UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

Chapter 11

In re

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

Case No. 09-50026 (REG)

Debtors.

BENJAMIN PILLAR'S RESPONSE IN OPPOSITION TO THE MOTION BY GENERAL MOTORS LLC, PURSUANT TO RULES 7052 AND 9023 OF THE FEDERAL RULES OF BANKRUPTCY PROCEDURE, AND LOCAL BANKRUPTCY RULE 9023-1, FOR RELIEF FROM AND TO RECONSIDER THE COURT'S ORDER DATED JULY 29, 2015

NOW COMES the Plaintiff, BENJAMIN W. PILLARS, as Personal Representative of the Estate of KATHLEEN ANN PILLARS, deceased, by and through his attorneys, THE MASTROMARCO FIRM, and for his response in opposition to the motion filed by General Motors LLC relies upon the brief filed in support of this response and requests that the motion be denied.

Respectfully submitted,
THE MASTROMARCO FIRM

Dated: August 27, 2015

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BRIEF IN SUPPORT OF BENJAMIN PILLAR'S RESPONSE

Introduction

On Thursday, July 16, 2015, the Court issued its ruling from the bench concluding that General Motors LLC [hereinafter referred to as New GM] was bound by the judicial admissions contained within its answer to the amended complaint filed by the Estate of Kathleen Ann Pillars [hereinafter referred to as Pillars] along with the admissions contained within its notice of removal. (Corrected Hearing Transcript pgs. 24-29 – **Ex. 1**). Based upon the admissions, the Court concluded that the Pillars' lawsuit could proceed against New GM. (Corrected Hearing Transcript pgs. 24-29 – **Ex. 1**).

The very next day, i.e. Friday, July 17, 2015, New GM filed its motion to amend its answer and notice of removal before the Eastern District of Michigan. (E.D. Mich. Civil Docket Sheets – **Ex. 2**). The briefing schedule was expedited and Pillars' responded in opposition to the motion to amend arguing, in part, that New GM had been dilatory in seeking an amendment. (See pages 10 through 12 of the Pillars' Response to Motion to Amend – **Ex. 3**). On August 5, 2015, the Eastern District of Michigan issued an Order granting an amendment to the answer and the notice of removal with the following caveat:

> The Court takes no position on the effect – if any – of the amended answer on the bankruptcy court's original ruling concerning the judicial admissions.

(See page 7 to General Motors LLC's Exhibit A).

New GM now brings its motion for reconsideration arguing that the amended answer and the amended notice of removal constitutes new evidence warranting a different outcome:

> The Court should thus reconsider its previous ruling based on this new evidence, deny the relief requested in the Pillars' No Stay Pleading, and direct Pillars to dismiss the Pillars Lawsuit without prejudice as mandated by the Judgment.

(See page 7 to General Motors LLC's Motion, ECF Document No. 13360).

As set forth more fully in this response, New GM's motion lacks merit and should be denied. In the alternative to an immediate denial of the motion, Pillars request a hearing.

Discussion

The standard applicable to a motion for re-argument or reconsideration is identical to a motion to amend a judgment under FRCP 59(e) as recently reiterated by a District Court. *See In re Papadopoulos,* No. 12-13125 (JLG), 2015 WL 1216541, at *2 (Bankr. S.D.N.Y. Mar. 13, 2015) (**Ex. 4**) citing to *Lyell Theatre Corp. v. Loews Corp.,* 682 F.2d 37, 41 (2d Cir.1982). The District Court reiterated the applicable standard in its opinion:

> Under FRCP 59 (e), a court can revisit a prior decision based upon an intervening change in the controlling law, the availability of new evidence, to correct manifest errors of law or fact upon which the judgment is based, or to prevent manifest injustice. *Official Comm. Of Unsecured Creditors of Enron Corp. v. Martin (In re Enron Creditors Recovery Corp.)*, 378 B.R. 54, 56-57 (Bankr. S.D.N.Y. 2007) (citing *Cray v. Nationwide Mut. Ins. Co.*, 192 F.Supp.2d 37, 39 (W.D.N.Y. 2001)). "The standard for granting ... a motion [for reconsideration] is strict, and reconsideration will generally be denied unless the moving party can point to controlling decisions or data that the court overlooked–matters, in other words, that might reasonably be expected to alter the conclusion reached by the court." *Shrader v. CSX Transp.,* 70 F.3d 255, 256 (2d Cir.1995) ("*Shrader* ") (citing *Schonberger v. Serchuk,* 742 F.Supp. 108, 119 (S.D.N.Y.1990); *Adams v. United States,* 686 F.Supp. 417, 418 (S.D.N.Y.1988)). In that way, the rule insures "the finality of decisions and ... prevent[s] the practice of a losing party examining a decision and then plugging the gaps of a lost motion with additional matters." *Carolco Pictures, Inc. v. Sirota,* 700 F.Supp. 169, 170 (S.D.N.Y.1988); *see also Park South Tenants Corp. v. 200 Central Park Assocs., L.P.,* 754 F.Supp. 352, 354 (S.D.N.Y.1985) ("The standard for granting a motion for reargument is strict in order to dissuade repetitive arguments on issues that have already been considered fully by the court."). It also precludes repetitive arguments on issues that have already been considered by the court. *Ruiz v. Comm'r of Dep't of Transp.,* 687 F.Supp. 888, 890 (S.D.N.Y.), *aff'd,* 858 F.2d 898 (2d Cir.1988); *see also In re Taub,* 421 B.R. 713, 716 (Bankr.E.D.N.Y.1997) (A motion for reconsideration "is not a proper tool to repackage and relitigate arguments and issues already considered by the Court in deciding the original motion."). A motion for reconsideration is "limited to the record that was before the Court on the original motion." *Pereira v. Aetna Cas. & Surety Co. (In re Payroll Exp. Corp.),* 216 B.R. 713, 716 (S.D.N.Y.1997) (quoting *Wishner v. Cont'l Airlines,* 1997 WL 615401, at *1 (S.D.N.Y. Oct. 6, 1997))).

*In re Papadopoulo*s, No. 12-13125 (JLG), 2015 WL 1216541, at *2 (Bankr. S.D.N.Y. Mar. 13, 2015) (**Ex. 4**).

New GM argues in its motion that the amended answer and the amended notice of removal constitute new evidence which New GM argues warrants this Court's reconsideration of its earlier ruling:

> The Court should thus reconsider its previous ruling based on this new evidence, deny the relief requested in the Pillars' No Stay Pleading, and direct Pillars to dismiss the Pillars Lawsuit without prejudice as mandated by the Judgment.

(See page 7 to General Motors LLC's Motion, ECF Document No. 13360).

It is firmly established that new evidence must be newly discovered and not otherwise discoverable through due diligence prior to the original ruling:

> In order to establish entitlement to reconsideration of a decision in light of the availability of new evidence, Principal Defendants must show that: "(1) newly discovered evidence is of facts existing at the time of [the prior decision]; (2) the moving party is excusably ignorant of the facts despite using due diligence to learn about them; (3) newly discovered evidence is admissible and probably effective to change the result of the former ruling; and (4) the newly discovered evidence is not merely cumulative ... of evidence already offered." *Fidelity Partners, Inc. v. First Trust Co. of New York,* 58 F.Supp.2d 55, 59 (S.D.N.Y.1999) (citation omitted). A party seeking to alter or amend a judgment on the basis of newly discovered evidence bears an "onerous" burden. *United States v. Int'l Bhd. of Teamsters,* 247 F.3d 370, 392 (2d Cir.2001).

Banco Cent. Del Paraguay v. Paraguay Humanitarian Found., Inc., No. 01 CIV. 9649 (JFK), 2007 WL 2493684, at *2 (S.D.N.Y. Sept. 5, 2007) (**Ex. 5**), See also *Awolesi v. Shinseki*, No. 10-CV-6125 MAT, 2013 WL 1819239, at *1 (W.D.N.Y. Apr. 29, 2013) (**Ex. 6**), See also *Stewart Park & Reserve Coal. Inc. (SPARC) v. Slater,* 374 F. Supp. 2d 243, 253-54 (N.D.N.Y. 2005), See also *In re Rezulin Products Liab. Litig.*, 224 F.R.D. 346, 350 (S.D.N.Y. 2004), See also *Davidson v. Scully,* 172 F. Supp. 2d 458, 461 (S.D.N.Y. 2001), See also *Palmer v. Sena*, 474 F. Supp. 2d 353, 355 (D. Conn. 2007).

At least one District Court has gone so far as to suggest that the submission of new evidence is not proper under any circumstances on a motion for reconsideration *East Coast Res., LLC v. Town of Hempstead,* 707 F. Supp. 2d 401, 414 (E.D.N.Y. 2010). Regardless of whether

or not newly discovered evidence can be considered, New GM has failed to demonstrate that the amended answer and the amended notice of removal is newly discovered evidence.

New GM has the onerous burden of showing that the purported mistakes along with its subsequent request for an amended answer and the amended notice of removal are newly discovered evidence and that the newly discovered evidence could not have been discovered prior to the hearing by New GM through due diligence. See *Banco Cent. Del Paraguay v. Paraguay Humanitarian Found., Inc.*, No. 01 CIV. 9649 (JFK), 2007 WL 2493684, at *2 (S.D.N.Y. Sept. 5, 2007) (**Ex. 5**), See also *Awolesi v. Shinseki*, No. 10-CV-6125 MAT, 2013 WL 1819239, at *1 (W.D.N.Y. Apr. 29, 2013) (**Ex. 6**) See also *Davidson v. Scully,* 172 F. Supp. 2d 458, 464 (S.D.N.Y. 2001) (invoices were not newly discovered when a F.O.I.L. request was not made by the litigant until after the decision at issue). New GM has failed to do so.

As explained by a District Court, the rules at issue should be narrowly and strictly applied:

> These rules are "narrowly construed and strictly applied so as to avoid repetitive arguments on issues that have been considered fully by the court." *See Walsh,* 918 F.Supp. at 110. **Strict application of these rules also "prevent[s] the practice of a losing party examining a decision and then plugging the gaps of the lost motion with additional matters."** *Polar Int'l Brokerage Corp. v. Reeve,* 120 F.Supp.2d 267, 268–69 (S.D.N.Y.2000). The moving party may not use a motion for reconsideration to advance new facts, arguments, or theories that were available but not previously presented to the Court. *See Graham v. Sullivan,* No. 86 Civ. 163, 2002 WL 31175181, at *2 (S.D.N.Y. Sept. 23, 2002); *Leonard v. Lowe's Home Ctrs., Inc.,* No. 00 Civ. 9585, at *2 (S.D.N.Y. April 12, 2002). (Emphasis Added).

Secured Sys. Tech., Inc. v. Frank Lill & Son, Inc., No. 08-CV-6256, 2011 WL 1599638, at *1 (W.D.N.Y. Apr. 27, 2011) (**Ex. 7**).

There can be no dispute that New GM was fully aware of the judicial admissions contained within its answer and notice of removal in the months leading up to the hearing before

this Court on Thursday, July 16, 2015, and chose to do nothing to correct the purported mistakes as illustrated by the following timeline:

- **May 6, 2015** – Pillars' filed a motion for remand with the Eastern District of Michigan pointing out the admissions in the notice of removal along with the legal effect of said admissions on pages seven and eight of the motion. (**Ex. 8**);[1]

- **May 16, 2015** – Pillars' filed a motion to vacate a conditional transfer order before the Multi-District Judicial Panel pointing out New GM's admissions in the notice of removal along with the legal effect of said admissions on pages five and six of Pillars' motion. (**Ex. 9**);[2]

- **May 28, 2015** – Pillars filed a no stay pleading in this Court again pointing out New GM's admissions in the notice of removal and in the answer along with the legal effect of said admissions on pages four and five of Pillars' bankruptcy submission. (**Ex. 11**);

- **June 4, 2015** - Pillars filed a reply to his motion to vacate before the Multi-District Judicial Panel again pointing out New GM's admissions in the notice of removal and in the answer along with the legal effect of said admissions on page two of Pillars' reply. (**Ex. 12**);

- **June 9, 2015** – Pillars filed a response to New GM's motion for stay in the Eastern District of Michigan again pointing out the admissions in the notice of removal and in the answer along with the legal effect of said admissions on page four of Pillars' response. (**Ex. 13**);

- **June 23, 2015** - Pillars filed an objection pleading in this Court again pointing out New GM's admissions in the notice of removal and in the answer along with the legal effect of said admissions on page five of Pillars' bankruptcy submission. (**Ex. 14**);

- **June 23, 2015** – Pillars also filed a no dismissal pleading in this Court again pointing out New GM's admissions in the notice of removal and in the answer along with the legal effect of said admissions on page five of Pillars' bankruptcy submission. (**Ex. 15**).

Indeed, counsel for New GM admitted at the hearing before this Court that New GM was aware of the purported mistakes within its answer and notice of removal leading up to the hearing:

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[1] (E.D. Mich. Civil Docket Sheets – **Ex. 2**).

[2] The multidistrict litigation docket sheets are attached as **Ex. 10**.

> MR. STEINBERG: I think, well I think Your Honor on page 7, footnote 5, New GM may have inadvertently referred to the original language contained in section 2(b)(3)(b)(9) of the sale agreement –
>
> THE COURT: I see. All right.
>
> MR. STEINBERG: -- and certain pleadings filed in the underlying lawsuit, the language contained in the first amendment with respect clearly governs this matter. Perhaps we didn't give it the attention that Your Honor wanted us to give the attention because we didn't think it mattered that much because at the end of the day –

(Corrected Hearing Transcript pgs. 18-19 – **Ex. 1**).

It is submitted that New GM's motion is nothing more than New GM examining this Court's decision and then attempting to plug the gaps contained within its earlier submissions to this Court with additional matters, i.e. an amended answer and an amended notice of removal. As evidenced by the civil docket for the Eastern District of Michigan, New GM filed their motion to amend the answer and the notice of removal within twenty-four (24) hours of this Court's decision. (E.D. Mich. Civil Docket Sheets – **Ex. 2**).

It is also submitted that the ease and speed in which New GM filed its motion to amend the answer and notice of removal after this Court's ruling further illustrates that there is no reason why New GM could not have sought the purported new evidence well in advance of this Court's decision on July 16, 2015. Instead of seeking an amendment prior to the hearing before this Court, New GM waited for this Court to issue its ruling. As noted by the Court, New GM had ample opportunity to address the issue surrounding its mistake prior to the hearing:

> MR. STEINBERG: Your Honor, will we have, can we have the opportunity to make a submission, and I don't know whether this is true or not, I would need to verify that at the time to answer or amend, we had a right to amend the answer, that this is not a judicial admission to give further briefing.
>
> THE COURT: There was plenty of time to focus on these issues before today. That's my ruling.
>
> MR. STEINBERG: All right.

> THE COURT: Mr. Steinberg, I have a zillion things on my watch and I have to rely on lawyers dealing with issues in a timely way. We can't have do-overs after I've ruled. I had the same issue with a motion for reargument now which is in substance a do-over after I've ruled, I'm not going to invite even more stuff of that character.

(Corrected Hearing Transcript pgs. 28-29 – **Ex. 1**).

The Court should note that litigants have unsuccessfully sought reconsideration attaching "new evidence" claiming that parties were acting under a mistaken belief and that the wrong evidence was inadvertently considered by the court as illustrated by the following excerpt:

> Plaintiffs now seek to have the court examine additional policy evidence which they claim was inadvertently omitted from the papers they submitted in response to the original dismissal motion. They claim that incomplete copies of two of the excess liability policies in question were inadvertently attached as exhibits to the complaint, leading to a factual misunderstanding of the limits of those policies, which they believe resulted in an erroneous decision on the dismissal motion. Plaintiffs contend that the omitted portions of these policies set forth the underlying schedule of insurance showing that the policies provide coverage to St. Joe Minerals after the company has paid $25,000 of self-insured retention rather than after higher limits of insurance coverage have been exhausted.
>
> Putting the substantive legal argument aside, the court must examine whether this can truly be considered "new evidence." The parties and the court agree that this additional information does not meet the requirements for "new evidence" as just outlined. However, plaintiffs insist that the court must consider this information now because they believe their omission resulted in a mistaken finding of fact which in turn led to an erroneous decision to dismiss this action.

Certain Underwriters at Lloyd's, London v. St. Joe Minerals Corp., 889 F. Supp. 65, 67 (N.D.N.Y. 1995) aff'd, 90 F.3d 671 (2d Cir. 1996).

It is submitted that the facts and circumstances before the District Court in *Certain Underwriters at Lloyd's, London v. St. Joe Minerals Corp.*, was far less egregious than the facts and circumstances which exist in the present case. Nevertheless, reconsideration was denied in that case. New GM was fully aware of the purported mistakes and did nothing to address the mistakes before the hearing with this Court. See also *Davidson v. Scully,* 172 F. Supp. 2d 458,

464 (S.D.N.Y. 2001) (invoices were not newly discovered when an F.O.I.L. request was not made by the pro se litigant until after the decision at issue).

Again, the sole basis given by the New GM for the relief sought in its motion is the purported existence of new evidence; however, New GM has failed to demonstrate that the evidence is newly discoverable and that it was not otherwise discoverable prior to the original hearing As set forth above, New GM's motion should be denied with regards to its allegation regarding purported new evidence.

New GM does not suggest in its motion that there has been a change in the controlling law. Accordingly, the analysis regarding a change in controlling law is irrelevant, since there is no allegation of a change in controlling law. There has been no change in the controlling law.

New GM's motion also does not argue the existence of manifest errors. See *In re Parikh*, 397 B.R. 518, 524 (Bankr. E.D.N.Y. 2008). Accordingly, the analysis regarding manifest errors is irrelevant, since there is no allegation of manifest errors. There have been no manifest errors made by this Court with regards to the judicial admissions.

Finally, New GM does not argue in its motion that this Court's decision was dead wrong and has not suggested the existence of extraordinary circumstances. As noted by a District Court, a manifest injustice requires a showing that this Court's earlier decision was dead wrong along with extraordinary circumstances:

> **Courts ordinarily have not defined precisely what constitutes clearly erroneous or manifest injustice for reconsideration purposes. At least one court has held though that reconsideration is not warranted unless the prior decision is "dead wrong."** *Parts & Electric Motors, Inc. v. Sterling Electric, Inc.,* 866 F.2d 228, 233 (7th Cir.1988), *cert. denied,* 493 U.S. 847, 110 S.Ct. 141, 107 L.Ed.2d 100 (1989). Finally, regardless of what the basis for reconsideration is, while acknowledging a court's power to revisit its own decision, the Supreme Court has cautioned that "as a rule courts should be loathe to do so in the absence of *extraordinary circumstances* ...." *Christianson v. Colt Industries Operating Corp.,* 486 U.S. 800, 817, 108 S.Ct. 2166, 2178, 100 L.Ed.2d 811 (1988) (emphasis added).

Niagara Mohawk Power Corp. v. Stone & Webster Eng'g Corp., No. 88-CV-819, 1992 WL 121726, at *20 (N.D.N.Y. May 23, 1992) (**Ex. 16**), See also *In re Parikh*, 397 B.R. 518, 524 (Bankr. E.D.N.Y. 2008).

Accordingly, the analysis regarding manifest injustice is irrelevant, since there is no allegation by New GM that this Court's decision was dead wrong and there has been no allegation by New GM of extraordinary circumstances.

Again, New GM limits the scope of its argument to the question of whether new evidence exists. (See page 7 to General Motors LLC's Motion, ECF Document No. 13360). As set forth more fully in this response, the purported mistakes which New GM claims resulted in an amendment to the answer to the complaint along with the amended notice of removal were known to New GM months before this Court's hearing and thus are not newly discovered evidence. Furthermore, an amendment to the answer and notice of removal could have been sought well in advance of the hearing further demonstrating that New GM did not act with due diligence. See *Banco Cent. Del Paraguay v. Paraguay Humanitarian Found., Inc.*, No. 01 CIV. 9649 (JFK), 2007 WL 2493684, at *2 (S.D.N.Y. Sept. 5, 2007) (**Ex. 5**), See also *Awolesi v. Shinseki*, No. 10-CV-6125 MAT, 2013 WL 1819239, at *1 (W.D.N.Y. Apr. 29, 2013) (**Ex. 6**).

Conclusion

As such the Estate of Kathleen Ann Pillars respectfully requests that the Court deny New GM's motion.

Respectfully submitted,

Dated: August 27, 2015

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UNITED STATES BANKRUPTCY COURT
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In re

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INDEX OF EXHIBITS
BENJAMIN PILLAR'S RESPONSE IN OPPOSITION TO THE MOTION BY GENERAL MOTORS, LLC, PURSUANT OT RULES 7052 AND 9023 OF THE FEDERAL RULES OF BANKRUPTCY PROCEDURE, AND LOCAL BANKRUPTCY RULE 9023-1, FOR RELIEF FROM AND TO RECONSIDER THE COURT'S ORDER DATED JULY 29, 2015

EXHIBIT 1	**JULY 16, 2015 CORRECTED TRANSCRIPT**
EXHIBIT 2	**CIVIL DOCKET SHEETS**
EXHIBIT 3	**PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION FOR LEAVE**
EXHIBIT 4	**ZEMON V. PAPADOPOULOS**
EXHIBIT 5	**BANCO CENTRAL DEL PARAGUAY V. PARAGUAY HUMMANITARIAN FOUNDATION**
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EXHIBIT 8	**PLAINTFF'S MOTION TO REMAND TO THE BAY COUNTY CIRCUIT COURT**
EXHIBIT 9	**BRIEF IN SUPPORT OF PLAINTIFF'S MOTION TO VACATE CONDITIONAL TRANSFER ORDER – 38**
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BEFORE THE UNITED STATES JUDICIAL PANEL
ON MULTIDISTRICT LITIGATION

IN RE: GENERAL MOTORS LLC IGNITION SWITCH LITIGATION

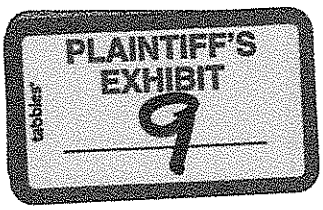
MDL NO. 2543

BRIEF IN SUPPORT OF PLAINTIFF'S MOTION TO VACATE CONDITIONAL TRANSFER ORDER-38

INTRODUCTION

Plaintiff's complaint surrounds an automobile accident which occurred on November 23, 2005. On that day, the decedent, Kathleen Ann Pillars, was driving her 2004 Pontiac Grand Am, to a blood drive. The decedent lost control of her vehicle when the defective ignition switch in her vehicle unexpectedly went to the off position causing the automobile accident. The decedent sustained severe injuries as a result of the accident rendering her incapacitated. The decedent remained incapacitated and died nearly seven (7) years later on March 12, 2012.

During decedent's on-going incapacitation, General Motors Corporation filed for bankruptcy on June 1, 2009, and, without affording the decedent with her due process right of notice, a month later entered into a bankruptcy approved Amended and Restated Master Sale and Purchase Agreement with General Motors LLC with a closing date of July 10, 2009. Subsequently, General Motors LLC disclosed to the public that the car manufacturer had been aware of the fact that its vehicles had a defective ignition system and had concealed that fact from the public and government officials.



The Plaintiff is the decedent's widower and the duly appointed personal representative of her estate having received his letter of authority on November 14, 2014. The Plaintiff filed his wrongful death lawsuit against General Motors LLC on March 23, 2015, the Circuit Court for the County of Bay, State of Michigan.

General Motors LLC removed the case to the Eastern District of Michigan citing to 28 U.S.C.A. § 1452 as the sole statutory basis for removal. The Schedule of Actions is attached as **Exhibit 1**. As explained more fully in this brief, the statute cited by General Motors LLC does not apply to the facts and circumstances which exist in the present case. Simultaneous with the filing of this motion, the Plaintiff is also filing a motion for remand with the Eastern District of Michigan.

In the alternative, the basis for removal was obtained without affording Plaintiff her due process right of notice as explained more fully in this brief. In the alternative, the transfer of this case will not further convenience of the parties and the witnesses, as required by 28 USC 1407(a).

For the reasons set forth in this brief, the Plaintiff requests that the Court reverse the conditional transfer order 38.

DISCUSSION

I. FEDERAL COURTS LACK JURISDICTION OVER PLAINTIFF'S PENDING LAWSUIT.

This Court's issuance of Conditional Transfer Order-38 necessarily followed the improper removal of Plaintiff's lawsuit against General Motors LLC ("New GM") by its counsel from state court to the Eastern District of Michigan. The propriety of the transfer

hinges, in part, upon whether or not the removal of the lawsuit was valid. If the removal was improper, the transfer of this case is likewise improper.

The Court should note that, contemporaneously with the filing of this motion, the Plaintiff is also filing a motion for remand with the Eastern District of Michigan referencing, in part, the arguments contained within this response. It is respectfully submitted that it is the transferor court, i.e. the Eastern District of Michigan, rather than this Court that is in the best position to adjudicate the issue of remand. The Honorable R. Wilson, Jr., in the context of a dispute over whether or not diversity jurisdiction existed, has noted that the issue of remand is better addressed by the transferor court. In re Prempro Products Liability Litigation, 417 F.Supp.2d 1058, 1061, n. 12 (E.D.Ark.,2006), see also Southern v. Pfizer, Inc., 471 F.Supp.2d 1207, 1212, n. 2 (N.D. Ala. 2006).

Without waiving Plaintiff's objections to this Court deciding the issue of remand, New GM, in the present case, relies upon 28 U.S.C.A. § 1452 as the sole statutory basis for removal. That statute states in relevant part:

> (a) A party may remove any claim or cause of action in a civil action other than a proceeding before the United States Tax Court or a civil action by a governmental unit to enforce such governmental unit's police or regulatory power, to the district court for the district where such civil action is pending, if such district court has jurisdiction of such claim or cause of action under section 1334 of this title.

28 U.S.C.A. § 1452.

It is well-settled that federal courts are courts of limited jurisdiction, and are, "empowered to hear only cases within the judicial power of the United States as defined by Article III of the Constitution." University of South Alabama v. American Tobacco

Co., 68 F.3d 405, 409 (11th Cir. 1999) (quoting Taylor v. Appleton, 30 F.3d 1365, 1367 (11th Cir. 1994)). As the removing party, New GM has the burden to prove the existence of federal subject matter jurisdiction. Pacheco de Perez v. AT&T Co., 139 F.3d 1368, 1373 (11th Cir. 1998); Her Majesty the Queen in Right of the Province of Ontario v. City of Detroit, 874 F.2d 332, 339 (6th Cir. 1989).

Because the effect of removal is to deprive the state court of an action otherwise properly before it, removal raises significant federalism concerns which mandate strict construction of the removal statute in favor of state court jurisdiction and against removal. See Merrell Dow Pharmaceutical, Inc. v. Thompson, 478 U.S. 804, 809 (1986); Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100 (1941); University of South Alabama, 168 F.3d at 411.

Courts have correctly concluded that issues of remand should be decided before anything else as illustrated by the following decision excerpt from the Eleventh Circuit:

> once a federal court determines that it is without subject matter jurisdiction, the court is powerless to continue. As the Supreme Court long ago held in Ex parte McCardle, 74 U.S. (7 Wall.) 506, 19 L.Ed 264 (1868), "[w]ithout jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." Id. at 514; see also Wernick v. Mathews, 524 F.2d 543, 545 (5th Cir. 1975) "[W]e are not free to disregard the jurisdictional issue, for without jurisdiction we are powerless to consider the merits.").

University of South Alabama v. American Tobacco Co., 68 F.3d 405, 410 (11th Cir. 1999). All doubts about jurisdiction are to be resolved in favor of remand to state court. University of South Alabama, 168 F.3d at 411.

As acknowledged by New GM in its notice of removal, the Plaintiff brought the action in state court seeking a recovery under a number of state theories of recovery including (1) products liability; (2) negligence; (3) Michigan Consumer Protection Act; (4) misrepresentation; (5) breach of contract, (6) promissory estoppel; (7) fraud; (8) fraudulent concealment; and (9) gross negligence. A copy of New GM's Notice of Removal is attached as **Exhibit 2**.

Indeed, Plaintiff's complaint against New GM seeks money damages following the wrongful death of Kathleen Ann Pillars on March 24, 2012. A copy of the Complaint is attached as **Exhibit 3**.[1]

The Plaintiff further alleges that the March 24, 2012, death was the result of a defective motor vehicle. (**Exhibit 3**). This is not disputed in New GM's notice of removal. The Court should note that New GM admitted in its notice of removal that it is responsible for any occurrences that happen on or after the July 10, 2009, closing date:

> GM LLC admits it ultimately assumed a narrow band of certain liabilities, including the following as provided in Section 2.3(a)(ix) of the Sale Order and/or the Amended and Restated Master Sale and Purchase Agreement:
>
> > all Liabilities to third parties for death, personal injury, or other injury to Persons or damage to property caused by motor vehicles designed for operation on public roadways or by the component parts of such motor vehicles and, in each case, manufactured, sold or delivered by Sellers (collectively, "Product Liabilities"), which arise directly out of accidents, incidents ***or other distinct and discreet occurrences that***

[1] New GM attached a copy of the complaint to its notice of removal as Exhibit D. The Court should note that the Plaintiff had already amended his complaint and served said amendment on New GM at the time of removal. For the purpose of this motion, reference to the amended complaint is not necessary since the changes/additions made in the amendment are not material to the limited issue before this Court.

> ***happen on or after the Closing Date [July 10, 2009]*** and arise from such motor vehicles' operation or performance. (Emphasis Added by Plaintiff).

(See page 4, footnote 1 of Notice of Removal - **Exhibit 2**).

New GM is bound by the clear and unequivocal admissions of its attorneys in its submissions to this Court as well as the United States District Court for the Eastern District of Michigan. Barnes v. Owens-Corning Fiberglass Corp., 201 F.3d 815, 829 (6th Cir. 2000), MacDonald v. Gen. Motors Corp., 110 F.3d 337, 340 (6th Cir. 1997).

Based upon New GM's admissions, the relevant inquiry is what constitutes an "occurrence". If an occurrence has taken place after the closing date of July 10, 2009, liability falls squarely upon the New GM rather than the bankrupt entity based upon the language relied upon New GM in its notice of removal so long as the occurrence arose from the operation or performance of a motor vehicle.

It is firmly established that in the absence of a specific definition to the contrary, courts are to give the words their ordinary meaning. The definition of "occurrence" is, "the action, fact, or instance of occurring ... 'something that takes place; an event or incident.'" See the American Heritage Dictionary of the English Language 1219 (5th ed. 2011). A copy of the American Heritage Dictionary definition is attached as **Exhibit 4**. Likewise, the Merriam–Webster's Collegiate Dictionary 858 (11th ed. 2003) defines "occurrence" as, "something that occurs... the action or instance of occurring". A copy of the Merriam–Webster's Dictionary definition is attached as **Exhibit 5**.

In the present case, the Plaintiff brought wrongful death causes of action on behalf of the estate. (See Complaint - **Exhibit 3**). The death of the decedent on March 24, 2012,

occurred almost three (3) years after the bankruptcy closing date, is certainly a distinct and discreet occurrence as the term "occurrence" is defined by two (2) major dictionaries.

Furthermore, the death of the Plaintiff was the result of the injuries she sustained from her operation of a General Motors vehicle. (**Exhibit 3**).

Significantly, federal subject matter jurisdiction is also lacking if an effect on the bankruptcy estate cannot be shown:

> Since the proceeding before this court does not involve the bankruptcy petition itself we find that it is not a "core" proceeding. Therefore, in order to determine whether we may exercise jurisdiction at all, we must determine whether it is at least "related to" Daher's bankruptcy case. And we find that it is at least "related to" because resolution of Daher's liability in this matter "could *conceivably* have [an] effect on the estate being administered in bankruptcy." Wood, 825 F.2d at 93.

Shamieh v. HCB Financial Corp., 2014 WL 5365452, 3 (W.D.La.,2014). A copy of the Shamieh Opinion is attached as **Exhibit 6**.

Pursuant to the Amended and Restated Master Sale and Purchase Agreement, relied upon by New GM in its notice of removal, the March 24, 2012, occurrence is a liability of the New GM and not a liability of the bankrupt entity. As such, Plaintiff's state court complaint does not involve the bankruptcy petition and, as already explained in the above-mentioned discussion, it will not have any effect on the bankruptcy estate being administered because Plaintiff's claims pertain to the New GM and not the bankrupt entity.[2]

[2] Even if it was determined that Plaintiff's lawsuit might conceivably have an effect on the bankruptcy estate, both the abstention provisions of 28 USC § 1334(c) and the equitable remand provision of § 1452(b) grants courts wide discretion in the determination whether to hear a case or remand it to the court from which it came. See

As such and as set forth more fully in the above-mentioned paragraphs, the Plaintiff respectfully requests the following relief. The Plaintiff requests that this Court allow the Eastern District of Michigan to decide the issue of remand. If remand is granted the issues before this Court becomes moot. In the alternative, the Plaintiff requests that this Court decide the issue of remand and to vacate the CTO-38 upon a showing of lack of subject matter jurisdiction.

II. IN THE ALTERNATIVE, THE PURPORTED REMOVAL AUTHORITY RELIED UPON BY NEW GM WAS IMPROPERLY OBTAINED AT THE EXPENSE OF PLAINTIFF'S DUE PROCESS RIGHTS AND THUS IS VOID.

As stated in the preceding discussion, New GM, in its notice of removal, relied upon 28 U.S.C.A. § 1452 as the sole statutory basis for removal. In doing so, New GM relies upon the Amended and Restated Master Sale and Purchase Agreement. (See page 4, footnote 1 of Notice of Removal - **Exhibit 2**).

It is respectfully submitted that the authority relied upon by New GM for its basis of removal from the state court proceeding was improperly obtained at the expense of Plaintiff's (along with the decedent's) due process rights. Again, the decedent was incapacitated from November 23, 2005, to her death on March 24, 2012, a period of almost seven (7) years. As a result, the decedent was unable to advocate her position during that period of time due to her incapacitation.

Shamieh v. HCB Financial Corp., 2014 WL 5365452, 3 (W.D.La.,2014) (**Exhibit 6**). The Plaintiff submits that the circumstances which exist in the present case support both abstention and equitable remand even if New GM was ultimately able to demonstrate an effect on the bankruptcy estate.

The lack of notice provided to the decedent or her family is significant. When a bankruptcy debtor seeks relief against third parties, due process requires notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections as explained by the Supreme Court:

> **An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections**. Milliken v. Meyer, 311 U.S. 457, 61 S.Ct. 339, 85 L.Ed. 278, 132 A.L.R. 1357; Grannis v. Ordean, 234 U.S. 385, 34 S.Ct. 779, 58 L.Ed. 1363; Priest v. Board of Trustees of Town of Las Vegas, 232 U.S. 604, 34 S.Ct. 443, 58 L.Ed. 751; Roller v. Holly, 176 U.S. 398, 20 S.Ct. 410, 44 L.Ed. 520. The notice must be of such nature as reasonably to convey the required information, Grannis v. Ordean, supra, and it must afford a reasonable time for those interested to make their appearance, Roller v. Holly, supra, and cf. Goodrich v. Ferris, 214 U.S. 71, 29 S.Ct. 580, 53 L.Ed. 914. But if with due regard for the practicalities and peculiarities of the case these conditions are reasonably met the constitutional requirements are satisfied. 'The criterion is not the possibility of conceivable injury, but the just and reasonable character of the requirements, having reference to the subject with which the statute deals.' American Land Co. v. Zeiss, 219 U.S. 47, 67, 31 S.Ct. 200, 207, 55 L.Ed. 82, and see Blinn v. Nelson, 222 U.S. 1, 7, 32 S.Ct. 1, 2, 56 L.Ed. 65, Ann.Cas.1913B, 555.

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314-315, 70 S.Ct. 652, 657 (1950).

This fundamental principle has been repeated in subsequent decisions including the following from the Bankruptcy Court for the District of New Jersey:

> Further, as held by the United States Supreme Court in Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865, 873 (1950), "an elementary and fundamental requirement of due process in any proceeding which is accorded finality is notice reasonably

> calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."

In re Martini, 2006 WL 4452974, 7 (Bkrtcy.D.N.J.,2006).

The method of notice necessary to satisfy due process depends on whether a creditor is "known" or "unknown" at the time the notice is to be given. While unknown creditors are merely entitled to constructive publication notice of the proceedings, known creditors must receive actual notice. See Mennonite Bd. of Missions v. Adams, 462 U.S. 791, 800 (1983). This is true regardless of how widely-publicized the bankruptcy case is or whether the known creditor is actually aware of the bankruptcy proceedings. See City of New York v. New York, New Haven & Hartford R.R. Co., 344 U.S. 293, 297 (1953) ("[E]ven creditors who have knowledge of a reorganization have a right to assume that the statutory 'reasonable notice' will be given them before their claims are forever barred."); Arch Wireless, Inc. v. Nationwide Paging, Inc. (In re Arch Wireless, Inc.), 534 F.3d 76, 83 (1st Cir. 2008) (same).

Significantly, the bankruptcy court has already concluded that the circumstances surrounding the Sale Order regarding the Amended and Restated Master Sale and Purchase Agreement violated the due process rights of the various owners of vehicles with defective ignition systems. In re Motors Liquidation Company, 2015 WL 1727285 (Bkrtcy.S.D.N.Y.2015). A copy of the Bankruptcy Opinion is attached as **Exhibit 7**.

Nevertheless, the bankruptcy court has improperly denied relief to the car owners speculating that the deprivation of the various car owners' due process rights was harmless, since the bankruptcy concluded that any opposition to the sale order would not

have changed the outcome. In re Motors Liquidation Company, 2015 WL 1727285 (Bkrtcy.S.D.N.Y.2015)(**Exhibit 7**). The bankruptcy court's conclusion is inconsistent with Supreme Court precedent.

The Court should note that the Supreme Court has expressly rejected the notion that a court should hypothesize an outcome, detrimental to the party that has been deprived of due process, as a substitute for the actual opportunity to defend that due process affords every party against whom a claim is stated:

> Instead, the Federal Circuit reasoned that nothing much turned on whether the party opposing Adams' claim for costs and fees was OCP or Nelson. "[N]o basis has been advanced," the panel majority concluded, "to believe anything different or additional would have been done to defend against the allegation of inequitable conduct had Nelson individually already been added as a party or had he been a party from the outset." 175 F.3d, at 1351. We neither dispute nor endorse the substance of this speculation. **We say instead that judicial predictions about the outcome of hypothesized litigation cannot substitute for the actual opportunity to defend that due process affords every party against whom a claim is stated. As Judge Newman wrote in dissent: "The law, at its most fundamental, does not render judgment simply because a person might have been found liable had he been charged."** Id., at 1354. (Emphasis Added).

Nelson v. Adams USA, Inc., 529 U.S. 460, 471, 120 S.Ct. 1579, 1587 (2000).

Even if the bankruptcy court's unconstitutional actual prejudice standard had any merit, the Plaintiff (along with the decedent) in the present case has been prejudiced by the lack of notice.

Furthermore, the bankruptcy court's order leaves the Plaintiff without a remedy for the wrongs resulting from decedent's operation of a General Motors vehicle. The deprivation of the due process rights is unjust and unconstitutional. (**Exhibit 7**).

As set forth more fully in the complaint, the decedent was incapacitated from the date of her motor vehicle accident on November 23, 2005, to her untimely death on March 24, 2012. (**Exhibit 3**). Recognizing the obvious fact that an incapacitated person lacks the ability to advocate that person's rights, Michigan law acknowledges that any deadline to act is tolled while the incapacitation exists. See Michigan Compiled Laws Annotated (MCLA) 600.5851(1)&(2). A copy of MCL§ 600.5851 is attached as **Exhibit 8**. Without providing notice to the decedent, the bankruptcy court has affectively deprived the decedent and her family (including the Plaintiff) of the tolling provisions provided by the Michigan legislature which is a statutory right which applies to claims arising under Michigan law.

Indeed, the incapacity of the decedent is a significant factor, since the only person with knowledge of the defective nature of the ignition switch when the ignition system unexpectedly shut down causing the accident (other than the bankrupt GM and later the New GM) along with the impact said defect had on the accident in question was the decedent and she was incapacitated at the time of the July 10, 2009, bankruptcy closing date. Her family did not have knowledge of the defect as evidenced by New GM's admissions that the defect was concealed from the public and governmental officials, and decedent's family was not in the car with her at the time of the accident.

As such and as set forth more fully in the above-mentioned paragraphs, the Plaintiff respectfully requests the following relief. The Plaintiff requests that this Court allow the Eastern District of Michigan to decide the issue of remand. If remand is granted the issues before this Court becomes moot. In the alternative, the Plaintiff requests that

this Court decide the issue of remand and to vacate the CTO-38 upon a showing of lack of subject matter jurisdiction as a result of the due process violations.

III. IN THE ALTERNATIVE, TRANSFER OF THIS CASE WILL NOT MAKE LITIGATION MORE CONVENIENT FOR THE PARTIES AND THE WITNESSES AND IT WILL NOT ADVANCE THE JUST AND EFFICIENT CONDUCT OF THIS CASE.

At a minimum, the transfer of this case will not further convenience of the parties and the witnesses, as required by 28 USC 1407(a). Assuming this Court was to find the existence of jurisdiction along with the existence of due process in obtaining jurisdiction, transfer is appropriate, "only when significant economy and efficiency in judicial administration may be obtained." In re Ivy, 901 F.2d 7 (2d. Cir. 1990).

Transfer is not appropriate because issues common to the MDL do not predominate over individual issues of fact. General Motor's fraudulent concealment and Plaintiff's additional claims are actionable under Michigan state law, and should be litigated in Michigan, with Michigan witnesses. Moreover, given the issuance of the Valukas Report[3], common issues of basic liability against General Motors are no longer contested, and transfer would be of no help.

It is also submitted that a transfer of the case will not further the convenience of the Plaintiff and the Michigan witnesses.

As an illustrative example, witnesses to the accident include at least three (3) Michigan State Police officials i.e., Trooper Jason Overstreet, Trooper Greg Hubers and

[3] Mr. Valukas is a former United States prosecutor. General Motors commissioned Mr. Valukas to conduct a thorough review of the facts behind the key ignition system defect and recall. A copy of the report is available at: http://www.detroitnews.com/article/20140605/SPECIAL01/140605001

Sergeant Timothy Robbins along with at least one Arenac County Deputy Sheriff i.e., Deputy Chris Jaime. Other identified witnesses to the accident include Steven Danajkowski, Terry Aidif, Gerald Anschuetz and Ruby Anschuetz. A copy of a redacted police report is attached as **Exhibit 9**.

In addition, the decedent was hospitalized and incapacitated for almost seven (7) years during which the decedent was treated by numerous healthcare providers including, but not limited to, Drs. George Shell, Richard Levy, Sunil S. Kini, Thomas Veverka, Jamal Akbar, and Dr. Christian VanDenberg, to name a few of the physicians. In the years that followed the accident, the decedent was treated at Saint Mary's of Standish, Saint Mary's of Michigan (Saginaw), Bay Medical Care Facility and at Spectrum Health Continuing Care Center. All of these facilities are in Michigan.

As illustrated by the above-mentioned witnesses and health care providers, a number of depositions will need to be taken and a transfer to a court in New York will not advance the just and efficient conduct of this case, since the accident and Plaintiff's subsequent treatment all took place in Michigan.

Furthermore, the vehicle at issue was marketed in Michigan. The decedent resided in Michigan, was in the accident in Michigan, was incapacitated in Michigan, and died in Michigan. The personal representative also resides in Michigan.

Furthermore, all of the claims at issue resolve the application of Michigan law to the facts and circumstances which exist in the present case. It would be more efficient for the dispositive issues of Michigan state law to be decided or adjudicated by a Michigan court. Any benefits of coordination of pretrial proceedings can be realized by less drastic

means than transfer of this action and consolidation with a conglomeration of scores of other actions under federal statutes and various laws of many states.

As such and as set forth more fully in the above-mentioned paragraphs, the Plaintiff respectfully requests the following relief. The Plaintiff requests that this Court allow the Eastern District of Michigan to decide the issue of remand. If remand is granted the issues before this Court becomes moot. In the alternative the Plaintiff respectfully requests that this Court first decide the issue of remand and order that Plaintiff's cause of action be remanded to state court.

In the alternative to the above-mentioned relief, the Plaintiff further requests that this Court vacate the CTO-38 upon a showing that the transfer of Plaintiff's lawsuit will not satisfy requirements set forth in 28 USC 1407(a).

CONCLUSION

For the reasons stated herein, this case should not be transferred to MDL 2543, and the Plaintiff respectfully asks this panel to vacate CTO-38 as it pertains to the Plaintiff.[4]

[4] A motion for remand is being filed with the United States District Court for the Eastern District of Michigan. A copy of an Affidavit from Attorney Russell C. Babcock is attached as **Exhibit 10**. A copy of the docket sheets for the Eastern District of Michigan is attached as **Exhibit 11**.

Respectfully submitted,

THE MASTROMARCO FIRM

Dated: May 6, 2015

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CTO_OPPOSED

United States Judicial Panel on Multidistrict Litigation
CIVIL DOCKET FOR CASE #: MIE/1:15-cv-11360

Pillars v. General Motors LLC
Assigned to: U.S. District Judge Thomas L. Ludington
Lead case: MDL No. 2543 (Transferred)
Member case: (View Member Case)

Date Filed: 04/14/2015
Jurisdiction: Diversity

Plaintiff

Benjamin W. Pillars

represented by **Russell C. Babcock**
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V.

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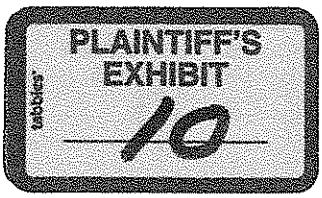

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Date Filed	#	Docket Text
04/17/2015	1	CONDITIONAL TRANSFER ORDER FILED TODAY (CTO-38) - 2 action(s) Signed by Clerk of the Panel Jeffery N. Luthi on 4/17/2015. Associated Cases: MDL No. 2543, MIE/1:15-cv-11360, NE/8:15-cv-00123 (TL) (Entered: 04/17/2015)
04/17/2015	2	***TEXT ONLY NOTICE*** **NOTICE OF FILING OF CTO AND PUBLICATION OF BRIEFING SCHEDULE (CTO-38)** ***re: pldg. (686 in MDL No. 2543, 1 in MIE/1:15-cv-11360, 1 in NE/8:15-cv-00123)*** **BRIEFING SCHEDULE IS SET AS FOLLOWS:** **Oppositions due on or before 4/24/2015.** **Signed by Clerk of the Panel Jeffery N. Luthi on 4/17/2015.** **Associated Cases: MDL No. 2543, MIE/1:15-cv-11360, NE/8:15-cv-00123 (TL) (Entered: 04/17/2015)**
04/23/2015	3	NOTICE OF OPPOSITION TO CONDITIONAL TRANSFER ORDER (CTO-38) - 1 action(s) - re: pldg. (686 in MDL No. 2543, 1 in MIE/1:15-cv-11360) Filed by Plaintiff Benjamin W. Pillars Associated Cases: MDL No. 2543, MIE/1:15-cv-11360 (Mastromarco, Victor) (Entered: 04/23/2015)
04/23/2015	4	***TEXT ONLY NOTICE*** **NOTICE OF FILED OPPOSITION TO CTO-38 AND PUBLICATION OF BRIEFING SCHEDULE** ***re: pldg. (691 in MDL No. 2543, 3 in MIE/1:15-cv-11360)*** **BRIEFING SCHEDULE IS SET AS FOLLOWS:** **Notices of Appearance due on or before 5/7/2015. Corporate Disclosure Statements due on or before 5/7/2015. Motion to Vacate with Brief in Support due on or before 5/7/2015. Responses due on or before 5/28/2015.** **Appearance forms (JPML form 18) and Corporate Disclosure forms can be downloaded from our website. Important: A Corporate Disclosure Form, if required, must be filed, even if one has previously been filed in this MDL.** **Please visit the CM/ECF Filing Guidelines & Forms page of our website for additional information.**

		Signed by Clerk of the Panel Jeffery N. Luthi, on 4/23/2015. **Associated Cases: MDL No. 2543, MIE/1:15-cv-11360 (TL) (Entered: 04/23/2015)**
04/27/2015	5	CORPORATE DISCLOSURE STATEMENT re: pldg. (691 in MDL No. 2543, 3 in MIE/1:15-cv-11360) -- Identifying **Corporate Parent** General Motors Company, **Non-Party/Financial Interest** General Motors Holdings LLC, **Non-Party/Financial Interest** General Motors LLC for General Motors LLC. (Attachments: # 1 Proof of Service) Associated Cases: MDL No. 2543, MIE/1:15-cv-11360 (Bloomer, Andrew) (Entered: 04/27/2015)
04/27/2015	6	NOTICE OF APPEARANCE FOR CTO-38 re: pldg. (686 in MDL No. 2543, 1 in MIE/1:15-cv-11360) Filed by Andrew Baker Bloomer on behalf of Defendant General Motors LLC (Attachments: # 1 Proof of Service) Associated Cases: MDL No. 2543, MIE/1:15-cv-11360 (Bloomer, Andrew) (Entered: 04/27/2015)
05/06/2015	7	MOTION TO VACATE CONDITIONAL TRANSFER ORDER WITH BRIEF IN SUPPORT (CTO-38) *re: pldg. (691 in MDL No. 2543, 3 in MIE/1:15-cv-11360)* Filed by Plaintiff Benjamin W. Pillars (Attachments: # 1 Brief in Support of Motion to Vacate CTO 38, # 2 Exhibit 1 - Schedule of Actions, # 3 Exhibit 2 - Defendant's Notice of Removal, # 4 Exhibit 3 - State Court Complaint, # 5 Exhibit 4 - American Heritage Dictionary Print out, # 6 Exhibit 5- Merriam Webster Dictionary Print out, # 7 Exhibit 6 - Shamieh v. HCB Financial, # 8 Exhibit 7 - Decision on Motion to Enforce Sale, # 9 Exhibit 8 - Westlaw Print Out, # 10 Exhibit 9 - State of Michigan Traffic Crash Report, # 11 Exhibit 10 - Affidavit of Russell C. Babcock, # 12 Exhibit 11 - Civil Docket Sheets, # 13 Proof of Service) Associated Cases: MDL No. 2543, MIE/1:15-cv-11360 (Mastromarco, Victor) Modified on 5/6/2015 (TL).(MDL LINK ADDED) (Entered: 05/06/2015)
05/06/2015	8	NOTICE OF APPEARANCE FOR CTO-38 re: pldg. (686 in MDL No. 2543, 1 in MIE/1:15-cv-11360) Filed by Victor Joseph Mastromarco, Jr on behalf of Plaintiff Benjamin W. Pillars Associated Cases: MDL No. 2543, MIE/1:15-cv-11360 (Mastromarco, Victor) Modified on 5/6/2015 (TL).(MDL LINK ADDED) (Entered: 05/06/2015)
05/06/2015	9	CERTIFICATE OF SERVICE re: pldg. (713 in MDL No. 2543, 8 in MIE/1:15-cv-11360) Filed by Plaintiff Benjamin W. Pillars -- Associated Cases: MDL No. 2543, MIE/1:15-cv-11360 (Mastromarco, Victor) Modified on 5/6/2015 (TL).(MDL LINK ADDED) (Entered: 05/06/2015)
05/28/2015	10	RESPONSE IN OPPOSITION TO MOTION TO VACATE CTO *(re: pldg. (712 in MDL No. 2543, 7 in MIE/1:15-cv-11360))* (CTO-38) Filed by Defendant General Motors LLC (Attachments: # 1 Proof of Service) Associated Cases: MDL No. 2543, MIE/1:15-cv-11360 (Bloomer, Andrew) (Entered: 05/28/2015)
06/04/2015	11	REPLY TO RESPONSE TO MOTION TO VACATE CTO-38 re: pldg. (732 in MDL No. 2543, 10 in MIE/1:15-cv-11360) Filed by Plaintiff Benjamin W. Pillars (Attachments: # 1 Brief Plaintiff's Reply to New GM's Response to Plaintiff's

		Motion to Vacate Conditional Transfer Order - 38 and Supporting Brief, # 2 Exhibit A - Plaintiff's Amended Complaint, # 3 Exhibit B - Decision on New Gm's Motion to Enforce Section 363 Order with Respect to Product Liability Claim of Beverly Deutsch, # 4 Exhibit C - Fen-Phen Cases, # 5 Proof of Service Proof of Service) Associated Cases: MDL No. 2543, MIE/1:15-cv-11360 (Mastromarco, Victor) Modified on 6/4/2015 (TLL).(MDL LINK ADDED) (Entered: 06/04/2015)
06/10/2015	12	HEARING ORDER re: pldg. (712 in MDL No. 2543, 7 in MIE/1:15-cv-11360), (737 in MDL No. 2543, 12 in NYN/1:15-cv-00240) in the following opposition(s) of Plaintiff in Pillars, MIE 1:15-11360, Defendants The City of Albany, Jack Wallace in Perez, NYN 1:15-00240 - SECTION B (DESIGNATED FOR CONSIDERATION WITHOUT ORAL ARGUMENT) **PANEL HEARING set for 7/30/2015 in San Francisco, California.** Signed by Judge Sarah S. Vance, Chair, PANEL ON MULTIDISTRICT LITIGATION, on 6/10/2015. Associated Cases: MDL No. 2543, MIE/1:15-cv-11360, NYN/1:15-cv-00240 (RH) (Entered: 06/10/2015)

PACER Service Center			
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07/21/2015 09:11:48			
PACER Login:	mw0759:2712648:0	**Client Code:**	Pillars
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Billable Pages:	3	**Cost:**	0.30

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re

Chapter 11

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

Case No. 09-50026 (REG)

Debtors.

BENJAMIN PILLAR'S NO STAY PLEADING

NOW COMES the Plaintiff, BENJAMIN W. PILLARS, as Personal Representative of the Estate of KATHLEEN ANN PILLARS, deceased, by and through his attorneys, THE MASTROMARCO FIRM, and pursuant to the Scheduling Order regarding Motion of General Motors LLC submits his "No Stay Pleading" in opposition to a stay of proceedings for the reasons as set forth more fully in the brief filed in support of this pleading.

Respectfully submitted,
THE MASTROMARCO FIRM

Dated: May 28, 2015

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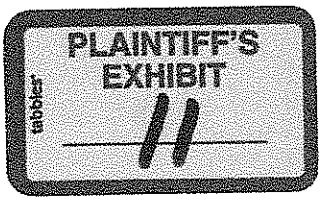

BRIEF IN SUPPORT

INTRODUCTION

Plaintiff's complaint surrounds an automobile accident which occurred on November 23, 2005. On that day, the decedent, Kathleen Ann Pillars, was driving her 2004 Pontiac Grand Am, to a blood drive. The decedent lost control of her vehicle when the defective ignition switch in her vehicle unexpectedly went to the off position causing the automobile accident. The decedent sustained severe injuries as a result of the accident rendering her incapacitated. The decedent remained incapacitated and died nearly seven (7) years later on March 12, 2012.

