HEARING DATE AND TIME: July 22, 2009 at 9:45 a.m. (Eastern Time)
OBJECTION DEADLINE: July 17, 2009 at 4:00 p.m. (Eastern Time)

Garry M. Graber
Deborah J. Piazza
HODGSON RUSS LLP
60 East 42nd Street, 37th Floor
New York, NY 10165-0150
Telephone: (212) 661-3535
Facsimile: (212) 972-1677

Bruce R. Leaverton (*pro hac vice* application pending)
Mary Jo Heston (*pro hac vice* application pending)
Heidi C. Anderson (*pro hac vice* application pending)
LANE POWELL PC
1420 Fifth Avenue, Suite 4100
Seattle, Washington 98101
Telephone: (206) 223-7000
Facsimile: (206) 223-7107

Attorneys for Stillwater Mining Company

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	**Chapter 11 Case No.**
GENERAL MOTORS CORP., *et al.*,	**09-50026 (REG)**
Debtors.	**(Jointly Administered)**

OBJECTION OF U.S./MONTANA BASED STILLWATER MINING COMPANY TO THE DEBTORS' MOTION TO REJECT ITS MINERAL SUPPLY CONTRACT IN FAVOR OF FOREIGN MINERAL SUPPLY CONTRACTS

TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. RELIEF REQUESTED 3

III. FACTUAL BACKGROUND 3

A. The Rejection of the Stillwater Contract Will Negatively Impact Stillwater's Income and Sustainability, Local Communities, Jobs and Its Access to Credit 3

B. Public Policy Considerations in GM Chapter 11 and Its Treatment of Its Suppliers. 5

C. Stillwater's Enjoys an Excellent Working Relationship With GM 6

D. The Sale Order Generally Contemplates a Joint Decision by Old GM and New GM on the Disposition of Executory Contracts. 7

IV. ARGUMENT 9

A. The Joint Business Decision to Reject the Stillwater Contract, while Assuming Similar Contracts with Foreign Suppliers, is Not Supported by Evidence Justifying Debtors' Business Judgment and Must be Denied Accordingly 9

1. Debtors' Third Omnibus Motion is devoid of any facts or evidence supporting the allegation that rejection of the Stillwater Contract will benefit the estate or the general unsecured creditors. 10

2. Rejection of the Stillwater Contract will cause damage grossly disproportionate to any benefit to be derived by the general creditors of Debtors estate 11

B. GM's Additional Business Justifications, If Any, for the Rejection of the Stillwater Contract, Should Only be Permitted in a New Motion Giving Stillwater an Opportunity to Engage in Limited Discovery 12

C. Debtors' Disguised Request to Reject the Stillwater Contract Nunc Pro Tunc Should be Denied. 13

V. CONCLUSION 14

TABLE OF AUTHORITIES

Page

Cases

In re Balco Equities Ltd., Inc., 323 B.R. 99 10
In re Fleming Companies, Inc., 304 B.R. 85 (Bankr. D. Del. 2003) 13
In re G Survivor Corp., 171 B.R. 755 (Bankr. S.D.N.Y. 1994) 9
In re G Survivor Corp., 171 B.R. 758 .... 9, 10
In re Lavigne, 114 F.3d 379 (2d. Cir. 1997) 12
In re Meehan, 46 B.R. 96 (Bankr. E.D.N.Y. 1985) 9
In re National Record Mart, Inc., 272 B.R. 131 (Bankr. W.D. Pa. 2002) 13
In re Sundial Asphalt Co., Inc., 147 B.R. 72 9
In re: Old Carco LLC, 40 B.R. 180 (S.D.N.Y. 2009) 9, 12, 13

Statutes

11 U.S.C. § 365(a) 13
Bankruptcy Code, § 363 2
Bankruptcy Code, § 365 .... 2, 3, 8

TO: THE HONORABLE ROBERT E. GERBER,
UNITED STATES BANKRUPTCY JUDGE

I. INTRODUCTION

Stillwater Mining Company ("Stillwater") is a Montana-based mining company *and* direct supplier to the Old GM of the minerals palladium and rhodium[1] for use in both Old and New GM's manufacture of catalytic converters[2] for GM automobiles.[3] Declaration of John Stark ("Stark Decl") ¶ 2. Stillwater is the only U.S. supplier of these critically important manufacturing materials. *Id.* The other two mining companies and direct substantial suppliers of such minerals – Mining and Metallurgical Company Norilsk Nickel (MMC Norilsk Nickel) ("Norilsk") and Impala Platinum Holdings Limited ("Implats")[4] – are based respectively in Russia and in South Africa. Declaration of James Binando ("Binando Decl." ¶ 5). The Debtors' motion (the "Third Omnibus Motion") offers no business justification for this joint decision by Old GM and New GM. Debtors are instead inexplicably assuming and assigning these two foreign mineral supply contracts to New GM while seeking permission pursuant to a canned

[1] Stillwater also mines and can supply platinum, the third primary mineral in the "platinum group minerals" ("PGMs") used in the manufacture of catalytic converters, although its current supply contract does not provide for the supply of platinum to GM. Stark Decl. ¶ 3.

[2] Auto catalysts are significantly the largest user of palladium which helps in the elimination of harmful emissions produced by internal combustion engines. Palladium is softer than platinum and is more resistant to oxidization. *See* www.stillwaterpalladium.com

[3] New GM is a company that is essentially carrying on the same car manufacturing operations of Old GM albeit stripped of some of its old debt obligations and operations and its old Union contract while being owned and financed substantially by the United States Treasury. New GM has rehired its same employees and retained virtually all of its 500 suppliers in order to preserve its infrastructure and preserve U.S. jobs. This is clearly not a situation where there is an independent separate purchaser (i.e. Fiat) with existing supplier contracts that is acquiring the debtor's assets.

[4] The Debtors also obtain such minerals from a Pennsylvania-based recycler, but upon information and belief the amounts of Platinum Group Minerals from such entity are significantly less than the amounts supplied by the three mining supply companies, Norilsk, Implats and Stillwater.

