UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 09-50026-reg

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In the Matter of:

MOTORS LIQUIDATION COMPANY, et al.,

f/k/a General Motors Corporation, et al.,

Debtors.

- -x

U.S. Bankruptcy Court

One Bowling Green

New York, New York

July 28, 2011

12:03 PM

B E F O R E:

HON. ROBERT E. GERBER

U.S. BANKRUPTCY JUDGE

Telephonic Hearing re: Motion to File Proof of Claim After Claims Bar Date by Judd Wiesjahn and Annalisa Sand

Transcribed by: Hana Copperman

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P R O C E E D I N G S

THE COURT: Hello. This is Robert Gerber. We have an on the record call in Motors Liquidation. Who do I have on the phone?

MR. GEILIM: Yes. My name is Gilbert Geilim. I'm an attorney in California, and I am appearing for Mr. Martin Stanley.

THE COURT: I'm sorry. I couldn't hear your name, sir.

MR. GEILIM: Gilbert. Last name Geilim.

THE COURT: Your last name again, please?

MR. GEILIM: G-E-I-L-I-M.

THE COURT: Geilim?

MR. GEILIM: Right.

THE COURT: All right, Mr. Geilim.

MR. SMOLINSKY: Good afternoon, Your Honor. Joe Smolinsky from Weil, Gotshal & Manges for the debtors.

THE COURT: All right, Mr. Smolinsky. Anyone else?

MS. FERRANTE: Angela Ferrante from The Garden City Group.

THE COURT: All right. Thank you.

MS. BENFIELD: And this is Brianna Benfield, also from Weil, Gotshal & Manges.

THE COURT: Okay. Ladies and gentlemen, I found all three witnesses credible, and though the matter is close I'm

finding as a fact that Mr. Stanley did not get actual notice of the bar date in time to respond to it in a timely manner.

I further find as a fact, or as a mixed question of fact and law, that his motion to file the late claim was not unreasonably sluggish after he learned of the need to do so, and as a mixed question of fact and law I determine that Motors Liquidation's most legitimate concern and defense, that of opening the floodgates to the many other late claims, shouldn't be that big a concern, because the facts here are, as Mr. Stanley argues, a perfect storm reflecting a confluence of facts that are unlikely to be duplicated again in my judicial lifetime.

The starting point for my findings is my personally eyeballing Mr. Stanley and Mr. Lamb and gauging their demeanor. Their testimony was credible. I don't believe that either timely saw the bar date notice. Each spoke directly and without hesitation on the matters relating to receipt. Mr. Lamb seemed to be choosing his words very carefully on whether there had been other instances of late filing, though not on matters involving a bar date or statute of limitations, but this was not the issue, and I'm inclined to think Mr. Lamb did so to take pains to be truthful on a matter that might potentially be embarrassing but wasn't really the point.

While I've considered the possibility that one or more bar date packages came into their office and didn't get opened

or read I think the likelihood of that is diminished as a consequence of the small size of their office and the testimony we heard about reviewing the incoming mail together.

Then, of course, I must consider the ways by which the mail was addressed. Motors Liquidation points out, appropriately, that about forty mailings were addressed to some variance of 137 Bay Street, Unit #2, Santa Monica, California, and only three were returned as undeliverable. But we also know that three notices of the bar date addressed to 137 Bay Street, Unit #2 but with Wiesjahn, Rachel and Sand, Annalisa, Wiesjahn, Rachel and Wiesjahn, Judd, and Wiesjahn, Rachel appearing twice were returned as undeliverable. This suggests that sending it to 137 Bay Street, Unit #2 wasn't enough to necessarily ensure delivery to that address. We also know that three more mailings addressed identically were neither returned as undeliverable nor, according to the testimony of Mr. Stanley and Mr. Lamb, received.

That cuts two ways. While that could, of course, be argued as undercutting their credibility it also calls into question the consistency of the U.S. Postal Service in sending back mail that may not have been delivered. If three mailings addressed to Wiesjahn, Rachel and Sand, Annalisa, Wiesjahn, Rachel and Wiesjahn, Judd, and Wiesjahn, Rachel were undeliverable why weren't others identically addressed equally undeliverable? Those facts undercut the reliability that I

might otherwise have in drawing inferences when mail isn't returned.

The odds of a screwup were magnified by the transposition of the name Martin Stanley to Stanley Martin, followed by "Law Offices of", putting Mr. Stanley's name only as the third name in the list. The insertion into the mailing labels of the names of people not located at 137 Bay Street, Unit #2 without also saying "care of" and the fact that the mail was supposed to go into one of sixteen mailboxes all next to each other, as in an apartment building, as compared and contrasted, for instance, to dropping off mail at physically distinct buildings or even physically distinct suites. In that connection I assume that it's not uncommon for mailing labels to show last names first and to use expressions like "Law Office of" after a name and even, possibly, after a transposed name, even though I would think that best practices would call for reordering the names shown on address labels to correspond to more typical usage. And I'd be surprised in this day and age if computers are incapable of doing so. And I'd also assume that many, if not most, employees of the U.S. Post Office would read the entire label, figure out what happened and reason what the appropriate addressees should be and then get the mail delivered to the right address.