During decedent's on-going incapacitation, General Motors Corporation filed for bankruptcy on June 1, 2009, and a month later, without affording the decedent with her due process right of notice, entered into a bankruptcy approved Amended and Restated Master Sale and Purchase Agreement with General Motors LLC ("New GM") with a closing date of July 10, 2009.[1] Subsequently, General Motors LLC disclosed to the public that the car manufacturer had been aware of the fact that its vehicles had a defective ignition system and had concealed that fact from the public and government officials.

The Plaintiff is the decedent's widower and the duly appointed personal representative of her estate having received his letter of authority on November 14, 2014. The Plaintiff filed his wrongful death lawsuit against General Motors LLC on March 23, 2015, the Circuit Court for the County of Bay, State of Michigan.

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[1] That agreement was later amended at least one more time. As explained more fully in this brief, the amended agreements do not apply to Plaintiff's claims.

General Motors LLC removed the case to the Eastern District of Michigan citing to 28 U.S.C.A. § 1452 as the sole statutory basis for removal. As explained more fully in this brief, the bankruptcy statute cited by General Motors LLC does not apply to the facts and circumstances which exist in the present case, since Plaintiff's lawsuit will not conceivably have any effect on the bankruptcy estate of Motors Liquidation Company, f/k/a General Motors Corporation. Furthermore, the facts and circumstances which exist in the present case are unrelated to the rulings from this Court as explained more fully in this brief.[2]

For the reasons set forth in this brief, the Plaintiff requests that the Court refrain from imposing a stay on the cause of action brought by the Plaintiff against General Motors LLC.

DISCUSSION

I. IN THE CONTEXT OF PLAINTIFF'S CLAIMS, GENERAL MOTORS LLC HAS TAKEN THE POSITION THAT IT IS RESPONSIBLE FOR "OCCURRENCES" WHICH TOOK PLACE AFTER THE DATE IT ACQUIRED THE BUSINESS OF THE GENERAL MOTORS CORPORATION, AND, AS SUCH, PLAINTIFF'S CLAIMS ARE NOT SUBJECT TO THIS COURT'S ORDERS AND THEY WILL NOT HAVE AN EFFECT ON THE BANKRUPTCY ESTATE RESULTING IN A LACK OF JURISDICTION.

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[2] Even if it was determined by this Court that Plaintiff's lawsuit might conceivably have an effect on the bankruptcy estate, both the abstention provisions of 28 USC § 1334(c) and the equitable remand provision of § 1452(b) grants the District Court wide discretion in the determination whether to hear a case or remand it to the court from which it came. See Shamieh v. HCB Financial Corp., 2014 WL 5365452, 3 (W.D.La.,2014). A copy of the Shameih Opinion is attached as **Exhibit 1**. The Plaintiff submits that the circumstances which exist in the present case support both abstention and equitable remand even if New GM was ultimately able to demonstrate an effect on the bankruptcy estate.

Federal courts are courts of limited jurisdiction. See U.S. Const. art. III, § 2, cl. 1; Kokkonen v. Guardian Life Ins. Co., 511 U.S. 375, 377 (1994). The "burden of establishing the contrary rests upon the party asserting jurisdiction." Id.

As acknowledged by New GM in its notice of removal, the Plaintiff brought the above-captioned action in state court seeking a recovery under a number of state theories of recovery including (1) products liability; (2) negligence; (3) Michigan Consumer Protection Act; (4) misrepresentation; (5) breach of contract, (6) promissory estoppel; (7) fraud; (8) fraudulent concealment; and (9) gross negligence. A copy of New GM's Notice of Removal w/o exhibits is attached as **Exhibit 2**.

Indeed, Plaintiff's complaint against New GM seeks money damages following the wrongful death of Kathleen Ann Pillars on March 24, 2012. A copy of the Complaint is attached as **Exhibit 3**.[3] The Plaintiff further alleges that the March 24, 2012, death was the result of a defective motor vehicle. (**Exhibit 3**). This is not disputed in New GM's notice of removal. (**Exhibit 2**).

The Court should note that New GM admitted in its notice of removal that, in the context of Plaintiff's claims against it, it is responsible for any "occurrences" that happen on or after the July 10, 2009, closing date:

> GM LLC admits it ultimately assumed a narrow band of certain liabilities, including the following as provided in Section 2.3(a)(ix) of the Sale Order and/or the Amended and Restated Master Sale and Purchase Agreement:

[3] New GM attached a copy of the complaint to its notice of removal as Exhibit D. The Court should note that the Plaintiff had already amended his complaint and served said amendment on New GM at the time of removal. For the purpose of this motion, reference to the amended complaint is not necessary since the changes/additions made in the amendment are not material to the limited issue before this Court.

> all Liabilities to third parties for death, personal injury, or other injury to Persons or damage to property caused by motor vehicles designed for operation on public roadways or by the component parts of such motor vehicles and, in each case, manufactured, sold or delivered by Sellers (collectively, "Product Liabilities"), which arise directly out of accidents, incidents ***or other distinct and discreet occurrences that happen on or after the Closing Date [July 10, 2009]*** and arise from such motor vehicles' operation or performance. (Emphasis Added by Plaintiff).

(See page 4, footnote 1 of Notice of Removal - **Exhibit 2**).

New GM made the same representations in paragraph seventeen (17) of its Answer to Plaintiff's Complaint. A copy of the Answer to the Complaint is attached as **Exhibit 4**. As this Court has noted in various rulings, the Amended and Restated Master Sale and Purchase Agreement was subsequently amended and reference to "occurrences" was removed from the amendments. A copy of this Court's Decision is attached as **Exhibit 5**.

In the present case, New GM has chosen to rely upon the original agreement rather than the subsequent amendments (which have different language) which this Court has ruled upon. It is firmly established that New GM is bound by the clear and unequivocal admissions of its attorneys in its submissions. Barnes v. Owens-Corning Fiberglass Corp., 201 F.3d 815, 829 (6th Cir. 2000), MacDonald v. Gen. Motors Corp., 110 F.3d 337, 340 (6th Cir. 1997).

Based upon New GM's admissions, the relevant inquiry is what constitutes an "occurrence" as set forth in the original version of the agreement. Again, the issue of

what constitutes an "occurrence" has never been raised to this Court as evidenced by at least one decision from this Court. **Exhibit 5.**

If an occurrence has taken place after the closing date of July 10, 2009, liability falls squarely upon the liability assumed by New GM rather than the bankrupt entity based upon the language relied upon New GM in its notice of removal and its answer in the District Court proceeding.

It is firmly established that in the absence of a specific definition to the contrary, courts are to give the words their ordinary meaning. The definition of "occurrence" is, "the action, fact, or instance of occurring ... 'something that takes place; an event or incident.'" See the American Heritage Dictionary of the English Language 1219 (5th ed. 2011). A copy of the American Heritage Dictionary definition is attached as **Exhibit 6.** Likewise, the Merriam–Webster's Collegiate Dictionary 858 (11th ed. 2003) defines "occurrence" as, "something that occurs... the action or instance of occurring". A copy of the Merriam–Webster's Dictionary definition is attached as **Exhibit 7.**

In the present case, the Plaintiff brought wrongful death causes of action on behalf of the estate. (See Complaint - **Exhibit 3**). The death of the decedent on March 24, 2012, occurred almost three (3) years after the bankruptcy closing date, is certainly a distinct and discreet occurrence as the term "occurrence" is defined by two (2) major dictionaries.[4]

[4] Furthermore, the death of the Plaintiff was the result of the injuries she sustained from her operation of a General Motors vehicle. (**Exhibit 3**).

Significantly, federal subject matter jurisdiction is lacking if an effect on the bankruptcy estate cannot be shown:

> Since the proceeding before this court does not involve the bankruptcy petition itself we find that it is not a "core" proceeding. Therefore, in order to determine whether we may exercise jurisdiction at all, we must determine whether it is at least "related to" Daher's bankruptcy case. And we find that it is at least "related to" because resolution of Daher's liability in this matter "could *conceivably* have [an] effect on the estate being administered in bankruptcy." Wood, 825 F.2d at 93.

Shamieh v. HCB Financial Corp., 2014 WL 5365452, 3 (W.D.La.,2014). **Exhibit 1.**

Pursuant to the Amended and Restated Master Sale and Purchase Agreement, relied upon by New GM in its notice of removal and its answer to the complaint the March 24, 2012, occurrence is a liability of the New GM and not a liability of the bankrupt entity. As such, Plaintiff's state court complaint (which is currently pending in the Eastern District of Michigan, does not involve the bankruptcy petition and, as already explained in the above-mentioned discussion, it will not have any effect on the bankruptcy estate being administered because Plaintiff's claims pertain to the New GM and not the bankrupt entity.[5] [6]

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[5] The Plaintiff in his complaint alleges a number of claims including intentional torts. **Exhibit 3.** Even if this Court (or a court with jurisdiction) ultimately concluded that the bankrupt entity, rather than New GM, was ultimately found to be liable, an intentional tort is not dischargeable through the bankruptcy process. See 11 U.S.C.A. § 523(a)(6). Again, it remains Plaintiff's position that New GM is liable.

[6] If this Court (or a court with jurisdiction) ultimately concluded that the bankrupt entity rather than New GM was liable for Plaintiff's claims, the Plaintiff has been unfairly prejudiced by the rulings from this Court.
As set forth more fully in the complaint, the decedent was incapacitated from the date of her motor vehicle accident on November 23, 2005, to her untimely death on March 24, 2012. (See Complaint - **Exhibit 2**). The lack of notice provided to the decedent or her family is significant. Recognizing the obvious fact that an incapacitated person lacks the

CONCLUSION

As such the Plaintiff respectfully requests that the Court issue an order concluding that Plaintiff's claims are not subject to a stay of proceedings.

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ability to advocate that person's rights, Michigan law acknowledges that any deadline to act is tolled while the incapacitation exists. See Michigan Compiled Laws Annotated (MCLA) 600.5851(1)&(2).

When a bankruptcy debtor seeks relief against third parties, due process requires notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections as explained by the Supreme Court. See Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314-315, 70 S.Ct. 652, 657 (1950).

This fundamental principle has been repeated in subsequent decisions including the following from the Bankruptcy Court for the District of New Jersey. In re Martini, 2006 WL 4452974, 7 (Bkrtcy.D.N.J.,2006).

The method of notice necessary to satisfy due process depends on whether a creditor is "known" or "unknown" at the time the notice is to be given. While unknown creditors are merely entitled to constructive publication notice of the proceedings, known creditors must receive actual notice. See Mennonite Bd. of Missions v. Adams, 462 U.S. 791, 800 (1983). This is true regardless of how widely-publicized the bankruptcy case is or whether the known creditor is actually aware of the bankruptcy proceedings. See City of New York v. New York, New Haven & Hartford R.R. Co., 344 U.S. 293, 297 (1953) ("[E]ven creditors who have knowledge of a reorganization have a right to assume that the statutory 'reasonable notice' will be given them before their claims are forever barred."); Arch Wireless, Inc. v. Nationwide Paging, Inc. (In re Arch Wireless, Inc.), 534 F.3d 76, 83 (1st Cir. 2008) (same).

This Court has already concluded that the circumstances surrounding the Sale Order regarding the Amended and Restated Master Sale and Purchase Agreement violated the due process rights of the various owners of vehicles with defective ignition systems. In re Motors Liquidation Company, 2015 WL 1727285 (Bkrtcy.S.D.N.Y.2015). The Supreme Court has expressly rejected the notion that a court should hypothesize an outcome, detrimental to the party that has been deprived of due process, as a substitute for the actual opportunity to defend that due process affords every party against whom a claim is stated. Nelson v. Adams USA, Inc., 529 U.S. 460, 471, 120 S.Ct. 1579, 1587 (2000).

The Plaintiff (along with the decedent) in the present case has been unconstitutionally prejudiced by the lack of notice. Furthermore, the bankruptcy court's order leaves the Plaintiff without a remedy for the wrongs resulting from decedent's operation of a General Motors vehicle. The deprivation of the due process rights is unjust and unconstitutional.

Respectfully submitted,
THE MASTROMARCO FIRM

Dated: May 28, 2015

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BEFORE THE UNITED STATES JUDICIAL PANEL
ON MULTIDISTRICT LITIGATION

IN RE: GENERAL MOTORS LLC IGNITION
SWITCH LITIGATION MDL NO. 2543

BRIEF IN SUPPORT PLAINTIFF'S REPLY TO NEW GM'S RESPONSE TO PLAINTIFF'S MOTION TO VACATE CONDITIONAL TRANSFER ORDER-38 AND SUPPORTING BRIEF

INTRODUCTION

New GM in its response argues that this Court should rule upon the motion to vacate the conditional transfer order forthwith rather than afford the Honorable Thomas L. Ludington an opportunity to rule upon a motion for remand which has been fully briefed as acknowledged by New GM in its response.

It is respectfully submitted that a decision on the motion for remand may make the issues before this Court moot, and, as such, affording the Eastern District of Michigan an opportunity to rule upon said motion will promote judicial economy.

Furthermore, the issue raised by New GM before Judge Ludington is unique as explained more fully in this reply. As such and as explained more fully in this reply, there is no chance that Judge Ludington will issue a ruling which will be inconsistent with prior rulings in this forum or in the bankruptcy proceeding.

REBUTTAL ARGUMENT

New GM in its response to Plaintiff's motion does not dispute the fact that it admitted in its Eastern District of Michigan notice of removal that, in the context of Plaintiff's claims against it, it is responsible for any "occurrences" that happen on or after the July 10, 2009, closing date. Again, New GM made the following representation in its notice of removal:

> GM LLC admits it ultimately assumed a narrow band of certain liabilities, including the following as provided in Section 2.3(a)(ix) of the Sale Order and/or the Amended and Restated Master Sale and Purchase Agreement:
>
> > all Liabilities to third parties for death, personal injury, or other injury to Persons or damage to property caused by motor vehicles designed for operation on public roadways or by the component parts of such motor vehicles and, in each case, manufactured, sold or delivered by Sellers (collectively, "Product Liabilities"), which arise directly out of accidents, incidents ***or other distinct and discreet occurrences that happen on or after the Closing Date [July 10, 2009]*** and arise from such motor vehicles' operation or performance. (Emphasis Added by Plaintiff).

(See page 4, footnote 1 of Notice of Removal - Exhibit 2 to Motion to Vacate CTO38).

The Court should also note that New GM made the same representations in paragraph seventeen (17) of its Answer to Plaintiff's Amended Complaint.[1] A copy of the Answer to the Complaint is attached as **Exhibit A**.

---

[1] New GM attached a copy of the complaint to its notice of removal as Exhibit D. The Court should note that the Plaintiff had already amended his complaint and served said amendment on New GM at the time of removal. For the purpose of this

Accordingly, New GM's answer to the complaint along with its notice of removal further demonstrates that there is no dispute as to which version of the purchase agreement which New GM has chosen to rely upon in the context of Plaintiff's pending lawsuit before the Eastern District of Michigan.[2]

The position taken by New GM in the Eastern District of Michigan is significant, since, as the Bankruptcy Court has noted in its rulings, the Amended and Restated Master Sale and Purchase Agreement was superseded by subsequent amendments to said agreement wherein the phrase, "***or other distinct and discreet occurrences that happen on or after the Closing Date [July 10, 2009]***" was removed. A copy of the Bankruptcy Court's Decision is attached as **Exhibit B**.

The undersigned is not aware of a single case where New GM has chosen to rely upon the above-mention language which only appears in the original purchase agreement. In other words, the arguments raised by New GM in the present case are unique. There is no reason why the District Court for the Eastern District of Michigan should not decide the issue. See In re Consol. Fen-Phen Cases, No. 03

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motion, reference to the amended complaint is not necessary since the changes/additions made in the amendment are not material to the limited issue before this Court.

[2] New GM in its response has not challenged the fact that it is bound by the clear and unequivocal admissions of its attorneys in its submissions to this Court. Barnes v. Owens-Corning Fiberglass Corp., 201 F.3d 815, 829 (6th Cir. 2000), MacDonald v. Gen. Motors Corp., 110 F.3d 337, 340 (6th Cir. 1997).

CV 3081 (JG), 2003 WL 22682440 (E.D.N.Y. Nov. 12, 2003). A copy of the District Court Decision is attached as **Exhibit C**.

Furthermore, the bankruptcy court has never been asked by New GM to rule upon the original purchase agreement or the language, "*or other distinct and discreet occurrences that happen on or after the Closing Date [July 10, 2009]*". (See **Exhibit B**, see also Exhibit 6 to Motion for Remand). This fact has been noted by the bankruptcy court in at least one of its rulings:

> Though it is undisputed that "incidents" remained in the MSPA after additional words "or other distinct and discrete occurrences," were deleted, neither side was able, or chose, to explain, by evidence, why the latter words were dropped, and what, if any relevance the dropping of the additional words might have as to the meaning of the word "incidents" that remained.

(**Exhibit B**). Again, it remains Plaintiff's position that the phrase, "*or other distinct and discreet occurrences that happen on or after the Closing Date [July 10, 2009]*"is significant.

New GM also does not challenge in its response the proposition that courts are to give the words their ordinary meaning. The definition of "occurrence" is, "the action, fact, or instance of occurring ... 'something that takes place; an event or incident.'" See the American Heritage Dictionary of the English Language 1219 (5th ed. 2011). A copy of the American Heritage Dictionary definition was attached as Exhibit 4 to Plaintiff's motion to vacate CTO38. Likewise, the Merriam–Webster's Collegiate Dictionary 858 (11th ed. 2003) defines

"occurrence" as, "something that occurs... the action or instance of occurring". A copy of the Merriam–Webster's Dictionary definition was attached as Exhibit 5 to the motion to vacate CTO38.

As pointed out in Plaintiff's motion, the Plaintiff brought wrongful death causes of action on behalf of the estate. (See Exhibit 3 to Motion to vacate CTO38). The death of the decedent on March 24, 2012, occurred almost three (3) years after the bankruptcy closing date, is certainly a distinct and discreet occurrence as the term "occurrence" is defined by two (2) major dictionaries.[3] New GM in its response does not dispute this fact.

CONCLUSION

For the reasons stated herein, the Court should refrain from ruling on the transfer of this case until the issue of subject matter jurisdiction is addressed by the Eastern District of Michigan.

In the alternative and/or in the unlikely event the motion for remand is denied, the Plaintiff respectfully asks this panel to vacate CTO-38 as it pertains to the Plaintiff for the reasons set forth in his motion.

[3] Furthermore, the death of the decedent was the result of the injuries she sustained from her operation of a General Motors vehicle. (See Exhibit 3 to Motion to vacate CTO38).

THE MASTROMARCO FIRM, 1024 N. Michigan Ave., Saginaw, MI 48602 (989) 752-1414

Respectfully submitted,

THE MASTROMARCO FIRM

Dated: June 4, 2015

By: */s/ Victor J. Mastromarco, Jr.*

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Counsel for Benjamin W. Pillars as personal Representative of the Estate of Kathleen Ann Pillars, deceased

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

BENJAMIN W. PILLARS,
as Personal Representative of the Estate of
KATHLEEN ANN PILLARS, deceased,

Plaintiffs,

Case No. 1:15-cv-11360-TLL-PTM

v.

Hon. Thomas L. Ludington

GENERAL MOTORS LLC,

Defendant.
_____/

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_____/

PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION TO STAY

NOW COMES the Plaintiff, BENJAMIN W. PILLARS, as Personal Representative of the Estate of KATHLEEN ANN PILLARS, deceased, by and through his attorneys, THE MASTROMARCO FIRM, and hereby submits his response to Defendant's motion and requests that this Honorable Court deny Defendant's motion for the reasons as set forth more fully in the brief filed in support of this response.

Respectfully submitted,

THE MASTROMARCO FIRM

Dated: June 9, 2015

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BRIEF IN SUPPORT OF PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION TO STAY

INTRODUCTION

New GM in its response urges this Court to issue a stay and refrain from ruling on the motion for remand stating that allowing the Judicial Panel on Multidistrict Litigation to the decide the issue of remand. New GM's argument is misplaced for at least two reasons.

First, a motion for remand has been filed with this Court rather than with the Multidistrict Litigation panel. The motion before the Multidistrict Litigation panel is a motion to vacate the Conditional Transfer Order rather than a motion for remand. A copy of the Multidistrict Litigation Docket Entry is attached as **Exhibit A**. Issues of remand should be decided before all other matters. See University of South Alabama v. American Tobacco Co., 68 F.3d 405, 410 (11th Cir. 1999).

Second, the issue raised by New GM in its notice of removal before this Court is unique as explained more fully in this response. New GM has not raised this issue in any other proceeding. Accordingly, this Court's addressing the issue raised before this Court will not result in an inconsistent ruling.[1]

[1] Even if an inconsistent ruling was possible, none of the cases cited by New GM are binding upon this Court and none of the cases cited by New GM stands for the proposition that this Court cannot decide issues of jurisdiction.

ARGUMENT

New GM in its motion does not dispute the fact that it admitted in its notice of removal that, in the context of Plaintiff's claims against it, it is responsible for any "occurrences" that happen on or after the July 10, 2009, closing date. Again, New GM made the following representation in its notice of removal:

> GM LLC admits it ultimately assumed a narrow band of certain liabilities, including the following as provided in Section 2.3(a)(ix) of the Sale Order and/or the Amended and Restated Master Sale and Purchase Agreement:
>
> > all Liabilities to third parties for death, personal injury, or other injury to Persons or damage to property caused by motor vehicles designed for operation on public roadways or by the component parts of such motor vehicles and, in each case, manufactured, sold or delivered by Sellers (collectively, "Product Liabilities"), which arise directly out of accidents, incidents ***or other distinct and discreet occurrences that happen on or after the Closing Date [July 10, 2009]*** and arise from such motor vehicles' operation or performance. (Emphasis Added by Plaintiff).

(See page 4, footnote 1 of Notice of Removal - Exhibit 2 to Motion for Remand).

The Court should also note that New GM made the same representations in paragraph seventeen (17) of its Answer to Plaintiff's Amended Complaint.[2] Accordingly, New GM's answer to the complaint along with its response to Plaintiff's motion further demonstrates that there is no dispute as to which version

[2] New GM attached a copy of the complaint to its notice of removal as Exhibit D. The Court should note that the Plaintiff had already amended his complaint and served said amendment on New GM at the time of removal. For the purpose of this response, reference to the amended complaint is not necessary since the changes/additions made in the amendment are not material to the limited issue before this Court.

of the purchase agreement which New GM has chosen to rely upon in the context of Plaintiff's pending lawsuit before this Court.[3]

The position taken by New GM in the above-captioned lawsuit is significant, since, as the Bankruptcy Court has noted in its rulings, the Amended and Restated Master Sale and Purchase Agreement was superseded by subsequent amendments to said agreement wherein the phrase, "***or other distinct and discreet occurrences that happen on or after the Closing Date [July 10, 2009]***" was removed. A copy of the Bankruptcy Court's Decision is attached as **Exhibit B**.

The undersigned is not aware of a single case where New GM has chosen to rely upon the above-mention language which only appears in the original purchase agreement. In other words, the arguments raised by New GM in the present case are unique.

There is no reason why this Court should not decide the issue. See In re Consol. Fen-Phen Cases, No. 03 CV 3081 (JG), 2003 WL 22682440 (E.D.N.Y. Nov. 12, 2003). A copy of the District Court Decision is attached as **Exhibit C**. In its filings with the MultiDistrict Litigation Panel acknowledges that this Court has the ability to rule on the motion for remand:

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[3] New GM in its response has not challenged the fact that it is bound by the clear and unequivocal admissions of its attorneys in its submissions to this Court. Barnes v. Owens-Corning Fiberglass Corp., 201 F.3d 815, 829 (6th Cir. 2000), MacDonald v. Gen. Motors Corp., 110 F.3d 337, 340 (6th Cir. 1997).

> To the contrary, as the Panel also recognized in each of those cases, "under Panel Rule 2.1(d), the pendency of a conditional transfer order does not limit the pretrial jurisdiction of the court in which the subject action is pending. Between the date a remand motion is filed and the date that transfer of the action to the MDL is finalized, a court generally has adequate time to rule on a remand motion if it chooses to do so." (12/12/14 Transfer Order (*Alers* and *Green*) at 1 n. 2; 2/5/15 Transfer Order (*Bloom*) at 1–2 n. 1; *accord* 10/15/14 Transfer Order (*Boyd*, *Kandziora*, and *Yagman*) at 1–2 n. 2.)

A copy of New GM's Response to the Motion to Vacate CTO38 is attached as **Exhibit D**.

Furthermore, the bankruptcy court has never been asked by New GM to rule upon the original purchase agreement or the language, "***or other distinct and discreet occurrences that happen on or after the Closing Date [July 10, 2009]***". (See **Exhibit B**, see also Exhibit 6 to Motion for Remand). This fact has been noted by the bankruptcy court in at least two of its rulings:

> Though it is undisputed that "incidents" remained in the MSPA after additional words "or other distinct and discrete occurrences," were deleted, neither side was able, or chose, to explain, by evidence, why the latter words were dropped, and what, if any relevance the dropping of the additional words might have as to the meaning of the word "incidents" that remained.

(Exhibit B).

> The agreement under which the 363 Sale would take place, which had the formal name of "Amended and Restated Master Sale and Purchase Agreement," dated June 26, 2009 (often referred to by the parties as the "ARMSPA" but by this Court as the "Sale Agreement"), was originally filed with the Sale Motion on June 1, 2009. **It was thereafter amended—in respects relevant here (1) to incorporate an agreement with the AGs under which New GM would assume**

> **liabilities under state Lemon Laws, and (2) to provide that New GM would assume responsibility for any and all accidents or incidents giving rise to death, personal injury, or property damage after the date of closing of the 363 Sale, irrespective of whether the vehicle was manufactured by Old GM or New GM.**

(Pages 23-24 Exhibit 6 to Motion for Remand). Again, it remains Plaintiff's position that the phrase, "***or other distinct and discreet occurrences that happen on or after the Closing Date [July 10, 2009]***"is significant.

This fact is further illustrated by a judgment which was recently entered by the bankruptcy court wherein that court again relies upon the language "incident" and "accident" on page three (3) of the judgment but makes no mention to the phrase, "***or other distinct and discreet occurrences that happen on or after the Closing Date [July 10, 2009]***" which only appears in the original version of the agreement:

> Any claims and/or causes of action brought by the Ignition Switch Pre-Closing Accident Plaintiffs that seek to hold New GM liable for **accidents or incidents** that occurred prior to the closing of the 363 Sale are barred and enjoined pursuant to the Sale Order. (Emphasis Added by Plaintiff).

A copy of the Bankruptcy Court's Judgment is attached as **Exhibit E**.

New GM also does not challenge in its response to the motion for remand the proposition that courts are to give the words their ordinary meaning. The definition of "occurrence" is, "the action, fact, or instance of occurring ... 'something that takes place; an event or incident.'" See the American Heritage

Dictionary of the English Language 1219 (5th ed. 2011). A copy of the American Heritage Dictionary definition was attached as Exhibit 6 to Plaintiff's motion for remand. Likewise, the Merriam–Webster's Collegiate Dictionary 858 (11th ed. 2003) defines "occurrence" as, "something that occurs... the action or instance of occurring". A copy of the Merriam–Webster's Dictionary definition was attached as Exhibit 7 to the motion for remand.

As pointed out in Plaintiff's motion for remand, the Plaintiff brought wrongful death causes of action on behalf of the estate. (See Exhibit 3 to Motion for Remand). The death of the decedent on March 24, 2012, occurred almost three (3) years after the bankruptcy closing date, is certainly a distinct and discreet occurrence as the term "occurrence" is defined by two (2) major dictionaries.[4] New GM in its response to the motion for remand does not dispute this fact.

As such, the Plaintiff again requests that this Court deny Defendant's motion for stay and find a lack of subject matter jurisdiction and remand Plaintiff's case back to the Bay County Circuit Court.

[4] Furthermore, the death of the decedent was the result of the injuries she sustained from her operation of a General Motors vehicle. (See Exhibit 3 to Motion for Remand).

CONCLUSION

As such and as set forth more fully in the above-mentioned paragraphs, the Plaintiff respectfully requests that the Court deny Defendant's motion for a stay and remand the above-captioned case to the Bay County Circuit Court.

Respectfully submitted,

THE MASTROMARCO FIRM

Dated: June 9, 2015

By: */s/ Victor J. Mastromarco, Jr.*
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PROOF OF SERVICE

I hereby certify that on **June 9, 2015**, I presented the foregoing papers to the Clerk of the Court for the filing and uploading to the CM/ECF system, which will send notification of such filing to the following: **Andrew Baker Bloomer & Thomas P. Branigan**.

THE MASTROMARCO FIRM

Dated: June 9, 2015

By: */s/ Victor J. Mastromarco, Jr.*
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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

Chapter 11

In re

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

Case No. 09-50026 (REG)

Debtors.

BENJAMIN PILLAR'S OBJECTION PLEADING

NOW COMES the Plaintiff, BENJAMIN W. PILLARS, as Personal Representative of the Estate of KATHLEEN ANN PILLARS, deceased, by and through his attorneys, THE MASTROMARCO FIRM, and pursuant to this Court's Judgment dated June 1, 2015, submits his "Objection Pleading" for the reasons as set forth more fully in the brief filed in support of this pleading.

The Court should note that the Plaintiff has also filed a "No Dismissal Pleading" which essentially mirrors this pleading in its content and exhibits. The additional pleading was filed so as to conform with the Court's direction as to the nature of permissible pleadings which could be filed in response to its judgment.

Respectfully submitted,

THE MASTROMARCO FIRM

Dated: June 23, 2015

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BRIEF IN SUPPORT

INTRODUCTION

Plaintiff's complaint surrounds an automobile accident which occurred on November 23, 2005. On that day, the decedent, Kathleen Ann Pillars, was driving her 2004 Pontiac Grand Am, to a blood drive. The decedent lost control of her vehicle when the defective ignition switch in her vehicle unexpectedly went to the off position causing the automobile accident. The decedent sustained severe injuries as a result of the accident rendering her incapacitated. The decedent remained incapacitated and died nearly seven (7) years later on March 12, 2012.

During decedent's on-going incapacitation, General Motors Corporation filed for bankruptcy on June 1, 2009, and a month later, without affording the decedent with her due process right of notice, entered into a bankruptcy approved Amended and Restated Master Sale and Purchase Agreement with General Motors LLC ("New GM") with a closing date of July 10, 2009.[1] Subsequently, General Motors LLC disclosed to the public that the car manufacturer had been aware of the fact that its vehicles had a defective ignition system and had concealed that fact from the public and government officials.

The Plaintiff is the decedent's widower and the duly appointed personal representative of her estate having received his letter of authority on November 14, 2014. The Plaintiff filed his wrongful death lawsuit against General Motors LLC on March 23, 2015, the Circuit Court for the County of Bay, State of Michigan.

[1] That agreement was later amended at least one more time. As explained more fully in this brief, the amended agreements do not apply to Plaintiff's claims.

General Motors LLC removed the case to the Eastern District of Michigan citing to 28 U.S.C.A. § 1452 as the sole statutory basis for removal. As explained more fully in this brief, the bankruptcy statute cited by General Motors LLC does not apply to the facts and circumstances which exist in the present case, since Plaintiff's lawsuit will not conceivably have any effect on the bankruptcy estate of Motors Liquidation Company, f/k/a General Motors Corporation. Furthermore, the facts and circumstances which exist in the present case are unrelated to the rulings from this Court as explained more fully in this brief.[2] Finally, this Court's Judgment improperly identifies Plaintiff's lawsuit as a "non-ignition switch complaint".

For the reasons set forth in this brief, the Plaintiff objects this Court's judgment and hereby submits his "Objection Pleading".

DISCUSSION

I. THIS COURT'S JUDGMENT IMPROPERLY IDENTIFIES PLAINTIFF'S CLAIMS AS BEING A "NON-IGNITION SWITCH COMPLAINT".

In its judgment this Court identifies Plaintiff's claims as being a "non-ignition switch complaint". A review of Plaintiff's complaint clearly demonstrates that his claims pertain to a defective ignition switch. As illustrative examples, paragraphs (7) and (8)

---

[2] Even if it was determined by this Court that Plaintiff's lawsuit might conceivably have an effect on the bankruptcy estate, both the abstention provisions of 28 USC § 1334(c) and the equitable remand provision of § 1452(b) grants the District Court wide discretion in the determination whether to hear a case or remand it to the court from which it came. See Shamieh v. HCB Financial Corp., 2014 WL 5365452, 3 (W.D.La.,2014). A copy of the Shameih Opinion is attached as **Exhibit 1**. The Plaintiff submits that the circumstances which exist in the present case support both abstention and equitable remand even if New GM was ultimately able to demonstrate an effect on the bankruptcy estate.

along with paragraphs (22b) and (22c) specifically mention the defective ignition switch. A copy of the Complaint is attached as **Exhibit 2**.

Accordingly, Plaintiff's complaint is not a "non-ignition switch complaint" and should not be subjected to the dismissal set forth in this Court's judgment.

II. IN THE CONTEXT OF PLAINTIFF'S CLAIMS, GENERAL MOTORS LLC HAS TAKEN THE POSITION THAT IT IS RESPONSIBLE FOR "OCCURRENCES" WHICH TOOK PLACE AFTER THE DATE IT ACQUIRED THE BUSINESS OF THE GENERAL MOTORS CORPORATION, AND, AS SUCH, PLAINTIFF'S CLAIMS ARE NOT SUBJECT TO THIS COURT'S ORDERS AND THEY WILL NOT HAVE AN EFFECT ON THE BANKRUPTCY ESTATE RESULTING IN A LACK OF JURISDICTION.

Federal courts are courts of limited jurisdiction. See U.S. Const. art. III, § 2, cl. 1; Kokkonen v. Guardian Life Ins. Co., 511 U.S. 375, 377 (1994). The "burden of establishing the contrary rests upon the party asserting jurisdiction." Id.

As acknowledged by New GM in its notice of removal, the Plaintiff brought the above-captioned action in state court seeking a recovery under a number of state theories of recovery including (1) products liability; (2) negligence; (3) Michigan Consumer Protection Act; (4) misrepresentation; (5) breach of contract, (6) promissory estoppel; (7) fraud; (8) fraudulent concealment; and (9) gross negligence. A copy of New GM's Notice of Removal w/o exhibits is attached as **Exhibit 3**.

Indeed, Plaintiff's complaint against New GM seeks money damages following the wrongful death of Kathleen Ann Pillars on March 24, 2012. A copy of the Complaint

is attached as **Exhibit 2**.[3] The Plaintiff further alleges that the March 24, 2012, death was the result of a defective motor vehicle. (**Exhibit 2**). This is not disputed in New GM's notice of removal. (**Exhibit 3**).

The Court should note that New GM admitted in its notice of removal that, in the context of Plaintiff's claims against it, it is responsible for any "occurrences" that happen on or after the July 10, 2009, closing date:

> GM LLC admits it ultimately assumed a narrow band of certain liabilities, including the following as provided in Section 2.3(a)(ix) of the Sale Order and/or the Amended and Restated Master Sale and Purchase Agreement:
>
> > all Liabilities to third parties for death, personal injury, or other injury to Persons or damage to property caused by motor vehicles designed for operation on public roadways or by the component parts of such motor vehicles and, in each case, manufactured, sold or delivered by Sellers (collectively, "Product Liabilities"), which arise directly out of accidents, incidents ***or other distinct and discreet occurrences that happen on or after the Closing Date [July 10, 2009]*** and arise from such motor vehicles' operation or performance. (Emphasis Added by Plaintiff).

(See page 4, footnote 1 of Notice of Removal - **Exhibit 3**).

New GM made the same representations in paragraph seventeen (17) of its Answer to Plaintiff's Complaint. A copy of the Answer to the Complaint is attached as **Exhibit 4**. As this Court has noted in various rulings, the Amended and Restated Master Sale and Purchase Agreement was subsequently amended and reference to "occurrences"

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[3] New GM attached a copy of the complaint to its notice of removal as Exhibit D. The Court should note that the Plaintiff had already amended his complaint and served said amendment on New GM at the time of removal. For the purpose of this motion, reference to the amended complaint is not necessary since the changes/additions made in the amendment are not material to the limited issue before this Court.

was removed from the amendments. A copy of this Court's Decision is attached as **Exhibit 5**.

In the present case, New GM has chosen to rely upon the original agreement rather than the subsequent amendments (which have different language) which this Court has ruled upon. It is firmly established that New GM is bound by the clear and unequivocal admissions of its attorneys in its submissions. Barnes v. Owens-Corning Fiberglass Corp., 201 F.3d 815, 829 (6th Cir. 2000), MacDonald v. Gen. Motors Corp., 110 F.3d 337, 340 (6th Cir. 1997).

Based upon New GM's admissions, the relevant inquiry is what constitutes an "occurrence" as set forth in the original version of the agreement. Again, the issue of what constitutes an "occurrence" has never been raised to this Court as evidenced by at least one decision from this Court. **Exhibit 5**.

If an occurrence has taken place after the closing date of July 10, 2009, liability falls squarely upon the liability assumed by New GM rather than the bankrupt entity based upon the language relied upon New GM in its notice of removal and its answer in the District Court proceeding.

It is firmly established that in the absence of a specific definition to the contrary, courts are to give the words their ordinary meaning. The definition of "occurrence" is, "the action, fact, or instance of occurring ... 'something that takes place; an event or incident.'" See the American Heritage Dictionary of the English Language 1219 (5th ed. 2011). A copy of the American Heritage Dictionary definition is attached as **Exhibit 6**. Likewise, the Merriam–Webster's Collegiate Dictionary 858 (11th ed. 2003) defines

"occurrence" as, "something that occurs... the action or instance of occurring". A copy of the Merriam–Webster's Dictionary definition is attached as **Exhibit 7**.

In the present case, the Plaintiff brought wrongful death causes of action on behalf of the estate. (See Complaint - **Exhibit 2**). The death of the decedent on March 24, 2012, occurred almost three (3) years after the bankruptcy closing date, is certainly a distinct and discreet occurrence as the term "occurrence" is defined by two (2) major dictionaries.[4]

Significantly, federal subject matter jurisdiction is lacking if an effect on the bankruptcy estate cannot be shown:

> Since the proceeding before this court does not involve the bankruptcy petition itself we find that it is not a "core" proceeding. Therefore, in order to determine whether we may exercise jurisdiction at all, we must determine whether it is at least "related to" Daher's bankruptcy case. And we find that it is at least "related to" because resolution of Daher's liability in this matter "could *conceivably* have [an] effect on the estate being administered in bankruptcy." Wood, 825 F.2d at 93.

Shamieh v. HCB Financial Corp., 2014 WL 5365452, 3 (W.D.La.,2014). **Exhibit 1**.

Pursuant to the Amended and Restated Master Sale and Purchase Agreement, relied upon by New GM in its notice of removal and its answer to the complaint the March 24, 2012, occurrence is a liability of the New GM and not a liability of the bankrupt entity. As such, Plaintiff's state court complaint (which is currently pending in the Eastern District of Michigan, does not involve the bankruptcy petition and, as already explained in the above-mentioned discussion, it will not have any effect on the

[4] Furthermore, the death of the Plaintiff was the result of the injuries she sustained from her operation of a General Motors vehicle. (**Exhibit 2**).

bankruptcy estate being administered because Plaintiff's claims pertain to the New GM and not the bankrupt entity.[5]

For the above-mentioned reasons, a dismissal or staying of Plaintiff's complaint is not appropriate, since Plaintiff's claims pertain to the New GM.

In the alternative, if this Court (or a court with jurisdiction) ultimately concluded that the bankrupt entity rather than New GM was liable for Plaintiff's claims, the Plaintiff has been unfairly prejudiced by the rulings from this Court.

As set forth more fully in the complaint, the decedent was incapacitated from the date of her motor vehicle accident on November 23, 2005, to her untimely death on March 24, 2012. (See Complaint - **Exhibit 2**). The lack of notice provided to the decedent or her family is significant. Recognizing the obvious fact that an incapacitated person lacks the ability to advocate that person's rights, Michigan law acknowledges that any deadline to act is tolled while the incapacitation exists. See Michigan Compiled Laws Annotated (MCLA) 600.5851(1)&(2).

When a bankruptcy debtor seeks relief against third parties, due process requires notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections as explained by the Supreme Court. See Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314-315, 70 S.Ct. 652, 657 (1950).

---

[5] The Plaintiff in his complaint alleges a number of claims including intentional torts. **Exhibit 2.** Even if this Court (or a court with jurisdiction) ultimately concluded that the bankrupt entity, rather than New GM, was ultimately found to be liable, an intentional tort is not dischargeable through the bankruptcy process. See 11 U.S.C.A. § 523(a)(6). Again, it remains Plaintiff's position that New GM is liable.

This fundamental principle has been repeated in subsequent decisions including the following from the Bankruptcy Court for the District of New Jersey. In re Martini, 2006 WL 4452974, 7 (Bkrtcy.D.N.J.,2006).

The method of notice necessary to satisfy due process depends on whether a creditor is "known" or "unknown" at the time the notice is to be given. While unknown creditors are merely entitled to constructive publication notice of the proceedings, known creditors must receive actual notice. See Mennonite Bd. of Missions v. Adams, 462 U.S. 791, 800 (1983). This is true regardless of how widely-publicized the bankruptcy case is or whether the known creditor is actually aware of the bankruptcy proceedings. See City of New York v. New York, New Haven & Hartford R.R. Co., 344 U.S. 293, 297 (1953) ("[E]ven creditors who have knowledge of a reorganization have a right to assume that the statutory 'reasonable notice' will be given them before their claims are forever barred."); Arch Wireless, Inc. v. Nationwide Paging, Inc. (In re Arch Wireless, Inc.), 534 F.3d 76, 83 (1st Cir. 2008) (same).

This Court has already concluded that the circumstances surrounding the Sale Order regarding the Amended and Restated Master Sale and Purchase Agreement violated the due process rights of the various owners of vehicles with defective ignition systems. In re Motors Liquidation Company, 2015 WL 1727285 (Bkrtcy.S.D.N.Y.2015). The Supreme Court has expressly rejected the notion that a court should hypothesize an outcome, detrimental to the party that has been deprived of due process, as a substitute for the actual opportunity to defend that due process affords every party against whom a

claim is stated. Nelson v. Adams USA, Inc., 529 U.S. 460, 471, 120 S.Ct. 1579, 1587 (2000).

The Plaintiff (along with the decedent) in the present case has been unconstitutionally prejudiced by the lack of notice. Furthermore, the bankruptcy court's order leaves the Plaintiff without a remedy for the wrongs resulting from decedent's operation of a General Motors vehicle. The deprivation of the due process rights is unjust and unconstitutional. The Plaintiff should not be subjected to proceedings which were the result of unconstitutional behavior.

CONCLUSION

As such the Plaintiff respectfully objects to the Court's judgment and requests that the Court issue an order concluding that Plaintiff's complaint is not a "non-ignition switch complaint" and is not subject to the dismissal set forth in the judgment. Furthermore, the Plaintiff requests that the Court find that the Plaintiff can proceed with his claims against the New GM. In the alternative, the Plaintiff requests that the Court find Plaintiff is not subject to the limitations which arose from unconstitutional behavior and/or outcomes.

Respectfully submitted,
THE MASTROMARCO FIRM

Dated: June 23, 2015

By: */s/ Victor J. Mastromarco, Jr.*
Victor J. Mastromarco, Jr. (P34564)
Attorney for Plaintiff Benjamin Pillars
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vmastromar@aol.com

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

	Chapter 11
In re	
MOTORS LIQUIDATION COMPANY, et al., f/k/a General Motors Corp., et al.	Case No. 09-50026 (REG)
Debtors.	

BENJAMIN PILLAR'S NO DISMISSAL PLEADING

NOW COMES the Plaintiff, BENJAMIN W. PILLARS, as Personal Representative of the Estate of KATHLEEN ANN PILLARS, deceased, by and through his attorneys, THE MASTROMARCO FIRM, and pursuant to this Court's Judgment dated June 1, 2015, submits his "No Dismissal Pleading" for the reasons as set forth more fully in the brief filed in support of this pleading.

The Court should note that the Plaintiff has also filed an "Objection Pleading" which essentially mirrors this pleading in its content and exhibits. The additional pleading was filed so as to conform with the Court's direction as to the nature of permissible pleadings which could be filed in response to its judgment.

Respectfully submitted,

THE MASTROMARCO FIRM

Dated: June 23, 2015

By: */s/ Victor J. Mastromarco, Jr.*
Victor J. Mastromarco, Jr. (P34564)
Attorney for Benjamin Pillars
1024 N. Michigan Avenue
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BRIEF IN SUPPORT

INTRODUCTION

Plaintiff's complaint surrounds an automobile accident which occurred on November 23, 2005. On that day, the decedent, Kathleen Ann Pillars, was driving her 2004 Pontiac Grand Am, to a blood drive. The decedent lost control of her vehicle when the defective ignition switch in her vehicle unexpectedly went to the off position causing the automobile accident. The decedent sustained severe injuries as a result of the accident rendering her incapacitated. The decedent remained incapacitated and died nearly seven (7) years later on March 12, 2012.

During decedent's on-going incapacitation, General Motors Corporation filed for bankruptcy on June 1, 2009, and a month later, without affording the decedent with her due process right of notice, entered into a bankruptcy approved Amended and Restated Master Sale and Purchase Agreement with General Motors LLC ("New GM") with a closing date of July 10, 2009.[1] Subsequently, General Motors LLC disclosed to the public that the car manufacturer had been aware of the fact that its vehicles had a defective ignition system and had concealed that fact from the public and government officials.

The Plaintiff is the decedent's widower and the duly appointed personal representative of her estate having received his letter of authority on November 14, 2014. The Plaintiff filed his wrongful death lawsuit against General Motors LLC on March 23, 2015, the Circuit Court for the County of Bay, State of Michigan.

[1] That agreement was later amended at least one more time. As explained more fully in this brief, the amended agreements do not apply to Plaintiff's claims.

General Motors LLC removed the case to the Eastern District of Michigan citing to 28 U.S.C.A. § 1452 as the sole statutory basis for removal. As explained more fully in this brief, the bankruptcy statute cited by General Motors LLC does not apply to the facts and circumstances which exist in the present case, since Plaintiff's lawsuit will not conceivably have any effect on the bankruptcy estate of Motors Liquidation Company, f/k/a General Motors Corporation. Furthermore, the facts and circumstances which exist in the present case are unrelated to the rulings from this Court as explained more fully in this brief.[2] Finally, this Court's Judgment improperly identifies Plaintiff's lawsuit as a "non-ignition switch complaint".

For the reasons set forth in this brief, the Plaintiff objects this Court's judgment and hereby submits his "No Dismissal Pleading".

DISCUSSION

I. THIS COURT'S JUDGMENT IMPROPERLY IDENTIFIES PLAINTIFF'S CLAIMS AS BEING A "NON-IGNITION SWITCH COMPLAINT".

In its judgment this Court identifies Plaintiff's claims as being a "non-ignition switch complaint". A review of Plaintiff's complaint clearly demonstrates that his claims pertain to a defective ignition switch. As illustrative examples, paragraphs (7) and (8)

[2] Even if it was determined by this Court that Plaintiff's lawsuit might conceivably have an effect on the bankruptcy estate, both the abstention provisions of 28 USC § 1334(c) and the equitable remand provision of § 1452(b) grants the District Court wide discretion in the determination whether to hear a case or remand it to the court from which it came. See Shamieh v. HCB Financial Corp., 2014 WL 5365452, 3 (W.D.La.,2014). A copy of the Shameih Opinion is attached as **Exhibit 1**. The Plaintiff submits that the circumstances which exist in the present case support both abstention and equitable remand even if New GM was ultimately able to demonstrate an effect on the bankruptcy estate.

along with paragraphs (22b) and (22c) specifically mention the defective ignition switch. A copy of the Complaint is attached as **Exhibit 2.**

Accordingly, Plaintiff's complaint is not a "non-ignition switch complaint" and should not be subjected to the dismissal set forth in this Court's judgment.

II. IN THE CONTEXT OF PLAINTIFF'S CLAIMS, GENERAL MOTORS LLC HAS TAKEN THE POSITION THAT IT IS RESPONSIBLE FOR "OCCURRENCES" WHICH TOOK PLACE AFTER THE DATE IT ACQUIRED THE BUSINESS OF THE GENERAL MOTORS CORPORATION, AND, AS SUCH, PLAINTIFF'S CLAIMS ARE NOT SUBJECT TO THIS COURT'S ORDERS AND THEY WILL NOT HAVE AN EFFECT ON THE BANKRUPTCY ESTATE RESULTING IN A LACK OF JURISDICTION.

Federal courts are courts of limited jurisdiction. See U.S. Const. art. III, § 2, cl. 1; Kokkonen v. Guardian Life Ins. Co., 511 U.S. 375, 377 (1994). The "burden of establishing the contrary rests upon the party asserting jurisdiction." Id.

As acknowledged by New GM in its notice of removal, the Plaintiff brought the above-captioned action in state court seeking a recovery under a number of state theories of recovery including (1) products liability; (2) negligence; (3) Michigan Consumer Protection Act; (4) misrepresentation; (5) breach of contract, (6) promissory estoppel; (7) fraud; (8) fraudulent concealment; and (9) gross negligence. A copy of New GM's Notice of Removal w/o exhibits is attached as **Exhibit 3.**

Indeed, Plaintiff's complaint against New GM seeks money damages following the wrongful death of Kathleen Ann Pillars on March 24, 2012. A copy of the Complaint

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The Court should note that New GM admitted in its notice of removal that, in the context of Plaintiff's claims against it, it is responsible for any "occurrences" that happen on or after the July 10, 2009, closing date:

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(See page 4, footnote 1 of Notice of Removal - **Exhibit 3**).

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[3] New GM attached a copy of the complaint to its notice of removal as Exhibit D. The Court should note that the Plaintiff had already amended his complaint and served said amendment on New GM at the time of removal. For the purpose of this motion, reference to the amended complaint is not necessary since the changes/additions made in the amendment are not material to the limited issue before this Court.

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If an occurrence has taken place after the closing date of July 10, 2009, liability falls squarely upon the liability assumed by New GM rather than the bankrupt entity based upon the language relied upon New GM in its notice of removal and its answer in the District Court proceeding.

It is firmly established that in the absence of a specific definition to the contrary, courts are to give the words their ordinary meaning. The definition of "occurrence" is, "the action, fact, or instance of occurring ... 'something that takes place; an event or incident.'" See the American Heritage Dictionary of the English Language 1219 (5th ed. 2011). A copy of the American Heritage Dictionary definition is attached as **Exhibit 6.** Likewise, the Merriam–Webster's Collegiate Dictionary 858 (11th ed. 2003) defines

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In the present case, the Plaintiff brought wrongful death causes of action on behalf of the estate. (See Complaint - **Exhibit 2**). The death of the decedent on March 24, 2012, occurred almost three (3) years after the bankruptcy closing date, is certainly a distinct and discreet occurrence as the term "occurrence" is defined by two (2) major dictionaries.[4]

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[4] Furthermore, the death of the Plaintiff was the result of the injuries she sustained from her operation of a General Motors vehicle. (**Exhibit 2**).

bankruptcy estate being administered because Plaintiff's claims pertain to the New GM and not the bankrupt entity.[5]

For the above-mentioned reasons, a dismissal or staying of Plaintiff's complaint is not appropriate, since Plaintiff's claims pertain to the New GM.

In the alternative, if this Court (or a court with jurisdiction) ultimately concluded that the bankrupt entity rather than New GM was liable for Plaintiff's claims, the Plaintiff has been unfairly prejudiced by the rulings from this Court.

As set forth more fully in the complaint, the decedent was incapacitated from the date of her motor vehicle accident on November 23, 2005, to her untimely death on March 24, 2012. (See Complaint - **Exhibit 2**). The lack of notice provided to the decedent or her family is significant. Recognizing the obvious fact that an incapacitated person lacks the ability to advocate that person's rights, Michigan law acknowledges that any deadline to act is tolled while the incapacitation exists. See Michigan Compiled Laws Annotated (MCLA) 600.5851(1)&(2).

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[5] The Plaintiff in his complaint alleges a number of claims including intentional torts. **Exhibit 2.** Even if this Court (or a court with jurisdiction) ultimately concluded that the bankrupt entity, rather than New GM, was ultimately found to be liable, an intentional tort is not dischargeable through the bankruptcy process. See 11 U.S.C.A. § 523(a)(6). Again, it remains Plaintiff's position that New GM is liable.

This fundamental principle has been repeated in subsequent decisions including the following from the Bankruptcy Court for the District of New Jersey. In re Martini, 2006 WL 4452974, 7 (Bkrtcy.D.N.J.,2006).

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CONCLUSION

As such the Plaintiff respectfully objects to the Court's judgment and requests that the Court issue an order concluding that Plaintiff's complaint is not a "non-ignition switch complaint" and is not subject to the dismissal set forth in the judgment. Furthermore, the Plaintiff requests that the Court find that the Plaintiff can proceed with his claims against the New GM. In the alternative, the Plaintiff requests that the Court find Plaintiff is not subject to the limitations which arose from unconstitutional behavior and/or outcomes.

Respectfully submitted,
THE MASTROMARCO FIRM

Dated: June 23, 2015

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UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 09-50026-LAS

- -x

In the Matter of:

MOTORS LIQUIDATION COMPANY

Debtor.

- -x

United States Bankruptcy Court

One Bowling Green

New York, New York 10004-1408

July 16, 2015

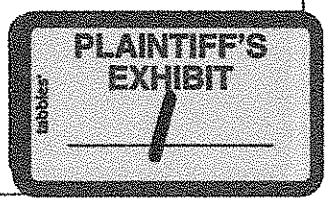
9:48 AM

B E F O R E:

HONORABLE ROBERT E. GERBER

U.S. BANKRUPTCY JUDGE

ECRO: K. HARRIS



Hearing Re: No Stay Pleading

Hearing Re: Motion to Strike Certain Documents Contained in Appellants' Designation of Items to be Included in the Record on Appeal

Transcribed by: Theresa Pullan

APPEARANCES:

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MR. WEISFELNER

PROCEEDINGS

THE COURT: I want to get appearances, and then I have some comments.