Section 365 motion to reject Stillwater's supply contract[5] *nunc pro tunc*[6] without any specific justification for such inconsistent and unsupportable decisions concerning GM's respective PGM supply contracts.[7] Notably, the Third Omnibus Motion is wholly devoid of any viable justification for the joint business decision by Old GM and New GM to reject the Stillwater Contract. Debtors further fails to acknowledge or address the significant disparate impact such rejection may have on Stillwater, its business operations, its employees in Montana and local Montana communities. Rather, it would appear from Debtors' sparse brief that the decision was a matter of mere convenience to Old GM and New GM. *See discussion infra*. at pp. 7-8; *see also* Binando Decl. ¶¶ 8-10.

The Debtors have not met their burden under Section 365. Their request to reject the Stillwater Contract under the facts and circumstances of this extraordinary bankruptcy case is contrary to the policies, purposes and reasoning articulated in this Court's July 5, 2009 decision (the "July 5th Decision") supporting the July 5, 2009 order authorizing Old GM to transfer substantially all of its assets free and clear of liens to New GM, and to assign certain executory contracts pursuant to Sections 363 and 365 of the Bankruptcy Code (the "July 5th Order"). Moreover, the rejection of the Stillwater Contract is contrary to the justifications and purposes articulated by President Obama's administration and the Auto Taskforce for the U.S. Treasury's

---

[5] Palladium and Rhodium Sales Agreement, dated August 8, 2007 (the "Original Contract"), as amended pursuant to the First Amendment dated December 9, 2008 (the "First Amendment") and the Second Amendment dated March 5, 2009 (the "Second Amendment") (collectively referred to as the "Stillwater Contract"). *See* Stark Decl. ¶ 4; Binando Decl. ¶ 4.

[6] The *nunc pro tunc* aspect of the Third Omnibus Motion's attempted rejection of the Stillwater Contract is not discussed, justified or addressed in any way by Debtors and is merely silently slipped into the schedule of contracts and the column marked rejection date. As more fully set forth below, there is no justification for such *nunc pro tunc* relief.

[7] The Third Omnibus Motion, like the First and Second Omnibus Motion, sets forth general case law standards for rejection without discussion of the Stillwater Contract or the assumed and assigned foreign platinum mineral supply contracts.

intervention in financing both Old and New GM with U.S. taxpayer's dollars. Accordingly, Debtors' request to reject the Stillwater Contract *nunc pro tunc* should be denied.

II. RELIEF REQUESTED

That Debtors' Third Omnibus Motion seeking to reject certain executory contracts be DENIED as respects the rejection of the Stillwater Contract for failure to establish a *prima facie* case for rejection under Section 365 of the Bankruptcy Code.

Alternatively, should the Court determine the Third Omnibus Motion should nevertheless be granted, for a continuance of this hearing and entry of an Order permitting Stillwater Mining Company to engage in discovery as respects Debtors' justification for seeking to reject the Stillwater Contract, while assuming similar PGM supply contracts held by foreign-based suppliers, and permitting Stillwater Mining Company to continue shipping pursuant to the terms of the Stillwater Contract.

III. FACTUAL BACKGROUND

A. The Rejection of the Stillwater Contract Will Negatively Impact Stillwater's Income and Sustainability, Local Communities, Jobs and Its Access to Credit.

Stillwater[8] is engaged in the development, recycling, extraction, processing, smelting, refining, and marketing of palladium, platinum and associated metals (e.g. rhodium) in southern Montana. The area known as the J-M Reef, which Stillwater owns, is the *only* known significant source of PGMs in the United States. Binando Decl. ¶ 2.

Stillwater currently employs 1322 employees in its Montana operations making it the largest employer in the counties of Stillwater and Sweet Grass, and one of Montana's largest statewide employers. Binando Decl. ¶ 3. The Stillwater Contract is one of two long-term auto company sales contracts held by Stillwater, which together represented 42.8% of Stillwater's

[8] For additional background information on Stillwater and its operations go to www.stillwatermining.com.

2008 revenue. *See* Stillwater's March 16, 2009 10K[9] ("2008 10K"), p. 36. The Stillwater Contract constituted approximately 12% of Stillwater's revenue in 2008 and approximately 11% of Stillwater's year-to-date revenue[10]. Binando Decl. ¶ 7. The Stillwater Contract provides for specific quantities of palladium[11] and rhodium to be delivered to GM on a monthly basis at prices slightly discounted from the market price, and includes floor and ceiling pricing for certain PGMs. Such floor pricing provides essential stability to Stillwater's income from the sale of these PGM minerals. Binando Decl. ¶ 6.

If the Stillwater Contract is rejected pursuant to Debtors' request, Stillwater will be required to sell the GM designated palladium and rhodium at the spot market price. Spot market pricing for palladium and rhodium is volatile and has recently experienced a significant downturn, in large part due to the recent worldwide economic decline. Binando Decl. ¶8. For example between March 2008 and December 2008, the spot price for palladium varied between $582 per ounce and $164 per ounce. *See* 2008 10K[12] p. 34. As of June 30, 2009, the palladium price was approximately $250 per ounce. Based on June 30, 2009 market prices, Stillwater's losses from the rejection of the Stillwater Contract will be approximately $500,000.00 per month.[13] If such losses continue for a sustained period of time, or if Stillwater's losses increase significantly due to an additional decline in the spot market price for PGMs, it will have the

---

[9] A copy of the relevant excerpt from the 2008 10K is attached hereto as Exhibit "A" for the Court's convenience.

[10] The reduction in revenue for 2009 is due in part to the fact that the First and Second Amendments to the Stillwater Contract reduced the amount of rhodium delivered to GM during the first six months of 2009.

[11] Through the two auto company long term sales contracts Stillwater has committed 100% of its mined palladium production. Ex. A (2008 10K) p. 36.

[12] A copy of the relevant excerpt from the 2008 10K is attached hereto as Exhibit "A" for the Court's convenience.

[13] The rejection of the contract will subject not only Stillwater to the above described significant consequences and financial losses, but will result in a very large claim for breach of contract. Binando Decl. ¶ 11.

likely effect of putting hundreds of Stillwater employees' jobs at risk. Binando Decl. ¶ 9-10. At current spot market prices, Stillwater is not currently sustainable without the pricing floors in the long term auto sales contracts. Binando Decl. ¶ 8.

In addition to the potential for significant job loss, although Stillwater currently has substantial cash reserves, rejection of the Stillwater Contract may impact Stillwater's ability to obtain third party financing and access to the credit markets, should it require credit in the future. Stark Decl. ¶ 9.