But the combination of all of these factors here together causes me to be uncomfortable with the presumption of

delivery, assuming that Motors Liquidation could otherwise rely on it, and when balanced against testimony that I find to be truthful that the mailings weren't received the evidence I heard from the Motors Liquidation side is insufficient to trump the testimony to the contrary.

In light of that I don't need to decide whether Motors Liquidation is entitled to the presumption of delivery upon mailing in the first place. I found Ms. Ferrante's testimony to be fully credible as well, and, to the extent it matters, I'll add that I found her to be very competent and knowledgeable as to her business and the employees she supervised. But with that said she did not have, by her own admission, knowledge of the specifics of over a million mailings, and she had to rely on statements by subordinates and entries in her computer system that were hearsay or that could strongly be argued to be such.

Best practices would suggest bringing in the person who actually did the mailing whenever testimony is required, laying a foundation for reliance on information in computer databases, using Federal Rules of Evidence 8036 and 902(11) to help do so, introducing more robust testimony as to patterns and practices and crafting affidavits of service when they use the words "caused to be mailed," to be drafted in a less ambiguous way with respect to whether the person who caused the mailing to be mailed actually was the one who dropped it off in

the mailbox or in the post office.

I also think that best practices would call for at least some review of the quality of the address data that's transmitted to claims agents or that the claims agents let go out the door, because I've seen, in this case and others, where cryptic abbreviations or a computer's presentation of information in the way they arrange it or truncate it materially increased the risks that mail won't properly arrive.

But there's a big difference, of course, between best practices and that which is required to meet minimum standards of persuasiveness. And here I don't need to make a finding as to whether mailing of the bar date notice was satisfactorily proven, as my problem isn't so much with respect to the fact of mailing as it is with my lack of confidence under the particular facts presented to me here that bar date notices that were, in fact, mailed actually found their way into the Law Offices of Martin Stanley mailbox. The presumption of delivery is still rebuttable in those rare cases like this one where denial coupled with extrinsic facts is so strong in rebutting the presumption.

To repeat, and for the avoidance of doubt, my concern arises because of my assumption, for the sake of analysis, that the mail did go out but my many doubts as to whether the mailing, once it went out, found its way to the recipient.

Finally, I agree with Old GM that floodgate concerns

are a very major concern in Chapter 11 cases and easily satisfy the prejudice requirement when estate representatives are opposing late-filed proofs of claim. See, for example, Judge Gonzalez's decision in In re Creditors Recovery Corp., 370 B.R. 90, 109 (Bankr. S.D.N.Y. 2007). I frequently noted this in denying leave to file late claims, though in oral decisions that haven't found their way into print or into electronic publication. But here the floodgate concerns aren't very strong as the facts here do, indeed, give rise to the "perfect storm". It will be difficult, if not impossible, for other claimants to put together a similar factual picture, or, indeed, anything close. Floodgate concerns just aren't a material factor here.

In my view the creditors' reasons for its delay and the prejudice to the debtor, the two factors I just discussed, are the most important of the Pioneer factors. The third factor, the time between learning of the bar date and the filing of the motion, which here is a few months, is, essentially, a nonfactor, as it's been satisfactorily explained and is not particularly long.

The last two Pioneer factors, based on assumptions I can and do make, are now insufficient to trump the conclusions that would result from the first two, though if the facts relevant to them were otherwise they could. There here will be no material delay in judicial proceedings, as the claims will

be going to ADR and they're not likely to have a material effect on the distributions to the other creditors, especially given the facts underlying the merits of the claim, which include one or more drunken drivers whose conduct may well be found to have had much more of an effect on the underlying accident than Old GM's manufacture of the vehicle. And if, as I expect, Mr. Stanley participates as he should in the ADR I'll have no reason to doubt the last factor, whether the creditor has acted in good faith. Of course, given how close this decision is, if either of the latter two assumptions upon which I've here ruled turns out not to be true Old GM has leave to file a motion for reconsideration of this determination.

Accordingly, after considering the evidence and the Pioneer factors, I find the requisite excusable neglect and will permit the late filing of the proofs of claim. Mr. Stanley and his clients well then go into the ADR procedures that were previously set up for other products liability claimants in this case.

If they do not participate, or if they do not participate in good faith that will call into question the premises upon which I issued this ruling and Old GM will be permitted to file a motion to reconsider.

You're to try to agree upon a form of order implementing this discernmination (sic) without prejudice to either side's right to appeal. If you cannot agree upon a

mutually satisfactory form of order that faithfully implements this ruling, any part of it, including the leave to reconsider it, either side may settle an order on no less than two business days notice by hand, fax or e-mail, or an extra two weeks if traditional U.S. mail is to be used.

We're adjourned.

(Whereupon these proceedings were concluded at 12:22 PM)

I N D E X

RULINGS

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

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

Hana Copperman

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Date: July 29, 2011