

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

TERRY MOORE, ELLEN MOORE, §
DAVID O’NIONS, DIANE §
O’NIONS, JOELLEN PISARCZYK, §
MARVIN PISARCZYK, and all §
others similarly situated, §

Case No.: _____

Plaintiffs

v.

GENERAL MOTORS LLC,

Defendant.

GENERAL MOTORS LLC’S NOTICE OF REMOVAL

Defendant, General Motors LLC (“New GM”), removes this action from the Circuit Court for the County of Livingston, State of Michigan, to the United States District Court for the Eastern District of Michigan, pursuant to 28 U.S.C. §§ 1441 and 1452, Bankruptcy Rule 9027, and based on the following facts:

BACKGROUND

1. On December 4, 2017, New GM was served with a Summons and Class Action Complaint (the “Complaint”) in an action styled *Terry Moore, et al. v. General Motors LLC*, Case No. 2017-29670-CE, filed on November 30, 2017, in the Circuit Court for the County of Livingston, State of Michigan (the “Action”).

2. This Action alleges contamination of the Plaintiffs' groundwater arising from the Milford Proving Grounds ("MPG"). Specifically, the Complaint alleges that New GM "and its predecessor General Motors Corporation ('GMC')[¹] have owned and operated the MPG since 1924 and tested vehicles on the site 24 hours per day, seven days per week." Compl. ¶ 9. The Complaint further states that "[s]ubstantial amounts of . . . hazardous materials are being used or have been used at the MPG" *Id.* ¶ 10. Plaintiffs contend that New GM "and GMC released hundreds of thousands of tons of salt at the MPG over the last several decades . . . , leading to extremely high concentrations of sodium and chloride in surface and groundwater at the MPG," and that such releases migrated from the MPG into groundwater beneath Plaintiffs' property, causing extremely high concentrations of sodium and chloride in water used by Plaintiffs" Compl. ¶¶ 12, 13.

3. Plaintiffs bring the Action as a putative class action on behalf of all persons in the past 10 years who have resided in a home to which New GM sent a Notice of Migration (as defined in the Complaint) on or about October 2014, and who claim damages from contamination of groundwater. Compl. ¶ 3. Plaintiffs repeatedly assert that New GM is liable to Plaintiffs on a successor liability theory. *See generally*, Complaint.

¹ General Motors Corporation, defined as GMC in the Complaint, is referred to herein as "Old GM."

4. Plaintiffs seek, *inter alia*, compensation for property damage and personal injury for (i) an alleged violation of Part 201 of the Michigan Natural Resources and Environmental Protection Act, (ii) an alleged violation of the Michigan Environmental Protection Act, (iii) fraud, (iv) negligence, (v) trespass, (vi) private nuisance, and (vii) public nuisance. *Id.* ¶¶ 56–101.

BASIS FOR REMOVAL

5. This Action is removable because it is a civil proceeding that (i) arises in a case under 11 U.S.C. §§ 101 et seq. (the “Bankruptcy Code”); and/or (ii) is related to a case under the Bankruptcy Code. This Court thus has jurisdiction pursuant to 28 U.S.C. §§ 157(b), 1331, and 1334(b), and removal to this Court is proper under 28 U.S.C. §§ 1452(a), as well as Rule 9027 of the Federal Rules of Bankruptcy Procedure.

6. On June 1, 2009, Old GM (n/k/a Motors Liquidation Company) filed a petition under chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Southern District of New York (“New York Bankruptcy Court”).

7. On July 5, 2009, the New York Bankruptcy Court issued an order (“Sale Order and Injunction”) approving the sale (“363 Sale”) of substantially all of Old GM’s assets to the predecessor of New GM. The sale of assets was free and clear of all liens, claims, and encumbrances, except for certain limited exceptions.