MR. BABCOCK: Good morning, Your Honor, Russell Babcock, I'm here on behalf of the estate of Kathleen Pillars.

THE COURT: Mr. Babcock that is.

MR. BABCOCK: Yes.

THE COURT: Okay. I thought I saw a different name on the papers, Mr. Babcock.

MR. BABCOCK: Yes, Mr. Markell Mastromarco is a lawyer, while he is a partner of the firm I am employed with, I filed an appearance too so I could argue the motion today.

THE COURT: Okay, sure. Mr. Steinberg.

MR. STEINBERG: On behalf of the New General Motors, and I'm with Mr. Davidson.

THE COURT: Okay. Folks, you don't need me to tell you about the similarities between this case and Deutsch. But there is a twist in it that I need you to address which neither of you dealt with as directly as I would have liked in the papers.

Mr. Babcock, Mr. Mastromarcos's brief recognized my earlier ruling in Deutsch which is quite obviously directly on point. And he tried to get around that, not by saying that Deutsch was improperly decided, but relied on a different kind of argument, although he didn't use what I would have thought

would be the right words to describe it.

The premise was that because whoever had filed the removal petition in the answer in the State Court action which I think was in Michigan, certainly wasn't in this district, had relied on the earlier version of the sale agreement. It had apparently said "execution copy," but was amended by a first amendment filed on June 30th, 2009, that this might be an "occurrence" even though I had held in Deutsch that the death of a victim after a car wreck wasn't either an "accident" or an "incident." But you didn't flesh out the law of, didn't mention the key words, "judicial estoppel," trying to rely on some kind of admission.

And it seems to me in essence what you and Mr. Mastromarco are asking me to do is to rely on a wrong version of the sale agreement. I got a couple of problems with that: a) I didn't know how a guy in my position could responsibly rely on what he knows to be the wrong agreement, and as a matter of Second Circuit law, I thought it's not unique to the Second Circuit because the Supreme Court has said it as well. To make out judicial estoppel, you need to have a couple of things: one is materially different statements, and second, reliance by the tribunal on the statement by the opponent.

New GM used the wrong language as far as I can tell. I will allow Mr. Steinberg to be heard if he wants to correct me on that, but it wasn't materially wrong at least at the

time, and more importantly, there's no reliance by me on that, and then third, of course, what the agreement says is the best evidence of what it says, not what a lawyer says about what the agreement says. So I need help from you on that.

Conversely, Mr. Steinberg, I'll need some help from you as to why either [indiscernible] there seemed to be reliance on the old language rather than the new, and why the issue that I just articulated wasn't raised. Once I rely on the proper language in the agreement, and I got to tell you Mr. Babcock that I think you'd have to throw a Hail Mary to convince me that I should rely on the wrong language. So you can tell me whether you think Deutsch was wrongly decided, and materially wrongly decided, being mindful of what I said in quite a number of published decisions, that the interest of predictability in the Southern District of New York is of great importance and that in the absence of manifest error I follow the decisions of Pillars ~~I follow~~ bankruptcy Judges in this district and of course I follow my own.

So strictly speaking, it's your motion, Mr. Babcock, so I'll hear from you first, and then Mr. Steinberg, with the usual reply.

MR. BABCOCK: Your Honor, Russell Babcock here on behalf of the estate of Kathleen Pillars. I guess the problem as we see it from the New GM's perspective is that parties can and do quite often waive defenses or arguments that they may

otherwise have. Why do I think that's important here? Your Honor, there has been no evidence to suggest that this was an error on the part of New GM. New GM like anyone can take on whatever obligations they want to. If they want to rely on different contractual language they can do so. And in fact, that takes it outside the purview. We're not asking the Court here to make any changes to its rulings as to these, as to the subsequent agreements. We're saying that New General Motors has made admissions, in fact they've even used the words admissions in their complaint, and not just once, Your Honor, in paragraph 17, but I mean paragraphs 22, 27, 29, 31 through 34, 36, 37, 39 through 44, 46 and onward. There's at least 40 times where they make the same admission or incorporate the same admission I should say.

And for them to come in here, and this case as Your Honor pointed out was in the Eastern District of Michigan under Sixth Circuit rules, courts, parties, are bound by the statements of their attorneys and especially in the context of pleadings. As Your Honor is well aware, under the Federal Rules of Civil Procedure, when you answer a complaint you either make a denial or an admission. In this case they made an admission, and not only that but they made it in the notice as well. There's been no authority cited by New GM which disputes what I've just said. They say we didn't really mean it. That's not authority, that's an unsupported assertion.

And then, Your Honor, I guess with regards to the, and I guess I want to make sure we flush out the Deutsch opinion. There is a couple of key language that appeared in the subsequent version that I think is important, besides the fact that it did not have "or other distinct and discrete occurrences" which the court noted in its opinion. Also in the version that New GM is not relying upon in this particular context, in this particular case, it doesn't have the "first occurring" language which also the Court found important in the Deutsch opinion as well.

THE COURT: Doesn't "first occurring" appear in both versions?

MR. BABCOCK: Not in the excerpt that they've, well see they did quote the language they're relying on in their answer. And in fact if you look at paragraph, page 4 to exhibit 2 to their notice of removal, they quote the language that they're standing --

THE COURT: My bundle doesn't include that document. Can you hand up what you're making reference to after showing it to Mr. Steinberg?

MR. BABCOCK: Sure, I can hand you this document, Your Honor.

THE COURT: And this is from the removal petition?

MR. BABCOCK: Yeah, it's from the removal. May I approach the bench, Your Honor?

THE COURT: Yes sir.

MR. BABCOCK: Okay. That language is from the page 4 of the notice of removal. And as Your Honor can see, the language that they're representing to the District Court of the Eastern District of Michigan is this is what controls the situation from our perspective. And --

THE COURT: Give me a second to read it. Was withdrawn by a Thomas P. Branigan of Bowman and Brook in Bloomfield Hills, Michigan, attorney for New GM.

MR. BABCOCK: And I believe Your Honor --

THE COURT: Do you need this back?

MR. BABCOCK: I was going to reference it, Your Honor. I can get -- all right. And again, Your Honor, if you don't have, I apologize if you didn't get these documents, Your Honor. And again, Your Honor, in paragraph 17 to the answer to our amended complaint, now, that was marked I believe -- hold one second here -- as exhibit 4 to our pleading, I don't know if Your Honor has that as well. It says here, and I think it's the same language. It says: "all liabilities to third parties for death, personal injury or other injury to persons or damage to property caused by motor vehicles designed for operation on public roadways or by the component parts of such motor vehicles and, in each case, manufactured, sold, or delivered by sellers (collectively) "product liabilities" which arise directly out of accidents, incidents -- excuse me -- accidents,

incidents or other and discrete occurrences that happened or after the closing date, July 10, 2009 and arise from such --

THE COURT: What are you reading from, Mr. Babcock?

MR. BABCOCK: I'm reading from, this is the quote from paragraph 17 to New GM's answer to the amended complaint. And again, and arise from such motor vehicles' operation or performance. That's the language, Your Honor, that New GM represented to the District Court for the Eastern District, not once but on two separate occasions, two separate pleadings.

And when Your Honor considers the fact that they acknowledge in paragraph 17 that this is what they state, GM LLC admits it ultimately did assume certain liabilities, including the following as provided in section 2.3 (a)(ix) of sale agreement. That's where the quote that I just read you comes from. That's what they're relying upon, and that was from attorney Tomas Branigan from Bowman and Brook LLP on behalf of New General Motors.

So, Your Honor, the reason we're here, and this is kind of, I mean I'm not aware of any other case where New GM decided to take this approach. This is a situation where in the context of this case, New General Motors made a decision to take a certain position, and as we've pointed out in responding to that position, the language that they're relying upon provides broader liability and ~~explore~~ exposure to New GM in the case which covers, in the case of my client's claim at least than

what may or may not have been accomplished in subsequent agreements, but they're not relying on the subsequent agreements in the case before the United States District Court Eastern District of Michigan which is where this case was removed by New GM.

So, Your Honor, we cited Sixth Circuit cases that would explain why the Court in that case in that venue would why those statements are dispositive to New GM. There's been no authority cited to the contrary. And then in --

THE COURT: Do I have the Sixth Circuit rule that you're relying on in the record?

MR. BABCOCK: Basically the Federal Rule of Civil Procedure Rule of pleading plus the two cases I was talking about, the two cases talking, which are Barnes and the McDonald opinions which appear in that no state pleading, and we cite to them. On page 4 of our brief, Barnes vs. Owens Corning Fiber Glass Corporation which is 201 F.3d 815 and page 829 is referenced specifically as the Sixth Circuit 2000 opinion. There's another one, McDonald vs. General Motors Corporation, 110 F.3d 337, 340 Sixth Circuit 1997. Again talking about the impact of admissions made by attorneys or defendants of parties in the course of litigation.

And again, Your Honor there's been no authority cited by New GM that disputes that. They say we don't really mean it. I take it as simply being buyer's remorse on their part

now that they, that the consequences of their position has become apparent now more willing to consider the impact to there is any form their opinion with regard to this Court's ruling rather than their own admissions earlier on.

THE COURT: Mr. Babcock, did the Pillars family file a claim against Old GM where its trust, back in the time when claims could still be filed?

MR. BABCOCK: Your Honor, that's the tragedy of the situation. My client was in an automobile, the estate, the decedent was in an automobile accident in 2005. She was in a, she was incapacitated until her death in 2000, I believe it was in 2012, Your Honor. And an estate was formed back in 2014.

THE COURT: Was there any kind of guardian or anything appointed for her in the time between the wreck and the time of her passing?

MR. BABCOCK: Not to my knowledge, Your Honor. In fact, the appointment took place in 2014. She had a, she had a, she was married at the time of the accident, and she was being taken care for in basically a vegetative state from my understanding at least up to the point of her death. And so that's what, and so that's what I think is the most, the tragic part about all this. New GM wants to be excused for its conduct and its statements and its actions it's made in front of Federal District Court in Michigan. But yet they want to penalize my client for something that they did when they did

nothing wrong. They were accused of, the decedent was a victim of a car accident. Her wrongful death did not occur until 2012. A wrongful death statute claim could not have been brought until her death, it goes without saying, and thus New GM is saying sorry, you're out of luck. And but yet they want this Court, to come in here and say on the other hand what we say and what we do doesn't matter. And that is where, that's where -- again, this is not going to have any impact on the ruling from this Court today on this issue that we're bringing to the Court's attention, will have no impact on the bankruptcy estate. In fact, quite the contrary, New GM's agreed to take on the additional liability which might otherwise went to the old bankruptcy.

THE COURT: Well you're not pressing that jurisdictional argument that I rejected I don't know how many times in the cases that that lawyer Gary Peller brought. You're simply saying that letting your client bring a wrongful death case against New GM isn't that big a deal?

MR. BABCOCK: Because this is just one case, Your Honor. This is, the admissions that they made in this particular case, the position that they took in this particular case involves only this particular case. It does not involve or require this Court to make any adjustments to any of its earlier rulings because --

THE COURT: I understand.

MR. BABCOCK: Yeah, so that's kind of where we're coming from, Your Honor. And again I think it's also important, that the defendant, that New GM I should say doesn't provide any explanation as to this additional changed language, the occurrence language that we already quoted. The fact that there is no "first occurrence" language in the portion that they're relying upon, the United States District Court Eastern District of Michigan, none of that is being challenged. They haven't said that we're not correct on our interpretation of that "occurrence" and or the fact that it says "or other distinct occurrences." They don't challenge any of that, Your Honor. They just say, well Your Honor made the rulings. Well Your Honor did make the rulings, and as you pointed out in the Deutsch opinion, you were, the issue in that case was whether or not "accidents" and "incidences" were, you had to deal with those particular terms.

And yet as you point out in your opinion that this "occurrence" issue wasn't even a part of it, so there was no reason to get into it. And as you pointed out in that case, no one bothered even to discuss it. And in this case we are discussing it. We've provided evidence, we provided definition term, definition for this, for this terminology. I think that, and the fact that the other additional language as we point out further supports the fact that what we have here is a much broader language.

So I guess with regards to this issue about the Deutsch opinion, I guess as a representative of a victim of these accidents, I would take the position even though I don't think that the Court needs to get to this point because I don't think you need to reverse yourself and Deutsch at all or even clarify it to give us the relief we're asking for today. But if push comes to shove, I guess and for the purpose of preserving it for the record, I guess in addition to the arguments made by the lawyers for that, for the estate in that case, I guess the way I read the terminology with all due respect to the Court is that you basically came down to "accident" or "incident" meaning at least in my opinion and how I took it, and maybe I'm wrong about this, is being the same thing. But I think that we don't need to go there. I think that the Court can grant the relief that we've already asked for to the mechanism I've already explained.

Unless Your Honor has any questions, and I guess, they have brought up these other issues about, and I just got these, I got these when I came back from vacation yesterday, about the responses to the [indiscernible] and the objection where they make the additional argument about the, whether this is, whether this is an ignition system. I guess we look at paragraph 4 to their answer to the complaint, they kind of tie it all together, they say this is all, ours is the same as everyone else's as far as the recall problem. And so I guess,

I don't think we need to go there because if you grant the relief we asked for at the very beginning, all this additional stuff becomes academic.

THE COURT: You're saying if I grant the relief you still got to prove your case in Michigan State Court or Michigan Federal Court?

MR. BABCOCK: Sure. Of course we would have to, we would have to prove the underlying case against New GM, the claims itself, yes. Unless Your Honor has any questions.

THE COURT: No, thank you. I want to hear from Mr. Steinberg.

MR. STEINBERG: Your Honor, I think the most fundamental point to start is that this lawsuit was improperly brought. It was in violation of Your Honor's sale order and injunction, and that it was a violation of the injunction to start. That actually is the starting point. Under the Seletex (phonetic) decision which we've cited to, Your Honor, many times that if there was any confusion, they were required to come in. Your Honor's Deutsch decision had been decided over three years ago, and they brought this lawsuit anyway. And they're arguing that some local counsel for New GM in the context of trying to get this to the JPML for purpose of then moving it to the MDL cited to the wrong version of the sale agreement.

THE COURT: He was a lawyer for New GM, wasn't he?

MR. STEINBERG: Yes he was.

THE COURT: And I don't know if it matters because over 45 years I've learned a little bit about the agency, but isn't there somebody at the national level that supervises local counsel?

MR. STEINBERG: I'm sure that in the context of this wave of lawsuits there was more than the local counsel just doing this. I think, Your Honor, that this was a mistake that was made.

THE COURT: It plainly was. And the consequence is, the question is, who should bear the consequences of that mistake?

MR. STEINBERG: But I don't think there's any reliance on anything here. First you start with an improperly brought --

THE COURT: Well that was the way I started, Mr. Steinberg, because more likely if not plainly we don't have a judicial estoppel, but Mr. Babcock makes a different point, he asserts a judicial admission that's contrasted to a judicial estoppel by reason of the fact that when people answer complaints we hold people to what they say.

MR. STEINBERG: People amend their answers all the time. And what was the admission that other than it was just a mistake? Because at the end of the day if we had asserted the old agreement and they had not refuted it, then are we all

governed by the old agreement instead of what was the governing agreement that applies to everybody in this case? The fact of the matter is there's an underlying agreement that governed this circumstance, the underlying agreement was the first amendment. That first amendment --

THE COURT: I didn't see much reference to that in your brief either, or attention to the distinction.

MR. STEINBERG: I think the, with regard to my brief --

THE COURT: Unless I read the wrong brief.

MR. STEINBERG: No, no, I think we say that the fact that there was a citation to the old amendment shouldn't change what the controlling law is and I think we put that in a sentence there.

THE COURT: In --

MR. STEINBERG: In our response.

THE COURT: 12 page response, it was pretty buried if it was stated.

MR. STEINBERG: Yes. If you can bear with --

THE COURT: You mean [indiscernible] reliance on subject matter jurisdiction and due process. Where is the discussion of judicial or admissions or estoppels?

MR. STEINBERG: I think, well I think Your Honor on page 7, footnote 5, New GM may have inadvertently referred to the original language contained in section 2(b)(3)(b)(9) of the

sale agreement --

THE COURT: I see. All right.

MR. STEINBERG: -- and certain pleadings filed in the underlying lawsuit, the language contained in the first amendment with respect clearly governs this matter. Perhaps we didn't give it the attention that Your Honor wanted us to give the attention because we didn't think it mattered that much because at the end of the day --

THE COURT: It matters critically, Mr. Steinberg.

MR. STEINBERG: Well, Your Honor, this issue actually did come up in Deutsch. The first hearing that you had in Deutsch, people had cited actually to the wrong amendment, you actually had I think a second hearing on Deutsch where you analyzed what would be the governing position, and you actually in the Deutsch decision compared the language that was in the June 26th, 2009 agreement versus the first amendment and said no one has explained why the language changed, and therefore it could have been because it was duplicative or otherwise, but otherwise you were going to discount it. So this actual, you know, this actual problem actually took place before in the Deutsch case and Your Honor handled it that way by just looking at the actual agreement. And maybe that's the reason why we didn't give it as much attention in our brief that perhaps it warranted.

But I go back and I also wanted to just address the

issue that Your Honor said that you thought that we perhaps miss-cited the section in our own brief. If you were referring to page 2 of our brief, we were actually citing to the section that was in the retain liabilities portion of the sale agreement as compared to the assumed liabilities and that is the right quote of how it was written in the retained liabilities. So I think we got it right in our pleading.

But fundamentally what happened is that you had an improperly started lawsuit in violation of Your Honor's sale order. And we had deadlines in the state court because those things go forward. We sent the no stay letter to them, and in the meantime we had to try to remove this to the JPML and get it ultimately before Judge Furman (phonetic) in the MDL, and the statement that is being referred to here has no material difference as to whether we cite it to the first amendment or the second amendment, the June 26th agreement or the first amendment, because the central focus was that it had bankruptcy court jurisdiction and there was a basis for federal removal, it relates to the bankruptcy case. New GM was disclaiming liability and was saying that it should all be ultimately moved to the MDL where it gets stayed because they're handling [indiscernible] cases, and it's subject to Your Honor's order. We waited then for them to file their response to the no stay pleading and then Your Honor entered the judgment and that created a separate procedure for the same thing.

Once in the, so the answer that was filed was the answer that was filed in conjunction with something that was ultimately going to be removed and stayed and ultimately the answer should not have necessarily been required to be filed because this action never should have been brought in the first place. It was a violation of the Deutsch decision. There's no, there's no judicial admission of anything because there was no attempt to admit to an older agreement versus a new agreement.

And if Your Honor needs a declaration from someone to say that it was a mistake and answers could be amended all the time, and so therefore I don't think in the very early stages of an improperly led complaint you can say there's a judicial admission of anything. This would have been amended if this case would have gone forward, but this case never should have been brought in the first place.

And I think the estate representative is the husband who was taking care of the wife since the accident in 2005. So Your Honor had this issue in Deutsch, unfortunately local counsel made a mistake in responding where the goal was just to get this to the MDL where it would be stayed while we simultaneously would be dealing with this in the bankruptcy court to say that it was subject to Your Honor's order. There's no difference as to whether we cited the first amendment or the June 26th amendment for purposes of the over-

reaching point, that this was an improperly started lawsuit, that this was, that there was federal jurisdiction based on the bankruptcy court on this, and that this matter should be ultimately removed to the federal court and then to the JPML.

Your Honor's decision in Deutsch also said that if you even relied on the old amendment that it wasn't sure whether there was any difference. And if you look at their brief when they decide, when they're focusing on the word occurrence --

THE COURT: I read Deutsch this morning again, I did not see in there but you can refresh my recollection if I'm mistaken any suggestion that if the words occurrence had appeared and the words first occurring had not appeared, that I had then ruled, assuming it wouldn't have been dictum, that the conclusion would be the same.

MR. STEINBERG: I don't think you said that. I think on page 5 of the Deutsch decision --

THE COURT: Give me a second please. Well I have it in the B.R. form, is it in the discussion or where?

MR. STEINBERG: It is in the discussion, it is after the heavily blocked quote, and it starts with the paragraph, but while incidents may be deemed to be somewhat ambiguous.

THE COURT: Right. I'm with you now. Basically I said is I didn't have an evidentiary basis for concluding, making conclusions as to the reasons for the change.

MR. STEINBERG: But the reason why this was even in your decision was because there was the same mistake that was made before, people were referring to the June 26th amendment in an earlier hearing and Your Honor was struggling with would it have made a difference, why was the change being made. If people had cited to it properly the first time even in Deutsch, you never would have had to deal with this discussion, because the operative agreement is what controls. And that is really you know we didn't say it in lots of words, sometimes you get criticized for being verbose, here we basically said there is one agreement, that is the agreement that is controlling, that is what Your Honor has to apply in this case.

No matter what we said, we could say that the sky is orange, but the sky is blue, that's what you have to recognize. Here, there was no attempt to change a different agreement with respect to a plaintiff who improperly started a lawsuit based on an accident that took place ten years ago. The rest of the arguments, I think, Your Honor, I think if, once you find that there are prepetition non-ignition switch plaintiff, then the rest flows from the judgment on the due process arguments and the Court's jurisdiction argument. And so I think really we're left to, and I think Your Honor has already said that you believe that Deutsch is applicable or not for this particular issue where a local counsel had improperly cited to a June 26th, but it wasn't to take any advantage, no court has ruled

on this matter. The JPML hasn't even ruled on the removal action.

And frankly again, and I'll conclude with this, and I know I've said it a number of times, it all starts with the fundamental notion that this was an improperly brought lawsuit. And to say that someone in an answer said something on a lawsuit that never should have been brought which was a violation of an injunction I don't think they should be able to bootstrap that type of argument. Thank you.

THE COURT: Mr. Babcock.

MR. BABCOCK: New GM filed a 58 page answer, a very detailed, they went through quotes, it's a very detailed answer. To suggest that what they say in this very detailed answer should be disregarded by this Court flies in the face of what the purpose of an answer is which is either make denials or make admissions. They could have just said denied, isn't true, denied, isn't true. But they instead they made the decision to make admissions. They have not, as Your Honor, as you pointed out when you, during opposing counsel's -- they have not cited any authority that says they are excused from the consequences of what they did, and I mean what the lawyers in that case did.

Your Honor, unless Your Honor has any questions for us, we'd --

THE COURT: Have everybody sit in place for a minute.

Gentleman, ladies and gentlemen, I'm ruling that the Pillars action can proceed against the New GM and that New GM will have the duty and of course the right to defend it on the merits without expressing [indiscernible] merits in the filing of my findings of fact, conclusions of law, and bases for the exercise of my discretion in connection of this decision, although I don't think I'm really relying on my discretion in any way on this.

At the outset of oral argument, I recognized, as we all had to recognize, my Deutsch decision, which if it had been decided in a vacuum, this controversy had been decided in a vacuum based upon the proper language of the sale agreement, would have resulted in a victory for New GM. But the fact that had the potential ability to change the applicability of the Deutsch decision was the language under which New GM's assumption of its liabilities would rest.

In Deutsch, as we all know, the key language was "accidents or incidents first occurring." And the underlying principal of that was that each word had to be given individual meaning, although they could overlap. It is not disputed that a local counsel through GM said in two separate submissions, first in a notice of removal and then also in an answer, perhaps I'm flip-flopping their chronological order, but in two separate documents, that New GM had assumed liabilities for "accidents, incidents or other occurrences, and did not rely on

the words first occurring or mention the words first occurring. As I discussed in the Deutsch opinion, first occurring had significance as well. As I indicated at the outset of oral argument, this is not a judicial estoppel, the requirements for judicial estoppel of reliance by the tribunal is missing. Nevertheless, as Mr. Babcock properly pointed out, it is a judicial admission, which is similar in some respects, but different in others. It is not for instance a statement in a brief. It's a statement in the answer, which has significance. Answers have to be taken seriously. Although it is true that answers can thereafter be amended, unless and until they have been, they stand. Judges need to have the ability to rely on answers because answers take issues off the table.

So then we get to the issue as to whether what GM's counsel, which is obviously an agent, [indiscernible] should be regarded because the litigation shouldn't have been brought in the first place. Well, lots of litigations were brought in what we now know to have been violation of my earlier order. And when I had become aware of that, I have stopped them, I have stopped them by stays. And it's for that reason that this litigation is stayed. But it was one thing to say that this action should be stayed, then later dismissed, and quite a different way to say never mind, [indiscernible] vis-a-vis everything that happened in the first place.

I have not ruled to that effect in any of the 22

decisions that previously issued in connection with the GM case, and I am not of the mind to do that now. Obviously GM has the ability to ensure that its counsel do their jobs and it's not too much to hold GM for the consequences of what its counsel who is plainly an agent did. So having admitted that New GM is liable for accidents, incidents or other occurrences I think have to parse those words. Under the principals of Deutsch each word is to be given meaning. Accidents refers to wrecks, we all know what an accident is. Incidents are, applies to something that can include wrecks but can also include other things. And as I ruled in Deutsch in of the Pillars actions, repeating or characterizing my ruling in Deutsch, that covers things like explosions, fires, car running off the road and the like. Occurrences can overlap with that, but it can also have some other meaning. And in this instance, occurrences which as far as I'm aware has not and will not ever be the subject of another judicial construction in this case. But the principals of Deutsch should be construed as meaning something else, and the arguments made by Pillars' counsel in its brief that death from that is subject to coverage under that ambiguity. Of course, the construction of documents when they're ambiguous necessarily must go against the drafter.

So I'm going to allow this lawsuit to proceed, and I'm going to state a couple of things for the avoidance of doubt, although they should be obvious. One is I reiterate for

*See 513 B.R. at 472 and nn.16,17 (GM-Phaneuf).

the 900th time that I have subject matter jurisdiction over this dispute. As is apparent from everything that I've said, this applies only to this particular judicial admission in this particular wrongful death case, and has no bearing on anything that I ruled on April 15th or on the Gary Gutler (phonetic) matters [indiscernible]. It does however, mean that New GM has to defend this wrongful death case. And if it doesn't like defending wrongful death cases when its local counsel admit things that maybe they shouldn't have been admitted to, it should supervise its counsel more carefully.

That summarizes my rulings. If New GM really wants to appeal this, I reserve the right to issue a written opinion. But as you all well know, I've got so many things beyond that to deal with in GM (and for that matter other cases on my watch), that I'm not going to write on this unless I need to.

Mr. Babcock, you or your co-counsel can settle an order in accordance with this ruling. Not by way of reargument, are there any questions?

MR. STEINBERG: Your Honor, will we have, can we have the opportunity to make a submission, and I don't know whether this is true or not, I would need to verify that at the time to answer or amend, we had a right to amend the answer, that this is not a judicial admission to give further briefing.

THE COURT: There was plenty of time to focus on these issues before today. That's my ruling.

MR. STEINBERG: All right.

THE COURT: Mr. Steinberg, I have a zillion things on my watch and I have to rely on lawyers dealing with issues in a timely way. We can't have do-overs after I've ruled. I had the same issue with a motion for reargument now which is in substance a do-over after I've ruled, I'm not going to invite even more stuff of that character. Anything else?

MR. BABCOCK: Your Honor, I'm not familiar with how the Court handles its orders.

THE COURT: Do you want to stand please? I take it in most of the courts you would stand when you're talking to a Judge?

MR. BABCOCK: I'm sorry, Your Honor, I wasn't being disrespectful. Okay, at this point, the lawyers, would GM be submitting a proposed order? Is that, do I understand what your instruction was or do you want me to prepare an order?

THE COURT: I said you are to settle an order. We have local court rules in this Court to deal with the settlement of orders.

MR. BABCOCK: Okay, Your Honor.

THE COURT: Okay. Anything else? Have a good day. We're adjourned.

MR. WEISFELNER: Your Honor, I apologize. This is a procedural housekeeping issue. And let me see if I can't state succinctly what the issue is.

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 09-50026-LAS

- -x

In the Matter of:

MOTORS LIQUIDATION COMPANY

Debtor.

- -x

United States Bankruptcy Court

One Bowling Green

New York, New York 10004-1408

July 16, 2015

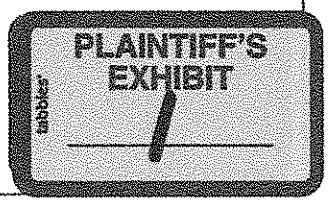
9:48 AM

B E F O R E:

HONORABLE ROBERT E. GERBER

U.S. BANKRUPTCY JUDGE

ECRO: K. HARRIS



Hearing Re: No Stay Pleading

Hearing Re: Motion to Strike Certain Documents Contained in Appellants' Designation of Items to be Included in the Record on Appeal

Transcribed by: Theresa Pullan

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PROCEEDINGS

THE COURT: I want to get appearances, and then I have some comments.

MR. BABCOCK: Good morning, Your Honor, Russell Babcock, I'm here on behalf of the estate of Kathleen Pillars.

THE COURT: Mr. Babcock that is.

MR. BABCOCK: Yes.

THE COURT: Okay. I thought I saw a different name on the papers, Mr. Babcock.

MR. BABCOCK: Yes, Mr. Markell Mastromarco is a lawyer, while he is a partner of the firm I am employed with, I filed an appearance too so I could argue the motion today.

THE COURT: Okay, sure. Mr. Steinberg.

MR. STEINBERG: On behalf of the New General Motors, and I'm with Mr. Davidson.

THE COURT: Okay. Folks, you don't need me to tell you about the similarities between this case and Deutsch. But there is a twist in it that I need you to address which neither of you dealt with as directly as I would have liked in the papers.

Mr. Babcock, Mr. Mastromarcos's brief recognized my earlier ruling in Deutsch which is quite obviously directly on point. And he tried to get around that, not by saying that Deutsch was improperly decided, but relied on a different kind of argument, although he didn't use what I would have thought

would be the right words to describe it.

The premise was that because whoever had filed the removal petition in the answer in the State Court action which I think was in Michigan, certainly wasn't in this district, had relied on the earlier version of the sale agreement. It had apparently said "execution copy," but was amended by a first amendment filed on June 30th, 2009, that this might be an "occurrence" even though I had held in Deutsch that the death of a victim after a car wreck wasn't either an "accident" or an "incident." But you didn't flesh out the law of, didn't mention the key words, "judicial estoppel," trying to rely on some kind of admission.

And it seems to me in essence what you and Mr. Mastromarco are asking me to do is to rely on a wrong version of the sale agreement. I got a couple of problems with that: a) I didn't know how a guy in my position could responsibly rely on what he knows to be the wrong agreement, and as a matter of Second Circuit law, I thought it's not unique to the Second Circuit because the Supreme Court has said it as well. To make out judicial estoppel, you need to have a couple of things: one is materially different statements, and second, reliance by the tribunal on the statement by the opponent.

New GM used the wrong language as far as I can tell. I will allow Mr. Steinberg to be heard if he wants to correct me on that, but it wasn't materially wrong at least at the

time, and more importantly, there's no reliance by me on that, and then third, of course, what the agreement says is the best evidence of what it says, not what a lawyer says about what the agreement says. So I need help from you on that.

Conversely, Mr. Steinberg, I'll need some help from you as to why either [indiscernible] there seemed to be reliance on the old language rather than the new, and why the issue that I just articulated wasn't raised. Once I rely on the proper language in the agreement, and I got to tell you Mr. Babcock that I think you'd have to throw a Hail Mary to convince me that I should rely on the wrong language. So you can tell me whether you think Deutsch was wrongly decided, and materially wrongly decided, being mindful of what I said in quite a number of published decisions, that the interest of predictability in the Southern District of New York is of great importance and that in the absence of manifest error I follow the decisions of Pillars ~~I follow~~ bankruptcy Judges in this district and of course I follow my own.

So strictly speaking, it's your motion, Mr. Babcock, so I'll hear from you first, and then Mr. Steinberg, with the usual reply.

MR. BABCOCK: Your Honor, Russell Babcock here on behalf of the estate of Kathleen Pillars. I guess the problem as we see it from the New GM's perspective is that parties can and do quite often waive defenses or arguments that they may

otherwise have. Why do I think that's important here? Your Honor, there has been no evidence to suggest that this was an error on the part of New GM. New GM like anyone can take on whatever obligations they want to. If they want to rely on different contractual language they can do so. And in fact, that takes it outside the purview. We're not asking the Court here to make any changes to its rulings as to these, as to the subsequent agreements. We're saying that New General Motors has made admissions, in fact they've even used the words admissions in their complaint, and not just once, Your Honor, in paragraph 17, but I mean paragraphs 22, 27, 29, 31 through 34, 36, 37, 39 through 44, 46 and onward. There's at least 40 times where they make the same admission or incorporate the same admission I should say.

And for them to come in here, and this case as Your Honor pointed out was in the Eastern District of Michigan under Sixth Circuit rules, courts, parties, are bound by the statements of their attorneys and especially in the context of pleadings. As Your Honor is well aware, under the Federal Rules of Civil Procedure, when you answer a complaint you either make a denial or an admission. In this case they made an admission, and not only that but they made it in the notice as well. There's been no authority cited by New GM which disputes what I've just said. They say we didn't really mean it. That's not authority, that's an unsupported assertion.

And then, Your Honor, I guess with regards to the, and I guess I want to make sure we flush out the Deutsch opinion. There is a couple of key language that appeared in the subsequent version that I think is important, besides the fact that it did not have "or other distinct and discrete occurrences" which the court noted in its opinion. Also in the version that New GM is not relying upon in this particular context, in this particular case, it doesn't have the "first occurring" language which also the Court found important in the Deutsch opinion as well.

THE COURT: Doesn't "first occurring" appear in both versions?

MR. BABCOCK: Not in the excerpt that they've, well see they did quote the language they're relying on in their answer. And in fact if you look at paragraph, page 4 to exhibit 2 to their notice of removal, they quote the language that they're standing --

THE COURT: My bundle doesn't include that document. Can you hand up what you're making reference to after showing it to Mr. Steinberg?

MR. BABCOCK: Sure, I can hand you this document, Your Honor.

THE COURT: And this is from the removal petition?

MR. BABCOCK: Yeah, it's from the removal. May I approach the bench, Your Honor?

THE COURT: Yes sir.

MR. BABCOCK: Okay. That language is from the page 4 of the notice of removal. And as Your Honor can see, the language that they're representing to the District Court of the Eastern District of Michigan is this is what controls the situation from our perspective. And --

THE COURT: Give me a second to read it. Was withdrawn by a Thomas P. Branigan of Bowman and Brook in Bloomfield Hills, Michigan, attorney for New GM.

MR. BABCOCK: And I believe Your Honor --

THE COURT: Do you need this back?

MR. BABCOCK: I was going to reference it, Your Honor. I can get -- all right. And again, Your Honor, if you don't have, I apologize if you didn't get these documents, Your Honor. And again, Your Honor, in paragraph 17 to the answer to our amended complaint, now, that was marked I believe -- hold one second here -- as exhibit 4 to our pleading, I don't know if Your Honor has that as well. It says here, and I think it's the same language. It says: "all liabilities to third parties for death, personal injury or other injury to persons or damage to property caused by motor vehicles designed for operation on public roadways or by the component parts of such motor vehicles and, in each case, manufactured, sold, or delivered by sellers (collectively) "product liabilities" which arise directly out of accidents, incidents -- excuse me -- accidents,

incidents or other and discrete occurrences that happened or after the closing date, July 10, 2009 and arise from such --

THE COURT: What are you reading from, Mr. Babcock?

MR. BABCOCK: I'm reading from, this is the quote from paragraph 17 to New GM's answer to the amended complaint. And again, and arise from such motor vehicles' operation or performance. That's the language, Your Honor, that New GM represented to the District Court for the Eastern District, not once but on two separate occasions, two separate pleadings.

And when Your Honor considers the fact that they acknowledge in paragraph 17 that this is what they state, GM LLC admits it ultimately did assume certain liabilities, including the following as provided in section 2.3 (a)(ix) of sale agreement. That's where the quote that I just read you comes from. That's what they're relying upon, and that was from attorney Tomas Branigan from Bowman and Brook LLP on behalf of New General Motors.

So, Your Honor, the reason we're here, and this is kind of, I mean I'm not aware of any other case where New GM decided to take this approach. This is a situation where in the context of this case, New General Motors made a decision to take a certain position, and as we've pointed out in responding to that position, the language that they're relying upon provides broader liability and ~~explore~~ exposure to New GM in the case which covers, in the case of my client's claim at least than

what may or may not have been accomplished in subsequent agreements, but they're not relying on the subsequent agreements in the case before the United States District Court Eastern District of Michigan which is where this case was removed by New GM.

So, Your Honor, we cited Sixth Circuit cases that would explain why the Court in that case in that venue would why those statements are dispositive to New GM. There's been no authority cited to the contrary. And then in --

THE COURT: Do I have the Sixth Circuit rule that you're relying on in the record?

MR. BABCOCK: Basically the Federal Rule of Civil Procedure Rule of pleading plus the two cases I was talking about, the two cases talking, which are Barnes and the McDonald opinions which appear in that no state pleading, and we cite to them. On page 4 of our brief, Barnes vs. Owens Corning Fiber Glass Corporation which is 201 F.3d 815 and page 829 is referenced specifically as the Sixth Circuit 2000 opinion. There's another one, McDonald vs. General Motors Corporation, 110 F.3d 337, 340 Sixth Circuit 1997. Again talking about the impact of admissions made by attorneys or defendants of parties in the course of litigation.

And again, Your Honor there's been no authority cited by New GM that disputes that. They say we don't really mean it. I take it as simply being buyer's remorse on their part

now that they, that the consequences of their position has become apparent now more willing to consider the impact to there is any form their opinion with regard to this Court's ruling rather than their own admissions earlier on.

THE COURT: Mr. Babcock, did the Pillars family file a claim against Old GM where its trust, back in the time when claims could still be filed?

MR. BABCOCK: Your Honor, that's the tragedy of the situation. My client was in an automobile, the estate, the decedent was in an automobile accident in 2005. She was in a, she was incapacitated until her death in 2000, I believe it was in 2012, Your Honor. And an estate was formed back in 2014.

THE COURT: Was there any kind of guardian or anything appointed for her in the time between the wreck and the time of her passing?

MR. BABCOCK: Not to my knowledge, Your Honor. In fact, the appointment took place in 2014. She had a, she had a, she was married at the time of the accident, and she was being taken care for in basically a vegetative state from my understanding at least up to the point of her death. And so that's what, and so that's what I think is the most, the tragic part about all this. New GM wants to be excused for its conduct and its statements and its actions it's made in front of Federal District Court in Michigan. But yet they want to penalize my client for something that they did when they did

nothing wrong. They were accused of, the decedent was a victim of a car accident. Her wrongful death did not occur until 2012. A wrongful death statute claim could not have been brought until her death, it goes without saying, and thus New GM is saying sorry, you're out of luck. And but yet they want this Court, to come in here and say on the other hand what we say and what we do doesn't matter. And that is where, that's where -- again, this is not going to have any impact on the ruling from this Court today on this issue that we're bringing to the Court's attention, will have no impact on the bankruptcy estate. In fact, quite the contrary, New GM's agreed to take on the additional liability which might otherwise went to the old bankruptcy.

THE COURT: Well you're not pressing that jurisdictional argument that I rejected I don't know how many times in the cases that that lawyer Gary Peller brought. You're simply saying that letting your client bring a wrongful death case against New GM isn't that big a deal?

MR. BABCOCK: Because this is just one case, Your Honor. This is, the admissions that they made in this particular case, the position that they took in this particular case involves only this particular case. It does not involve or require this Court to make any adjustments to any of its earlier rulings because --

THE COURT: I understand.

MR. BABCOCK: Yeah, so that's kind of where we're coming from, Your Honor. And again I think it's also important, that the defendant, that New GM I should say doesn't provide any explanation as to this additional changed language, the occurrence language that we already quoted. The fact that there is no "first occurrence" language in the portion that they're relying upon, the United States District Court Eastern District of Michigan, none of that is being challenged. They haven't said that we're not correct on our interpretation of that "occurrence" and or the fact that it says "or other distinct occurrences." They don't challenge any of that, Your Honor. They just say, well Your Honor made the rulings. Well Your Honor did make the rulings, and as you pointed out in the Deutsch opinion, you were, the issue in that case was whether or not "accidents" and "incidences" were, you had to deal with those particular terms.

And yet as you point out in your opinion that this "occurrence" issue wasn't even a part of it, so there was no reason to get into it. And as you pointed out in that case, no one bothered even to discuss it. And in this case we are discussing it. We've provided evidence, we provided definition term, definition for this, for this terminology. I think that, and the fact that the other additional language as we point out further supports the fact that what we have here is a much broader language.

So I guess with regards to this issue about the Deutsch opinion, I guess as a representative of a victim of these accidents, I would take the position even though I don't think that the Court needs to get to this point because I don't think you need to reverse yourself and Deutsch at all or even clarify it to give us the relief we're asking for today. But if push comes to shove, I guess and for the purpose of preserving it for the record, I guess in addition to the arguments made by the lawyers for that, for the estate in that case, I guess the way I read the terminology with all due respect to the Court is that you basically came down to "accident" or "incident" meaning at least in my opinion and how I took it, and maybe I'm wrong about this, is being the same thing. But I think that we don't need to go there. I think that the Court can grant the relief that we've already asked for to the mechanism I've already explained.

Unless Your Honor has any questions, and I guess, they have brought up these other issues about, and I just got these, I got these when I came back from vacation yesterday, about the responses to the [indiscernible] and the objection where they make the additional argument about the, whether this is, whether this is an ignition system. I guess we look at paragraph 4 to their answer to the complaint, they kind of tie it all together, they say this is all, ours is the same as everyone else's as far as the recall problem. And so I guess,

I don't think we need to go there because if you grant the relief we asked for at the very beginning, all this additional stuff becomes academic.

THE COURT: You're saying if I grant the relief you still got to prove your case in Michigan State Court or Michigan Federal Court?

MR. BABCOCK: Sure. Of course we would have to, we would have to prove the underlying case against New GM, the claims itself, yes. Unless Your Honor has any questions.

THE COURT: No, thank you. I want to hear from Mr. Steinberg.

MR. STEINBERG: Your Honor, I think the most fundamental point to start is that this lawsuit was improperly brought. It was in violation of Your Honor's sale order and injunction, and that it was a violation of the injunction to start. That actually is the starting point. Under the Seletex (phonetic) decision which we've cited to, Your Honor, many times that if there was any confusion, they were required to come in. Your Honor's Deutsch decision had been decided over three years ago, and they brought this lawsuit anyway. And they're arguing that some local counsel for New GM in the context of trying to get this to the JPML for purpose of then moving it to the MDL cited to the wrong version of the sale agreement.

THE COURT: He was a lawyer for New GM, wasn't he?

MR. STEINBERG: Yes he was.

THE COURT: And I don't know if it matters because over 45 years I've learned a little bit about the agency, but isn't there somebody at the national level that supervises local counsel?

MR. STEINBERG: I'm sure that in the context of this wave of lawsuits there was more than the local counsel just doing this. I think, Your Honor, that this was a mistake that was made.

THE COURT: It plainly was. And the consequence is, the question is, who should bear the consequences of that mistake?

MR. STEINBERG: But I don't think there's any reliance on anything here. First you start with an improperly brought --

THE COURT: Well that was the way I started, Mr. Steinberg, because more likely if not plainly we don't have a judicial estoppel, but Mr. Babcock makes a different point, he asserts a judicial admission that's contrasted to a judicial estoppel by reason of the fact that when people answer complaints we hold people to what they say.

MR. STEINBERG: People amend their answers all the time. And what was the admission that other than it was just a mistake? Because at the end of the day if we had asserted the old agreement and they had not refuted it, then are we all

governed by the old agreement instead of what was the governing agreement that applies to everybody in this case? The fact of the matter is there's an underlying agreement that governed this circumstance, the underlying agreement was the first amendment. That first amendment --

THE COURT: I didn't see much reference to that in your brief either, or attention to the distinction.

MR. STEINBERG: I think the, with regard to my brief --

THE COURT: Unless I read the wrong brief.

MR. STEINBERG: No, no, I think we say that the fact that there was a citation to the old amendment shouldn't change what the controlling law is and I think we put that in a sentence there.

THE COURT: In --

MR. STEINBERG: In our response.

THE COURT: 12 page response, it was pretty buried if it was stated.

MR. STEINBERG: Yes. If you can bear with --

THE COURT: You mean [indiscernible] reliance on subject matter jurisdiction and due process. Where is the discussion of judicial or admissions or estoppels?

MR. STEINBERG: I think, well I think Your Honor on page 7, footnote 5, New GM may have inadvertently referred to the original language contained in section 2(b)(3)(b)(9) of the

sale agreement --

THE COURT: I see. All right.

MR. STEINBERG: -- and certain pleadings filed in the underlying lawsuit, the language contained in the first amendment with respect clearly governs this matter. Perhaps we didn't give it the attention that Your Honor wanted us to give the attention because we didn't think it mattered that much because at the end of the day --

THE COURT: It matters critically, Mr. Steinberg.

MR. STEINBERG: Well, Your Honor, this issue actually did come up in Deutsch. The first hearing that you had in Deutsch, people had cited actually to the wrong amendment, you actually had I think a second hearing on Deutsch where you analyzed what would be the governing position, and you actually in the Deutsch decision compared the language that was in the June 26th, 2009 agreement versus the first amendment and said no one has explained why the language changed, and therefore it could have been because it was duplicative or otherwise, but otherwise you were going to discount it. So this actual, you know, this actual problem actually took place before in the Deutsch case and Your Honor handled it that way by just looking at the actual agreement. And maybe that's the reason why we didn't give it as much attention in our brief that perhaps it warranted.

But I go back and I also wanted to just address the

issue that Your Honor said that you thought that we perhaps miss-cited the section in our own brief. If you were referring to page 2 of our brief, we were actually citing to the section that was in the retain liabilities portion of the sale agreement as compared to the assumed liabilities and that is the right quote of how it was written in the retained liabilities. So I think we got it right in our pleading.

But fundamentally what happened is that you had an improperly started lawsuit in violation of Your Honor's sale order. And we had deadlines in the state court because those things go forward. We sent the no stay letter to them, and in the meantime we had to try to remove this to the JPML and get it ultimately before Judge Furman (phonetic) in the MDL, and the statement that is being referred to here has no material difference as to whether we cite it to the first amendment or the second amendment, the June 26th agreement or the first amendment, because the central focus was that it had bankruptcy court jurisdiction and there was a basis for federal removal, it relates to the bankruptcy case. New GM was disclaiming liability and was saying that it should all be ultimately moved to the MDL where it gets stayed because they're handling [indiscernible] cases, and it's subject to Your Honor's order. We waited then for them to file their response to the no stay pleading and then Your Honor entered the judgment and that created a separate procedure for the same thing.

Once in the, so the answer that was filed was the answer that was filed in conjunction with something that was ultimately going to be removed and stayed and ultimately the answer should not have necessarily been required to be filed because this action never should have been brought in the first place. It was a violation of the Deutsch decision. There's no, there's no judicial admission of anything because there was no attempt to admit to an older agreement versus a new agreement.

And if Your Honor needs a declaration from someone to say that it was a mistake and answers could be amended all the time, and so therefore I don't think in the very early stages of an improperly led complaint you can say there's a judicial admission of anything. This would have been amended if this case would have gone forward, but this case never should have been brought in the first place.

And I think the estate representative is the husband who was taking care of the wife since the accident in 2005. So Your Honor had this issue in Deutsch, unfortunately local counsel made a mistake in responding where the goal was just to get this to the MDL where it would be stayed while we simultaneously would be dealing with this in the bankruptcy court to say that it was subject to Your Honor's order. There's no difference as to whether we cited the first amendment or the June 26th amendment for purposes of the over-

reaching point, that this was an improperly started lawsuit, that this was, that there was federal jurisdiction based on the bankruptcy court on this, and that this matter should be ultimately removed to the federal court and then to the JPML.

Your Honor's decision in Deutsch also said that if you even relied on the old amendment that it wasn't sure whether there was any difference. And if you look at their brief when they decide, when they're focusing on the word occurrence --

THE COURT: I read Deutsch this morning again, I did not see in there but you can refresh my recollection if I'm mistaken any suggestion that if the words occurrence had appeared and the words first occurring had not appeared, that I had then ruled, assuming it wouldn't have been dictum, that the conclusion would be the same.

MR. STEINBERG: I don't think you said that. I think on page 5 of the Deutsch decision --

THE COURT: Give me a second please. Well I have it in the B.R. form, is it in the discussion or where?

MR. STEINBERG: It is in the discussion, it is after the heavily blocked quote, and it starts with the paragraph, but while incidents may be deemed to be somewhat ambiguous.

THE COURT: Right. I'm with you now. Basically I said is I didn't have an evidentiary basis for concluding, making conclusions as to the reasons for the change.

MR. STEINBERG: But the reason why this was even in your decision was because there was the same mistake that was made before, people were referring to the June 26th amendment in an earlier hearing and Your Honor was struggling with would it have made a difference, why was the change being made. If people had cited to it properly the first time even in Deutsch, you never would have had to deal with this discussion, because the operative agreement is what controls. And that is really you know we didn't say it in lots of words, sometimes you get criticized for being verbose, here we basically said there is one agreement, that is the agreement that is controlling, that is what Your Honor has to apply in this case.

No matter what we said, we could say that the sky is orange, but the sky is blue, that's what you have to recognize. Here, there was no attempt to change a different agreement with respect to a plaintiff who improperly started a lawsuit based on an accident that took place ten years ago. The rest of the arguments, I think, Your Honor, I think if, once you find that there are prepetition non-ignition switch plaintiff, then the rest flows from the judgment on the due process arguments and the Court's jurisdiction argument. And so I think really we're left to, and I think Your Honor has already said that you believe that Deutsch is applicable or not for this particular issue where a local counsel had improperly cited to a June 26th, but it wasn't to take any advantage, no court has ruled

on this matter. The JPML hasn't even ruled on the removal action.

And frankly again, and I'll conclude with this, and I know I've said it a number of times, it all starts with the fundamental notion that this was an improperly brought lawsuit. And to say that someone in an answer said something on a lawsuit that never should have been brought which was a violation of an injunction I don't think they should be able to bootstrap that type of argument. Thank you.

THE COURT: Mr. Babcock.

MR. BABCOCK: New GM filed a 58 page answer, a very detailed, they went through quotes, it's a very detailed answer. To suggest that what they say in this very detailed answer should be disregarded by this Court flies in the face of what the purpose of an answer is which is either make denials or make admissions. They could have just said denied, isn't true, denied, isn't true. But they instead they made the decision to make admissions. They have not, as Your Honor, as you pointed out when you, during opposing counsel's -- they have not cited any authority that says they are excused from the consequences of what they did, and I mean what the lawyers in that case did.

Your Honor, unless Your Honor has any questions for us, we'd --

THE COURT: Have everybody sit in place for a minute.

Gentleman, ladies and gentlemen, I'm ruling that the Pillars action can proceed against the New GM and that New GM will have the duty and of course the right to defend it on the merits without expressing [indiscernible] merits in the filing of my findings of fact, conclusions of law, and bases for the exercise of my discretion in connection of this decision, although I don't think I'm really relying on my discretion in any way on this.

At the outset of oral argument, I recognized, as we all had to recognize, my Deutsch decision, which if it had been decided in a vacuum, this controversy had been decided in a vacuum based upon the proper language of the sale agreement, would have resulted in a victory for New GM. But the fact that had the potential ability to change the applicability of the Deutsch decision was the language under which New GM's assumption of its liabilities would rest.

In Deutsch, as we all know, the key language was "accidents or incidents first occurring." And the underlying principal of that was that each word had to be given individual meaning, although they could overlap. It is not disputed that a local counsel through GM said in two separate submissions, first in a notice of removal and then also in an answer, perhaps I'm flip-flopping their chronological order, but in two separate documents, that New GM had assumed liabilities for "accidents, incidents or other occurrences, and did not rely on

the words first occurring or mention the words first occurring. As I discussed in the Deutsch opinion, first occurring had significance as well. As I indicated at the outset of oral argument, this is not a judicial estoppel, the requirements for judicial estoppel of reliance by the tribunal is missing. Nevertheless, as Mr. Babcock properly pointed out, it is a judicial admission, which is similar in some respects, but different in others. It is not for instance a statement in a brief. It's a statement in the answer, which has significance. Answers have to be taken seriously. Although it is true that answers can thereafter be amended, unless and until they have been, they stand. Judges need to have the ability to rely on answers because answers take issues off the table.

So then we get to the issue as to whether what GM's counsel, which is obviously an agent, [indiscernible] should be regarded because the litigation shouldn't have been brought in the first place. Well, lots of litigations were brought in what we now know to have been violation of my earlier order. And when I had become aware of that, I have stopped them, I have stopped them by stays. And it's for that reason that this litigation is stayed. But it was one thing to say that this action should be stayed, then later dismissed, and quite a different way to say never mind, [indiscernible] vis-a-vis everything that happened in the first place.

I have not ruled to that effect in any of the 22

decisions that previously issued in connection with the GM case, and I am not of the mind to do that now. Obviously GM has the ability to ensure that its counsel do their jobs and it's not too much to hold GM for the consequences of what its counsel who is plainly an agent did. So having admitted that New GM is liable for accidents, incidents or other occurrences I think have to parse those words. Under the principals of Deutsch each word is to be given meaning. Accidents refers to wrecks, we all know what an accident is. Incidents are, applies to something that can include wrecks but can also include other things. And as I ruled in Deutsch in of the Pillars actions, repeating or characterizing my ruling in Deutsch, that covers things like explosions, fires, car running off the road and the like. Occurrences can overlap with that, but it can also have some other meaning. And in this instance, occurrences which as far as I'm aware has not and will not ever be the subject of another judicial construction in this case. But the principals of Deutsch should be construed as meaning something else, and the arguments made by Pillars' counsel in its brief that death from that is subject to coverage under that ambiguity. Of course, the construction of documents when they're ambiguous necessarily must go against the drafter.

So I'm going to allow this lawsuit to proceed, and I'm going to state a couple of things for the avoidance of doubt, although they should be obvious. One is I reiterate for

*See 513 B.R. at 472 & nn.16,17 (GM-Phaneuf).

the 900th time that I have subject matter jurisdiction over this dispute. As is apparent from everything that I've said, this applies only to this particular judicial admission in this particular wrongful death case, and has no bearing on anything that I ruled on April 15th or on the Gary Gutler (phonetic) matters [indiscernible]. It does however, mean that New GM has to defend this wrongful death case. And if it doesn't like defending wrongful death cases when its local counsel admit things that maybe they shouldn't have been admitted to, it should supervise its counsel more carefully.

