UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK
Case No. 09-50026(REG)
- -x
In the Matter of:

MOTORS LIQUIDATION COMPANY, et al.,
f/k/a General Motors Corp., et al.
Debtors.

- -x

U.S. Bankruptcy Court
One Bowling Green
New York, New York
May 17, 2011
2:02 PM

B E F O R E:
HON. ROBERT E. GERBER
U.S. BANKRUPTCY JUDGE

HEARING re Jurisdictional issue with respect to the motion of General Motors LLC (f/k/a General Motors Company) to enforce sale order.

Transcribed by: Penina Wolicki

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ALSO PRESENT: (TELEPHONICALLY)
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P R O C E E D I N G S

THE COURT: Good afternoon. Have seats, please.

All right. We're here on GM. I want to get appearances, then I want everybody to sit down. I have preliminary comments.

MS. LENNOX: Good afternoon, Your Honor. For the record, Heather Lennox of Jones Day --

THE COURT: I'm having some trouble hearing you. I think you said Lennox?

MS. LENNOX: Yes, Your Honor.

THE COURT: Okay, Ms. Lennox.

MS. LENNOX: On behalf of New GM.

THE COURT: All right.

MR. ROTH: Andrew Roth at the law firm of Bredhoff & Kaiser, on behalf of the UAW, Your Honor.

THE COURT: Right.

MS. BUELL: Deborah Buell; Cleary, Gottlieb, Steen & Hamilton, LLP; co-counsel for the UAW.

THE COURT: All right, Ms. Buell.

MR. MEISLER: Ron Meisler; Skadden Arps, on behalf of DPH Holdings. Good afternoon, Your Honor.

THE COURT: Okay, Mr. Meisler.

Folks, I have problems with both of your positions. And while I'm not going to put a sock in anybody's mouth, I want to hear principally about discretionary abstention. My

reaction -- it's subject to your rights to be heard, but a lot of this is based on documents, on review of the papers -- is that Mr. Roth, Ms. Buell, I have some questions in my mind as to whether the UAW is right that New GM's position on this controversy is so frivolous as not to be colorable. If I stick with that tentative view, then I do have, in the first instance, subject-matter jurisdiction, exclusive jurisdiction over this controversy, and I would have a basis, if I chose to exercise it, for displacing the Eastern District of Michigan.

But with that said, I think that on the facts presented here, the issues as to discretionary abstention are pretty close, and I have some concerns as to what I would be bringing to the table -- appropriately bringing to the table, that Judge Cohn wouldn't be bringing to the table in the Eastern District of Michigan.

Both sides are free to talk about exclusive jurisdiction, but I think it's mainly about discretionary abstention. I want you, when you're making your presentations, to focus on the underlying issues on the merits, which are not before me today, except to set the table for your future controversy, that either I, or Judge Cohn, or if I were to accept the Skadden view, Judge Drain, would ultimately be dealing with. And I want you to focus in particular on the distinction or whether a distinction should be made, between us judges enforcing orders where we had some intention of our own

as to what we thought we were trying to accomplish.

Sometimes we write our own orders. More commonly we sign whatever is put in front of us, either as offered or as revised. Orders, on the one hand, and the underlying documents which we approve as part of those orders, on the other. Because the amount of judicial input into the underlying agreement, which ultimately the judge is just deciding whether he or she wants to approve, doesn't rise to the level of judicial input that we put into an order that we either draft or sign.

Now, when matters as to abstention are before me, when I'm construing my own orders, especially those where I was pretty specific in what the order was trying to accomplish, I rarely abstain. But it appears to me from your briefs that what you're mainly talking about are issues of contractual construction in the underlying documents that I approved, in particular the 2009 agreement, as contrasted to the language in the order -- the sale order itself. And to the extent Judge Drain's intention would make a difference, I would think that that might be true there as well.

But if there is something -- and this is a question aimed mainly at you, Ms. Lennox, I guess -- if you think there's something important that I said in the order where my insights as to what I was trying to accomplish make a difference, I need you to help me on that.

I well understand the difference, folks, between the old VEBA and the new VEBA. But there seems to be a point in time in which the parties came to the view or intent that whatever was in the old VEBA would be poured into the new VEBA, kind of like I rolled over my 401-K into my rollover IRA. It could made a difference on the merits as to what people's intentions were at that time in terms of whether the underlying obligation for the 450 million bucks would be erased as part of that transaction or not. But subject to your rights to be heard, that seems to be a classic matter of contractual interpretation, if documents are ambiguous, by bringing in parol evidence. And that's the kind of thing that bankruptcy judges and district judges both do all the time, with no apparent difference in skill, in my view, amongst the folks who do that kind of thing.

One last thing. Ms. Lennox, in your papers, I forgot whether it was your first brief or your second or both, you talk about me bringing stuff to the table in terms of an arguably superior ability to analyze these issues. I want both sides to address whether that's true; and if it were true, whether it would be appropriate for me to use it. Because we're not talking about a matter of discretion here, where what I bring to the table in the way of knowing cases on my watch makes a difference. We're talking about making findings of disputed fact or potentially so, or drawing conclusions of law,

as to which I don't know if either side wants me to bring to the table anything that's not already in the record or about to be in the record on this particular controversy.

In fact, I would think that most lawyers don't like judges pulling in stuff from outside the record, and therefore, I have some concerns as to whether, if I had any special insights here, I'd appropriately be invoking them or not.

Lastly, on the Skadden side and Delphi's needs and concerns. It seems to me that on the issues of what happened in this court, Delphi may care about the result, but it really doesn't have a dog in the fight. I also noticed nobody complained about Delphi's standing, so I'm going to allow Delphi to be heard here. And then if people think that I should take what Delphi says with a grain of salt, I'll hear whatever's said in that regard.

But I didn't see that much relevance to what happened in the Delphi case as applicable here. The Delphi case led to my colleague, Judge Drain, approving an MOU and I think a settlement agreement as well, which created the obligation. But once that happened, the obligation was there. And it seems to me, your principal bone of contention is how I or Judge Cohn should deal with whatever happened after Judge Drain did what he did.

And by the way, I think, subject to your rights to be heard, that what Judge Drain did is what I thought I was doing,

which was approving agreements; and that the substance of the orders that Judge Drain entered, doesn't give that -- result in that much of a need for him to construe orders any more than it imposes that duty on me.

So that's where I need help from you guys. You know, I have two briefs from each of you. I guess the first brief came from the union, but ultimately New GM is asking me to exercise jurisdiction and to keep it. So I'll hear from new GM first. Then I'll hear from the union, then I'll permit reply, and then I'll permit surreply. If you guys had worked out some alternate deal, I don't muchly care.

MR. ROTH: I think we did, Your Honor. And since we were essentially the moving party in terms of saying that there is no jurisdiction, we had agreed among ourselves that we would go first, if Your Honor doesn't mind.

THE COURT: I don't mind. Either way, I'm going to give each of you two chances to talk.

MR. ROTH: And, Your Honor, we further agreed among ourselves that I was going to address the issue of jurisdiction over the preclusion dispute, the colorability argument, and that Ms. Buell would argue the point of discretionary abstention. And since you have signaled very clearly that you would like to hear primarily from her, I'm going to be very brief.

THE COURT: That's good. It's going to take Tom Brady

to complete the Hail Mary to convince me that --

MR. ROTH: Well, I --

THE COURT: -- that the contentions as to jurisdiction aren't even colorable and that there isn't a starting jurisdiction here. But have at it.

MR. ROTH: -- well, let me -- we did brief the issue, and I'll be very brief in my argument in terms of the Hail Mary.

Parties don't waive or release 450 million dollars claims willy-nilly. They generally put words in the agreement that can plausibly or colorably be construed. And there is not -- GM has -- they've thrown out dozens of provisions in this 2009 agreement, but they have not cited a single word in this very voluminous agreement, that could possibly be construed as a waiver or release of this 450 million dollar obligation to the DC VEBA, not a word in that agreement. It's all inferential on their part.

And what is the basis for their inference? The basis for the inference is that the 2009 agreement applies to the DC VEBA. It applies in the way that Your Honor indicated. It provides that as of January 16, 2010, the assets of the DC VEBA will be poured into the new VEBA. That -- I'll just say two things then I'll sit down. That provision takes the assets of the DC VEBA as a given. It doesn't say claims, obligations, whatever, that might end up being assets are extinguished.