In summary, the narrative in Stillwater's 2008 10K commented as follows on the relationship between Stillwater's business operations and the fate of long term sales automotive contracts, including the Stillwater Contract:

> Should the Company [Stillwater] be unable to renew these sales contracts, and the market price of PGMs proves insufficient to cover the Company's operating and capital costs of production, then the Company operations might have to be curtailed, suspended or closed.[14]

B. Public Policy Considerations in GM Chapter 11 and Its Treatment of Its Suppliers.

Due to the broad economic and societal policies implicated in this case, this is not the typical Chapter 11 bankruptcy case, as the Court repeatedly points out in the July 5th Decision. As such, the result is an alteration of the normally narrower application of bankruptcy principals and procedures. *See e.g.* July 5th Decision, at. p. 6, pp. 13-14 and p. 15. The U.S. and Canadian Governments' willingness to employ billions of their respective taxpayers' dollars to save a long-time critical North American industry further suggests the need for a different approach, with social impacts and public policy considerations becoming paramount over the typically

[14] 2008 10K p. 37, a copy of the relevant excerpt of which is attached hereto as Exhibit "A" for the Court's convenience.

predominant economic factors. Specifically in this regard, this Court states as follows in the July 5th Decision:

> Only the U.S. and Canadian Governmental authorities were prepared to invest in GM-and then not so much by reason of the economic merit of the purchase, but rather to address the underlying societal interests in preserving jobs and the North American auto industry, **the thousands of suppliers to that industry,** and the health of communities, in the U.S. and Canada, in which GM operates.

See July 5th Decision, at p. 15 (emphasis added).

In keeping with these public policy priorities, the Court notes: "Substantially all of the old GM executory contracts with direct suppliers are likely to be assumed and assigned to New GM." A review of the recently filed motions to reject executory contracts comports with that statement, with almost no supplier contracts being rejected aside from the rejection of the Stillwater Contract. Even those dealers whose contracts are not being assumed have been given what the Court referred to as a "softer landing and orderly termination" through an approximately 17 month termination notice. Notably, New GM is apparently assuming Russian and South African PGM supply contracts like the Stillwater Contract without giving Stillwater, a company headquartered in the U.S. and employing thousands of people in the State of Montana, the opportunity to continue with New GM. Stillwater has been given no such soft landing or consideration.

C. Stillwater's Enjoys an Excellent Working Relationship With GM.

Stillwater has consistently maintained an excellent working relationship with GM and has worked closely with them through their financial difficulties by amending the Stillwater GM Agreement on not one, but two occasions since 2007, to reduce the amount of rhodium to meet Old GM's supply needs. Stark Decl. ¶ 5. Neither Old nor New GM discussed their joint decision to reject the Stillwater Contract prior to making the decision to reject. Instead,

Stillwater representatives were contacted by their GM contract representative who advised that the decision had been made to reject the Stillwater Contract. *See* Stark Decl. ¶ 6. When Stillwater inquired as to the reasons behind GM's decision, it was informed that pricing under the Stillwater Contract was not the deciding issue. Rather, the GM representative cited the reduced manufacturing capacity as a reason for the company's decision to consolidate its suppliers of PGM metals. *See* Stark Decl. ¶ 6.

No justification was given to Stillwater representatives as to why GM chose to retain two foreign suppliers over the only PGM mining company in the United States. *See Id*. This lack of justification is particularly relevant where the negative impacts on this U.S. supplier may lead to significant job loss and business interruptions in several Montana communities dependant on Stillwater.

Stillwater has always performed under the terms of the Stillwater Contract and is ready willing and able to continue to do so.[15] Stark Decl. ¶ 7. As of the date of this Objection, there are no cures due under the terms of the Stillwater Contract.

D. The Sale Order Generally Contemplates a Joint Decision by Old GM and New GM on the Disposition of Executory Contracts.

The July 5th Order which approved the terms of the purchase and sale agreement (the "MPA") addresses the post-sale treatment of Old GM's executory contracts. *See* Section 6.6 and 6.7 of the MPA attached hereto as Exhibit A. These sections generally provide that Old GM and New GM will jointly make decisions as to the disposition of the Debtors' executory contracts at

[15] Stillwater has a delivery due and scheduled for July 20th under the terms of the Stillwater Contract which it intends to fulfill. Stark Decl. ¶ 7

least until the "Executory Contract Deadline"[16] with certain limited exceptions not relevant to this proceeding. Until the Executory Contract Deadline, New GM may specify in writing additional executory contracts to those specifically identified in the MPA that it wishes to designate as assumable and to include it in the Assumable Executory Contract Schedule. *See* MPA § 6.6(a). As to "Rejectable Contracts"[17] New GM, with Old GM's consent, may designate such contracts for assumption and assignment unless such contract has previously been rejected by Old GM pursuant to Section 365 of the Bankruptcy Code. *See* MPA, § 6.6(a). Similarly, New GM may designate contracts as "Proposed Rejectable Contracts" which Old GM may, but is not obligated to, reject pursuant Section 365 of the Bankruptcy Code. *See* MPA,§ 6.6(b). The MPA further provides that Old GM shall have the right, but not the obligation, to reject, at any time, any Rejectable Executory Contract with certain limited exceptions not relevant to this proceeding. *See* MPA § 6.6(c). Finally, New GM is generally obligated to pay for costs and cure amounts related to assumable contracts as well as certain designated contracts pending the Executory Contract Deadline and share costs and expenses related to other contracts pending such deadline. *See* MPA § 6.6(d). Under these circumstances it is clear that both Old GM and New GM are jointly exercising their business judgment in determining the fate of contracts such as the Stillwater Contract and whether such contracts will be part of the go forward business of GM and are jointly apportioning the respective costs and cure amounts pending such decisions.

[16] The term "Executory Contract Designation Deadline" means thirty (30) calendar days following the Closing Date or if mutually agreed upon by the Parties, any later date up to and including the Business Day immediately prior to the date of the confirmation hearing for Sellers' plan of liquidation or reorganization.

[17] The term Rejectable Contract means "an Executory Contract that Sellers may, but are not obligated to, reject pursuant [sic] Section 365 of the Bankruptcy Code." Section 6.6(b).

IV. ARGUMENT

A. The Joint Business Decision to Reject the Stillwater Contract, while Assuming Similar Contracts with Foreign Suppliers, is Not Supported by Evidence Justifying Debtors' Business Judgment and Must be Denied Accordingly.

