm" prior adjudication should be deemed "final" and accorded conclusive effect; the "better view is that a judgment otherwise final remains so despite the taking of an appeal unless [the] appeal actually consists of a trial de novo"). The Court, however, understands *pro se* plaintiffs concerns about what would happen in this case if the prior action is reversed on appeal. If that were to happen, the plaintiffs in this action can write to this Court informing them of this fact, and the Court will re-open the case pursuant to Fed.R.Civ.P. 60(b)(6) ("The Court may relieve a party ... from a final judgment ... [if] a "prior judgment upon which it is based has been reversed or otherwise vacated").

III. CONCLUSION

For the reasons set forth above, defendants' motion for summary judgment based on collateral estoppel is GRANTED and plaintiff Murty Narumanchi's claims are dismissed. Devi Narumanchi's claim for loss of consortium is also dismissed. The Clerk of the Court shall enter judgment in favor of defendants and close this case.

SO ORDERED.

E.D.N.Y.,2006.
Narumanchi v. Foster
Not Reported in F.Supp.2d, 2006 WL 2844184 (E.D.N.Y.)

END OF DOCUMENT

317 Fed.Appx. 56, 2009 WL 754768 (C.A.2 (N.Y.))
(Not Selected for publication in the Federal Reporter)
(Cite as: 317 Fed.Appx. 56, 2009 WL 754768 (C.A.2 (N.Y.)))

H

This case was not selected for publication in the Federal Reporter.

United States Court of Appeals,
Second Circuit.
Murty NARUMANCHI, Devi Narumanchi,
Plaintiffs-Appellants,
v.
AMERICAN HOME ASSURANCE COMPANY,
As subrogee of Caterpillar, Inc., Winston Foster,
Vanessa Scott, Geico Indemnity Co., Defendants-Appellees.
Nos. 05-6523-cv (L), 06-4734-cv (CON).

March 24, 2009.

Background: Motorist who suffered a stroke approximately two weeks after motor vehicle accident brought personal injury action and claimed entitlement to no-fault insurance benefits. The United States District Court for the Eastern District of New York, Joseph F. Bianco, J., denied motorist's motion for new trial, granted summary judgment in favor of other motorists, 2006 WL 2844184, and entered judgment, upon a jury verdict, in favor of remaining defendants. Motorist appealed.

Holdings: The Court of Appeals held that:
(1) motorist had burden to prove that the accident caused his stroke, and
(2) personal injury action was barred by collateral estoppel.

Affirmed.

West Headnotes

[1] Insurance 217 2673

217 Insurance
217XXII Coverage--Automobile Insurance
217XXII(A) In General
217k2672 Nature and Cause of Injury or Damage
217k2673 k. In General. Most Cited Cases

Insurance 217 2692

217 Insurance
217XXII Coverage--Automobile Insurance
217XXII(A) In General
217k2689 Evidence
217k2692 k. Burden of Proof. Most Cited Cases
Motorist who suffered stroke approximately two weeks after motor vehicle accident had burden of proving by a preponderance of the evidence that the accident was a substantial factor in causing his stroke, in order to obtain benefits under New York's no-fault law.

[2] Judgment 228 713(1)

228 Judgment
228XIV Conclusiveness of Adjudication
228XIV(C) Matters Concluded
228k713 Scope and Extent of Estoppel in General
228k713(1) k. In General. Most Cited Cases

Judgment 228 715(2)

228 Judgment
228XIV Conclusiveness of Adjudication
228XIV(C) Matters Concluded
228k715 Identity of Issues, in General
228k715(2) k. What Constitutes Identity of Issues. Most Cited Cases
Motorist's personal injury action against other drivers, in connection with stroke motorist suffered two weeks after motor vehicle accident, was barred by collateral estoppel, where issue of proximate cause of motorist's stroke had been decided in favor of automobile insurer in motorist's prior action seeking no-fault insurance benefits, and motorist had the opportunity to litigate fully the question of

causation, as the issue was given to a jury after presentation of expert testimony.

***57** Appeal from judgments of the United States District Court for the Eastern District of New York (Lois Bloom, Magistrate Judge; Joseph F. Bianco, District Judge).
UPON DUE CONSIDERATION IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgments be, and they hereby are, AFFIRMED.Murty Narumanchi, New Haven, CT, pro se.

Devi Narumanchi, New Haven, CT,[FN*] pro se.

FN* Murty Narumanchi argued the case for himself *pro se*. Inasmuch as he is not a lawyer, he cannot represent Devi Narumanchi. Her position on appeal is taken on submission.

Bryan M. Rothenberg, Hicksville, NY, (Jeffrey J. Imeri, Conroy, Simberg, Ganon, Krevans, Abel, Lurvey, Morrow & Schefer, P.C., New York, NY, on the brief), for Appellee American Home Assurance Company.

Franshone Winn, James G. Bilello & Associates, Westbury, NY, for Appellees Winston Foster and Vanessa Scott.

PRESENT: Hon. ROBERT D. SACK, Hon. B.D. PARKER, Circuit Judges, and Hon. TIMOTHY C. STANCEU, Judge, Court of International Trade.[FN1]

FN1. The Honorable Timothy C. Stanceu, of the United States Court of International Trade, sitting by designation.

SUMMARY ORDER

****1** Plaintiff-Appellant Murty Narumanchi ("Murty"), *pro se*, appeals from the district court's denial of a request for a new trial and its judgment upon the verdict of the jury in Murty's complaint against Appellee American Home Assurance Company ("*Narumanchi I* "). Murty and Appellant Devi Narumanchi (collectively "the Narumanchis") also appeal from the district court's grant of summary judgment to Appellees Winston Foster and Vanessa Scott ("*Narumanchi II* "). We assume the parties' familiarity with the underlying facts, ***58** the procedural history of the case, and the issues on appeal.

Narumanchi I

We review an order denying or granting a new trial for abuse of discretion. *Kosmynka v. Polaris Industries, Inc.*, 462 F.3d 74, 82 (2d Cir.2006). We review the district court's evidentiary rulings for abuse of discretion. *Arlio v. Lively*, 474 F.3d 46, 51 (2d Cir.2007). We review jury instructions *de novo*. *Hudson v. New York City*, 271 F.3d 62, 67 (2d Cir.2001).

[1] We find no error with respect to the jury instruction in *Narumanchi I*, which stated, *inter alia*, that Murty had the "burden of proving by a preponderance of the evidence that [his] July 15, 2000 car accident was a substantial factor in his July 29, 2000 stroke." Tr. Trans. 124. This instruction followed the pattern jury instructions used in New York courts, and properly informed the jury as to New York's no-fault insurance law, which places the burden on the plaintiff to prove his entitlement to benefits by showing that "the injury sustained arose out of the use or operation of the motor vehicle." *Walton v. Lumbermens Mut. Cas. Co.*, 88 N.Y.2d 211, 215, 666 N.E.2d 1046, 1048, 644 N.Y.S.2d 133, 135 (1996) (alteration omitted). To the extent that Murty asserts that American Home was required to plead lack of causation as an affirmative defense, the argument is meritless because the burden of proof to show that there was a causal connection between the plaintiff's use of his vehicle and his injury rests with him. *See Sochinski*

v. Bankers and Shippers Ins. Co., 221 A.D.2d 889, 889, 634 N.Y.S.2d 269, 269 (3d Dep't 1995).

Murty also argues that he was entitled to a new trial, in part because (1) American Home's expert witnesses did not qualify as experts; and (2) American Home's attorney acted in a "boorish" manner by requesting judgment as a matter of law. First, despite having the opportunity to do so, Murty did not object to the testimony of American Home's expert witnesses, who were qualified by the court as experts after they testified as to their qualifications. Similarly, Murty provided no support for his allegations that defense counsel acted improperly. The only specific action Murty points to is American Home's motion for a directed verdict after Murty rested his case. That is entirely permissible under the Federal Rules of Civil Procedure. *See* Fed.R.Civ.P. 50(a)(2). There is therefore no legal basis for his motion for a new trial in this case.

