**Date of Oral Argument: December 14, 2011 at 9:45 a.m.**

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

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| **In re** | : | **Chapter 11** |
| **MOTORS LIQUIDATION COMPANY, *et al.*, f/k/a General Motors Corp., *et al.*** | : | **Case No.: 09-50026 (REG)** |
| **Debtors.** | : | **(Jointly Administered)** |
| **KELLY CASTILLO, NICHOLE BROWN, BRENDA ALEXIS DIGIAN DOMENICO, VALERIE EVANS, BARBARA ALLEN, STANLEY OZAROWSKI, AND DONNA SANTI,** | : | **Adv. Proc. No. 09-00509** |
| **Plaintiffs,** | : | |
| **v.** | : | |
| **General Motors Company, f/k/a New General Motors Company, Inc.,** | : | |
| **Defendant.** | : | |
| **GENERAL MOTORS LLC,** | : | |
| **Counterclaimant,** | : | |
| **v.** | : | |
| **KELLY CASTILLO, NICHOLE BROWN, BRENDA ALEXIS DIGIAN DOMENICO, VALERIE EVANS, BARBARA ALLEN, STANLEY OZAROWSKI, DONNA SANTI, LAKINCHAPMAN LLC, ROBERT W. SCHMIEDER, II, AND MARK L. BROWN,** | : | |
| **Counterdefendants.** | : | |

**NEW GM'S RESPONSE TO PLAINTIFFS' OBJECTIONS**
**TO DEFENDANT'S TESTIMONY AND OTHER EVIDENCE**

Defendant General Motors LLC ("**New GM**"), formerly known as General Motors Company, hereby responds to *Plaintiffs' Objections to Defendant's Testimony and Other Evidence* ("**Objections**").

## GENERAL RESPONSES

1. Net of his understandable lack of detailed recollection of specific conversations during the heat of the around-the-clock negotiation of the MSPA, [1] there is more than adequate foundation showing Mr. Buonomo's personal knowledge, *see* Fed.R.Evid. 602, much of which is contained in his deposition testimony elicited *by the same plaintiffs' counsel who claims that foundation is missing*. *See* Supp. Buonomo Decl., ¶¶ 4-10 & **GM Exhibits 11–17**.

2. Testimony by Mr. Buonomo about statements made by him or others during negotiations is not hearsay at all, because it is not offered for the truth of the statements. As Plaintiffs themselves say: "Hearsay is a statement … offered in evidence *to prove the truth of the matter asserted*." Plaintiffs' Objections, ¶ 2 (emphasis added), *citing* Fed.R.Evid. 801(c). Here, the statements are instead offered only to show that the statements were made; these statements, independent of their truth, have obvious relevance to the intent and state-of-mind of the Parties' representatives who designed and negotiated the MSPA. *See, e.g., Smith v. Duncan*, 411 F.3d 340, 347 n. 4 (2d Cir.2005) ("'the mere utterance of a statement, without regard to its truth, may indicate circumstantially the state of mind ... of the declarant' and is *not hearsay*" (citation omitted) (emphasis in original)); *Arista Records LLC v. Lime Group LLC*, No. 06 CV 5936 (KMW), 2011 WL 1742029, *12 (S.D.N.Y. May 2, 2011) ("Out-of-court statements are not hearsay if offered to show the context within which parties were acting, or to show a party's motive or intent for behavior"); *In re MetLife Demutualization Litigation*, 262 F.R.D. 217, 236-37 (E.D.N.Y. 2009) ("Evidence that would otherwise satisfy the definition of hearsay, if not offered for the truth of the matters asserted, but instead to show defendants' state of mind, is not hearsay").

[1] Capitalized terms not defined herein have the same meanings as in New GM's Opening Brief.

3. Mr. Lines and Mr. Buonomo were the two GM employees who, in different respects, were in charge of the *Castillo* Settlement and its treatment in bankruptcy. If anyone knew Old GM's legal intent – and the intent of the United States Treasury's Auto Team ("**UST**") – it was them. To suggest, as Plaintiffs do, that their personal knowledge should be disregarded because they cannot remember specific conversations and all of the participants is beyond the pale. For example, Mr. Lines supervised the legal assistant who sent the e-mail directing that the *Castillo* Settlement be categorized in the data base as a "reject later" executory contract. Lines Decl., ¶ 15 and **GM Exhibit 4**; Lines Depo, pp. 35-36. Yet in their Objections, Plaintiffs argue (¶ 6) that Mr. Lines' conclusion that "the parties did not intend for Old GM to assume the [*Castillo*] Stipulation of Settlement and assign it to New GM" is without foundation because Mr. Lines "identifies no parties to any conversation leading to this conclusion." As applied to Mr. Lines, the person who "pushed the button" to reject the Settlement (and thereby prevent its assignment to New GM), this argument is nonsense. Moreover, Mr. Buonomo identified specific conversations (notably, with Messrs. Patti and Wilson) in which the rejection of class action settlements, including *Castillo*, and the need to avoid assuming this and other unnecessary liabilities was clearly discussed. Buonomo Decl., ¶¶ 6-10, 18; Supp. Buonomo Decl, ¶¶ 8-10.