That summarizes my rulings. If New GM really wants to appeal this, I reserve the right to issue a written opinion. But as you all well know, I've got so many things beyond that to deal with in GM (and for that matter other cases on my watch), that I'm not going to write on this unless I need to.

Mr. Babcock, you or your co-counsel can settle an order in accordance with this ruling. Not by way of reargument, are there any questions?

MR. STEINBERG: Your Honor, will we have, can we have the opportunity to make a submission, and I don't know whether this is true or not, I would need to verify that at the time to answer or amend, we had a right to amend the answer, that this is not a judicial admission to give further briefing.

THE COURT: There was plenty of time to focus on these issues before today. That's my ruling.

MR. STEINBERG: All right.

THE COURT: Mr. Steinberg, I have a zillion things on my watch and I have to rely on lawyers dealing with issues in a timely way. We can't have do-overs after I've ruled. I had the same issue with a motion for reargument now which is in substance a do-over after I've ruled, I'm not going to invite even more stuff of that character. Anything else?

MR. BABCOCK: Your Honor, I'm not familiar with how the Court handles its orders.

THE COURT: Do you want to stand please? I take it in most of the courts you would stand when you're talking to a Judge?

MR. BABCOCK: I'm sorry, Your Honor, I wasn't being disrespectful. Okay, at this point, the lawyers, would GM be submitting a proposed order? Is that, do I understand what your instruction was or do you want me to prepare an order?

THE COURT: I said you are to settle an order. We have local court rules in this Court to deal with the settlement of orders.

MR. BABCOCK: Okay, Your Honor.

THE COURT: Okay. Anything else? Have a good day. We're adjourned.

MR. WEISFELNER: Your Honor, I apologize. This is a procedural housekeeping issue. And let me see if I can't state succinctly what the issue is.

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United States District Court, N.D. New York.

NIAGARA MOHAWK POWER CORPORATION; Long Island Lighting Company; New York State Electric & Gas Corporation; Rochester Gas and Electric Corporation; and Central Hudson Gas & Electric Corporation, Plaintiffs,

v.

STONE & WEBSTER ENGINEERING CORPORATION, ITT Fluid Products Corporation, and ITT Fluid Technology Corporation, Defendants.

No. 88–CV–819. | May 23, 1992.

Attorneys and Law Firms

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MEMORANDUM–DECISION AND ORDER

McCURN, Chief Judge.

*1 On April 30, 1991, the court heard oral argument with respect to the summary judgment motion by defendants, ITT Fluid Products Corporation and ITT Fluid Technology Corporation ("ITT" or "the ITT defendants"), and the cross-motion for summary judgment by plaintiffs. Due to the lengthy memoranda of law, volumes of exhibits and appendices, as well as the numerous legal issues (some quite complex) raised by those motions, the court reserved decision. Then, on January 3, 1992, the court heard oral argument on a second set of summary judgment motions by ITT.[1] As it did on April 30, 1991, and for the same reasons, the court reserved decision. The first set of motions focuses entirely on liability, whereas the second set of motions is framed both in terms of liability and damages. This memorandum-decision and order will address all of the outstanding motions.

INTRODUCTION

This lawsuit arises out of the construction of the Nine Mile Point 2 nuclear power plant ("NMP2" or "the project"). In 1988, plaintiffs, five New York utilities that own and operate NMP2[2], commenced the present lawsuit against defendant Stone and Webster Engineering Corporation ("SWEC"), the company which designed and engineered NMP2 and served as the project construction manager. Also named as defendants are ITT Fluid Corporation and ITT Fluid Technology, as successors to ITT Grinnell Industrial Piping, Inc., the company which actually had the contract with plaintiffs for the piping work on NMP2. In the spring of 1991, NiMo and SWEC entered into an undisclosed settlement agreement, leaving the ITT defendants as the only remaining defendants in this action.[3]

The amended complaint contains three causes of action against ITT: breach of contract; negligence; and gross negligence.[4] By NiMo's calculations, the alleged resulting damages total approximately $88 million.[5] Over the past three and one-half years, the parties have conducted exhaustive discovery; and it is the fruits of that discovery which, in large part, form the basis for these motions.

BACKGROUND

Basically, this controversy centers around the interpretation of four documents—the contract between NiMo and ITT for "Field Fabrication and Erection of Piping for Nine Mile Point Nuclear Station—Unit 2" ("contract P301C") and three Contract Changes thereto, Contract Changes 26, 32 and 34. In their various memoranda of law, the parties have detailed a great many facts, including extrinsic evidence, which they deem relevant to these motions. To simplify matters, in this section the court will limit its recitation of the facts to the provisions of those four documents which the parties maintain govern the outcome of the motions. Other relevant facts will be referred to subsequently as necessary to resolve the legal issues raised herein.

A. Contract P301C

The long and contentious relationship between NiMo and ITT began almost twenty years ago in August, 1974, when NiMo and ITT entered into contract P301C.[6] As originally negotiated, contract P301C was a "Cost Plus Fixed Fee Contract." Put simply, instead of being paid one "lump sum" for its work on the project, ITT was to be paid a fixed fee. ITT was also entitled to reimbursement for all costs it incurred in connection with the piping work. The ostensible reason for structuring the contract in that way was that as of 1974, a nuclear power plant of this size had not previously been designed, making it impossible to know with certainty at the time of contracting how much the piping would eventually cost.

*2 Not surprisingly, contract P301C is lengthy and extremely detailed. The court need not be concerned at this point, however, with the many nuances of that contract. In response to ITT's second motion for summary judgment on liability, two provisions of contract P301C are particularly relevant, at least in NiMo's view. The first such provision is the "Alterations and Amendments" clause, which states in relevant part:

No waiver of any provision of the Contract, and no consent to departure therefrom, by either party, shall be effective *unless in writing and signed by the waiving or consenting party, and no such waiver or consent shall extend beyond the particular case and purpose involved.*

Contract P301C, "Supplementary Conditions of Contract" at ¶ 16 (Plaintiffs' Exhs., Vol. I at 18 (emphasis added)). Although numerous contract changes were entered into between NiMo and ITT, as NiMo is quick to point out, that clause was never changed in any way or deleted from the original contract.

NiMo also relies upon article four of the contract's "Supplementary Conditions", the "Release of Claims" provision. That provision also was not altered in any way or deleted from contract P301C by any of the subsequent contract changes. Article four states in its entirety:

The Engineers, in its sole discretion, may withhold final approval of the work until the Contractor shall furnish to it an affidavit setting forth the extent to which final payment or settlement has been made of all bids and claims of whatever kind or nature in any manner arising out of the Contract, including full details as to any such bills and claims remaining unpaid or unsettled; and the Purchaser shall have the right to retain from any payment then due to the Contractor, so long as any of said bills or claims remain unpaid or unsettled and outstanding, a sum sufficient (or if insufficient, then all of any such payment due to the Contractor) in the opinion of the Engineers to provide for the payment of the same and the Purchaser may pay any such bills or claims pro tanto in full satisfaction and discharge of any like amount due to the Contractor. Prior to final payment and as a condition thereto the Contractor shall furnish a release, in form and substance satisfactory to the Engineers, of all claims of Contractor against the Purchaser and the Engineers arising under and by virtue of the Contract.

If any breach or breaches by the Contractor of any provision of the Contract shall occur at any time prior to the completion of the Contract and the acceptance of the work by the Purchaser, and any part of the amounts due or to become due to the Contractor hereunder (including payments for additional work) shall be unpaid to the Contractor, the Purchaser may retain therefrom a sum sufficient, in the opinion of the Engineers to indemnify the Purchaser against all damages which have resulted or may result from such breach or breaches, but, if no such amount shall be retained, or if the amount of such damages shall exceed the amount so retained, the Contractor shall pay to the Purchaser on demand the amount of such damages or such excess as the case may be.

*3 Contract P301C, "Supplementary Conditions of Contract" at ¶ 4 (Plaintiffs' Exhs., Vol. I at 13).

B. Contract Change 26

In 1976, ITT began to work on the project. As a result of numerous delays, the original Commercial Operation Date was extended four years from 1981 to 1986, thus requiring ITT to work on the project for five years longer than it had planned originally. Naturally, the delays also resulted in cost escalation. Based upon the increased amount of time it would be expected to work on the project, and the estimated cost increases, ITT requested a fee adjustment in June, 1980.

Following over a year of negotiations, on December 21, 1981, NiMo and ITT executed Contract Change 26. ITT vigorously contends that that Contract Change settled all claims existing as of December 21, 1981. One change included therein was the method by which ITT was to be

paid, which, at least in part, was a response to the New York Public Service Commission's suggestion that reimbursable contracts (such as contract P301C) be converted to a type of contract containing greater incentives and penalties. Contract Change 26 converted the original "Cost Plus Fixed Fee" contract to a "Cost Reimbursable Incentive Fee Contract." ITT's fee was ultimately increased to $10,390,000.00. As part of the incentive compensation, ITT agreed to put $2,000,000.00 of that fee into a pool which NiMo would then unilaterally award based upon certain performance criteria. NiMo contributed $1,000,000.00 to that fund. The remainder of ITT's $10,390,000.00 fee (or $8,390,000.00) was the "base" fee.

With respect to this base fee, Contract Change 26 specifically provided:

It is agreed that the total fee compensation to which Contractor [ITT] is entitled for all work performed and any and all things done pursuant to performance of this Contract through 7:59 am EST, December 21, 1981, is *Two Million, Four Hundred Forty Nine Thousand, Seven Hundred Forty Five Dollars ($2,449,745).*

Contract Change 26, Article VI at ¶ 2 (Plaintiffs' Exhs., Vol. I at 56) (emphasis in original)). Other changes incorporated in Contract Change 26 were a change in the completion date of the piping work to October 1, 1986, and an increase in the estimated cost of ITT's work from $49 million to $206 million.

Relevant also is the provision of Contract Change 26 requiring ITT to pay $135,000.00 to NiMo "in consideration of full and final settlement of charges levied against Contractor [ITT] for tool loss and alleged defective or deficient work occurring through 7:59 a.m. EST December 21, 1981...." Contract Change 26, Article VI at ¶ 5 ("the settlement clause") (Plaintiffs' Exhs., Vol. I at 56). Insofar as future disputes over liability for defective work were concerned, Contract Change 26 provided that ITT would be reimbursed for all costs of rework:

If at any time before final completion and acceptance of the work, the Engineers shall certify to the Purchaser that any part of the work is found to be deficient or in any way fails to conform to the specifications, plans and drawings, then the Engineer is hereby expressly authorized and empowered to reject such defective or deficient work and to require the Contractor to redo and make good all such defective or deficient work at no cost to the Purchaser; *provided, however, that such defective work occurs as a result of gross negligence, willful misconduct or willful failure of Contractor's [ITT] supervisory employees to follow the directions of the Purchaser and/or Engineer.* If, however, the Contractor [ITT] is required to redo or make good deficient or defective work *for any other reason,* the Contractor [ITT] shall re-perform this work and will be reimbursed for costs incurred therefor, without additional fee.

*4 Contract Change 26, Article XVI at ¶ 3(10) (emphasis added) (Plaintiffs' Exhs., Vol. I at 76–77)). ITT's second summary judgment motion on liability is premised upon this apparent limitation of liability.

Finally, in conjunction with Contract Change 26, ITT executed an "Intermediate Corporation Release," which provided in relevant part:

[I]TT ..., for good and valuable consideration, as determined through negotiations stipulated in Change Order No 26 to Contract No. PC–NMP2–P301C and all amendments thereto, agrees that, except for amounts retained under Contract No. PC–NMP2–P301C through 7:59 EST A.M., December 21, 1981, in the total amount of $190,432, *said Change represents full and final settlement of any and all costs, claims, and outstanding changes and charges whether or not recognized, claimed and purported, incurred from contract inception through 7:59 EST, A.M., December 21, 1981.*

ITT's Appendix, Vol. II at 268 (emphasis added). No reciprocal release was ever executed by NiMo. Indeed, ITT's efforts to obtain a mutual release in connection with this Contract Change were rebuffed by NiMo. According to NiMo's Manager of Contract Administration at the time, NiMo informed ITT that it would not execute a mutual release because it had a policy of not granting such releases to contractors. Affidavit of James T. Niezabytowski (February 21, 1991) at ¶ 5 (Plaintiffs' Exhs., Vol. II thereto at 248). Furthermore, NiMo's Manager of Contract Administration did not think a mutual release was justified because the only claim being settled was ITT's fee claim against NiMo and not any outstanding claims which NiMo might have had against ITT. *Id.*

C. Contract Change 32

Out of a growing concern over the "major change in scope in terms of size and speed" on the project, in approximately March, 1984, ITT began asserting that it was entitled to an

increase in compensation. ITT's Appendix, Vol. III at 614. At the same time, ITT also expressed concern over various "backcharges" NiMo apparently unilaterally deducted from ITT invoices. More than one year later, on May 28, 1985, NiMo and ITT executed Contract Change 32.

From ITT's standpoint, by acquiescing in that Contract Change, it relinquished a claim for $9.6 million—the fee to which ITT believed it was entitled as of March, 1985. In exchange for relinquishing that fee, according to ITT, it received the following. First, contract P301C was changed from a "base fee" contract to a $14.6 million dollar "fixed fee," representing ITT's total entitlement on a base cost of $309,450,000.00. *See* Contract Change 32 at ¶ IV(1) (ITT's Appendix, Vol. III at 783). Notably, that fee was "not subject to adjustment for any reason," except as specifically provided by Contract Change 32. *Id.* at ¶ III (ITT's Appendix, Vol. III at 782). Second, Contract Change 32 provided, that "the total value of all fees earned ... through April 12, 1985, which amount reflects consideration for the value of the work accomplished ... is agreed and established at ... $12,207,704.36." *Id.* at ¶ IV(2)(a) (ITT's Appendix, Vol. III at 783). With respect to ITT's fee, that Change also explicitly stated that the "remaining amount of fixed fee payable to the Contractor [ITT] is ... agreed and established at ... $2,392,295.64." *Id.* at ¶ IV(2)(b) (ITT's Appendix, Vol. III at 783). The penultimate paragraph of Contract Change 32 clearly stated:

*5 The compensation stipulated for performance of this change represents *total and complete compensation for such performance including costs associated with the impact, if any, on the unchanged work.*

Id. at 7 (emphasis added) (ITT's Appendix, Vol. III at 788).

As it did with Contract Change 26, as part of Contract Change 32, ITT executed an "Intermediate Corporation Release" which stated:

[I]TT ..., for good and valuable consideration, as determined through negotiations stipulated in Change Order No. 32 to Contract No. NMP2–PC–P301C and all amendments thereto, agrees that *said Change Order represents full and final settlement of any and all extra costs, claims, and outstanding changes and charges whether or not recognized, claimed or purported, incurred from contract inception through May 8, 1985.* In consideration of Change Order No. 32, this release hereby remises, releases and forever discharges Niagara Mohawk Power Corporation and Stone & Webster Engineering Corporation, Agent, from all claims, demands and rights thereto arising in connection with work performed or any contractual, statutory or common law basis pursuant to said Contract for Nine Mile Point Nuclear Power Station — ... through said date.

ITT's Appendix, Vol. III at 789 (emphasis added). Once again, no reciprocal release was executed by NiMo. From ITT's standpoint, the effect of this Contract Change was to settle all other claims (those not settled by Contract Change 26), including those set forth in the amended complaint.

D. Contract Change 34

Contract Change 34 was the final contract change to contract P301C. It established a final cost of $296,785,801.24 for all work performed by ITT under the contract; and it set the total fee at $14,600,000.00. Contract Change 34 at 1 (ITT's Appendix, Vol. III at 852). In comparison to contract P301C and Contract Changes 26 and 32, Contract Change 34 is a short document (only two pages), over which there was evidently little negotiation or dispute.

As with the prior contract changes, ITT executed a release to accompany Contract Change 34. That release, while varying some from those executed in connection with Contract Changes 26 and 32, still had the common feature of, at least by its terms, releasing only NiMo, and not ITT, from claims arising out of contract P310C. *See* "For Corporate Release" (ITT's Appendix, Vol. III at 854). Again, NiMo did not execute a reciprocal release.

ITT contends that summary judgment should be granted on its first motion based upon any one of four affirmative defenses: (1) accord and satisfaction; (2) estoppel; (3) release; and (4) waiver.[7] NiMo takes the position that summary judgment is appropriate, but in favor of plaintiffs, dismissing each of those affirmative defenses as a matter of law. Alternatively, NiMo declares that the record is replete with genuine issues of material fact, rendering entirely improper ITT's motion for summary judgment on the affirmative defenses.

DISCUSSION

*6 There is little upon which these parties agree. There is one small but important undisputed point, however, and that is the applicable law. In this diversity action New York law applies,

Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938); *PSI Metals, Inc. v. Firemen's Ins. Co.*, 839 F.2d 42, 43–44 (2d Cir.1988); and the parties realize that. *Niagara Mohawk Power Corp. v. Stone & Webster Engineering Corp.*, 725 F.Supp. 656, 659 (N.D.N.Y.1989) ("*NiMo*"); *see also* Transcript of December 31, 1988 Hearing ("Tr. I") at 5. Moreover, any doubt here as to the applicability of New York law is removed by the parties' choice of law clause, unequivocally stating that contract P301C should "take effect and ... be construed in accordance with the laws of the State of New York." Contract P301C, Supplementary Conditions at 10, ¶ 22 (Plaintiffs' Exhs., Vol. I at 20). *See Bank of America Nat. Trust & Sav. Assn. v. Envases Venezolanos, S.A.*, 740 F.Supp. 260, 264–65 (S.D.N.Y.), *aff'd sub nom. without pub. opinion, First Nat'l Bank of Maryland v. Envases Venezolanos*, 923 F.2d 843 (2d Cir.1990).

There is one other minor point upon which the parties are now in agreement. In light of NiMo's concession that it is not seeking damages from ITT on account of "costs associated with investigative and corrective action taken in response to falsification of weld radiographic film committed by two ITT employees,"[8] NiMo does not appear to be contesting that part of ITT's motion seeking summary judgment on the enhanced radiograph claim. Thus, insofar as the amended complaint can be read as seeking damages based upon the radiograph falsification incident, summary judgment is granted in favor of ITT on such claim.

By now the legal standards for granting summary judgment in this Circuit are well settled and familiar to all. Some of those principles are worth repeating though, particularly as they relate to contract actions. Such a review is also useful where, as here, those principles have a tendency to become somewhat obscured by the necessarily zealous legal representation by counsel.

Summary judgment is an extraordinary remedy available only when it is clear that no genuine issue of material fact remains to be resolved at trial and that the movant is entitled to judgment as a matter of law. *See*Fed.R.Civ.P. 56(c). The initial burden of demonstrating the absence of a genuine issue of material fact is on the moving party. *Adickes v. S.H. Kress and Co.*, 398 U.S. 144, 157, 90 S.Ct. 1598, 1608, 26 L.Ed.2d 142 (1970). That burden may be discharged if the movant demonstrates to the court that there is an absence of evidence to support the non-moving party's case on which that party would have the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986). In deciding whether the moving party has met this burden, all ambiguities must be resolved against the movant. *Lopez v. S.B. Thomas, Inc.*, 831 F.2d 1184, 1187 (2d Cir.1987) (citing *United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S.Ct. 993, 994, 8 L.Ed.2d 176 (1962)).

*7 The burden then shifts to the non-moving party to come forward with "specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e). That burden is not met where the non-movant simply shows that there is some "metaphysical doubt as to the material facts." *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 1355–56, 89 L.Ed.2d 538 (1986). To avoid summary judgment then, enough evidence must favor the non-moving party's case such that a jury could return a verdict in its favor. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2509, 91 L.Ed.2d 202 (1986) (interpreting the "genuineness" requirement).

In *Seiden Associates, Inc. v. ANC Holdings, Inc.*, No. 91–7770 (2d Cir. March 23, 1992), the Second Circuit just recently reiterated several well known rules of contract construction, and the effect of such rules upon a summary judgment motion:

In reviewing a written contract, a trial court's primary objective is to give effect to the intent of the parties as revealed by the language they chose to use.... When the question is a contract's proper construction, summary judgment may be granted when its words convey a definite and precise meaning absent any ambiguity..... Where the language used is susceptible to differing interpretations, each of which may be said to be as reasonable as another, and there is relevant extrinsic evidence of the parties' actual intent, the meaning of the words become an issue of fact and summary judgment is inappropriate, ..., since it is only when there is no genuine issue as to any material fact that the moving party is entitled to judgment as a matter of law.....

Id., slip op. at 2452–53 (citations omitted).[9] Stated more succinctly, the Second Circuit has held that where the issue to be decided concerns the parties' interpretation of a contract, " 'summary judgment is perforce improper unless the terms of the agreement are '*wholly unambiguous*, ' and no material facts are in dispute." *Leberman v. John Blair & Co.*, 880 F.2d 1555, 1559 (2d Cir.1989) (emphasis added) (citing *Wards Co. v. Stamford Ridgeway Associates*, 761 F.2d 117, 120 (2d Cir.1985) (quoting in turn *Heyman v. Commerce & Industry Insurance Co.*, 524 F.2d 1317, 1320 (2d Cir.1975)).[10]

Therefore, "where one party opposes summary judgment by propounding a reasonable interpretation of a disputed matter, it may be sufficient to defeat the motion." *Schering*, 712 F.2d at 10. Finally, if there is conflicting evidence regarding the parties' intent, the court may only identify the issues at the summary judgment stage, not resolve them. *Id.* at 9–10.

To prevail on a motion for summary judgment on a breach of contract cause of action, a movant faces difficult although not insurmountable hurdles. Nonetheless, the summary judgment mechanism is a valuable litigation tool, and not a "disfavored procedural shortcut,...." *Celotex*, 477 U.S. at 327, 106 S.Ct. at 2555. As the Supreme Court reminded lower courts in *Celotex*:

*8 Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis.

Id. Consistent with that view of Rule 56, in a case decided prior to *Celotex*, the Second Circuit cautioned district courts that "[j]ustice requires careful consideration of the entire posture of the case so the 'drastic device' of summary judgment, .., is not precipitously imposed." *Schering*, 712 F.2d at 6 (quoting *Heyman*, 524 F.2d at 1320). To avoid "precipitously" granting summary judgment, the court has reviewed the seemingly endless record on these motions, and has carefully considered the parties' extensive memoranda of law, all the while keeping in mind the foregoing standards governing summary judgment.

I. BREACH of CONTRACT

A. Accord and Satisfaction

The first affirmative defense offered by ITT as a possible basis for summary judgment is that of accord and satisfaction. The Second Circuit has defined that defense as follows:

Accord and satisfaction is a legal rule of repose. Available as a defense in appropriate circumstances, its policy is to bar further litigation if the parties agreed to satisfy all existing claims by means of a substituted performance.

Geisco, Inc. v. Honeywell, Inc., 682 F.2d 54, 57 (2nd Cir.1982). The Court in *Geisco* then outlined and discussed the elements of accord and satisfaction:

To establish the defense, 'the Court must find (i) the parties agreed that the transactions in question were to constitute an accord and satisfaction, and (ii) the performance rendered by defendant was sufficient consideration for a discharge.' ...The requisite agreement is not foreclosed by the plaintiff's unexpressed, subjective understanding; agreement *in law* arises if 'what was done by the defendant ..; made it unreasonable for plaintiff not to understand" that defendant's performance 'was offered to him as full satisfaction of any claim he might have' against defendant ... As to the sufficiency of the consideration, an accord and satisfaction is supported if 'the payments tendered by the (defendant) were in excess of any amount *then owing* to plaintiff,'... Where these factors appear, plaintiff may not accept the defendant's substituted performance and then sue on his original claims.

Id. at 57 (citations omitted) (emphasis in original). In other words, "[i]n appropriate instances, the acceptance by one party of benefits offered in settlement by the other will give rise to an inference that the differences have been settled by the proffered agreement." *Pepper's Steel & Alloys, Inc. v. Lissner Minerals & Metals, Inc.*, 494 F.Supp. 487, 496–97 (S.D.N.Y.1979) (citation omitted). Determining whether there was a meeting of the minds necessary to create an accord "requires the court to examine the circumstances surrounding the putative contract, including the parties' expressions of intent." *Id.* at 497 (citations omitted). It thus stands to reason that, as ITT admits, [11] "[w]hether there is an accord and satisfaction ordinarily involves a pure question of intention, which is, as a rule, a question of fact." *Moers v. Moers*, 229 N.Y. 294, 300 (1920) (citation omitted). Of course, "[i]f the evidence directly or through reasonable inference creates no conflict concerning the intention it is a question of law." *Id.*

*9 ITT claims that the evidence is not in conflict here, and so the court can find as a matter of law that the parties intended Contract Changes 26 and 32 to be "settlements;" and as such, those Contract Changes constitute an accord and satisfaction which operates to bar NiMo's pending claims against ITT. Even though the conventional wisdom is that summary judgment is seldom appropriate on an intent issue, ITT strongly urges that summary judgment be granted in its favor on this defense. Regardless of the inherently factual nature of an intent inquiry, ITT argues that it had reason to believe that Contract Changes 26 and 32 worked an accord

and satisfaction of NiMo's pending claims because "[t]he language of the Contract Changes and the undisputed facts concerning the circumstances of their negotiation would have led any reasonable person to understand that a settlement of *both* parties' claims had been reached." ITT's Memorandum at 48 (emphasis in original). NiMo responds that those contract changes were merely "modifications" of the parties' ongoing contractual relationship,...." Plaintiffs' Memorandum at 59. According to NiMo, the purpose of those Contract Changes was to "change payment terms for future performance, *not* to discharge ITT from liability for all past substandard performance." *Id.* (emphasis added).

Whether, as ITT contends, there was a complete accord and satisfaction by Contract Changes 26 and 32, or, whether, as NiMo contends, those Contract Changes were simply modifications cannot be decided as a matter of law on these motions. Obviously, to ascertain whether the parties reached an accord necessitates an inquiry into the parties' intent. To discern the parties' intent, the court must first look to Contract Changes 26 and 32.

At first glance it appears, as NiMo maintains, that those documents are unambiguous. Closer examination reveals, however, that when read as a whole, Contract Changes 26 and 32 are susceptible of at least two fairly reasonable meanings, insofar as whether the parties intended to effect an accord and satisfaction by executing those documents and accompanying releases. In particular, when the settlement clause of Contract Change 26 is read in conjunction with the release accompanying that Change, and with the provision setting ITT's fee at $2,449,745.00, it is reasonable to infer that ITT thought it had at least settled some, if not all, of the claims which are the subject of this litigation. That is the meaning which ITT attributes to Contract Change 26. It is equally plausible, however, to read Contract Changes 26 and 32, as does NiMo, as a very limited release, having little, if any, bearing on the claims herein. That interpretation is supported by the settlement clause of Contract Change 26.[12] Therefore, the court cannot say that the relevant documents are wholly unambiguous on the issue of accord and satisfaction. Consequently, because the parties' intent as to accord and satisfaction cannot readily be ascertained from the documentary evidence, extrinsic evidence should be considered.

***10** Even a cursory examination of the extrinsic evidence offered on these motions readily shows that there is a conflict as to what the parties intended when they entered into Contract Changes 26 and 32. To illustrate, with respect to Contract Change 26, relying in large part upon the deposition testimony of two key players in the negotiations of that Contract Change (Louis Stoltenberg, SWEC's contract administrator, chief negotiator and draftsperson for Contract Change 26, and Lee Foster Henry, ITT's chief negotiator on Contract Change 26), ITT argues that Contract Change 26 settled all claims existing as of December, 1981. Messrs. Stoltenberg and Henry essentially so testified. *See* Deposition of Louis H. Stoltenberg (September 27, 1990) (ITT's Appendix, Vol. IV at 1158); Deposition of Lee Henry Foster (July 17, 1990) at 81–82 (ITT's Appendix, Vol. IV at 1016–17).

Not only does NiMo offer a widely varying interpretation of Contract Change 26 based on the language thereof, but it relies upon the deposition of James Niezabytowski, Manager of Contract Administration during the relevant time frame and one of the chief negotiators of Contract Change 26, whose testimony directly controverts that of Messrs. Stoltenberg and Henry. Mr. Niezabytowski testified that the settlement clause was limited; it was meant to confine the settlement to identified tool losses and formally processed back charges for defective or deficient work. Deposition Testimony of James T. Niezabytowski (July 12, 1990) at 228–32 (Plaintiffs' Exhs., Vol. III at 523–27). That testimony is corroborated by the affidavit of Dominick T. Scafidi, a Senior Contract Administrator for NiMo, who avers:

> The only performance deficiencies addressed in Contract Change 26 were those performance deficiencies previously identified by SWEC and formally processed as 'back charges.' Niagara Mohawk and ITT did reach an agreement on the total amount ITT was to pay with respect to these specific back charges.

Affidavit of Dominick T. Scafidi (February 20, 1991) at ¶ 10 (Plaintiffs' Exhs., Vol. II at 238).

The parties also offer divergent views as to what was intended by Contract Change 32. According to ITT, that claim settled all claims currently pending in this action, other than those already settled by Contract Change 26. ITT maintains that because in Contract Change 32 it agreed to a $14.6 million fixed fee "not subject to adjustment for any reason,"[13] "[p]ermitting Niagara Mohawk to pursue this claim would permit it to attempt to take back from Grinnell [ITT] the very consideration for which Grinnell [ITT] agreed to settle its fee claim." ITT's Memorandum at 53.

ITT portrays the events leading up to Contract Change 32 as a series of negotiations extending over nearly a year, due to the mutual dissatisfaction of both parties over their respective obligations under contract P301C. Calling ITT's view "grossly inaccurate," NiMo implies that ITT is conveniently overlooking the fact that during that same time, ITT was asserting "everescalating claims against the project." Plaintiffs' Memorandum at 41. Against that background, NiMo contends that any claims which it had against ITT were simply not part of the negotiations for Contract Change 32, explaining that "[t]he project decided *not* to perform an assessment of ITT's performance deficiencies at the time of Contract Change 32, because it would drain too many resources from the project and disrupt the work." Deposition of Gary C. Hoyt at 194–96, 210–11, and 367–69 (August 28 and 29, 1990) (Plaintiffs' Exhs., Vol. III at 575–77, 579–80, and 666–68).

***11** That conflicting evidence as to what was meant by Contract Changes 26 and 32 makes summary judgment "perforce improper" [14]. At this stage of the litigation, the court cannot hold as a matter of law that those Contract Changes constitute an accord and satisfaction. Nor can the court hold (as NiMo urges) that as a matter of law Contract Changes 26 and 32 do not constitute an accord and satisfaction. Moreover, even assuming *arguendo* that the court could somehow determine at this juncture that an accord and satisfaction had been reached, the scope of such an accord cannot be resolved as a matter of law. Thus, due to the existence of genuine issues of material fact as to whether the parties intended Contract Changes 26 and 32 to operate as an accord and satisfaction; and, if so, the scope of such accord, summary judgment must be denied on that defense—both as to ITT and as to NiMo.

B. Release

Another affirmative defense advanced by ITT is that of release, or, more appropriately, implied release. Specifically, ITT asserts that NiMo's "acceptance of a release [from ITT] without an express reservation of rights bars all claims inconsistent with the claims released by" ITT. [15] Based upon the express language of the alterations and amendments clause in P301C, [16] it is NiMo's position that any releases or waivers thereunder must be in writing and narrowly construed. Thus, NiMo asserts that because the only releases here were unilateral releases executed by ITT discharging NiMo, and not the other way around (that is, NiMo did not execute any reciprocal releases discharging ITT), those releases cannot operate as a bar to this action.

ITT's implied release argument is derived solely from law outside this jurisdiction. *See* ITT's Memorandum at 62–66. In reliance upon that case law, ITT asks this court to apply a legal presumption that because it executed a unilateral release in favor of NiMo, the court should find, as a matter of law, a reciprocal release in favor of ITT. The court will not invoke such a presumption. Indeed, to do so would be in direct contravention of New York law which requires "an 'explicit, unequivocal statement of a present promise to release defendant from liability.' " *Bank of America Nat. Trust & Sav. Asso. v. Gillaizeau,* 766 F.2d 709, 713 (2d Cir.1985) (quoting *Carpenter v. Machold,* 86 A.D.2d 727, 727, 447 N.Y.S.2d 46, 47 (3rd Dep't 1982)). [17] The court will not disregard that settled law and will adhere to the traditional rules governing releases, as articulated by New York courts.

Contract principles apply to the interpretation of releases. *Id.* at 715 (citations omitted). "The scope and meaning of a release will be determined by the manifested intent of the parties—in Corbin's words, 'by the process of interpretation, just as in the case of determining the meaning of an executory contract.' " *In re Thomson McKinnon Secur. Inc.,* 132 B.R. 9, 13 (Bankr.S.D.N.Y.1991) (quoting *Gordon v. Vincent Youmans, Inc.,* 358 F.2d 261, 263 (2d Cir.1965) (quoting in turn 5A Corbin on Contracts § 1238 at 560 (1964)). [18] An additional rule which is of particular significance here is that "[i]f ambiguities in the document prevent a firm conclusion that it is a release, additional evidence may be considered to resolve the issue." *Marvel Entertainment Group, Inc. v. Young Astronaut Council,* 747 F.Supp. 945, 948 (S.D.N.Y.1990) (citing *Gillaizeau,* 766 F.2d at 714). Thus, under those circumstances, "[w]hether a document is a release is a factual question and therefore extrinsic evidence and oral testimony may be considered." *Id.*

***12** Application of those rules to the present case mandates the conclusion that, as with the accord and satisfaction defense, there is a factual issue as to intent, rendering summary judgment wholly improper. Admittedly, when read in isolation, Contract Changes 26 and 32 appear to be clear and unambiguous. To effectuate a release thereunder, a writing is required and NiMo did not do that. When read together to give effect to each part, however, it is plausible to construe those documents as meaning that NiMo intended to release ITT from any liability for the claims which are

the subject of this suit, even in the absence of a document executed by NiMo expressly designated as a release.

For instance, the release ITT executed in connection with Contract Change 32 contains arguably broad language; it is not limited to particular claims or claims by only certain parties. *See supra,* p. 12 (particularly the highlighted language thereon). In addition, Contract Change 32 itself describes the release thereto as having been given "[i]n consideration of the agreements and understandings between the parties which form the complete basis of this Contract Change 32...." ITT's Appendix, Vol. III at 788. This apparent ambiguity prohibits the court from reaching a "firm conclusion"[19] that the parties intended Contract Changes 26 and 32 to operate as a release barring this lawsuit. Extrinsic evidence on this issue will thus be permitted. Moreover, the court cannot find as a matter of law (as would be necessary to grant ITT's motion) the requisite "explicit unequivocal statement of a present promise to release"[20] by NiMo. Thus, ITT's summary judgment motion on this defense must be denied. Likewise, the existence of a factual dispute as to intent also precludes summary judgment on NiMo's cross-motion.

C. Waiver

ITT makes two waiver arguments. The first is a general waiver argument that by agreeing to an "equitable fee arrangement"[21] in Contract Changes 26 and 32, NiMo waived any rights it may have had to pursue the pending claims against ITT in this action. ITT's second waiver argument is commonly referred to as waiver-by-acceptance and usually arises in the area of construction contracts. In particular, according to ITT, when NiMo executed Contract Change 34—the final Contract Change; accepted ITT's work without reservation or qualification; released all the retainage; paid all monies due ITT and requested and received ITT's release, NiMo accepted ITT's work. By that purported acceptance, ITT contends that NiMo waived the right to recover for patent, as opposed to latent, defects.[22]

ITT's perfunctory treatment of the general waiver argument makes it practically impossible for the court to respond in any meaningful way. *See* ITT's Memorandum at 68. So the court is forced to resort to the settled rule that because "[i]t is often not clear that a party has waived its legal right(s), the waiver issue frequently involves questions of fact, and cannot be decided on a summary judgment motion." *Topps Chewing Gum, Inc. v. Imperial Toy Corp.*, 686 F.Supp. 402, 408 (E.D.N.Y.1988) (citing *Alsens A.P.C. Works v. Degnon Cont. Co.*, 222 N.Y. 34, 37 (1917)), *aff'd without pub. opinion,* 895 F.2d 1410 (2d Cir.1989). Contrary to what ITT thinks, this is not a situation such as that presented in *Topps* where the court found a waiver as a matter of law. Unlike *Topps,* in the present case there is an "opportunity for a reasonable inference"[23] to be drawn that NiMo did not waive its right to sue. Thus, the court must return to a by now familiar refrain: the existence of a material issue of fact precludes granting summary judgment in favor of either party on a general waiver theory.

***13** ITT fares no better with its waiver-by-acceptance argument. Application of the waiver-by-acceptance doctrine to the present case is problematic for several reasons. The first is that courts have not applied that doctrine in the broad manner ITT implies. In *Philip Zweig & Sons, Inc. v. Tuscarora Constr. Co.,* 50 A.D.2d 1069, 376 N.Y.S.2d 761 (1975), for example, the court differentiated between waiver of the right to terminate a contract for breach, which may result due to acceptance of later performance, and the waiver of the right to recover damages caused by that breach. In so doing the court repeated the general proposition that, " 'Failure to enforce the right to terminate the contract promptly constitutes to that extent a waiver of the default, but we have repeatedly held that it constituted no waiver of the claim for damages.' " *Id.* at 1069, 376 N.Y.S.2d at 762–63 (quoting *General Supply & Constr. Co. v. Goelet,* 241 N.Y. 28, 36 (1925) and citing *Deeves & Son v. Manhattan Life Ins. Co.,* 195 N.Y. 324, 330 (1909)). *See also Parke v. Franco-American Trading Co.,* 120 N.Y. 51, 56–57 (1890) (holding, *inter alia,* that "defective performance [may] be waived, subject to the right of the party damnified to recover or recoup damages for the loss he has sustained by reason of it"). As a result, even if waiver-by-acceptance is appropriate here, such waiver is potentially more limited than ITT would have this court believe.

Application of the waiver-by-acceptance rule is also questionable because of an obvious factual distinction between the cases in which it has been discussed and this case. In those cases, the plaintiffs were seeking to recover for physically defective work,[24] not, as NiMo, for excessive costs incurred as a result of ITT's alleged failure to properly and efficiently manage the piping work at NMP2, and for its alleged failure to develop and monitor adequate quality assurance programs. *See* Plaintiffs' Memorandum at 67. Third, even assuming for the sake of argument that the waiver-by-acceptance doctrine should be invoked in the present case, it would be premature for the court to do so today

because the court cannot find as a matter of law an intent to waive by NiMo.

Competing inferences may be drawn from the present record on the waiver issue. NiMo reasons that the inference of waiver-by acceptance which ITT urges this court to find as a matter of law is impermissible in light of the "Release of Retainage" provision contained in Contract Change 26. That provision specifies, "Final payment, ..., shall not relieve the Contractor [ITT] from responsibility under the Contract and guarantee." Contract Change 26, Article XI(3) (Plaintiffs' Exhs., Vol. I at 67). ITT responds that that "language merely memorializes the rule that liability for latent defects survives final payment, ..." ITT's Memorandum at 73, n. 30. Any other interpretation of the release of retainage provision would, in the opinion of ITT, "lead to absurd results." *Id.* As NiMo mentions, however, that restrictive reading of the release of retainage provision "is at odds with the plain meaning of ... [that] provision." Plaintiffs' Memorandum at 68. Hence, another ambiguity.

***14** Moreover, the release of retainage provision does not, as NiMo states, "[d]ispose[ ] once and for all of any contention that final payment by NMPC could be construed to bar any claims that it might have against ITT for breach of the contract." Plaintiffs' Memorandum at 47–48. But, the existence of that provision is highly relevant to the parties' intent with respect to waiver—a factual issue, resolution of which must await trial. *Accord In re Family Showtime Theatres, Inc.*, 67 B.R. 542, 550 (Bankr.E.D.N.Y.1986)*aff'd*,72 B.R. 38 (Bankr.E.D.N.Y.), *aff'd without pub. opinion*,819 F.2d 1130 (2d Cir.1987) (citing *In re Delta Hotel of Syracuse*, 10 B.R. 585, 597 (Bankr.N.D.N.Y.1981)) ("Waiver is matter of intent which depends on the factual circumstances of each particular case."). In light of the foregoing, neither ITT nor NiMo is entitled to summary judgment insofar as waiver-by-acceptance is concerned.

D. Estoppel

Resorting to vague notions of fairness, ITT contends that NiMo should be equitably estopped from pursuing its claims in this lawsuit against ITT. More specifically ITT states, "Niagara Mohawk's settlement of Grinnell's [ITT's] fee claim and the 'taking of a release may be regarded as an express or implied admission' that any problems with Grinnell's [ITT's] performance were, as Grinnell [ITT] claimed, either the plaintiffs' [NiMo's] fault or caused by events beyond Grinnell's [ITT's] control." ITT's Memorandum at 67 (quoting *Lugena v. Hanna*, 420 S.W.2d 335, 341 (Mo.1967)). ITT argues, although not wholeheartedly, that "[s]uch an admission now estops the plaintiffs from claiming it was Grinnell's [ITT's] wrongful conduct which was responsible for its allegedly inefficient performance." *Id.* at 67–68. This estoppel argument, while somewhat novel, is not persuasive. At this point, the court will not find such a purported admission.

More important is that ITT has not met its burden of proof with respect to this defense. The New York Court of Appeals has explained that "[t]he doctrine of equitable estoppel 'is imposed by law in the interest of fairness to prevent the enforcement of rights which would work fraud or injustice upon the person against whom enforcement is sought and who, in justifiable reliance upon the opposing party's words or conduct has been misled into acting upon the belief that such enforcement would not be sought.' " *Walther v. Bank of New York*, 772 F.Supp. 754, 768 (S.D.N.Y.1991) (quoting *Nassau Trust Co. v. Montrose Concrete Products Corp.*, 56 N.Y.2d 175, 184, 451 N.Y.S.2d 663, 667 (1982)). ITT has pointed to no evidence of "misleading" words or conduct by NiMo. Thus, because ITT has not met its burden of proof as to the estoppel defense, summary judgment will not be granted in its favor on this issue. However, because NiMo did not expressly address estoppel in its cross-motion, summary judgment striking that defense will not be granted in NiMo's favor either. The parties should be aware, though, that the court has serious reservations, at least on the current state of the record, as to the viability of the estoppel defense.

E. Contractual Limitation for Gross Negligence

***15** ITT's second motion for summary judgment on liability, is grounded on § 10 of Contract Change 26. ITT claims that that provision limits its potential liability to acts of gross negligence or willful misconduct.[25] ITT further claims that the work for which NiMo is seeking recovery was not done in a grossly negligent manner, and thus summary judgment is warranted. NiMo counters that irrespective of the exclusion in § 10, article four of contract P301C's supplementary conditions gave NiMo the right to seek damages in the event of a breach, and nothing has happened subsequent to the execution of that contract altering or constraining that right in any way. Moreover, even if the gross negligence standard of article 10 applies here, NiMo argues that there are genuine issues of material fact precluding summary judgment.

Here again the issue is one of contract construction—what is meant by § 10 of Contract Change 26. Section 10 is susceptible of more than one fairly reasonable interpretation, neither of which " 'strain[s] the contract language beyond its reasonable and ordinary meaning." *Seiden Associates, supra,* slip op. at 2453 (quoting *Bethlehem Steel Co. v. Turner Constr. Co.*, 2 N.Y.2d 456, 459 (1957)). The first possible meaning is that ascribed to § 10 by ITT; that is that the parties intended that ITT "not be responsible for the cost of redoing or repairing defective or deficient work unless that work was caused by gross negligence or willful misconduct...." Memorandum (Liability Issues) in Support of the ITT Defendants' Second Motion for Summary Judgment ("ITT's Damages Memorandum") at 18. According to NiMo, such an interpretation would impermissibly render other contract provisions unreasonable or of no effect. *See* Plaintiffs' Memorandum Opposing ITT's Second Motion for Summary Judgment (Liability Issues) ("Plaintiffs' Liability Memorandum") at 31 (and discussion therein).

It is a close call, but after careful consideration of the memoranda of law, the applicable case law, the relevant portions of the record and the Transcript of the January 3, 1992 hearing ("Tr. II"), the court is left with the distinct impression that there is an ambiguity. Section 10 is sufficiently unclear to warrant consideration of parole evidence. And, at the risk of sounding repetitive, when the parole evidence is surveyed here, there is no doubt that genuine issues of material fact remain. There is a serious factual dispute as to what the parties intended by § 10 of Contract Change 26. NiMo's president during the relevant time frame testified as follows at his deposition:

Q. And the resolution [of the parties' dispute over Grinnell's liability for defective or deficient work] was that unless it was gross negligence, willful misconduct or failure to follow the engineer's specific instructions by a management person at ITT, then ITT couldn't be backcharged?

A. That is as you—what you just described is in this document that I just reviewed?

***16** Q. And your understanding?

A. Yes.

Deposition Testimony of William J. Donlon at 82 (June 19, 1991) (ITT's Appendix, Vol. VII at 1896). Mr. Donlon's testimony is compatible with that of Ronald Wagner, SWEC's construction manager who attended the negotiating sessions for Contract Change. Mr. Wagner emphatically testified: "Let me say for the record one more time, for errors in work of a normal event, human fallibility, without any semblance of any evidence that there was fraud or malintent, I thought those types of backcharges were frivolous." Deposition Testimony of Ronald Wagner at 677 (June 24, 1991) (ITT's Appendix, Vol. VII at 2129). Conversely, NiMo has come forth with documentary evidence, and deposition testimony tending to show that the purpose of article 10 was not to limit NiMo's right to seek damages from ITT in an action such as the present one. *See* Plaintiffs' Liability Memorandum at 8–14, and 33 (outlining relevant proof). On the basis of that contradictory evidence, the court must deny ITT's second motion for summary judgment to the extent that it is seeking dismissal premised on the theory that § 10 of Contract Change 26 is a bar to this action.

The parties are forewarned that even if it is ultimately decided that the gross negligence standard of § 10 applies, then, in all probability, there will be an additional factual determination for the jury—whether ITT's conduct was grossly negligent. *Food Pageant, Inc. v. Consolidated Edison Co.*, 54 N.Y.2d 167, 173, 445 N.Y.S.2d 60, 62 (1981) ("Where the inquiry is to the existence or nonexistence of gross negligence, ..., ... the question ... remains a matter for jury determination."). A critical part of that determination will be whether, as ITT has labeled it, NiMo's "aggregate" theory of gross negligence will suffice to establish gross negligence in the minds of the jury. Apparently NiMo is not claiming that any specific items or categories of work by ITT were grossly negligent, but rather that ITT's work on the project as a whole was grossly negligent. ITT strongly argues that NiMo should not be allowed to proceed on that theory because inherent in such theory is that ITT's conduct did not rise to the level of gross negligence. While the aggregate theory of gross negligence propounded by NiMo undoubtedly makes NiMo's burden of proof more difficult, that does not necessarily mean, as a matter of law, that NiMo cannot succeed on such theory. Providing the issue of gross negligence gets that far, it will be up to the jury to give such weight to NiMo's evidence on the issue of gross negligence as it deems appropriate.

What should be abundantly clear by now is that summary judgment is not proper insofar as liability is concerned (with the one inconsequential exception of the enhanced radiograph claim), because at the heart of each of ITT's defenses is the issue of intent—a factual issue in all but the most unusual of cases. That is not to say, however, that the court does not

find quite convincing ITT's version of events on these motions (as well might a jury). The court's task at this stage of the proceedings is not to resolve factual disputes, however, but only to identify them.[26] As set forth above, a number of triable issues exist as to the interpretation of Contract P301C and the relevant supplemental documents. Consequently, insofar as the first set of motions is concerned, ITT's motion for summary judgment on the enhanced radiograph claim is granted. ITT's motion is in all other respects denied. NiMo's cross-motion is denied in all respects as well.

II. Negligence Claim

***17** In addition to the contract based cause of action, NiMo is seeking to recover on negligence and gross negligence theories. ITT is also moving for summary judgment on both of those claims. NiMo's tort claims are not completely unfamiliar to this court. In *NiMoI, supra,* 725 F.Supp. 656, this court considered those claims in the context of ITT's motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6). At that time, NiMo proffered two separate theories of tort liability. NiMo first maintained that it should be able to recover against ITT on a claim of negligent performance of a contract. Secondly, NiMo asserted that ITT could be liable in tort because of a special relationship of trust and confidence which arose out of, among other things, NiMo's long standing contractual relationship with ITT.

For a number of reasons, the court did not agree with NiMo that New York always recognizes a cause of action for negligent performance of services under a contract. *Id.* at 661–66. The court therefore dismissed NiMo's tort claims to the extent that they were based upon such legal theory, concluding "the mere fact that the alleged breach involved a contract that encompassed the performance of services does not suffice as special additional allegations of wrongdoing which amount to 'a breach of a duty distinct from, or in addition to, the breach of a contract.' " *Id.* at 666 (quoting *North Shore Bottling Co., Inc. v. C. Schmidt and Sons, Inc.,* 22 N.Y.2d 171, 179, 292 N.Y.S.2d 86, 92 (1968)).

NiMo's tort claims were allowed to stand, however, insofar as they were premised upon the second theory of liability—the existence of a special relationship of trust and confidence. *Id.* at 668–69. Specifically, the court found that the allegations pertaining to the long-standing contractual relationship between NiMo and ITT, as well as other allegations, could, if ultimately proven, perhaps support an independent tort duty of care. *Id.* The court reminded the NiMo, though, that to establish an independent duty of care based on tort law, they would have a "heavy burden." *Id.* at 669.

Before considering NiMo's second theory of tort liability, which is before the court again on these (ITT's second motion for summary judgment) motions, the court is obliged to discuss a Second Circuit case, decided just four days after *NiMoI.* In *William Wrigley Jr. Co. v. Waters,* 890 F.2d 594 (2d Cir.1989), the Second Circuit reaffirmed its view that "[i]t is well settled under New York law that negligent performance of a contract *may* give rise to a claim sounding in tort as well as one for breach of contract,...." *Id.* at 602 (citations omitted) (emphasis added). Although at first glance that statement appears to be at odds with *NiMoI* (rejecting NiMo's negligent performance of a contract claim), closer scrutiny of *Wrigley* demonstrates that it and *NiMoI* are factually distinguishable in two significant respects. As will be more fully explained herein, *NiMo* and *Wrigley* differ in terms of the basis asserted for the independent tort duty of care, and with respect to the nature of the damages sought.

***18** The uncontradicted proof at trial in *Wrigley* demonstrated that defendants held themselves out as experts in trademark law; and in that capacity, they undertook to protect approximately 3,500 trademarks held worldwide by Wrigley, the well-known vendor of candy and chewing gum. For a number of years, defendants were responsible for renewing Wrigley's numerous trademark registrations. Then, for economic reasons, Wrigley decided to discontinue hiring outside trademark agents, and instead decided to manage its trademarks inhouse. The inhouse trademark agent hired by Wrigley to replace defendants soon discovered that defendants had been extremely derelict in to renewing Wrigley's trademarks. Many trademarks had lapsed, for example, and others, which were about to lapse, were only salvaged because of the frantic and costly last minute efforts of Wrigley's then newly hired inhouse trademark agent. As a result, Wrigley incurred substantial damages, which it characterized as "clean-up" costs. Essentially those damages were the expenses Wrigley incurred in getting the trademark aspect of its business back in order.

Following a non-jury trial, the district court found that defendants were liable to Wrigley for both negligent performance of a contract and for breach of contract. The damages awarded included a sum for clean-up costs. On appeal, although a portion of the judgment was reversed, those particular aspects of the judgment were undisturbed. *See id.* at 604.

Emphasizing, as did the district court, that defendants had held themselves out as experts in trademark law, the Second Circuit agreed that defendants were liable for negligent performance of a contract because they breached a duty of care which arose out of their expertise. *Id.* at 602; *see also William Wrigley Jr. Co. v. Waters,* 1987 WL 123988, 1987 U.S. Dist. LEXIS 13663 at *10–*11 (S.D.N.Y. December 16, 1987). As experts, the Second Circuit held defendants to a duty of care and "caution proper to [their] calling.' " *Id.* (quoting *Ultrameres Corp. v. Touche, Niven & Co.,* 255 N.Y. 170, 179, (1931) (other citations omitted)). Referring to the defendants as "specialized service personnel," the *Wrigley* Court found persuasive "[t]he uncontradicted testimony establish[ing] that the trademark registration renewal business necessitates precision, careful attention and strict adherence to the legal requirements of numerous foreign jurisdictions." *Id.* The Court further explained:

Running afoul of such standards means risking a defective or untimely registration which translates into potentially disastrous consequences. Thus, there is an obligation on behalf of experts such as defendants to maintain files that are scrupulously accurate, up to date and complete.

Id. at 602–03.

In contrast, in the present case, NiMo did not expressly allege that ITT owed an independent duty of care to it based upon some expertise held by ITT. NiMo's tort claims now, as they were at the time of *NiMoI,* are couched strictly in terms of ordinary negligence and gross negligence, with no specific mention in the amended complaint as to a duty of care arising out of ITT's expertise. NiMo seeks only to hold ITT liable for falling "below the standard of care exercised by piping contractors" generally. *See* Amended Complaint at ¶¶ 154 and 157. Now, well into this litigation and nearly two years after the filing of the amended complaint, NiMo seems to be implying that ITT should be considered an expert in the area of nuclear power plant construction (specifically with respect to the piping therein), based primarily upon ITT's status as a holder of the "N stamp."[27] Initially that was not the stated basis for the negligent performance of a contract claim, and thus not expressly considered by the court in *NiMoI.* Furthermore, NiMo did not, and has not, explicitly asserted that an extra-contractual duty of care arose based upon the purported expertise of ITT.

***19** The other notable factual distinction between *NiMoI* and *Wrigley* is that in the latter, the damages awarded, particularly those for clean-up costs, were not contemplated under the contract. To illustrate, Wrigely was allowed to recover as part of its damages, under a negligence theory, costs incurred in connection with organizing all of the case files for which defendants were responsible. *Wrigley,* 890 F.2d at 604, n. 4. Whereas in this case, NiMo is seeking damages in its negligence causes of action which were contemplated under the contract, as is evidenced by the fact that those damages are identical to the damages sought in the breach of contract action. Indeed, in the amended complaint NiMo includes a separate subsection entitled damages, amended complaint at ¶ 135; and then incorporates that paragraph by reference in all three causes of action relating to ITT. *See id.* at ¶¶ 150, 153 and 156.

