

**UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

In re:	:	Chapter 11
	:	
GMC	:	Case No. 09-50026
	:	
Debtor	:	

**PLAINTIFF MARLA SOFFER’S REPLY TO THE RESPONSE OF M&M MOTORS TO
PLAINTIFF’S MOTION TO SEVER THE CLAIM AGAINST
BANKRUPT GENERAL MOTORS CORPORATION**

The gist of the Response of M&M Motors is that because General Motor’s Corporation is “primarily” liable for a product defect, and because M&M Motors is only “secondarily” liable for a product defect, the claim against General Motors should not be severed due to the effect that severance would have on M&M’s ability to pursue a common law indemnification claim.

The fallacy behind this argument is obvious: Strict product liability does not distinguish between so-called “primary” and “secondary” liability. Strict product liability looks only to whether the Defendant is a seller. It does not attempt to distinguish, rank, prioritize, or weight liability based on whether the seller is the manufacturer or a retail distributor. This is exemplified by M&M’s admission that Ms. Soffer could have sued only M&M for the same defect claims made against General Motors Corporation.

Severance remains the fairest and best approach to this entire situation. Attached as “**Exhibit A,**” are Court Orders from other parts of the Nation which have recognized the need to sever claims against bankrupt General Motors Corporation so that those who have suffered injuries at the hands of a defective product can reasonably expect to someday have their day in

court. That Defendant M&M's indemnification claim may suffer the same fate as Plaintiff's direct claim against General Motors changes nothing.

Defendant M&M Motors also argues that the "proper forum" for the determination of Ms. Soffer's requested severance is the forum from which this claims came; the Superior Court of Pennsylvania. This is both factually and legally inaccurate. *First*, please find the attached "**Exhibit B**," an Order from the Superior Court of Pennsylvania, issued in this case, directing Ms. Soffer to Petition the Appellate Court for reinstatement **in the event that this Bankruptcy Court lifts the stay**- this Order can also be found as "Exhibit A" to the Respondent's Opposition. The Superior Court of Pennsylvania has already taken measures to direct the Movant to the proper forum for this request of relief from the automatic stay. *Second*, even if Ms. Soffer were to file a similar Motion within the Superior Court of Pennsylvania, this Court would be final arbiter of the relief from the stay- since this is the Court that originated and imposed this stay. Please see "**Exhibit B**." *Third*, pursuant to the above "Suggestion of Bankruptcy" filed in the Superior Court of Pennsylvania, that Court has dismissed this matter and does not enjoy jurisdiction over this, or any request for relief, filed by Ms. Soffer. Please see "**Exhibit C**." Thus, M&M's assertion that Ms. Soffer should simply file this request for relief in a different jurisdiction is impossible and simply another dilatory tactic to delay Ms. Soffer's day in court.

Further, this Court is the only jurisdiction that may issue an Order granting Ms. Soffer's requested relief. State courts enjoy concurrent jurisdiction with the bankruptcy courts to determine the nature, applicability, and extent of an automatic stay. 28 U.S.C. § 1334(b); In re Baldwin-United Corp, 765 F. 2d 343, 347 (2d. Cir. 1985). However, the bankruptcy court may nevertheless enter orders extending or imposing the automatic stay, or may exercise its equitable powers under 11 U.S.C. § 105; a power unfettered by the powers of state courts. While a stay is

not *supposed to* impair claims against a non-debtor, state court judges unfamiliar with federal bankruptcy practice often impose blanket stays or request that creditors' counsel obtain "comfort orders" from the bankruptcy court prior to taking any action which might arguably be in violation of the automatic stay.

Such was the case recently in In re Crescent Resources, LLC, case no. 09-11507, Western District of Texas Bankruptcy Court (Memorandum Order, document No. 442, Craig Gargotta, J., filed Sept. 23, 2009). There, the U.S. Bankruptcy Court directed a Florida state court Judge to sever claims against the debtor from those against non-debtor defendants in a state tort action. The issue presented there was strikingly similar to the one presented here.

That state court judges sometimes incorrectly stay claims even against non-debtors is why §362(d) exists for those in Movant's place. Relief from the automatic stay imposed by 11 U.S.C. §362(a) should be granted to the Movant according to the provisions of 11 U.S.C. §362(d) which states: "On request of a part in interest and after notice and a hearing, the court shall grant relief from the stay provided under Subsection (a) of the Section, such as by terminating, annulling, modifying or conditioning such stay (1) for cause, including the lack of adequate protection of an interest in property of such party in interest .."