The parties knew, obviously, about the DC VEBA. They made provision for the DC VEBA. If they had intended that that 450 million no longer be an asset, that claim no longer be an asset that would be poured into the new VEBA, Your Honor, they would have said something to that effect, and they said absolutely nothing.

And I want to add that that provision in the -- New GM wants you to believe that this agreement sort of sprung out out -- this 2009 settlement agreement sprung up out of a vacuum in 2009 before His Honor. That's not the truth. The agreement was basically word-for-word the same agreement that the UAW and New GM -- and Old GM signed outside of bankruptcy court in 2008. It had all these fixing and capping provisions. It had the same provision about the DC VEBA being melded into the new VEBA in 2008. That was February 2008.

In September of 2008, more than half a year later, the parties signed what's referred to in the briefs as the implementation agreement. And the implementation agreement specifically recognized -- explicitly recognized the continuing validity of the 450 million dollar obligation. It said, "that shall remain payable subject to the conditions set forth in the 2007 agreement." So there you have it. The same words about pouring it in, about fixing and capping, were there in 2008, and the parties recognized that far from extinguishing -- those did not have the function of extinguishing it. Those had the

function of keeping it intact, and the parties recognized that specifically in writing in September of 2008.

THE COURT: I hear you, Mr. Roth. In substance, you're making a parol evidence argument that by reason of the surrounding circumstances, I or Judge Cohn should ultimately say you win. And I well understand the argument. But you got to do more than that to keep this away from being within my jurisdiction at all. You've got to in essence say that they're not even making colorable claims, and you know, you're more diplomatic and more polite than that, but you're almost like saying they're not meeting Rule 11 standards.

MR. ROTH: Well, I don't think the cases impose that frivolous Rule 11 standard. Some of the cases speak in terms of frivolous. I think some are more diplomatic and speak of "wholly insubstantial". I think it is fair to say, when the Court reserves jurisdiction over disputes, I think it's implicit that it's bona fide disputes, that are really serious disputes that are worthy of -- that the parties could reasonably be understood to have carved out for the bankruptcy court.

I just don't think this meets that standard, Your Honor. I think -- and it's not -- I want to say, it is not a parol evidence. It's supported by parol evidence, but the main argument is not a parol evidence rule argument at all. It's on the face of that document --

THE COURT: You're saying that you win by the unambiguous text of the --

MR. ROTH: Absolutely, Your Honor.

THE COURT: -- document. And I understand your position, but forgive me. But you being the lawyer that I sense you are, if either I or Judge Cohn says these documents aren't as clear as either side contends they are, then you're going to be bringing the exact same facts to the attention of whoever is deciding this issue on the merits, I assume.

MR. ROTH: Yes. And the fact -- let me respond to that. That's true, but let me respond in two ways. First of all, the buttressing argument about the September 2008 implementation agreement, that's not a parol evidence argument either. That's a subsequent contract that is indicative of the parties' intent, that that obligation -- 450 million dollar obligation, it says on the face of that contract -- this is not parol evidence -- that obligation remains payable.

And the parties said that six months after they signed an agreement creating the new VEBA, containing the same exact language about fixing and capping the obligations to the new VEBA, about pouring the old VEBA assets into the new VEBA. Every word -- every word in that 2009 agreement was repeated in haec verba in the 2009 agreement. And the parties, six months after that, evinced unmistakably their intent that they had not extinguished that obligation pursuant to the 2008 agreement.

It is untenable, Your Honor, uncolorable, frivolous, however you want to characterize it, to argue in front of this Court that language in a 2008 agreement that by the parties' own recognition did not have effect X, all of a sudden magically has that effect -- same effect X when repeated word-for-word in a subsequent agreement that was approved by this Court.

I'm not going to belabor the point, Your Honor, because I see you don't agree with me. But I wholeheartedly believe that that is an untenable, uncolorable argument --

THE COURT: Where I don't agree with you is not necessarily that I don't necessarily think that you will not ultimately win. I'm just not as persuaded that it's as one-sided as you contend that it is.

MR. ROTH: Well, we also -- we did put in parol evidence. We put in a declaration from Dan Sherrick, who was the negotiator of both the 2008 and 2009 agreement. New GM in their brief says, you know, Your Honor, just be patient. We're going to show you. We're going to show you we have more -- we're just giving you the tip of the iceberg here. We're going to -- there's nothing to preclude them from putting in a counter-declaration saying -- that declaration in paragraph 18 recites the discussions in two thousand -- not only the discussions in 2008 leading up to the 2008 agreement and then the implementation agreement, but the 2009 agreement. That there were discussions -- the UAW did seek the removal of that

contingency as part of this agreement before this Court, and New GM said no, we're not going to agree to that. But we'll keep the -- you know, we're going to keep the contingency going. That's in paragraph 18 of the Sherrick declaration.

Where's the responsive declaration from New GM saying -- from their negotiator, saying that's not accurate? I mean, there's nothing further to be had. You know, this is clear on the face of the agreement. Whatever parol evidence that they might have had on the other side of that -- and frankly, the parol evidence rule, I think, would absolutely preclude somebody from coming in and contradicting the clear terms of an agreement which don't have a word about extinguishing a 450 million dollar obligation.

Even if somebody in the UAW had made a comment that they would want to try to construe, as a comment that that was the intention, that could not possibly carry the day, Your Honor. How could that possibly be that parol evidence could override the absence of any language pointing the direction of a waiver of a 450 million dollar obligation?

So by every light, Your Honor, it is our firm submission that that is not a colorable position. If they had anything, if they had an item of parol evidence to even cast a shadow of a doubt on that, where is it? We haven't seen it. And I don't know what they're holding back for.

So, Your Honor, I'm not going to belabor the point,

although I do think that obviously, if there is jurisdiction, if it is colorable, it's by a fraction of an inch. And that argues strongly in favor of discretionary abstention. If they want to proceed on this argument in front of Judge Cohn as a defense to the claim, they're welcome to do that. Nothing -- if Your Honor declined jurisdiction on that ground, they certainly wouldn't be precluded from raising it.

But, you know, so I think the fact that if there is jurisdiction, if there is a colorable argument, based on what's been -- the contract language and the parol evidence that we put before this Court, if it's there, it's -- you need a magnifying glass to see it. And in that regard, I think that points ineluctably to discretionary abstention at a minimum. But I'm going to let Ms. Buell pick up on that point.

THE COURT: Fair enough. But, you know, folks, I think I want to change one thing I said. Since I heard you on jurisdiction, Mr. Roth --

MR. ROTH: Yes.

THE COURT: -- Ms. Lennox, I'd like to hear whatever you have to say at jurisdiction. Then I'm going to button up the jurisdictional point and then we'll turn to the separate discretionary abstention point. And conversely, to the extent you want to be heard on jurisdiction after she speaks, Mr. Roth, I'll let you. And then I'll let her have a sur-reply on that issue as well.

MS. LENNOX: Good afternoon, Your Honor. On your exclusive jurisdiction point, I would say a couple of things, some of which are in our papers. But we rest on two primarily documentary --

THE COURT: Do you mind pulling the microphone closer to you, please?

MS. LENNOX: Certainly. Is that better, Your Honor.

THE COURT: Somewhat.

MS. LENNOX: Okay. We rest on two primary preces for jurisdiction. One is the parties' agreement in Section 26(b) of the 2009 agreement that this Court would have exclusive jurisdiction over the enforcement, implementation, application or interpretation of that agreement. And that's buttressed by paragraph 71 of the sale order in which the Court retains exclusive jurisdiction to implement the terms and provisions of the order, the MPA and each of the agreements executed in connection therewith.

Our position, as Your Honor has stated, is that our entry into that 2009 agreement forecloses any contention that New GM has a contractual obligation to make the payment at issue. And we elucidate several reasons for that that we put in our briefs. But whatever the merits of our arguments will be, Your Honor, and we're not arguing merits here, which is why there's no counter-declaration on the merits -- once we argue the merits, we will present all of our arguments on the merits.