Debtors are not properly exercising their business judgment in seeking to reject the Stillwater Contract. Stillwater agrees that the decision to assume or reject an executory contract is within the business judgment of Debtors. "Generally, absent a showing of bad faith, or an abuse of business discretion, the debtor's business judgment [in determining to reject an executory contract will not be altered." *In re G Survivor Corp. Corp.*, 171 B.R. 755, 757 (Bankr. S.D.N.Y. 1994). However, the "business judgment" test permits the court to consider the rights of other parties affected by the rejection of a contract. *In re Sundial Asphalt Co., Inc.*, 147 B.R. 72, 81 (E.D.N.Y. 1992) *citing In re Meehan*, 46 B.R. 96 (Bankr. E.D.N.Y. 1985). In that regard, "the Court may refuse to authorize rejection where the party whose contract is to be rejected would be damaged disproportionately to any benefit to be derived by the general creditors of the estate." *Id*. *But compare In re: Old Carco LLC*, 40 B.R. 180, 188 (S.D.N.Y. 2009) (stating that under the business judgment standard, "the effect of rejection on the other entities is not a material fact to be weighed . . . but under a heightened standard or a balancing of the equities such effect would be a fact to be weighed.")

Case law supports the consideration of a wide variety of factors in evaluating whether the debtor employed reasonable business judgment in its decision to reject a contract, including: "(a) whether the contract burdens the estate financially; (b) whether rejection would result in a large claim against the estate; (c) whether the debtor <u>showed real economic benefit</u> resulting from the rejection; and (d) whether <u>upon balancing the equities, rejection will do more harm to the other party to the contract than to the debtor if not rejected</u>." *In re Balco Equities Ltd., Inc.*, 323 B.R.

85, 99 (S.D.N.Y. 2005) *quoting G Survivor*, 171 B.R. at 758 (emphasis added) (internal citations omitted).

In this instance, Debtors have failed to provide <u>any</u> facts or evidence establishing <u>any</u> economic benefit to either Old GM or New GM through rejection of the Stillwater Contract in support of their motion. In contrast, rejection of the Stillwater Contract will cause great harm to Stillwater's business and place hundreds of U.S. jobs in jeopardy. In this case, Debtors' motion to reject the Stillwater Mining Contract must be denied.

1. <u>Debtors' Third Omnibus Motion is devoid of any facts or evidence supporting the allegation that rejection of the Stillwater Contract will benefit the estate or the general unsecured creditors</u>.

Debtors seek to reject various executory contracts, including the Stillwater Contract, in a conclusory brief relying solely on the sale of substantially all its assets to New GM. In support of Debtors' request, the Third Omnibus Motion states merely that: (1) "continuing the Executory Contracts would be costly and would provide no corresponding benefit or utility to the Debtors or their estates" and "would impose unnecessary costs and burdens on the Debtors' estates"[18]; (2) the executory contracts are no longer necessary for or beneficial to Debtors' estates; and (3) no meaningful value would be realized by Debtors if the Executory Contracts were assumed and assigned to third parties.[19] As noted above, the Third Omnibus Motion fails to provide any facts or evidence to support these assertions and contains no proper justification for rejecting the Stillwater Contract.

The only facts in the record evidencing the "business judgment" exercised by Debtors imply that the decision to reject the Stillwater Contract in favor of the remaining PGM suppliers are without basis. *See* Stark Decl. ¶ 6. This decision was not based upon pricing concerns

---

[18] Third Omnibus Motion ¶¶ 6, 8.
[19] *See* Third Omnibus Motion ¶ 13.

related to the Stillwater Contract, nor the performance by Stillwater under the terms of the Stillwater Contract. *See Id.* In fact, Debtors have provided no concrete rationale to either Stillwater or to the Court for New GM's decision to retain Norilsk and Impala as PGM suppliers while not retaining Stillwater. Aside from expressing a general desire to consolidate suppliers, the only major supplier (whose products are not obsolete to New GM) that appears to have been eliminated to-date out of several hundred GM suppliers is Stillwater.[20] *See* Stark Decl.¶ 6; *see also,* Third Omnibus Motion, Ex. A. Such disparate and discriminatory treatment without a correspondingly sound business reason or showing of concrete harm by the assumption of the Stillwater Contract by New GM or Old GM is an abuse of the Debtors' discretion.

Debtors reliance on the sale under the above described circumstances wholly ignores the reality of the joint decision making process proscribed by the MPA, and New GM's direct participation with Old GM in the designation of assumable and rejectable executory contracts. *See discussion supra.* Such a joint decision making process inherently requires a business justification for the actual decision to designate for assumption the Russian and South African PGM supply contracts, while rejecting the Stillwater Contract. Debtors' Third Omnibus Motion is remarkably devoid of any such business justification, and the motion should accordingly be denied.

2. Rejection of the Stillwater Contract will cause damage grossly disproportionate to any benefit to be derived by the general creditors of Debtors estate.

Rejection of the Stillwater Contract will cause great harm to Stillwater while conferring no benefit to the Debtors' general creditors. In this case, GM currently does not have any cure amount due to Stillwater under the Stillwater Agreement. As such, the assumption of this

[20] In the Fourth Omnibus Motion there appears to be the rejection of two manufacturing supply contracts related to discontinued vehicle brands which discontinuation likely provides a rationale for such rejection. Such is not the case with the PGM suppliers.

contract would not harm the Debtors' unsecured creditors or New GM. Stillwater is capable of providing all three PGM minerals required in New GM's current manufacturing operations, and thus would arguably support New GM's efforts to consolidate suppliers.

By contrast, as set forth more fully in the attached declarations of John Stark and James Binando, rejection of the Stillwater Contract will cause substantial harm to Stillwater's operations in Montana. Moreover, the rejection of the Stillwater Contract may subject Debtors' estate to a large damage claim for breach of contract arising from certain losses resulting from declining spot market pricing for PGMs. *See In re: Old Carco LLC*, 406 B.R. 180, 190 (Bankr. S.D.N.Y. 2009) *citing In re Lavigne*, 114 F.3d 379, 387 (2d. Cir. 1997) (noting that a debtor's rejection of an executory contract gives rise to a breach of contract claim against the debtor's bankruptcy estate).