In determining whether "cause" exists for relief from the automatic stay under 11 U.S.C. §362(d)(1) to permit the continuation of a state court proceeding, the courts have developed a balancing of interests test whereby the interests of the Debtor's estate are weighed against the hardships that will be incurred to the Movant. The elements of this balancing test are: (a) will any "great prejudice" to *either the bankruptcy estate or the debtor* result from continuation of the civil suit, (b) would the hardship to the plaintiff by maintenance of the stay considerably out- weigh the hardship to the debtor, and (c) [does] the creditor-plaintiff have a probability of prevailing on the

merits of his/her case (emphasis provided). In re Bock Laundry Mach. Co., 37 B.R. 564, 566 (Bkrcty N.D.OH. 1984); Matter of McGraw, 18 B.R. 140 (Bkrcty. W.D. Wis. 1982), see also, Matter of Holtkamp, 669 F.2d 505 (7th Cir. 1982).

Because of the considerable burden placed upon plaintiffs of having to wait to litigate their cases, and effectively being denied the opportunity to litigate, due to aging evidence, loss of witnesses and crowded court dockets, the courts have regarded the opportunity to litigate the issue of liability as a significant right which cannot be easily set aside, despite the existence of a bankruptcy proceeding. Id. These same courts have also considered the significant judicial economy of continuing existing actions rather than beginning a suit anew in another forum. Id., citing In re Palmer Const. Co., Inc., 7 B.R. 232 (Bkrcty. S.D. 1980); In re Philadelphia Athletic Club, Inc., 9 B.R. 280 (Bkrcty. E.D. Pa. 1981); In re Rounseville, 20 B.R. 892 (Bkrcty. R.I. 1982); In re James Hunter Mach. Co., Inc., 31 B.R. 528 (Bkrcty. Mass. 1983). For instance, bankruptcy courts have lifted and/or modified the stay in cases where debtors are required to participate in their defense, despite the fact that the debtors were uninsured. In re Terry, 12 B.R. 578 (Bkrcty. E.D. Wis. 1981); In re McGraw, supra.

Movant meets all criteria for lifting the Automatic Stay imposed by 11 U.S.C. § 362. Here, the Movant will be unduly burdened by a continued suspension of her state court action. Not only has the Movant – Administratrix for the estate of David Arenas, a young man who left behind an unborn child as his sole heir —already lost her hearing date in the Superior Court of Pennsylvania last June, but she will also have to bear the expense of considerable amounts of time and money which commonly results from protracted litigation.¹ The Movant must bear the risk that any delay may compromise her right to a fair trial because of the aging of the evidence and

¹ For instance, Movant is incurring hundreds of dollars of litigation costs each month to keep the subject vehicle in a secured storage facility.

loss of witnesses. In re Bock Mach. Co., supra. Moreover, considering the size and nature of this bankruptcy case, requiring the Movant to forego prosecution of her state tort claim against Respondent non-debtor until the stay is no longer in effect will add to the Movant's hardship and compromise her right to litigate her claims against the Respondent non-debtor. The Movant's opportunity to litigate the issues of liability is a significant right which cannot easily be set aside, despite the existence of this bankruptcy. Matter of Holtkamp, supra. Continued delay would be a significant detriment to the Movant.

By contrast, Debtor here will not be prejudiced *at all* by the relief requested. It bears repeating that an element of the balancing test is whether there is any "great prejudice" to *either the bankruptcy estate or the debtor* from continuation of the state civil suit against a non-debtor. One needs only to recognize that the debtor *agrees* to the relief requested to resolve this issue in favor of Movant. Respondent has not even attempted to articulate any prejudice *to the debtor* in granting the relief requested.

In conclusion, this very Court has already recognized that state court litigants such as Movant may need "to resort to dealers" to be made whole on their personal injury claims, see In Re GMC Bankruptcy, 407 B.R. 463, 506 n. 110, and this is exactly what Movant is seeking to do through this request for relief.

WHEREFORE, Movant urges this Court to OVERRULE these objections.

Respectfully submitted,

ZAJAC & ARIAS, LLC



BY: _____
Eric G. Zajac, Esquire

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*Appellate & Trial Counsel for Marla
Soffer, Administratrix for the Estate
of David Arenas*

DATED: January 12, 2010

**UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

In re:	:	Chapter 11
	:	
GMC	:	Case No. 09-50026
	:	
Debtor	:	

CERTIFICATE OF SERVICE

It is certified that a true and correct copy of Reply to the Response of M&M Motors to Plaintiff's Motion to Sever the Claim against Bankrupt General Motors Corporation is being served on all counsel of record via regular first class mail as follows:

Eric A. Weiss, Esquire
Charles W. Craven, Esquire
**Marshall Dennehey Warner
Coleman & Goggin**
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Philadelphia, PA 19103-4797
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**Marshall Dennehey Warner
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Francis J. Grey, Esquire
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Zajac & Arias, LLC



BY: _____

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Soffer, Administratrix for the Estate
of David Arenas*

DATE: January 12, 2010



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EXHIBIT A



CAUSE NO. 08-5154

SEAN DANIELS, INDIVIDUALLY, AND AS
NEXT FRIEND OF NATALIE DANIELS AND
TESSA DANIELS, MINORS, AND AS
NEXT FRIEND OF MICHELLE DANIELS;
MICHELLE DANIELS, INDIVIDUALLY,
AND BLYTHE LAUREN DANIELS,
INDIVIDUALLY,

PLAINTIFFS

v.

DONOVAN TENNANT,
GENERAL MOTORS CORPORATION,
FRANK PARRA AUTOPLEX, INC.
TAKATA CORPORATION,
TK HOLDINGS INC.,
TAKATA SEAT BELTS INC.,
TK-TAITO L.L.C.

DEFENDANTS

IN THE DISTRICT COURT OF

DALLAS COUNTY, TEXAS

95TH JUDICIAL DISTRICT

ORDER GRANTING PLAINTIFFS' MOTION TO SEVER

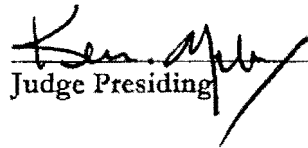
BEFORE THE COURT IS Plaintiffs' Motion for Severance in the above styled and numbered cause. The Court, having considered the motion and applicable law, is of the opinion that the motion should be **GRANTED**.

It is therefore **ORDERED, ADJUDGED and DECREED** that Plaintiffs' Motion for Severance is hereby **GRANTED** and the Court severs General Motors Corporation and orders the clerk of the court to assign the severed action a separate cause number and that the following documents be included in the new cause:

1. Plaintiff's Second Amended Petition;
2. All discovery on file in this case;
3. All motions and responses on file in this case;

4. All notices sent by the Court to the parties on file in this case;
5. All signed Orders on file in this case;
6. Any other relevant matter from the original file;
7. A copy of the docket sheet;
8. A copy of this Order.

SIGNED this ~~31st~~ day of July, 2009.



Judge Presiding

IN THE CIRCUIT COURT, FOURTH JUDICIAL
CIRCUIT, IN AND FOR DUVAL COUNTY,
FLORIDA

ANOM JOSIL, individually, and as the
Personal Representative of the Estate of
DENISE JOSIL, deceased,
Plaintiffs,

v.

MICHELIN NORTH AMERICA, INC., et al.
Defendants,

CASE NO.: 16-2006-CA-000193-XXXX-MA
DIVISION: CV-A

Consolidated with:

CASE NO: 16-2007-CA-005860: Div. CV-B
CASE NO: 16-2007-CA-005861: Div. CV-C
CASE NO: 16-2007-CA-008501: Div. CV-B

PIERRE E. MILORD, as the Personal
Representative of the Estate of JEAN PAUL
MILOR, deceased,
Plaintiff,

v.

MICHELIN NORTH AMERICA, INC., et al.
Defendants

CASE NO.: 16-2007-CA-005860-XXXX-MA
DIVISION: CV-B

Consolidated with:

CASE NO: 16-2006-CA-000193: Div. CV-A

JEAN F. DESANGES and FRANCOIS J.
DESANGES, his wife,
Plaintiffs,

v.

MICHELIN NORTH AMERICA, INC., et al.
Defendants,

CASE NO.: 16-2007-CA-005861-XXXX-MA
DIVISION: CV-C

Consolidated with:

CASE NO: 16-2006-CA-000193: Div. CV-A

PIERRE E. MILORD, as the Personal
Representative of the Estate of MARIE
ALINA MILORD, deceased,
Plaintiff,

v.

MICHELIN NORTH AMERICA, INC., et al.
Defendants,

CASE NO.: 16-2007-CA-008501-XXXX-MA
DIVISION: CV-B

Consolidated with:

CASE NO: 16-2006-CA-000193: Div. CV-A

**ORDER GRANTING PLAINTIFFS' MOTION TO
SEVER GENERAL MOTORS CORPORATION**

This cause came to be heard on August 20, 2009, upon the Consolidated Plaintiffs' Motion to Sever General Motors Corporation, the Court having heard argument of counsel, considered the pleadings, and being otherwise fully advised in the premises herein, it is hereby ORDERED AND ADJUDGED as follows:

1. Plaintiffs' Motion to Sever General Motors Corporation is GRANTED, and the Court hereby abates the portion of the action against General Motors Corporation and Orders the Clerk of Court to assign a separate case number with the following documents be included in the new cause:

- A. Plaintiff's Amended Complaints (Case Nos. 16-2006-CA-000193; 16-2007-CA-005860; 16-2007-CA-005861; & 16-2007-CA-008501); Defendant General Motors Corporation's Answers; & Plaintiff's Replies.
- B. All filed discovery.
- C. All motions and responses involving Defendant General Motors Corporation.
- D. All signed Orders on file.
- E. Any other relevant matter from the original file.
- F. A copy of this Order.