But what -- whether we win or lose, it's self-evident that we are talking about questions regarding the application, interpretation and enforcement of the 2009 agreement.

What the UAW, Your Honor, is arguing, is that -- with respect to colorability -- what they're trying to argue is that the additional VEBA payment that they would like is entirely unrelated to both the new VEBA and the 2009 agreement; that they've got absolutely nothing to do with each other.

Essentially, Your Honor, what they're arguing is that a 450 million dollar payment to be made by New GM that will be deposited directly into the new VEBA for the sole benefit of the UAW represented retirees, is entirely unrelated to the 2009 agreement, when that was the agreement, that was the comprehensive agreement, on all UAW-related retiree benefits.

THE COURT: Doesn't Mr. Roth make the point, which I will confess I read as a parol evidence point, rather than a colorability point, but if you wanted to erase an obligation of 450 million bucks, you might have said so.

MS. LENNOX: Well, Your Honor, I think that goes the other way. And our position is if you wanted to retain an obligation of 450 million dollars, you would have said so. And nobody said so. Nobody said so in court; nobody said so in the papers; in the notice that the UAW sent to the retirees about what was going to be put into the new VEBA that wasn't mentioned. And so I would argue the reverse of that, Your

Honor. If you wanted to retain that kind of obligation that New GM would have to pay a half a billion dollars, when everything else that New GM was putting into this VEBA was clearly delineated, you would say so. And that wasn't said. And so I would argue the reverse, Your Honor.

So we -- given all that, Your Honor, we do think that on the merits, there is -- there clearly is a dispute. And it involves the interpretation of the 2009 agreement and the papers that surrounded it and what was said in court. And we think, Your Honor, that the parties agreed to your exclusive jurisdiction, and they did it for a reason. They did it because this agreement was so important to the sale that the sale would not have happened without it.

And in fact, the UAW mentions that in their reply to the objections that were filed to the sale. They basically said that without this agreement there would be no 363 transaction. And so that's why Your Honor retained exclusive jurisdiction, and that's why the parties agreed to Your Honor's exclusive jurisdiction.

THE COURT: Suppose I were allowed to break the rule that I just said in my opening remarks I thought I shouldn't break, and added my own knowledge to this, and suppose it were the case that I never even read the new VEBA agreement, the 2009 one, and that I was totally preoccupied with whether GM would survive and whether I'd keep a couple of hundred thousand

jobs alive at GM and another 800,000 in the supplier chain. And I was focused solely on the legal argument that were put before me, and I didn't think about that at all? Tie that assumption to what my role in life would be in interpreting an agreement that I never saw or focused on.

MS. LENNOX: Okay. Your Honor, we're getting a little into preclusion, but I'm happy to address that here. I think Your Honor's role in that is twofold, okay? First, with respect to the agreement itself, in the sale order, paragraph 20 of the sale order -- you've got two paragraphs in that sale order that specifically approve the 2009 agreement. And in particular, in paragraph 20 of that order, Your Honor references specific provisions of the retiree settlement agreement.

On page 28 of your order in Roman III, you specifically order things to happen under that agreement, and you speci --

THE COURT: In paragraph 20?

MS. LENNOX: 20, yes, sir.

THE COURT: Um-hum.

MS. LENNOX: Page 28 -- maybe seven or eight lines --

THE COURT: Well, I have the key language in a separate document, so just talk about the paragraph number.

MS. LENNOX: Okay, so paragraph 20. You specifically reference one of our key arguments that says, "In accordance

with Section 5(d) of the UAW retiree settlement agreement, all provisions of the purchaser's plan relating to retiree medical benefits shall terminate as of the implementation date or otherwise be amended so as to be consistent with the UAW retiree settlement agreement."

Your Honor, that's a decretal paragraph of your order, and that's one of our key arguments -- one of our key arguments on the merits. And so it has made its way into this order.

The second thing I would say, Your Honor, is that the hearing lasted several days, and there were some --

THE COURT: The 363 hearing?

MS. LENNOX: Yes, Your Honor, the 363 hearing lasted several days. And one of the key struts for approving the 363 sale was this agreement. Old GM had to be relieved of its retiree liabilities; New GM had to come to some agreement with the UAW as an employer going forward. And this was a key provision of this sale.

Your Honor heard lots and lots of testimony about that sale. Your Honor heard lots and lots of evidence about how people were objecting to what they perceived to be the UAW's unfair treatment, unfairly favorable treatment, under the sale. Your Honor heard three days of testimony on that. And it sounds from what Mr. Roth is saying and certainly from some arguments I've made, that parol evidence regarding what happened at the sale hearing, the documents that were

introduced at the sale hearing, the documents that went out in connection with the sale hearing, are going to have some bearing on the merits of this dispute, should Your Honor or should some court determine that the language of the agreement is ambiguous.

And there -- Your Honor, Judge Cohn in Michigan, could try to wade through three days of that and try to remember the import of what was happening and the tone and the demeanor of what was happening at that time, Your Honor. But that would be a monumental hurdle to climb. I'm sure Judge Cohn is up to the task, but it doesn't make any sense for somebody without that --

THE COURT: Which witness' tone and demeanor do you think is relevant to this controversy?

MS. LENNOX: I'm sorry, Your Honor?

THE COURT: Now, you're ahead on this point. I don't know if you want to blow it. But I sat through that hearing and I remember it pretty well. It's one of the more important cases I've had over the last eleven years, and --

MS. LENNOX: Exactly.

THE COURT: -- I cannot for the life of me remember any tone and demeanor that I could think of as being potentially relevant to this controversy at all.

MS. LENNOX: Your Honor, maybe that is an overstatement. But certainly the papers that were filed in

connection with this, the arguments that were made, the import that people put on certain things, which may not be reflected in the record -- people emphasize things, they gesture for certain things that Your Honor may remember in terms of their import, that may not come across on paper. Not everything comes across on paper.

And there are so many things that are related to this hearing that are so critical to this particular point, which was an unwaivable condition for the sale to go forward, that it just doesn't make any sense to have a judge who was uninvolved in the proceedings continue with this. And so, Your Honor, that's what I would say with respect to your exclusive jurisdiction.

THE COURT: Okay. Mr. Roth, I'll take brief reply.

MR. ROTH: Your Honor, I'm sorry, but that was -- this stuff about the centrality of the three days of hearing and the critical nature of the 2009 agreement, that's all true, but what was at stake in the 2009 agreement? What was at stake was the twenty billion dollar obligation that New GM had undertaken in 2008 in that agreement, they couldn't pay it anymore. They didn't have the cash to pay the twenty billion, as this Court well knows.

So all the dispute -- the thing that this Court was wrestling with was, how to restructure that twenty billion so it would go into equity and other -- that was what was the nub

of the matter. That was the big fish to fry. 450 million is a lot of money. But 20 billion is a lot more. And that's what the parties were wrestling with.

As with respect to the DC VEBA, the 450 million and all, the parties just carried forward everything else from the 2008 agreement. The fact that the DC VEBA assets would be folded in; the fixing and capping; all those provisions. Those were not controversial in 2009. That was all settled.

The parties, as set forth in the Sherrick declaration, they used the same -- section 2 became -- section 2 from the 2008 agreement became section 2 from the 2009 agreement. Everything was repeated except for the one big piece which was the restructuring of that twenty billion, which Your Honor is exactly right, has nothing to do with the present dispute. Everything that has to do with the present dispute was just carried over without controversy, into the 2009 agreement.

Therefore, it's dispositive that when those same provisions were agreed to in 2008, nobody thought for a second that those provisions had the effect of extinguishing the 450 million dollar obligation. They said so explicitly in September of 2008 in the implementation agreement. They said that 450 remains payable. If that pouring provision, those fixing and capping provisions had the effect that New GM now says it does, that implementation agreement makes absolutely no sense.

It is just un -- it is not colorable, it's untenable, it's frivolous, however you want to characterize it. It is just not an argument that this Court could possibly accept.

As far as paragraph 20 of the sale order, what the Court -- and we briefed this very carefully. What the Court was addressing was Section 5(d). And what the Court said was, pursuant to the 2009 agreement, New GM is not going to be providing health benefits anymore. Those benefits are going to come exclusively out of the new VEBA. That didn't address payment obligations to the new VEBA much less the DC VEBA. That was a provision just setting forth a concept that was settled in 2008 and carried forward into 2009, which is that GM's getting out of the business of providing health benefits. The UAW VEBA is taking over. That's all that that paragraph 20 says. Again, it has nothing whatsoever to do with this dispute over the payment obligation into the DC VEBA.