Narumanchi II

****2** We review orders granting summary judgment *de novo*, drawing all factual inferences in favor of the non-moving party, and granting summary judgment "only if the moving party shows that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law." *Miller v. Wolpoff & Abramson, L.L.P.*, 321 F.3d 292, 300 (2d Cir.2003).

Collateral estoppel precludes a party from relitigating an issue once it has been "actually and necessarily determined by a court of competent jurisdiction." *Montana v. United States*, 440 U.S. 147, 153, 99 S.Ct. 970, 59 L.Ed.2d 210 (1979). New York courts apply collateral estoppel "if the issue in the second action is identical to an issue which was raised, necessarily decided and material in the first action, and the plaintiff had a full and fair opportunity to litigate the issue in the earlier action." *Parker v. Blauvelt Volunteer Fire Co.*, 93 N.Y.2d 343, 349, 712 N.E.2d 647, 651, 690 N.Y.S.2d 478, 482 (1999). The party asserting issue preclusion bears the burden of showing that the identical issue was raised and necessarily decided in a previous proceeding, ***59***LaFleur v. Whitman*, 300 F.3d 256, 272 (2d Cir.2002), while "the party against whom the doctrine is asserted bears the burden of showing the absence of a full and fair opportunity to litigate in the prior proceeding," *Colon v. Coughlin*, 58 F.3d 865, 869 (2d Cir.1995).

[2] Foster and Scott carried their burden to show that the issue of proximate cause was previously decided in Narumanchi I. Despite the differing theories of recovery, both the claim of entitlement to no-fault insurance benefits (Narumanchi I) and the claim of personal injury (Narumanchi II) required the Narumanchis to prove that the July 2000 accident was causally related to Murty's strokes. *See Sochinski*, 221 A.D.2d at 889, 634 N.Y.S.2d at 269 (proximate causation is essential to proving no-fault insurance benefits); *Kosmynka v. Polaris Industries, Inc.*, 462 F.3d 74, 79 (2d Cir.2006)("a negligent tortfeasor is liable for any reasonably foreseeable risk that is proximately caused by its action"). Moreover, Murty had the opportunity to litigate fully the question of causation in Narumanchi I, where the issue was given to a jury after presentation of expert testimony. The Narumanchis have not carried their burden to show that they did not have a full and fair opportunity to litigate the proximate cause issue before.

We have carefully considered the appellants' other claims on appeal and find them to be without merit.

For the foregoing reasons, the judgments of the district court are hereby AFFIRMED.

C.A.2 (N.Y.),2009.
Narumanchi v. American Home Assur. Co.
317 Fed.Appx. 56, 2009 WL 754768 (C.A.2 (N.Y.))

END OF DOCUMENT

Not Reported in B.R., 2006 WL 1288591 (Bkrtcy.S.D.N.Y.)
(Cite as: 2006 WL 1288591 (Bkrtcy.S.D.N.Y.))

United States Bankruptcy Court,
S.D. New York.
In re HHG CORP. a/k/a Extreme Championship Wrestling, Debtor.
No. 01-B-11982 (ASH).

May 2, 2006.

Joseph Capobianco, Reisman Peirez Reisman LLP, Garden City, NY, Gary B. Sachs, Sachs Kamhi & Kushner, P.C., Carle Place, NY, for Debtor.

FINDINGS OF FACT

HARDIN, Bankruptcy J.

***1** 1. On April 5, 2001, HHG Corp. (the "Debtor") filed a voluntary petition for relief under chapter 11 of the United States Bankruptcy Code.

2. On June 20, 2001, the Debtor's case was converted to a case under chapter 7 of the Bankruptcy Code.

3. On June 22, 2001, Barbara Balaber-Strauss (the "Trustee") was appointed to serve as the chapter 7 trustee for the Debtor's estate.

4. On or about January 28, 2003, the Trustee entered into an Asset Purchase Agreement (the "APA") with WWE, pursuant to which WWE agreed to purchase, and the Trustee agreed to sell, the Assets (as that term is defined in the Asset Purchase Agreement).[FN1]

FN1. Order Pursuant to 11 U.S.C. §§ 105 and 363 Approving Sale of Assets to World Wrestling Entertainment, Inc. dated June 17, 2003 (Docket No. 102) (the "Sale Order").

5. The APA defined the term "Assets" to include, without limitation, "[a]ny and all intellectual property owned by the Estate or used by the Debtor in connection with the Debtor's professional wrestling business including without limitation, the name 'Extreme Championship Wrestling', 'ECW' and variants thereof [and] ... the entire ECW library of footage...." [FN2]

FN2. *See* APA. § 1(a)(i).

6. On March 14, 2003, a hearing was held with respect to the Trustee's proposed sale of assets to WWE.

7. At the conclusion of that hearing, the Court determined, among other things, that WWE's offer was the highest and best offer received for the Debtor's assets, and that consummation of the APA was in the best interests of the Debtor and its estate.

8. The Court thus directed counsel for WWE to settle an order on notice to all parties in interest, approving the APA, and authorizing the Trustee to consummate the transactions contemplated thereby.

9. On March 19, 2003, WWE filed with the Court, and served on all parties in interest, including Gordon, a Notice of Settlement of Order Approving Sale of Assets to World Wrestling Entertainment, Inc. and Granting Other Relief (Docket No. 85) (the "Notice of Settlement"), which included a proposed form of order identical in all material respects to the Sale Order.

10. The Proposed Order attached to the Notice of Settlement expressly provided, among other things, that "[t]he Assets include, without limitation, copyright ownership of the entire ECW library of footage and no party, including, without limitation, Tod Gordon or any affiliate, has any Claim against the ECW library."

11. Movants admit that they received the Notice of Settlement, and had actual knowledge of the pro-

posed form of the Sale Order, including the provisions: (i) defining the assets conveyed to WWE to include "copyright ownership of the entire ECW library of footage," and (ii) declaring that "no party, including, without limitation, Todd Gordon or any affiliate, has any Claim against the ECW library."

12. Moreover, Movants admit that they made a tactical decision not to object, and "knowingly waived various ownership interests" in connection with the entry of the Sale Order.[FN3]

> FN3. Memorandum of Law in Response to Objection of World Wrestling Entertainment, Inc., to the Motion of Eastern Championship Wrestling and Tod A. Gordon to Enforce and Interpret Order dated 6/17/2003 pursuant to 11 U.S.C. Sections 105 and 603 Approving Sale of Assets to World Wrestling Entertainment, Inc. (Docket No. 154) (the "Response Brief"), p. 6, fn. 4.

13. On June 17, 2003, the Court entered the Sale Order, which approved the APA, and authorized the Trustee to, among other things, "take all steps necessary or appropriate to carry out the terms and intent of the Asset Purchase Agreement, including, without limitation, the sale and transfer of the Assets to WWE." Sale Order, ¶ 2-3.

***2** 14. Neither the Movants, nor any other party in interest, appealed the entry of the Sale Order, or sought a stay of its implementation.

15. Following the entry of the Sale Order, Movants had actual knowledge that WWE was making active commercial use of the ECW library purchased from the Debtor.[FN4]

> FN4. *See* Motion, ¶ 15, p. 5 ("Upon information and belief, WWE has made millions as a result of the Infringing Uses....").

16. Nevertheless, Movants waited until October 11, 2005, more than two years after entry of the Sale Order, to file their Motion, and thereby assert an interest in the ECW library of footage notwithstanding the express terms of the Sale Order.

17. For the reasons that follow, the relief requested by the Motion must be denied in its entirety, and with prejudice.

CONCLUSIONS OF LAW

18. An order approving a sale under section 363(b) of the Bankruptcy Code is a final order for *res judicata* purposes. *In re Clinton Street Food Corp.*, 254 B.R. 523, 530 (Bankr.S.D.N.Y.2000).

19. Moreover, because a section 363(b) sale of assets is an *in rem* proceeding, a bankruptcy sale order is "good against the world, not just the parties to a judgment or persons with notice of the proceeding." *Gekas v. Pipin (In re Met-L-Wood Corp.)*, 861 F.2d 1012, 1016 (7th Cir.1988).