DONE and ORDERED in chambers, Jacksonville, Duval County, Florida, this _____ day of _____, 2009.

ENTERED

AUG 24 2009

Jr.

The Honorable James L. Harrison Circuit Judge

Copies to Counsel of Record:

William A. Bald, Esquire 200 Forsyth Street, Suite 1100 Jacksonville, FL 32202 <i>Co-counsel for Plaintiffs</i>	Stuart C. Poage, Esquire Jessica L. Lanifero, Esquire 1660 Prudential Drive #204 Jacksonville, FL 32207 <i>Attorney for Dieubeny Cyrius</i>
Kyle H. Dryer, Esquire Deron L. Wade, Esquire Giovanna C. Tarantino, Esquire 6688 North Central Expressway Suite 1000 Dallas, TX 75206 <i>Attorney for General Motors</i>	Michael D. Begey, Esquire Post Office Box 1873 Orlando, FL 32802-1873 <i>Attorney for General Motors</i>

<p>Robert P. Monyak, Esquire Bonnie Lassiter, Esquire 950 East Paces Ferry Road, NE One Atlanta Plaza, Suite 2275 Atlanta, GA 30326 <i>Attorney for Michelin North America, Inc.</i></p>	<p>R.H. Farnell, II, Esquire Amanda Eaton Ferrelle, Esquire 101 E. Adams Street Jacksonville, FL 32202 <i>Attorney for Michelin North America, Inc.</i></p>
<p>Lee P. Teichner, Esquire Lyndall M. Lambert, Esquire 701 Brickell Avenue, Suite 3000 Miami, FL 33131 <i>Attorney for BFS Retail</i></p>	<p>Michelle Bedoya Barnett, Esquire 50 North Laura Street Suite 3900 Jacksonville, FL 32202 <i>Attorney for BFS Retail</i></p>
<p>Raymond P. Reid, Jr., Esquire Benjamin E. Richard, Esquire Stephen J. Pajcic, Esquire 1 Independent Drive, Suite 1900 Jacksonville, FL 32202 <i>Attorneys for Plaintiffs</i></p>	

cc: The Honorable Jim Fuller
Clerk of Court Duval County 4th Judicial Circuit
Duval County Courthouse
330 East Bay Street, Room 103
Jacksonville, FL 32202

CAUSE NO. DC-09-03933-K

HEATHER L. KAUL, Individually and as Next Friend of AMY KAUL, a Minor,	§	IN THE DISTRICT COURT OF
	§	
Plaintiffs,	§	
v.	§	DALLAS COUNTY, TEXAS
	§	
GENERAL MOTORS CORPORATION,	§	
LONE STAR BUICK-GMC II, L.P. d/b/a	§	
LONE STAR PONTIAC BUICK GMC;	§	
LONE STAR BUICK-GMC INC. d/b/a	§	
LONE STAR PONTIAC BUICK GMC	§	
and BRENDA A. FEE,	§	
	§	
Defendants.	§	<i>192nd</i> 102nd JUDICIAL DISTRICT

**ORDER GRANTING PLAINTIFFS' MOTION TO REOPEN CASE
AND TO SEVER GM**

BEFORE THE COURT is Plaintiffs' motion to reopen the case and to sever GM in the above styled and numbered cause. The Court, having considered the motion and applicable law, is of the opinion that the motion should be summarily **GRANTED**.

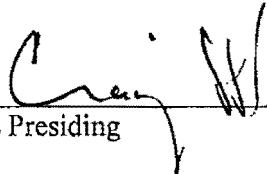
It is therefore **ORDERED, ADJUDGED and DECREED** that Plaintiffs' motion to reopen the case is **GRANTED**. Plaintiffs' motion to sever GM is **GRANTED**. The Court further orders the clerk of the court to assign the severed action a separate cause number and that the following documents be included in the new cause:

1. Plaintiffs' Original Petition;
2. All discovery on file in this case;
3. All motions and responses on file in this case;
4. All notices sent by the Court to the parties on file in this case;
5. All signed Orders on file in this case;

6. Any other relevant matter from the original file;
7. A copy of the docket sheet;
8. A copy of this Order.

The Court further sets the severed case for a Scheduling Conference on the ____ day of _____, 2009.