THE COURT: Mr. Roth, to what extent was first Old GM -- I guess we're really talking about Old GM here -- as of June of 2009, paying benefits directly for retirees as contrasted to putting money into a VEBA and then the payments to the VEBA being deemed to be its obligation to take care of those retirees? In other words, after --

MR. ROTH: Yes.

THE COURT: -- the 2008 agreement and before --

MR. ROTH: Yes.

THE COURT: -- or maybe 2007, and before 2009, were there employees where GM was still direct taking care of their retiree benefits, or --

MR. ROTH: Absolutely. Absolutely, Your Honor. Through the implementation date, that was the understanding that they would -- you know, it would be a gradual process that they would turn it over as of January 2010. This was decided back in 2008, reaffirmed in 2009, that GM would continue paying health benefits, and the DC VEBA would continue paying -- you know, the DC VEBA was a mitigation VEBA. It paid -- since New GM had lessened the retiree health benefits back in 2006, the DC VEBA was established at that time to mitigate the added costs to the retirees from the lowering of retiree health benefits.

So New GM continued to do it out of their own coffers, supplemented by the DC VEBA. And that's a critical point, Your Honor. Pursuant to the 2008 agreement and the 2009 agreement, the DC VEBA continued in existence, continued to pay claims -- the mitigation claims -- up through the implementation date in January 2010.

The Delphi plan -- we say the condition was satisfied because the Delphi plan was con -- the condition to the obligation to pay the 450 was satisfied in October of 2009 when Judge Drain confirmed -- when the approved plan was consummated. The UAW sent out a demand letter in October 2009.

That was reje -- for the 450 million dollar payment. It said pay it into the DC VEBA, still in existence. New GM rejects it. We say that's a breach of contract, because the obligation had not been extinguished and it was, we allege, contingent on the consummation of the Delphi plan, and that contingency was satisfied, and the UAW made a demand.

If that -- so that's a breach according to the allegations of our complaint. They've asserted an affirmative defense of extinguishment, so those allegations of the complaint have to be accepted as true. Therefore, under the allegations of our complaint in the Eastern District of Michigan, if they had not breached the contract, that money would have gone into the DC VEBA which was still in existence.

Now, they want to take advantage of their own contract breach and say wait, Your Honor, I think -- I'm quoting Ms. Lennox -- that we're seeking a payment that would be deposited solely into the new VEBA. That's true by virtue of the asset transfer and the extinguishment of the DC VEBA. But it wasn't true at the time that the UAW made the demand and the demand was unlawfully rejected, according to the allegations of our complaint.

So again, nothing -- there is absolutely nothing that they can hang their hat on in terms of that obligation being extinguished. They said exactly the opposite with respect to the exact same contract language in September of 2008. And if

they had not breached the contract, that obligation would have been satisfied and we wouldn't be here today, I don't believe. They're trying to take advantage of their own breach by saying now we're seeking what they characterize as an additional VEBA payment, in violation of the fixing and capping provisions that say no additional payments to the new VEBA. That's too cute, Your Honor. I think that is frivolous. I think that's not colorable. And that's our position.

THE COURT: Okay. Let's go right to you, Ms. -- well, pause. I said I'd give you sur-reply on jurisdiction if you want it, Ms. Lennox.

MS. LENNOX: Just a couple brief -- very brief points, Your Honor.

THE COURT: Okay.

MS. LENNOX: Your Honor, I just want to rise to dispel the impression that Mr. Roth would like to leave that the 2008 agreement was substantially similar to the 2009 agreement. It's not. If you black-line those two agreements, they're actually quite substantially different, including, most importantly, as to the parties to whom -- the parties to each of the agreements: Old GM in 2008 and New GM in 2009. And why does that matter?

Because New GM wasn't negotiating on its own in 2009. New GM had a sponsor. It was called the U.S. government that had restrictions about what it was going to let New GM assume

and let New GM pay and what was going to happen vis-a-vis this VEBA. And that's an important -- notwithstanding the language changes, which are quite different, that's an important game-changing event that happened between the 2008 and 2009 agreements.

THE COURT: Well, I take that point. But by the same token, the 2008 agreement seems to say in paragraph 8, fixed and capped, just as the 2009 agreement in its paragraph 8 seems to also have fixed and capped language. Am I correct in that regard?

MS. LENNOX: It has -- in that respect it uses the same language, Your Honor. But I would say the intervening events that happened -- Old GM went bankrupt in the middle of that. Everything was on the table. Everything was supposed to be resolved with finality. Everything was renegotiated. And it was renegotiated with the government in the room. So just because the words are the same, doesn't mean that the import was the same, Your Honor. And we will certainly be prepared to get into this in the merits phase of this argument.

And the only other point I wanted to make, Your Honor, is Mr. Roth is right. Paragraph 20 does rely on Section 5(d) of the agreement. And it's part of your order. And that just reemphasizes our point that Your Honor should be the one to interpret and enforce your own order.

THE COURT: Okay. Thank you. Let's go right to

abstention, now, folks.

Ms. Buell?

MS. BUELL: Good afternoon, Your Honor. Deborah Buell, Cleary Gottlieb, co-counsel to the UAW.

The parties obviously cited a great many cases on the abstention point, and as I was going through them, in addition to remarking on the number of cases in this area, jurisdiction and abstention, authored by this Court, which was an interesting aspect in the preparation for this argument, as well as a little humbling, it seemed to me that Longacre, decided by this Court, and NTL decided by Judge Gropper, are perhaps the most on point with the case that we have before us today.

And as the Court will recall, both of those cases involved nondebtor disputes that bore some connection to the underlying bankruptcy cases, but which in neither case was the order of the bankruptcy court itself a part of the disputed facts. It was a relevant fact in each of those disputes, but the parties did not take issue with whether the orders were ambiguous, what they meant, or what they had accomplished.

Now, as Your Honor said in Longacre, which was the claims trading dispute, that case was procedurally but not substantively core. Procedurally core in that if there had not been a Chapter 11 case, there wouldn't have been a Chapter 11 claim; there wouldn't have been a trading dispute, and

therefore, not an underlying dispute.

But the issue was not substantively core in the Court's judgment, because the issue was a good, old-fashioned, state law breach of contract claim. And on that basis, while the Court noted that the sale order in that case was of relevance, it did not cause this Court to conclude that the other factors that supported discretionary abstention should be overlooked.

In NTL, Judge Gropper had another interesting situation where he issued an order modifying a plan. There was litigation for holders and traders in the when-issued market. And Judge Gropper concluded in that case that, again, even though his plan modification order was an important fact in those disputes, the parties were not disputing what his order meant. No one needed interpretation of his order. It was a relevant fact, but the issue really was, what was its effect on the private contracts and what did those contracts mean in light of the judge's order.

So these cases, I think, are very much on point with what we have here, where while there is certainly plenty of disagreement going on between the UAW and New GM, there's no disagreement as to what the terms of this Court's sale order are; there is no allegation of ambiguity in this Court's sale order; there is no request for interpretation of this Court's sale order. And I think that Ms. Lennox had it right when she

was describing in her remarks, that there is absolutely a dispute regarding the interpretation and construction of the 2009 retiree settlement agreement. That is in dispute.

Now, when we look at the factors that this Court and others have identified on the abstention front, I think that each of those either militate in favor of abstention or are at least neutral. And the first that I want to address is the effect on estate administration. I think it's well-understood by everyone here, but let's state the obvious, that there is no claim against the Old GM estate.

The other potential effect on the administration of the estate that New GM has raised is that there will be an opening of the floodgates and objectors to the sale order will reemerge arguing that UAW got too good of a deal, if it turns out that the 450 million dollar payment is actually due and owing. And they're referring the Court to the situation that we've seen recently in the Lehman case.

First of all, Your Honor, I think that there is no factual basis to think that the objectors are going to come out of the woodwork here in this case. And two, Lehman is really not an apt example, because what you had in Lehman were people saying after the fact, gee, the buyer took too much from the estate; the buyer got too good of a deal. Here, there's no question that UAW was taking from the estate.