20. As a matter of public policy, sale orders entered under section 363(b) of the Bankruptcy Code are accorded a heightened degree of finality in order to prevent precisely the sort of chaos that Movants seek to create-namely, "the chance the purchasers will be dragged into endless rounds of litigation to determine who has what rights in the [purchased] property." *In re Sax*, 796 F.2d 994, 998 (7th Cir.1986); *accord In re Clinton Street Food Corp.*, 254 B.R. 523, 530-31 (Bankr.S.D.N.Y.2000) (noting "the important public policy favoring the finality of orders transferring ownership of bankruptcy estate assets.").

21. The express language of the Sale Order provides that the "ECW library of footage" was among the assets conveyed to WWE by the Trustee, and that that "no party, including, without limitation, Tod Gordon or any affiliate, has any Claim against the ECW library." Sale Order, ¶ 5.

22. It is undisputed Movants had actual notice of the terms of the Sale Order prior to its entry. As such, "it was incumbent upon [them] to continue to

continue to scrutinize the terms of the sale as memorialized in the Sale Order." *In re Kenilworth Systems Corp. .*, 204 B.R. 665, 669 (E.D.N.Y.1997).

23. Nevertheless, it is undisputed that the Movants did not object to entry of the Sale Order, nor did they seek a stay of its implementation or file an appeal.

24. Instead, they made a tactical decision not to object to entry of the Sale Order, and to "knowingly waive various ownership interests" in connection with its entry.[FN5]

FN5. Response Brief, p. 6, fn. 4.

25. Having knowingly waived their opportunity to object to the entry of the Sale Order, the Movants are barred by the doctrine of *res judicata* from challenging its provisions, or seeking to assert an interest in the property expressly conveyed to WWE thereunder. *See In re Clinton Street Food Corp.*, 254 B.R. at 530-31; *In re Kenilworth*, 204 B.R. at 669.[FN6]

FN6. The Court notes that Movants have not sought relief based on Fed.R.Civ.P. 60(b). As a practical matter, however, the Court finds that the facts of this case would not support relief under Rule 60(b) in any event since relief from a final judgment is simply not available based on a party's "dissatisfaction in hindsight with choices deliberately made by counsel," or "an attorney's failure to evaluate carefully the legal consequences of a chosen course of action." *Nemaizer v. Baker*, 793 F.2d 58, 62 (2d Cir.1986). Moreover, a Rule 60(b) motion would be time barred under both the one year and "reasonable time" standards incorporated in the Rule.

***3** 26. Movants' contention that *res judicata* does not apply because this Court lacked subject matter jurisdiction to enter the Sale Order to the extent it conveyed assets that did not belong to the Debtor is legally inaccurate, and based on a mischaracterization of what the Sale Order accomplished.

27. As a legal matter, even if the Court had not considered whether Movants had an interest in the ECW library, res judicata would still apply because Movants themselves, who had actual notice of the Sale Order, could have raised that issue as an objection to its entry. *In re Clinton Street*, 254 B.R. at 531 (finding that res judicata applied where "the trustee could have raised these claims to defeat Maui's bid and acquisition of the Penco assets.").

28. Moreover, as a practical matter, rather than authorizing the sale of assets that did not belong to the Debtor's estate, the Sale Order affirmatively determined that certain assets, including the ECW library of footage and related intellectual property rights, belonged to the Debtor's estate and could be sold by the Trustee. *See* Sale Order, ¶ 5 ("The Assets include, without limitation, copyright ownership of the entire ECW library of footage.").

29. The Sale Order further determined that no other party, including the Movants, which were identified by name, had any interest in or claim against the assets conveyed to WWE by the Sale Order. *See* Sale Order, ¶ 5 ("[N]o party including, without limitation, Tod Gordon or any affiliate, has any Claim against the ECW library.").

30. These determinations fall well within the bounds of this Court's subject matter jurisdiction, which clearly includes the power to "determine what is and what is not property of the estate," *DiBerto v. The Meadows at Madbury, Inc. (In re DiBerto)*, 171 B.R. 461, 475 (Bankr.D.N.H.1994).

31. The Court thus had ample jurisdiction to enter the Sale Order, and if Movants believed themselves to be aggrieved by any of the provisions of the Sale Order, they were obligated to file a timely appeal and to seek a stay of its implementation.[FN7]

FN7. In the absence of such a stay, which was neither sought, nor obtained, any ap-

peal the Movants might have taken would have been rendered moot pursuant to 11 U.S.C. § 363(m), even if, as the Movants suggest, the assets conveyed by the Sale Order did not belong to the Debtor. *See In re Sax,* 796 F.2d 994, 998 (7th Cir.1986) ("A stay is necessary to challenge a bankruptcy sale authorized under § 363(b)."); *Gilchrest v. Westcott (Matter of Gilchrest),* 891 F.2d 559, 561 (5th Cir.1990) ("Gilchrist's failure to obtain a stay is fatal to his position, regardless of whether there was jurisdiction.").

32. Having failed to do so, they are now forever precluded by the doctrine of *res judicata* from relitigating the conclusions reached by the Sale Order. *In re Met-L-Wood Corp.,* 861 F.2d at 1016 ("[A]fter the time for appeal had lapsed, the order could not be attacked in a new lawsuit brought by a party to the sale proceeding ... such a suit would be barred by res judicata.").

33. Even if the Movants' initial failure to object could somehow be excused, their decision to lie in wait for more than two years after the entry of the Sale Order before asserting a claim of right in the ECW library cannot be, and would give rise to equitable estoppel or laches, particularly since they knew that WWE was making active commercial use of the ECW library in reliance on the Sale Order during the period of their silence. *See In re DeArakie,* 199 B.R. 821, 827 (Bankr.S.D.N.Y.1996) (holding that a debtor was equitably estopped from enforcing exemption where he "stated that he was not opposed to the sale, and failed to object to the distribution of the proceeds made by the trustee."); *Canino v. Bleau (In re Canino),* 185 B.R. 584, 595 (9th Cir. B.A.P.1995) (holding that a debtor's failure to object to trustee's distribution of proceeds resulting from the sale of exempt property equitably estopped her from complaining, two years after the fact, that she should have received a greater share).

***4** 34. Movants allowed WWE to act in justifiable reliance on the provisions of the Sale Order and the Movants' "tacit approval" of the same for more than two years, and it would be profoundly inequitable to allow the Movants to raise a new claim of ownership to the ECW library or any of the other assets conveyed by the Sale Order at this late date.

35. Accordingly, the Motion must be denied.

A separate order consistent with these findings shall be entered forthwith.

Bkrtcy.S.D.N.Y.,2006.
In re HHG Corp.
Not Reported in B.R., 2006 WL 1288591 (Bkrtcy.S.D.N.Y.)

END OF DOCUMENT

--- B.R. ----, 2009 WL 667301 (S.D.N.Y.)
(Cite as: 2009 WL 667301 (S.D.N.Y.))

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Only the Westlaw citation is currently available.

United States District Court,
S.D. New York.
In re LEHMAN BROTHERS HOLDINGS, INC., et al., Debtor.
Bay Harbour Management, L.C., et al., Appellants,
v.
Lehman Brothers Holdings Inc., et al., Appellees.
Nos. 08 Civ. 8869(DLC), 08 Civ. 8914(DLC).

March 13, 2009.

David S. Rosner, Andrew K. Glenn, Ronald R. Rossi, Kasowitz, Benson, Torres & Friedman LLP, New York, NY, for Appellants.

Lindsee P. Granfield, Lisa M. Schweitzer, Cleary Gottlieb Steen & Hamilton LLP, New York, NY, for Appellee Barclays.

Harvey R. Miller, Michelle J. Meises, Weil, Gotshal & Manges LLP, New York, NY, for Appellee Lehman Brothers Holdings Inc.