4. Plaintiffs' requests that the Court ignore all parol evidence or, alternatively, limit that evidence to conversations in which the "arising under" phrase was specifically discussed should be rejected. Plaintiffs have provided no evidence, nor any legal argument, supporting reversal of the Court's prior ruling that section 2.3(a)(vii)(A) is ambiguous and that its proper construction requires consideration of parol evidence. Further, it is obvious that evidence of the MSPA Parties' overall intent concerning the *categories* or *types* of liabilities that would be assumed by New GM, on the one hand, and retained by Old GM, on the other hand, are probative of their intent with respect to the categories of liabilities which either include or exclude the *Castillo* Settlement. As the most basic example, Old GM's decision to reject the Settlement and New GM-UST's policy of accepting only those Old GM liabilities that were commercially necessary for the successful operation of the new company did not specifically

refer to the "arising under" language in MSPA sections 2.3(a)(vii)(A) and 6.15(b), but these decisions are obviously probative of the Parties' intent regarding the assumption and retention of liabilities *not* covered by the terms of the standard repair warranties specified in those MSPA provisions. Moreover, in a case where contract language is ambiguous the parol evidence rule does not require exclusion of evidence concerning the circumstances under which the contract was formed and, indeed, expressly permits such evidence. *See, e.g., In re Safety-Kleen Corp*., 380 B.R. 716, 738 (Bankr.D.Del.2005) (extrinsic evidence the court may consider includes "the structure of the contract, the bargaining history, and the conduct of the parties that reflects their understanding of the contract's meaning" and "prior agreements and communications of the parties") (citations and internal quotes omitted).

5. Plaintiffs' Brief asserts at page 31 that Mr. Buonomo "never had any discussions with Matt Feldman, his main contact at UST, "about the very issues underlying this adversary proceeding," citing page 74, lines 20-25 from Mr. Buonomo's deposition. On the very next page, however, Mr. Buonomo modified and supplemented his answer by describing in detail a conversation in which Mr. Feldman, Mr. Buonomo and high-level members of the GM Legal Staff discussed *and rejected* a proposal to broaden New GM's assumed warranty obligations. Buonomo Depo, page 75, line 4 through page 76, line 10. Supp. Buonomo Decl., ¶ 9.

6. Plaintiffs use a partial answer from Mr. Buonomo's deposition to argue that there was "very, very little" discussion between Old GM and UST concerning which liabilities would be assumed by New GM. PB, pp. 31-32, citing only the first line of Mr. Buonomo's answer which begins on page 26, line 5. Plaintiffs did not designate the remainder of Mr. Buonomo's answer in which he explained that the reason for the paucity of detailed negotiation was that "there was essentially consensus *at a conceptual level*." Buonomo Depo, page 26, lines 11-23 (emphasis added). Plaintiffs also have not designated Mr. Buonomo's ensuing testimony that "the intent and structure of the transaction that was outlined to us by the treasury team was that all liabilities would be left behind [in Old GM] except a few individual items which include the express[] warranties" [which as he explained elsewhere meant only the standard repair

warranties, *see* **GM Exhibit 13**] and also included "contracts necessary to operation of the business" [by New GM]. Buonomo Depo, page 27, lines 13-23. As both Mr. Buonomo and Mr. Lines have testified, there was relatively little discussion about the *Castillo* Settlement specifically because it clearly fell into a *category* of liabilities that would not be assumed by New GM, and was slated for rejection by Old GM. Buonomo Depo, page 49, line 5 through page 50, line 3 and page 53, line 10 through page 54, line 1; Lines Depo, page 36, line 24 through page 37, line 15.