See, e.g., Sale Order and Injunction, attached as Exhibit “A,” ¶ 7. The 363 Sale was consummated on July 10, 2009. Ultimately, New GM was transferred certain Old GM assets and assumed certain limited liabilities, as described in the Sale Order and Injunction and the Amended and Restated Master Sale and Purchase Agreement (as amended, the “Sale Agreement”).²

8. The terms of the Sale Order and Injunction, and the Sale Agreement that it approved,³ limit New GM’s liabilities relating to Old GM’s real property transferred to New GM, and environmental claims arising therefrom. Specifically, environmental issues were addressed by the New York Bankruptcy Court in its Sale Decision in 2009. *See In re Gen. Motors Corp.*, 407 B.R. 463 (Bankr. S.D.N.Y. 2009), *aff’d sub nom., In re Motors Liquidation Co.*, 428 B.R. 43 (S.D.N.Y. 2010), and 430 B.R. 65 (S.D.N.Y. 2010). *In re Gen. Motors Corp.*, 507 B.R. 529 (Bankr. S.D.N.Y. 2009). There, the New York Bankruptcy Court found:

The Environmental Matters Objectors understandably would like New GM to satisfy cleanup obligations that were the responsibility of Old GM, on theories of successor liability. For reasons articulated in the Court’s “Successor Liability Issues” discussion in Section 2 above, however, the property may be sold free and clear of such claims.

² A copy of the Sale Agreement follows the Sale Order and Injunction in Exhibit “A” hereto.

³ New GM’s obligations under the Sale Order and Injunction have been the subject of proceedings in the New York Bankruptcy Court, the U.S. District Court for the Southern District of New York, the United States Second Circuit Court of Appeals, and the United States Supreme Court.

Indeed, further reinforcing that view (as well as the Court's decision to follow *Chrysler*) is this Court's decision, seven years ago, in *Mag. Corp.* There, upon the sale of property with substantial environmental issues, this Court was faced with the exact same issue—to what extent could that property be sold free and clear of environmental claims under 363(f). This Court ruled that one had to make a distinction. Under section 363(f), there could be no successor liability imposed on the purchaser for the seller MagCorp's monetary obligations related to cleanup costs, or any other obligations that were obligations of the seller. But the purchaser would have to comply with its environmental responsibilities starting with the day it got the property, and if the property required remediation as of that time, any such remediation would be the buyer's responsibility:

When you are talking about free and clear of liens, it means you don't take it subject to claims which, in essence, carry with the property. It doesn't absolve you from compliance with the law going forward.

Those same principles will be applied here. Any Old GM properties to be transferred will be transferred free and clear of successor liability, but New GM will be liable from the day it gets any such properties for its environmental responsibilities going forward. And if the State of New York (or, to the extent it has jurisdiction, the Tribe) feels a need to cause any acquirer of Old GM property to engage in remedial action because of environmental issues existing even at the outset of the acquirer's ownership, nothing in this Court's order will stand in its way.

Id. at 508.

9. While New GM did agree to assume certain liabilities arising under Environmental Laws (as defined in the Sale Agreement) with respect to real property purchased by New GM in the 363 Sale, and may be responsible for its own conduct after the closing of the 363 Sale, it did not agree to assume all liabilities associated with such real property. Those remaining claims based on

contamination/migration and/or successor liability are considered Retained Liabilities of Old GM, and were not assumed by New GM.

10. The New York Bankruptcy Court reserved exclusive and continuing jurisdiction to enforce the injunction set forth in the Sale Order and Injunction and to address and resolve all controversies concerning the interpretation and enforcement of the Sale Order and Injunction. *Id.* ¶ 71. Old GM's bankruptcy case is still pending in the New York Bankruptcy Court and that Court has previously exercised its exclusive and continuing jurisdiction to enforce the Sale Order and Injunction to actions filed against New GM. *See Trusky v. Gen. Motors Co. (In re Motors Liquidation Co.)*, Adv. No. 12-09803, 2013 Bankr. LEXIS 620 (Bankr. S.D.N.Y. Feb. 19, 2013); *Castillo v. Gen. Motors Co. (In re Motors Liquidation Co.)*, Adv. No. 09-00509, 2012 Bankr. LEXIS 1688 (Bankr. S.D.N.Y. Apr. 17, 2012), *aff'd*, 500 B.R. 333 (S.D.N.Y. 2013); *see also In re Motors Liquidation Co.*, 2011 WL 6119664 (Bankr. S.D.N.Y. 2010).