James B. Kobak, Jr., David W. Wiltenburg, Sarah L. Cave, Jeffrey S. Margolin, Hughes Hubbard & Reed LLP, New York, NY, for Appellee James Giddens, SIPA Trustee.

OPINION & ORDER

DENISE COTE, District Judge.

***1** This bankruptcy appeal arises out of the financial collapse of Lehman Brothers in 2008, when it was the fourth largest independent investment banking and financial services enterprise in the United States. Barclays Capital, Inc. ("Barclays") purchased certain divisions of Lehman Brothers within days of Lehman Brothers declaring bankruptcy on September 15, 2008. Bay Harbour Management, L.C., Bay Harbour Master, Ltd., Trophy Hunter Investments, Ltd., BHCO Master, Ltd., MSS Distressed & Opportunities 2, and Institutional Benchmarks (collectively, "Appellants") appeal from the order approving the sale of Lehman's North American registered broker-dealer subsidiary Lehman Brothers International ("LBI") to Barclays "free and clear of liens and other interests" ("Sale Order"),[FN1] entered on September 20 by United States Bankruptcy Judge for the Southern District of New York James Peck. For the following reasons, the Sale Order is affirmed.

BACKGROUND

The debtors in this action are Lehman Brothers Holdings Inc. ("LBHI") and LB 745 LLC ("LB 745") (collectively, "Debtors"). LBHI is the parent corporation of the numerous subsidiaries and affiliates that constituted the global Lehman enterprise. Appellants are investment funds that maintained prime brokerage accounts with LBI and Lehman Brothers Inc. (Europe) ("LBIE"), Lehman's major European investment banking and capital markets subsidiary.[FN2]

Appellants challenge the Sale Order that governs Barclays's purchase of LBI's investment banking and capital markets operations and supporting infrastructure, including the Lehman headquarters building in Manhattan. Appellants speculate that they may have been harmed by an alleged transfer of funds that may have benefited Barclays. On this basis, they seek to revise a crucial term of the sale.[FN3] They contend that the bankruptcy court's expedited review of the proposed sale was so grievously flawed that it (1) deprived Appellants of their due process right to learn whether Barclays was a good faith purchaser of LBI and (2) did not provide an adequate basis for the bankruptcy court itself to conclude that the sale to Barclays should be approved free and clear of liabilities due to Barclays's status as a good faith purchaser. Appellants assert these rights even though any claims they may have

to any transferred funds are entirely derivative of LBIE's claims, and LBIE supported the sale. The chronology of Lehman's bankruptcy and the relevant proceedings before the bankruptcy court are summarized here.

Lehman's Collapse and Bankruptcy Filing

After over 150 years as a leader in financial services, Lehman crumbled during a period of extraordinary distress in the U.S. financial markets. As Lehman faced constraints on its ability to borrow, it was forced to tap its own cash reserves to fund transactions and had difficulty operating its businesses. Lehman tried to save itself, first by searching for a buyer and then by asking for federal bailout funds. Neither course of action worked. On September 15, 2008, LBHI filed for bankruptcy; LB 745 followed suit the next day.

Sale Procedures Hearing

***2** By 7:00 a.m. on September 15, Barclays had already begun negotiating a purchase of LBI. The following day, Barclays and LBHI executed an Asset Purchase Agreement setting out the terms of Barclays's proposed purchase of LBI's investment banking and capital markets businesses and supporting infrastructure for approximately $1.7 billion. On September 17, the Debtors filed with the bankruptcy court a motion to schedule an expedited sale hearing.

The bankruptcy court held a hearing on September 17 to consider the sale procedures. Debtors emphasized that time was of the essence because LBI was a "wasting asset." While Appellants objected, the Securities and Exchange Commission ("SEC"), the Federal Reserve Bank of New York ("Federal Reserve"), [FN4] and SIPC supported expedited review. At the hearing, LBHI's Chief Operating Officer Herbert McDade testified that if a sale were not approved by September 19, Lehman would likely disappear as a going concern. Although Fed. R. Bankr.P.2002(a)(2) prescribes a twenty-day notice period, the bankruptcy court found cause to shorten the notice period to two days. The court found that the Debtors' estates would suffer "immediate and irreparable harm" if preliminary relief were not granted "on an expedited basis."

In approving the expedited schedule, the bankruptcy court explicitly considered due process issues. It heard arguments that financial markets participants had known for months that Lehman's assets were for sale. It also took judicial notice of the fact that interested parties and spectators filled two courtrooms and overflow rooms for the hearing: "there's no question that parties-in-interest and parties who are just plain interested know about today's hearing." Acknowledging that the proposed sale was "an absolutely extraordinary transaction with extraordinary importance to the capital markets globally," the bankruptcy court scheduled the sale hearing for two days later, September 19. Given the circumstances, the bankruptcy court said that emailing, faxing, and overnight mailing of the notice of the motion and sale hearing to a number of specified entities would constitute "good and sufficient notice." The parties do not dispute that such notice was effected.

The court allowed interested parties to file written objections or make oral objections to the proposed sale any time up to the conclusion of the sale hearing. Over the next two days Debtors' counsel made themselves available to answer questions about the proposed sale on a twenty-four hour basis. At 3:00 p.m. on September 18, they hosted a conference for the purpose of soliciting questions. At no time before the sale hearing did Appellants attempt to take any discovery from Barclays.

Sale Hearing

On the afternoon of Friday, September 19, interested parties and spectators again filled Judge Peck's courtroom and two overflow courtrooms for the sale hearing, which lasted until early the next morning. Debtors offered testimony about the sale's

urgency. LBHI COO McDade testified that the "state of affairs at Lehman Brothers Holdings Inc. and LBI is critical." If the sale did not close that day or over the weekend, according to McDade, "the effect on the broker-dealers business and on Lehman Holdings would be devastating." FN5 Broker-dealer customers were threatening to take their business elsewhere. He warned that a failure to consummate this sale might "ignite a panic in the financial condition" of the country.

***3** Debtors also offered the testimony of Barry Ridings, head of capital markets at Lazard Frères & Co., who was retained by Lehman to provide advice about the sale. Ridings echoed McDade. He emphasized that time was of the essence, that no other party had shown interest in purchasing LBI, and that nothing would be left of Lehman if the sale were not approved quickly.

At the hearing, Debtors also explained the history of the sale process and course of negotiations. They noted that Lehman had looked for a purchaser months before filing for bankruptcy, but to no avail. Both McDade and Ridings testified that the terms of the post-bankruptcy sale of LBI had been negotiated "aggressively" and "at arm's length." In addition, Ridings testified that the transaction "served the best interest of the creditors, the public and the nation." According to the terms of the sale, Barclays assumed billions of dollars in liabilities, and paid over $1 billion in cash to the Debtors. In addition, customer accounts would be saved from being frozen indefinitely and 9,000 jobs would be saved for at least ninety days. The Federal Reserve, the SEC, and SIPC supported the sale, and the Official Creditors' Committee did not object to it.

Appellants attended and participated in this hearing. Parties were permitted to lodge objections and to clarify the terms of sale. Appellants' attorneys cross-examined McDade-other attorneys cross-examined Ridings-on their understanding of the terms of the sale. Although Appellants now claim that it was difficult to hear the sale hearing proceedings, Appellants did not raise this concern during the hearing.

The Appellants objected to the sale on the ground that questions about the fate of so-called "Defalcated Funds" purportedly owed to LBIE precluded a finding that Barclays was a good faith purchaser. This issue had its genesis in the disclosure made by the Joint Administrators of LBIE on September 19.

The Joint Administrators of LBIE had taken over LBIE's operations pursuant to British insolvency laws and filed papers advising the bankruptcy court that a "preliminary investigation" had "revealed evidence of substantial transfers of securities out of LBIE which merit close investigation." Clients had been transferring their securities from Lehman to other prime brokers. Those securities that had been transferred from LBIE to LBI had already been transferred to a Lehman entity located in Luxembourg, and possibly from there to a new prime broker. As a result of the transfers of securities out of LBIE, it appeared that LBIE was owed $8 billion. These missing funds were referred to as the "Defalcated Funds."