The question is, in the agreement, which was assigned

from Old GM to New GM, and the obligations that New GM got as a result of that assignment, what were the liabilities that Old GM transferred. Did they include this 450 million or not? And that is the issue that goes to the underlying agreement, Your Honor, and not to the sale order itself.

Another factor that is looked at in these decisions is the degree of relatedness to the main bankruptcy. And here I want to just point out, Your Honor, that while I certainly --

THE COURT: Before you get off that --

MS. BUELL: Yes.

THE COURT: -- Ms. Buell, refresh my recollection on what 60(b) imposes in the way of the requisite showing for undoing an old order, and also in terms of establishing a time limit. I remember something about a one-year rule, but I --

MS. BUELL: Yes, Your Honor. It's --

THE COURT: -- may have it confused.

MS. BUELL: -- one year. And I believe it's, you know, newly discovered evidence or a mistake in law, neither of which, I think, could be said to be the case with respect to an objection here. And in fact, Judge Peck, in the Lehman case, readily disposed of those objections in Lehman where, of course, there was a more significant issue in terms of whether the estate had given up more than it should have.

THE COURT: Go on, please.

MS. BUELL: Okay. So the degree of relatedness to the

main bankruptcy. We've heard a lot about the preclusion dispute so far today. But of course, the claim that the UAW has is what we've described in the papers, both sides, as the MOU dispute; whether under the terms of the Delphi MOU, the conditions precedent to the 450 million dollar payment have been satisfied or not. And certainly New GM expects to defend on that in addition to the preclusion defense that has focused this Court on its jurisdictional scope.

New GM, in their briefing, argued that this Court did not have jurisdiction exclusively over the MOU dispute. Right? That's in their brief, page 18 of their February 7th brief. So I was a little surprised to hear the discussion today. But I understand where this Court is coming from, which I take it, that based on the preclusion issue, based on the issue under the 2009 retiree agreement, you've concluded that that is a sufficient basis for this Court's exclusive jurisdiction, based on the sale order.

But I just want to point out that New GM is on record saying they don't think any court has exclusive jurisdiction over the MOU dispute, not this Court and not Judge Drain. So I think at a minimum, Your Honor, that the argument as to the degree of relatedness of this dispute to the main bankruptcy is attenuated under the particular facts of this case.

THE COURT: Weave into that Skadden's point on behalf of Delphi. I think Skadden said in its second brief, in

substance, that the controversy between New GM and the UAW sprung up at a time in which Bob Drain still did have exclusive jurisdiction.

MS. BUELL: Your Honor, I think there is no dispute between the parties that the order that Judge Drain entered in 2007, approving the Delphi MOU, retained only nonexclusive jurisdiction through plan confirmation. Right? That, I think, there's no dispute by any party here. Delphi is taking the position that in the retention of jurisdiction provisions of the plan, somehow that nonexclusive jurisdiction got morphed into exclusive jurisdiction over the Delphi MOU agreement itself.

We think that that is, you know, a very objectionable and indefensible reading of those provisions. We don't think that Judge Drain went from nonexclusive jurisdiction during the course of the case to decide that only he could then exercise jurisdiction over a contractual dispute, after the fact, even after it was assigned from Delphi to GM.

So I think that the Delphi issue is a little bit of a red herring, Your Honor. I think that it need not detain this Court today, if you conclude that you will abstain. And I suppose we could leave for another day among the parties, if necessary, to address this before Judge Drain as part of this jurisdictional saga. But it's an extremely weak position.

And I did note certainly with interest the Court's

suggestion that we could have objected to Delphi making their view known. And if it's not too late, we do object. But we also felt that as a matter of respect among the judges of this Court, that if there was some kind of an argument that Judge Drain had jurisdiction, that this Court would want to hear about it in the overall context of this dispute.

THE COURT: Would I be talking out of school if I were to say in this open courtroom that if I thought I were stepping on Judge Drain's toes, a matter of that type would get my attention, whoever's raising it?

MS. BUELL: Thank you, Your Honor.

THE COURT: So I'm looking at you when I say that. I guess I should be looking at everybody when I say that.

I do have an interest in how much, if at all, this steps on Judge Drain's toes. Right now I don't see that it does. But anybody who feels differently should tell me so.

Go on.

MS. BUELL: Thank you. So I think the point on abstention, right, is this question of the relatedness of the dispute to the main proceeding. And we think that the record here clearly indicates that it is not central to the main proceeding, both because of the lack of the claim against the estate, and based on what you've heard, the colloquy between counsel, regarding the issues that are going to be of debate on the 2009 retiree agreement. It's basically what did the

parties negotiate before they got into this court.

There is an additional factor, Your Honor. Jury trial right. We think that does militate strongly in favor of abstention in favor of Judge Cohn. There is --

THE COURT: I saw that Ms. Buell. I didn't regard that as one of your strongest points. You don't have a jury trial here. And whether -- if I do send it to Judge Cohn, he decides that, it's his decision and not mine.

But the biggest fight that we have here is the one I just heard from Mr. Roth and Ms. Lennox, are threshold decisions that are made by a judge long before you get to a jury. Because first, whether an agreement is ambiguous or not, it's plainly a matter for the judge. And I've forgotten what the applicable law is as to how the parol evidence is dealt with, if there is deemed to be an ambiguity. But I mean, the notion that a jury is going to be deciding issues of this complexity strikes me as first an assumption that may not have factual support, and second, if I really thought that a jury would be deciding it, that would actually cut against your point, because I would be -- you know, the underlying basis on which I abstain in a federal abstention analysis is the interest of justice. And throwing this controversy into the hands of a jury may or may not be in the interests of justice.

MS. BUELL: Understood, Your Honor. The point is that unlike the 2009 retiree settlement agreement, where there is a

jury trial waiver, under the Delphi MOU there is no such waiver. So understanding that the case has a lot of procedural steps to go, including the type of motion practice that you've described, that is at the end of the day, a point of consideration, and I think it relates also to another factor which is, you know, in the conventional case, is it state law, is it unsettled state law.

You know, here, the law that governs the Delphi MOU is federal common law with respect to labor law contracts. Certainly no question that this Court could capably handle that if it were called on to do so, as it has -- bankruptcy judges have to handle a huge myriad of types of substantive law. But I think the question is not whether the Court could, but whether there's a reason for the Court to do so in this case where we also have a court of general jurisdiction which is available to do so in lieu of this Court if abstention is appropriate.

The last thing I wanted to address, Your Honor -- well, I think, two things, if I may. Just quickly, you had talked about your role and whether there was any kind of special insight that you would be bringing to the table that would militate against abstention. And you know, I think that we've heard some of that in the colloquy with counsel so far. But I do think that what we have here is, on balance, a breach of contract action dealing with the Delphi MOU, dealing with

the meaning of fixed and capped, which was the subject of negotiations which preceded the time the parties came into this Court and which were not, themselves, the subject of testimony before this Court during the sale hearing, and also did not work their way in any specific shape or form into the sale order which this Court was presented with.

And I think that that leads me to the last point, which is, to what extent would there be prejudice to New GM if this Court were to abstain. And I read certainly with great interest your more recent decision on this topic in the Rally case, in this very matter. And I think that the question of prejudice to a Chapter 11 asset buyer is an important one, deserves more thought in the context of this case, but frankly, with a different outcome here.

I think no bankruptcy lawyer could stand here and say that in the Chapter 11 sale process it is not important for a buyer to be able to rely on a bankruptcy court order and to have a bankruptcy court forum where that order needs interpretation or construction. But that is very different than saying that in every instance where a sale order may be a relevant fact to a post-sale post-assignment dispute, the bankruptcy court must take jurisdiction.

And here, I have to go back to the point that New GM has taken the position in the papers before this Court that this Court does not have exclusive jurisdiction over the MOU

itself, over the MOU dispute, the contractual dispute, which was, of course the basis for the UAW's complaint in Michigan. It's not a case where the language of the sale order is in contention, as in NTL, as in Longacre. It's the situation where the fact of the sale order is a relevant fact. But it's not in dispute. What's in dispute is the terms of the Delphi MOU, the term in the 2009 fixed and capped, what does that mean, in light of the facts that we have here today.