SIGNED this 10 day of Sept, 2009.



Judge Presiding



ZAJAC &
ARIAS, LLC

www.TeamLawyers.com

EXHIBIT B

MARLA SOFFER, ADMINISTRATRIX OF
THE ESTATE OF DAVID ARENAS,
DECEASED,

Appellant

v.

GENERAL MOTORS CORPORATION AND
M & M MOTORS,

IN THE SUPERIOR COURT OF
PENNSYLVANIA

JUN 23 2009

No. 2011 Eastern District Appeal 2008

Appeal from the Order Entered June 20, 2008,
in the Court of Common Pleas of Philadelphia County
Civil Division at No. 2064, November Term, 2007

BEFORE: FORD ELLIOTT, P.J., BENDER AND GANTMAN, JJ.

ORDER

AND NOW, to-wit this 22nd day of June, 2009, the court having received a Notice of Bankruptcy involving one of the parties to this appeal, the appeal is dismissed without prejudice to any party to petition for reinstatement in the event that such is necessary after bankruptcy proceedings are concluded or if the Bankruptcy Court issues an order lifting the automatic stay under the Bankruptcy Code.

PER CURIAM



ZAJAC &
ARIAS, LLC

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EXHIBIT C

JUN 10 2009

IN THE SUPERIOR COURT OF PENNSYLVANIA

MARLA SOFFER, Administratrix of the :
Estate of DAVID ARENAS, Deceased, :
Plaintiff-Appellant :

v. :

GENERAL MOTORS CORPORATION :
and M&M MOTORS, :
Defendants-Appellees :

Docket No. 2011 EDA 2008

NOTICE OF BANKRUPTCY

PLEASE TAKE NOTICE that, on June 1, 2009 (the "Commencement Date"), General Motors Corporation and certain of its subsidiaries filed a voluntary petition seeking bankruptcy protection under chapter 11 of title 11 of the United States Code (11 U.S.C. § 101 *et seq.*) ("Bankruptcy Code") in the United States Bankruptcy Court for the Southern District of New York ("Bankruptcy Court"). The bankruptcy case has been assigned Case No. 09-50026 (REG). A copy of General Motors Corporation's chapter 11 petition is attached hereto as Exhibit A.

PLEASE BE ADVISED that, as of the Commencement Date, any new or further action against General Motors Corporation is stayed pursuant to section 362 of the Bankruptcy Code (the "Automatic Stay"), which provides that the filing of the petition, among other things, "operates as a stay, applicable to all entities, of ... the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose

before the commencement of the case under this title” and of “any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate.” 11 U.S.C. § 362(a)(1) & 362(a)(3).

PLEASE BE FURTHER ADVISED that any action taken against General Motors Corporation without obtaining relief from the Automatic Stay from the Bankruptcy Court may be void ab initio and may result in a finding of contempt against Plaintiff. General Motors Corporation reserves and retains its statutory right to seek relief in the Bankruptcy Court from any judgment, order, or ruling entered in violation of the Automatic Stay.

Respectfully submitted,

By: Francis J. Grey, Jr.

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Robert J. Martin, Esquire (45234)

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Philadelphia, PA 19106

Phone: (215) 627-0303

Fax: (215) 627-2551

Attorneys for Defendant-Appellee,
General Motors Corporation

Dated: June 9, 2009

AFFIRMATION OF SERVICE BY FEDERAL EXPRESS

Francis J. Grey, Jr., an attorney duly admitted to practice law before the courts of the Commonwealth of Pennsylvania, hereby affirms the following to be true under penalty of perjury:

I am over the age of eighteen (18) years, am employed by the law firm of Lavin, O'Neil, Ricci, Cedrone & DiSipio, 190 North Independence Mall West, Suite 500, 6th & Race Streets, Philadelphia, PA 19106, and am not a party to this action.

On the 9th day of June, 2009, I served a copy of the foregoing Notice of Bankruptcy in the above-captioned action upon:

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Attorneys for Appellee, M&M Motors

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Unrepresented Party

Mr. Hector Gonzalez
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Bethlehem, PA 18017-5402
Pro Se

by depositing a true copy of the same in a properly addressed wrapper into the custody of FedEx, an overnight delivery service for overnight delivery, prior to the latest time designated by FedEx for overnight delivery.

Francis J. Grey Jr.
Francis J. Grey, Jr.