As noted, on the basis of the Defalcated Funds issue, Appellants objected to the sale. Appellants claimed that it was possible that some of the assets being sold to Barclays derived from the Defalcated Funds. They speculated that the transfer of the Defalcated Funds might have been manipulated to prop up LBI for sale, or to fund Debtors' operations; or perhaps Barclays otherwise benefited from the transfer, or even caused the transfer. Appellants argued that these concerns cast doubt on whether Barclays was a purchaser in good faith. In addition, Appellants argued that the bankruptcy court would violate due process if it found that Barclays was a good faith purchaser without allowing additional time for discovery on the Defalcated Funds issue. Appellants' objection, however, stopped short of alleging that Barclays actually knew about, benefited from, or was involved with the transfer. In fact, the objection said: "Bay Harbour is not alleging that [Barclays] was [involved in the transfer of Defalc-

ated Funds]. It is alleging that neither [Bay Harbour] nor this Court knows."

***4** Although Appellants' claim, if any, to these Defalcated Funds was merely derivative of any LBIE claim, the LBIE Joint Administrators did not file any objection to the sale on the basis of the Defalcated Funds. Indeed, they supported the sale. Counsel to the Joint Administrators noted that because "no cash was being transferred to the purchaser" the issue of the cash owed to LBIE was "probably not an issue for the purchaser."

The bankruptcy court directly addressed the Defalcated Funds. It agreed with the Joint Administrators' counsel that the allegations about LBIE's cash being wrongly possessed by LBI were not relevant to the sale because no cash was being transferred to Barclays under the proposed sale. Judge Peck said: "I'm satisfied that given the fact that Barclays is not taking cash and the only thing that came into the debtor from Europe was cash that in practical terms we should be safe."

Ultimately, the court rejected Appellants' objection and approved the sale. It reiterated that "this is really not a question of due process being denied." The court emphasized that the proposed sale was "the only available transaction;" and it called the idea of delaying approval of the sale with hope that a better transaction would come along "preposterous." The consequences of not approving the transaction, according to the court, "could prove to be truly disastrous," and the "harm to the debtor, its estates, the customers, creditors, generally, the national economy and the global economy could prove to be incalculable." By the end of the hearing, the court felt that everything it heard "was indicative of arm's length, good faith, aggressive negotiations" and that it had "heard ample evidence ... that would support good faith findings."

Sale Order

On the basis of these conclusions about the sale procedure, the bankruptcy court entered the Sale Order on September 20, 2008.[FN6] The Sale Order found that "good cause exists to shorten the applicable notice periods," that "due, proper, timely, adequate and sufficient notice" of the motion and hearing had been provided, and that a "reasonable opportunity to object and to be heard" had been given to all interested persons and entities.

Again, the court emphasized that if it did not approve the sale on an expedited basis, the Debtors' estates would suffer "immediate and irreparable harm." This was the case, in part, because "[n]o other person or entity or group of entities, other than [Barclays], has offered to purchase the Purchased Assets for an amount that would give greater economic value to the Debtors' estates." As such, the sale was "necessary and appropriate to maximize the value of the Debtors' estates," and thereby served the "best interests of the Debtors, their estates, their creditors and other parties in interest."

The Sale Order deemed Barclays a purchaser in good faith. The court noted that the purchase agreement was "negotiated, proposed, and entered into by the Sellers and the Purchaser without collusion, in good faith and from arm's-length bargaining positions." The order explicitly noted that Barclays was "a good faith Purchaser of the Purchased Assets within the meaning of Bankruptcy Code section 363(m)." As such, the order conveyed the assets to Barclays "free and clear of all Liens, claims ..., encumbrances, obligations, liabilities, contractual commitments, rights of first refusal or interests of any kind or nature whatsoever." The bankruptcy court noted the importance of this provision to Barclays:

> ***5** The Purchaser asserts that it would not have entered into the Purchase Agreement and would not consummate the transactions contemplated thereby ... if the sale of the Purchased Assets ... to the Purchaser ... was not free and clear of all Interests of any kind or nature whatsoever, or if the Purchaser would, or in the future could, be liable for any of the Interests.

The Sale Order instructed parties wishing to appeal the order to pursue a stay of the Sale Order. It warned that "[a]ny party objecting to this Order must exercise due diligence in filing an appeal and pursuing a stay, or risk its appeal being foreclosed as moot." Before the sale was consummated, Appellants filed a notice of appeal on September 21 and amended it the next day. Appellants did not, however, seek a stay of the Sale Order. The sale closed September 22. After that closing, over 135,000 LBI customer accounts were transferred to Barclays or other institutions and more than a hundred billion dollars of customer property followed. Based on the bankruptcy court's authorization of the sale, the Trustee in the SIPA proceeding mailed over 900,000 claim forms.

Appellants now bring this appeal. They argue the bankruptcy court erred by: (1) finding that Barclays was a good faith purchaser pursuant to Section 363 of the Bankruptcy Code; (2) concluding that the sale complied with the Fifth Amendment's Due Process Clause; and (3) approving a sale free and clear of liabilities to Barclays.

In their reply brief Appellants clarify they are "*not* seeking to unwind the sale." They ask this Court instead to revise the terms of the sale by reversing the Bankruptcy Court's good faith purchaser finding, which would mean Barclays did not take LBI's assets free and clear of all interests.

DISCUSSION

District courts are vested with appellate jurisdiction over bankruptcy court rulings pursuant to 28 U.S.C. § 158(a), and may "affirm, modify, or reverse a bankruptcy judge's judgment, order or decree." Fed R. Bankr.P. 8013. On appeal, the legal conclusions of the bankruptcy court are reviewed *de novo*, but the findings of fact are reversed only when they are "clearly erroneous." *Id .; AppliedTheory Corp. v. Halifax Fund, L.P. (In re AppliedTheory Corp.),* 493 F.3d 82, 85 (2d Cir.2007). While the bankruptcy court's findings of fact are not conclusive on appeal, "the party that seeks to overturn them bears a heavy burden." *H & C Dev. Group, Inc. v. Miner (In re Miner),* 229 B.R. 561, 565 (2d Cir.1999). The reviewing court must be left with a "definite and firm conviction" that a mistake has been made. *Ortega v. Duncan,* 333 F.3d 102, 107 (2d Cir.2003) (citation omitted). Mixed questions of law and fact are reviewed "either de novo or under the clearly erroneous standard depending on whether the question is predominantly legal or factual." *Italian Colors Rest. v. Am. Express Travel Related Servs. Co. (In re Am. Express Merchants' Litig.),* 554 F.3d 300, 316 n. 11 (2d Cir.2009) (citation omitted).

I. Purchaser in Good Faith Status

***6** Although the Bankruptcy Code does not define "good faith purchaser," the Second Circuit has adopted the traditional equitable definition: "one who purchases the assets for value, in good faith and without notice of adverse claims." *Licensing by Paolo, Inc. v. Sinatra (In re Gucci),* 126 F.3d 380, 390 (2d Cir.1997) (citation omitted) ("*Gucci II*"). To determine a purchaser's good faith, courts look to "the integrity of his conduct during the course of the sale proceedings; where there is a lack of such integrity, a good faith finding may not be made." *Id.* Good faith is absent where a purchaser engaged in "fraud, collusion between the purchaser and other bidders or the trustee, or an attempt to take grossly unfair advantage of other bidders." *Id* . (citation omitted). The "good-faith purchaser" determination "is a mixed question of law and fact." *Id.* (citation omitted). Thus, this Opinion must review the issue of whether the bankruptcy court applied the correct legal standard *de novo;* and it must review the court's factual determinations under the clearly erroneous standard.

Appellants do not take issue with the bankruptcy court's choice of legal standard; rather, they argue that the court erred in making its factual determination that Barclays satisfied the definition of a purchaser in good faith. They assert that "the Court had no evidentiary basis to support its conclusion

that Barclays purchased the assets without knowledge that some or all of the Defalcated Funds were being conveyed to them or had been used to prop up LBI in contemplation of its Sale." They object to the fact that the bankruptcy court "foreclosed any factual investigation into Barclays's conduct and then issued findings based on [the court's] own speculation that Barclays was not complicit in or a beneficiary of the misappropriation of the Defalcated Funds."