Interestingly, none of the parties moved for reconsideration of *NiMoI* based upon *Wrigley* or, for that matter, upon any other ground. However, because *Wrigley* was decided after *NiMoI,* and because arguably *Wrigley* mandates a different result than that reached in *NiMoI,* the court is compelled to examine the law of the case doctrine and its possible bearing on the present litigation.[28] The Second Circuit in *In Re PCH Associates,* 949 F.2d 585 (2d Cir.1991), explained that "[u]nder the law of the case doctrine, a decision on an issue of law made at one stage of a case becomes binding precedent to be followed in subsequent stages of the same litigation." *Id.* at 592 (citing 1B J. Moore, J. Lucas, & T. Currier, *Moore's Federal Practice* ¶ 0.404[1], at 117 (1991)). This doctrine is discretionary, however, and generally "does not limit a court's power to reconsider its own decisions prior to final judgment."[29] *Virgin Atlantic Airways, Ltd. v. Nat'l. Mediation Bd.,* 956 F.2d 1245, 1255 (2d Cir.1992) (citations omitted).

There are three well recognized circumstances which may justify a court in departing from the law of the case. Those circumstances are "[1] an intervening change in controlling law, [2] the availability of new evidence, or [3] the need to correct a clear error or to prevent manifest injustice." *Id.* (citing 18 C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* § 4478 at 790). With respect to the first circumstance, it is not enough that the party seeking reconsideration could now make a "more persuasive" argument based upon intervening law. *Fogel v. Chestnutt,* 668 F.2d 100, 109 (2d Cir.1981), *cert. denied.*459 U.S. 828, 103 S.Ct. 65, 74 L.Ed.2d 66 (1982). Rather, "The law of the case will be disregarded only when the court has 'a

clear conviction of error' with respect to a point of law on which its previous decision was predicated,...." *Id.*(quoting *Zdanok v. Glidden,* 327 F.2d 944, 953 (2d Cir.1964) (citing in turn *Johnson v. Cadillac Motor Car Co.,* 241 F.2d 878, 886 (2d Cir.1919)). This court has held that to warrant a change in a prior decision based upon a change in the law, the change " 'must truly be significant and controlling.' " *Wilson v. Great American Industries, Inc.,* 770 F.Supp. 85, 89 (N.D.N.Y.1991) (McCurn, C.J.) (quoting *Sango v. City of New York,* 1989 WESTLAW 86995 (E.D.N.Y.1989) (citing in turn *Fogel,* 668 F.2d at 109)). The Second Circuit has stressed that "mere doubt" on the part of the court is insufficient to open the point for full reconsideration. *Fogel,* 668 F.2d at 109 (quoting *White v. Higgins,* 116 F.2d 312, 317 (1st Cir.1940)).

***20** Courts ordinarily have not defined precisely what constitutes clearly erroneous or manifest injustice for reconsideration purposes. At least one court has held though that reconsideration is not warranted unless the prior decision is "dead wrong." *Parts & Electric Motors, Inc. v. Sterling Electric, Inc.,* 866 F.2d 228, 233 (7th Cir.1988), *cert. denied,*493 U.S. 847, 110 S.Ct. 141, 107 L.Ed.2d 100 (1989).[30] Finally, regardless of what the basis for reconsideration is, while acknowledging a court's power to revisit its own decision, the Supreme Court has cautioned that "as a rule courts should be loathe to do so in the absence of *extraordinary circumstances* ...." *Christianson v. Colt Industries Operating Corp.,* 486 U.S. 800, 817, 108 S.Ct. 2166, 2178, 100 L.Ed.2d 811 (1988) (emphasis added).

With those principles firmly in mind, the court sees no reason to revisit the issue of whether New York always recognizes a cause of action for negligent performance under a contract. Assuming *arguendo* that *Wrigley* represents a "change" in the law, the court still is not left with the clear conviction that it erred in dismissing NiMo's negligent performance of a contract claim. Given the previously discussed factual distinctions between *NiMoI* and *Wrigley,* the court does not believe that *Wrigley* is controlling here. And while, based upon *Wrigley,* perhaps NiMo could make a more persuasive argument as to the viability of a negligent performance of a contract claim, that simply is not enough. Nor, even after *Wrigley,* does the court believe that its *NiMoI* decision is "dead wrong."[31] Thus, the court will stand by its prior holding that, under the particular facts of this case, to the extent that NiMo's tort claims are based upon negligent performance of a contract, such claims cannot be allowed to stand.

The court is now free to consider the various arguments on these motions as to NiMo's remaining tort claims. After having the benefit of extensive discovery, ITT advances two reasons as to why summary judgment should be granted on these claims. First, ITT contends that NiMo cannot meet its burden of proving an independent tort duty of care, because no special relationship existed between ITT and NiMo. Second, ITT asserts that the economic loss doctrine bars NiMo's tort claims (both for negligence and for gross negligence). Basically that doctrine provides that recovery for purely economic loss is limited to a contract action, and therefore such losses are not recoverable in a negligence cause of action.

Insofar as the first argument is concerned, NiMo vigorously responds that the facts do establish that it and ITT had the requisite "special relationship." Alternatively, NiMo argues that, at the very least, there are genuine issues of material fact regarding the existence of a special relationship and so summary judgment on these claims is not appropriate. With respect to the economic loss doctrine, NiMo simply asserts that that doctrine does not bar their tort claims, which are indisputably for economic damages only.[32]

A. Independent Legal Duty of Care

1. Special Relationship

***21** The court will first consider ITT's contention that, as a matter of law, no special relationship existed between it and NiMo. NiMo contends, as it did previously,[33] that a special relationship of trust and confidence, such as that described in *Apple Records, Inc. v. Capitol Records, Inc.,* 137 A.D.2d 50, 529 N.Y.S.2d 279 (1st Dep't 1988), existed between it and ITT. NiMo believes that ITT can be held liable for negligence and gross negligence based upon such a relationship. NiMo also suggests a somewhat related but arguably distinct basis for the finding of a special relationship; that is ITT's alleged status as project manager. NiMo specifically contends that ITT "functioned as the project manager for piping erection, ... [;]" and in that capacity ITT owed an independent duty of care to NiMo. Plaintiffs' Liability Memorandum at 44.

The parties did not separately analyze the existence of a special relationship based upon trust and confidence, and one arising out of ITT's purported status as project manager. To clarify, the court will differentiate between the two. First,

the court will consider the existence of a special relationship based upon the trust and confidence which NiMo allegedly reposed in ITT. Secondly, the court will consider the related issue of whether a special relationship existed arising out of ITT's alleged status as project manager for piping.

a. Trust and Confidence

At the outset the court observes that it finds somewhat surprising, given the voluminous record on these motions, that the proof relied upon by the parties in connection with this issue is quite scant. For example, in asserting that no special relationship existed between it and NiMo, ITT relies exclusively upon the deposition testimony of NMP2 project manager and NiMo vice president, Gerald K. Rhode. Mr. Rhode flatly responded "No," to the question "Were you aware of any relationship between ITT Grinnell and Niagara Mohawk Power Company other than that of owner and contractor?" Deposition of Gerald K. Rhode (July 16, 1991) at 19 (ITT's Appendix, Vol. VII at 2014.) ITT interprets that emphatic denial as meaning that no special relationship of trust and confidence existed between it and NiMo.

NiMo counters by relying primarily upon the affidavits of Mr. Rhode and Mr. Stanley Seiken. Mr. Seiken is one of several prospective expert witnesses retained by NiMo. In seeming contrast to his just quoted testimony, Mr. Rhode avers in his affidavit that "[I]TT was in effect a fiduciary for NMPC,...." Affidavit of Gerald K. Rhode (Nov. 27, 1991) at ¶ 13 (Plaintiffs' Exhs., Vol. IV thereto at 746). Both Messrs. Rhode and Seiken assert, but for different reasons, that NiMo placed trust and confidence in ITT, and hence in ITT's abilities. Mr. Rhode explains that "[b]ecause the precise scope of ITT's piping work could not be known at the time that ITT was hired to do the piping work, NMPC [NiMo] had no choice but to enter into a 'cost-plus' contract." *Id.* He further explains, "This forced NMP [NiMo] to repose great trust and confidence in ITT's integrity, technical ability, organizational and management ability, and ability to select qualified personnel." *Id.* Along a similar vein, Mr. Seiken avers that NiMo's trust and confidence in ITT was based upon "[t]he delegation of portions of the NMP2 quality assurance program associated with piping construction/erection to ITT through the NMP2 Preliminary Safety Analysis Report,...." Affidavit of Stanley J. Seiken (Dec. 14, 1991) at ¶ 17 (Plaintiffs' Exh., Vol IV Ex. 2 thereto at 790).

New York state courts, as well as others,[34] have recognized that whether a fiduciary relationship[35] exists is a question of fact. *Pavone v. Aetna Cas. & Sur. Co.*, 91 Misc.2d 658, ——, 398 N.Y.S.2d 630, 636 (N.Y.Sup.Ct.1977); *Levine v. Chussid*, 221 N.Y.S.2d 311, 314 (N.Y.Sup.Ct.1961) (question of fact presented regarding existence of "confidential relationship" for purposes of imposing a constructive trust, thus precluding summary judgment); *cf. Litton Industries, Inc. v. Lehman Bros. Kuhn Loeb Inc.*, 767 F.Supp. 1220, 1232–33 (S.D.N.Y.1991) (applying New York law, summary judgment denied where a general question of fact existed regarding whether an investment banker owed a fiduciary duty to a tender offeror based upon the latter's disclosure of confidential information). Thus, given the conflicting evidence set forth above, the issue of whether there was a special relationship of trust and confidence between ITT and NiMo, which could form the basis for an independent tort duty of care, is, in all likelihood, a factual issue for the jury.[36]

b. Project Manager

***22** ITT's argument (albeit not explicit) that summary judgment is proper because, as a matter of law, it was not the project manager for NMP2 is equally unavailing, although for a different reason. Specifically ITT, as the party seeking summary judgment on these tort claims, did not satisfy its "initial responsibility of informing the district court of the basis for its motion and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex*, 477 U.S. at 323, 106 S.Ct. at 2553 (quoting Fed.R.Civ.P. 56(c)). The only proof referenced by ITT in the massive record[37] is the previously mentioned deposition of Gerald Rhode, wherein he testified that he was not aware of any relationship between ITT and NiMo other than that of owner-contractor. Rhode Deposition at 19 (ITT's Appendix, Vol. VII at 2014). That proof is not directly responsive to the issue of whether ITT was the project manager on the NMP2 project, and is an insufficient basis for the granting of summary judgment on that issue.

The court notes in passing that even if ITT had met its initial burden of proof here, NiMo was also remiss in satisfying its burden as the nonmoving party. More particularly, NiMo did not designate "specific facts showing that there is a

genuine issue for trial[,]" as required by Fed.R.Civ.P. 56(e). Instead of refuting with specific references to the record ITT's contention that it was not the project manager, in apparent reliance upon the affidavit of Mr. Rhode,[38] NiMo simply asserts that "[t]he record shows that ITT functioned as the project manager for piping erection, a task that exceeded the scope of many entire construction projects." Plaintiffs' Liability Memorandum at 44. Providing that ITT had met its initial burden of proof on the project manager issue, on the basis of the meager proof just recounted, the court assumes, without deciding, that NiMo would not have been able to survive ITT's motion for summary judgment on this issue. That is so because serving as a project manager for piping erection alone is nearly identical to the situation presented in *Morse/Diesel, Inc. v. Trinity Industries, Inc.*, 859 F.2d 242 (2d Cir.1988), wherein the Second Circuit held that a steel contractor and erector could not assert direct negligence claims against subcontractors with "discrete, circumscribed roles in [an] overall construction project," and who had no general supervisory duties concerning such project. *Id.* at 248. Thus, even though the court is extremely doubtful as to whether NiMo can proceed under a theory that an independent tort duty of care arose because of ITT's status as a project manager, it will not grant summary judgment against ITT on that narrow issue. Consequently, ITT's motion for summary judgment on NiMo's tort claims is denied insofar as that motion is premised upon the nonexistence of a special relationship, regardless of the basis for such relationship (trust and confidence and/or project manager status).

B. Economic Loss Doctrine

***23** At oral argument on January 3, 1992, the court expressed some concern as to the viability of NiMo's tort causes of action in light of the economic loss doctrine. NiMo immediately sought and was granted permission to file a supplemental memorandum of law more fully detailing its position on this issue. In that memorandum of law NiMo narrowed the focus of its argument, asserting that the economic loss doctrine is inapplicable where a special relationship of trust and confidence has been shown. After much reflection, the court disagrees.

The general rule in New York, previously alluded to, is that "[a] simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated. *Macmillan, Inc. v. Federal Ins. Co.*, 764 F.Supp. 38, 41 (S.D.N.Y.1991) (citing *Clark–Fitzpatrick, Inc. v. Long Island Rail Rd. Co.*, 70 N.Y.2d 382, 521 N.Y.S.2d 653 (1987)). As one court astutely observed, however, "[t]he *Clark–Fitzpatrick* rule, ..., is only *one* of the dikes that New York courts have erected in their inevitable attempt to keep contract law 'from drown[ing] in a sea of tort.' " *Carmania Corp., N.V. v. Hambrecht Terrell Int'l*, 705 F.Supp. 936, 938 (S.D.N.Y.1988) (emphasis added) (*quoting East River S.S. Corp. v. Transamerica Delaval Inc.*, 476 U.S. 858, 866, 106 S.Ct. 2295, 2300 (1986)). The second dike which New York courts have erected is that "[i]f the damages suffered are of the type remediable in contract, a plaintiff may not recover in tort."[39] *Id.* (and cases cited therein). Or, as the Second Circuit has more narrowly stated, "New York law holds that a *negligence* action seeking recovery for economic loss will not lie." *County of Suffolk v. Long Island Lighting Co.*, 728 F.2d 52, 62 (2d Cir.1984) (emphasis added) (citing *Price Brothers Co. v. Olin Construction Co.*, 528 F.Supp. 716, 721 (W.D.N.Y.1981); *Martin v. Julius Dierck Equipment Co.*, 43 N.Y.2d 583, 403 N.Y.S.2d 185 (1978)); *see also Alloy Briquetting Corp. v. Niagara Vest. Inc.*, 756 F.Supp. 713, 722 (W.D.N.Y.1991) (plaintiff not allowed to recover under negligence and strict liability where only economic loss damages sought).

There are a few recognized exceptions to that rule. The first exception, broadly stated, is that a party may recover purely economic loss damages in a tort malpractice action when the underlying contract is for the rendering of professional services.[40] For example, the New York of Appeals has allowed causes of action to stand against architects sued by clients for negligence in design, construction, or choice of materials, even where the only injury claimed is economic.[41] The second exception is where a party is seeking to recover economic loss damages on a theory of negligent performance of a contract for services. This exception is illustrated by the often cited case of *Consol. Edison Co. v. Westinghouse Elec. Corp.*, 567 F.Supp. 358 (S.D.N.Y.1983). The *Westinghouse* court plainly held that "a suit for negligent performance of contractual duties is clearly available where only economic injury is alleged." *Id.* at 364. Obviously, after *NiMoI*, which dismissed NiMo's tort claims insofar as they were based upon negligent performance of a contract, NiMo cannot avail itself of this exception to the economic loss doctrine. *See NiMoI*, 725 F.Supp. at 666.

***24** The foregoing makes clear that in New York, unless a party falls within one of the exceptions, there are two significant limitations to recovery in tort where the allegations essentially mirror those of the breach of contract cause of action. The first limitation is that the plaintiff "[m]ust

establish that the defendant violated a legal duty separate from its contractual obligations,...." *Robehr Films, Inc. v. American Airlines, Inc.*, No. 85 Civ. 1072, 1989 WL 111079, at *2, 1989 U.S.Dist. LEXIS 10998, at *5 (S.D.N.Y. September 19, 1989) (citing *Carmania*, 705 F.Supp. 936),*aff'd without pub. opinion*,902 F.2d 1556 (2d Cir.1990). The second limitation is that the plaintiff "[ ]must demonstrate that the damages it suffered do not constitute mere 'economic loss.' " *Id.* Assuming for the moment that NiMo can overcome that first limitation, the court is not convinced that it can overcome the second, at least insofar as the negligence claim is concerned.

The economic loss doctrine was the subject of some discussion in *NiMoI*.[42] NiMo implies from that discussion that the court has taken the position that economic loss damages are recoverable in tort where there is a finding of a special relationship of trust and confidence. The court did not so hold in *NiMoI;* and it declines to do so now. Discussion of the economic loss doctrine in *NiMoI* was limited to the negligent performance of a contract claim.[43] The possible applicability of the economic loss doctrine in the context of a tort claim, based upon the existence of a special relationship, was not expressly considered by the court in *NiMoI*. Therefore, even though the economic loss doctrine was discussed in *NiMoI*, because that doctrine was not considered in the context of the special relationship issue, that earlier decision does not preclude the court from now finding, as it must, that the economic loss doctrine bars NiMo's negligence claim.

Published decisions on the narrow issue of whether economic loss damages are recoverable in a tort action where only simple negligence is alleged are seemingly non-existent. *Robehr*, a case heavily relied upon by ITT is instructive though. The court in *Robehr* denied plaintiff's motion to amend its complaint to include a cause of action for negligence, finding that such an amendment would be futile because the plaintiff alleged only economic loss in its proposed negligence claims. *Robehr*, 1989 WL 111079, at *4–5, 1989 U.S.Dist. LEXIS 10998, at *13. In so holding, the *Robehr* court relied upon Judge Silverman's dissent in *Schiavone Constr. Co. v. Elgood May Corp.*, 81 A.D.2d 221, 439 N.Y.S.2d 933 (1st Dep't 1981), which the New York Court of Appeals subsequently adopted with approval.[44] In particular, the *Robehr* court reasoned:

[w]here there is no accident, and no physical damage, and the only loss is a pecuniary one, through loss of the value or use of the thing sold, or the cost of repairing it, the courts have adhered to the rule ... that purely economic interests are not entitled to protection against *mere negligence*, and so have denied the recovery.

***25** *Robehr*, 1989 WL 111079, at *5, 1989 U.S.Dist. LEXIS 10998, at *14 (emphasis added) (quoting *Schiavone*, 439 N.Y.S.2d at 939 (quoting in turn *Jones & Laughlin Steel Corp. v. Johns–Manville Sales Corp.*, 626 F.2d 280, 287–89 (3rd Cir.1980)). Importantly, neither the fact that a contract is for services, rather than goods, nor the fact that the parties are in contractual privity diminishes the force of the economic loss rule. 1989 WL 111079, at *8, n. 7, 1989 U.S.Dist. LEXIS 10998, at *13, n. 7 (citations omitted).

In their amended complaint, with respect to damages incurred as a result of ITT's allegedly tortious conduct, NiMo asserts the following:

As a result of the foregoing, the Owners [plaintiffs] have incurred and continue to incur damages including, but not limited to, the following:

a. the cost of redesign and reconstruction of systems and component of the NMP2 project;

b. the cost of excess manhours;

c. additional overhead expense resulting from redesign, reconstruction an excess manhours;

d. the cost of financing these Owner expenditures;

e. the cost of delay in the NMP2 project.

Amended Complaint at 38, ¶ 135(a)–(e).[45] Clearly then the amended complaint does not allege that NiMo ever sustained personal or property injury, as is required to recover in tort. Indeed, consistent with the voluminous damage reports NiMo *Id.* submitted in opposition to ITT's second summary judgment motion,[46] at oral argument, as mentioned earlier, NiMo conceded that it is only seeking economic loss damages in this action. Tr. II at 57. Furthermore, that has been NiMo's position since the early stages of this litigation. Therefore, as in *Robehr*, because NiMo is not seeking to recover for any injury apart from economic loss, summary judgment dismissing NiMo's negligence claim is mandated.

NiMo tries to circumvent the general rule prohibiting negligence actions for purely economic loss by arguing

that once a special relationship is shown, such damages are recoverable in tort. Thus, in essence, NiMo is urging this court to adopt yet another exception to the general prohibition against the recovery of strictly economic losses in negligence actions. The court is reluctant to do that for several reasons. First, NiMo has not pointed to any cases, and the court is aware of none, allowing recovery for strictly economic loss damages where mere negligence is the only tort claim. Second, NiMo's assertion, while somewhat forceful at first glance, does not withstand closer analysis because, without exception, the cases NiMo relies upon are readily distinguishable. Some of the cases, such as *Paver* and *Sears*, involved professional malpractice claims. NiMo has already conceded, however, that it is not seeking to recover against ITT on a professional malpractice theory. *NiMoI*, 725 F.Supp. at 666. Therefore, the fact that economic loss damages are generally recoverable in malpractice cases is of no consequence here.

***26** In addition to the malpractice line of cases, NiMo places much credence in *Apple Records*. The plaintiffs in *Apple Records* were the world renowned recording group, the Beatles. They sued Capitol Records alleging fraud, breach of fiduciary duties, tortious conduct, and conversion. The Supreme Court, among other things, dismissed the fraud and conversion causes of action, as well as a catch-all cause of action designated as a claim for "tortious conduct." *See Apple Records*, 137 A.D.2d at ——, 529 N.Y.S.2d at 284. On appeal, the Appellate Division reversed and reinstated the fraud and conversion causes of action. *Id.* Significantly, the Appellate Division's affirmance included that part of the lower court's decision dismissing the tortious conduct cause of action. *Id.* Although the Appellate Division did not give any reason for affirming dismissal of the tortious conduct cause of action, it can be inferred that the court did so because if allowed to stand, that claim would have violated the economic loss doctrine.

It is true, however, as NiMo has repeatedly reminded the court, that in *Apple Records* the Beatles were allowed to proceed with their tort claims, in part under a special relationship theory, even though the only damages sought were economic. NiMo is ignoring two critical distinctions between *Apple Records* and the present case, though. The first is that the remaining viable tort claims in *Apple Records* were intentional torts—claims which NiMo has already freely admitted are absent from this case. *NiMoI*, 725 F.Supp. at 666. Any arguably negligence based theory of recovery was dismissed in *Apple Records* when the court dismissed the "tortious conduct" cause of action. Thus, because in *Apple Records* the tort claims arose from a duty wholly independent of the contract, there was no danger of tort law encroaching upon contract law. The Beatles were seeking redress for separate harms—breach of contract and the commission of intentional torts. Thus, it stands to reason that the economic loss doctrine was not an issue, and indeed was not even mentioned in *Apple Records*. The second vital distinction between *Apple Records* and the instant case is that in the former the special relationship theory was used to sustain the claim for breach of fiduciary duties, another claim which NiMo is not alleging in this litigation. Because of those important distinctions, the court is unwilling to apply the rationale of *Apple Records* to the present case.

Additionally, NiMo's assertion that, "Breach of such a societally imposed duty [an independent duty based on a special relationship] permits the recovery of economic damages even if a contract between the plaintiff and defendant exists," is not persuasive. Plaintiffs' Liability Memorandum at 42. In the court's view, that assertion is not supported by the case law set forth above; and neither of the cases relied upon by NiMo persuades the court otherwise. In neither *Int'l Ore & Fertilizer Corp. v. SGS Control Services, Inc.*, 743 F.Supp. 250, 258–60 (S.D.N.Y.1990), nor *Apple Records*, did the courts suggest that recovery for economic damages would be permitted based upon a theory that an independent duty of care arose because of a special relationship between the parties. Moreover, the tort claims alleged in those two cases were not mere negligence claims; but in the case of *Int'l Ore*, a claim for negligent misrepresentation, and, in the case of *Apple Records*, claims for intentional torts and breach of a fiduciary duty. Thus, because the plaintiffs in those two cases sought recovery for breach of a duty extraneous to the contract, the intentional tort and negligent misrepresentation claims therein could stand regardless of the vitality of the contract claims.[47]

***27** Finally it is true, as NiMo contends, that a contract action can be grounded in negligence or gross negligence standards, or both.[48] The availability of alternative theories of recovery in a contract action does not mean, as NiMo insinuates,[49] that courts should, or must, allow separate independent tort claims for negligence where only economic damages are alleged. Indeed, as previously discussed, such a holding would be contrary to well settled New York case law. Consequently, ITT is entitled to summary judgment on NiMo's tort based negligence claim because NiMo has not

shown any injury apart from economic loss, which clearly is not recoverable under a negligence theory.

III. Gross Negligence

Up to this point, the court has purposely omitted from its discussion NiMo's separate cause of action for gross negligence in tort. That omission is deliberate. By definition,[50] gross negligence is more closely analogous to an intentional tort than it is to negligence. Thus, the court believes that, notwithstanding the economic loss doctrine, NiMo's cause of action for gross negligence in tort is still viable, provided, of course, that NiMo can establish the requisite independent duty of care, which would arise here, if at all, out of the alleged special relationship (based upon trust and confidence and/or project manager status) between NiMo and ITT.

To summarize, as to liability, NiMo is entitled to proceed for the time being on its breach of contract cause of action under theories of both negligence and gross negligence. NiMo's negligence cause of action sounding in tort cannot, however, survive ITT's motion for summary judgment because that cause of action is barred by the economic loss doctrine. NiMo is permitted to go forth, however, on its gross negligence tort cause of action. To ultimately prevail on such cause of action, however, NiMo must establish, *inter alia,* a special relationship between it and ITT. Otherwise there would be no independent duty of care—a necessary prerequisite to any finding of tort liability. Allowing NiMo to proceed on a gross negligence theory under both contractual and tort theories might at first appear redundant in that the damages sought thereunder are identical. The scope of recovery under those two theories is potentially different though. Due to the qualifying language of § 10 of Contract Change 26 (i.e., recovery for grossly negligent defective or deficient work), any recovery for gross negligence under the contract is arguably more restrictive than the scope of recovery for gross negligence in tort. Thus, for now, NiMo is entitled to proceed on a theory of gross negligence predicated upon both contractual and tort theories.

IV. DAMAGES[51]

In a nutshell, ITT contends that plaintiffs' damages claims, totaling approximately $88,000,000.00, are ripe for summary judgment because the damages are either consequential and therefore barred under the contract, or speculative, or both. NiMo responds: (1) the damages are direct, and thus not barred by the contract; (2) if there is a dispute as to whether any of the damages are direct or consequential, that dispute must be resolved by a jury; and (3) New York law does not permit a contractual limitation on liability for gross negligence. NiMo further responds that their damages are not speculative because the damage analyses furnished by its experts are all acceptable under New York law.

**28 To facilitate analysis of the damage claims, the court has divided the damages into twelve separate categories,[52] each of which will be addressed herein. Before turning to the arguments particular to each separate category of damages, there are two issues common to several categories of damages which must be considered: (1) whether certain damages are direct or consequential and (2) whether certain damages are speculative as a matter of law.

A. Direct versus Consequential Damages

ITT contends that four of the damage categories are barred because those damages are, as a matter of law, consequential, and the contract expressly bars the recovery of consequential damages.[53] In particular, ITT contends that the costs for financing, CAT/SALP (generally), engineering oversight and overhead[54] are all consequential. NiMo does not dispute that the contract bars the recovery of consequential damages.[55] NiMo strongly contests ITT's characterization of the damages as consequential, however. Rather, NiMo contends that the contractual limitation does not apply here because the damages plaintiffs are seeking to recover are direct—*not* consequential.[56]

In *American List Corp. v. U.S. News & World Report, Inc.*, 75 N.Y.2d 38, 550 N.Y.S.2d 590 (1989), the New York Court of Appeals explained the difference between general (or direct) and consequential (or special) damages:

General damages are those which are the natural and probable consequences of the breach ..., while special damages are extraordinary in that they do not so directly flow from the breach.

Id. at 42–43, 550 N.Y.S.2d at 593 (citations omitted).[57] Consequential damages are recoverable only when they were both foreseeable and within the contemplation of the parties at the time the contract was made. *Id.* at 43, 550 N.Y.S.2d at 593 (citations omitted). Generally, whether damages are direct or consequential is an issue of fact which

must be reserved for trial. *See Long Island Lighting Co. v. Transamerica Delaval, Inc.*, 646 F.Supp. 1442, 1459 n. 30 (S.D.N.Y.1986) ("We reserve for trial the question of whether the plaintiff's claimed damages should be characterized as direct, incidental, or consequential.") *American Electric Power Co. v. Westinghouse Elec. Corp.*, 418 F.Supp. 435, 459 (S.D.N.Y.1976) ("[t]he precise demarcation between direct and consequential damages is a question of fact,...."); *but see Starmakers Pub. Corp. v. Acme Fast Freight, Inc.*, 646 F.Supp. 780, 782 (S.D.N.Y.1986) (special damages for three-week delay in delivery not recoverable as a matter of law where shipper could not establish that defendant freight forwarders had notice that shipped matter was time-sensitive); and *Sweazey v. Merchants Mutual Insurance Co.*, 169 A.D.2d 43, 571 N.Y.S.2d 131, 132 (3rd Dep't 1991) (reversing denial of motion to dismiss consequential damages claim based upon the absence of a showing that such damages were foreseeable and within the contemplation of the parties at the time the contract was made or prior thereto).

***29** Disregarding that general rule, ITT and NiMo cite a number of cases which they contend stand for the proposition that the four categories of damages listed above are, as a matter of law, either consequential or direct.[58] Significantly, in none of those cases did the court hold, as a matter of law on a summary judgment motion, that certain types of damages were either direct or consequential. Without exception, all of the cited cases were tried (although most were non-jury), and the determination as to whether the damages therein were direct or consequential was made by the court after it had an opportunity to review the fully developed trial record.[59] Stated somewhat differently, it was the insufficiency of the proof which led to the conclusion that the sought damages in those cases were consequential and thus not recoverable.

Turning to the present case, ITT cannot prevail on its motion for summary judgment on the damage claims insofar as that motion is premised on the argument that certain of NiMo's damages are consequential, and thus barred by the contract. The issue of whether those particular damages (financing[60], engineering oversight, engineering overhead costs and CAT/SALP damages (generally) are consequential is, most likely, one of fact and thus cannot be decided until trial.[61] *See Charles E.S. McLeod, Inc. v. R.B. Hamilton Moving & Storage*, 89 A.D.2d 863, 453 N.Y.S.2d 251 (2d Dep't 1982) (summary judgment thwarted where fact issue as to whether lessee knew that lessor was in the business of renting heavy equipment, and therefore should have foreseen that if it breached the lease, lessor might sustain loss by reason of inability to relet the equipment until it was repaired).[62]

1. Financing Costs

As part of its damages, NiMo is seeking approximately $27 million in financing costs. That figure was derived from an accounting concept commonly used in the public utilities industry, known as "Allowance for Funds Used During Construction" ("AFUDC"). The regulations governing public utilities subject to the provisions of the Federal Power Act, such as NiMo, defines AFUDC, in relevant part, as:

"Allowance of funds used during construction" (Major and Non-major utilities) includes the net cost for the period of construction of borrowed funds used for construction purposes and a reasonable rate on other funds when so used, not to exceed, without prior approval of the Commission, allowances computed in accordance with the formula prescribed in paragraph (a) of this subparagraph.

18 C.F.R. part 101, Electric Plant Instructions § 3(17) (1990). *See generally, Greenapple v. Detroit Edison Co.*, 618 F.2d 198, 200–202 (2d Cir.1980).

ITT offers three reasons as to why it is entitled to summary judgment with respect to financing cost damages. First, according to ITT, such damages are prohibited under New York law unless it is shown that the plaintiff is seeking to recover for a loan obtained *solely* to finance the underlying damages. In other words, ITT maintains that because NiMo cannot trace any actual financing expenditures to ITT's wrongdoing, it should not be allowed to recover any such costs. Second, ITT contends that by seeking a damage award for financing costs NiMo is seeking, in effect, a "double recovery"[63] because they are seeking to be compensated for an award of financing costs using AFUDC calculations, as well as seeking an award of statutory interest on the base damages.[64] Third, ITT contends that the financing costs are consequential, and thus barred under the contract.

***30** Simply stated, NiMo counters that ITT is attempting to impose an impermissible tracing requirement on the recovery of financing costs under New York law. NiMo further counter that CPLR § 5001 is not a bar to the recovery of financing costs. In light of the previous discussion regarding consequential damages, the court will assume, for purposes of

these motions only, that financing costs are not consequential damages, and therefore the contractual limitation on the same is inapplicable. Operating from that basic assumption, the court will consider ITT's remaining arguments regarding tracing and § 5001.

a. CPLR § 5001—Prejudgment Interest

ITT contends that NiMo should not be allowed to recover its financing costs because such costs are, in reality, a claim for prejudgment interest, governed exclusively by § 5001 of the CPLR. ITT further maintains that NiMo "[s]eek [s] to be compensated not once but twice for the lost time-value of money, first in the award of 'financing costs' based on the AFUDC data and then with the award of statutory interest on both the base damages and the 'financing costs.' " ITT's Damages Memorandum at 14. This argument need not detain the court for long. ITT's position is not well taken after *Long Island Lighting Co. v. IMO Industries, Inc.*, No. 85 Civ. 6892, 1990 WL 64588, 1990 U.S.Dist. LEXIS 5,351 (S.D.N.Y. May 3, 1990) ("*LILCO* "), wherein Judge Owen plainly stated, "[a] party to a contract may recover financing costs as incidental damages, *apart* from prejudgment interest allowable under New York State law." 1990 WL 64588, at *4–5, 1990 U.S.Dist. LEXIS 5,351, at *16 (emphasis added) (citing *Bulk Oil (U.S.A.), Inc. v. Sun Oil Trading Co.*, 697 F.2d 481 (2d Cir.1983) and *Intermeat, Inc. v. American Poultry, Inc.*, 575 F.2d 1017 (2d Cir.1978)); *see also Minpeco, S.A. v. Hunt*, 686 F.Supp. 420, 425–27 (S.D.N.Y.1988) (denying motion to preclude claim for cost of borrowing money necessitated by defendants' alleged manipulation of the silver market).[65] There are obvious factual and legal distinctions between the cited cases and the present case: the cited cases deal predominately with the issue of the recovery of incidental damages under the U.C.C. and, for the most part, pertain to contracts for goods, as opposed to services. Nonetheless, the court finds the cited authority applicable here given the Second Circuit's express determination in *Bulk Oil* that the plaintiff there was entitled to be made whole for its interest payments. *See Bulk Oil*, 697 F.2d at 485.

Of equal if not more import is the fact that NiMo is not, as ITT implies, trying to seek a double recovery for financing cost damages. Instead, NiMo is merely seeking to prove its actual financing costs, which have been computed only through NMP2's commercial operation ("C.O.") date of April, 1988. Cotenants' Memorandum in Opposition to ITT's Motion for Summary Judgment on Damages Issues ("Plaintiff's Damages Memorandum") at 50; *see also* Tr. II at 76. NiMo is then seeking statutory prejudgment interest from that date to the present. *Id.* at 50. Indeed, NiMo states with candor:

***31** [I]f the [plaintiffs] recover all of their pre-commercial operation financing costs at trial, they will *not* seek an award of prejudgment interest for the time period *prior* to C.O. On the other hand, if the [plaintiffs] do not recover some or all of their pre-commercial operation financing cost damages at trial, the Court can then determine, in light of the jury's damage award, whether or to what extent an award of statutory prejudgment interest is appropriate for that period.

Id. (emphasis in original). Given those candid statements by NiMo, there is absolutely no basis for ITT's assertion that NiMo is seeking a double recovery here. Moreover, the case law set forth above provides ample support for NiMo's financing cost claim as part of the damages arising from ITT's alleged breach of contract and alleged tortious conduct. Consequently, § 5001 of the CPLR does not prevent NiMo from attempting to prove at trial so much of its damages as relates to financing costs.

b. Traceability

ITT vigorously contends that *LILCO*, 1990 WL 64588, 1990 U.S.Dist. LEXIS 5351, is dispositive of NiMo's damage claim for financing costs. In *LILCO*, Judge Owen held that a financing cost award was not proper because the plaintiff was "*[u]nable to point to a particular loan* necessitated by [defendant's] conduct, ..."[66] 1990 WL 64588, at *4–5, 1990 U.S.Dist. LEXIS 5351, at *16 (emphasis added) (citation omitted). The *LILCO* court also noted that "[a]n award of interest would be appropriate if LILCO had rightfully and properly rejected the diesels as non-conforming goods, *and had secured a loan in order to purchase replacement diesels from Colt.*" *Id.* (emphasis added).

NiMo, on the other hand, heavily relies on two cases outside this jurisdiction: *The Cincinnati Gas & Electric Co v. General Electric Co.*, No. C–1–84–988, (S.D.Ohio 19—)[67] ("*Zimmer* ") (applying Ohio law); and *Washington Public Power Supply System v. General Electric Co.*, No. 85–098–AA, 1989 WL 306200, 1989 U.S.Dist. LEXIS 18,279 (E.D.Wash. Nov. 8, 1989) ("*WPPSS* ") (applying Washington law). The courts in both of those cases allowed the plaintiff utilities to submit financing cost proof to the jury. The issue arose in *Zimmer* against the backdrop of defendants' motion to

exclude evidence relevant to plaintiffs' financing costs claim. The *Zimmer* court held that the plaintiffs were entitled to present such evidence for purposes of a summary jury trial.[68] *Zimmer*, slip op. at 12–13.[69] The *Zimmer* court warned plaintiffs, however, "[t]hat they must be prepared to make the requisite showing of casuation [sic] and, to the extent that the injury was foreseeable, a showing of a nexus between the damages alleged and the alleged wrongdoing of defendant, i.e., that the costs are attributable to the wrongdoing." *Id.* at 11–12. In other words, the *Zimmer* court equated causation with traceability: "[t]o require plaintiffs to establish this nexus [attributing the costs of the loan to the breach] serves the same purposes as the concept of traceability." *Id.* at 12. The court in *Zimmer* further explained:

***32** [t]hat the requirements of causation and certainty of damages [sic] provide an adequate means for defendants to present their argument to the jury on such matters as whether some or all of plaintiffs' alleged 'financing costs' were due to plaintiffs' alleged mismanagement of its affairs or whether costs incurred (e.g. costs of dividends) were the result of business decisions..... Similarly, while we are not barring plaintiffs from offering testimony on the general methods of accounting in the utilities industry or presenting a formula for assessing the amount of damages, we note that the jury will be instructed on plaintiffs' burden of establishing causation, ..., and certainty of the amount of damages.

Id. at 12 (citation omitted). It is critical to note that the *Zimmer* court did not place an additional burden on plaintiffs of demonstrating traceability to a specific loan.

In an analogous situation, the court in *WPPSS* denied defendant's summary judgment motion on plaintiff's claim for interest, basically finding that the defendant had failed to satisfy its burden of presenting evidence negating either causation or accountability. *WPPSS*, 1989 WL 306200, 1989 U.S.Dist. LEXIS 18279, at *16. The relevance of *WPPSS* to the present case is arguably limited somewhat by the fact that traceability, although offered as a possible basis for summary judgment, was not actually an issue therein. In *WPPSS* the defendant, as does ITT, asserted that the plaintiff should not be allowed to recover "cost of capital" "where it cannot trace specific interest expense to the claimed injury." *Id.* at 20 (citations omitted). However, because in *WPPSS* the bonds issued to finance the subject construction were spent only on that particular project, it was not critical that the court define the parameters of the asserted traceability requirement. *See id.* at *21. Nevertheless, the court implicitly rejected defendant's tracing argument, observing that in another case (upon which defendants had relied), "[t]he plaintiff's claim for actual interest was denied because 'its books were not set up to show the amount of interest paid on a particular job,'..., *not* because the plaintiff could not trace a particular expense within one job to the proceeds of a specific loan.") *Id.* (emphasis added) (quoting *Wyoming v. Brasel & Sims Constr. Co.*, 688 P.2d 871, 881 (Wyo.1984)). The court concurs with NiMo's reading of *WPPSS;* that is *WPPSS* does not impose a stringent tracing requirement on the recovery of financing costs. Instead, *WPPSS* only confirms the view that there be a "legally sufficient casual link" between a plaintiff's direct damage and the loan in question. *Id.* at *19.

Ordinarily the court would be reluctant to follow *Zimmer* and *WPPSS* because they construe case law outside this jurisdiction. However, because the definition of causation (in the context of a financing cost claim) in those cases is remarkably similar, indeed, virtually identical to the definition under New York law,[70] *Zimmer* and *WPPSS* are certainly instructive on the tracing argument. In addition, a careful reading of *Zimmer* and *WPPSS,* as well as *LILCO* and the cases cited therein, convinces the court that NiMo should, at a minimum, be permitted to proffer evidence at trial relating to its purported financing cost damages.[71] Not only is that the more sound practice given the current posture of this case,[72] but, importantly, such a practice is also in accordance with New York law. In *Ernst Steel,* a case referred to in *LILCO,* the Appellate Division started with the generally accepted proposition that "[i]n an appropriate case a seller is entitled to recover commercially reasonable finance and interest charges incurred as a result of a buyer's breach as a proper item of incidental damages...." 104 A.D.2d at ——, 481 N.Y.S.2d at 839 (citations omitted).[73] Then, even though the Appellate Division reversed the trial court's award of interest damages, it reasoned:

***33** *[w]hile there is no requirement in the code [U.C.C.] that interest expenses must be identified to indebtedness specifically covering the contact [sic] goods, where a seller cannot link the claimed damages to the contract it clearly has a more difficult burden of proof.* In our view, [plaintiff] has not substantiated its claim that the entire amount of increased costs due to the delay was paid for with borrowed funds ... and it has failed to link any portion of its indebtedness to the delay in payment resulting from [defendant's] breach. [Plaintiff] has not met its burden of proof that its claim for financing

costs was attributable to [defendant's] breach and the award of interest expenses must be reversed *due to a failure of proof.*

Id. (citation omitted) (emphasis added). The basis for the reversal in *Ernst Steel* was thus not due to a failure to trace to a specific loan, but rather due to a failure of proof on causation.[74]

Based upon the foregoing (particularly the highlighted language), unlike the *LILCO* court, this court does not construe *Ernst Steel* as mandating traceability to prevail on a claim for financing costs damages. All that is required is that a plaintiff's proof of financing cost damages be "commercially reasonable and foreseeable under the circumstances." *See LILCO*, 1990 WL 64588, at *4–5, 1990 U.S.Dist. LEXIS 5351 at *16 (citation omitted).[75] NiMo thus is entitled to offer evidence that its claimed financing costs are attributable to ITT's alleged breach. NiMo should, of course, be mindful of its burden of proof on this issue, especially with respect to causation. As did the plaintiff in *Ernst Steel*, in the absence of proof relating a specific loan to ITT's alleged breach, NiMo will undoubtedly have a more difficult burden of proof. That does not mean, however, that NiMo should be prohibited from offering at trial proof of its supposed financing cost damages.

B. Claimed Speculative Nature of Damages

ITT's other argument, common to several different categories of damages, is that those damages are speculative as a matter of law. ITT makes that argument as to the following categories of damages: large bore piping; QA/QC; MAC review; QPMP; civil penalty; engineering oversight; and overhead. Naturally NiMo disagrees, asserting that the damages calculations by its own experts are "manifestly reasonable" and an "accurate assessment" of the damages sustained by plaintiffs.[76] Thus, from NiMo's perspective, there is absolutely no reason that the jury should not hear its proof on the categories of damages just listed.

"It is well-settled that a plaintiff in a contract action must demonstrate *both* that his damages were caused by the alleged breach and that the alleged loss is capable of proof with reasonable certainty." *Ullman–Briggs, Inc. v. Salton, Inc.*, 754 F.Supp. 1003, 1008 (S.D.N.Y.1991) (emphasis added) (citing *Lexington Products, Ltd. v. B.D. Communications, Inc.*, 677 F.2d 251, 253 (2d Cir.1982); *Kenford Co. v. County of Erie*, 67 N.Y.2d 257, 261, 502 N.Y.S.2d 131, 132 (1986)). On this aspect of its motion, ITT centered almost exclusively on whether the amount of NiMo's asserted damages can be proven with reasonable certainty; it did not focus on causation.[77] So at this point, the court will limit its discussion to whether the amount of NiMo's damage estimates, as calculated by its experts, is based upon speculation or conjecture, and as such should not be allowed to be presented to a jury.

***34** In appraising the sufficiency of damage evidence, several well established principles have evolved. In *Wolff & Munier, Inc. v. Whiting–Turner Contracting Co.*, 946 F.2d 1003 (2d Cir.1991), the Second Circuit reiterated a couple of those principles. First, "[a]lthough the amount of recoverable damages is a question of fact, the measure of damages upon which the factual computation is based is a question of law.' " *Id.* at 1009 (quoting *United States ex rel. Juno Constr. Corp.*, 759 F.2d 253, 255 (2d Cir.1985)). Second, "[a] party is not to be denied damages when they are necessarily uncertain, ..., New York law does not countenance damage awards based on '[s]peculation or conjecture.' " *Id.* at 1010 (quoting *Berley Indus., Inc. v. City of New York*, 45 N.Y.2d 683, 687, 412 N.Y.S.2d 589, 591 (1978)). "In other words, 'the damages may not be merely speculative, possible or imaginary, but must be reasonably certain and directly traceable to the breach, not remote or the result of other intervening causes.' " *Care Travel Co. v. Pan American World Airways, Inc.*, 944 F.2d 983 (2d Cir.1991) (quoting *Kenford Co.*, 67 N.Y.2d at 261, 502 N.Y.S.2d at 132 (citing in turn *Wakeman v. Wheeler & Wilson Manuf'g Co.*, 101 N.Y. 205 (1886)). "[T]he burden of uncertainty as to the amount of damages is upon the wrongdoer,...."[78] *Lamborn v. Dittmer*, 873 F.2d 522, 532–33 (2d Cir.1989) (quoting *Contemporary Mission, Inc. v. Famous Music Corp.*, 557 F.2d 918, 926 (2d Cir.1977)) (citations omitted). Lastly, the principle having perhaps the most impact upon ITT's motion pertaining to damages is that "[t]he test for admissibility of evidence concerning prospective damages is whether the evidence has *any tendency* to show their probable amount.[79] *Id.* (emphasis added).

Those same principles were expounded upon by the New York Court of Appeals in *Berley Industries:*

Particularly in actions *ex contractu*,..., when it is clear that some injury has been occasioned, recovery will not necessarily be denied a plaintiff when it is apparent that the quantum of damages is unavoidably uncertain, beset by complexity or difficult to ascertain.... The law is realistic enough to bend to necessity in such cases. A jury then may draw reasonable inferences from the other, though lesser,

proofs actually presented in order to arrive at an estimate of the amount of extra costs which are the natural and probable result of the delay.... Even then there must be a definite and logical connection between what is proved and the damages a jury is asked to find....

Id. at ——, 412 N.Y.S.2d at 591; *see also Borne Chemical Co. v. Dictrow,* 85 A.D.2d 646, ——, 445 N.Y.S.2d 406, 413–14 (2d Dep't 1981). It cannot be overlooked, however, that "[t]he amount of damages need not be calculated with absolute certainty or mathematical precision." *Trans World Airlines, Inc. v. 47th Street Photo, Inc.,* 751 F.Supp. 439, 440 (S.D.N.Y.1990) (citing *Story Parchment Co. v. Paterson Parchment Paper Co.,* 282 U.S. 555, 563, 51 S.Ct. 248, 250–251, 75 L.Ed. 544 (1931), and other cases). Similarly, "[e]vidence that, as a matter of just and reasonable inference, shows the existence of damages and the extent thereof will suffice, even though the result is only an approximation." *Id.* at 441 (citing *Story Parchment,* 282 U.S. at 563, 51 S.Ct. at 250 and other cases). The court will now examine the evidence submitted in connection with ITT's summary judgment motion on damages in light of the standards just recited.

2. Large Bore Piping

***35** ITT claims that the damages NiMo seeks to recover for erection, repair and rework of large bore piping and pipe supports are speculative because the sampling methodology employed by NiMo's experts is "inherently speculative," and the determination of a "reasonable" [80] amount of rework is also speculative. The court will separately address those two contentions.

a. Sampling

Preliminarily, it should be noted that according to ITT there would be no need for statistical sampling if one of two events had occurred at Contract Change 34—the final contract change. Either NiMo should have kept the contemporaneous time records, which it had a right to do under Contract Change 26; [81] or, NiMo should not have agreed to final acceptance of ITT's work by signing Contract Change 34. As discussed in section one, ITT adheres to the view that when NiMo approved final payment to ITT under Contract Change 34, [82] ITT had settled all claims (past and future) with NiMo. In reliance upon NiMo's final acceptance of ITT's work (in Contract Change 34), ITT also did not retain the contemporaneous time records.

ITT makes much of the fact that NiMo did not exercise its right to retain the contemporaneous time records. While in hindsight it obviously would have been preferable to have those documents; the fact remains that they are not available. [83] Nothing in the record suggests that the unavailability of those documents is due to wrongdoing by any party to this litigation. [84] Thus, the court will not prevent NiMo from relying upon statistical sampling evidence just because at one point there were contemporaneous time records, which purportedly would have established what NiMo is endeavoring to show by way of sampling.

To fully understand ITT's objections to the sampling methodology devised and applied by NiMo's experts, an overview of that methodology is helpful. The starting point for NiMo's sampling methodology is the document packages ("planners"), which were retrieved from NMP2 plant records. The information contained in those planners, while incomplete, contains such items as isometric drawings for a certain section of piping; weld data reports; and sign-off forms from the superintendent, foreperson or field engineer. ITT's Appendix, Vol. V at 1411. Out of 17,735 pipe support planners, the sampling population consisted of 401 planners selected by NiMo's statistical expert. *Id.* at 1259 and 1411; ITT's Appendix, Vol. VII at 1945–48. The sampling population was smaller for piping sections; 41 out of 421 planners were reviewed. *Id.* at 1251; *id.* at 1972.

Using the sample planners, one of NiMo's experts, Alan D. Nance, tried to ascertain whether repair and rework was done, and the cause for such repair or rework, i.e. craft error or other causes, such as SWEC mandated design changes. *Id.* at 1409, 1412. When he determined that the rework or repair was due to craft error, Mr. Nance then estimated the hours spent on such repair or rework. *Id.* at 1213, 1242, 1409, 1412. Those figures were totaled and extrapolated to the entire number of pipe supports and pipes. A reasonable amount of rework was then credited by the expert, and the hours were translated into a dollar amount by using average wage costs for the years in question. *Id.* at 1251, 1256.

***36** The methodology just described, albeit in far less detail than that contained in the damage reports of NiMo's experts, is objectionable to ITT. According to ITT, "[b]ecause of the small number of documentation packages actually reviewed

and the multiplier effect of overhead and interest, the smallest error in Mr. Nance's judgment as to whether a piece of rework occurred, was [ITT's] fault, or the time necessary to accomplish it is enormously magnified in the final damages calculation." ITT's Damages Memorandum at 20. To illustrate, ITT states that "[i]n the pipe support claim, ..., an incorrect assumption that a single incident of rework required scaffolding in 1983 would add approximately $51,000 to the damages sought by the plaintiffs." *Id.* (citing ITT's Appendix Vol. V, at 1255–1268).

Due to the time and expense allegedly involved in reviewing every planner,[85] NiMo hired several experts, including a statistician, Dr. Charles Mann, and Alan Nance, a mechanical engineer specializing in piping. In conducting his review of the sample planners, Nance's job was to apply the sampling method devised by Dr. Mann. Mr. Nance avers that his review exposed that "there were systemic, recurring, ongoing and serious failures on the part of ITT in the pipe support and piping erection process," including improper installation sequence, incorrect installation, lost documentation, carelessly performed work, welding defects, loose hardware, delayed inspections, lost material and incorrect repairs. Nance Affidavit at ¶ 33 (Plaintiffs' Appendix Vol. I, Ex. C thereto). Based on Nance's results, Dr. Mann then determined the cost of excessive work in the total population of pipe and pipe supports. Affidavit of Charles Mann (December 3, 1991) ("Mann Affidavit") at ¶ 6 (Plaintiffs' Appendix Vol. I, Ex. E thereto).

Not unexpectedly, Dr. Mann avers that "[t]he statistical methodology used to make the calculations and inferences ... is widely accepted and used in the statistical community." *Id.* at ¶ 8 (Plaintiffs' Appendix, Vol. I, Ex. E thereto). NiMo has provided the court with additional information regarding the methods used and conclusions drawn by its damages experts. Although the court did review that information, it need not concern itself with those details to resolve this motion.

The threshold issue here is the propriety of statistical sampling in the context of this rather unique litigation (the construction of a nuclear power plant). After reviewing NiMo's proof as to damages, which is part of the record on this motion, the court cannot accept ITT's assertion that NiMo's sampling evidence is inherently speculative. It is true, as ITT points out, that sampling has generally been allowed in factual settings vastly different than the present one. *See, e.g., Royal Business School, Inc. v. New York State Dept. of Education,* 141 A.D.2d 170, 534 N.Y.S.2d 489 (3rd Dep't 1988) (allowing statistical sampling to determine the accuracy of a business school's certification of students for state tuition assistance awards, and to compute the total amount disallowed for improper certification); and *People v. Chesler,* 91 Misc.2d 551, 398 N.Y.S.2d 320 (N.Y.Sup.Ct.1977) (expert testimony permissible based upon sampling in a case challenging the representation of minorities in a jury pool). It is equally true, however, that the evidence before the court, primarily in the form of damage reports and experts' affidavits, undeniably has a "tendency" to show the amount of damages allegedly sustained by NiMo. Estimates based on "sound sampling techniques" will, in some circumstances, suffice as the best evidence of proving damages. *Martin Motor Sales, Inc. v. Saab–Scania of America, Inc.,* 452 F.Supp. 1047, 1053 (S.D.N.Y.1978), *aff'd without pub. opinion,*595 F.2d 1209 (2d Cir.1979) (citation omitted).[86] Thus, even though the present case might not fall into the group of cases where statistical sampling evidence has typically been permitted, without a more fully developed record, there can be no determination as to whether NiMo's sampling techniques are sound.

