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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re: Motors Liquidation Company, *et al.* f/k/a General Motors Corp., *et al.* Debtors.	Chapter 11 Case No. 09-50026 (REG) (Jointly Administered)

RESPONSIVE BRIEF OF DESIGNATED COUNSEL FOR PRE-CLOSING ACCIDENT PLAINTIFFS ON THRESHOLD ISSUES CONCERNING NEW GM'S MOTIONS TO ENFORCE THE SALE ORDER AND INJUNCTION

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Designated Counsel for the plaintiffs in Pre-Closing Accident Lawsuits (the "Pre-Closing Accident Plaintiffs") submits this Responsive Brief to the Opening Brief by General Motors LLC on Threshold Issues Concerning its Motions to Enforce the Sale Order and Injunction (the "New GM Opening Brief") and represents as follows:

INTRODUCTION

On August 1, 2014, General Motors LLC ("New GM") filed its *Motion of General Motors LLC Pursuant to 11 U.S.C. Sections 105 and 363 to Enforce this Court's July 9, 2009 Sale Order and Injunction Against Plaintiffs in Pre-Closing Accident Lawsuits* [Dkt. No. 12807] (the "Motion to Enforce Sale Order re: Pre-Closing Accident Lawsuits").

Subsequently, on September 15, 2014, this Court entered its *Scheduling Order Regarding Motion of General Motors LLC Pursuant to 11 U.S.C. Sections 105 and 363 to Enforce this Court's July 9, 2009 Sale Order and Injunction Against Plaintiffs in Pre-Closing Accident Lawsuits* [Dkt. No. 12897] (the "Scheduling Order re: Pre-Closing Accident Lawsuits").

Pursuant to the Scheduling Order re: Pre-Closing Accident Lawsuits, this Court ordered, *inter alia*, that Designated Counsel for the Pre-Closing Accident Plaintiffs should (i) absent further order of the Court, adhere to the briefing schedule set forth in the Court's *Supplemental Scheduling Order Regarding (I) Motion of General Motors LLC Pursuant to 11 U.S.C. Sections 105 and 363 to Enforce this Court's July 9, 2009 Sale Order and Injunction, (II) Objection Filed by Certain Plaintiffs in Respect Thereto, and (III) Adversary Proceeding No. 14-01929*, entered on July 11, 2014 [Dkt. No. 12770] (as amended, the "Scheduling Order re: Original Motion to Enforce Sale Order"); and (ii) coordinate its efforts with other Designated Counsel for the plaintiffs asserting claims against New GM for economic damages (the "Economic Damages Plaintiffs" and, together with the Pre-Closing Accident Plaintiffs, the "Plaintiffs") "to the extent reasonably practicable to avoid repetition and duplicative arguments" with respect to the Four

Threshold Issues and the Fraud on the Court Standard Briefing as described in the Scheduling Order re: Original Motion to Enforce Sale Order.

In keeping with the Court's requests, Designated Counsel for the Pre-Closing Accident Plaintiffs hereby adopts and incorporates by reference the following arguments made by Designated Counsel for the Economic Damages Plaintiffs in their responsive briefs: (i) the Old GM Claim Threshold Issue, (ii) the Equitable Mootness Threshold Issue, and (iii) the Fraud on the Court Standard Briefing. Also in keeping with the Court's requests, rather than setting forth a lengthy and duplicative Statement of Facts, Designated Counsel for Pre-Closing Accident Plaintiffs hereby adopts and incorporates by reference the statement of facts set forth in the responsive briefs filed by Designated Counsel for the Economic Damages Plaintiffs.

In addition, Designated Counsel for the Pre-Closing Accident Plaintiffs hereby adopts and incorporates by reference: (i) the *Agreed and Disputed Stipulations of Fact Pursuant to the Court's Supplemental Scheduling Order, Dated July 11, 2014*, filed on August 8, 2104, [Dkt. No. 12826] and Exhibits A-D attached thereto (the "Stipulated Facts")[1]; (ii) the Proposed Additional Agreed and Disputed Stipulations of Fact filed with the Court on November 5, 2104, as Exhibit A to Designated Counsel's *Notice of Submission of Proposed Additional Agreed and Disputed Stipulations of Fact in Connection with Court's Scheduling Order Regarding Motion of General Motors LLC Pursuant to 11 U.S.C. Sections 105 and 363 to Enforce this Court's July 9, 2009 Sale Order and Injunction Against Plaintiffs in Pre-Closing Accident Lawsuits* [Dkt. No. 12977] (the "Additional Pre-Closing Accident Stipulated Facts")[2]; and (iii) all declarations and exhibits attached thereto filed by the Economic Damages Plaintiffs in support of their responsive briefs.

[1] Capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the Stipulated Facts.
[2] Goodwin Procter LLP has been engaged to act as Designated Counsel only with respect to claims relating to the Ignition Switch, not other defects.

PRELIMINARY STATEMENT AND FACTUAL BACKGROUND

General Motors Corporation ("Old GM") sold defective automobiles to unsuspecting customers. The defect was embedded in the DNA of every one of the millions of vehicles that used the Ignition Switch. The defective Ignition Switch was used for years in Saturn Ions, Chevrolet Cobalts, Pontiac G5s, Chevrolet HHRs, and other vehicles. Referred to internally as "the switch from hell," there were early electrical problems with the switch, high failure rates during testing, and the torque required to supply the resistance necessary to prevent the switch from inadvertently slipping from the "run" position to "auxiliary" or "off" was inadequate and below specification even before mass production began.[3] Because problems were noted almost immediately, the gallows humor within Old GM was that the problem had been around "since man first lumbered out of the sea and stood on two feet." Stipulated Facts, Exh. B ¶ 14(B)(vi).

However, the defect was deadly serious. The defect made all of the Subject Vehicles prone to spontaneous unexpected moving stalls on rough roads, or if the key was inadvertently jostled or bumped by the driver, or if the key ring had too many keys or too much weight on it. Although unexpected stalling is immediately recognizable as a safety hazard to any sentient person, Old GM treated the possibility of an unexpected moving stall as an issue of "customer convenience." V.R. at 2, 33. As one car reviewer for the *Cleveland Plain Dealer* put it in 2005, that characterization was "a knee slapper." V.R. at 85. According to the Valukas Report, although Old GM employees knew better and categorized the moving stalls as a safety issue, they were either intimidated into acquiescence or ignored. *See* Stipulated Facts, Exh. B ¶ 14(R)(i), (S)(i); V.R. at 83, 93.