The court, however, did not base its determination of Barclays's good faith on speculation. It based its conclusion on evidence presented at the sale hearing, which was sufficient to support its finding. As such, Appellants have failed to carry their heavy burden to show that the finding was clearly erroneous. The court relied on the testimony of both McDade and Ridings to support its good faith findings. Cross-examination of these witnesses failed to unearth evidence of fraud, collusion, or any impropriety. After hearing testimony at the sale hearing, Judge Peck said "I try to listen with great care to the evidence that's being put into the record to support findings ... and everything that I heard was indicative of arm's length, good faith, aggressive negotiations."

Despite the fact that Appellants' objection was based on speculation rather than evidence, the court carefully considered Appellants' claims about the Defalcated Funds. Judge Peck ultimately found that the claims regarding the Defalcated Funds were irrelevant to Barclays's good faith status. Noting that Debtors proposed to transfer to Barclays only securities and other property, and not cash, the Court determined that it was "safe" to approve the sale. Appellants' speculation is insufficient to show that the court's conclusion was clearly erroneous. The bankruptcy court's determination of Barclays's good faith status is therefore affirmed.

II. Statutory Mootness

***7** Appellees argue that Section 363(m) of the Bankruptcy Code limits appellate jurisdiction to the issue of Barclays's status as a good faith purchaser. Under Section 363(m),

> The reversal or modification on appeal of an authorization under subsection (b) ... of this section of a sale ... of property does not affect the validity of a sale ... under such authorization to an entity that purchased ... such property in good faith ... *unless such authorization and such sale ... were stayed pending appeal.*

11 U.S.C. § 363(m) (emphasis supplied). Pursuant to this section, "appellate jurisdiction over an *unstayed* sale order issued by a bankruptcy court is statutorily limited to the narrow issue of whether the property was sold to a good faith purchaser." *Licensing by Paolo, Inc. v. Sinatra (In re Gucci),* 105 F.3d 837, 839 (2d Cir.1997) ("*Gucci I*").

Limiting appellate jurisdiction over unstayed sale orders to the issue of good faith "furthers the policy of finality in bankruptcy sales and assists the bankruptcy court to secure the best price for the debtor's assets." *Kabro Assocs. of W. Islip, LLC v. Colony Hill Assocs. (In re Colony Hill Assocs.),* 111 F.3d 269, 272 (2d Cir.1997) (citation omitted). "[W]ithout this assurance of finality, purchasers could demand a large discount for investing in a property that is laden with the risk of endless litigation as to who has rights to estate property." *Gucci II,* 126 F.3d at 387.

Despite the fact that the Sale Order explicitly cautioned any party wishing to appeal the order to pursue a stay or "risk its appeal being foreclosed as moot," Appellants failed to seek a stay. The sale then closed on September 22, 2008. As a result, the only issue this Court may consider on appeal is whether the bankruptcy court committed reversible error in finding that Barclays was a good faith purchaser. As discussed above, the bankruptcy court did not commit reversible error in determining Barclays's good faith status.

Appellants seek to escape the limitations imposed

by Section 363(m) by arguing in their reply brief that they do not challenge the sale, but only the terms of the sale, which delivered the LBI assets to Barclays free and clear of liens. This is a specious distinction. As the bankruptcy court found, Barclays demanded that the sale be free and clear of liens, and without that term no sale would have occurred. The bankruptcy court's approval of the sale on these terms was unremarkable and utterly consistent with its duty to maximize the value of the Debtors' estate with the benefit of the finality provided by Section 363(m).

Consequently, statutory mootness forecloses Appellants' arguments beyond the issue of Barclays's good faith. Appellants having sought no relief that stops short of challenging the validity of the entire sale, *see Gucci I,* 105 F.3d at 839-40 & n. 1, Appellants' request for relief is moot under Section 363(m).[FN7]

CONCLUSION

***8** The bankruptcy court's September 20, 2008 Sale Order and Incorporation Order are affirmed. The appeal is dismissed.

SO ORDERED:

FN1. Appellants also appeal from a September 20 derivative order of the bankruptcy court incorporating the Sale Order, which was entered in adversary proceedings in the Lehman bankruptcy cases filed under the Security Investor Protection Act ("SIPA") against LBI. At the request of the Securities Investor Protection Corporation ("SIPC"), on September 19 the U.S. District Court for the Southern District of New York entered an order placing LBI in liquidation under SIPA. The district court then transferred the SIPA proceeding to the bankruptcy court.

FN2. A prime broker is a broker who offers professional services specifically aimed at large institutional customers, such as hedge funds and money managers.

FN3. Appellants did not clarify until their reply brief that they were not challenging on appeal the sale to Barclays but only that term of the sale which gave Barclays the assets free and clear of liens.

FN4. The Federal Reserve explained that only one or two entities met both the regulatory and financial qualifications to bid successfully for LBI.

FN5. Debtors explained inter alia that in just the past week, the value of assets to be transferred to Barclays had declined from roughly $70 billion to less than $50 billion.

FN6. The Court concurrently issued an order approving the sale in the SIPA proceeding.

FN7. Even if this Court were to consider the remaining merits of the appeal, Appellants would lose. First, since Appellants failed to obtain a stay and allowed a comprehensive change in circumstances to take place, the appeal is equitably moot. *Frito-Lay, Inc. v. LTV Steel Co. (In re Chateaugay Corp.),* 10 F.3d 944, 952-53 (2d Cir.1993); *Official Comm. Of Unsecured Creditors of LTV Aerospace and Def. Co. v. Official Comm. Of Unsecured Creditors of LTV Steel Co. (In re Chateaugay Corp.),* 988 F.2d 322, 325 (2d Cir.1993); *see also Deutsche Bank AG v. Metromedia Fiber Network, Inc. (In re Metromedia Fiber Network, Inc.),* 416 F.3d 136, 144 (2d Cir.2005).

Second, Judge Peck appropriately considered and resolved due process interests throughout the sale process. Judge Peck correctly determined that Appellants had sufficient notice and op-

portunity to be heard. *Mullane v. Cent. Hanover Bank & Trust Co.*, 339, U.S. 306, 314 (1950); *Brody v. Village of Port Chester*, 434 F.3d 121, 127 (2d Cir.2005).

Finally, the bankruptcy court found that LBI's assets could be sold free and clear under 11 U.S.C. § 363. Appellants' challenge of this provision relies entirely on the premise that the bankruptcy court committed reversible error in determining the good faith issue, and argument this Opinion has rejected.

S.D.N.Y.,2009.
In re Lehman Bros. Holdings, Inc.
--- B.R. ----, 2009 WL 667301 (S.D.N.Y.)

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Only the Westlaw citation is currently available.

United States District Court,
D. Connecticut.
In re PAUL J. SCHIEFFER, INC., et al., Debtors.
Paul J. Schieffer, Inc., Paul J. Schieffer, and Barbara P. Schieffer, Appellants,
v.
Richard M. Coan, Trustee, Appellee.
Civil No. 3:08cv12 (JBA).

Sept. 11, 2008.

Peter L. Ressler, Groob, Ressler & Mulqueen, New Haven, CT, for Debtor Paul J. Schieffer Inc.

MEMORANDUM AND ORDER

JANET BOND ARTERTON, District Judge.

***1** This appeal from a Chapter 7 bankruptcy proceeding concerns the court-approved disposition of the bankruptcy estate's interest in certain real property located in Prospect, Connecticut. Appellee Richard M. Coan, the Trustee, moved to sell this property and, after notice and a hearing, Chief Bankruptcy Judge Albert S. Dabrowski entered an order authorizing the sale. Appellants Paul J. Schieffer, Inc., Paul J. Schieffer, and Barbara P. Schieffer (also the debtors below) appeal from this order allowing the Trustee to sell the property free and clear of liens pursuant to 11 U.S.C. § 363(f), contending that the court erred by not considering a higher and better offer for the property.