***37** NiMo's experts need to be cross-examined and defense experts also need to render their opinion—both as to the propriety of the sampling methodology employed, and as to the conclusions which can be drawn from that methodology. Presumably, cross-examination of experts on both sides of this litigation will allow the respective opposing counsel to show, for example, the fallacy, if any, in the reasoning of a given expert; whether that expert's calculations are based upon faulty underlying assumptions, and whether the methodology used is a reasonable basis for ascertaining damages.[87] Only then will the court be in a position to determine whether certain damage claims are truly speculative.[88]

This is not a situation, as ITT contends, where it can be safely said at this point that NiMo's damages calculations as to large bore piping are so "grossly inflated and exaggerated as to render them meaningless." *D.S. Magazines, Inc. v. Warner Publisher Services,* 640 F.Supp. 1194, 1209 (S.D.N.Y.1986) (damages claims "derived from unwarranted bases and speculative assumptions ... [were] so conjectural that they could not serve as a proper basis for calculating plaintiff's alleged damages"). Nor is this a situation such as that presented in *Herman Schwabe* where the testimony of plaintiff's economist was properly excluded because it was based on assumptions that ranged from "demonstrably false to unreasonable and contrary to common sense." *Autowest,*

Inc. v. Peugeot, Inc., 434 F.2d 556, 566 (2d Cir.1970) (citing *Herman Schwabe,* 297 F.2d at 910–12). Looking at NiMo's damage proof in a vacuum (that is without the advantage of experts offering contrary opinions), as the court necessarily must on this motion, it cannot say that the assumptions of NiMo's experts are demonstrably false and/or contrary to common sense. Such a finding would be premature given the current state of the record. The present case is more akin to *Trans World Airlines, supra,* 251 F.Supp. 439, where the court, quoting from a Ninth Circuit decision, observed that when evidence tends to support a theory of damages, a party has the right to put that evidence before a jury and ask them to believe it. 751 F.Supp. at 441 (quoting *Transworld Airlines Inc. v. American Coupon Exchange, Inc.*, 913 F.2d 676, 692–693 (9th Cir.1990). To conclude, the court denies ITT's summary judgment motion insofar as that motion is seeking a determination that NiMo's large bore piping claims are speculative as a matter of law because they are based upon statistical sampling.

b. Rework Determination

The second aspect of ITT's motion as to the large bore piping damage claim is that the attempt by NiMo's expert to ascertain a reasonable amount of rework is wholly speculative. As ITT describes it, there are essentially three steps in the methodology used by NiMo's expert to make that determination. First, the expert used a 73.4 manhour rate derived from the negotiation of unit rates in 1981. Deposition of Alan D. Nance (May 8, 1991) at 298 (ITT's Appendix, Vol. VII at 1954). Those rates supposedly reported a projection as to how long it would take to erect a given commodity. Mr. Nance (NiMo's engineering expert) then rounded up the unit rate to 100 manhours to justify "things we could not quantify." *Id.* at 309. (ITT's Appendix, Vol. VII at 1963). The resulting calculation represents the time Mr. Nance posits that ITT *should have* spent on each large bore pipe support. *Id.* at 293 (ITT's Appendix, Vol. VII at 1949). (emphasis added). Lastly, to arrive at a final reasonable rework figure, Mr. Nance relied upon a 1981 report suggesting that rework for all crafts on a nuclear power plant, not just large bore piping and pipe supports, could "represent 15 to 20 percent of total manhours in certain areas." ITT's Appendix Vol., VI at 1490. He also relied upon a 1981 estimate by SWEC that rework due to design changes might equal 12%. Mr. Nance thus computed that rework due to craft error (put more bluntly, ITT's "fault") should have been no more than ten percent. ITT's Appendix, Vol. VII at 1950. The end result of those calculations is an allocation of ten manhours (that is, ten percent of 100 manhours) as a reasonable rework rate for each large bore pipe support. ITT's Appendix, Vol. V at 1256.

***38** These calculations result in "no more than a guess" in ITT's opinion. ITT's Damages Memorandum at 31. ITT disputes these calculations claiming that "plaintiffs are attempting to unilaterally impose a contractual obligation on Grinnell [ITT] that was never discussed in negotiations." *Id.* More particularly, according to ITT, "[t]he final result of the plaintiffs' methodology is an attempt to hold Grinnell [ITT] liable for hours devoted to rework in excess of ten percent of the time Grinnell [ITT] 'should' have taken to erect the pipe supports and piping." *Id.*

NiMo does not challenge ITT's description of the methodology used by Mr. Nance to determine a reasonable rework amount. Instead, as it did with most of the damage claims, NiMo responds by reiterating the general rules of law as to proof of damages, and by outlining the extensive work done by its experts to quantify the damages. Basically for the same reasons set forth in section III(B)(2)(a), the court is unable to hold that the reasonable amount of rework calculated by NiMo's experts in connection with large bore piping is speculative as a matter of law. NiMo is apprised, however, that on the record as it is presently constituted, on a spectrum, the rework element of the large bore piping claims seems to fall far closer to impermissible, speculative evidence than it does to admissible evidence.

3. CAT/SALP

The only ground asserted by ITT for granting summary judgment on NiMo's claim regarding CAT/SALP costs generally is that those damages are consequential. In ITT's view, these damages are consequential and thus excluded under the contract because they are not a "direct" or "natural" result of ITT's alleged breach of contract. ITT's Damages Memorandum at 34. As previously discussed, whether damages are consequential or not is usually a fact issue.[89] Therefore, ITT's assertion that these damages are consequential does not form an adequate basis for the granting of summary judgment.

4. Increased QA/QC Costs

As part of their CAT/SALP claim, NiMo is seeking to recover $10,522,576.00 (excluding overhead and financing costs) of the total project QA/QC costs. ITT's Appendix, Vol. V at 1310. This calculation is based on the assumption that as a result of failures (at least some, if not all, of which NiMo is attributing to ITT) revealed by the CAT and SALP audits conducted by the NRC, there were "substantial increases in *project* QA/QC manpower" which otherwise would not have been needed. *Id.* (emphasis added). ITT presents the court with compelling reasons as to why this particular claim is speculative as a matter of law. *See* ITT's Damages Memorandum at 36–40. NiMo does not refute that reasoning; instead, as before, it simply makes generalizations regarding the merits of its proof. NiMo cannot survive ITT's motion for summary judgment on this claim on the basis of those generalizations.

The court agrees with ITT—the mathematical formula used by NiMo to quantify this claim is fraught with uncertainty. The most glaring and perhaps most significant uncertainty is that one of NiMo's experts "estimated," with no readily apparent foundation, that 25% of the QA/QC costs which he deemed as "excessive" are attributable to ITT. ITT's Appendix, Vol. V at 1384. Plainly then this claim is far too speculative and as such does not meet the standards established in the case law discussed herein. Thus, for substantially the reasons set forth in ITT's Damages Memorandum, the court grants summary judgment to ITT as to the damage claim for increased QA/QC costs.

5. MAC Review Costs

***39** Another part of the CAT/SALP claim is the $3,690,604.00, which supposedly represents ITT's share of the MAC review. The MAC review refers to the consulting work done by an outside firm (MAC) assessing NMP2 quality programs. NiMo divides the MAC review cost into two parts: the amount charged by MAC and the estimated costs of all personnel on the NMP2 project, including ITT employees, who assisted or otherwise interacted with MAC. ITT's Appendix, Vol. V at 1230–32; 1304–05. Once again, NiMo did not respond in any specific or meaningful way to ITT's cogent argument that this element of damages is speculative because it is based upon no more than a series of estimates connected by unfounded assumptions. So, for the reasons set forth in ITT's Damages Memorandum, ITT is also entitled to summary judgment on that portion of the CAT/SALP claim pertaining to the cost of the MAC review.

6. QPMP Costs

Supposedly as a result of mismanagement by ITT, the NRC ordered the NMP2 project to establish a program to monitor construction quality activities. ITT's Appendix, Vol. V at 1232–33. NiMo is seeking to recover $113,682.00 of the estimated cost of that program. This claim too cannot withstand ITT's summary judgment motion. NiMo has come forth with absolutely nothing to convince the court that these calculations are based upon anything other than educated guesswork. The court agrees with ITT, given the guesswork and unsupported assumptions which form the basis for this damage estimate, summary judgment on the QPMP claim is mandated. *See* ITT's Damages Memorandum at 42–44; and ITT's Reply Memorandum at 13.

7. Civil Penalty

In a letter dated March 20, 1984, the NRC included a Notice of Violation imposing a $100,000.00 civil penalty on NMP2. ITT's Appendix, Vol. V at 1309; *see also id.* at 1373–82. One of NiMo's experts determined that 19% of that penalty or $19,000.00 was attributable to ITT. NiMo is seeking to recover that sum. The $19,000.00 figure was arrived at through a relatively simple computation. The total number of NRC violations cited was divided by the violations (or portions of violations) which NiMo contends were the "fault" of ITT. *Id.* at 1309, 1373–83. The court concurs with ITT that because "[t]he plaintiffs did not consider the severity of the violations, nor take into consideration the NRC's overwhelming concern with Niagara Mohawk's management deficiencies," this particular damage calculation "does not bear the 'definite and logical connection' between Grinnell's alleged deficiencies and the claimed damages required by *Berley Industries,...*." ITT's Damages Memorandum at 44–45. That, combined with the fact that NiMo offered nothing to convince the court otherwise, requires that summary judgment be granted in favor of ITT on this claim.

8. Engineering Oversight

As previously mentioned, engineering oversight costs are not a separate category of damages, but are a portion of the damage claims for planner preparation, large bore pipe

support and large bore piping.[90] ITT contends that these oversight damages are both consequential and speculative. The court can find no reason in this instance to deviate from its initial conclusion that generally whether damages are consequential is a fact issue. (ITT itself seems to place little credence in the argument that oversight damages are consequential, as it devotes only one sentence of its lengthy damages memorandum to that argument. *See* ITT Damages Memorandum at 48.) Thus, summary judgment is denied on the engineering oversight portion of NiMo's damages insofar as said motion is based upon the assumption that those damages are consequential.

***40** Nor does the court agree with ITT that these damages are speculative as a matter of law. ITT insists (mistakenly) that NiMo's formula is based on two unsupported assumptions. Specifically, according to ITT the assumptions that NiMo's engineering costs increased and that they did so on a proportional basis are both unsupported. Those assumptions are not completely unsupported, however. In fact, the contrary is true: both assumptions are amply supported by proof in the record. For example, two NiMo employees unequivocally averred that NiMo incurred increased oversight costs due to ITT failures. Affidavit of Yatish C. Goyal (Dec. 3, 1991) at ¶ 9 (Plaintiffs' Exhs. Vol. V, Tab T thereto); Affidavit of Gerald K. Rhode (Nov. 27, 1991) at ¶ 12 (Plaintiffs' Exhs. Vol. VI, Tab U thereto); *see also* Huston Affidavit at ¶ 17 (Plaintiffs' Exhs., Vol. IV at 770). Insofar as the assumption that increases were on a proportional basis is concerned, based upon the averments and deposition testimony of Charles Huston, one of NiMo's experts, the court is also satisfied that that is not a completely unsupported assumption. *See* Huston Affidavit at ¶ 17 (and citations therein) (Plaintiffs' Exhs., Vol. IV at 770).

ITT tries to depict the oversight formula as being the same or worse than the mathematical formula rejected by the Court of Appeals in *Berley Industries,* where there was no attempt "to prove that the formula was logically calculated to produce a fair estimate of actual damages." *Berley Industries,* 45 N.Y.2d at 688, 412 N.Y.S.2d at 591. In the present case, NiMo made such an attempt. Therefore, the court will allow NiMo's damage claim for oversight to remain in the case—at least for now.

9. Overhead

NiMo's claim for overhead costs, totaling $3,573,744.00, (also a portion of other damage claims rather than an actual category of damages unto itself), is in almost the exact same position as the oversight claim. ITT contends that summary judgment on this claim is also mandated because such costs are speculative, and barred as consequential damages. Again, the court will not retreat from its determination that the issue of whether damages are consequential is ordinarily one of fact. Therefore, the resolution of that issue will have to await another day. Further, because there is no discernable difference between the method used to calculate oversight costs and that used to calculate overhead costs, there is also no basis for granting summary judgment in ITT's favor on the overhead claim.

10. Liquid Penetrant Inspection

During the course of the CAT inspection, the NRC found that five welds that had been liquid penetrant inspected[91] and accepted by ITT had, in fact, unacceptable "linear indications." As part of the damages, NiMo is seeking $9,633,506.00,[92] which it attributes to the fact that for a period of time, ITT's union pipefitters accompanied liquid penetrant inspectors. ITT's Appendix Vol. V, at 1286.

***41** ITT vigorously argues that it is "inconceivable" that NiMo is entitled to recover any amount for these alleged damages because the arrangement to have ITT union pipefitters accompany inspectors was approved with the piping union management by SWEC's resident manager, Ronald Wagner. And relying upon contract P301C, ITT states that it was obligated to abide by SWEC's directions, and, by the same token, was entitled to reimbursement for such resulting labor costs.

NiMo alleges that ITT misapprehends the nature of this claim. NiMo, through the affidavit of Charles Huston, contends that it is not an issue of who supplied or requested the union pipefitters who accompanied the liquid penetrant inspectors. Huston Affidavit at 15 ¶ 29 (Plaintiffs' Exhs., Vol. IV at 777). Rather, in NiMo's view, the reason the pipefitters had to accompany the inspectors was essentially due to ITT's alleged breach of contract. That is, "[i]f ITT had planned and scheduled its work so that the welds were tested within a reasonable time, before dirt and rust had a chance to build up," then presumably there would have bee no need for the accompanying pipefitters. *Id.* (citation omitted). Because the outcome here appears to depend upon whether ITT properly performed under the contract, and because that is one of the

definitive issues for trial, ITT's summary judgment motion on this claim is denied.

This category of damages is also consequential according to ITT. The basis for ITT's argument this time is slightly different than it was for the other categories of damages. This time around, ITT is asserting that the use of additional ITT union pipefitters constitutes a "special" or "unusual" circumstance; and thus any damages arising therefrom are consequential. Even though the argument is different, the result is the same. Whether these damages are consequential and thus excluded under the contract cannot be decided on this summary judgment motion.

11. Planner Preparation

The last specified category of damages is for costs incurred due to SWEC's preparation of planner packages. Following an NRC inspection in April, 1982, SWEC personnel began to prepare some of the planners. ITT's Appendix, Vol. V at 1292, 1299. They did that because the NRC resident inspector found that the welding procedure for a certain category of welds had not specified that the welds be qualified for impact testing. *Id.* at 1292. According to ITT, those planners would have had to have been prepared by someone in any event, so the cost of SWEC personnel who eventually performed that task is not recoverable. ITT bluntly states, "[t]here is no legal theory or contractual obligation to support such a recovery." ITT's Damages Memorandum at 51.

NiMo argues, on the other hand, that the damages it is seeking under this claim are for costs incurred as a result of "[t]he fact that SWEC personnel had to take over work that ITT personnel had performed improperly." Huston Affidavit at 16, ¶ 31 (Plaintiffs' Exhs., Vol. IV at 778) (citation omitted). Thus, as with the liquid penetrant inspection claim, this claim too seems to turn on NiMo's success in proving a breach of the underlying contract; and that issue cannot and has not been decided by these motions. NiMo's claim for planner preparation will thus remain in the case for now.

12. Other Damages

*42 Finally, ITT is arguing that a catch-all category of damages, which it simply refers to as "other," are consequential damages and thus barred under the contract. *See* ITT's Damages Memorandum at 52 and chart attached thereto. It should come as no surprise that the court is hesitant to conclude that these damages are consequential, and therefore prohibited by the contract, when ITT has not even specified what those damages are, except in a cursory manner. Moreover, such a finding would be wholly inconsistent with the court's prior determination that whether damages (of any kind) are consequential is a fact issue.

To summarize, with the exception of the damage claims for QA/QC costs; MAC review; QPMP costs; and the civil penalty, [93] the court is not prepared to hold at this point in the litigation that any of NiMo's other damage claims are speculative (or otherwise barred) as a matter of law. Furthermore, the court on these motions will not, and cannot, determine that any of NiMo's purported damages are consequential and thus barred under contract P301C. The possibility always remains, however, that the court will be in a position to make such determinations (both as to the speculative nature of given damage claims and/or whether any damages are consequential as a matter of law) after hearing the proof at trial. [94]

Accordingly, for the reasons set forth herein, it is hereby ORDERED:

(1) that the first motion for summary judgment by the ITT defendants is GRANTED with respect to the enhanced radiograph claims; and in all other respects it is DENIED;

(2) that plaintiffs' cross-motion for summary judgment is in all respects DENIED;

(3) that the motion for summary judgment by the ITT defendants seeking to dismiss Count V (Breach of Contract) of the Amended Complaint on the grounds that that cause of action is contractually barred is DENIED;

(4) that the motion for summary judgment by the ITT defendants seeking to dismiss Count VI (Negligence) of the Amended Complaint on the grounds that that cause of action is barred by the economic loss doctrine is GRANTED;

(5) that the motion for summary judgment by the ITT defendants seeking to dismiss Count VII (Gross Negligence) of the Amended Complaint on the grounds that the ITT defendants did not owe the plaintiffs any independent tort duty and/or that such cause of action is barred by the economic loss doctrine is DENIED;

(6) that the motion for summary judgment by the ITT defendants seeking to dismiss plaintiffs' claim for financing costs on the grounds that those damages are barred by law and are consequential damages barred by the parties' contract is DENIED;

(7) that the motion for summary judgment by the ITT defendants seeking to dismiss plaintiffs' claim for increased QA/QC costs, MAC review costs, QPMP costs and a portion of the civil penalty on the grounds that they are speculative is GRANTED;

(8) that the motion for summary judgment by the ITT defendants seeking to dismiss plaintiffs' claim for CAT/SALP damages on the grounds that those damages are consequential damages barred by the parties' contract is DENIED;

*43 (9) that the motion for summary judgment by the ITT defendants seeking to dismiss plaintiffs' claims for engineering oversight costs on the grounds that those damages are speculative and are consequential damages barred by the parties' contract is DENIED;

(10) that the motion for summary judgment by the ITT defendants seeking to dismiss plaintiffs' claim for overhead on the grounds that those costs are speculative is DENIED;

(11) that the motion for summary judgment by the ITT defendants seeking to dismiss plaintiffs' claim for the costs of pipefitters accompanying liquid penetrant inspectors is DENIED;

(12) that the motion for summary judgment by the ITT defendants seeking to dismiss plaintiffs' claim for the costs of SWEC's preparation of planners is DENIED; and

(13) that the motion for summary judgment by the ITT defendants to dismiss all claims for consequential damages identified on the chart attached to ITT's Damages Memorandum on the grounds that they are barred by the parties' contract is DENIED.

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp., 1992 WL 121726

Footnotes

1 The various memoranda of law submitted in connection with these two sets of motions total over 300 pages in length, excluding exhibits thereto and Statements of Material Facts pursuant to Local Rule 10(J). The combined exhibits total approximately 3,818 pages. In addition, in response to ITT's second set of summary judgment motions, plaintiffs submitted six volumes of appendices which are not numbered sequentially, but which measure nearly nine inches in height. Some of the exhibits are duplicative, but not many.

2 The plaintiffs are Niagara Mohawk Power Corporation ("NiMo"), Long Island Lighting Company, New York Gas and Electric Corporation, Rochester Gas and Electric Corporation, and Central Hudson Gas & Electric Corporation. Because NiMo is the owner of the largest share of NMP2 and because it is the first named plaintiff, NiMo and plaintiffs will be used interchangeably throughout this decision.

3 When ITT filed its original summary judgment motion in December, 1990, it included a motion for summary judgment on SWEC's cross-claim for contribution and indemnification. However, based upon the SWEC settlement agreement, SWEC has agreed to drop this cross-claim against ITT; thus rendering moot that portion of ITT's first summary judgment motion.

4 Amended Complaint at ¶¶ 150–157.

5 The damage figures cited herein are all taken from NiMo's damage reports—part of the record on these motions. The court is cognizant of the fact that due to additional recent calculations by NiMo's experts (some as recent as early this month), these figures may not correspond exactly to the damages NiMo will be seeking to prove at trial. The court will use the figures contained in those damage reports simply as a point of reference. Those figures are not binding on the parties in any way.

6 In addition to P301C, ITT and NiMo entered into two other contracts for the project. One was a contract to fabricate the pipe ("the piping contract" or "301B" contract) and the other was a contract to fabricate the pipe supports. Contract P301C is at the heart of this litigation, but there is one allegation pertaining to the 301B piping contract and that is the so-called radiograph enhancement claim, which will be briefly addressed later.

7 *See* Answer to Amended Complaint, Counterclaim and Jury Demand of ITT Fluid Products Corporation and ITT Fluid Technology Corporation at 16–17.

In its answer, ITT specifically asserts an affirmative defense based upon the "settlement agreements" (i.e. the pertinent Contract Changes). *Id.* at 17. That is not truly a discrete aspect of ITT's first summary judgment motion, however. Therefore, even though ITT separately asserted in its answer a defense based upon the "settlement agreements," the court will not consider that as a possible independent basis for ITT's first summary judgment motion. The settlement agreement defense will only be considered insofar as the same is encompassed in the other affirmative defenses which form the basis for ITT's motions herein.

8 Plaintiffs' Memorandum in Support of their Cross–Motion for Summary Judgment and in Opposition to Motion for Summary Judgment of Defendants ITT Fluid Products Corporation and ITT Fluid Technology Corporation ("Plaintiffs' Memorandum") at 4, n. 4.

9 *See also Ginett v. Computer Task Group, Inc.,* No. 91–7768, 91–7792, slip op. 3169, 3195–3196 (2d Cir. April 21, 1992) ("If an ambiguity in the contract exists, then summary judgment is generally improper, because the principles governing summary judgment 'require that where contract language is susceptible of at least two fairly reasonable meanings, the parties have a right to present extrinsic evidence of their intent at the time of contract.' " (quoting *Schering Corp. v. Home Ins. Co.,* 712 F.2d 4, 9 (2d Cir.1983)); *see also Werbungs Und Commerz Union Austalt v. Collectors' Guild, Ltd.,* 930 F.2d 1021, 1025–1026 (2d Cir.1991) ("Where contract language is ambiguous, interpretation of the language's meaning, and hence determination of the parties' intent, is a question of fact for the jury.") (citations omitted); *Enercomp, Inc. v. McCorhill Pub., Inc.,* 873 F.2d 536, 546 (2d Cir.1989) ("Where parties' intent cannot be conclusively determined as a matter of law from the terms of the agreement at issue, a factual question arises that must be resolved by a jury.")

10 And that is so even where, as here, both parties move for summary judgment. *Long Island Airports Limousine Service Corp. v. Playboy–Elsinore Associates,* 739 F.2d 101, 103 (2d Cir.1984) (citations omitted); *see also Home Ins. Co. v. Aetna Cas. & Sur. Co.,* 528 F.2d 1388, 1390 (2d Cir.1976) (citing *American Manuf. Mutual Ins. Co. v. American Broadcasting–Paramount Theatres, Inc.,* 388 F.2d 272, 279 (2d Cir.1967)) (fact that both sides move for summary judgment does not make it more readily available).

11 Memorandum in Support of Motion for Summary Judgment of Defendants ITT Fluid Products Corporation and ITT Fluid Technology Corporation ("ITT's Memorandum") at 46.

12 *See supra,* p. 9.

13 Contract Change 32 at 1, ¶ III (ITT's Appendix, Vol. III at 782).

14 *See Leberman, supra,* 880 F.2d at 1559.

15 ITT's Memorandum at 62.

16 *See supra,* p. 6.

17 ITT endeavors to distinguish this case, among others, on the ground that it involved a gratuitous, as opposed to a bargained for release. That is a distinction without a difference, at least for purposes of analyzing the issues raised by ITT's motions. ITT has not pointed to any case authority, and the court is aware of none, in which a New York court has employed different standards governing releases based upon whether they are gratuitous or not.

18 *Accord Gillaizeau,* 766 F.2d at 713 (citing *Gordon,* 358 F.2d at 263) ("The parties' intent will determine the scope of a release.")

19 *See Marvel Entertain.,* 747 F.Supp. at 948.

20 *See Gillaizeau,* 766 F.2d at 713.

21 ITT's Memorandum at 68.

22 Patent defects are those defects "known or discernible by reasonable inspection." *Yeshiva Univ. v. Fidelity & Deposit Co.,* 116 A.D.2d 49, ——, 500 N.Y.S.2d 241, 244 (1st Dep't 1986) (citing *Town of Tonawanda v. Stapell, Mumm & Beals Corp.,* 240 A.D. 472, 270 N.Y.S. 377 (4th Dep't), *aff'd,*265 N.Y. 630 (1934)).

23 *See id.* at 408 (citation omitted).

24 *See, e.g., Cawley v. Weiner,* 236 N.Y. 357 (1923); *John W. Cowper Co. v. Buffalo Hotel Dev. Venture,* 115 A.D.2d 346, 496 N.Y.S.2d 127 (1985), *appeal of third-party plaintiff dismissed,*68 N.Y.2d 660, 505 N.Y.S.2d 75 (1986), *aff'd,*72 N.Y.2d 890, 532 N.Y.S.2d 742 (1988).

25 *See supra,* p. 9.

26 *See Schering, supra,* 712 F.2d at 9–10.

27 The "N" stamp refers to the "NA/NPT" stamp held by ITT. According to ITT, "[a]n N stamp represents authorization by the American Society of Mechanical Engineers ... to install safety related piping on a nuclear power plant. Memorandum (Liability Issues) in Support of the ITT Defendants Second Motion for Summary Judgment ("ITT's Liability Memorandum") at 42.

28 A court may, *sua sponte,* deviate from the law of the case doctrine for, among other reasons, the purpose of avoiding the perpetration of error. When that is done, certain notice requirements must be met. For example, in *United States v. Uccio,* 940 F.2d 753 (2d Cir.1991), the Second Circuit held that the district court properly exercised its discretion to revisit one of its prior rulings where the district court believed such ruling was "incorrect." *Id.* at 758–59. The Second Circuit explicitly held that "[h]aving given Uccio [the defendant] sufficient notice and an opportunity to be heard, it was well within the court's discretion to decline to deem itself bound by a ruling that it had come to view as wrong." *Id.* at 759. *See also United States v. Lorusso,* 695 F.2d 45, 53 (2d Cir.1982) (" 'whether the case *sub judice* be civil or criminal[,] so long as the district court has jurisdiction over the case, it possesses inherent power over interlocutory orders, and can reconsider them when it is consonant with justice to do so' ") (quoting *United States v. Jerry,* 487 F.2d 600, 605 (2d Cir.1973)), *cert. denied,*460 U.S. 1070, 103 S.Ct. 1525, 75 L.Ed.2d 948 (1983)). Thus, in the present case, even though none of the parties moved for reconsideration after *NiMol,* if the court were, in its discretion, to revisit the issues decided therein, the law of the case doctrine would not be violated, assuming the existence of a valid legal basis justifying such reconsideration.

29 Although part of NiMo's tort claims were dismissed in *NiMol,* the parties did not seek and the court did not enter a partial or final judgment with respect to those claims, as provided for in Fed.R.Civ.P. 54(b). That rule allows a court to "direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment." Fed.R.Civ.P. 54(b). That was not done here. Rule 54(b) further states, in straightforward language:

> In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision *is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.*
>
> *Id.* (emphasis added); *see also In Re United States,* 733 F.2d 10, 13 (2d Cir.1984) ("It is well established that the interlocutory orders and rulings made pretrial by a district judge are subject to modification by the district judge at any time prior to final judgment,....") (citations omitted). Therefore, because a partial final judgment under Rule 54(b) was not issued in connection with *NiMol,* the court could conceivably reconsider its prior decision therein, providing no other obstacles to reconsideration are present.

30 In a more picturesque statement, the Court in *Sterling* stated, "to be clearly erroneous, a decision must ... strike us as wrong with the force of a five-week-old, unrefrigerated dead fish." 886 F.2d at 233.

31 Indeed, the court observes that after both *NiMol* and *Wrigley* were decided, at least one New York state court plainly held, albeit with no analysis, that a cause of action for negligent performance of a contract "simply does *not* exist...." *Megaris Furs, Inc. v. Gimbel Bros., Inc.,* 172 A.D.2d 209, ——, 568 N.Y.S.2d 581, 583 (1st Dep't 1991) (emphasis added) (citing *Hamilton v. Hertz Corp.,* 130 Misc.2d 1034, 1037, 498 N.Y.S.2d 706). *Cf. Westminster Const. Co. v. Sherman,* 160 A.D.2d 867, ——, 554 N.Y.S.2d 300, 301 (2d Dep't 1990) (citations omitted) (allegations that work was performed under a contract in a "less than skillful and workmanlike manner" stated a cause of action for breach of contract, and not for negligence).

32 NiMo does not attempt to characterize its damages as anything other than economic in nature. *See* Tr. II at 57 (plaintiffs' counsel admitting that all damages sought here under negligence theories are economic loss damages). In fact, as early as December 13, 1988, when ITT's motion to dismiss the tort claims was argued, ITT described NiMo's damages as solely for economic loss. *See* Tr. I at 5. NiMo did not challenge that.

33 *NiMol,* 725 F.Supp. at 667–68.

34 *See Richardson Greenshields Securities v. Mui–Hin Lau,* 693 F.Supp. 1445, 1456 (S.D.N.Y.1988) (applying New York law, court denied summary judgment on breach of fiduciary duty claim because of conflicting evidence regarding whether brokerage firm employee had a fiduciary relationship with customer); *see also Carter Equipment Co. v. John Deere Industrial Equipment Co.,* 681 F.2d 386, 390 (5th Cir.1982) ("The existence or nonexistence of a fiduciary relationship between parties is a question of fact for the jury."); *Roberts v. Sears, Roebuck & Co.,* 573 F.2d 976, 983 (7th Cir.), *cert. denied,*439 U.S. 860, 99 S.Ct. 179, 58 L.Ed.2d 168 (1978), (To establish the existence of a confidential relationship in the context of a fraud claim, the Court stated, "The trier of fact must examine all of the circumstances surrounding the relationship between the parties and determine whether 'one person reposes trust and confidence in another who thereby gains a resulting influence and superiority over the first.' ") (quoting *Kester v. Crilly,* 405 Ill. 425, 91 N.E.2d 419, 423 (1950)).

35 The court is cognizant of the fact that, for the most part, the cases referenced herein included separate and distinct claims for breach of a fiduciary duty. *NiMol,* 725 F.Supp. at 666. NiMo is making no such claim. The court is of the view, though,

that the rules governing whether a fiduciary relationship exists, be it formal or informal, apply with equal force even where no claim for breach of a fiduciary duty is alleged.

36 Judge Sweet's decision in *Don King Productions, Inc. v. Douglas,* 742 F.Supp. 741 (S.D.N.Y.1990), does not require a different conclusion. Although the court in *Don King* held, as a matter of law, that there was no special relationship of trust and confidence arising out of a promotional contract between a boxer and a promoter, there was persuasive evidence in that case that the boxer, as well as his manager, believed that the promoter had not been doing a satisfactory job, thus destroying any alleged trust relationship. *See id.* at 766–67.

> There is a marked contrast between the evidence presently before this court and the evidence in *Don King.* Unlike *Don King,* ITT has not pointed to any evidence showing that the alleged relationship of trust between it and NiMo was destroyed. Perhaps more importantly, however, at least at this stage in the court's analysis, is the fact that NiMo has highlighted evidence which, if found credible by a jury, could support a finding of a special relationship of trust and confidence.

37 The court readily admits that, in an effort to find evidence which would support ITT's position, it did not scrupulously review the entire record submitted in connection with motions presently before it. That is not the court's obligation; it is the obligation of the parties.

38 Without any evident foundation, Mr. Rhode avered that ITT was "functioning as the project manager for piping erection [at NMP2]...." Rhode Affidavit at ¶ 13 (Plaintiffs' Exhs., Vol. IV thereto at 746).

39 Such a rule is necessary because of the divergent goals of tort and contract law, which the court can in *Carmania* thoughtfully explained as follows:

> The law of contracts is meant to facilitate voluntary economic exchange. Plaintiffs who sue successfully for breach of contract are entitled to damages providing them with the benefit of the bargains they and the defendants chose to strike—i.e., to be placed in the positions they would have enjoyed had the parties' expectations panned out. The law of torts, in contrast, has different goals: to deter people from inflicting harm when they behave unreasonably, and to compensate those injured by restoring them to the state they occupied before they suffered harm.
>
> *Carmania,* 705 F.Supp. at 938.

40 Insofar as NiMo's liability memorandum can be read as intimating that the economic loss doctrine is not a bar to the tort claims because ITT rendered professional services, the court declines to so find. Even assuming that the erection of large bore piping and pipe supports by ITT amounted to the rendering of professional services, the court is not prepared to expand the professional services exception to include construction project subcontractors such as ITT. Including subcontractors within the limited professional services exception to the economic loss doctrine would significantly undermine that doctrine; because then any subcontractor on a construction project, even those in contractual privity, could be held liable for strictly economic loss damages. The court is not prepared to take so expansive a view of the professional services exception to the economic loss doctrine.

41 *See, e.g., Sears, Roebuck & Co. v. Enco Assocs., Inc.,* 43 N.Y.2d 389, 401 N.Y.S.2d 767 (1977); *Paver & Wildfoerster v. Catholic High School Association,* 38 N.Y.2d 669, 382 N.Y.S.2d 22 (1976); *but see Robinson Redevelopment Co. v. Anderson,* 155 A.D.2d 755, 547 N.Y.S.2d 458 (3rd Dep't 1989) (developer not entitled to bring professional malpractice claim for economic loss against architectural firm).

42 *See NiMol,* 725 F.Supp. at 665.

43 *See id.*

44 *See Schiavone,* 56 N.Y.2d 667, 451 N.Y.S.2d 720 (1981).

45 Although this paragraph is designated as a separate subsection of the amended complaint entitled, "damages," it is incorporated by reference in the tort causes of action alleged against ITT. *See* Amended Complaint at 41–42, ¶¶ 153 and 156. And no other damages are referred to in the tort claims. Thus, it is clear that NiMo is seeking to recover for these damages based upon a tort theory.

46 *See* Plaintiffs' Appendices Vols. II, III, IV, and V, Tabs I–P thereto.

47 Although there was a plain negligence claim asserted in *Int'l Ore,* the district court refused to allow that claim to stand because it found no independent tort liability in that the claimed failure to perform arose only by virtue of the contract. *Int'l Ore,* 743 F.Supp. at 258.

48 *See, e.g., Kalisch–Jarcho, Inc. v. New York,* 58 N.Y.2d 377, 381–85, 461 N.Y.S.2d 746, 747–50 (1983).

49 *See* Plaintiffs' Liability Memorandum at 42, n. 12.

50 The accepted definition of gross negligence actually combines two definitions. *See Federal Ins. Co. v. Honeywell, Inc.,* 631 F.Supp. 1560, 1563 (S.D.N.Y.1986). " 'Gross negligence means a failure to use even slight care, or conduct that is

so careless as to show complete disregard for the rights and safety of others.' " *Id.* (quoting *N.Y. Pattern Jury Instructions* 2:10A (Supp.1986)).

51 On April 27, 1992, the court received, via facsimile, a copy of Plaintiffs' Supplemental Memorandum in Opposition to ITT's Second Motion for Summary Judgment ("supplemental memorandum"). Accompanying that memorandum was a letter from plaintiffs' counsel, John Ferguson, indicating that the memorandum would be filed with the court on April 28, 1992. The court did not consider that memorandum in connection with the present motions, and denied ITT's telephone request for permission to file a reply to the supplemental memorandum.

Plaintiffs did not seek permission from the court for the filing of such memorandum, as required by Local Rule 10(E). Furthermore, of at least equal significance is the fact that when the court received that supplemental memorandum, it was in the throes of drafting this decision. The court understands all too well that this is a technically complex case, and that at least one expert was not deposed until April 15, 1992. (Plaintiffs' supplemental memorandum did focus primarily on that testimony.) Those factors do not justify plaintiffs' unsolicited submission. As previously mentioned, the record on these motions is voluminous, and the combined memoranda of law extremely lengthy. This case is scheduled to be tried in less than three weeks—at some point submissions to the court must stop. The court has reached that point.

52 Those categories are:

(1) financing costs;

(2) erection, repair, and rework of large bore piping and pipe supports ("large bore piping");

(3) costs allegedly incurred by NiMo as a result of inspections conducted as part of the Nuclear Regulatory Commission's ("NRC") "Construction Appraisal Team" ("CAT") and three "Systematic Assessment of Licensee Performance" ("SALP") inspections—generally referred to by the parties (and hence the court) as the CAT/SALP claim;

(4) increased quality assurance/quality control ("QA/QC");

(5) retaining Management Analysis Company ("MAC") to assess NMP2's quality programs and assist with corrective actions supposedly necessitated by ITT's alleged mismanagement of quality programs;

(6) the quality performance management program ("QPMP") instituted at the behest of the NRC;

(7) civil penalty;

(8) engineering oversight;

(9) overhead;

(10) liquid penetrant inspection;

(11) planner preparation; and

(12) a final category designated by ITT only as "other damages". ITT's Damages Memorandum at 52.

The costs for QA/QC, MAC review, civil penalty and QPMP are part and parcel of the so-called CAT/SALP claim; but for the sake of clarity, the court, as did ITT, will separately address each of those elements of the CAT/SALP claim. Additionally, overhead costs and financing costs are not actually separate and distinct categories of damages, but have been added to various other categories of damages. They too will be separately addressed, because there are some legal arguments pertaining only to them.

53 The contract specifically provides, "In no event shall the Contractor [ITT] be liable for consequential damages arising out of the performance of erection work to the project." Contract P301C, Supplementary Conditions, at 6, ¶ 8 (Plaintiffs' Exhs., Vol. I at 16). Interestingly, despite a total of 34 contract changes, that particular provision remained unchanged throughout the duration of contract P301C.

54 In its analysis, NiMo combines the last two categories of damages, but to avoid possible confusion, the court will separately address the engineering oversight costs and the overhead costs.

55 Tr. II at 52.

56 *Id.*

57 This rule has its origins in the often cited case of *Hadley v. Baxendale*, 9 Exch. 341, 156 Eng.Rep. 145 (1854), wherein it states:

Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if

these special circumstances were wholly unknown to the party breaching the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract.

9 Exch. at ———, 156 Eng.Rep. at 151.

58 Such a contention by NiMo is slightly curious given the fact that it did not cross-move for summary judgment in response to ITT's summary judgment motion on the damage issues. Perhaps NiMo intends for the court, on its own volition, to grant summary judgment to plaintiffs on this narrow issue. *See Coach Leatherware Co. v. Anntaylor, Inc.*, 933 F.2d 162, 167 (2d Cir.1991) (citations omitted) (recognizing that although not expressly authorized by Rule 56, the practice of a district court independently granting summary judgment in favor of a nonmoving party has become "an accepted method of expediting litigation"). The court will not grant summary judgment in favor of NiMo, declaring that some or all of their damages are direct damages as a matter of law because, as will be seen, summary judgment on the issue of whether certain damages are direct or consequential is not appropriate.

59 *See Record Club of America, Inc. v. United Artists Records, Inc.*, 696 F.Supp. 940, 947 (S.D.N.Y.1988) (following non-jury trial, court dismissed claims for lost customer-list rental fees and advertising-insert income as consequential where there was no evidence submitted that such damages were within the contemplation of the parties when they entered into the agreement); *Havens Steel Co. v. Randolph Engineering Co.*, 613 F.Supp. 514, 541 (W.D.Mo.1985), *aff'd*,813 F.2d 186 (8th Cir.1987) (documentary evidence supported finding under Missouri law that "costs of capital" were recoverable as "direct" damages); *Burgess Constr. Co. v. M. Morrin & Son Co.*, 526 F.2d 108, 117 (10th Cir.1975), *cert denied*,429 U.S. 866, 97 S.Ct. 176, 50 L.Ed.2d 146 (1976) (citation omitted) ("Overhead is a proper element of cost of completion damages,...."); and *437 Madison Ave. Associates v. A.T. Kearney, Inc.*, 127 Misc.2d 37, 488 N.Y.S.2d 950 (Sup.Ct., 1st Dep't 1985) (losses due to non-breaching party's dealings with third party were consequential); *Certain–Teed Products Corp. v. Goslee Roofing & Sheet Metal, Inc.*, 26 Md.App. 452, 339 A.2d 302 (1975) (jury award of interest upheld on appeal because, among other reasons, "the interest paid was in fact a normal and thus foreseeable incident to [defendant's] breach of warranty"); and *Roanoke Hospital Ass'n v. Doyle & Russell, Inc.*, 215 Va. 796, 214 S.E.2d 155 (1975) (consequential damages denied where jury made factual determination that such damages were not within contemplation of the parties).

60 With respect to financing costs, ITT emphasizes that one scholar has written, albeit within the framework of the Uniform Commercial Code ("U.C.C."), "[b]ecause recovery of such interest or finance charges is a recovery of consequential damage, such recovery must be denied where consequential damages have been properly disclaimed or excluded by the buyer's contract of sale." Roy R. Anderson, *Incidental and Consequential Damages,* 7 Journal of Law and Commerce 327, 435 (1987). The court cannot accept that view, however, in light of the relevant case law set forth above. Moreover, the author's view is not especially persuasive because in that same article, as NiMo notes, the author references cases holding to the contrary. *See id.* at 435–36, 439. Thus, the court is unwilling, based upon the Anderson article, to hold as a matter of law that financing costs are consequential damages.

61 The court does not intend by this statement to foreclose the possibility of granting a directed verdict on this issue in the event NiMo does not come forth with sufficient proof at trial that the enumerated categories of damages were foreseeable and within the contemplation of the parties at the time they contracted.

62 *Accord Barker v. Underwriters at Lloyd's, London,* 564 F.Supp. 352, 358 (E.D.Mich.1983) (under Michigan law, applying *Hadley* rule, court stated, "[t]he issue of whether plaintiff can recover the alleged consequential damages is a question of fact that will be determined by evidence showing whether these damages were within the contemplation of the parties at the time the contract was made.")

63 ITT's Damages Memorandum at 14.

64 New York Civil Practice Law and Rules ("CPLR") § 5001 provides, in relevant part:

Interest *shall* be recovered upon a *sum awarded* because of a breach of performance of a contract, ..., ... and the rate and date from which it shall be computed shall be in the court's discretion.

N.Y.Civ.Prac.L. & R. § 5001 (McKinney 1963) (emphasis added).

65 *Accord Havens, supra,* 613 F.Supp. 514 (W.D.Mo.1985), *aff'd*,813 F.2d 186, 188 (8th Cir.1987) ("In Missouri, a claim for the cost of money used to pay expenses necessitated by a breach of contract is a claim for damages, not for prejudgment interest.")

66 In denying plaintiff's claim for financing costs, the *LILCO* court plainly relied upon the traceability factor as defined therein, as well as upon the fact that the plaintiff did not meet " '[i]ts burden of proof that its claim for financing costs was attributable to [lmo's] [defendant's] breach,'...." *LILCO* 1990 WL 64588, at *5, 1990 U.S.Dist. LEXIS 5351, at *17 (quoting *Ernst Steel Corp. v. Horn Const. Div.*, 104 A.D.2d 55, 481 N.Y.S.2d 833, 839, n. 16 (4th Dep't 1984), *mod'd*,486 N.Y.S.2d 1022 (4th

Dep't 1985)). Therefore, the just quoted statement is not, as NiMo suggests, mere *dicta* (and thus implicitly not worthy of serious consideration).

67 The date of this decision is illegible on the copy provided to the court.

68 A summary jury trial is a proceeding used to facilitate settlement by allowing parties to try a case before a jury, which will then render an advisory verdict. *See*Fed.R.Civ.P. 39(c).

69 Because the decision itself did not contain page numbers, the court took the liberty of inserting page numbers so as to avoid confusion.

70 *Compare Zimmer,* slip op. at 7 ("[C]ausation requires a showing that the damages claimed were reasonably foreseeable and in the contemplation of the parties."); and *WPPSS,* 1989 WL 306200, 1989 U.S.Dist. LEXIS 18279 at *19, n. 11 (citations omitted) ("In a contract action, the need to borrow the funds must be shown to have been 'a normal and foreseeable incident arising from' the breach of contract.") *with LILCO,* 1990 WL 64588, 1990 U.S.Dist. LEXIS 5351 at *16 (citation omitted) ("[C]ourts award such relief [financing costs] where the injured party can point to costs associated with a particular loan that was 'commercially reasonable and foreseeable' under the circumstances.")

71 As with other issues in this litigation, whether that proof will be legally sufficient to withstand the inevitable motion for a directed verdict by ITT remains to be seen.

72 In response to ITT's summary judgment motion on damages, NiMo has identified Ronald Ungerer, NiMo's Chief Financial Officer as someone who will testify regarding NiMo's capital raising efforts purportedly necessitated by ITT's alleged breach of contract. Specifically, NiMo states that Mr. Ungerer "will testify at trial that NMPC raised money to pay for the costs attributable to ITT's wrongdoing from various sources—including selling preferred stock and common stock, issuing long-term and short-term securities and making substantial borrowings—and incurred a finance cost on each source." Plaintiffs' Damages Memorandum at 42 (citing Ungerer Affidavit at ¶¶ 4–5; and NMPC's Response to ITT Interrogatories on Damages). The other plaintiffs will also present similar testimony. *Id.* (citing Cotentant Responses to ITT Interrogatories on Damages). That contemplated testimony, in conjunction with the fact that, at least at this juncture, ITT is not disputing that plaintiffs borrowed money and hence incurred financing costs due to ITT's alleged wrongdoing, renders summary judgment inappropriate.

73 As are many of the cases cited in this subsection, *Ernst Steel* involved a breach of a contract for goods under the U.C.C. Clearly the present case does not involve a contract for goods under the U.C.C.; but, in the absence of case authority directly on point, these U.C.C. cases at least provide some guidance.

74 The court does not read the selective language quoted by ITT from *Ernst Steel, see* ITT's Damages Memorandum at 12, as establishing a traceability requirement. When read in context, that language simply refers to causation. The plaintiff therein did not show that it borrowed funds to perform the subject contract.

75 *See also Zimmer,* slip op. at 8–9 (" '[R]andolph's [plaintiff] ability to recover its 'cost of capital' expense is [not] limited by its ability to 'trace' its actual 'borrowing' costs.... The only thing necessary is that the court have some reasonable way of determining Randolph's [plaintiff] borrowing cost *or* the cost associated with a use of its own capital....' ") (quoting *Havens, supra,* 613 F.Supp. at 542).

76 Plaintiffs' Damages Memorandum at 26.

77 ITT did mention (almost as an afterthought) that summary judgment could be granted dismissing the CAT/SALP claim on causation grounds. *See* ITT's Damages Memorandum at 45, n. 28. ITT also made that argument by inference with respect to the large bore piping claim. *See* Defendants' Reply Memorandum in Support of their Second Motion for Summary Judgment ("ITT's Reply Memorandum") at 10–11. However, because the parties did not undertake a thorough legal analysis of the fact of injury issue, but only briefly touched upon that issue, the court will not address it at this time. For the same reason (lack of briefing), the court will not hypothesize as to whether lack of causation is a viable alternate basis for granting summary judgment on any of the other damage claims.

78 In support of this statement, the Second Circuit here cited to *Perma Research & Dev. Co. v. Singer Co.,* 542 F.2d 111 (2d Cir.), *cert. denied,*429 U.S. 987, 97 S.Ct. 507, 50 L.Ed.2d 598 (1976). After *Kenford Co., supra,* the continuing validity of *Perma Research* is "seriously in doubt," but not insofar as it stands for the particular rule quoted above. *See Penthouse International, Ltd. v. Dominion Federal Sav. & Loan Asso.,* 855 F.2d 963, 983 (2d Cir.1988), *cert. denied,*490 U.S. 1005, 109 S.Ct. 1639, 104 L.Ed.2d 154 (1989) (acknowledging that Court of Appeals in *Kenford* specifically rejected the "rational basis" test enunciated in *Perma Research* as a basis by which to assess future lost profits damages).

79 In a number of the cited cases, including *Lamborn,* the courts discussed the standard for assessing damages proof as it relates to future damages, such as future lost profits. Even though NiMo is not seeking recovery of lost future profits, or any other type of prospective damages, that difference in the type of damages sought does not, in the court's view, render the cited cases involving prospective relief inapplicable here.

80 "Reasonable" is the characterization of NiMo's expert, Mr. Nance. Thus, any further references to a reasonable rework rate shall mean in the opinion of Alan Nance—not necessarily in the opinion of the court.

81 *See* Contract Change 26 at ¶ 27 (ITT's Appendix, Vol. VI at 1530).

82 *See* Contract Change 34, ITT's Appendix, Vol. III at 852–54.

83 ITT now regrets its failure to return those records because they would be helpful in showing "the grossly excessive nature of the plaintiffs' time estimates" regarding large bore piping. ITT's Reply Memorandum at 11.

84 NiMo insinuates that there was something improper about ITT destroying those records, whereas it appears that those records were simply destroyed "in the normal course of [ITT's] business many years ago." Affidavit of Charles L. Huston (December 4, 1991) ("Huston Affidavit"), Ex. 8 thereto at 2 (Plaintiffs' Appendix, Vol. I, Exh. H thereto).

85 Without deciding whether NiMo will ultimately be allowed to present their statistical sampling evidence at trial, the court notes that if, as NiMo suggests, it would take one person working 2,000 hours per year 54 years to perform a comprehensive review of each of the nearly 16,000 planners, the use of statistical sampling seems justifiable. *See* Plaintiffs' Damages Memorandum at 7 (citing Affidavit of Alan D. Nance (December 3, 1991) ("Nance Affidavit") at ¶ 23).

86 *Accord Tenants' Union of West Side, Inc. v. Beame,* 40 N.Y.2d 133, 138, 386 N.Y.S.2d 83, 85 (1976) ("[f]or the statistical methods ... to be acceptable, they need[ ] to be sound, fair, representative and, in general designed to produce an accurate result,....") (citations omitted).

87 *See William H. Rankin Co. v. Assoc. Bill Posters of U.S.,* 42 F.2d 152, 155 (2d Cir.1930) (citing *Eastman Kodak Co. v. Southern Photo Material Co.,* 273 U.S. 359, 379, 47 S.Ct. 400, 405, 71 L.Ed. 684 (1926)).

88 Without prejudging any of the evidence which may be proffered at trial, the court reminds counsel, and defense counsel in particular, that:

> There is no bright line that divides evidence worthy of consideration by a jury, although subject to heavy counter-attack, from evidence that is not. Especially because of the guaranty of the Seventh Amendment, a federal court must be exceedingly careful not to set the threshold to the jury room too high.
>
> *Brink's Inc. v. City of New York,* 717 F.2d 70, 711 (2d Cir.1983) (quoting *Herman Schwabe, Inc. v. United Shoe Machinery Corp.,* 297 F.2d 906, 912 (2d Cir.), *cert. denied,*369 U.S. 865, 82 S.Ct. 1031, 8 L.Ed.2d 85 (1962)). Heeding that admonition in the present case may mean that when all is said and done, it will be a matter of weight and credibility as opposed to admissibility.

89 *See supra,* § IV(A).

90 In its damages memorandum, ITT states that this claim is in the amount of $120,561. ITT's Damages Memorandum at 45. That number is transposed; it should be $120,651.00.

91 A liquid penetrant inspection is a type of nondestructible test used to measure the acceptability of a given weld.

92 Plaintiffs' Appendix Vol. IV, Tab M at 1. This figure is inclusive of the $846,609.00 in overhead costs and the $2,401,874.00 in associated financing costs.

93 These four categories of damages total roughly $14.3 million.

94 The standard for granting a motion for summary judgment and the standard for granting a motion for a directed verdict under Fed.R.Civ.P. 50(a) are essentially the same. *Anderson,* 477 U.S. at 250, 106 S.Ct. at 2511. Given the highly technical and complex nature of this litigation, combined with the fact that at trial there will undoubtedly be widely divergent opinions offered by the parties' respective experts, the advantage to the court (and to the parties) of a fully developed record is obvious.

End of Document

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

BENJAMIN W. PILLARS,
as Personal Representative of the Estate of
KATHLEEN ANN PILLARS, deceased,

Plaintiffs,

Case No. 1:15-cv-11360-TLL-PTM

v.

Hon. Thomas L. Ludington

GENERAL MOTORS LLC,

Defendant.
_____/

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_____/

PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION FOR LEAVE TO FILE AMENDED NOTICE OF REMOVAL AND AMENDED ANSWER

NOW COMES the Plaintiff, BENJAMIN W. PILLARS, as Personal Representative of the Estate of KATHLEEN ANN PILLARS, deceased, by and through his attorneys, THE MASTROMARCO FIRM, and hereby submits his response to Defendant's motion and requests that this Honorable Court deny Defendant's motion for the reasons as set forth more fully in the brief filed in support of this response.

Respectfully submitted,

THE MASTROMARCO FIRM

Dated: July 21, 2015

By: */s/ Russell C. Babcock*
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BRIEF IN SUPPORT OF PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION FOR LEAVE TO FILE AMENDED NOTICE OF REMOVAL AND AMENDED ANSWER

INTRODUCTION

As the Court is aware, the Defendant, after removing the above-captioned case to this Court, filed a motion to stay proceedings before this Court which was granted by this Court on June 12, 2015. See ECF Document No. 14. The Court in its order noted the following:

> **On April 14, 2015, Defendant General Motors LLC removed the case to this Court, claiming that the proceedings are subject to the core jurisdiction of the New York Bankruptcy Court under 28 U.S.C. §§ 157(b) and 1334(b) because the proceedings relate to the interpretation and enforcement of the 2009 Sale Order**. General Motors LLC further indicated that it would apply to transfer the case to the Judicial Multidistrict Litigation Panel ("JMPL") assigned to faulty ignition switch cases in the Southern District of New York.
>
> ***
>
> The parties are therefore currently waiting for a decision from the JMPL on whether this case will be transferred to the MDL.
>
> Because Plaintiff's objection to transfer is still pending before the JMPL, Defendant's motion to stay will be granted. If the JMPL overrules Plaintiff's objection and transfers the case to New York, then any further proceedings here – including Plaintiff's motion to remand will be obviated. **To conserve judicial resources, the most appropriate course of action is to stay the instant case until the JMPL has determined whether the case belongs to the MDL in New York.** (Emphasis added by Plaintiff).

ECF Document No. 14.

In what appears to be an attempt at circumventing this Court's stay order, the Defendant has improperly filed a motion seeking to amend certain pleadings following an adverse outcome in the United States Bankruptcy Court for the Southern District of New York. (Hearing Transcript – **Exhibit 1**).[1] No effort was made by the Defendant to have the stay before this Court lifted prior to the filing of the pending motion even though the Judicial Multidistrict Litigation Panel has not yet issued its decision which was, in part, the purpose of the stay issued by this Court.

DISCUSSION

Contrary to the representations contained within Defendant's motion, on Thursday, July 16, 2015, the Honorable Robert E. Gerber, United States Bankruptcy Judge for the Southern District of New York, issued his ruling from the bench unequivocally concluding that the Defendant was bound by the judicial admissions contained within its answer to Plaintiff's amended complaint along with the admissions contained within its notice of removal. (Hearing Transcript pgs. 24-29 – **Exhibit 1**). Based upon Defendant's admissions, Judge Gerber

[1] The attached hearing transcript is twenty-nine (29) pages in length. At the conclusion of oral arguments and after the bankruptcy court's ruling, the bankruptcy court took up an unrelated procedural matter involving the GM bankruptcy. The matter did not pertain to Plaintiff's pleadings and that portion of the transcript has not been attached to this response.

concluded the Plaintiff's pending lawsuit can proceed against the Defendant. (Hearing Transcript pgs. 24-29 – **Exhibit 1**).