[3] *See generally*, Anton R. Valukas, *Report to Board of Directors of General Motors Company Regarding Ignition Switch Recalls*, dated May 29, 2014 (the "Valukas Report" or "V.R."). A copy of the Valukas Report is available in redacted form at http://www.nhtsa.gov/staticfiles/nvs/Valukas-report-on-gm-redacted.pdf. *See also* Stipulated Facts, Exh. B ¶¶ 1-3.

Significantly, the electrical system of the Subject Vehicles was designed so that if the engine was shut off by the Ignition Switch moving from the "run" position to "auxiliary" or "off," not only would power be lost for the steering and brakes, but the airbags would be disengaged and would not deploy upon a crash. Stipulated Facts, Exh. B ¶ 1.

Knowledge of problems with the Ignition Switch was widespread within Old GM:

- Raymond DeGiorgio (Design Release Engineer for the Ignition Switch) knew about it.
- Steven Oakley (Brand Quality Manager) knew about it.
- William Kemp (Senior In-House Attorney) knew about it.
- Gay Kent (Director of Product Investigations) knew about it.
- Elizabeth Kiihr (Product Investigations Engineer) knew about it.
- Alberto Manzor (Engineer) knew about it.
- Gary Altman (Program Engineering Manager) knew about it.
- Dwayne Davidson (Manager for TREAD Reporting) knew about it.
- Jaclyn Palmer (In-House Product Liability Attorney) knew about it.
- Elizabeth Zatina (In-House Attorney) knew about it.
- Doug Parks (Chief Engineer for Cobalt) knew about it.
- William Chase (Warranty Engineer) knew about it.
- Douglas Wachtel (Manager, Products Investigation Unit) knew about it.
- David Trush (Design Engineer for Ignition Cylinder/Key for Cobalt) knew about it.
- John Dolan (Electrical Engineer) knew about it.
- Brian Everest (Field Performance Assessment Supervisor, Engineer) knew about it.
- John Hendler (Vehicle Systems Engineer for Electrical Systems) knew about it.
- Joseph Joshua (employee) knew about it.
- Joseph Manson (Engineer) knew about it.

- Onassis Matthews (employee) knew about it.
- Lori Queen (Vehicle Line Executive, Chair November 2004 PRTS) knew about it.
- John Sprague (Performance Assessment Airbag Engineer) knew about it.
- Lisa Stacey (Field Performance Assessment Engineer) knew about it
- Brian Stouffer (Products Investigation Engineer) knew about it.

See Stipulated Facts, Exh. B ¶ 14.

Millions of vehicles using the defective Ignition Switch were in circulation among unsuspecting owners and, by extension, the rest of the driving and pedestrian public during the seven year period between the Ignition Switch's earliest commercial use in 2002 and the Petition Date in 2009. During that seven year period, Old GM initiated no fewer than six investigative reports with respect to moving stalls resulting from the defective Ignition Switch, including three "Problem Resolution Tracking System" ("PRTS") inquiries (November 2004, May 2005, and February 2009). V.R. at 63. These internal probes followed as result of (i) customer complaints, (ii) the observations of Old GM's own employees that had either witnessed or experienced stalling in Subject Vehicles, (iii) negative press reports, (iv) inquiries from the National Highway Traffic Safety Administration ("NHTSA") about the high rate of airbag non-deployments in Cobalts and Ions, and (v) accidents involving Subject Vehicles. As a result of these investigations, in March of 2009, the key for the Ignition Switch was redesigned from a slot to a hole. Stipulated Facts, Exh. B ¶ 14(F)(ii); V.R. at 131. This belated and far from adequate change was acknowledged internally at Old GM to be a "band-aid" that fell short of the needed changes to the Ignition Switch. Stipulated Facts, Exh. B ¶ 14(R)(ii). In fact, the key modification had been recommended four years earlier in May of 2005, but was inexplicably delayed while accidents and deaths continued to occur. Stipulated Facts, Exh. B ¶ 14(T)(ii); V.R. at 78, 80, 88. Everyone within Old GM involved with the three PRTS investigations and

everyone within Old GM that read the multiple reports, received the multiple emails, or attended the multiple meetings, knew about the problems with the Ignition Switch that were being investigated.

During this same seven year period, Old GM issued at least two Technical Service Bulletins to all of its dealers warning of the possibility of an unexpected moving stall in identified vehicles using the Ignition Switch – a switch that was common to vehicles designed using the Delta and Kappa platforms such as the Cobalt, the Ion, and several Pontiac vehicles. Stipulated Facts, Exh. B ¶¶ 10, 11, 14(R)(ii). Perforce, everyone within Old GM that authorized the issuance of the Technical Service Bulletins and everyone within Old GM that saw those bulletins, had knowledge of the faulty Ignition Switch. Shamefully, neither Technical Service Bulletin actually used the word "stall" because "stall" was considered to be a hot button word that would alert the NHTSA to a safety issue and a possible recall. V.R. 8, 92.[4] This ultimately meant that drivers were not adequately warned of the hazard and only those who complained to a dealer would learn of the "band aid" recommendation that a plug could be inserted into the key to reconfigure it from a slot to a circular hole. V.R. at 93.

Likewise, beginning in 2005, the Product Investigations group within Old GM initiated the first of several investigations into the Ignition Switch problem to try to diagnose and correct the stalling problem. V.R. at 74, 86, 102. Everyone within Old GM involved with these multiple investigations and everyone within Old GM that read the Field Performance Reports that were issued in connection with these investigations, received the emails, or attended the meetings, knew about the problems with the Ignition Switch.

[4] This willful obfuscation by Old GM belies any claim that it did not perceive the Ignition Switch defect as a safety issue.

As reports of accidents mounted, people outside Old GM realized what people inside Old GM were denying: An unexpected moving stall is a safety issue.

- In May 2005, a reviewer for the *Sunbury Daily Item* described four unplanned engine shutdowns during a hard driving test and concluded the review with "I never encountered anything like this in 37 years of driving and I hope I never do again." V.R. at 84.

- In June 2005, a customer wrote to Old GM's Customer Service and called the moving stall issue in his 2005 Cobalt "a safety/recall issue if ever there was one." V.R. at 89.

- In February 2006, a Better Business Bureau arbitrator mandated that GM repurchase a Cobalt from a customer because "unexplained stalling of a vehicle in traffic certainly constitutes a serious safety hazard." V.R. at 89 n.378.