The Trustee has moved to dismiss this appeal as moot pursuant to 11 U.S.C. § 363(m),[FN1] which provides:

> The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

This language means that "regardless of the merit of an appellant's challenge to a sale order," an appeal from such an order is moot "if the entity that purchased or leased the property did so in good faith and if no stay was granted." *Licensing by Paolo, Inc. v. Sinatra*, 105 F.3d 837, 839-40 (2d Cir.1997). Thus, this Court's "appellate jurisdiction over an unstayed sale order issued by a bankruptcy court is statutorily limited to the narrow issue of whether the property was sold to a good faith purchaser." *Id.* at 839. "This rule applies even where the debtor has sought a stay, but the stay has been denied," and also "where the debtor believes the sale has been wrongly authorized." *In re Baker*, 339 B.R. 298, 303 (E.D.N.Y.2005).

The bankruptcy court authorized the Trustee's sale on December 7, 2007. In that order, the court found that the purchaser, Hesch, LLC ("Hesch") "is a good faith purchaser within the meaning of 11 U.S.C. § 363(m)." The Appellants then moved for a stay pending appeal, which the bankruptcy court denied on December 20 after a hearing. With no stay in place, the Trustee and Hesch completed the sale on December 31, 2007.

Therefore, because the property at issue has already been sold, this Court considers only whether Hesch was a good-faith purchaser. Although "good faith" is not a well-defined term in this context, courts have looked to "the equity of the bidder's conduct

FN1. The Trustee's motion also asserts that Appellants lack standing because they held no lien or encumbrance on the property and thus were not aggrieved by the sale. In light of the disposition of this appeal on mootness grounds, this alternative ground is not addressed.

in the course of the sale proceedings" and to whether the purchase was "for value." *Kabro Assocs. of West Islip, LLC v. Colony Hill Assocs.*, 111 F.3d 269, 276 (2d Cir.1997) (quotation marks omitted). This "good-faith requirement prohibits fraudulent, collusive actions specifically intended to affect the sale price or control the outcome of the sale." *Licensing by Paolo, Inc. v. Sinatra*, 126 F.3d 380, 390 (2d Cir.1997). In neither their brief on the merits of the appeal nor their one-page opposition to the motion to dismiss do Appellants raise the issue of Hesch's good faith. At oral argument on September 10, 2008, counsel for the Appellants argued that the Court should not find Hesch to have acted in good faith for two reasons: (1) based on the relationship of this sale to an earlier transaction involving property in Puerto Rico, and (2) because Hesch completed the purchase of the Prospect property even while the sale order was being challenged and appealed. But counsel provided no authority showing why this means that Hesch's conduct was fraudulent, collusive, or otherwise improper. Appellants have pointed to no factual or legal justification for overturning the bankruptcy court's specific finding of good faith.

***2** There is no basis, then, on which to conclude that Hesch did not buy the property in good faith. Accordingly, because § 363(m) precludes further inquiry into the nature of the challenged transaction here, the Court grants appellee's motion [Doc. # 11] and dismisses the appeal.

IT IS SO ORDERED.

D.Conn.,2008.
In re Paul J. Schieffer, Inc.
Not Reported in F.Supp.2d, 2008 WL 4186944 (D.Conn.)

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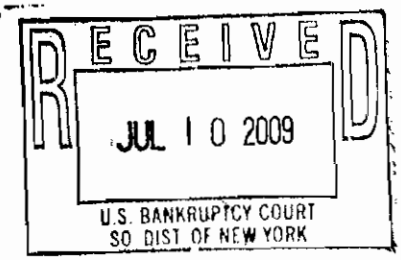
Clerk of Court

United States Bankruptcy Court
Southern District of New York
One Bowling Green
New York, N.Y. 10004-1408



Lead Case # 09-50026

In Re:	)	
	)	**Chapter 11**
GENERAL MOTORS CORP., et. al,,	)	**Case # 09-0950026**
Debtors	)	(Gerber)
	)	Jointly Administered
	)	**July 7, 2009**

Notice of Appeal on 7-6-2009 Decision of Honorable Judge Robert E. Gerber, on Debtors' Motion for approval of Sec. 363 Sale of Assets, etc. to New GM

Pursuant to Rule 8002 of Federal Bankruptcy Rules, **this is a notice** to indicate that I [1] hereby appeal to the United States District for the Southern District of New York, N.Y. 10007 from the 7-6-2009 Decision of honorable Judge Robert E. Gerber in the above referenced case (Docket #s 2967, 2968, 2985 etc.) dealing with Sec. 363 Sale to New GM.

To the best of my knowledge, the following are the interested parties in this case:

Interested Party	Name of Law Firm	Names of Attorneys	Phone #
1) **The Debtors:**	Weil, Gotshal & Manges LLP 767 Fifth Avenue New York, N.Y. 101153	Harvey R. Miller Stephen Karotkin Joseph H. Smolinsky	(212) 310-8000
2) **The Official Committee of Unsecured Creditors**	Kramer Levin Naftalis & Frankel LLP 1177 Ave. of the Americas New York, N.Y. 10036	Kenneth H. Eckstein Thomas Moers Mayer Robert Schmidt Jeffrey S. Trachtman	(212) 715-9100
3) **United States Trustee**	Office of U.S. Trustee 33 Whitehall St., 21st floor New York, N.Y. 10004	Diana G. Adams	(212) 510-0500
4) **U.S. Attorney For SDNY**	86 Chambers St., 3rd floor New York, N.Y. 10007	Lev. L. Dassin David S. Jones	(212) 637-1945

[1] This is Radha R.M. Narumanchi of New Haven, Connecticut, "a party in interest", being a "Creditor" (Bondholder worth $400,000.00 + -- cost basis) of the bankrupt General Motors Corp., as those terms are generally understood in bankruptcy proceedings

		Matthew L. Schwartz	
&			
5) **NGMCO. Inc.**	Cadwalader Wickersham & Taft LLP One World Fin. Center New York, N.Y. 10281	John J. Rapisardi Peter Friedman	(212) 504-5585

A money order drawn out in favor of the Clerk of Bankruptcy Court, in the amount of $255.00, towards this appeal docketing fees, is attached.

Respectfully submitted.

Dated at New Haven, Conn. 06513, this 7th day of July, 2009.

CREDITOR (Interested Party) *Pro Se*

7/7/2009

(Radha R.M. Narumanchi)
657 Middletown Avenue
New Haven, Conn. 06513
Phone: (203) 562-0536
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Clerk of Court

United States Bankruptcy Court
Southern District of New York
One Bowling Green
New York, N.Y. 10004-1408

Lead Case # 09-50026

In Re:	)	
	)	**Chapter 11**
MOTORS LIQUIDATION COMPANY, et. al	)	**Case # 09-0950026**
Debtors	)	(Gerber)
(formerly General Motors Corp. et. al.)	)	Jointly Administered
	)	**July 16, 2009**

Statement of Issues and Designation of Documents related to my 7-7-2009 Notice of Appeal on 7-5-2009 Decision of Honorable Judge Robert E. Gerber, [on Debtors' Motion for approval of Sec. 363 Sale of Assets, etc. to Motors Liquidation Company et. al. (Formerly General Motors Corp. et. al.)] [1]

Part One – Statement of Issues

1) Lax and ineffective supervision by the lower court in ensuring that Debtor's Chapter 11 filing notifications to various parties of interest (including the so-called unsecured bondholders - creditors) **are timely** to enable for an intelligent response from them, stifled, emasculated, and decimated the due process rights of such parties of interest and made the evidentiary hearings virtually ineffective [2].

2) Lower court's specific bias against and prohibition of ***pro se*** **parties of interest** (especially the so-called unsecured bondholders - creditors) from effectively and vigorously participating in the pre-evidentiary hearing discovery (such as request for production of documents), examinations of potential witnesses or participating during deposition of any potential witnesses; and cross-examination of witnesses during

[1] I reserve the right to add additional issues or modify the issues noticed here as it is warranted from time to time. Similarly, I reserve the right to identify and designate new documents, as it is warranted from time to time.