Specifically, Judge Gerber concluded at the end of oral arguments that Defendant admitted in its pleadings, for the above-captioned case only, that the death of the decedent which occurred after July 10, 2009, was an assumed liability of the Defendant. (Hearing Transcript pgs. 24-29 – **Exhibit 1**). Accordingly, Judge Gerber lifted the bankruptcy stay so that Plaintiff's claims against the Defendant can proceed. (Hearing Transcript pgs. 24-29 – **Exhibit 1**).

On Friday, July 17, 2015, the Defendant filed its motion to amend which now seeks to have this Court circumvent the bankruptcy court's rulings. Contrary to Defendant's assertions, Judge Gerber has already considered and rejected Defendant's argument that it should now be excused from its earlier admissions because of the purported mistake made by its attorneys. (Hearing Transcript pgs. 24-29 – **Exhibit 1**). Judge Gerber noted, in part, that Defendant had done nothing to correct the purported errors contained within its pleadings prior to the July 16, 2015, hearing and specifically refused to entertain Defendant's request for a rehearing after his ruling was rendered. (Hearing Transcript pgs. 24-29 – **Exhibit 1**). The following excerpts from Judge Gerber's opinion illustrate the findings by the bankruptcy court:

Obviously GM has the ability to ensure that its counsel do their jobs and it's not too much to hold GM for the consequences of what it's counsel who is plainly an agent did.

***

So I'm going to allow this lawsuit to proceed, and I'm going to state a couple of things for the avoidance of doubt, although they should be obvious. One is I reiterate for the 900th time that I have subject matter jurisdiction over this dispute. As is apparent from everything that I've said, this applies only to this particular judicial admission in this particular wrongful death case, and has no bearing on anything that I ruled on April 15th or on the Cary Cutler (phonetic) matters [indiscernable]. **It does however, mean that New GM has to defend this wrongful death case. And if it doesn't like defending wrongful death cases when its local counsel admit things that maybe they shouldn't have been admitted to, it should supervise its counsel more carefully.**

***

MR. STEINBERG: Your Honor, will we have, can we have the opportunity to make a submission, and I don't know whether this is true or not, I would need to verify that at the time to answer or amend, we had a right to amend the answer, that this is not a judicial admission to give further briefing.

THE COURT: **There was plenty of time to focus on these issues before today. That's my ruling.**

MR. STEINBERG: All right.

THE COURT: **Mr. Steinberg, I have a zillion things on my watch and I have to rely on lawyers dealing with issues in a timely way. We can't have do-overs after I've ruled. I had the same issue with a motion for reargurments now which is in substance a do-over after I've ruled, I'm not going to invite even more stuff of that character.** (Emphasis added by Plaintiff).

(Hearing Transcript pgs. 27-29 – **Exhibit 1**).

Judge Gerber's conclusion that Defendant is bound by the admissions contained within its answer and notice of removal is consistent with the prevailing case law. As the Court is aware, a party is bound by the judicial admissions made by its attorneys in its pleadings. The Sixth Circuit has discussed the dispositive effect of judicial admissions:

> Judicial admissions "eliminate the need for evidence on the subject matter of the admission," as admitted facts are no longer at issue. Seven-Up Bottling Co. v. Seven-Up Co., 420 F.Supp. 1246, 1251 (E.D.Mo.1976), aff'd, 561 F.2d 1275 (8th Cir.1977). Once made, the subject matter of the admission should not be reopened in the absence of a showing of exceptional circumstances. New Amsterdam Casualty Co. v. Waller, 323 F.2d 20, 24 (4th Cir.1963), cert. denied, 376 U.S. 963, 84 S.Ct. 1124, 11 L.Ed.2d 981 (1964). This court has observed that "[u]nder federal law, stipulations and admissions in the pleadings are generally binding on the parties and the Court." Brown v. Tennessee Gas Pipeline Co., 623 F.2d 450, 454 (6th Cir.1980) (citations omitted). Not only are such admissions and stipulations binding before the trial court, but they are binding on appeal as well. See, e.g., Glick v. White Motor Co., 458 F.2d 1287, 1291 (3d Cir.1972).

Ferguson v. Neighborhood Hous. Servs. of Cleveland, Inc., 780 F.2d 549, 550-51 (6th Cir. 1986).

> Judicial admissions, on the other hand, are formal admissions in the pleadings of a present action, "which have the effect of withdrawing a fact from issue and dispensing wholly with the need for proof of the fact." In re Fordson Eng' Corp., 25 B.R. 506, 509 (Bankr.E.D.Mich.1982). "[U]nder federal law, stipulations and admissions in the pleadings are generally binding on the parties and the Court." Ferguson v. Neighborhood Hous. Servs., Inc., 780 F.2d 549, 551 (6th Cir.1986) (citation and quotation marks omitted). "Not only are such admissions and stipulations binding before the trial court, but they are binding on appeal as well." Id. (citation omitted).

Cadle Co. II v. Gasbusters Prod. I Ltd. P'ship, 441 F. App'x 310, 312-13 (6th Cir. 2011).

Again, Judge Gerber concluded at the end of oral arguments that Defendant admitted in its pleadings, for the above-captioned case only, that the death of the decedent which occurred after July 10, 2009, was an assumed liability of the Defendant. (Hearing Transcript pgs. 24-29 – **Exhibit 1**). Furthermore, Judge Gerber has already considered and rejected Defendant's argument that it should now be excused from its earlier admissions. (Hearing Transcript pgs. 27-29 – **Exhibit 1**). It is respectfully submitted that Judge Gerber's ruling has become the law of this case:

> Under the law-of-the-case doctrine, findings made at one point in the litigation become the law of the case for subsequent stages of that same litigation. See United States v. Moored, 38 F.3d 1419, 1421 (6th Cir.1994). The doctrine also bars challenges to a decision made at a previous stage of the litigation which could have been challenged in a prior appeal, but were not. See United States v. Adesida, 129 F.3d 846, 849–50 (6th Cir.1997) (citation omitted).

Rouse v. DaimlerChrysler Corp., 300 F.3d 711, 715 (6th Cir. 2002).

If the Defendant is dissatisfied with Judge Gerber's decision, the mechanism is for the Defendant to appeal Judge Gerber's decision to the United States District Court for the Southern District of New York:

> If New GM really wants to appeal this, I reserve the right to issue a written opinion. But as you all well know, I've got so many things beyond that to deal with in GM and for that matter other cases on my watch, that I'm not going to write on this unless I need to.

(Hearing Transcript pgs. 28 – **Exhibit 1**).

An appeal has not been filed by the Defendant. Instead, the Defendant has filed its motion with this Court. Defense Counsel, in an e-mail to the undersigned, acknowledged Defendant's plan to utilize this Court as a means of forcing Judge Gerber to revisit his earlier ruling:

> **New GM intends to appeal Judge Gerber's ruling in Pillars, unless he reconsiders it, in light of the proceeding referred to in the next paragraph.** [The proceeding referred to by defense counsel is the pending motion to amend before this Court.]
>
> ***
>
> [The next paragraph to the e-mail states in part.] **If the Michigan District Court grants New GM's Motion to Amend, New GM will ask Judge Gerber to reconsider his ruling.**

(7/21/15 e-mail – **Exhibit 11**).

Again, Judge Gerber has already ruled and provided notice to the Defendant that his decision is final:

> MR. STEINBERG: Your Honor, will we have, can we have the opportunity to make a submission, and I don't know whether this is true or not, I would need to verify that at the time to answer or amend, we had a right to amend the answer, that this is not a judicial admission to give further briefing.
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> THE COURT: **There was plenty of time to focus on these issues before today. That's my ruling.**
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> MR. STEINBERG: All right.

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(Hearing Transcript pgs. 27-29 – **Exhibit 1**).

It is respectfully submitted that the Defendant is attempting to avoid the bankruptcy court ruling by attempting to obtain a ruling from this Court on an issue which has already been decided by the bankruptcy court. The bankruptcy court has concluded that Defendant's judicial admissions are dispositive and has rejected Defendant's request for a rehearing. (Hearing Transcript pgs. 27-29 – **Exhibit 1**). Indeed, the Defendant did not provide a copy of Judge Gerber's opinion to its motion to amend.

The Defendant has previously acknowledged, as a basis for its removal of Plaintiff's state claims to this Court, that the bankruptcy court was the Court which has jurisdiction to decide the issue of whether or not Defendant assumed the liability regarding Plaintiff's claims. The bankruptcy court has now issued its ruling in favor of the Plaintiff.

Indeed, Judge Gerber's refusal to give Defendant a "second bite at the apple" is supported by the procedural history. As shown below, the Defendant failed to take any action to correct the purported mistakes appearing in its answer to the amended complaint and in its notice of removal in the months leading up to

the bankruptcy hearing despite the existence of clear (and repeated) notice as illustrated below:

- **April 14, 2015** – Defendant filed notice of removal with the admissions at issue;

- **May 5, 2015** – Defendant filed its answer to Plaintiff's amended complaint with the admissions at issue;

- **May 6, 2015** – Plaintiff filed a motion for remand with this Court pointing out Defendant's admissions in the notice of removal along with the legal effect of said admissions on pages seven and eight of Plaintiff's motion. (**Exhibit 2**);

- **May 16, 2015** – Plaintiff filed a motion to vacate a conditional transfer order before the Multi-District Judicial Panel pointing out Defendant's admissions in the notice of removal along with the legal effect of said admissions on pages five and six of Plaintiff's motion. (**Exhibit 3**);[2]

- **May 28, 2015** – Plaintiff filed a no stay pleading in the bankruptcy court again pointing out Defendant's admissions in the notice of removal and in Defendant's answer along with the legal effect of said admissions on pages four and five of Plaintiff's bankruptcy submission. (**Exhibit 4**);[3]

- **June 4, 2015** - Plaintiff filed a reply to his motion to vacate before the Multi-District Judicial Panel again pointing out Defendant's admissions in the notice of removal and in Defendant's answer along with the legal effect of said admissions on page two of Plaintiff's reply. (**Exhibit 5**);

- **June 9, 2015** – Plaintiff filed a response to Defendant's motion for stay again pointing out Defendant's admissions in the notice of removal and in Defendant's answer along with the legal

[2] The multidistrict litigation docket sheets are attached as **Exhibit 9**.
[3] The bankruptcy court docket sheets are attached as **Exhibit 10**.

effect of said admissions on page four of Plaintiff's response. (**Exhibit 6**);

- **June 23, 2015** - Plaintiff filed an objection pleading in the bankruptcy court again pointing out Defendant's admissions in the notice of removal and in Defendant's answer along with the legal effect of said admissions on page five of Plaintiff's bankruptcy submission. (**Exhibit 7**);

- **June 23, 2015** – Plaintiff also filed a no dismissal pleading in the bankruptcy court again pointing out Defendant's admissions in the notice of removal and in Defendant's answer along with the legal effect of said admissions on page five of Plaintiff's bankruptcy submission. (**Exhibit 8**);

- **July 16, 2015** – Bankruptcy hearing & ruling. (**Exhibit 1**);

- **July 17, 2015** – Defendant's motion to amend pleadings.

Accordingly, Judge Gerber had ample reason to side with the Plaintiff. On at least seven (7) separate occasions in at least three (3) different forums over a period of almost three (3) months, the Plaintiff gave Defendant notice of its admissions along with the legal consequences of said admissions. Instead of addressing Plaintiff's argument regarding its admissions and attempt to correct its purported errors in the months leading up to the July 16, 2015, bankruptcy hearing, the Defendant chose to proceed with the hearing before the bankruptcy court. (Hearing Transcript – **Exhibit 1**).

The bankruptcy court noted the fact that Defendant provided little explanation for its actions leading up to the hearing along with the consequences of

said actions during its questioning of defense counsel during the hearing notwithstanding the fact that defense counsel was well aware of the purported mistake as illustrated by defense counsel's comments on the record. (Hearing Transcript pgs. 16-19 – **Exhibit 1**). The process of amending pleadings was discussed at the hearing. (Hearing Transcript pgs. 17-18 – **Exhibit 1**). As noted by a reading of this portion of the hearing transcript, the bankruptcy court expressly addressed the admissions and why they were binding upon the Defendant. (Hearing Transcript pgs. 16-19 – **Exhibit 1**). It was only after the bankruptcy sided with the Plaintiff that the Defendant for the first time sought to "correct" its answer and its notice of removal.

There is no excuse for Defendant's purported mistake and there is also no excuse for its failure to take action to challenge its admissions before the bankruptcy hearing. The Plaintiff will be unfairly prejudiced in a substantial manner if the relief sought by the Defendant is granted. Defendant should be precluded from doing so at this late date after the bankruptcy court has already issued its ruling.

CONCLUSION

As such and as set forth more fully in the above-mentioned paragraphs, the Plaintiff respectfully requests that the Court deny Defendant's motion.

Respectfully submitted,

THE MASTROMARCO FIRM

Dated: July 21, 2015

By: */s/ Russell C. Babcock*

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PROOF OF SERVICE

I hereby certify that on **July 21, 2015**, I presented the foregoing papers to the Clerk of the Court for the filing and uploading to the CM/ECF system, which will send notification of such filing to the following: **Andrew Baker Bloomer & Thomas P. Branigan**.

Dated: July 21, 2015

By: */s/ Russell C. Babcock*
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NOT FOR PUBLICATION
United States Bankruptcy Court,
S.D. New York.

In re : Gregory Papadopoulos, Debtor.
Ray Zemon, Plaintiff,
v.
Gregory Papadopoulos, Defendant.

Case No. 12–13125 (JLG) | Adversary No. 12–01907 (JLG) | Signed March 13, 2015

Attorneys and Law Firms

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GREGORY PAPADOPOULOS, Debtor/Defendant Pro Se, 2520 30th Road, Apt. 5H, Queens, New York 11102

MEMORANDUM OPINION AND ORDER DENYING THE DEFENDANT'S MOTION FOR RECONSIDERATION

The Honorable James L. Garrity, Jr., United States Bankruptcy Judge

Introduction

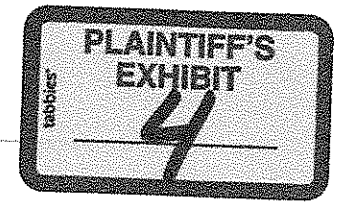
*1 Ray Zemon (the "Plaintiff") commenced this adversary proceeding by filing a complaint seeking a judgment denying Gregory Papadopoulos, a *pro se* debtor (the "Debtor"), a discharge in bankruptcy under sections 727(a)(3) and (a)(4)(A) of the Bankruptcy Code, 11 U.S.C. §§ 727(a)(3) and (a)(4)(A). [ECF Doc. # 1] [1] By motion dated July 15, 2014 (the "Summary Judgment Motion"), the Plaintiff sought summary judgment on his complaint pursuant to Federal Rule of Bankruptcy Procedure ("Fed. R. Bankr.P.") 7056 and Federal Rule of Civil Procedure ("FRCP") 56. [ECF Docs. # # 79, 80, 81, 82] On January 8, 2005, the Court (Grossman, J.) [2] issued an opinion (the "Opinion") granting the motion and directing entry of judgment against the Debtor. [3] The Court assumes familiarity with the Opinion for purposes of the discussion below.

On January 20, 2015, the Debtor timely sought reconsideration of the Opinion pursuant to a *Motion for Reconsideration* and *Adentum [sic] to Motion for Reconsideration* (collectively, the "Motion"). [ECF Docs. # # 101, 102] The Debtor contends that he is entitled to relief to correct errors of fact contained in the Opinion and because the Court erroneously relied on *Moreo v. Rossi* (*In re Moreo*), 437 B.R. 40 (E.D.N.Y.2010) ("*Moreo* ") in the Opinion. The Plaintiff opposes the Motion, arguing that it is little more than a rehash of the arguments rejected by the Court in resolving the Summary Judgment Motion and thus not grounds for the relief the Debtor seeks. *See Opposition of Creditor Ray Zemon to Motion of Gregory Papadopoulos for Reconsideration* at 2–3. [ECF Doc. # 103] The Debtor does not contend that there has been an intervening change of controlling law, and does not point to evidence or other matters overlooked by the Court that would have altered the Opinion. Nor has the Debtor demonstrated a need to correct clear errors of fact or law in the Opinion–even in light of the liberal pleading standards that this Court accords the *pro se* Debtor. [4] Accordingly, as explained below, the Motion is **DENIED.**

Standard of Review

*2 Local Bankruptcy Rule 9023–1(a) provides:

> A motion for reargument of a court order determining a motion shall be served within fourteen (14) days after the entry of the Court's order determining the original motion, or in the case of a court order resulting in a judgment, within fourteen (14) days after the entry of the judgment, and, unless the Court orders otherwise, shall be made returnable within the same amount of time as required for the original motion. The motion shall set forth concisely the matters or controlling decisions which counsel believes the Court has not considered. No oral argument shall be heard unless the Court grants the motion and specifically orders that the matter be reargued orally.



S.D.N.Y. L.B.R. 9023–1(a). [5]

The standard applicable to a motion for reargument or reconsideration is identical to a motion to amend a judgment under FRCP 59(e). [6] *SeeLyell Theatre Corp. v. Loews Corp.*, 682 F.2d 37, 41 (2d Cir.1982) ("[W]here a post-judgment motion is timely filed and 'calls into question the correctness of that judgment it should be treated as a motion under FRCP 59(e), however it may be formally styled.' " (quoting *Dove v.Codesco*, 569 F.2d 807, 809 (4th Cir.1978))); *In re Jamesway Corp.*, 203 B.R. 543, 545 (Bankr.S.D.N.Y.1996) (A "motion for 'reargument' is properly in the nature of a motion for a new trial or for the amendment of a judgment pursuant to Fed.R.Civ.P. 59"); *see also* 10 Collier on Bankruptcy ¶ 9023.04 (15th ed. rev.2008) ("Any motion that draws into question the correctness of the judgment is functionally a motion under Rule 9023, whatever its label. Thus a motion to 'reconsider,' 'for clarification,' to 'vacate,' to 'set aside' or to 'reargue' is a motion under Rule 9023....").

Under FRCP 59(e), a court can revisit a prior decision based upon an intervening change in the controlling law, the availability of new evidence, to correct manifest errors of law or fact upon which the judgment is based, or to prevent manifest injustice. *Official Comm. of Unsecured Creditors of Enron Corp. v. Martin (In re Enron Creditors Recovery Corp.)*, 378 B.R. 54, 56–57 (Bankr.S.D.N.Y.2007) (citing *Cray v. Nationwide Mut. Ins. Co.*, 192 F.Supp.2d 37, 39 (W.D.N.Y.2001)). "The standard for granting ... a motion [for reconsideration] is strict, and reconsideration will generally be denied unless the moving party can point to controlling decisions or data that the court overlooked–matters, in other words, that might reasonably be expected to alter the conclusion reached by the court." *Shrader v. CSX Transp.*, 70 F.3d 255, 256 (2d Cir.1995) ("*Shrader*") (citing *Schonberger v. Serchuk*, 742 F.Supp. 108, 119 (S.D.N.Y.1990); *Adams v. United States*, 686 F.Supp. 417, 418 (S.D.N.Y.1988)). In that way, the rule insures "the finality of decisions and ... prevent[s] the practice of a losing party examining a decision and then plugging the gaps of a lost motion with additional matters." *Carolco Pictures, Inc. v. Sirota*, 700 F.Supp. 169, 170 (S.D.N.Y.1988); *see alsoPark South Tenants Corp. v. 200 Central Park Assocs., L.P.*, 754 F.Supp. 352, 354 (S.D.N.Y.1985) ("The standard for granting a motion for reargument is strict in order to dissuade repetitive arguments on issues that have already been considered fully by the court."). It also precludes repetitive arguments on issues that have already been considered by the court. *Ruiz v. Comm'r of Dep't of Transp.*, 687 F.Supp. 888, 890 (S.D.N.Y.), *aff'd*,858 F.2d 898 (2d Cir.1988); *see also In re Taub*,421 B.R. 713, 716 (Bankr.E.D.N.Y.1997) (A motion for reconsideration "is not a proper tool to repackage and relitigate arguments and issues already considered by the Court in deciding the original motion."). A motion for reconsideration is "limited to the record that was before the Court on the original motion." *Pereira v. Aetna Cas. & Surety Co. (In re Payroll Exp. Corp.)*, 216 B.R. 713, 716 (S.D.N.Y.1997) (quoting *Wishner v. Cont'l Airlines*, 1997 WL 615401, at *1 (S.D.N.Y. Oct. 6, 1997))).

**3 As noted, the Debtor contends that the Opinion is rife with factual errors and that the Court misplaced its reliance on *Moreo*. "A motion based on manifest errors of law or fact will not be granted except on a showing of some substantial reason. The burden is on the movant to demonstrate these manifest errors." *In re Crozier Bros., Inc.*, 60 B.R. 683, 688 (Bankr.S.D.N.Y.1986) (citing *Hager v. Paul Revere Life Ins. Co.*, 489 F.Supp. 317, 321 (E.D.Tenn.1977), *aff'd* without opinion, 615 F.2d 1360 (6th Cir.1980); Solar Laboratories v. Cincinnati Adver. Prods. Co., 34 F.Supp. 783, 784 (S.D.Ohio 1940), appeal dismissed, 116 F.2d 497 (6th Cir.1940).

Analysis

I. *Alleged Errors of Fact*

The Debtor contends that, in the Opinion, the Court relied on "fraudulent unsworn factual misrepresentations and trickery" by the Plaintiff and ignored or overlooked documents submitted in opposition to the Summary Judgment Motion. [7] *See* Motion at 1. Neither contention supports the Debtor's claim for relief under FRCP 59(e). Contrary to the Debtor's assertion, the Court based its findings in the Opinion on evidence in the record–much of it consisting of the Debtor's deposition testimony and responses to the Plaintiff's interrogatories. Moreover, the Debtor does not point to specific facts or legal arguments in the documents that the Court allegedly overlooked, let alone those that, if considered, would reasonably be expected to alter the Opinion. [8]

Debtor next points to portions of the Opinion that he says contain factual errors warranting FRCP 59(e) relief. Here, as above, Debtor neither demonstrates that the Court's findings are clearly erroneous, nor points to evidence or other matters that, if properly applied, could alter the Opinion. Rather, the Debtor seems intent on relitigating matters already decided by the Court in the Opinion. That is plainly prohibited by FRCP

59(e). *SeeShrader*, 70 F.3d at 257 ("[A] motion to reconsider should not be granted where the moving party seeks solely to relitigate an issue already decided."); *Sequa Corp. v. GBJ Corp.*, 156 F.3d 136, 144 (2d Cir.1998) ("*Sequa Corp.*") ("Rule 59 is not a vehicle for relitigating old issues, presenting the case under new theories, securing a rehearing on the merits, or otherwise taking a 'second bite at the apple'...."). The Court considers each of the Debtor's contentions below.

*4 On Page 3 of the Opinion, the Court stated that "[t]he Debtor's assets included ... a 100% ownership interest in Revcon, Inc./Revcon, LLC, his proprietary trading firm." Opinion at 3. As support for that finding, the Court relied on the Debtor's sworn deposition testimony. *Id.* (citing Papadopoulos Depo. 162:7–17).[9] Nonetheless, the Debtor contends that the finding is "false" and is "clearly contradicted" by affidavits dated October 10, 2014 and October 19, 2014, respectively [ECF Docs. # # 98, 99], that the Debtor submitted in opposition to the Summary Judgment Motion.[10] *See* Motion at 1. Those affidavits provide no support for the Motion because the Debtor is plainly taking a "second bite at the apple" in contravention to FRCP 59(e) and, in any event, the Court properly disregarded the affidavits in rendering the Opinion. *See, e.g.,Schwimmer v. SONY Corp. of Am.*, 637 F.2d 41, 45–46 (2d Cir.1980) (on motion for summary judgment, court "could properly rely on Schwimmer's earlier deposition testimony, as opposed to his later conflicting hearsay affidavit"); *Perma Research & Dev. Co. v. Singer Co.*, 310 F.2d 572, 577 (2d Cir.1969) ("If a party who has been examined at length on deposition could raise an issue of fact simply by submitting an affidavit contradicting his own prior testimony, this would greatly diminish the utility of summary judgment as a procedure for screening out sham issues of fact.").

On Page 3 of the Opinion, the Court stated:

> [t]he Debtor admits to having had numerous bank accounts, including accounts with Bank of America, Caisse D'Epargne, Capital One, Citibank, Commerzbank, Société Générale, TD Bank, and Washington Mutual.... The Debtor also admits having had brokerage accounts with over twenty institutions.

Opinion at 3. As support for that finding, the Court relied on the Debtor's responses to the Plaintiff's interrogatories. *Id.* (citing Debtor's First Interrog. Resps. ¶¶ 1–2).[11] The Debtor does not point to a specific error by the Court in relying on his interrogatory responses. The Debtor contends that the Court erred in focusing on the enumerated bank accounts since they either were not in his name or were closed more than one year prior to the petition date.[12] The Debtor made the same argument in opposition to the Summary Judgment Motion. *See* Summ. Judg. Opp'n[13] at 15–16 ("Since 2010, two years prior to filing, I was signatory in the same two active bank accounts, one with Citibank in the name of Revcon Retirement, and one with Chase in the name of Revcon LLC. A personal bank account with Chase in the name of Greg Palos was opened in 2006 and became inactive in January 2010.... Chapter 7 Bankruptcy was filed by Gregory Papadopoulos and not by Revcon LLC or Revcon Retirement Plan."). As such, it provides no support for the Motion. *SeeShrader*, 70 F.3d at 257; *Sequa Corp.*, 156 F.3d at 144; *see alsoPadilla v. Maersk Line, Ltd.*, 636 F.Supp.2d 256, 259 (S.D.N.Y.2009) ("*Padilla*") (noting that arguments "previously considered and rejected" by the court "may only be properly addressed on appeal").

*5 On Page 3 of the Opinion, the Court stated:

> In addition, the Debtor admitted in his supplemental responses to the Plaintiff's interrogatories that he engaged in substantial trading activity within the two years prior to filing for bankruptcy. For example, the Debtor admitted that his ex-wife invested $125,000 in a trading account operated by the Debtor in January 2012, which the Debtor admits was "extremely profitable".... None of the foregoing assets or trading activities were disclosed in the Debtor's schedules or statement of financial affairs.

Opinion at 3 (citations omitted). The Debtor states that "[t]his event has been described to this court numerous times." Motion at 3. He argues that the trading activity did not result in income to him and did not need to be disclosed.[14] *Id.* The Debtor does not does not point to any fact or legal principle overlooked by the Court in concluding that his failure to disclose those assets supports denial of his discharge. Rather, Debtor merely rehashes arguments previously made in opposition to the Summary Judgment Motion. *See* Summ. Judg. Opp'n at 34 ("In fact when my

ex-wife put $125,000 in an account in her name and gave trading authorization, Zemon and [his attorney] trough [sic] subpoenas, restraining orders and harassment insured that the account closed within two months. During these two months the account made some money but I received no income, and reported to the IRS no income. So: what is to report in the Bankruptcy forms?"). This plainly violates FRCP 59(e)'s prohibition against relitigating matters already considered by the Court. *SeeShrader,* 70 F.3d at 257; *Sequa Corp.,* 156 F.3d at 144; *see alsoPadilla,* 636 F.Supp.2d at 259.

*6 On Pages 3 and 4 of the Opinion, the Court stated:

> According to his deposition, the Debtor owns at least four computers, a number of external memory devices, and various email addresses that he used in connection with his business.... However, the Debtor contends that none of his computers or emails contain any electronic files or documents relevant to his financial condition.

Opinion at 3–4 (citations omitted). The Debtor contends that he has no electronic records other than privileged legal research.[15] The Debtor simply repeats his prior explanation for why he did not produce responsive electronic files or financial records. *See* Summ. Judg. Opp'n at 31 ("There were no electronic documents responsive to [the Plaintiff's] requests. For example email is used to transmit legal research from a law library to my home computer.... I am my own Attorney and as such I am protected by the Attorney Client Confidentiality Principal [sic] and the broader Work Product Doctrine."). This too plainly violates the rule prohibiting a party from revisiting old arguments in a FRCP 59(e) motion. *SeeShrader,* 70 F.3d at 257; *Sequa Corp.,* 156 F.3d at 144; *see alsoPadilla,* 636 F.Supp.2d at 259.

On Page 4 of the Opinion, the Court stated:

> On June 24, 2013, former Judge Peck issued an order compelling the Debtor to produce all hard copy and electronic documents responsive to the Plaintiff's interrogatories and production requests. Despite admitting to having numerous domestic and foreign bank and brokerage accounts, the Debtor failed to produce any underlying records documenting the alleged dissipation of his wealth in contempt of the Court's order.

Opinion at 4 (citation omitted). The Debtor disputes that finding. He contends that, in responding to the Plaintiff's interrogatories, he produced copies of "account numbers, voided checks, copies of debit cards, as well as numerous adverse decisions issued by [various courts]." Motion at 5. He maintains that he sent the interrogatory responses, together with exhibits consisting of documents supporting those responses, to the Clerk's Office. *Id.* He says that the Clerk docketed the interrogatory responses, but not the exhibits, and that the Clerk is in possession of the exhibits. *Id.* ("Defendant's responses and exhibits to interrogatories were submitted to the Court and docketed as ECF Doc. # 23. The Clerk's Office docketed the responses but not the exhibits as they were deemed confidential. The exhibits and all account information must be in the Court's file as definitive proof that Defendant properly responded to [the] interrogatories and production of documents request."). This allegation is new; the Debtor did not raise it in his opposition to the Summary Judgment Motion. Therefore, it is outside the scope of FRCP 59(e). *See Schonberger,* 742 F.Supp. at 119 ("[A] party making a motion for reargument may not ... advance new facts or arguments not previously presented to the Court."); *see also Payroll Exp.* Corp., 216 B.R. at 716 (Motions for reconsideration are "limited to the record that was before the Court on the original motion."(citation omitted)).[16]

*7 On Page 4 of the Opinion, the Court stated that, "[t]hroughout his bankruptcy case, the Debtor has filed numerous papers alleging a vast conspiracy between the FBI, members of the so-called 'Palm Beach Mafia,' and others to bring about the Debtor's financial ruin." Opinion at 4. The Debtor contends that the Court failed to address these arguments.[17] Motion at 6. However, the Court considered and rejected the arguments, stating that other courts have described the Debtor's claims as "frivolous, irrational, and, at times, incomprehensible" and "fanciful, fantastic, and delusional." *See* Opinion 4, n.2. As the Court addressed and rejected these claims, and Debtor has failed to demonstrate manifest error in the Court's doing so, they are an inappropriate basis for reconsideration. *Shrader,* 70 F.3d at 257; *Padilla,* 636 F.Supp.2d at 259.

On Page 7 of the Opinion, the Court stated that the Debtor "failed to maintain and produce adequate records of his business activity and financial affairs." Opinion at 7. The

Debtor does not point to evidence allegedly overlooked by the Court in reaching that conclusion. Rather, the Debtor contests the Court's finding and argues that, given his financial hardships, he was unable to preserve all of his financial records. [18] The Debtor made similar arguments in opposition to the Summary Judgment Motion. *See* Summ. Judg. Opp'n at 19 ("Since 1997 because of Zemon and his Gang I had to move 48 times. Zemon wants this bankruptcy dismissed because I was not able to preserve 100% of these 1,000,000 pages [of records] dating back to 1986–2008. Zemon ... knows the volume of paper that existed in 2006. So cleverly he wants this bankruptcy dismissed for failing to move 1,000,000 pages from apartment to apartment 48 times since 1997."). As such, they provide no support for his Motion. *Shrader,* 70 F.3d at 257; *Sequa Corp.*, 156 F.3d at 144; *see also Padilla,* 636 F.Supp.2d at 259. [19]

II. ***Alleged Errors of Law***

*8 The Debtor also complains that the Court relied "exclusively" on *Moreo,* 437 B.R. 40, in granting summary judgment. Motion at 8. Although the Debtor correctly contends that the facts of *Moreo* are distinguishable from those in this case, the differences are irrelevant. The Court relied on *Moreo* as support for well-settled legal principles plainly applicable to this case, not for fact-specific matters unique to *Moreo*. The Debtor has not shown that the Court erred in relying on *Moreo,* much less "manifest error" of the type warranting reconsideration under FRCP 59(e). We review the Court's use of *Moreo* below.

First, on pages 7 and 8 of the Opinion, the Court stated:

> As the Plaintiff has satisfied his initial burden, the burden shifts to the Debtor to justify the deficiencies in his record keeping. The Debtor has repeatedly maintained that he did not keep any financial records other than those already provided to the Plaintiff. However the Debtor is a sophisticated businessman, formerly employed as an options trader and arbitrageur subject to the scrutiny of regulators and self-regulated organizations. He therefore can offer no sufficient justification for his failure to maintain and disclose even basic records of his business activities and financial accounts, including bank statements. "Debtors have a duty to preserve those records that others in like circumstances would ordinarily keep.... Hence, the debtor's honest belief that he does not need to keep the records in question, or that his records are sufficient, or his statement that it is not his practice to keep additional records, does not constitute justification for failure to keep or preserve records under § 727(a)(3)." *Moreo v. Rossi (In re Moreo),* 437 B.R. 40, 53 (E.D.N.Y.2010).

Opinion at 7–8. The Debtor does not contest the accuracy of the Court's quote or contend that *Moreo* does not stand for proposition cited. Indeed, *Moreo* merely recites the well-settled law in this Circuit. "It has long been the law that the privilege of a discharge depends upon the debtor's disclosure of a true and accurate picture of his financial affairs." *State Bank of India v. Chalasani (In re Chalasani),* 92 F.3d 1300, 1309 (2d Cir.1996). Debtors may not excuse the failure to maintain records by arguing that they simply did not keep records or by claiming that their records are sufficient. *See, e.g.,Aid Auto Stores, Inc. v. Pimpinella (In re Pimpinella),* 133 B.R. 694, 698 (Bankr.E.D.N.Y.1991) ("The debtor must do more than profess a belief that his records were sufficient or that it was not his practice to keep additional records.... Any attempt to justify the failure to keep records must show that the circumstances were in fact so unusual that ordinary record keeping was not required.").

Second, the Court stated that, for purposes of § 724(a)(4)(A), "[a] debtor's bankruptcy petition and the accompanying schedules and statement of financial affairs constitute statements under oath." Opinion at 8 (quoting *Moreo,* 439 B.R. at 59). Again, the Debtor does not challenge accuracy of the quote or the well-settled legal principle. *See, e.g.,Nof v. Gannon (In re Gannon),* 173 B.R. 313, 320 (Bankr.S.D.N.Y.1994) ("A debtor's petitions and annexed schedules can constitute a statement under oath for purposes of § 727(a)(4)(A)."); *MacLeod v. Arcuri (In re Arcuri),* 116 B.R. 873, 880 (Bankr.S.D.N.Y.1990) (holding that § 727(a)(4)(A) "clearly extends" to documents filed under oath such as schedules and statements of financial affairs).

Third, the Court cited *Moreo* for the proposition that, for the purpose of § 727(a)(4)(A), "an objecting creditor has the initial burden of producing persuasive evidence of a false statement or omission." Opinion at 9 (citing *Moreo,* 437 B.R. at 62). This, too, is well-settled. *See, e.g.,Forrest v. Bressler (In re Bressler),* 387 B.R. 446, 461 (Bankr.S.D.N.Y.2008) ("Once the plaintiff meets its initial burden to produce persuasive evidence of a false statement, the burden of production shifts to the debtor to produce a credible explanation."); *Pereira v. Gardner (In re Gardner),* 384 B.R. 654, 662 (Bankr.S.D.N.Y.2008) ("[O]nce the objecting creditor has produced persuasive evidence of a false statement, the burden shifts to the debtor

to come forward with evidence to prove that it was not an intentional misrepresentation or provide some other credible explanation."); *Adler v. Ng (In re Adler)*, 395 B.R. 827, 841 (E.D.N.Y.2008) (same).

*9 Fourth and finally, the Court stated that, for purposes of § 727(a)(4)(A), "fraudulent intent may be inferred from a series of incorrect statements and omissions contained in the [debtor's] schedules," and "while subsequent disclosure before an objection to discharge is filed may be some evidence of innocent intent, ... the effect of a false statement is not cured by correction." Opinion at 9 (quoting *Moreo*, 437 B.R. at 62). Again, there is substantial support for the Court's legal conclusion. *See, e.g.,Congress Talcott Corp. v. Sicari (In re Sicari)*, 187 B.R. 861, 882 (Bankr.S.D.N.Y.1994) ("[F]raudulent intent may be inferred, for purposes of a § 727(a)(4)(A) objection, from a debtor's reckless indifference to or cavalier disregard of the truth."); *In re Diorio*, 297 F.Supp. 842, 845 (2d Cir.1968) ("[A] false statement in schedules is not 'cured' by the bankrupt's subsequent disclosure...."); *In re Tabibian*, 289 F.2d 793, 797 (2d Cir.1961) ("The referee felt that the false answer in the petition was 'cured' by [the debtor's] subsequent testimony at the first meeting of creditors. As a 'rule of law,' stated broadly, the referee was incorrect.").

Conclusion

Based on the foregoing, the Motion is **DENIED.**

IT IS SO ORDERED.

All Citations

Slip Copy, 2015 WL 1216541

Footnotes

1 References to ECF docket entries refer to the electronic docket maintained in the above-captioned adversary proceeding, No. 12–01907.

2 This adversary proceeding was initially assigned to Bankruptcy Judge James M. Peck. After Judge Peck's retirement on January 31, 2014, the case was temporarily reassigned to Judge Robert E. Grossman, sitting by designation in the Southern District of New York pursuant to an order signed on January 6, 2014 by Chief Judge Robert A. Katzmann of the Second Circuit. On February 18, 2015, the proceeding was reassigned to the undersigned.

3 *See Memorandum Decision Granting the Plaintiff's Motion for Summary Judgment* [ECF Doc. # 100].

4 In *In re Enron Corp.*, 352 B.R. 363 (Bankr.S.D.N.Y.2006), the court noted the leeway that courts accord *pro se* litigants, as follows:

> The Motion is a *pro se* pleading, and as such, it will be held "to less stringent standards than formal pleadings drafted by lawyers." *Hughes v. Rowe*, 449 U.S. 5, 9, 101 S.Ct. 173, 66 L.Ed.2d 163 (1980) (per curiam) (quoting *Haines v. Kerner*, 404 U.S. 519, 520, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972)). Courts are instructed to "read the pleadings of a *pro se* plaintiff liberally and interpret them to raise the strongest arguments that they suggest." *McPherson v. Coombe*, 174 F.3d 276, 280 (2d Cir.1999) (quoting *Burgos v. Hopkins*, 14 F.3d 787, 790 (2d Cir.1994)). *Pro se* status, however, "does not exempt a party from compliance with the relevant rules of procedural and substantive law." *Traguth v. Zuck*, 710 F.2d 90, 95 (2d Cir.1983) (quoting *Birl v. Estelle*, 660 F.2d 592, 593 (5th Cir.1981)).

352 B.R. at 366.

5 Local Rule 9023–1(a) derives from former Local Bankruptcy Rule 13(j) and is an adaptation of Civil Rule 6.3 of the Local District Rules. *See* S.D.N.Y. L.B.R. 9023–1 cmt. The Motion was returnable before the Court on February 24, 2015. The Court declined to hear argument on the Motion.

6 Fed. R. Bankr.P. 9023 incorporates FRCP 59. *See*Fed. R. Bankr.P. 9023.

7 The Debtor identified the following documents that the Court allegedly ignored or overlooked:

- Defendant's Opposition to Motion for Summary Judgment [ECF Doc # 86];
- Undisputed Facts [ECF Doc. # 87];
- Memorandum of Law In Opposition to Plaintiff's Motion for Summary Judgment [ECF Doc. # 88];
- Crossmotion [sic] Seeking Sanctions Against Zemon [ECF Doc. # 89];
- Letter of Gregory Papadopolous to the Court dated October 6, 2014 [ECF Doc. # 94];
- Defendant's Sur-reply Afidavit [sic] in Opposition to Plaintiff's Motion for Summary Judgement [sic] and Additional Demand for Sanctions [ECF Doc. # 95];
- Suporting Afidavit [sic] on the History of Revcon as It Relates to this Bankruptcy [ECF Doc. # 96];

- Suplamental [sic] Affidavit on the Issue of Ownership of Revcon LLC in Opposition to Zemons [sic] Letter Dated October 10, 2014 [ECF Doc. # 98]; and
- Suporting Afidavit [sic] on the History of Revcon as It Relates to this Bankruptcy [ECF Doc # 99].

See Motion at 1.

8 In the addendum to the Motion [ECF Doc. # 102], the Debtor seeks to supplement the record with two documents. The first is a copy of a picture of what the Debtor says are books and records of Revcon LLC, Revcon Inc., and Revcon Retirement Plan, including check books, debit cards, credit cards, account monthly statements, financial diaries, and other documents that he claims he produced to the chapter 7 trustee at the section 341 creditors' meeting. The second is a copy of a list of documents that the Debtor delivered to the chapter 7 trustee's office. The questionable probative value of those documents aside, the Court will not consider them in ruling on the Motion, since the Debtor is prohibited from supplementing the record. *SeePayroll Exp. Corp.*, 216 B.R. at 716.

9 "Papadopoulos Depo." refers to the transcript of the deposition of Gregory Papadopolous taken on October 1, 2013. A copy of the deposition transcript is attached to the *Declaration of Matthew J. Press* (the "Press Declaration") as Exhibit 2.

10 In substance, in those affidavits, the Debtor avers that he never held more than a 70% interest in Revcon. *See* Debtor's Supp'l Aff. ¶ 1 ("Revcon Associates Inc., a NYS S Corporation, was formed in late 1985. There were 3 partners with Papadopoulos owning 70%."). The Debtor "bought out" the other equity partners in 1987 and immediately assigned a 40% interest to his ex-wife. *Id.* ¶ 2. The Debtor contends that the Court's allegedly erroneous conclusion that he owned 100% of Revcon was "fundamental" to the Court's denial of his discharge. Motion at 1. However, the exact amount of the Debtor's ownership interest in Revcon was not germane to the Court's conclusion that the Debtor failed to disclose the interest. On Page 9 of the Opinion, the Court made clear that there is a dispute over the exact amount of the Debtor's ownership interest and specifically noted that the amount of his interest "is not a question to be resolved on summary judgment." Opinion at 9, n.4.

11 "Debtor's First Interrog. Resps." refers to *Debtor's Responces [sic] to Interogatories [sic] Requested by Zemon* dated March 2, 2013. A copy of the responses is attached to the Press Declaration as Exhibit 3.

12 In relevant part, the Debtor contends:

> Question in interrogatories asked: "*...Provide all documents and communications concerning any bank (and brokerage) or trust account in the name of Gregory Papadopoulos, Gregory Palos, Revcon, Revcon Retirement Plan, or any entity owned or controlled by any of the foregoing anywhere in the world* ***from January 2002 to the present***..." Since the question was requesting 12 years old information Defendant listed as many relationships as he could recall with financial institution [sic] and provided all documents in "his possession custody and control" as required by federal discovery rules [....]
>
> In compiling Bankruptcy forms, Debtor filed Chapter 7 Bankruptcy on behalf of himself and not Revcon Inc [sic] or LLC or Revcon Retirement, and properly answered the questions as if they were pertaining to himself. In Schedule B Personal property the question is: "*1. List (property in) checking, savings, or other financial accounts etc.*" and Debtor properly claimed he had no accounts in his name. The question was in the present tense requesting disclosure of currently existing accounts.
>
> In the Statement of Financial Affairs question # 11 asks: "*List all closed financial accounts ... held in the name of the Debtor ... which were closed ... within one year ... preceding this case ...*" Again, this was left blank since no accounts qualified to be listed.

Motion at 2 (emphasis original; bracketed ellipses added).

13 "Summ. Judg. Opp'n" refers to *Defendant's Opposition to Motion for Summary Judgment.*

14 In relevant part, the Debtor asserts:

> In January 2012 Defendant's ex-wife invested $125,000 in an account with TD Ameritrade and gave Defendant limited trading authorization. Limited means Defendant can enter orders but had no authority to withdraw funds. The account was exclusively in Ms. Claire Burke's name defendant's ex-wife.... The account made approximately $9,000 over three months. When [the Plaintiff's attorney] issued restraining orders and subpoenas to TD Ameritrade trying to illegally restrain the account, the firm not wishing to be involved, closed the account and returned $134,000 to Ms. Burke (ex-wife) in April 2012. Three months later on July 18 2012 Defendant filed Chapter 7 and filled the schedules based on information available to him at the time....
>
> The Court claims this activity should have been listed in the forms but fails to state where and remains vague. Such activity does not belong in "Statistical Summary" or schedule I because it is not income. It does not belong in Sch. B, C, G, because it is not property of the Debtor. It does not belong in SOFA 1 and 2 because it is not income. It clearly does not belong in SOFA 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, and 25

because it is not a busiess [sic]. ***So obviously not even the Court knows where such activity should have been listed on July 18, 201 2 based on the information available at the time.***

A business is defined as an economic activity intended and expected to generate income for the entrepreneur. Buying lottery tickets is not a business although it could be extremely profitable. Buying or selling a stock or an option or a future from home is not a business although again it could be profitable. Especially buying and selling securities in another party's account with no personal profit motive is definitely not a business and obviously there was nothing to report in bankruptcy forms.

Motion at 3–4 (emphasis original).

15 In the Motion, the Debtor states:

Question is why does this Court finds [sic] it so difficult to believe Defendant's sworn statements without a trial? Defendant since 1985 kept accurate financial diaries and saved some necessary financial statements. Starting 1998 due to some 50 changes of residential addresses it became impossible to retain more than 3 year old statements. All financial information is in the financial diaries and up to 3 year old statements are available and have been provided. One computer is used for Google searches, legal research (not discoverable), legal document storage (not discoverable) and some monitoring of the financial markets. No financial information is stored in the computer. Three laptops were used for the same purposes during travel and have not been used since 2007. External storage devices are used to save duplicate copies of legal documents and are not discoverable. So there is nothing responsive to [the Plaintiff's counsel's] request for electronic financial documents. So the question remains why is this court, not only does not believe any of Defendant's sworn statements, but desperately wants to believe any unsworn fraudulent allegation by [Plaintiff's counsel] without trial.

Motion at 4–5.

16 In any event, the Court questions the accuracy of the Debtor's assertions. The document referred to at ECF Doc. # 23 is the Debtor's *Responces [sic] to Court Ordered Interrogatories by Defendant* dated June 27, 2013 ("Debtor's Second Interrog. Resps."), which contains the Debtor's responses to 22 interrogatories propounded by the Plaintiff. The Debtor does not purport to annex exhibits or other documents to those responses, and in those responses does not refer to documents other than those he previously produced. *See* Debtor's Second Interrog. Resps. ¶¶ 1, 2, 15. The Debtor does not contend anywhere in those responses that he intended to file documents in the Clerk's Office. To the contrary, in his "Final Comments" to the responses, he asserts:

There are no documents stored electronically other than non-discoverable litigation related documents. There are no other financial records available in my possession. You know how to issue subpoenas for more information. Anything else has been made available for your inspection on June 21, 2013 after the court hearing.

I have nothing further. I am available for a deposition during which I can perhaps easier provide lengthy explanations and more details about facts. I can appear on a three day notice at a court house or other public building and I can bring with me anything in my possession you wish to inspect. I am not available July 17, 2013.

Debtor's Second Interrog. Resps. at 5.

17 The Debtor asserts:

The Court however provides no explanation why some 60 prior civil cases were all assigned to Judges formerly in criminal justice and close friends of high level FBI officials, or Judges from the Caribbean with offshore connections and accounts that the Fanjul Crime Family could secretly bribe. It also provides no explanation why two recent appeals to the District Court were assigned to Judge Failla ... formerly with the SDNY U.S. Attorney's office Criminal Division and FBI Director Comey's former protégé and employee (Comey was her boss for many years), and Judge Edgardo Ramos.... It provides no explanation why for two and a half years Defendant had to leave [sic] a few doors away from former U.S. Attorney General Mukasey and as result suffered severe injuries. And last it provides no explanation why Judge Peck, a Judge whose integrity nobody could possibly question, just quit the bench and went back to private practice. He even abandoned the Lehman case and some 235 Lehman adversarial proceedings. As he was dashing out of his 9 year Courtroom where Lehman was being litigated he labeled Zemon's case the elephant in his Court room and obviously felt he could not possibly administer justice in a case where FBI protected Organized Crime was the adversary.

Motion at 6.

18 In relevant part, the Debtor contends as follows:

The Court does not seem to realize that for the two years prior to filing bankruptcy Debtor was defending himself in minor criminal allegations, was incarcerated and detained for six months, lived month to month on $1,300 Social Security and $190 food stamps, occasionally sold some furniture and decorative items at ebay and yard sales to

make ends meet, and controlled a $1,000–3,000 futures account in the name of Revcon/Retirement. During this period, perhaps once a month did a trade in that account. On June 2011 total cash resources were less than $1,000. In early January 2012 total cash recourses increased to about $6,000 due to accumulated past due Social Security payments while incarcerated and detained. Debtor provided monthly statements of the bank account where the Treasury was depositing his retirement check, monthly statement of the Revcon account, tax returns, and financial diaries. All these documents were received and are annexed as exhibits by the Plaintiff. The Court is vague and does not state what is missing because given this level of complexity nothing is missing. In other cases, such as in *Moreo* the courts have always been specific in stating what was missing.

Motion at 6–7.

19 The Debtor also reads the Opinion to state that the Debtor "does not 'explain the dissipation of the Debtor's assets,' " and argues that "[n]othing is further from the truth." Motion at 7. However, the relevant portion of the Opinion actually reads as follows:

> [The Debtor] failed to maintain and produce adequate records of his business activity and financial affairs, even when expressly ordered by the Court to do so. Such records are necessary to explain the dissipation of the Debtor's assets and to reasonably ascertain the Debtor's financial condition.

Opinion at 7. To the extent Debtor contests that determination, Debtor is seeking to relitigate matters previously heard by the Court. That is not grounds for relief under FRCP 59(e). *Shrader,* 70 F.3d at 257; *Sequa Corp.*, 156 F.3d at 144; *see alsoPadilla,* 636 F.Supp.2d at 259.

End of Document

2007 WL 2493684
Only the Westlaw citation is currently available.
United States District Court,
S.D. New York.

BANCO CENTRAL DEL PARAGUAY, on behalf and as assignee of Banco Union S.A.E.C.A. in liquidation and Banco Oriental S.A.I.F.E.C.A. in liquidation, Plaintiff,
v.
PARAGUAY HUMANITARIAN FOUNDATION, INC. f/k/a CQZ Humanitarian Foundation, Inc., CQZ Holding Corp., Avijos, Inc., Jose M. Avila, Ronald L. Wolfson and Jorge Ralph Gallo Quintero, Principal Defendants.

No. 01 Civ. 9649(JFK). | Sept. 5, 2007.

Attorneys and Law Firms

Hughes Hubbard & Reed LLP, Nicolas Swerdloff, Esq., Daniel H. Weiner, Esq., of Counsel, New York, NY, for Plaintiff.

Cubitt & Cubitt, H. Dale Cubitt, Esq., of Counsel, Bad Axe, MI, for Defendants.

OPINION and ORDER

JOHN F. KEENAN, United States District Judge.

BACKGROUND

*1 Before the Court is (i) Principal Defendants' motion for a "new trial", pursuant to Rule 59 of the Federal Rules of Civil Procedure, and (ii) Plaintiff's motion to impose sanctions on Principal Defendants' counsel for attorneys' fees and expenses incurred by Plaintiff in connection with its opposition to the Rule 59 motion. For the reasons that follow, Principal Defendants' motion pursuant to Rule 59 is denied. Plaintiff's motion for the imposition of fees and expenses is also denied.

The underlying facts of this case are set forth in considerable detail in prior decisions of this Court, *see, e.g., Banco Central de Paraguay v. Paraguay Humanitarian Foundation, Inc.*, No. 01 Civ. 9649(JFK), 2006 U.S. Dist. LEXIS 87093 (S.D.N.Y. Nov. 29, 2006), *Banco Central de Paraguay v. Paraguay Humanitarian Foundation, Inc* ., No. 01 Civ. 9649(JFK), 2005 U.S. Dist. LEXIS 293 (S.D.N.Y. Jan. 7, 2005), and familiarity is assumed.

In brief, by Order dated January 6, 2005, the Court granted Plaintiff Banco Central de Paraguay's ("Banco Central") motion for summary judgment on its claim of conversion (Count I of the amended complaint) and denied Principal Defendants' motion for summary judgment. On March 3, 2005, Principal Defendants moved for reconsideration of the Court's January 6, 2005 Order. By Order dated June 30, 2005, the Court denied Principal Defendants' motion for reconsideration, observing that it had already considered and rejected the arguments advanced by the Principal Defendants. On January 3, 2006, the Court entered judgment in favor of Banco Central in the amount of $16 million plus interest. On January 17, 2006, Principal Defendants filed another motion for reconsideration of the Court's January 6, 2005 grant of summary judgment, which the Principal Defendants characterized as a motion for a new trial pursuant to Federal Rule 59. On May 4, 2006, the Court denied Principal Defendants' Rule 59 motion.

By Order dated November 29, 2006, the Court granted Banco Central's motion to dismiss without prejudice its remaining claims for constructive trust and civil conspiracy (respectively, Counts II and III of the amended complaint). By the same Order, the Court also granted Banco Central's motion to compel Principal Defendants to produce discovery in aid of judgment and its motion to impose sanctions against Principal Defendants for their abuse of the discovery process. Principal Defendants' instant Rule 59 motion followed. [1]

DISCUSSION

(i) Principal Defendants' Rule 59 Motion

Principal Defendants move for a "new trial" under Federal Rule 59. The Court construes this motion as one "to alter or amend the judgment" under Rule 59(e), because it follows the Court's Order of November 29, 2006, not a trial. Principal Defendants contend that "[r]ecently additional evidence has been obtained which was never provided by Plaintiff and was never available to Defendants which shed [sic] a new light on the case."(Principal Defendants' Brief In Support of Motion for New Trial Under FRCP Rule 59 ("Def.Mot.") 2.) The "new" evidence that Principal Defendants have submitted consists of a translation into English of an order, dated August 22, 2005, issued by a Paraguayan bankruptcy court

(the "Paraguayan order"), in which Banco Orientale, one of the two insolvent Paraguayan banks for which Plaintiff has acted as representative in this case, was declared bankrupt and a bankruptcy trustee was appointed to administer Banco Orientale's assets. (Def. Mot., Ex. A .) Principal Defendants contend that the Paraguayan order constitutes proof that Banco Centrale is not authorized to act in a representative capacity for Banco Orientale. The new evidence, Principal Defendants argue, warrants the setting aside not only of the Court's November 29, 2006 Order, but also previous Orders of the Court, including the Court's grant of summary judgment in Banco Central's favor on January 6, 2005, and the Order of October 31, 2005, in which the Court dismissed Principal Defendants' counterclaim.