- In April 2007, a Wisconsin State Trooper published an Accident Reconstruction Report that identified the connection between the loss of power and the non-deployment of airbags. Stipulated Facts, Exh. B ¶ 14(H)(i). This was something that should have been evident to the Old GM engineers that designed the electrical system of the Subject Vehicles and to the trouble-shooting engineers that were assigned to the Preliminary Investigations and the PRTS investigations.

Of course, Old GM was aware of and possessed all of these materials, but it resolutely refused to classify the unexpected stalling and concomitant loss of power to the power steering and brakes as anything more than an inconvenience. In response to Old GM's contention that the moving stalls were not a safety issue, the *Cleveland Plain Dealer* quipped, "[s]o, if you're whisking along at 65 mph or trying to pull across an intersection and the engine stops, [you restart the engine after shifting into neutral.] Only a gutless ninny would worry about such a problem. Real men are not afraid of temporary reductions of forward momentum."[5] V.R. at 85.

As is evident from the reporter's sarcasm, moving stalls do not only occur in the daytime on deserted suburban streets. Notwithstanding the proven connection between the unexpected

[5] Indeed, the press had it right. When Old GM senior in-house attorney Bill Kemp wanted to "shut up" the Cleveland Plain Dealer with a video demonstration that would show the remoteness of the stalling risk, another Old GM in-house attorney (Elizabeth Zatina) told Kemp that she was "not optimistic we can come up with something compelling." V.R. at 86.

moving stalls and the failure of the airbags to deploy, airbag non-deployment did not cause the crashes that killed and injured the Pre-Closing Accident Plaintiffs. While the failure of the airbags to deploy may have exacerbated the injuries, the failure of the airbags to deploy was not the cause of the crashes at issue. Those crashes would have occurred regardless of whether the airbags were disengaged.

To date, the Pre-Closing Accident Plaintiffs have been denied the opportunity to demonstrate that their crashes, injuries and deaths were attributable to the Ignition Switch defect. This is because until the parade of recalls began in February 2014, the defect in the Ignition Switch was undisclosed, or worse, deliberately hidden. Everything laid out above, which is but a fraction of the already available information, was culled from the Stipulated Facts or the Valukas Report. For almost a decade preceding the sale of Old GM to New GM (the "363 Sale"), engineers, supervisors, lawyers, and others within Old GM consciously nibbled around the edges of the problem of the Ignition Switch defect. V.R. at 256. They gave each other what the Valukas Report unflatteringly describes as the "GM nod" and "GM salute" while the buck was being passed back and forth by employees that were reluctant to raise safety issues for fear of retaliation. V.R. at 255. Information about crashes involving Subject Vehicles was accumulated, compiled and logged onto spreadsheets by such Old GM employees as John Sprague, Brian Everest, and Dwayne Davidson, but that wealth of data remained buried within Old GM, and stayed buried within New GM until the dam finally burst. Stipulated Facts, Exh. B ¶ 14(H), (K), (X).

Old GM unquestionably had knowledge of the Ignition Switch defect.[6] Yet, at the time that Old GM filed its motion for authority to sell its assets to New GM free and clear of

[6] Should the Court have any doubt about Old GM's knowledge, then the Pre-Closing Accident Plaintiffs respectfully request the opportunity to take discovery on the question of knowledge. This critically important, fact-intensive

successor liability claims, it did not disclose the existence of the Ignition Switch defect or any of the relevant data it possessed. In particular, Old GM did not disclose the existence of the Ignition Switch defect in the Sale Motion or in the Sale Notice mailed to Pre-Closing Accident Plaintiffs that had already sued Old GM. Nor did Old GM disclose the existence of the Ignition Switch defect in the Publication Notice published in newspapers of general circulation. Old GM did not even describe the Ignition Switch defect and the claims that would be affected by the free and clear aspect of the sale when it asked the Court in the Sale Motion to approve the form and method of notice as "sufficient under the circumstances." New GM Opening Brief at 10. In every instance, the notice that was given was generic and lacked any hint or mention of the known Ignition Switch defect. As a result of the insufficient notice that was given, persons injured or the relatives of persons killed were unaware that the Subject Vehicles contained an intrinsic safety defect that could have both caused and amplified the consequences of their accidents.

Had the Pre-Closing Accident Plaintiffs been notified of the existence of the Ignition Switch defect, those persons (or their surviving relatives) would have been alerted to the actual (rather than abstract) consequence of the free and clear aspect of the pending sale upon their claims. Lacking this crucial information, the Pre-Closing Accident Plaintiffs were denied due process because the Pre-Closing Accident Plaintiffs were deprived of the opportunity to file meaningful objections to the free and clear aspect of the proposed sale.[7] The factual predicates of that objection are obvious:

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question cannot be decided against the Pre-Closing Accident Plaintiffs on a stunted record that has been limited to a stipulated set of facts culled from a report commissioned by New GM.

[7] Every Pre-Closing Accident Plaintiff was a known creditor of Old GM at the time of the sale entitled to notice because (unbeknownst to these victims) every owner of a Subject Vehicle already had a claim against Old GM for the repair of the faulty Ignition Switch regardless of whether an accident had occurred. Constitutionally sufficient notice to the owners of Subject Vehicles describing the existence and nature of the defect would have gone to the

- Information about a known safety defect is withheld from the public for many years;

- Although the vehicle owners are identifiable by Old GM due to federally mandated record-keeping requirements, or reachable through targeted press releases, no warnings are given and no repairs or recalls are made;

- The "symptoms" of the defect (moving stalls, loss of power to the steering and brakes, and disengagement of the airbags) are elements of many of the accidents that occurred in the Subject Vehicles;

- After several years of non-disclosure and failures to remedy or warn, Old GM (with full knowledge of the lack of disclosure) readies to sell itself to itself in a taxpayer-funded, expedited sale that will leave these inconvenient claims behind and shield itself from successor liability from the moment it transforms itself to "New GM"; and

- The sale is to be accomplished on a highly expedited basis without ever telling the victims – or this Court – about the existence of the defect.