## RESPONSES TO SPECIFIC OBJECTIONS

**Buonomo Declaration**

Paragraph 5, final sentence and Paragraph 6: The participants in the conversations described by Mr. Buonomo are identified in the deposition testimony cited in paragraphs 5 through 8 and 10 of his Supplemental Declaration. Statements by the UST representatives were not hearsay, because they are not offered for the truth of those statements but instead as a summary of UST's position regarding what kinds of liabilities New GM would and would not be permitted to assume. Statements by representatives of parties who are negotiating a contract are obviously relevant regarding the manifestation of contractual intent and state of mind of those who were proposing, accepting, negotiating and drafting contractual provisions

Paragraphs 7, 8, 9, 10 and 11: The participants in the conversations described by Mr. Buonomo are identified in the deposition testimony cited in paragraphs 5 through 8 and 10 of his Supplemental Declaration. Statements by Mr. Wilson and the other UST representatives were not hearsay, because they were not offered for the truth of those statements but instead as a summary of UST's position regarding what kinds of liabilities New GM would and would not be permitted to assume. These statements are being offered as to the intent and state of mind of the declarants.

Paragraph 12: The first sentence, asserting that Old GM believed the Stipulation of Settlement was an executory contract, is simply the topic sentence of the paragraph and is supported by Mr. Buonomo's personal knowledge, detailed in the remainder of the paragraph, that there was a specific process set forth under which Old GM made case-by-case decisions to assume or reject executory contracts, that these decisions were reflected in a database, that the database never included the *Castillo* Settlement as an Assumable Executory Contract and that none of the other steps necessary to assume the Settlement was ever taken.

Paragraph 13: The participants in the conversations described by Mr. Buonomo are identified in the deposition testimony cited in paragraphs 5 through 8 and 10 of his Supplemental Declaration. Internally, Mr. Buonomo also discussed the decision not to pass Old GM's litigation liabilities on to New GM with Mr. Lines. *See* Buonomo Depo, pp. 10-11, 95 (Messrs. Lines and Buonomo decided in a discussion in late May or early June 2009 that the *Castillo* Settlement was a "net liability" as opposed to "something that was essential to the business"); Lines Depo, pp. 35-37 (knowledge of Old GM's and New GM's intent that New GM would not assume the Settlement was based on Mr. Lines' personal knowledge and information communicated to him by Mr. Buonomo; they decided together that Old GM would designate the Settlement for "rejection later").

Paragraphs 14 and 15: Statements by the UST are not hearsay because they are not offered for the truth of the statements but instead as evidence that the UST requested Old GM to search for and identify contracts that represented net liabilities, decline to assume them and designate them for rejection. The foundation for the UST statements is set forth in paragraphs 5, 6 and 8 of Mr. Buonomo's supplemental declaration. *See also* Buonomo Depo, p. 79 ("Ultimately it was the treasury people who decided what they were willing to buy and what they were willing to assume…. although they charged the seller, the old company, repeatedly with making the effort to find, determine, identify and make sure that unfavorable liabilities were left behind…."). As for the adoption of the "Excluded Contract" clause, MSPA § 2.2(b)(vii)(E), Mr. Buonomo's declaration is clear that he was "personally involved in proposing this concept … in

order to guard against inadvertent assumption of liabilities by New GM…." Thus, there cannot be any valid foundational objection based on lack of personal knowledge.

Paragraph 16**:** The first clause merely repeats the Parties' clear intent established by prior paragraphs of the deposition. The substance of paragraph 16, to which Plaintiffs do not object, is that Old GM did not transfer, and New GM did not re-establish, an accounting reserve for the *Castillo* Settlement, demonstrating that it was not assigned to or assumed by New GM.

Paragraphs 17, 19 and 20: Mr. Buonomo conducted the discussions with representatives of the Creditors' Committee and National Association of Attorneys General and therefore has personal knowledge of those discussions and subsequent resulting changes to the MSPA and Proposed 363 Sale Order.

Paragraph 18: Mr. Wilson's statement was not hearsay because it is offered not for its truth but as a manifestation of intent supporting the contractual construction urged by GM; again, plaintiffs' foundational objection must be rejected because Mr. Buonomo as a participant in the late June conference call has personal knowledge of what was said during the call.

Paragraph 21: Mr. Buonomo's statements clearly reflect his personal knowledge as a long-time class action litigator and primary draftsmen of the pertinent provisions contained in MSPA § 2.3 and the Proposed 363 Sale Order.

**Lines Declaration**

Paragraph 15: *See* General Responses *supra*, ¶ 3. As Professional-in-Charge of the *Castillo* case for Old GM, Mr. Lines certainly would have had personal knowledge of any decision to assume and assign liability under the Settlement to New GM.

Paragraphs 17, 18, 19 and 21: Mr. Lines was personally involved in the decision to discontinue Old GM's goodwill policy, and in the original issuance of the February 3, 2009 Administrative Bulletin, so he had personal knowledge of the voluntary nature of the policy, as

well as the circumstances that caused New GM to take a few weeks to discontinue it. *See* Lines Decl., ¶¶ 12, 17; Lines Depo, pp. 26-27, 37-39.

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