Finally, the unique circumstances of this case involving U.S. Taxpayer financing, mandate that the Court factor the disproportionate impact that rejection of the Stillwater Contract will have on this U.S. company, and by extension, U.S. jobs. This is particularly relevant when considered in the context of New GM assuming the contracts of virtually every other supplier, and the fact that New GM would experience no harm by assuming the Stillwater Contract in addition to, or in place of, one or both of the foreign PGM suppliers. Such an imbalance of interests suggests a clear abuse of Debtors' business judgment under their retained assumption and rejection responsibilities.

B. GM's Additional Business Justifications, If Any, for the Rejection of the Stillwater Contract, Should Only be Permitted in a New Motion Giving Stillwater an Opportunity to Engage in Limited Discovery.

The rejection of the Stillwater Contract should be denied based upon the Old and New GM's failure to establish its *prima facie* burden of showing it exercised proper business

judgment in making this decision. Any additional justification presented by Debtors should be made only in renewed motion on sufficient notice to provide Stillwater with the opportunity to conduct limited discovery of those individuals involved in the decision to reject the Stillwater Contract and assume the foreign PGM Contracts prior to the Court making a decision on the rejection of the Stillwater Contract. *See generally, In re: Old Carco LLC*, 406 B.R. 180 (Bankr. S.D.N.Y. 2009) (acknowledging that while motion to assume or reject is a summary proceeding that limited discovery is warranted).

C. Debtors' Disguised Request to Reject the Stillwater Contract Nunc Pro Tunc Should be Denied.

Debtors seek to reject the Stillwater Contract *nunc pro tunc*, as indicated only by a notation in the schedule of contracts attached to the Third Omnibus Motion. Moreover, Debtors' motion fails to explicitly request *nunc pro tunc relief*, let alone address the reasons why such relief is warranted in this case. As such, the Court should decline to grant Debtors' motion to reject the Stillwater Contract effective on July 9, 2009.

As a general rule, rejection becomes effective only upon entry of a court order approving a motion to reject an executory contract. 11 U.S.C. § 365(a). *In re Fleming Companies, Inc.* 304 B.R. 85, 96 (Bankr. D. Del. 2003) *citing, e.g., In re National Record Mart, Inc.,* 272 B.R. 131, 133 (Bankr. W.D. Pa. 2002) (agreeing with the general principle that the effective date of a debtor's rejection of an unexpired lease is the date the court enters the order).

As noted above, Debtors failed to explicitly request such relief, choosing instead to silently slip the requested date of rejection into the attached schedule of contracts. The motion itself is devoid of any reference to *nunc pro tunc* relief, including any case law supporting such relief. In that regard, Debtors have failed to provide the Court with "exceptional circumstances" justifying the retroactive rejection of the Stillwater Contract and, in fact, has failed to provide the

Court with <u>any</u> circumstances justifying this extraordinary relief. As such, Debtors have clearly failed to meet the burden required for obtaining *nunc pro tunc* relief in this case and its request should be denied accordingly.

V. CONCLUSION

Old and New GM have failed to satisfy their *prima facie* burden of showing that they exercised reasonable business judgment in rejecting the Stillwater Contract. The Debtors' reliance on the sale of assets to justify its decision is, at best, misplaced, particularly in light of the facts of this case and the joint involvement of Old and New GM in the decisions concerning the fate of executory contracts. As a long time and loyal supplier of palladium and rhodium to GM that has worked to accommodate GM's needs and financial difficulties, Stillwater and its Montana-based employees and communities deserve better. Stillwater and others are entitled to the real answer as to why Old and New GM chose the Russian and South African suppliers of PGM minerals over a U.S. based supplier who will be significantly harmed if the Stillwater Contract is rejected. This is particularly true where, as here, Stillwater appears to be the only substantial supplier to GM whose contract is being rejected without a "soft landing" or any opportunity to discuss the matter with GM. The Debtors added insult to injury in seeking *nunc pro tunc* relief without any discussion or notice. The purpose, policies and intent discussed in this Court's July 5th Order concerning the U.S. Government backing of New GM have not been honored or fulfilled in the filing of the Motion Accordingly, Stillwater respectfully requests that the relief requested in the Third Omnibus Motion be summarily Denied.

Dated: New York, New York.

July 16, 2009

/s/ Garry M. Graber
Garry M. Graber

Deborah J. Piazza
HODGSON RUSS LLP
60 East 42nd Street, 37th Floor
New York, NY 10165-0150
Telephone: (212) 661-3535
Facsimile: (212) 972-1677

Bruce R. Leaverton
Mary Jo Heston
Heidi C. Anderson
LANE POWELL PC
1420 Fifth Avenue, Suite 4100
Seattle, Washington 98101
Telephone: (206) 223-7000
Facsimile: (206) 223-7107
Attorneys for Stillwater Mining Company

EXHIBIT "A"

EXCERPT FROM STILLWATER MINING COMPANY 2008 10K REPORT

PRICES

Stillwater Mining Company's revenue and earnings depend significantly on world palladium and platinum market prices. The Company has no direct control over these prices, which tend to fluctuate widely. The Company does have the ability to hedge prices, however, and is working to foster PGM demand growth by encouraging new uses for its products. See " *Management's Discussion and Analysis of Financial Condition and Results of Operations – Revenue* " and *"Factors That May Affect Future Results and Financial Condition* ." The volatility of palladium and platinum prices is illustrated in the following table of the London Metals Exchange afternoon postings of annual high, low and average prices per ounce since 1996. The accompanying charts also demonstrate this volatility. (See " *Business and Properties – Risk Factors – Vulnerability to metals price volatility – Changes in supply and demand could reduce market prices* ," in the following section.)