The Pre-Closing Accident Plaintiffs do not have to demonstrate they would have been successful in opposing the successor liability shield in the Sale Order and Injunction. What would have happened if proper disclosure had been made is speculative and unknowable. But what is not speculative is that the Pre-Closing Accident Plaintiffs were prevented from making arguments against the free and clear aspect of the sale using the information that was withheld from them – information that was known to Old GM and that should have been disclosed. The Pre-Closing Accident Plaintiffs can never go back in time and make the arguments that they could have made but for the lack of proper notice. The context, tension, and fluidity of July 2009 cannot be recreated, hypothetically or otherwise. Old GM's failure to provide meaningful content in the Sale Notice meant that the Pre-Closing Accident Plaintiffs were unable to fully comprehend the effect of the successor liability shield on claims that are based on the decade-long failure by Old GM to publicly announce and correct a defect that resulted in grievous bodily

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Pre-Closing Accident Plaintiffs as a subset of the group of all owners of Subject Vehicles, irrespective of whether Old GM knew of the accident. Upon receipt of the notice, those claimants would have been able to act accordingly.

injury and loss of life. The absence of full comprehension in turn impacted the ability of those most immediately affected by the free and clear aspect of the sale (the Pre-Closing Accident Plaintiffs) to knowledgeably assert their best arguments against the extraordinary relief that was being requested by Old GM. The firestorm reaction of the American public, federal and state governments, and the press to New GM's 2014 revelation gives every indication that a similar or greater maelstrom would have occurred in July 2009 had Old GM made proper disclosure before the 363 Sale.

As a result of the disclosure failures, the free and clear aspect of the sale was approved based upon faulty premises and a deficient record that was manipulated by Old GM to its own advantage in anticipation of its reincarnation as New GM. The violation of due process that resulted from the insufficient disclosure of the Ignition Switch defect can (and should) be remedied by insulating the Pre-Closing Accident Plaintiffs from the free and clear aspects and injunctive provisions of the Sale Order and Injunction and permitting their claims to be asserted against New GM under theories of successor liability.

ARGUMENT

I. DUE PROCESS THESHOLD ISSUE: THE PLAINTIFFS' DUE PROCESS RIGHTS WERE VIOLATED IN CONNECTION WITH THE 363 SALE REGARDLESS OF WHETHER THEY WERE INVOLVED IN A PRE-CLOSING ACCIDENT

New GM argues in its opening brief that the Plaintiffs were "unknown" claimants at the time of the 363 Sale and, thus, were only entitled to publication notice of the 363 Sale to satisfy the Fifth Amendment's due process requirement.[8] In taking this position, New GM ignores reams of evidence demonstrating that – for years prior to the commencement of Old GM's chapter 11 case – at least dozens of Old GM employees were aware of the Ignition Switch defect

[8] "No person shall … be deprived of … property, without due process of law." U.S. Const. amend. V.

present in the Subject Vehicles.[9] In fact, certain of these employees held senior positions within the company's legal, engineering, and Products Investigation departments. As the Court is aware, this defect causes the Ignition Switch to unexpectedly move out of the "run" position and into the "accessory" or "off" positions while the vehicle is in motion (possibly at highway speed), disabling the vehicle's electrical system, power steering, power breaks, and airbag deployment system.

When New GM finally disclosed the existence of this deadly safety defect in February 2014 and the public learned that General Motors (both "Old" and "New") was aware of this defect for over a decade, there was an immediate and explosive reaction. As New GM belatedly began its series of 2014 recalls affecting millions of vehicles, an avalanche of media coverage, litigation, congressional hearings, and federal criminal investigations ensued. Although the Plaintiffs do not possess a time machine, there is no reason to believe that a response of similar force would not have occurred had Old GM made these same disclosures prior to the 363 Sale.

Because the Ignition Switch defect and its hazardous implications were known to Old GM for years prior to the 363 Sale and because owners of the Subject Vehicles were reasonably identifiable through the same federally-regulated means by which GM conducts recalls, Supreme Court precedent required Old GM to provide these known creditors actual notice of the 363 Sale proceedings. On this record, generic publication notice alone does not suffice for due process purposes. Moreover, Old GM had to provide sufficient detail about the Ignition Switch defect to apprise these known creditors of the existence of their claims and afford them a reasonable and

[9] *See* Stipulated Facts at Exh. B ¶¶ 6-22. Nowhere in the New GM Opening Brief is there mention of the voluminous Valukas Report prepared at the request of New GM's board of directors, which describes Mr. Valukas's conclusions as to why GM (both "Old" and "New") took so long to recall the Subject Vehicles in the face of the substantial knowledge of the defect within the organization "from the outset" of the Ignition Switch being installed in GM vehicles. V.R. at 5. The Plaintiffs are confident that there is a great deal more to learn than what was revealed in the Valukas Report about the level and timing of knowledge of this safety defect within the ranks of GM.

meaningful opportunity to object to the free and clear nature of the 363 Sale that purported to shield the taxpayer-funded purchaser from liability to them.

Instead, the Plaintiffs – including those who were involved in an accident prior to the 363 Sale – were kept in the dark about GM's longstanding knowledge of this defect and, thus, were deprived of the ability effectively participate in the proceedings culminating in the 363 Sale. This was a violation of the Plaintiffs' due process rights for which New GM should not be rewarded.

A. The Plaintiffs Were Known Creditors Entitled To Actual Notice Reasonably Calculated To Allow Them To Object To The 363 Sale And Protect Their Litigation Rights

When a bankruptcy debtor seeks relief against third parties, due process requires "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).[10] The method of notice necessary to satisfy due process depends on whether a creditor is "known" or "unknown" at the time the notice is to be given. While unknown creditors are merely entitled to constructive publication notice of the proceedings, known creditors must receive actual notice. *See Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 800 (1983). This is true regardless of how widely-publicized the bankruptcy case is or whether the known creditor is actually aware of the bankruptcy proceedings. *See City of New York v. New York, New Haven & Hartford R.R. Co.*, 344 U.S. 293, 297 (1953) ("[E]ven creditors who have knowledge of a reorganization have a right to assume that the statutory 'reasonable notice' will be given them before their claims are forever barred.");

[10] The *Mullane* due process standard established by the Supreme Court implicates both the method and the content of the required notice. Section I.A of this brief addresses the method of notice required to satisfy due process while Section I.B addresses the required content. In this case, both were constitutionally deficient such that all Plaintiffs were denied due process in connection with the 363 Sale.

Arch Wireless, Inc. v. Nationwide Paging, Inc. (In re Arch Wireless, Inc.), 534 F.3d 76, 83 (1st Cir. 2008) (same).