11. Under 28 U.S.C. §§ 157(b) and 1334(b), the New York Bankruptcy Court has core, arising in jurisdiction to approve the 363 Sale and enter the Sale Order and Injunction. In connection with the Old GM bankruptcy case, the Second Circuit has expressly found that “[a] bankruptcy court’s decision to interpret and enforce a prior sale order falls under this formulation of ‘arising in’ jurisdiction.” *In re Motors Liquidation Co.*, 829 F.3d 135, 153 (2d Cir. 2016). Thus, the

determination of this Action, which involves the resolution of disputes concerning the Sale Agreement, the Sale Order and Injunction, and the Bankruptcy Code necessarily invokes the “arising in” jurisdiction of the New York Bankruptcy Court. *See also In re Hereford Biofuels, L.P.*, 466 B.R. 841, 844 (Bankr. N.D. Tex. 2012) (post-confirmation dispute regarding interpretation and enforcement of a sale transaction approved by the Bankruptcy Court was a core proceeding); *Luan Investment S.E. v. Franklin 145 Corp.*, 304 F.3d 223, 229-30 (2d Cir. 2002) (disputes concerning sale transaction approved by the Bankruptcy Court fall within “core” jurisdiction); *In re Eveleth Mines, LLC*, 312 B.R. 634, 644-45 and n.14 (Bankr. D. Minn. 2004) (“A purchaser that relies on the terms of a bankruptcy court’s order, and whose title and rights are given life by that order, should have a forum in the issuing court.”).

12. Plaintiffs’ claims also fall within the category of “related to” jurisdiction. “Related to” jurisdiction encompasses all actions in which the outcome could have a “conceivable effect” on the bankrupt estate. *Parmalat Cap. Fin. Ltd. v. Bank of Am. Corp.*, 639 F.3d 572, 579 (2d Cir. 2011); *Delaware Trust v. Wilmington Trust, N.A.*, 534 B.R. 500, 511 (S.D.N.Y. 2015). Accordingly, an action is “related to the bankruptcy if the outcome could alter the debtor’s rights, liabilities, options, or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankrupt estate.”

Delaware Trust, 534 B.R. at 511; *In re Sportsman's Warehouse, Inc.*, 457 B.R. 372, 385 (Bankr. D. Del. 2011) (“Furthermore, ‘whether a lawsuit could “conceivably” have an effect on the bankruptcy proceeding [depends on] whether the allegedly related lawsuit would affect the bankruptcy proceeding without the intervention of yet another lawsuit.’ ‘A key word in this test is “conceivable.” Certainty, or even likelihood, is not a requirement.’”) (internal citations omitted)).

13. Plaintiffs’ claims in this Action relate to real property transferred to New GM as part of the 363 Sale. As noted, however, New GM did *not* assume all environmental liabilities related to such real property, or all liabilities related to Old GM conduct. *See* Sale Agreement, §§ 2.3(a)(viii), 2.3(b)(iv). Plaintiffs’ claims for fraud, negligence, trespass, private nuisance, and public nuisance are Retained Liabilities of Old GM, and not Assumed Liabilities of New GM. Such claims, thus, violate the Sale Order and Injunction and the Sale Agreement that it approved.

14. In addition, the Complaint requires interpretation of other rulings of the New York Bankruptcy Court because it, among other things, alleges that New GM is the successor to Old GM, and continuously lumps Old GM and New GM conduct together. *See, e.g.*, Compl. ¶¶ 19, 34, 40. These allegations are improper. *See, e.g.*, Sale Order and Injunction, ¶ 7 (“Except for the Assumed Liabilities, pursuant to sections 105(a) and 363(f) of the Bankruptcy Code, the Purchased