And I think it's important, obviously, to recognize that buyers have a legitimate interest in bankruptcy court jurisdiction, but they don't have a legitimate interest in every case. And in this case, particularly when they're on record in the way that they are, I think it's an appropriate case for this Court to exercise its powers of discretion to abstain.

THE COURT: Thank you.

MS. BUELL: Thank you.

THE COURT: Ms. Lennox?

MS. LENNOX: Thank you, Your Honor. Before I would get into the seven-factor standard for discretionary or permissive abstention, I thought it would be a good idea to go through some threshold principles that I think are crucial to the Court's consideration of the matter as to whether Your Honor should abstain.

And the first of these principles is that where the

grounds for federal court's jurisdiction exist, permissive abstention is the exception and not the rule. Courts have held that where a court does have jurisdiction, they should be quite loathe to refrain from exercising it.

The second of these overarching principles -- and we think one that applies with special force here, is that abstention is particularly inappropriate where a dispute involves the interpretation or the enforcement of a bankruptcy court sale order. Ms. Buell referred to Your Honor's rationale in Rally, and we do think that that's relevant here, that the ability of an asset purchaser to return to the bankruptcy court for construction or clarification of a sale order, will maximize the value of the debtor's assets.

And finally, Your Honor -- and I'd like to spend a little time on this one before I get into the factors -- we think permissive abstention is unwarranted where New GM and the UAW previously agreed to the court's exclusive jurisdiction, certainly over the preclusion dispute, which does involve consideration of the MOU contract.

And the UAW did not object to the exclusive jurisdiction provisions in the sale order. It's my understanding that the UAW had a chance to pass on that order before it was entered and submitted to Your Honor, and they didn't object to that. So that exclusive jurisdiction is in the sale order.

Your Honor, the district court in the Winstar Holdings case characterized the parties' agreement regarding jurisdiction as the most important factor affecting its decision not to abstain in a dispute involving a sale of the debtors' assets among nonparties. And the UAW goes through this argument a little bit more in its brief, and I'd like to respond to its points.

Again, the UAW expressly agreed to the jurisdiction -- the exclusive jurisdiction of this Court in the 2009 settlement agreement and then consented to it by not objecting to the sale order. So it would perverse for the UAW to profit from its disregard of these commitments by filing the VEBA complaint and having the Michigan court hear it.

Similarly, Your Honor, our papers cite multiple case holding that a court's reservation of exclusive jurisdiction divests other courts of jurisdiction. And I believe Your Honor held so recently in its Lyondell opinion that came out at the end of March of this year.

THE COURT: Divests unless the court wants to order otherwise, right?

MS. LENNOX: Certainly, Your Honor. You can choose to order otherwise. But it would be unusual, I believe, for --

THE COURT: In essence, what you're saying is that if I thought, with respect to Judge Cohn, that my toes were being stepped on, just as I expressed in colloquy to one or another

of you guys that I was nervous about stepping on Judge Drain's toes -- but if I thought that my toes were being stepped on, I would be able to tell Judge Cohn, with respect, that I've got to keep this controversy. That's in substance what you're telling me, right?

MS. LENNOX: Certainly, Your Honor.

THE COURT: Okay. But you're not arguing the converse, which is that I lack the power to determine that my toes aren't being stepped on and that I have no important interests that I need to protect?

MS. LENNOX: Your Honor, there are cases out there, not from this jurisdiction, that we have found, that have said that a court that has exclusive jurisdiction can choose to abstain. I've not found any in this jurisdiction. And it would seem to me that that would be sort of a mockery of the principle of why keep exclusive jurisdiction over a matter that is so important for which exclusive jurisdiction is required, and the parties have agreed to, if one is not going to exercise it. Which is why I would think I didn't find many, many cases where abstention was granted in exclusive jurisdiction cases.

And there's yet another principle that adds to this, Your Honor, and that is, New GM and the UAW have contractually agreed to a forum selection clause, granting this Court exclusive jurisdiction. Second Circuit cases and cases in this district and elsewhere are clear that a first-filed rule or

abstention shouldn't overcome a presumptively valid and mandatory forum selection clause. And we think that that's what's at issue here in Section 26(b) of the retiree settlement agreement.

So with that background on the general principles, Your Honor, I thought that I would go through some of the factors and address some of Ms. Buell's points.

With respect to the degree of relatedness or remoteness to the proceedings of the main bankruptcy case, certainly we have argued in front of this Court today that the sale obviously was the most important thing that happened in this case, and there were two key components to the sale. One was the dealing with of the bond debt, and the other one was the dealing with of UAW obligations. This retiree settlement agreement wasn't just some ancillary agreement. It was a prop. It was a necessary component of the sale order. And it is so integral to the main proceeding in this case that we think it could not possibly be more related to this case.

I think, Your Honor, you had asked what do you bring that's special. I think we talked about that in our earlier colloquy. We do think that particularly if parol evidence is going to come into this, that Your Honor, having sat through three days of hearings, having been in the middle of the importance that was this case, Your Honor really does bring something special to this case that would be missing from just

a pure reading of the paper.

I would also like to clarify a question that Your Honor asked Ms. Buell with respect to Rule 60. Actually, Your Honor, in Rule 9024, which incorporates Rule 60, there's only a one-year statute of limitations if it were for grounds for relief (b)(1), (2) and (3). Your Honor --

THE COURT: Well, that's what 60 says also.

MS. LENNOX: I'm sorry, Your Honor?

THE COURT: Isn't that what 60(c) --

MS. LENNOX: (c)(1)?

THE COURT: -- (1) says?

MS. LENNOX: Yes, but for -- if one is going to make an argument under, for example, Rule 60(b)(6) one only has to bring that within a reasonable time. If somebody wanted to bring grounds for relief on any other reason that justifies relief, Your Honor, they wouldn't have grounds until a 450 million dollar obligation was imposed. So --

THE COURT: Well, the circuit has told us that 60(b)(6)s are the poster child for Hail Mary efforts, aren't they? I mean, 60(b)(6)s are very, very hard to successfully bring.

MS. LENNOX: Understood, Your Honor. And I'm not suggesting that they would win with any kind of merit. Alls I'm suggesting, Your Honor, it could have a degree of relatedness to this proceeding, because it could involve papers

filed in front of Your Honor, whether they were meritorious or not.

With respect to the efficient administration of the bankruptcy estate, sort of building on that theme, if you have exclusive jurisdiction over the preclusion dispute, which basically encompasses everything we're talking about here, and anything -- any arguments that emanate from there and/or ancillary to there, it is certainly most efficient for this Court to hear the entire dispute and not risk conflicting judgments in other courts.

With respect to issues of state law -- and I would point out, Your Honor, with respect to the cases Ms. Buell cited, issues of state law are not at issue here. There is no state law cause of action here. The complaint that the UAW filed is a federal cause of action under Section 301 of the LMRA. The two cases that Ms. Buell would like you to refer to, Your Honor's Casual Male case and the case in front of Judge Gropper, NTL, involved state law causes of action.

And I understand, when there is a state law issue, federal courts are much more deferential and much more concerned about comity than with respect to federal courts. Federal courts, including bankruptcy courts, are entitled and are empowered to decide federal issues. So state law is not an issue here nor is the law that we're asking you to apply particularly difficult or unsettled.

With respect to comity, I would relate that to state law issues. There aren't any. There's no concern about comity with state courts. And courts in this district, including this Court, have held that abstention in favor of other federal courts is appropriate in the interests of justice or when circumstances warrant. And I'm not sure that anybody has articulated the interest of justice or circumstances warranting that would require this Court to abstain from exercising its exclusive jurisdiction, particularly given your vast institutional knowledge of the sale and the agreement that we're talking about.

Again, with respect to the existence of a jury trial, I think Your Honor talked to Ms. Buell about that. I would say that if this had to get to a jury, courts in this district are also quite permissive with respect to having bankruptcy courts handle all the issues up to pre-trial, up until it's clear that there's a trial that has to happen.

THE COURT: So you want me to act as an MJ?