1. *If A Debtor's Books And Records Suggest That A Party Might Reasonably Bring A Particular Claim, That Party Is A Known Creditor Entitled To Actual Notice*

A known creditor is one whose identity is "reasonably ascertainable" by the debtor. *Mennonite Bd. of Missions*, 462 U.S. at 800 ("Notice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of any party, whether unlettered or well versed in commercial practice, if its name and address are reasonably ascertainable."); *Tulsa Prof'l Collection Servs., Inc. v. Pope*, 483 U.S. 478, 489-90 (1988) (executor required to provide actual notice by mail of probate proceedings to creditors whose identities were "reasonably ascertainable"). To identify its known creditors, a debtor must undertake a diligent examination of its books and records. *In re Drexel Burnham Lambert Grp., Inc.*, 151 B.R. 674, 681 (Bankr. S.D.N.Y. 1993); *Solow Bldg. Co., LLC v. ATC Assocs. Inc.*, 175 F. Supp.2d 465, 471-72 (E.D.N.Y. 2001); *In re Thomson McKinnon Secs. Inc.*, 130 B.R. 717, 720 (Bankr. S.D.N.Y. 1991). *See also Zurich Am. Ins. Co. v. Tessler (In re J.A. Jones, Inc.)*, 492 F.3d 242, 252 (4th Cir. 2007) (for purposes of determining if a creditor is a known creditor, "settled and sensible authority provides that [a creditor providing notice to the debtor of its claim] is not necessary and that the debtor must make its own determination based on a reasonably diligent effort in reviewing its own records.").

New GM asserts that the Plaintiffs' claims would not have been identified through a diligent examination of Old GM's books and records. Specifically, New GM argues that Plaintiffs who had not yet asserted claims against Old GM at the time of the 363 Sale would not have been "listed as creditors in Old GM's books and records" and were, thus, unknown

creditors. *See* New GM Opening Brief at 27-28. New GM's contention that known creditors are only those whose names appear on some "list of creditors" is incorrect, contrary to case law, and unconstitutionally narrow.

Courts within and without this circuit have recognized that "books and records" is much broader than the debtor's accounting ledger or its list of pending litigations. Indeed, "[d]irect knowledge based on a demand for payment is not … required for a claim to be considered 'known.' A known claim arises from facts that would alert the reasonable debtor to the possibility that a claim might reasonably be filed against it." *Drexel Burnham*, 151 B.R. at 681 (rejecting argument that guaranty creditor was unknown because debtor's accounting principles prevented it from listing its guaranty obligations as liabilities on financial reports). Thus, if the debtor has in its possession "some specific information that reasonably suggests both the claim for which the debtor may be liable and the entity to whom he would be liable," that creditor is a known creditor entitled to actual notice of the proceedings. *In re Arch Wireless, Inc.*, 332 B.R. 241, 255 (Bankr. D. Mass. 2005), *aff'd*, 534 F.3d 76 (1st Cir. 2008) (quoting *La. Dep't of Envtl. Quality v. Crystal Oil Co.*, 158 F.3d 291, 297 (5th Cir. 1998)). *See also Thomson McKinnon*, 130 B.R. at 720 ("If the debtor knows, or should know, of its potential liability to a specific creditor, that creditor is a known creditor entitled to actual notice.") (emphasis added)).

Arch Wireless is instructive in this regard. In that case, the debtor argued that one of its customers was an unknown creditor not entitled to actual notice of the bankruptcy because the debtor's list of payables did not reflect a debt owing to that customer but instead a reflected a receivable. *Arch Wireless*, 332 B.R. at 255. The bankruptcy court found this argument "wholly unpersuasive" because there were written communications from that customer in the debtor's records asserting that the debtor had overcharged the customer and was potentially liable for

damages resulting from the debtor's delivery of faulty product. *Id.* The fact that the debtor disputed the allegations in these letters and that the customer was generally aware of the bankruptcy were irrelevant to the fact that this customer was a known creditor deprived of due process by not receiving actual notice. *Id.* The First Circuit affirmed this result, finding no fault in the bankruptcy court's conclusion that this customer was known creditor. *Arch Wireless*, 534 F.3d at 82. *See also Solow Bldg.*, 175 F. Supp.2d at 472 (letters from plaintiff in debtor's possession regarding problems with debtor's asbestos abatement work rendered plaintiff a known creditor entitled to actual notice even though plaintiff had not yet sued debtor); *Brunswick Hosp. Ctr., Inc. v. New York Dep't of Health (In re Brunswick Hosp. Ctr.)*, No. 892-80487-20, 1997 Bankr. LEXIS 2184, *13-*14 (Bankr. E.D.N.Y. Sept. 12, 1997) (prepetition correspondence from state to debtor regarding allocation of previously-awarded subsidy payments supported court's conclusion that state was a known creditor).

As shown below, the record here similarly reflects ample documentation of knowledge of this longstanding defect within Old GM's internal records to render all Plaintiffs known creditors regardless of whether Old GM categorized them as such on the schedule of creditors they utilized for purposes of bankruptcy notices.

2. *The Record Demonstrates That The Plaintiffs' Ignition Switch Defect Related Claims Were Reasonably Ascertainable From Old GM's Books And Records*

The Plaintiffs have not had access to discovery and instead must rely on New GM's own internal investigation conducted by Mr. Valukas and those facts to which New GM is willing to stipulate. Nevertheless, the factual record before the Court still establishes that, for years prior to the 363 Sale, Old GM's internal books and records were littered with documents evidencing pervasive corporate knowledge that all owners of the Subject Vehicles had claims for the dangerous Ignition Switch defect that had been evident since the day these vehicles first rolled

off of the assembly line. *See, e.g.*, Stipulated Facts, Exh. B ¶ 14(B)(vi) (Old GM engineer wrote in an email that the defect in the Ignition Switch dated back to the time that "man first lumbered out of [the] sea and stood on two feet.").

Old GM's internal knowledge of the Ignition Switch defect pre-dates the commencement of mass production of the Subject Vehicles. Indeed, one of the lead engineers involved in the development of the defective Ignition Switch was aware since at least 2003 that the torque problems with these switches were causing the Subject Vehicles to inadvertently stall while moving. *See, e.g.*, Stipulated Facts, Exh. B ¶ 14(I) (describing knowledge and activities of Raymond DiGiorigio in relation to issues involving the ignition switch). Moreover, several Old GM employees have admitted that, prior to Old GM's bankruptcy, they viewed stalls resulting from the Ignition Switch defect as a safety issue. *See, e.g.*, Stipulated Facts, Exh. B ¶ 14(R)(i) (assertions by one of the engineers investigating the Cobalt Ignition Switch in the spring of 2005 that he believed at the time that the Ignition Switch defect should be classified as a safety issue and communicated his safety concerns, including airbag non-deployment, to numerous co-workers and his superiors), ¶ 14(S)(i) (assertion by brand quality manager that he was aware of the Ignition Switch issues in March 2005 and was concerned that it presented a safety issue but that he was reluctant to pursue his concerns because of his perception that he would lose his job for doing so). That these employees now admit to having had safety concerns about the Ignition Switch in the Subject Vehicles is not surprising; logic and common sense belie any argument that a loss of a rapidly-moving vehicle's electrical power, power steering, power brakes, and airbags is anything but a dangerous safety hazard.