***2** Although Principal Defendants ask the Court to "review all of its Opinions issued since January of 2005," (Def.Mot.7), the Court notes at the outset that Principal Defendants' motion is timely only as to the Court's November 29, 2006 Order. *See Empresa Cubana Del Tabaco v. Culbro Corp.*, 478 F.Supp.2d 513, 518 (S.D.N.Y.2007) ("To be timely under Civil Rule 59(e), a motion must be filed within 10 days after entry of the judgment ... This time limitation is uncompromisable, for Civil Rule 6(b) provides, in pertinent part, that the district court may not extend the time for taking any action under Rules 50(b) and (c)(2), 52(b), 59(b), (d) and (e).") (internal quotation marks and citations omitted). Further, even if the Court were to consider Principal Defendants' motion as arising under Rule 60(b)(2), which permits a movant to seek relief from a judgment or order on the ground of newly discovered evidence within one year of the judgment or order, the motion would be untimely as to all orders except for the Order of November 29, 2006. This is because the prior Orders of this Court, including the January 6, 2005 Order granting summary judgment to Banco Central and the January 3, 2006 Order entering judgment against the Principal Defendants, were entered more than one year prior to the filing of the instant motion, which Principal Defendants filed on March 6, 2007. Therefore, the Court will consider Principal Defendants' motion only to the extent that it addresses the Court's Order of November 29, 2006.

A motion to alter or amend a judgment pursuant to Rule 59 is evaluated under the same standard as a motion for reconsideration under Local Civil Rule 6.3. *See Williams v. New York City Dep't of Corrections*, 219 F.R.D. 78, 83 (S.D.N.Y.2003). To receive reconsideration, "the moving party must demonstrate controlling law or factual matters put before the court on the underlying motion that the movant believes the court overlooked and that might reasonably be expected to alter the court's decision." *Parrish v. Sollecito*, 253 F.Supp.2d 713, 715 (S.D.N.Y.2003); *see also Williams*, 219 F.R.D. at 83. Rule 59(e) should be "narrowly construed and strictly applied so as to avoid repetitive arguments on issues that have been considered fully by the Court," *Williams*, 219 F.R.D. at 83, and "to prevent the rule from being used as a substitute for appealing a final judgment." *USA Certified Merchants, LLC v. Koebel*, 273 F.Supp.2d 501, 503 (S.D.N.Y.2003). Furthermore, "[r]econsideration of a court's previous order is an 'extraordinary remedy to be employed sparingly in the interests of finality and conservation of scarce judicial resources.' " *Montanile v. Nat'l Broad. Co.*, 216 F.Supp.2d 341, 342 (S.D.N.Y.2002) (quoting *In re Health Mgmt. Sys. Inc. Sec. Litig.*, 113 F.Supp.2d 613, 614 (S.D.N.Y.2000)).

In order to establish entitlement to reconsideration of a decision in light of the availability of new evidence, Principal Defendants must show that: "(1) newly discovered evidence is of facts existing at the time of [the prior decision]; (2) the moving party is excusably ignorant of the facts despite using due diligence to learn about them; (3) newly discovered evidence is admissible and probably effective to change the result of the former ruling; and (4) the newly discovered evidence is not merely cumulative ... of evidence already offered." *Fidelity Partners, Inc. v. First Trust Co. of New York*, 58 F.Supp.2d 55, 59 (S.D.N.Y.1999) (citation omitted). [2] A party seeking to alter or amend a judgment on the basis of newly discovered evidence bears an "onerous" burden. *United States v. Int'l Bhd. of Teamsters*, 247 F.3d 370, 392 (2d Cir.2001).

***3** Principal Defendants have failed to meet their heavy burden of establishing that the new evidence is "probably effective to change the result of the former ruling," because the Paraguayan order simply has no bearing on the Court's former ruling of November 29, 2006. By that Order, the Court granted Banco Central's motion to dismiss its remaining claims without prejudice, pursuant to Federal Rule 41(a)(2); granted Banco Central's motion to compel discovery in aid of judgment, pursuant to Rule 37(a); and imposed sanctions on Principal Defendants for discovery abuses, also pursuant to Rule 37(a). In rendering its decision to dismiss the remaining claims, the Court found that Principal Defendants made no attempt to show, and indeed could not show, that dismissal of Banco Central's remaining claims would result in legal prejudice to Principal Defendants. The Court noted that Principal Defendants largely failed to address the five

factors, set forth by the Second Circuit in *Zagano v. Fordham Univ.*, 900 F.2d 12 (2d Cir.1990), that a court must consider in determining whether a defendant will suffer legal prejudice. [3] The Court observed that the Principal Defendants, instead of addressing the *Zagano* factors, argued fruitlessly and irrelevantly that various events unfolding in Paraguay would allow the Court to " 'discover that [Banco Central] is the real party in interest without authority and its allegations to a considerable extent are false, misrepresent the real facts and that this case was brought for [Banco Central's] political purposes without regard to the [insolvent banks] that they control by appointment of liquidators to do what it requests and its whim.' " *Banco Cent. de Para. v. Para. Humanitarian Found., Inc.*, 2006 U .S. Dist. LEXIS 87093, at *9-10 (quoting Principal Defendants' Mem. of Law in Denial of Pl. Mot. to Dismiss Remaining Claims Without Prejudice, at 9).

Here, too, Principal Defendants fail to demonstrate how the existence of the "new" evidence implicates the *Zagano* factors and thus constitutes proof of legal prejudice sufficient to preclude Banco Central from dismissing its remaining claims without prejudice. The Paraguayan order shows little beyond the facts that Banco Orientale was declared bankrupt under Paraguayan law and that a bankruptcy trustee was appointed to administer the insolvent bank's assets. Even assuming, arguendo, that the Principal Defendants are correct in their unsupported assertion that the Paraguayan order somehow divests Banco Central of its authority to act in a representative capacity for Banco Orientale, this fact alone does not implicate the *Zagano* factors and thus does not create legal prejudice within the meaning of Rule 41(a). Similarly, the Paraguayan order is utterly irrelevant to the other issues adjudicated in the November 29, 2006 Order, namely the compelling of Principal Defendants to provide discovery in aid of judgment and the imposition of sanctions for discovery abuses.

*4 In essence, Principal Defendants "seek to use this motion for reconsideration to introduce a decision of a foreign court that is wholly irrelevant" to the matters decided by the November 29, 2006 Order. *Dux S.A. v. Megasol Cosmetic GmbH*, No. 03 Civ. 8820(RO), 2006 U.S. Dist. LEXIS 15778, at *5 (S.D.N.Y. Apr. 3, 2006). Principal Defendants thus have failed to establish that the purported new evidence, had it been before the Court, would have caused me to alter or amend my rulings of November 29, 2006. *See id.; ACLU v. DOD*, 406 F.Supp.2d 330, 332 (S.D.N.Y.2005); *Fields v. Merrill Lynch, Pierce, Fenner, & Smith, Inc.*, No. 03 Civ. 8363(SHS), 2004 U.S. Dist. LEXIS 5155, at *7 (S.D.N.Y. Mar. 30, 2004).

Finally, to the extent that Principal Defendants argue in their reply brief that their motion may be analyzed under Rule 60(b)(3), which permits relief from an order or judgment on the grounds of an adverse party's misconduct, "[a]rguments made for the first time in a reply brief need not be considered by a court."*Playboy Enters. v. Dumas*, 960 F.Supp. 710, 720 (S.D.N.Y.1997). In any event, there is no basis for Principal Defendants' claim for relief under the misconduct prong of Rule 60(b). A party seeking relief pursuant to Rule 60(b)(3) must establish by clear and convincing evidence that the opposing party engaged in fraud or other misconduct. *See Fleming v. New York Univ.*, 865 F.2d 478, 484 (2d Cir.1989). Moreover, "[t]o prevail on a Rule 60(b)(3) motion, a movant must show that the conduct complained of prevented the moving party from fully and fairly presenting his case."*State Street Bank and Trust Co. v. Inversiones Errazuriz Limitada*, 374 F.3d 158, 176 (2d Cir.2004) (internal quotation marks omitted). As stated above, Principal Defendants claim that, in light of the Paraguayan order, Banco Central had no authority to act in a representative capacity for Banco Orientale. Principal Defendants appear to claim that Banco Central was under an obligation to alert the Court about its alleged absence of authority under Paraguayan law. Principal Defendants do not explain, however, how the Paraguayan order operated to divest Banco Central of its authority to act as Banco Orientale's representative. Principal Defendants also do not state why Banco Central was obligated to keep the Court informed about the Paraguayan bankruptcy proceedings. Moreover, Principal Defendants themselves during the course of this litigation have repeatedly made the unsuccessful argument that, under Paraguayan law, Banco Central was not authorized to act as the representative of Banco Orientale. The Court cannot fathom how Banco Central's failure to echo the oft-repeated, losing arguments of its adversary constitutes fraud or misconduct. Principal Defendants have not come close to establishing by clear and convincing evidence any misconduct on the part of Banco Central.

In sum, Principal Defendants have failed to demonstrate that newly discovered evidence, or any overlooked controlling law or other factual matters, could reasonably be expected to alter the Court's November 29, 2006 rulings. Accordingly, Principal Defendants' motion is denied.

(ii) Banco Central's Motion for Sanctions

*5 Banco Central moves for the imposition of attorneys' fees and expenses against Principal Defendants' counsel, H. Dale

Cubitt ("Mr .Cubitt"), pursuant to 28 U.S.C. § 1927 and the inherent powers of the Court.

Section 1927 of Title 28, United States Code, authorizes a court to sanction an attorney "who so multiplies the proceedings in any case unreasonably and vexatiously."28 U.S.C. § 1927. Further, under its "inherent power," a court "may impose sanctions against parties or their counsel who have litigated in bad faith or who have willfully abused the litigation process."*Jones v. Hirschfeld,* 348 F.Supp.2d 50, 62 (S.D.N.Y.2004) (quoting, *inter alia, Chambers v. NASCO, Inc.,* 501 U.S. 32, 43-46 (1991))."[T]o impose sanctions under either authority, the trial court must find clear evidence that (1) the offending party's claims were entirely meritless and (2) the party acted for improper purposes."*Id.* (internal quotation marks and citations omitted). To impose sanctions pursuant to § 1927 or the court's inherent authority, the movant must make a "clear showing of bad faith." *Oliveri v. Thompson,* 803 F.2d 1265, 1273 (2d Cir.1986). Bad faith is found when an action is brought " 'entirely without color and has been asserted wantonly, for purposes of harassment or delay, or for other improper reasons.' " *Howard v. Klynveld Peat Marwick Goerdeler,* 977 F.Supp. 654, 667 (2d Cir.1997) (quoting *Browning Debenture Holders' Committee v. DASA Corp.,* 560 F.2d 1078, 1088 (2d Cir.1977)). The United States Supreme Court has cautioned that the court's authority to impose sanctions should be used with "restraint and discretion." *Chambers,* 501 U.S. at 44.

Although the Court agrees that the defendants and Mr. Cubitt "have routinely taken unjustifiable positions and made unsupportable arguments," and that the instant motion arguably may be characterized as "frivolous," (Pl.Opp.8), Banco Central has not clearly shown bad faith on the part of Mr. Cubitt or Principal Defendants. The new evidence that forms the basis for the instant motion was never before submitted to the Court, and according to the affidavit of Mr. Cubitt, was not obtained by Principal Defendants until February 2007, well after the Court's Order of November 29, 2006. Thus, the evidence at issue, while incapable of altering the prior ruling of the Court, is arguably "new" and thus the instant motion is not "entirely without color." Banco Central also has not shown that the instant motion was brought solely to harass Banco Central or for any other clearly impropoer purpose. Accordingly, Banco Central's motion for sanctions is denied.

CONCLUSION

For the foregoing reasons, Principal Defendant's motion for a "new trial" pursuant to Rule 59 is DENIED. Banco Central's motion for imposition of attorneys' fees and expenses against Principal Defendants' counsel, Mr. Cubitt, is DENIED. The Clerk of the Court is directed to close this case and remove it from the Court's active docket.

***6 SO ORDERED.**

All Citations

Not Reported in F.Supp.2d, 2007 WL 2493684

Footnotes

1 Although issued on November 29, 2006, the Court's Order dismissing Plaintiff's remaining claims was not entered until February 16, 2007. The instant motion was filed within ten business days after entry of the Order and thus is timely under Rule 59(e).

2 Although the court in *Fidelity Partners, Inc.* was citing to the requirements for reconsideration on the grounds of new evidence under Rule 60(b)(2), the standard for newly discovered evidence under Rule 59(e) is identical. *See Brocuglio v. Proulx,* 478 F.Supp.2d 297, 300 (D.Conn.2007) ("Whether moving on the basis of presentation of new evidence under Rule 59(e) or Rule 60(b)(2), the standard for newly discovered evidence is the same.") (internal quotation marks and citation omitted).

3 The five factors set forth in *Zagano* are: "[1] the plaintiff's diligence in bringing the motion; [2] any 'undue vexatiousness' on plaintiff's part; [3] the extent to which the suit has progressed, including the defendant's efforts and expense in preparation for trial; [4] the duplicative expense of relitigation; and [5] the adequacy of plaintiff's explanation for the need to dismiss."900 F.2d at 14.

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Only the Westlaw citation is currently available.
United States District Court,
W.D. New York.

Mark AWOLESI, M.D., Plaintiff,
v.
Eric SHINSEKI, Secretary, Department of Veterans Affairs, Defendant.

No. 10–CV–6125 (MAT). | April 29, 2013.

Attorneys and Law Firms

Christina A. Agola, Ryan Charles Woodworth, Christina Agola PLLC, Brighton, NY, for Plaintiff.

Kathryn L. Smith, U.S. Attorney's Office, Rochester, NY, for Defendant.

DECISION AND ORDER

MICHAEL A. TELESCA, District Judge.

INTRODUCTION

*1 Plaintiff Mark Awolesi, M.D. ("Plaintiff"), represented by counsel, filed this action pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et *seq.*, alleging race-based discrimination in the form of a hostile work environment and retaliation during his tenure at the Buffalo VA Medical Center ("Buffalo VA"). (Docket No. 1). On February 7, 2013, the Court granted and denied in part Defendant's motion for summary judgment (Docket No. 40) and referred the case to mediation (Docket No. 41).

On March 7, 2013, Plaintiff filed a motion for reconsideration (Docket No. 43) pursuant to both Rules 59(e) and 60(b) of the Federal Rules of Civil Procedure ("F.R.C.P."). Defendant filed his opposition on April 9, 2013 (Docket No. 46), and the motion was submitted without oral argument on April 18, 2013. (Docket No. 47).

For the reasons discussed below, Plaintiff's motion for reconsideration is denied.

DISCUSSION

I. Plaintiff's Motion Is Properly Considered Under F.R.C.P. 59(e) and Not Under F.R.C.P. 60(b).

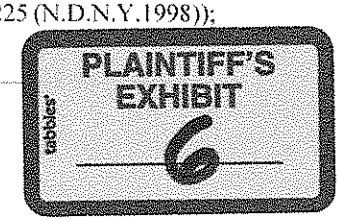
Plaintiff asserts that he seeks relief pursuant to both F.R.C.P. 59(e) and F.R.C.P. 60(b)."[W]here a post-judgment motion is timely filed and 'calls into question the correctness of that *Lyell Theatre Corp. v. Loews Corp.*, 682 F.2d 37, 40 (2d Cir.1982) (quoting FED. R. CIV. P. 60(b)); *see also Rodriguez–Antuna v. Chase Manhattan Bank Corp.*, 871 F.2d 1, 3 (1st Cir.1989) ("[A] motion which asks the court to modify its earlier disposition of a case solely because of an ostensibly erroneous legal result is brought under Fed.R.Civ.P. 59(e). Such a motion, without more, does not invoke Fed.R.Civ.P. 60(b)....")

Plaintiff's motion, however, is properly considered under F.R.C.P. 59(e) only. As Defendant argues, Plaintiff timely filed his motion with F.R.C.P.'s 28–day time-limit. Furthermore, Plaintiff alleges no grounds that would entitle him to relief under Rule 60(b). His sole basis for relief is that the district court erred, as a matter of law, on several points. Consequently, the motion should be viewed as an F.R.C.P. 59(e) motion to alter or amend the judgment. *See Echevarria–Gonzalez v. Gonzalez–Chapel*, 849 F.2d 24, 26 (1st Cir.1988) (cautioning that " 'nomenclature should not be exalted over substance' ") (quoting *Lyell Theatre Corp. v. Loews Corp.*, 682 F.2d 37, 41 (2d Cir.1982)).

II. Analysis of Plaintiff's Motion

A. Legal Standard for Evaluating F.R.C.P. 59(e) Motions

The standard for granting a motion for reconsideration under F.R.C.P. 59(e) is strict, and relief will be denied unless the movant can demonstrate that the district court overlooked matters "that might reasonably be expected to alter the conclusion reached by the court[,]" such as "controlling decisions or data." *Shrader v. CSX Transp., Inc.*, 70 F.3d 255, 257 (2d Cir.1995); *see also Analytical Surveys, Inc. v. Tonga Partners, L.P.*, 684 F.3d 36, 52 (2d Cir.2012). For instance, reconsideration under F.R.C.P. 59(e) is proper if the movant "presents newly discovered evidence that was not available at the time of the trial, or there is evidence in the record that establishes a manifest error of law or fact."*Cray v. Nationwide Mutual Ins. Co.*, 192 F.Supp.2d 37, 39 (W.D.N.Y.2001) (citing *Cavallo v. Utica–Watertown Health Ins. Co., Inc.*, 3 F.Supp.2d 223, 225 (N.D.N.Y.1998));



see also United States v. Potamkin Cadillac Corp., 697 F.2d 491, 493 (2d Cir.1983) (stating that the evidence must be "newly discovered or ... could not have been found by due diligence") (citation omitted). The parties, however, may not "reargue those issues already considered." *In re Houbigant, Inc.*, 914 F.Supp. 997, 1001 (S.D.N.Y.1996). Denials of relief under F.R.C.P. 59(e) are reviewed only for abuse of discretion. *Analytical Surveys, Inc.*, 684 F.3d at 52 (citation omitted).

B. Application to Plaintiff's Arguments

*2 Plaintiff asserts that the Court committed manifest errors of fact and law in determining whether he had sufficiently adduced evidence that there were other comparators, that is, employees at the VA similarly situated to him who were Caucasian and who committed patient abuse, but were not subject to adverse employment actions as he was. A plaintiff alleging discriminatory treatment must show he was " 'similarly situated in all material respects' to the individuals with whom [ ]he seeks to compare [him]self[,]"*Graham v. Long Island R.R.*, 230 F.3d 34, 39 (2d Cir.2000) (citation omitted), including being "subject to the same performance evaluation and discipline standards."*Id.* (citation omitted). Evidence regarding whether a plaintiff's co-employee was "similarly situated" must be submitted in proper form to defeat a motion for summary judgment. *Id.* It is well established that "where a party relies on affidavits or deposition testimony to establish facts, the statements "must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated."*DiStiso v. Cook*, 691 F.3d 226, 230 (2d Cir.2012) (citing FED. R. CIV. P. 56(c)(4); FED. R. ENID. 602)).

In its decision granting summary judgment for Defendant, the Court found as follows:

> Plaintiff refers to several incidents in which other, [C]aucasian employees were subject to a patient abuse investigations or were accused of patient abuse and were allegedly treated differently. However, after reviewing Plaintiff's testimony it is clear that he either does not have personal knowledge of the events relating to these accusations or investigations or they are based on hearsay.

Decision at 7 (quoting *DiStiso v. Cook*, 691 F.3d at 230 ("[W]here a party relies on affidavits or deposition testimony to establish facts, the statements 'must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.'") (quoting FED. R. CIV. P. 56(c)(4); citing FED.R.EVID. 602)).

Plaintiff asserts that the Court committed a manifest error of fact in the above-quoted portion of its Decision, arguing that Plaintiff's deposition testimony illustrates that he did have personal knowledge of all of the comparators' incidents. The Court has re-reviewed the deposition testimony in question and adheres to its original ruling with regard to all of the alleged comparators except Dr. Li, as discussed further below.

With regard to the first comparator, Dr. Simpson, Plaintiff testified, "I know that there was a doctor who sent a patient home T.115:20–23. [1] Plaintiff did not know Dr. Simpson's first name or when this incident occurred. T.115:10, 14, 20. Plaintiff thus did not establish he had personal knowledge of the incident.

With regard to Dr. Dosluoglu, Plaintiff stated, "I know he left the patient to bleed to death in the hallway in the hospital."T.118:13–17. However, he did not offer any other details about the alleged incident involving Dr. Dosluoglu. This allegation is too conclusory for purposes of F.R.C.P. 56.

*3 As to Dr. Hobicka, Plaintiff testified that his knowledge of the incident came from Dr. Hobicka himself. T.120:16–23. He admitted that he "[did] n't know much about it" and did not know whether the incident resulted in injury to the patient. T.121:116–23. By Plaintiff's own admission, he did not have any first-hand knowledge of the incident involving Dr. Hobicka. Plaintiff notably has not argued that a hearsay exception applies to Dr. Hobicka's statements. It appears that Dr. Hobicka's statements would not qualify as declarations against interest for purposes of FED.R.EVID. 803(b)(4) as Plaintiff has failed to make any attempt to show that he is unavailable. *See Deutsche Asset Management, Inc. v. Callaghan*, 2004 WL 758303, at *13 (S.D.N.Y. Apr.7, 2004) (where party offering statements did not demonstrate that witnesses were unavailable, statements, even though against witnesses' interests, were hearsay and did not qualify for the exception in FED. R. EVID. 803(b)(4); thus the court did not consider them on a summary judgment motion).

With regard to Dr. Cartegena, Plaintiff testified, "He was accused of patient abuse and I also think sexual abuse, I don't know the details of it."T.122:20–22; *see also* T:125:20–23 (admitting that he "[did]n't know the details of the [patient abuse] allegation" such as whether Dr. Cartegena caused injury to the patient). Again, by Plaintiff's own admission, he did not have any personal knowledge of the incident involving Dr. Cartegena, meaning that his deposition testimony was not admissible to establish that Dr. Cartegena was a comparator. *See*FED. R. CIV. P. 56.

Finally, as to Dr. Li, Plaintiff said, "I know that Dr. Li had placed a patient into ventricular fibrillation... [and] he connected the pacemaker in a reverse manner" causing the patient's heart to stop. T.126:2–6. The patient did not die, however, and Plaintiff did not provide any further details about the resultant injury, if any, to the patient. *See id.*Plaintiff reported the incident to their supervisor, Dr. Rainstein, and "nothing was done." T.126:7.

Plaintiff could not identify the date of the Dr. Li incident more precisely than "2007, 2008." T.126:23. He did not write a formal memo charging Dr. Li with patient abuse, but he "did complain ... about the inappropriateness" of the service Dr. Li provided. T.127:12–16. Taking the testimony in the light most favorable to Plaintiff, and assuming *arguendo* that it showed personal knowledge sufficient to raise a triable issue of fact with regard to one comparator (Dr. Li), Plaintiff has failed to raise an issue of fact with regard to the issue of pretext, for which he bears the ultimate burden of proof.

As this Court found in its original Decision and Order, Plaintiff did not met his burden of coming forward with sufficient evidence of discriminatory, retaliatory animus to rebut the Defendant's legitimate, non-discriminatory reasons for its actions in investigating the allegation of patient abuse. As the Court noted, Plaintiff admitted that the actions taken were authorized by the Buffalo VA Patient Abuse Policy, and he did not present any admissible evidence to support a conclusion that following the Patient Abuse Policy was discriminatory in and of itself. *See Brown v. City of Syracuse,* 673 F.3d 141, 150 (2d Cir.2012) ("an employee does not suffer a materially adverse change in the terms and conditions of employment where the employer merely enforces its preexisting disciplinary policies in a reasonable manner").

*4 In sum, Plaintiff has offered no new arguments on this issue. It is beyond cavil that F.R.C.P. 59(e)"is not a vehicle for relitigating old issues, presenting the case under new theories, securing a rehearing on the merits, or otherwise taking a 'second bite at the apple'...."*Analytical Systems, Inc.*, 684 F.3d at 52 (quoting *Sequa Corp. v. GBJ Corp.*, 156 F.3d 136, 144 (2d Cir.1998) (ellipsis in original)). Having offered nothing to change this Court's conclusion on the issue of pretext, Plaintiff is not entitled to the extraordinary relief contemplated by F.R.C.P. 59(e).*Cf. Graham,* 230 F.3d at 44 (reversing grant of summary judgment where "[t]he district court's conclusions regarding the similarity of [of several comparators] improperly resolved factual questions" and the Circuit "also f [ou]nd questions of fact with respect to plaintiff's ultimate burden on the issue of pretext").

CONCLUSION

For the foregoing reasons, Plaintiff's Motion for Reconsideration (Docket No. 43) is denied with prejudice.

IT IS SO ORDERED.

All Citations

Slip Copy, 2013 WL 1819239

Footnotes

1 Citations to "T. ___" refer to pages from Plaintiff's deposition transcript. Numerals following a colon in these citations refer to individual lines from Plaintiff's deposition transcript.

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2011 WL 1599638
Only the Westlaw citation is currently available.
United States District Court,
W.D. New York.

SECURED SYSTEMS TECHNOLOGY, INC., Plaintiff
v.
FRANK LILL & SON, INC., Defendant.

No. 08–CV–6256. | April 27, 2011.

Attorneys and Law Firms

Keith R. Hemming, Esq., Daniel Font, Esq., McElroy, Deutsch, Mulvaney & Carpenter, LLP, New York, NY, for Plaintiffs.

Martha A. Connolly, Esq., Timothy D. Boldt, Esq., Ernstrom & Dreste, LLP, Rochester, NY, for Defendant.

DECISION AND ORDER

CHARLES J. SIRAGUSA, District Judge.

INTRODUCTION

*1 This action involves a dispute arising from a construction contract for a project in the State of Connecticut. Plaintiff Secured Systems Technology, Inc. ("Plaintiff") is a New Jersey Corporation, and Defendant Frank Lill & Son, Inc. ("Defendant") is a New York corporation with its principal place of business in New York. Plaintiff maintains that the contract is governed by the law of the State of New York, while Defendant contends that the contract is governed by the law of the State of Connecticut. By Decision and Order (Docket No. [# 73]) entered on June 17, 2010, the Court granted Plaintiff's objections to a non-dispositive decision by the Honorable Jonathan W. Feldman, United States Magistrate Judge, which had held that the subject contract was governed by the law of Connecticut. In sustaining Plaintiff's objections, this Court granted partial summary judgment to Plaintiff, and held that the parties' contract is governed by New York law. Now before the Court is Defendant's motion [# 76] for reconsideration of the Court's Decision and Order [# 73], pursuant to Federal Rule of Civil Procedure ("FRCP") 59(e). The application is denied.

FRCP 59(e) STANDARD

Plaintiff brings the subject motion pursuant to FRCP 59(e), and it is well settled that when making such a motion,

> the moving party must show that the Court overlooked the controlling decisions or factual matters that were put before the Court in the underlying motion. *Nakano v. Jamie Sadock, Inc.*, No. 98 Civ. 0515, 2000 WL 1010825, at *1 (S.D.N.Y. July 20, 2000); *Walsh v. McGee*, 918 F.Supp. 107, 110 (S.D.N.Y.1996). However, in addition, "[a] court is justified in reconsidering its previous ruling if: (1) there is an intervening change in the controlling law; (2) new evidence not previously available comes to light; or (3) it becomes necessary to remedy a clear error of law or to prevent obvious injustice."*See Nnebe v. Daus*, No. 06 Civ. 4991, 2006 WL 2309588, at *1 (S.D.N.Y. Aug. 7, 2006). New evidence, for these purposes, must be evidence that "could not have been found by due diligence."*Word v. Croce*, No. 01 Civ. 9614, 2004 WL 434038, at *4 (S.D.N.Y. March 9, 2004).
>
> These rules are "narrowly construed and strictly applied so as to avoid repetitive arguments on issues that have been considered fully by the court."*See Walsh*, 918 F.Supp. at 110. Strict application of these rules also "prevent[s] the practice of a losing party examining a decision and then plugging the gaps of the lost motion with additional matters."*Polar Int'l Brokerage Corp. v. Reeve*, 120 F.Supp.2d 267, 268–69 (S.D.N.Y.2000). The moving party may not use a motion for reconsideration to advance new facts, arguments, or theories that were available but not previously presented to the Court. *See Graham v. Sullivan*, No. 86 Civ. 163, 2002 WL 31175181, at *2 (S.D.N.Y. Sept. 23, 2002); *Leonard v. Lowe's Home Ctrs., Inc.*, No. 00 Civ. 9585, at *2 (S.D.N.Y. April 12, 2002).

*2 *U.S. v. Billini*, No. 99 CR. 156(JGK), 2006 WL 3457834 at *1 (S . D.N.Y. Nov. 22, 2006). A district court's decision to deny a motion under Rule 59(e) is reviewed on appeal for abuse of discretion. *Munafo v. Metro. Transp. Auth.*, 381 F.3d 99, 105 (2d Cir.2004).

BACKGROUND

A detailed description of the factual background of this motion was set forth in the Court's prior Decision and Order [# 73] and need not be repeated here. Very briefly, the

underlying motion for partial summary judgment involves the interpretation of a purchase order ("the purchase order") between Plaintiff and Defendant. Paragraph nine of the purchase order's "terms and conditions" states that, "[t]he contract arising from acceptance of this order shall be governed by the laws of the State of New York."The next paragraph, paragraph ten, states that the purchase order is subject to a separate agreement between Defendant and a third-party, Stone & Webster ("Stone & Webster"), as follows:

> *OWNER SPECIFICATIONS.*This purchase order is subject to the Agreement between the Buyer [Defendant] and the Owner [Stone & Webster]. The conditions of the contract between between the Buyer and Owner including drawings, specifications, all Addenda issued prior to and all modifications issued after execution of the Agreement, are as fully a part of this purchase order as if repeated herein.

Significantly, the separate agreement between Defendant and Stone & Webster contained a Connecticut choice-of-law provision. Defendant maintains that pursuant to paragraph ten, the New York choice of law provision in paragraph nine was nullified, and the Connecticut choice-of-law provision in the separate agreement was incorporated into the purchase agreement instead. The Magistrate Judge determined that Connecticut law applied to the parties' dispute, and denied Plaintiff's motion for partial summary judgment. The undersigned sustained Plaintiff's objections to the Magistrate Judge's decision, and granted Plaintiff's motion for partial summary judgment, finding that New York law applies to the dispute. In that regard, the Court held that paragraph ten of the purchase order incorporated the specifications from the separate agreement, but not the Connecticut choice-of-law provision. The Court further held that it would reach the same outcome regardless of whether it applied New York law or Connecticut law.

In the subject motion for reconsideration, Defendant maintains that the Court erred in the following ways: 1) the Court assigned undue significance to the heading of paragraph ten of the purchase order ("Owner Specifications"), and failed to give proper meaning to the rest of that paragraph; 2) the Court's interpretation of paragraph ten was inconsistent with industry custom and usage; 3) the Court erred by failing to follow Connecticut law, under which the Connecticut choice-of-law provision would have been incorporated into the purchase order; 4) the Court did not give proper deference to the Magistrate Judge's decision; and 5) the Court improperly addressed certain issues *sua sponte*.

DISCUSSION

***3** The Court has carefully reviewed the underlying decision and Defendant's motion for reconsideration. The Court disagrees with all of the points raised by Defendant, primarily for the same reasons discussed in the underlying decision. For example, the Court did not give undue weight to the heading of paragraph ten while ignoring the rest of the paragraph, as Defendant suggests. Instead, the Court interpreted the entire paragraph, as discussed in the prior decision. The Court also believes that it reviewed the Magistrate Judge's decision under the proper standard, which was set forth in the Court's Decision and Order. Additionally, the Court disagrees that it improperly raised issues *sua sponte*, which prejudiced Defendant. On that point, Defendant contends that, "arguably," the Court decided, without being asked to do so, "that the only part of the Agreement [between Defendant and Stone & Webster] that was incorporated into the Purchase Order was the specifications."Def. Memo of Law [# 77] at 24. However, that is incorrect. Instead, the Court found that the only parts of that agreement which were incorporated by *paragraph ten* of the purchase order were the specifications. As Defendant has shown, other parts of the purchase order, such as paragraph eleven, [1] may incorporate other parts of that agreement. For all of these reasons, the Court finds that Defendant has not met the standard for reconsideration under FRCP 59(e).

CONCLUSION

Defendant's motion for reconsideration is denied.

So Ordered.

All Citations

Not Reported in F.Supp.2d, 2011 WL 1599638

Footnotes

1 In its motion for reconsideration, Defendant makes an argument concerning paragraph eleven of the purchase order, which states: *"If called for in the agreement between Buyer (Lill) and Owner (SWCI),* the buyer (Lill) shall hold retainage until the final payment is made to the Buyer (Lill) by the Owner (SW CI)." (Def. Memo of Law [# 77] at 12) (emphasis added). Defendant argues that this provision shows that the Court's interpretation of paragraph ten is incorrect, since it proves that the parties intended to incorporate more than just the other contract's specifications. However, to the Court, it further disproves Defendant's interpretation of paragraph ten. That is, Defendant maintains that paragraph ten of the purchase order clearly incorporated the *entire agreement* between Defendant and Stone & Webster. However, if that were true, then there would be absolutely no reason to have included the above-quoted language in paragraph eleven, since the retainage provision of the agreement between Defendant and Stone & Webster would already have been incorporated. In fact, in light of the wording of paragraphs eleven and thirteen of the purchase order, if Defendant is correct one would expect that paragraph nine would have stated, *"Unless otherwise specified in the Agreement between the Owner and the Buyer,* the contract arising from acceptance of this order shall be governed by the laws of the State of New York."Instead, however, paragraph nine unequivocally states that the agreement will be governed by the law of New York. The Court also disagrees with Defendant's argument that paragraph three of the purchase order casts doubt on the Court's interpretation of the agreements. *See,* Def. Memo of Law [# 77] at 11.

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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

BENJAMIN W. PILLARS,
as Personal Representative of the Estate of
KATHLEEN ANN PILLARS, deceased,

Plaintiffs,

Case No. 1:15-cv-11360-TLL-PTM

v.

Hon. Thomas L. Ludington

GENERAL MOTORS LLC,

Defendant.
_____/

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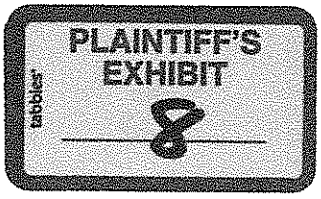
_____/

PLAINTIFF'S MOTION FOR REMAND TO THE BAY COUNTY CIRCUIT COURT



NOW COMES the Plaintiff, BENJAMIN W. PILLARS, as Personal Representative of the Estate of KATHLEEN ANN PILLARS, deceased, by and through his attorneys, THE MASTROMARCO FIRM, and hereby moves this Honorable Court pursuant to 28 U.S.C.A. § 1447 (c) for an order of remand of the above-captioned case to the Bay County Circuit Court for the reasons as set forth more fully in the brief filed in support of this motion.

Respectfully submitted,

THE MASTROMARCO FIRM

Dated: May 6, 2015

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BRIEF IN SUPPORT OF PLAINTIFF'S MOTION FOR REMAND TO THE BAY COUNTY CIRCUIT COURT

INTRODUCTION

Plaintiff's complaint surrounds an automobile accident which occurred on November 23, 2005. On that day, the decedent, Kathleen Ann Pillars, was driving her 2004 Pontiac Grand Am, to a blood drive. The decedent lost control of her vehicle when the defective ignition switch in her vehicle unexpectedly went to the off position causing the automobile accident. The decedent sustained severe injuries as a result of the accident rendering her incapacitated. The decedent remained incapacitated and died nearly seven (7) years later on March 12, 2012.

During decedent's on-going incapacitation, General Motors Corporation filed for bankruptcy on June 1, 2009, and a month later, without affording the decedent with her due process right of notice, entered into a bankruptcy approved Amended and Restated Master Sale and Purchase Agreement with General Motors LLC ("New GM") with a closing date of July 10, 2009. Subsequently, General Motors LLC disclosed to the public that the car manufacturer had been aware of the fact that its vehicles had a defective ignition system and had concealed that fact from the public and government officials.

The Plaintiff is the decedent's widower and the duly appointed personal representative of her estate having received his letter of authority on November 14,

2014. The Plaintiff filed his wrongful death lawsuit against General Motors LLC on March 23, 2015, the Circuit Court for the County of Bay, State of Michigan.

General Motors LLC removed the case to this Court citing to 28 U.S.C.A. § 1452 as the sole statutory basis for removal. As explained more fully in this brief, the bankruptcy statute cited by General Motors LLC does not apply to the facts and circumstances which exist in the present case, since Plaintiff's lawsuit will not conceivably have any effect on the bankruptcy estate of Motors Liquidation Company, f/k/a General Motors Corporation.

Even if it was determined by this Court that Plaintiff's lawsuit might conceivably have an effect on the bankruptcy estate, both the abstention provisions of 28 USC § 1334(c) and the equitable remand provision of § 1452(b) grants this Court wide discretion in the determination whether to hear a case or remand it to the court from which it came. See Shamieh v. HCB Financial Corp., 2014 WL 5365452, 3 (W.D.La.,2014). A copy of the Shameih Opinion is attached as **Exhibit 1**. The Plaintiff submits that the circumstances which exist in the present case support both abstention and equitable remand even if New GM was ultimately able to demonstrate an effect on the bankruptcy estate.

For the reasons set forth in this brief, the Plaintiff requests that the Court remand the above-captioned case to the Bay County Circuit Court.

DISCUSSION

I. FEDERAL COURTS LACK JURISDICTION OVER PLAINTIFF'S PENDING LAWSUIT.

Again, New GM relies upon 28 U.S.C.A. § 1452 as the sole statutory basis for removal. That statute states in relevant part:

> (a) A party may remove any claim or cause of action in a civil action other than a proceeding before the United States Tax Court or a civil action by a governmental unit to enforce such governmental unit's police or regulatory power, to the district court for the district where such civil action is pending, if such district court has jurisdiction of such claim or cause of action under section 1334 of this title.

28 U.S.C.A. § 1452.

It is well-settled that federal courts are courts of limited jurisdiction, and are, "empowered to hear only cases within the judicial power of the United States as defined by Article III of the Constitution." University of South Alabama v. American Tobacco Co., 68 F.3d 405, 409 (11th Cir. 1999) (quoting Taylor v. Appleton, 30 F.3d 1365, 1367 (11th Cir. 1994)). As the removing party, New GM has the burden to prove the existence of federal subject matter jurisdiction. Pacheco de Perez v. AT&T Co., 139 F.3d 1368, 1373 (11th Cir. 1998); Her Majesty the Queen in Right of the Province of Ontario v. City of Detroit, 874 F.2d 332, 339 (6th Cir. 1989).

Because the effect of removal is to deprive the state court of an action otherwise properly before it, removal raises significant federalism concerns which

mandate strict construction of the removal statute in favor of state court jurisdiction and against removal. See Merrell Dow Pharmaceutical, Inc. v. Thompson, 478 U.S. 804, 809 (1986); Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100 (1941); University of South Alabama, 168 F.3d at 411.

Courts have correctly concluded that issues of remand should be decided before anything else as illustrated by the following decision excerpt from the Eleventh Circuit:

> once a federal court determines that it is without subject matter jurisdiction, the court is powerless to continue. As the Supreme Court long ago held in Ex parte McCardle, 74 U.S. (7 Wall.) 506, 19 L.Ed 264 (1868), "[w]ithout jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." Id. at 514; see also Wernick v. Mathews, 524 F.2d 543, 545 (5th Cir. 1975) "[W]e are not free to disregard the jurisdictional issue, for without jurisdiction we are powerless to consider the merits.").

University of South Alabama v. American Tobacco Co., 68 F.3d 405, 410 (11th Cir. 1999). All doubts about jurisdiction are to be resolved in favor of remand to state court. University of South Alabama, 168 F.3d at 411.

As acknowledged by New GM in its notice of removal, the Plaintiff brought the above-captioned action in state court seeking a recovery under a number of state theories of recovery including (1) products liability; (2) negligence; (3) Michigan Consumer Protection Act; (4) misrepresentation; (5) breach of contract, (6) promissory estoppel; (7) fraud; (8) fraudulent concealment; and (9) gross

negligence. A copy of New GM's Notice of Removal w/o exhibits is attached as **Exhibit 2**.

Indeed, Plaintiff's complaint against New GM seeks money damages following the wrongful death of Kathleen Ann Pillars on March 24, 2012. A copy of the Complaint is attached as **Exhibit 3**.[1]

The Plaintiff further alleges that the March 24, 2012, death was the result of a defective motor vehicle. (**Exhibit 3**). This is not disputed in New GM's notice of removal. The Court should note that New GM admitted in its notice of removal that it is responsible for any occurrences that happen on or after the July 10, 2009, closing date:

> GM LLC admits it ultimately assumed a narrow band of certain liabilities, including the following as provided in Section 2.3(a)(ix) of the Sale Order and/or the Amended and Restated Master Sale and Purchase Agreement:
>
> > all Liabilities to third parties for death, personal injury, or other injury to Persons or damage to property caused by motor vehicles designed for operation on public roadways or by the component parts of such motor vehicles and, in each case, manufactured, sold or delivered by Sellers (collectively, "Product Liabilities"), which arise directly out of accidents, incidents ***or other distinct and discreet occurrences that happen on or***

[1] New GM attached a copy of the complaint to its notice of removal as Exhibit D. The Court should note that the Plaintiff had already amended his complaint and served said amendment on New GM at the time of removal. For the purpose of this motion, reference to the amended complaint is not necessary since the changes/additions made in the amendment are not material to the limited issue before this Court.

> ***after the Closing Date [July 10, 2009]*** and arise from such motor vehicles' operation or performance. (Emphasis Added by Plaintiff).

(See page 4, footnote 1 of Notice of Removal - **Exhibit 2**).

New GM is bound by the clear and unequivocal admissions of its attorneys in its submissions to this Court. Barnes v. Owens-Corning Fiberglass Corp., 201 F.3d 815, 829 (6th Cir. 2000), MacDonald v. Gen. Motors Corp., 110 F.3d 337, 340 (6th Cir. 1997).

Based upon New GM's admissions, the relevant inquiry is what constitutes an "occurrence". If an occurrence has taken place after the closing date of July 10, 2009, liability falls squarely upon the New GM rather than the bankrupt entity based upon the language relied upon New GM in its notice of removal so long as the occurrence arose from the operation or performance of a motor vehicle.

It is firmly established that in the absence of a specific definition to the contrary, courts are to give the words their ordinary meaning. The definition of "occurrence" is, "the action, fact, or instance of occurring ... 'something that takes place; an event or incident.'" See the American Heritage Dictionary of the English Language 1219 (5th ed. 2011). A copy of the American Heritage Dictionary definition is attached as **Exhibit 4**. Likewise, the Merriam–Webster's Collegiate Dictionary 858 (11th ed. 2003) defines "occurrence" as, "something that occurs...

the action or instance of occurring". A copy of the Merriam–Webster's Dictionary definition is attached as **Exhibit 5**.

Furthermore, the death of the Plaintiff was the result of the injuries she sustained from her operation of a General Motors vehicle. (**Exhibit 3**).

In the present case, the Plaintiff brought wrongful death causes of action on behalf of the estate. (See Complaint - **Exhibit 3**). The death of the decedent on March 24, 2012, occurred almost three (3) years after the bankruptcy closing date, is certainly a distinct and discreet occurrence as the term "occurrence" is defined by two (2) major dictionaries.

Significantly, federal subject matter jurisdiction is also lacking if an effect on the bankruptcy estate cannot be shown:

> Since the proceeding before this court does not involve the bankruptcy petition itself we find that it is not a "core" proceeding. Therefore, in order to determine whether we may exercise jurisdiction at all, we must determine whether it is at least "related to" Daher's bankruptcy case. And we find that it is at least "related to" because resolution of Daher's liability in this matter "could *conceivably* have [an] effect on the estate being administered in bankruptcy." Wood, 825 F.2d at 93.

Shamieh v. HCB Financial Corp., 2014 WL 5365452, 3 (W.D.La.,2014). A copy of the Shamieh Opinion is attached as **Exhibit 1**.

Pursuant to the Amended and Restated Master Sale and Purchase Agreement, relied upon by New GM in its notice of removal, the March 24, 2012, occurrence is a liability of the New GM and not a liability of the bankrupt entity.

As such, Plaintiff's state court complaint does not involve the bankruptcy petition and, as already explained in the above-mentioned discussion, it will not have any effect on the bankruptcy estate being administered because Plaintiff's claims pertain to the New GM and not the bankrupt entity.[2]

As such and as set forth more fully in the above-mentioned paragraphs, the Plaintiff respectfully requests that the Court remand the above-captioned case to the Bay County Circuit Court.

II. IN THE ALTERNATIVE, THE PURPORTED REMOVAL AUTHORITY RELIED UPON BY NEW GM WAS IMPROPERLY OBTAINED AT THE EXPENSE OF PLAINTIFF'S DUE PROCESS RIGHTS AND THUS IS VOID.

As stated in the preceding discussion, New GM, in its notice of removal, relied upon 28 U.S.C.A. § 1452 as the sole statutory basis for removal. In doing so, New GM relies upon the Amended and Restated Master Sale and Purchase Agreement. (See page 4, footnote 1 of Notice of Removal - **Exhibit 2**).

It is respectfully submitted that the authority relied upon by New GM for its basis of removal from the state court proceeding was improperly obtained at the

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[2] Even if it was determined that Plaintiff's lawsuit might conceivably have an effect on the bankruptcy estate, both the abstention provisions of 28 USC § 1334(c) and the equitable remand provision of § 1452(b) grants courts wide discretion in the determination whether to hear a case or remand it to the court from which it came. See Shamieh v. HCB Financial Corp., 2014 WL 5365452, 3 (W.D.La.,2014) (**Exhibit 1**). The Plaintiff submits that the circumstances which exist in the present case support both abstention and equitable remand even if New GM was ultimately able to demonstrate an effect on the bankruptcy estate.

expense of Plaintiff's (along with the decedent's) due process rights. Again, the decedent was incapacitated from November 23, 2005, to her death on March 24, 2012, a period of almost seven (7) years. As a result, the decedent was unable to advocate her position during that period of time due to her incapacitation.

The lack of notice provided to the decedent or her family is significant. When a bankruptcy debtor seeks relief against third parties, due process requires notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections as explained by the Supreme Court:

> **An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections**. Milliken v. Meyer, 311 U.S. 457, 61 S.Ct. 339, 85 L.Ed. 278, 132 A.L.R. 1357; Grannis v. Ordean, 234 U.S. 385, 34 S.Ct. 779, 58 L.Ed. 1363; Priest v. Board of Trustees of Town of Las Vegas, 232 U.S. 604, 34 S.Ct. 443, 58 L.Ed. 751; Roller v. Holly, 176 U.S. 398, 20 S.Ct. 410, 44 L.Ed. 520. The notice must be of such nature as reasonably to convey the required information, Grannis v. Ordean, supra, and it must afford a reasonable time for those interested to make their appearance, Roller v. Holly, supra, and cf. Goodrich v. Ferris, 214 U.S. 71, 29 S.Ct. 580, 53 L.Ed. 914. But if with due regard for the practicalities and peculiarities of the case these conditions are reasonably met the constitutional requirements are satisfied. 'The criterion is not the possibility of conceivable injury, but the just and reasonable character of the requirements, having reference to the subject with which the statute deals.' American Land Co. v. Zeiss, 219 U.S. 47, 67, 31 S.Ct. 200, 207, 55 L.Ed. 82, and see Blinn v. Nelson, 222 U.S. 1, 7, 32 S.Ct. 1, 2, 56 L.Ed. 65, Ann.Cas.1913B, 555.

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314-315, 70 S.Ct. 652, 657 (1950).

This fundamental principle has been repeated in subsequent decisions including the following from the Bankruptcy Court for the District of New Jersey:

> Further, as held by the United States Supreme Court in Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865, 873 (1950), "an elementary and fundamental requirement of due process in any proceeding which is accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."

In re Martini, 2006 WL 4452974, 7 (Bkrtcy.D.N.J.,2006).

The method of notice necessary to satisfy due process depends on whether a creditor is "known" or "unknown" at the time the notice is to be given. While unknown creditors are merely entitled to constructive publication notice of the proceedings, known creditors must receive actual notice. See Mennonite Bd. of Missions v. Adams, 462 U.S. 791, 800 (1983). This is true regardless of how widely-publicized the bankruptcy case is or whether the known creditor is actually aware of the bankruptcy proceedings. See City of New York v. New York, New Haven & Hartford R.R. Co., 344 U.S. 293, 297 (1953) ("[E]ven creditors who have knowledge of a reorganization have a right to assume that the statutory 'reasonable notice' will be given them before their claims are forever barred."); Arch Wireless,

Inc. v. Nationwide Paging, Inc. (In re Arch Wireless, Inc.), 534 F.3d 76, 83 (1st Cir. 2008) (same).

Significantly, the bankruptcy court has already concluded that the circumstances surrounding the Sale Order regarding the Amended and Restated Master Sale and Purchase Agreement violated the due process rights of the various owners of vehicles with defective ignition systems. In re Motors Liquidation Company, 2015 WL 1727285 (Bkrtcy.S.D.N.Y.2015). A copy of the Bankruptcy Opinion is attached as **Exhibit 6**.

Nevertheless, the bankruptcy court has improperly denied relief to the car owners speculating that the deprivation of the various car owners' due process rights was harmless, since the bankruptcy concluded that any opposition to the sale order would not have changed the outcome. In re Motors Liquidation Company, 2015 WL 1727285 (Bkrtcy.S.D.N.Y.2015)(**Exhibit 6**). The bankruptcy court's conclusion is inconsistent with Supreme Court precedent.

The Court should note that the Supreme Court has expressly rejected the notion that a court should hypothesize an outcome, detrimental to the party that has been deprived of due process, as a substitute for the actual opportunity to defend that due process affords every party against whom a claim is stated:

> Instead, the Federal Circuit reasoned that nothing much turned on whether the party opposing Adams' claim for costs and fees was OCP or Nelson. "[N]o basis has been advanced," the panel majority concluded, "to believe anything different or additional would have

> been done to defend against the allegation of inequitable conduct had Nelson individually already been added as a party or had he been a party from the outset." 175 F.3d, at 1351. We neither dispute nor endorse the substance of this speculation. **We say instead that judicial predictions about the outcome of hypothesized litigation cannot substitute for the actual opportunity to defend that due process affords every party against whom a claim is stated. As Judge Newman wrote in dissent: "The law, at its most fundamental, does not render judgment simply because a person might have been found liable had he been charged."** Id., at 1354. (Emphasis Added).

Nelson v. Adams USA, Inc., 529 U.S. 460, 471, 120 S.Ct. 1579, 1587 (2000).

Even if the bankruptcy court's unconstitutional actual prejudice standard had any merit, the Plaintiff (along with the decedent) in the present case has been prejudiced by the lack of notice.

Furthermore, the bankruptcy court's order leaves the Plaintiff without a remedy for the wrongs resulting from decedent's operation of a General Motors vehicle. (**Exhibit 6**). The deprivation of the due process rights is unjust and unconstitutional.

As set forth more fully in the complaint, the decedent was incapacitated from the date of her motor vehicle accident on November 23, 2005, to her untimely death on March 24, 2012. (See Complaint - **Exhibit 2**). Recognizing the obvious fact that an incapacitated person lacks the ability to advocate that person's rights, Michigan law acknowledges that any deadline to act is tolled while the incapacitation exists. See Michigan Compiled Laws Annotated (MCLA)

600.5851(1)&(2). A copy of MCL§ 600.5851 is attached as **Exhibit** 7. Without providing notice to the decedent, the bankruptcy court has affectively deprived the decedent and her family (including the Plaintiff) of the tolling provisions provided by the Michigan legislature which is a statutory right which applies to claims arising under Michigan law.

Indeed, the incapacity of the decedent is a significant factor, since the only person with knowledge of the defective nature of the ignition switch when the ignition system unexpectedly shut down causing the accident (other than the bankrupt GM and later the New GM) along with the impact said defect had on the accident in question was the decedent and she was incapacitated at the time of the July 10, 2009, bankruptcy closing date. Her family did not have knowledge of the defect as evidenced by New GM's admissions that the defect was concealed from the public and governmental officials, and decedent's family was not in the car with her at the time of the accident.

The Plaintiff respectfully submits that the above-mentioned circumstances support both abstention and equitable remand even if New GM was ultimately able to demonstrate an effect on the bankruptcy estate. Both the abstention provisions of 28 USC § 1334(c) and the equitable remand provision of § 1452(b) grants courts wide discretion in the determination whether to hear a case or remand it to the

court from which it came. See Shamieh v. HCB Financial Corp., 2014 WL 5365452, 3 (W.D.La.,2014). **(Exhibit 1)**.

As such and as set forth more fully in the above-mentioned paragraphs, the Plaintiff respectfully requests that the Court remand the above-captioned case to the Bay County Circuit Court.

CONCLUSION

As such and as set forth more fully in the above-mentioned paragraphs, the Plaintiff respectfully requests that the Court remand the above-captioned case to the Bay County Circuit Court.

Respectfully submitted,

THE MASTROMARCO FIRM

Dated: May 6, 2015

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PROOF OF SERVICE

I hereby certify that on **May 6, 2015**, I presented the foregoing papers to the Clerk of the Court for the filing and uploading to the CM/ECF system, which will send notification of such filing to the following: **Andrew Baker Bloomer & Thomas P. Branigan**.

THE MASTROMARCO FIRM

Dated: May 6, 2015

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