MS. LENNOX: No, Your Honor. I think if it's with respect to contractual interpretation, you don't have to do that. We actually argue in our papers that we don't think a jury trial is here, one, is because with respect to the preclusion dispute, the UAW has waived it. They have agreed to jurisdiction in front of this Court and they have waived a right to jury trial on that issue.

If they think there's a jury trial right, and even if there were -- and we don't think that there is, because this is a contractual interpretation dispute -- the courts in this district have said judges can decide. But if for some reason there had to be a jury trial, the only thing I want to point out, Your Honor, is that courts in this district have allowed bankruptcy courts to handle matters until it became absolutely clear that there had to be a jury trial, which we don't think will happen in this case.

Finally, Your Honor, with respect to prejudice to an involuntarily removed defendant, New GM is the defendant, and New GM is invoking this Court's jurisdiction. So we think that that --

THE COURT: Say that again slower, please, Ms. Lennox.

MS. LENNOX: The seventh factor, Your Honor, is the -- whether -- the prejudice to an involuntarily removed defendant. New GM is the defendant in the Michigan action. And so it's not an issue, because we, as the defendant, are invoking this Court's jurisdiction.

THE COURT: Oh. So you're simply saying the factor doesn't apply one way or the other?

MS. LENNOX: Correct. Yes.

And so --

THE COURT: Because, although discretionary abstention and discretionary remand have the same case law in substance,

the factor you just articulated applies principally in cases of removal and remand motions in multi-defendant cases.

MS. LENNOX: Yes. Inequitable remand, yes, Your Honor.

And so we think it's clear that all of the factors and all of the relevant governing principles would dictate, in this case, against abstention, Your Honor, and we would ask Your honor to exercise its jurisdiction.

THE COURT: Okay. Thank you. I'll hear reply from you, Ms. Buell; sur-reply from Ms. Lennox. And then I'll hear from Delphi.

MS. BUELL: Thank you, Your Honor.

THE COURT: That's Mr. Meisler. Forgive me. I had forgotten your name.

Go ahead.

MS. BUELL: Deborah Buell again. Your Honor, just a couple of points. One, I wanted to note that the Winstar case which is decided in the Southern District, was a case where the dispute was over what had been sold, and the court order was, itself, in dispute in that case. That was part of the court's jurisdictional analysis, as well as part of the abstention analysis.

It's true that in that case the Court did note that there was an exclusive jurisdiction of the bankruptcy court which also factored into the abstention analysis. But I really

think that as a matter almost of common sense, Your Honor, that it cannot be that where a court concludes it has exclusive jurisdiction, that it is not permitted under 1334(c)(1) to choose to abstain in a particular situation. As you know much better than anyone else here, plans of confirmation routinely have retention of juris -- exclusive jurisdiction provisions, which allow the Court to be the funnel and make a judgment in particular cases, whether it is called upon to exercise its exclusive jurisdiction or not.

It cannot be the case that the Court may not abstain, and therefore I think it cannot be the case that a party that has agreed to exclusive jurisdiction is not permitted to argue to the Court on a discretionary matter, that the discretionary factors present for abstention compel or support, really, the exercise of that discretion in a particular case.

Here in particular, Your Honor, I just want to go back to the point that the exclusive jurisdiction here pertains to the defense to this claim rather than to the claim itself. I understand that that's the basis for the Court's determination that the exclusive jurisdiction provision in the sale order applies to the entire dispute. But that was not the position --

THE COURT: Well, that's often the case in exclusive jurisdiction controversies, isn't it? I mean, let's just take Rally. You have a bunch of disgruntled dealers who are trying

to do a run-around around the important aspect of the entire scheme which was the wind-down agreements. And New GM's contention -- I think it was raised by King & Spaulding rather than by Jones Day. But the contention was these guys want to go elsewhere but the importance of those provisions to the success of the entire 363 transaction made it impossible to say never mind. It was an important concern. And I think this was a point you made the first time.

It's not uncommon that those invoking exclusive jurisdiction will be doing it principally on defense rather than on offense.

MS. BUELL: That's correct, Your Honor. And I do think that the Rally decision provides a valuable point of distinction between the situation that the Court was addressing there and the situation that you have in front of you today. In Rally, as I read your decision, certainly the whole question of those wind-down agreements was very important to the GM Chapter 11 case and to the sale agreement -- sale order and that there was plenty of time spent on the propriety of the wind-down agreements in the course of the proceedings before this Court. And in the sale order, there was an expressed provisions which dealt with the wind-down agreements and this Court's continued exclusive jurisdiction over those wind-down agreements.

So as I read Rally, and then I thought about the facts

that we have here, what we have here was the 2009 retiree settlement agreement, without question approved by this Court and assigned from Old GM to New GM as part of the sale order. But there is nothing in the sale order today where the parties are pointing to and saying these are the provisions of the sale order that are in dispute on the preclusion dispute or the MOU dispute. And there is no express focus by the Court in the sale order with respect to that agreement. That may not change the analysis ultimately, but it helped me as I thought through what the context of the Rally situation that the Court had and the relationship between that issue, that post-sale issue and the risk to the buyer as compared to what we have here today. There is no need for Judge Cohn or any other judge who would resolve this dispute were the Court to abstain to interpret or construe this Court's order. It is a function of construing and understanding the party's contentions with respect to the two underlying agreements one of which was before this Court but which, in the sale hearing, there was no evidence presented on the matters in question.

THE COURT: The two agreements you're referring to in the last sentence being the 2007 MOU and 2008 original settlement agreement?

MS. BUELL: The 2007 Delphi MOU, which was assigned as part of the sale order in this case from Old GM to New GM, and then the 2009 retiree settlement agreement which was approved

by this Court --

THE COURT: Oh.

MS. BUELL: -- as part of the sale order.

THE COURT: Okay. Okay. Thank you. Ms. Lennox?

MS. LENNOX: Again, just quite briefly, Your Honor, and just in response to what Ms. Buell argued, with respect to the Rally and the dealer cases, I believe, after reading those cases and if I'm recalling correctly, those cases also dealt not only with jurisdictional issues and with what happened subsequently with the federal arbitration issues, but they also involved interpretations of the agreements themselves: what did they say, what -- which dealerships were included. And it involved a reading of the agreements themselves.

So, too, with the 2009 retiree settlement agreement. Your Honor had asked, well, is it just the order or is it the agreement. And my answer to you was it's both. And I think in the dealer cases was it's both.

And we do -- I would just like to reiterate that we do think there are provisions under the sale order that apply and are important to the merits of this case and, specifically, Findings of Fact FF, R and decretal paragraphs 19, 20 and 71, we do think relate directly to what we would be arguing on the merits and the rights of the parties.

THE COURT: You said FF, RR and what was the third?

MS. LENNOX: Single R, Your Honor.

THE COURT: Single R?

MS. LENNOX: Yes. 19, 20 and 71.

THE COURT: Of the --

MS. LENNOX: Sale order.

THE COURT: -- 363 order?

MS. LENNOX: Yes, Your Honor. Thank you.

THE COURT: Okay. Thank you. Mr. Meisler, do you want to be heard?

MR. MEISLER: Thank you, Your Honor. Your Honor, to the extent this relates to the labor MOU and whether the conditions have been satisfied to trigger the 450 million dollar contribution, then Your Honor asked your question as to whether or not you might be stepping on Judge Drain's toes, I'd answer that in the affirmative.

Your Honor, the textural analysis is plain. Judge Drain did reserve exclusive jurisdiction. Ms. Buell raises a curious question, indeed. The labor MOU order did say that there was nonexclusive jurisdiction reserved by Judge Drain's court. That was something that was negotiated by the parties. But in 2007, the state of the world was much different in the auto industry than it was in 2009 when a modified plan was approved and consummated. The jurisdictional provision was a trilateral agreement. All parties were represented by counsel and it was negotiated among the parties. There were lots of moving pieces. And there were reasons for the parties to

decide that, in that situation, the state of the world in 2009 -- that having Judge Drain take exclusive jurisdiction over that matter was the right thing to do and a decision that was made by the parties. No party objected to exclusive jurisdiction being retained by Judge Drain.