Old GM's knowledge of the Ignition Switch defect was also demonstrated through the Technical Service Bulletins ("TSBs") Old GM sent to its dealers regarding the problems with the

Ignition Switch. *See* Stipulated Facts, Exh. B ¶ 10 (describing TSB issued in December 2005 with the subject reference "Information on Inadvertent Turning Off of Key Cylinder, Loss of Electrical System and No [Diagnostic Trouble Codes] for [certain Subject Vehicles]."), ¶ 11 (describing update of December 2005 TSB published in October 2006 to cover additional vehicle models and model years), and ¶ 14(AA)(ii) (describing unpublished draft of TSB from spring of 2007 that included in its title the word "stalls," which word was added with approval from Old GM's Senior Manager – Internal Investigation, Product Investigation). The TSBs prepared for dissemination to GM dealers are concrete evidence of a corporate decision to make a formal authorized communication to third parties (the dealers) acknowledging existence of the defect.

The record also demonstrates that numerous senior members of Old GM's legal, engineering, warranty, products investigations, and communications staff were well aware of serious and fatal accidents involving Subject Vehicles experiencing losses of power and airbag non-deployments. *See, e.g.*, Stipulated Facts, Exh. B ¶ 14(A) (Alan Adler, manager for safety communications), (C) (Kathy Anderson, Field Performance Assessment Engineer), (D) (Douglas Brown, In-House Counsel), (E) (Eric Budrius, engineer in Product Investigations unit), (L) (Michael Gruskin, in-house counsel, former head of GM's product litigation team), (N) (William Hohnstadt, sensing performance engineer), (O) (William Kemp, Counsel for Engineering Organization), (P) (Gay Kent, Director of Product Investigations), (S) (Steven Oakley, brand quality manager), (T) (Jaclyn Palmer, in-house product liability attorney); (U) (Manuel Peace, Field Performance Assessment Engineer), (W) (Keith Schultz, Manager of Internal Investigations), (X) (John Sprague, Field Performance Assessment Engineer), (Y) (Lisa Stacey, Field Performance Assessment Engineer), (Z) (David Trush, design engineer for ignition

cylinder and key for 2005 Cobalt), and (AA) (Douglas Wachtel, manager in Product Investigations unit).

In addition to institutional knowledge, people outside of GM had provided written notification to Old GM regarding problems with the Ignition Switch and its deadly implications. As noted above:

- In May 2005, a reviewer for the *Sunbury Daily Item* described four unplanned engine shutdowns during a hard driving test and concluded the review with "I never encountered anything like this in 37 years of driving and I hope I never do again." V.R. at 84.

- In June 2005, a customer wrote to Old GM's Customer Service and called the moving stall issue in his 2005 Cobalt "a safety/recall issue if ever there was one." V.R. at 89.

- In February 2006, a Better Business Bureau arbitrator mandated that GM repurchase a Cobalt from a customer because "unexplained stalling of a vehicle in traffic certainly constitutes a serious safety hazard." V.R. at 89 n.378.

- In April 2007, Old GM was provided with a copy of report by a Wisconsin state trooper regarding a fatal crash of a 2005 Cobalt that correctly concluded that "it appears likely that the vehicle's key turned to Accessory as a result of the low key cylinder torque/effort" and connected this to "the failure of the airbags to deploy." *See* Stipulated Facts, Exh. B ¶¶ 14(H)(i) (Old GM's Senior Manager for TREAD Reporting stating that he obtained a copy of this report in 2007 from someone within the Old GM legal department). *See also* Stipulated Facts, Exh. B ¶ 14(CC), (DD).

For years prior to the 363 Sale, Old GM knew the Subject Vehicles were defective and all in need of repair. Because of the widespread corporate knowledge of this dangerous safety defect, Old GM reasonably should have expected that – if they knew about the defect – all owners of Subject Vehicles could file claims against the company. This is true regardless of whether (i) the owner was involved in a Pre-Closing Accident, (ii) a lawsuit had been commenced against Old GM as of the 363 Sale, or (iii) Old GM was otherwise aware of the

accident. All owners of Subject Vehicles were known creditors entitled to actual notice of the 363 Sale.

3. *Old GM Employees' Knowledge Of The Ignition Switch Defect Was Imputable To Old GM*

New GM attempts to dodge the conclusion that the Plaintiffs were known creditors by stating that only "a certain limited number of Old GM personnel" were aware of problems with the ignition switches turning from the "run" position to "accessory" or "off" while in motion. *See* New GM Opening Brief at 28. In addition to this statement being contrary to the evidentiary record before the Court, it also misleading because it ignores the tenet of agency law that the knowledge of a corporation's employees acting within the scope of their employment is imputed to the company. Because Old GM personnel were aware of the Ignition Switch defect for years and the problems it caused, Old GM as a corporation had the same knowledge and was obligated to notify Subject Vehicle owners that their rights were going to be impacted by the 363 Sale.

Because corporations can only act through their employees and agents, "[k]nowledge and actions of a corporation's employees and agents are generally imputed to the corporation where the acts are performed within the scope of their authority." *Arista Records LLC v. Usenet.com, Inc.*, 633 F. Supp. 2d 124, 152 n.18 (S.D.N.Y. 2009) (quoting *UCAR Int'l, Inc. v. Union Carbide Corp.*, No. 00 CV 1338 (GBD), 2004 U.S. Dist. LEXIS 914, 2004 WL 137073, at *3 (S.D.N.Y. Jan. 26, 2004)). *See also Bondi v. Bank of Am. Corp. (In re Parmalat Secs. Litig.)*, 383 F. Supp. 2d 587, 597 (S.D.N.Y. 2005); *Koam Produce, Inc. v. DiMare Homestead, Inc.*, 213 F. Supp. 2d 314, 325-26 (S.D.N.Y. 2002), *aff'd*, 329 F.3d 123 (2d Cir. 2003); *Picard v. Cohmad Secs. Corp. (In re Bernard L. Madoff Inv. Secs. LLC)*, 454 B.R. 317, 336 n.14 (Bankr. S.D.N.Y. 2011). To have his or her knowledge or actions imputed to the employer corporation, an employee need not be high ranking. *United States v. Koppers Co.*, 652 F.2d 290, 298 (2d Cir. 1981) (rejecting

argument that imputation to a corporate employer is only permissible in the case of "high managerial agents."); *Arista Records*, 633 F. Supp. 2d at 152, n.18 ("[E]mployee or agent need not be high-ranking for knowledge and actions to be imputed to corporation if employee was acting within the scope of his responsibilities"; knowledge and actions of marketing department employees imputed to the corporation because they were acting within the scope of their employment when creating promotional materials encouraging copyright infringement).