[2] In fairness to debtor, once their proper set up came on line, I started receiving information from its serving agent in a fast and efficient manner. For example, an order issued by the lower court on Wednesday, 7-15-2009, was promptly received by me that very evening.

evidentiary hearings on 6-30-2009 and 7-1-2009; and participating the closing arguments on 7-1-2009 and 7-2-2009, had effectively stifled, emasculated, and decimated the procedural and substantive due process rights of such parties of interest and made the evidentiary hearings virtually ineffective.

3) The entire proceedings of this Chapter 11 case have been infected and consequently vitiated the outcomes in this case by virtue of the fact that the Chief Judge of the SDNY bankruptcy court is the spouse of a partner of the attorneys for the Debtor; and yet the partner another law firm appearing before the lower court happened to be closely associated with the United States Treasury, the Purchaser in the 363 Sale transaction in this case.

4) The lower court's 7-5-2009 ruling and decision on the issue of treating cash infusion by the U.S. treasury between 12-31-2008 and 5-31-2009, as capital contribution, rather than loans, is perfunctory and a plain error in application of proper law and requires a *de novo* ruling on appeal [3]. A proper application of law would result in a deficiency in purchase prince, since it would not allow the U.S. Treasury to make a credit bid. This would also mean that the U.S. Treasury has to bring in additional funds of $27.0 billion dollars towards the purchase price.

5) The lower court's 7-5-2009 ruling and decision on the issue of breach of the 12-7-1995 indenture, triggering automatic equal and joint security interest by the so-called unsecured bondholders, is perfunctory and a plain error in application of proper law and requires a *de novo* ruling on appeal. [4] A proper application of the law would/should result in treating the $27.00 billion debt as "secured" and, hence, a better and a much higher equity position in the purchaser's UST sponsored corporation.

6) The purchase consideration offered by the Purchaser (sponsored by the U.S. Treasury) was totally unfair to the Debtor (and thus indirectly to Creditors, including the so-called unsecured bondholders) in that the Debtor's operating loss carry forward by the Purchaser that would result in an effective federal tax refund of $31.5 billion dollars was not counted at all in arriving at the purchase price. The negotiations about the purchase price were not at arm's length and they were virtually articulated and dictated by the U.S. Treasury (sponsor of the purchaser) to the Debtor. A proper arm's length transaction

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[3] Since this *pro se* appellant, who has raised most of these issues in his adversarial complaint (docket # 1568) dated 6-16-2009, has been banned/prohibited by the lower court in participating in the pre-evidentiary hearing process (see Issue # 2 above), no effective examination of the witnesses could take place, and no documentary evidence could be established on record during the evidentiary hearing process. **HENCE, THE APPELLANT SHOULD BE AFFORDED AN OPPORTUNITY TO COMPLETE THIS PROCESS BEFORE THE APPEAL COULD BE HEARD.**

[4] See footnote # 2 above.

would command more infusion of cash by the U.S. Treasury.

7) No consideration was given at all by the lower court to equitably subordinate the claims of the U.S. Treasury to that of the so-called unsecured bondholders. This would have severe impact on the purchase price articulated and dictated by the U.S. Treasury.

8) The lower court's action in decimating the claims of the so-called unsecured bondholders (See issue # 5 above) is in violation of the "takings" clause of the U.S. Constitution, inasmuch as the so-called unsecured bondholders have, in fact, a "property interest" in the collaterals of GM. Also, the "public policy" declarations by President O'Bama should result in directly nationalizing the GM by using a fair market value approach, at taxpayer's expense.

9) Is there a bankruptcy fraud?

Part Two – Designation of Documents

A) Depositions of Harry Wilson, Frederick Henderson, William C. Repko, J. Stephen Worth, Albert Koch, and Michael Raleigh.[5]

B) Affidavits of Harry Wilson (# 2577) and Frederick Henderson (#sm 21 and 102).

C) Declarations of David Curson (# 2518) and Michael Raleigh (# 3109). However, applicant is unable to locate the declarations of William Repko, J. Steven Worth, and Albert Koch.

D) Case Management Order # 1 (Docket # 157).

E) Decision of Lower Court (Docket #s 2967, 2968, and 2985).

F) Motion on Sale (Docket # 92).

G) Appellant's Memorandum of Law (Docket # 2357)

H) Appellant's Adversarial Complaint (Docket # 1568)

I) Debtor's Memorandum of Law (Docket # 105)

J) Evidentiary Hearing Testimonies of Frederick Henderson, Harry Wilson, William Repko, Albert Koch, Michael Raleigh, and David Curson; and final arguments – on 6/30/2009,

[5] This appellant is unable to locate these documents in the court's docket sheet. In fact, even the PDF files are missing. However, it seems that the debtor is in possession of such documents.

7/1/2009, and 7/2/2009 (Docket #s 2922, 2926, 2927, 2928, 2930, 2931, 2932, 2972, 2973, 2974, 3062). **All PDF files are missing in these docket entries**.

K) Debtor's indentures dated 11-15-1990 and 12-7-1995 and other supplements thereto. Appellant is unable to locate the docket numbers.

L) Loan Agreement between U.S. Treasury and GM dated 12-31-2008 and all supplements and modifications thereof. Appellant is unable to locate the docket numbers.

M) All UCC filings made by secured bondholders, as well as by U.S. Treasury. Appellant is unable to locate the docket numbers.

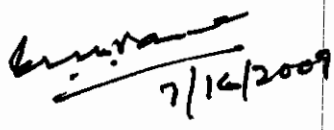
N) Informal Note-holders' group (Docket # 316).

O) Objections to late Notice: (#s 1260, 1277, 1290, 1692, 2025, 2104, 2123, 2128, 2193, 2194, 2211, 2216 – just to name a few).

Respectfully submitted.

Dated at New Haven, Conn. 06513, this 16th h day of July, 2009.

CREDITOR (Interested Party) *Pro Se*



(Radha R.M. Narumanchi)
657 Middletown Avenue
New Haven, Conn. 06513
Phone: (203) 562-0536
Email: rrm_narumanchi@hotmail.com

Certification

This is to certify that a copy of the aforementioned was mailed by first class mail, postage paid this 16th day of July, 2009 to:

1) Weil, Gotshal & Manges LLP, Attorneys for Debtors, 767 Fifth Avenue, New York, N.Y. 10153 - Attn: Harvey R. Miller/Stephen Karotkin/Joseph H. Smolinsky;

2) Cadwalader, Wickersham & Taft LLP, Attorneys for the Purchaser, One World Financial Center, New York, N.Y. 10281 - Attn: John J. Rapisardi;

3) Kramer Levin Naftalis & Frankel LLP, Attorneys for the Creditors Committee, Attorneys for the Creditors Committee, 1177 Avenue of the Americas, New York, N.Y. 10036, Attn: Kenneth H. Eckstein;

4) Cleary Gottlieb Steen & Hamilton LLP, Attorneys for the UAW, One Liberty Plaza, New York, N.Y. 10006 - Attn: James L. Bromley;

5) Cohen, Weiss and Simon LLP, Attorneys for the UAW, 330 West 42nd Street, New York, N.Y. 10036 - Attn: Babette Ceccotti;

6) Vedder Price, P.C., Attorneys for Export Development Canada, 1633 Broadway - 47th Floor, New York, N.Y. 10019 - Attn: Michael J. Edelman/Michael L. Schein;

7) Office of the United States Trustee for the Southern District of New York, 33 Whitehall Street, 21st floor, New York, N.Y. 10004 - Attn: Diana G. Adams;

8) U.S. Attorney's General Office, S.D.N.Y., 86 Chambers Street - Third Floor, New York, N.Y. 10007 - Attn: David S. Jones/Matthew L. Schwartz.

7/16/2009

(Radha R.M. Narumanchi)