Your Honor, you ask an important question. Do we have standing? Does DPH Holdings have standing? Your Honor, we have no issue and we do not have standing as it relates to whether or not the sale order capped and fixed the claims that UAW might have against GM. But to the extent the motion -- or to the extent the question relates to the MOU that was agreed to by three parties, then, Your Honor, we do have standing. Delphi is a party to the MOU. It was entered into as part of the Delphi Chapter 11 case. And just as an example of GM's argument regarding whether or not the conditions were satisfied to trigger the 450 million dollar contribution then, Your Honor, respectfully, I'd say that we do have standing. And among the reasons that we have standing is there's also a claim waiver in there. And there's a release in that same agreement. And once you start --

THE COURT: Don't you have those anyway?

MR. MEISLER: Your Honor, the way the plan works is it incorporates the release inside the MOU. And so, once you start eating away at the integrity of the MOU then you take away from our release that we have in the plan.

THE COURT: You have an effective confirmation order, don't you?

MR. MEISLER: That's correct, Your Honor.

THE COURT: I think you anticipated, Mr. Meisler, the question that I was about to ask you if you hadn't hit it first which is why you care so much about this because I had always thought that Delphi is protected, that Delphi doesn't have a dog in this fight.

MR. MEISLER: Your Honor, as to whether or not the sale order fixes and caps the claim against GM, you're correct, Your Honor. We have no dog in this fight. Where we start getting anxious is when someone's trying to pick apart the labor MOU because that agreement is integral to our modified plan. That agreement comes very close, Your Honor, to a collateral attack on our plan. And the releases and discharges in the modified plan are very important to us.

THE COURT: Well, it's one thing for GM to say -- New GM to say that, no, UAW, we don't owe you the extra 450 million bucks. It's quite a different thing for them to say that they or anybody else can go back against the Delphi estate and to try to undo a confirmed plan that, if I understand correctly, has also gone effective, to say never mind with respect to discharges and releases that you have incident to that plan. Now, I don't want to make you talk contrary to your client's interest. I suspect you would love to agree with me on that

from the bigger picture even if it costs you the war today. Or am I mistaken in that regard?

MR. MEISLER: Your Honor, you're absolutely correct. But our concern is that the issues are so interrelated that if one were to argue that the conditions precedent to the triggering of the 450 million dollar contribution then one necessarily has to tackle the issue of whether or not the UAW has waived its claim, its 450 million dollar claim against Delphi because that's what J-2 was all about. J-2 was a give-and-get by the various parties. There was a trilateral agreement between these parties. And any argument as to whether or not the conditions precedent were satisfied may just have an effect on whether or not that claim waiver went effective.

THE COURT: Are you saying, Mr. Meisler, to help me keep us with you, that the deal in Delphi can be thought of the UAW saying we won't go after you, Delphi, for that money; we'll just go after GM instead?

MR. MEISLER: Well, Your Honor, I wouldn't want to say it that way. I would want to say that the three parties came together and the agreement was that the UAW would waive its claim against Delphi. And in consideration for doing so, because there were also claims against GM in connection with the benefit guaranty, that GM was going to make a contribution. Now, what happened afterwards, Your Honor, again, we don't have

a dog in that fight. And whether or not the sale order capped and fixed that claim -- God bless this Court but we don't have a dog in that fight. We don't have an issue. And we're not looking to get involved in the merits of that matter. But as it relates to what happened in the labor MOU and whether those conditions were satisfied, Your Honor, that's something that we do have issue with and, Your Honor, that's something that Judge Drain reserved exclusive jurisdiction upon.

THE COURT: Isn't the corollary of your point, Mr. Meisler, that if I agreed with you on this, I couldn't decide this controversy any more than Judge Cohn could?

MR. MEISLER: Your Honor, let's -- just to be clear, the scope of what you said, the controversy being whether or not the conditions precedent to the labor MOU, to the triggering of the 450 million dollar contribution, yes, Your Honor, I agree with you. And, Your Honor, to the same point, when you were asking about discretionary abstention, Your Honor, I don't think that that's a question that this Court should answer because, in fact, that's a question that needs to be addressed by Judge Drain.

THE COURT: Whether I should exercise discretionary abstention with respect to an issue before me should be decided by Judge Drain?

MR. MEISLER: Your Honor, the whole point is that with respect to the labor MOU, DPH Holdings' perspective is that

this Court does not have jurisdiction. And therefore, discretionary abstention on this particular matter shouldn't come into play at all.

THE COURT: Okay. Anything else?

MR. MEISLER: Your Honor, with respect to -- the only other points I have is if you would like to discuss discretionary abstention. But again, I rest on the point that --

THE COURT: I think the other two counsel did it pretty well. You have some factor that neither of them thought of?

MR. MEISLER: Your Honor, again, with respect to the labor MOU, it's uniquely a bankruptcy issue because our releases and discharges are at issue. There's questions as to whether or not the Delphi bankruptcy plan is a plan of reorganization which is a concept that the bankruptcy court is uniquely situated to answer.

THE COURT: You think a district judge is too dumb to know what a plan of reorganization is?

MR. MEISLER: No, Your Honor. I don't think that that's the case. But there's some nuances here that require an understanding of what happened in the Delphi bankruptcy case and was the -- what is called an amended plan of reorganization, is that a plan of reorganization or is that a plan of liquidation? Now is that something that Judge Cohn can

answer? Of course he can. But what we're saying is that Judge Drain is uniquely situated to answer that question.

THE COURT: You got the same it-proves-too-much argument, Mr. Meisler, because the issue before me is whether I should keep the matter, not whether I'm going to pick it apart and send part of it to Judge Drain.

MR. MEISLER: Your Honor, that's why I go back to what I said earlier. I think, with respect to discretionary abstention, I think that question should not be in front of this Court regarding the labor MOU.

THE COURT: Okay. Anything else?

MR. MEISLER: No, thank you, Your Honor.

THE COURT: Okay. I'll give either of the other two counsel an opportunity to respond to Mr. Meisler if either wants to.

MS. BUELL: Briefly, Your Honor, I think we have a profound --

THE COURT: Having trouble hearing you, Ms. Buell.

MS. BUELL: Yeah. Deborah Buell, for the record, Your Honor. We have a profound disagreement with the Delphi position as described to you. We think it's inconsistent with the documents, the confirmed plan that they have, the discharge that they've received, the fact that the Delphi MOU had provisions in it that were always those of GM and that those provisions of GM were assigned by this Court from Old GM to New

GM as part of the sale order. And what was left under the Delphi MOU for Delphi was assigned to GM as part of the Delphi plan confirmation. I really -- I don't understand -- I really don't understand what we just heard. I just want to make clear that we think --

THE COURT: Well, I think he has a fear -- and maybe the key to the jail is in your own pocket. He's afraid that if you -- excuse me -- that if New GM wins in its battle with you, in Manhattan or Detroit as contrasted to White Plains, that you're then going to go back against Delphi and say, well, we didn't get it out of New GM so we want to go against Delphi to get that 450 million bucks. Can you take that issue off the table?

MS. BUELL: According to my co-counsel, the answer is yes, Your Honor.

THE COURT: All right. That's helpful.

MS. BUELL: Thank you.

THE COURT: Thank you. Ms. Lennox, do you want to add anything?

MS. LENNOX: I have nothing further to add to Ms. Buell's remarks.

THE COURT: Okay. Thank you. I'm not going to give you guys a ruling this minute, folks. There are a couple of things that I want to read and consider. In your proceedings before Judge Cohn in Detroit, did he indicate to you any

request vis-a-vis the level of formality of my ruling or did he care solely about the bottom line?

MR. MEISLER: Solely about the bottom line, Your Honor. Just asked us to advise him -- the parties to advise him of your Court's ruling.

THE COURT: Very well. Your understanding is the same, Ms. Lennox?

MS. LENNOX: Yes, Your Honor.

THE COURT: Okay. I may ask you guys to join me in an on-the-record conference call or I may write something. I haven't decided yet. But I'm not going to make you wait around this afternoon. Thank you very much. Very helpful. We're in recess. Bye-bye.

MS. BUELL: Thank you, Your Honor.

(Whereupon these proceedings were concluded at 3:34 p.m.)

C E R T I F I C A T I O N

I, Penina Wolicki, certify that the foregoing transcript is a true and accurate record of the proceedings.

Penina Wolicki

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