Additionally, a corporation's large size or complex internal structure does not immunize it from imputation of its employees' knowledge. As one court recently recognized:

> An organization's large size does not in itself defeat imputation, nor does the fact that an organization has structured itself internally into separate departments or divisions. Organizations are treated as possessing the collective knowledge of their employees and other agents, when that knowledge is material to the agents' duties, however the organization may have configured itself or its internal practices for transmission of information.

Liberty Mut. Ins. Co. v. Excel Imaging, P.C., 879 F. Supp. 2d 243, 271 (E.D.N.Y. 2012) (quoting RESTATEMENT (THIRD) OF AGENCY § 5.03 (2006)).

Many people within Old GM (several of whom were in positions of authority) learned of the Ignition Switch defect and its implications through the ordinary course of their employment years prior to the 363 Sale. Indeed, many Old GM staffers (most of whom became New GM staffers) were specifically tasked with (i) investigating problems with the Ignition Switch installed in the Subject Vehicles, (ii) drafting the TSBs warning GM dealers of the problem, (iii) performing the PRTS inquiries aimed at resolving the problem, and (iv) handling (as in-house attorneys) litigation claims relating to accidents involving Subject Vehicles. Old GM knew that all owners of the Subject Vehicles were driving defective and dangerous cars and, thus, were "known" creditors. New GM cannot credibly contend that, despite widespread knowledge within Old GM of the defect, the Plaintiffs were unknown creditors only entitled to

generic publication notice because a handful of directors or senior officers allegedly did not personally know of the defect in this Ignition Switch. If accepted, such an argument would violate not only basic tenets of agency law but also public policy because it would encourage financially-troubled companies to keep their senior management in the dark about likely litigation claims in hopes of riding through bankruptcy unchallenged, with the company (or the purchaser of its assets) emerging on the other side with a permanent injunction against such claims.

4. *Owners Of Cars With Claims Arising From The Ignition Switch Defect Were Reasonably Identifiable By GM Through The Same Process By Which It Eventually Recalled Those Vehicles*

In addition to Old GM having longstanding corporate knowledge that owners of Subject Vehicles had claims arising from the undisclosed Ignition Switch defect, the names and addresses of such known claimants were readily identifiable. Specifically, since the 1966 enactment of the Motor Vehicle Safety Act, automobile manufacturers have been required to maintain records of the name and address of all purchasers of their vehicles. *See* 49 U.S.C. § 30117(b). The purpose of this requirement is to facilitate recall notifications to drivers when a manufacturer learns that a vehicle has a safety-related defect or does not comply with applicable safety standards. *See* 49 U.S.C. § 30118(c). Indeed, once New GM belatedly determined to recall the Subject Vehicles in 2014, it presumably utilized its records of purchases of Subject Vehicles (many of which it inherited from Old GM) to issue its recall notifications. Thus, the Plaintiffs' identities were "reasonably ascertainable," rendering them "known" creditors under the Supreme Court precedent described above.[11]

[11] *Compare Chemetron Corp. v. Jones*, 72 F.3d 341 (3d Cir. 1995) (case New GM relies upon in which debtor was sued post-bankruptcy for alleged injuries suffered by plaintiffs who lived in or visited the neighborhood in which the debtor owned a manufacturing facility and landfill over 20 years earlier; because debtor had no conceivable means of identifying itinerant people exposed to toxins such a long time ago, plaintiffs were unknown creditors).

5. *New GM Relies On Inapposite Cases To Support Its Argument That the Plaintiffs Were Unknown Claimants*

In support of its argument that no due process violation occurred here, New GM's brief cites a litany of cases that have no application here. For example, New GM relies heavily on this Court's decision in *Morgenstein v. Motors Liquidation Co., (In re Motors Liquidation Co.)*, 462 B.R. 494 (Bankr. S.D.N.Y. 2012) to establish that Plaintiffs were not known creditors of Old GM. New GM Opening Brief at 27-30. In actuality, *Morgenstein* provides a stark factual contrast to the present dispute. In that case, unscheduled creditors alleged that Old GM's knowledge of an undisclosed design defect gave rise to a fraud on the court, warranting a partial revocation the confirmation order entered in these proceedings. *Morgenstein*, 462 B.R. at 505 ("Here the substance of the claim of fraud is that Old GM knew that the design defect was in all of Old GM's 2007 and 2008 Impalas . . . and that Old GM intended to defraud the Court by failing to disclose that deficiency and make allowance for the resulting liability . . ."). In concluding that the heightened pleading standard for fraud under Rule 9(b) had not been met[12], the Court observed that "the allegations that Old GM knew of the design defect . . . generally are conclusory statements, supported by no evidentiary facts" and that "this is in substance a claim that Old GM should have known that the alleged design defect was more widespread." *Id.* at 505-06 (first emphasis added); *see also id.* at 506 ("No facts are set forth establishing that Old GM actually knew the defect was more widespread." (emphasis added)). Here, by contrast, knowledge within Old GM of the undisclosed Ignition Switch defect is a stipulated fact. Moreover, as noted above, the investigative report commission by New GM itself is replete with examples demonstrating longstanding knowledge within Old GM of the undisclosed defect. Thus, the Court's dismissal of the fraud on the court claim in *Morgenstein* based on the absence

[12] As noted by the Court, Rule 9(b) requires plaintiffs "to allege facts that give rise to a strong inference of fraudulent intent." *Id.* at 505 (citation and internal quotation marks omitted).

of any evidence that Old GM had knowledge of the alleged defect in no way advances New GM's argument that Plaintiffs were not known creditors.