	PALLADIUM			PLATINUM		
YEAR	HIGH	LOW	AVERAGE	HIGH	LOW	AVERAGE
1996	$ 144	$ 114	$ 128	$ 432	$ 367	$ 397
1997	$ 239	$ 118	$ 177	$ 497	$ 343	$ 396
1998	$ 419	$ 201	$ 284	$ 429	$ 334	$ 372
1999	$ 454	$ 285	$ 358	$ 457	$ 342	$ 377
2000	$ 970	$ 433	$ 680	$ 622	$ 414	$ 544
2001	$ 1,090	$ 315	$ 604	$ 640	$ 415	$ 529
2002	$ 435	$ 222	$ 338	$ 607	$ 453	$ 539
2003	$ 269	$ 148	$ 201	$ 840	$ 603	$ 691
2004	$ 333	$ 178	$ 230	$ 936	$ 767	$ 846
2005	$ 295	$ 172	$ 201	$ 1,012	$ 844	$ 897
2006	$ 404	$ 261	$ 320	$ 1,355	$ 982	$ 1,143
2007	$ 382	$ 320	$ 355	$ 1,544	$ 1,118	$ 1,303
2008	$ 582	$ 164	$ 352	$ 2,273	$ 763	$ 1,576
2009*	$ 218	$ 179	$ 197	$ 1,090	$ 918	$ 999

* (Through March 6, 2009)

AVAILABLE INFORMATION

The Company's Internet Website is http://www.stillwatermining.com. The Company makes available, free of charge, through its Internet Website, its annual reports on Form 10-K, quarterly reports on Form 10-Q, current reports on Form 8-K, corporate proxy statements, and any amendments to those reports, as soon as reasonably practicable after the Company electronically files such materials with, or furnishes them to, the Securities & Exchange Commission. These documents will also be provided free of charge in print, upon request.

RISK FACTORS

Set forth below are certain risks faced by the Company.

THE WORLDWIDE FINANCIAL AND CREDIT CRISES CREATES VULNERABILITY FOR THE COMPANY

The Company has not been immune to the ongoing world financial crisis. In light of world events and the sharp decrease in PGM prices, during the fourth quarter of 2008, the Company restructured its operations in an effort to conserve cash and reduce anticipated losses. The restructuring of the Company's operations resulted in dramatic changes and essentially reduced the scope of its mining operations. The Company recognizes that the combined effect of low PGM prices, the upcoming expiration of its automobile contracts containing floors on pricing and reduced demand for its metals have negatively impacted the Company. The Company believes that it is in the interests of shareholders for management to seek to maintain some stability in its operations while looking forward to a turnaround in pricing and the markets, as to which there can be no assurance and the timing of which cannot be predicted.

The Company's primary business remains in the mining of PGM's. As a high cost producer, over the years management has continued to focus on ways to lower its costs. In the current low price environment, management has restructured the business to focus on maintaining cash and remaining in a position to take advantage of improved pricing, if and when that should occur. Thus, the Company may be said to be in preservation mode in order to minimize cash costs, maintain operations at its mines and keep employed its skilled set of miners.

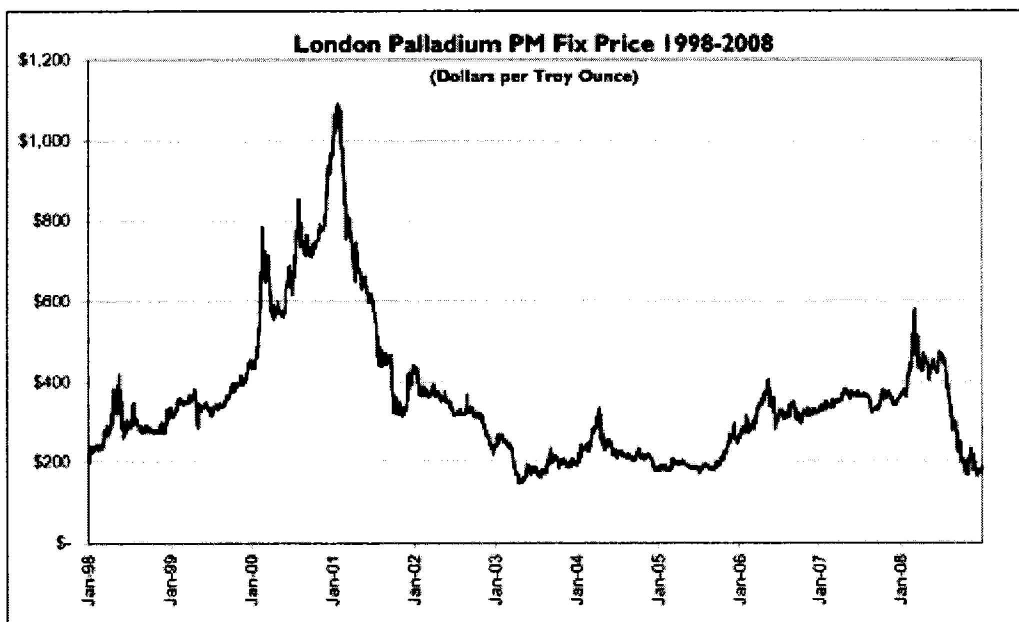
As a result of the sale of an issue of convertible debentures in March 2008, the Company raised approximately $181.5 million, the proceeds of which were used to eliminate an outstanding bank credit agreement balance and for general corporate purposes. The Company is seeking to maintain its current liquidity in order to navigate beyond the current financial crisis, but no assurances can be given that the Company will be successful. The Company has been unsuccessful in the current environment in obtaining a successor credit agreement. The Company is therefore vulnerable if conditions worsen, which could in turn negatively impact its relative liquidity.

The world financial crisis has also negatively impacted the Company's recycling segment, which has proven to be a very attractive and profitable ancillary business that utilizes surplus capacity in the smelting and refining facilities. In view of the market conditions and questions as to collectability under various commitments with vendors, the Company's ongoing business is substantially reduced and the Company has taken certain non-cash charges on its advances respecting inventory purchases related to its recycling segment. The Company is in the process of determining what changes can be made to minimize risk in the advance process, while at the same time continuing to support and further the recycling segment as it is complementary to its mining operations and can be very profitable if the risks can be controlled.