Assets shall be transferred to the Purchaser in accordance with the MPA [Sale Agreement] and, upon the Closing, shall be free and clear of all liens, claims, encumbrances, and other interests of any kind or nature whatsoever (other than Permitted Encumbrances), including rights or claims based on any successor or transferee liability”); *In re Motors Liquidation Co.*, Case No. 09-50026 (MG), 2017 WL 3835802, at *6 (Bankr. S.D.N.Y. Aug. 31, 2017) (“The Proposed FAC mischaracterizes the 363 Sale, implying that New GM is the successor to Old GM and that New GM assumed *all* liabilities for Post-Closing Accidents, without reference to the Assumed Liabilities defined in the Sale Order.”); 880 *S. Rohlwing Rd., LLC v. T&C Gymnastics, LLC*, No. 16-CV-07650, 2017 WL 264504, at *10 (N.D. Ill. Jan. 19, 2017) (“Movant’s successor liability and alter ego claims likely fall within the category of ‘related to’ jurisdiction.”) (*citing Celotex Corp. v. Edwards*, 514 U.S. 300, 307 n.5 (1995) (“Proceedings ‘related to’ the bankruptcy include ... suits between third parties which have an effect on the bankruptcy estate”)); *In re Motors Liquidation Co.*, 549 B.R. 607, 609 (Bankr. S.D.N.Y. 2016) (“New GM is *not* a successor in interest to General Motors Corporation (‘Old GM’); it is a completely separate legal entity from Old GM.”); *In re Paris Indus. Corp.*, 132 B.R. 504 (D. Me. 1991) (proceeding brought by purchaser of debtor-manufacturer’s assets to enforce language in order approving sale as one “free and clear” of claims, and to enjoin third parties from bringing successor liability action

against it, was “related to” proceeding over which bankruptcy court could exercise subject matter jurisdiction); *cf. In re Motors Liquidation Co.*, 568 B.R. 217, 220 n.1 (Bankr. S.D.N.Y. 2017) (“As the Court will discuss below, certain of the Pitterman Plaintiffs’ claims do not sufficiently distinguish between conduct of Old GM or New GM. Those claims cannot go forward against New GM as drafted.”).

15. The New York Bankruptcy Court has exercised ongoing jurisdiction with respect to complaints that violate previous New York Bankruptcy Court rulings. The New York Bankruptcy Court has stated that it is the “gatekeeper” that will decide what allegations, claims and requests for damages get through the bankruptcy “gate.” *In re Motors Liquidation Co.*, 568 B.R. 217, 222 (Bankr. S.D.N.Y. 2017) (“The Court’s role, then, is a ‘gatekeeper’ role. It should be the court to decide what claims and allegations should get through the ‘gate,’ under the Sale Order’ and this Court’s prior decisions.” (quoting *In re Motors Liquidation Co.*, 541 B.R. 104, 112 (Bankr. S.D.N.Y. 2015))).

16. The Complaint in this matter necessarily requires judicial construction and/or interpretation of the Sale Agreement, the Sale Order and Injunction, and other federal court rulings.

17. Accordingly, the Action implicates the New York Bankruptcy Court’s core, arising in, related to and exclusive jurisdiction, and is therefore removable to this Court under 28 U.S.C. §§ 1452(a) and Bankruptcy Rule 9027.

REMOVAL IS TIMELY

18. This Notice of Removal is timely because it is being filed within 30 days after New GM was served with the Summons and Complaint. 28 U.S.C. §1446(b). Plaintiff filed suit on November 30, 2017, and New GM was served with the Summons and Complaint on December 4, 2017. *See Exhibit “B”*.

VENUE

19. The United States District Court for the Eastern District of Michigan is the United States District Court embracing the Circuit Court for the County of Livingston, State of Michigan, where this action was filed and is pending. *See* 28 U.S.C. § 94(b)(1). Therefore, venue of this removed action is proper in this Court.

CONSENT

20. “Only defendants against whom a claim [arising under the Constitution, laws, or treaties of the United States] has been asserted are required to join in or consent to” removal pursuant to federal question jurisdiction. 28 U.S.C. § 1441(c)(2). As New GM is the only defendant in this Action, no consent for removal is needed.

NOTICE TO THE STATE COURT

21. Pursuant to 28 U.S.C. § 1446(d), a copy of this Notice of Removal is being served on all adverse parties and filed with the Circuit Court for the County of Livingston, State of Michigan.

STATE COURT FILINGS

22. New GM files herewith as Exhibit "B" copies of all process served upon it in this Action as part of this Notice, [such being the Summons and Complaint, Civil Scheduling/Trial Order, Motion for Admission Pro Hac Vice, and Notice of Re-Hearing on Motion for Admission Pro Hac Vice].

WHEREFORE, Defendant General Motors LLC respectfully requests that this Action in the Circuit Court for the County of Livingston, State of Michigan, be removed to this Court, and that no further proceedings be had in the Michigan state court.

Dated this 29th day of December, 2017.

Respectfully submitted,

GENERAL MOTORS LLC

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