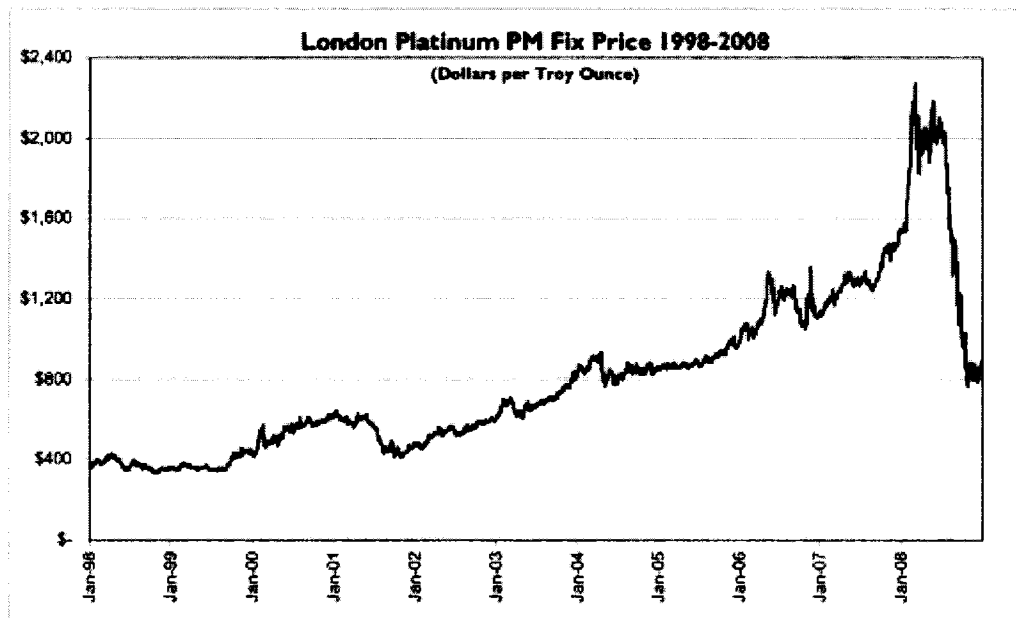
VULNERABILITY TO METALS PRICE VOLATILITY-CHANGES IN SUPPLY AND DEMAND COULD REDUCE MARKET PRICES

Because the Company's sole source of revenue is the sale of platinum group metals, changes in the market price of platinum group metals may significantly affect profitability. Many factors beyond the Company's control influence the market prices of these metals. These factors include global supply and demand, speculative activities, international political and economic conditions, currency exchange rates, and production levels and costs in other PGM-producing countries, principally Russia and South Africa.

Over the last few years, the market price of palladium has been extremely volatile. After reaching a record high price level of $1,090 per ounce in January 2001, the price of palladium declined over a 27-month period until bottoming at a low of $148 per ounce in April 2003. Thereafter, the price gradually recovered, posting a high of $333 per ounce in April of 2004 and then declined again, rose to $404 per ounce in May of 2006, rose to $582 per ounce in April 2008 and declined sharply in December of 2008 to $164. At March 6, 2009, the market price of palladium (based on the London Metal Exchange afternoon fixing) was $203 per ounce.



The market price of platinum trended generally upward from $440 per ounce at the end of 2001 to $1,530 at the end of 2007. This upward trend continued briefly into 2008, when the price peaked in March at $2,273 per ounce in London, and then declined sharply as the economy deteriorated in the second half of 2008, bottoming at $756 per ounce before ending 2008 at $898 per ounce. On March 6, 2009, the London Metal Exchange afternoon fixing for platinum was $1,071 per ounce.



A prolonged or significant economic contraction in the United States or worldwide could put further downward pressure on market prices of PGMs, particularly if demand for PGMs continued to decline in connection with reduced automobile demand and more restricted availability of investment credit. If other producers or investors release substantial volumes of platinum group metals from stockpiles or otherwise, the increased supply could reduce the prices of palladium and platinum. Changes in currency exchange rates, and particularly a significant weakening of the South African rand, could reduce relative costs of production and improve the competitive cost position of South African PGM producers. This in turn could make additional PGM investment attractive in South Africa and reduce the worldwide competitiveness of the Company's North American operations.

Reductions in PGM prices would adversely affect the Company's revenues, profits and cash flows. Protracted periods of low metal prices could significantly reduce revenues and the availability of required development funds, particularly after the Company's supply contracts expire in 2010 and 2012, to levels that could cause portions of the Company's ore reserves and production plan to become uneconomic. This could cause substantial reductions to PGM production or suspension of mining operations, impair asset values, and reduce the Company's proven and probable ore reserves. See " *Business and Properties – Competition: Palladium and Platinum Market* " for further explanation of these factors.

Extended periods of high commodity prices may create economic dislocations that may be destabilizing to PGM supply and demand and ultimately to the broader markets. Periods of high PGM market prices generally are beneficial to the Company's current financial performance. However, strong PGM prices also create economic pressure to identify or create alternate technologies that ultimately could depress future long-term demand for PGMs, and at the same time may incentivize development of otherwise marginal mining properties. Similarly, markets for PGM jewelry are primarily driven by discretionary spending that tends to decline during periods of high prices and may drive the industry toward developing new, more affordable jewelry materials. See " *Risk Factors – Users of PGMs May Reduce Their Consumption and Substitute Other Materials for Palladium and Platinum* " for additional discussion of these risks.

THE COMPANY DEPENDS UPON A FEW CUSTOMERS AND ITS SALES AND OPERATIONS COULD SUFFER IF IT LOSES ANY OF THEM

The Company is party to long-term sales contracts with Ford Motor Company and General Motors Corporation for palladium and platinum produced from its mines which are scheduled to expire in 2010 and 2012. The Company also enters into fixed forward sales and financially settled forward contracts for metal produced from recycling of catalysts, normally at the time the catalyst material is purchased. The Company's revenues for the year ended December 31, 2008, were comprised 42% from mine production, and 58% from recycling and other activities. For more information about these sales contracts, see " *Business and Properties – Current Operations – PGM Sales and Hedging Activities.* " For additional discussion of hedging risks, see " *Risk Factors – Hedging and Long-term Sales Contracts Could Limit the Realization of Higher Metals Prices* ."

As a result of these long-term sales contracts, the Company is subject to the customers' compliance with the terms of the contracts, their ability to terminate or suspend the contracts and the customers' willingness and ability to pay. The loss of any of these customers or contracts could require the Company to sell at prevailing market prices, which might expose it to lower metal prices as compared to the floor price structures under the sales contracts. In the event the Company becomes involved in a disagreement with one or more of its customers, their compliance with these contracts may be at risk. In such an event, the Company's operating plans could be threatened. Thus, termination or breach by a customer could adversely impact the Company's operations and financial results.

Beginning in the third quarter of 2005, the major U.S. bond rating agencies have successively downgraded the corporate ratings of Ford Motor Company and General Motors Corporation, the two customers represented under the Company's long-term sales contracts. As a result, the debt of these companies no longer qualifies as investment grade. The Company's business is substantially dependent on its contracts with Ford and General Motors, particularly when the average floor price under these contracts is greater than the current market price of palladium. Under applicable law, these contracts may be void or voidable if Ford or General Motors were to become insolvent or file for bankruptcy. Federal financial assistance to automotive manufacturers cannot be assured and pressures for the restructuring or combination among manufacturers may increase, with potentially negative impacts on the Company. The loss of either of these contracts could require the Company to sell its mine PGMs at prevailing market prices, which might expose it to lower metal prices as compared to the floor prices under the contracts. Thus, termination of these contracts could have a material adverse effect on the Company.

For the Company's fixed forward sales related to recycling of catalysts, the Company is subject to the customers' compliance with the terms of the contracts, their ability to terminate or suspend the contracts and their willingness and ability to pay. The loss of any of these contracts or failure of a counterparty to perform could require the Company to sell or purchase the metal in the open market, which could have a negative effect on the Company.

FAILURE TO RENEW LONG-TERM SALES CONTRACTS FOR OUNCES PRODUCED FROM MINE PRODUCTION COULD RESULT IN CURTAILMENT OR CLOSURE OF OPERATIONS

During 1998, the Company entered into long-term sales contracts with Ford Motor Company and General Motors Corporation, which, when combined, represented about 42.8% of the Company's 2008 revenues. The contracts collectively apply to ounces produced from the Company's mine production through December 2012. Under the contracts, the Company currently has committed 100% of its mined palladium production and 70% of its mined platinum production through 2010. Metal sales are priced at a modest discount to market, with floor and ceiling prices that apply to all or a portion of the sales. Accordingly, the Company benefits if the market price drops below the floor price of the contract but is unable to realize the full market price if the market price exceeds the ceiling price of the contract. The two automotive contracts will expire in 2010 and 2012. Once these contracts expire, if they are not renewed or replaced with contracts having similar provisions, the Company will be directly dependent on PGM market prices, without the price protection or risk due to the floors and ceilings of the long-term contracts. The contract expiring at the end of 2010 will eliminate the floor and ceiling prices on 70% of the Company's mined platinum sales and up to 80% of mined palladium sales. Should the Company be unable to renew these sales contracts, and the market price of PGMs proves insufficient to cover the Company's operating and capital costs of production, then the Company's operations might have to be curtailed, suspended or closed.

RELIANCE ON THIRD PARTIES FOR SOURCING OF RECYCLING MATERIALS AND THE CONCENTRATION OF RECYCLING SOURCES CREATES THE POTENTIAL FOR LOSSES

The Company has excess smelter and base metal refinery capacity and purchases catalyst materials from third parties for recycling activities to recover PGMs. The Company has entered into long-term sourcing agreements for catalyst material with two vendors, one of which provides most of the Company's catalyst for recycling. The Company is subject to the vendors' compliance with the terms of these agreements and their ability to terminate or suspend the agreement. Should one or both of the sourcing agreements be terminated, the Company could suffer a loss of profitability as a result of the termination. This loss could have a negative impact on the Company's business, financial condition and results of operations. Similarly, these vendors source material from various third parties in a competitive market, and there can be no assurance of the vendors' continuing ability to source material on behalf of the Company at current volumes and prices. Any continuing issue associated with the vendors' ability to source material could have an adverse effect on the Company's profitability.

Under these sourcing agreements, the Company advances cash for purchase and collection of these spent catalyst materials. These advances are reflected as *Advances on inventory purchases* on the balance sheet until such time as the material has been received and title has transferred to the Company. The Company has a security interest in the materials that the vendors have procured but the Company has not yet received. However, until the material has been procured, a portion of the advances are unsecured and the unsecured portion of these advances represents a substantial share of the total amount advanced. This unsecured portion is fully at risk.

Following the sharp decline in PGM prices during the second half of 2008, the volume of spent catalyst material received from the Company's recycling vendors diminished significantly. This appears to be an industry-wide trend in which it is likely that some of the vendors have incurred significant inventory losses, a few have exited the business, and the pricing reversal may have impaired the collectability of the advances to others. The Company has had to roll forward certain commitments from its suppliers associated with a portion of these advances on inventory purchases, as the volumes in that market have contracted sharply. While the Company's primary vendors remain in the business and have provided certain assurances that they will meet their commitments under the advances, the risk of loss associated with the advances clearly has increased. Notwithstanding that a portion of these advances to the suppliers is collateralized, the Company believes that performance under the contracts is unlikely unless and until market conditions improve, and consequently has taken a non-cash charge of $26.0 million against *Advances on inventory purchases* related to its recycling segment. The Company is pursuing collection of these advances through all appropriate means.

In light of the sharp decline in PGM prices during the second half of 2008 and the worldwide financial and credit crises, the Company's recycling segment has been adversely affected and the Company's prior business model has resulted in collection issues with certain vendors which, in turn, led to the non-cash charge discussed above. The Company is in the process of reviewing its recycling segment with a view to considering changes to the business in order to mitigate against certain risks on a going forward basis. There can be no assurance that the Company will be successful in implementing any such changes or that the Company will succeed in its efforts to maintain the profitability it benefitted from in the past.

AN EXTENDED PERIOD OF LOW RECYCLING VOLUMES AND WEAK PGM PRICES COULD PUT THE COMPANY'S OPERATIONS AT ADDITIONAL RISK

The Company relies upon the recycling segment to provide supplemental earnings and cash flow to help support the economics of its mining business when PGM prices are low. The recycling segment in turn depends upon the copper and nickel produced in mine concentrates to extract the PGMs in recycled material within the Company's processing facilities. The economics of the recycling segment to a large extent have been regarded as incremental within the processing operations, with the result that recycling volumes have attracted only an incremental share of their operating costs.

Volumes of recycling materials available in the marketplace have diminished substantially in response to lower PGM prices. These lower recycling volumes result in less earnings and cash flow from the recycling segment, and therefore less economic support for the mining operations. Should it become necessary to reduce or suspend operations at the mines for economic reasons, whether because of limited recycling support or otherwise, the proportion of operating costs allocated to the recycling segment could increase, making the recycling segment less competitive. Further, the ability to operate the smelter and refinery without significant volumes of mine concentrates would likely require modification to the processing facilities. There is no assurance that the recycling facilities can operate profitably in the absence of significant mine concentrates, nor that capital would be available to complete necessary modifications to the processing facilities.