New GM's reliance on Judge Bernstein's decision in *Chrysler* is similarly misplaced. New GM Opening Brief at 30, 48, 56, 66 (citing *Burton v. Chrysler Grp., LLC, (In re Old Carco LLC)*, 492 B.R. 392 (Bankr. S.D.N.Y. 2013)). In that case, post-sale purchasers of vehicles manufactured pre-sale by the debtors sued the bankruptcy purchaser for damages relating to the defect in their vehicles. Because the successor liability shield was assumed to be in effect and was not challenged, Judge Bernstein analyzed the issue as a matter of contract interpretation: whether the asserted claims were assumed by the bankruptcy purchaser under the terms of the sale agreement. Judge Bernstein held that post-sale claims against the purchaser were not assumed liabilities and noted that, even though the plaintiffs had purchased their vehicles after the bankruptcy sale had closed, the debtor had issued recall notices for type of defect at issue before the bankruptcy sale. Thus, the plaintiffs in that case should have anticipated future repairs. *Id.* at 403 ("Anyone who owns a car contemplates that it will need to be repaired, particularly when, as here, Old Carco had already issued at least two and possibly three recall notices for the 'fuel spit back' problem for certain Durango and other Old Carco vehicles before the original purchasers bought their vehicles from Old Carco").[13] Significantly, the court did not address or determine whether the plaintiffs were known creditors or whether notice of sale was constitutionally adequate. In stark contrast to *Chrysler*, the Pre-Closing Accident Plaintiffs' claims arose prior to the 363 Sale and those claims arose from a defect that Old GM had known

[13] That car owners can expect to make repairs on their cars – especially for defective components that the manufacturer had already recalled in similar vehicles – has no bearing on whether individuals such as the Plaintiffs should reasonably "expect" that when they buy their cars that they will instantly have claims against the manufacturer arising from safety defects the manufacturer incorporated into the vehicle for years but failed to disclose to the public notwithstanding widespread corporate knowledge of the defect and the dangers it posed.

to exist in the Subject Vehicles for years before bankruptcy but was not revealed to the public until February 2014, when New GM began its recalls.

New GM also relies on *In re New Century TRS Holdings, Inc.* to support its argument that Plaintiffs were not known creditors. New GM Opening Brief at 27-28, 31-32 (citing *In re New Century TRS Holdings, Inc.*, No. 07-10416 (BLS), 2014 WL 842637 (Bankr. D. Del. Mar. 4, 2014)). In that case, a creditor argued that her late proof of claim – based on Truth-in-Lending Act violations she first discovered years after plan confirmation – should be deemed timely because she was a known creditor who did not receive actual notice of the claims bar date. *New Century*, 2014 WL 842637 at *3. In rejecting this argument, the bankruptcy court concluded that the claimant was an unknown creditor because: (i) the creditor did not put the debtors on notice of her claims until after the bar date; (ii) her status as a customer of the debtors, without more, did not make her a creditor (whether known or unknown); and (iii) because the circumstances of each loan were different, the existence of similar claims by other customers did not put the debtors on notice of her particular claims. *Id.* at *3-*5. According to the bankruptcy court, the creditor's argument that the debtors "should have known that all borrowers, including herself were known potential claimants" lacked merit because the debtors did not have a "duty to search out each conceivable or possible creditor and urge the person or entity to make a claim against it." *Id.* at *5 (citation and internal quotation marks omitted). Indeed, nothing in the record before the court even suggested that this particular creditor's claims could have been discovered upon investigation by the debtor. *Id.* at *6. Here by contrast, Plaintiffs are not suggesting that they are known creditors simply because they were customers of Old GM or because they have claims that are similar to those previously asserted by other customers. Rather, Plaintiffs were known creditors because they were owners of a limited universe of cars manufactured by Old

GM that had been specifically identified as defective by Old GM. Unlike the situation in *New Century*, where the circumstances giving rise to the claim would be unique to each borrower, the Ignition Switch was identically manufactured and identically defective in every Subject Vehicle (and Old GM knew it). Thus, New GM's reliance *New Century* is completely misplaced.[14]

B. Notice Of The 363 Sale Was Constitutionally Insufficient Because It Failed To Apprise Plaintiffs – Including Pre-Closing Accident Plaintiffs – Of The Defect From Which Their Claims Arise

The notice that Old GM provided with respect to the 363 Sale was constitutionally deficient regardless of whether the Plaintiffs are considered to be known or unknown creditors and regardless of whether the notice was mailed directly to the Plaintiff or published in the newspaper. Simply put, even if Old GM had actually delivered a copy of the 363 Sale notice to each and every Plaintiff prior to the sale, those Plaintiffs' due process rights were still violated because the notice did not apprise Plaintiffs of the existence of the Ignition Switch defect in the Subject Vehicles. Because Plaintiffs – including those Pre-Closing Accident Plaintiffs who had commenced litigation against Old GM prior to the 363 Sale and may have received actual written notice of the 363 Sale – were kept unaware that their vehicles were defective, they had no ability to make an informed objection to the proposed free and clear nature of the 363 Sale. This denial of information deprived all such owners (including those whose vehicles had already crashed) of the due process the U.S. Constitution guarantees them before they can be deprived of their rights

[14] For the same reasons, the following cases upon which New GM relies are readily distinguishable. New GM Opening Brief at 27-31 (citing *In re Envirodyne Indus., Inc.*, 206 B.R. 468 (Bankr. N.D. Ill. 1997) (concluding that claimants asserting antitrust claims were unknown creditors where there was" totally insufficient proof that [the debtor] knew or should have known that [claimant] held a clam for anti-trust violations on its part" and pointing out that "Plaintiffs seem to be arguing that the debtor should have chased down every person who ever bought plastic cutlery over a three year period to personally notify such person that it might have an antitrust claim against the debtor.") (emphasis added); *In re Enron Corp.*, No. 01-16034 (ALG), 2006 WL 898031 (Bankr. S.D.N.Y. March 20, 2006) (holding that state asserting late claim based on debtor's alleged manipulation of "western power markets" was not a known creditor simply because federal agency was generally investigating price manipulation in those markets and where any investigation by the debtors of their records would not have indicated that state held a claim); *In re Agway, Inc.*, 313 B.R. 31 (Bankr. N.D.N.Y. 2004) (holding that claimant asserting contribution claim was not a known creditor because claim was "uncertain and speculative" from the debtor's perspective)).

under state law to sue a successor company for damages they suffered as a result of this undisclosed safety defect.

1. *Old GM's Failure To Disclose To Potential Claimants Facts Necessary For Them To Realize They Had Claims Deprives Them of Due Process*

When a debtor can reasonably ascertain the existence of a creditor's claim and identity but the creditor himself is unaware of the claim, due process requires the debtor to take measures reasonably calculated to apprise that creditor of the facts necessary for him to protect his rights and property interests from being extinguished through the bankruptcy. Courts within this circuit have recognized that due process should "require that a debtor notify a creditor of his claim when the creditor is unlikely to know about the claim otherwise" because "[a] creditor who is notified of the bankruptcy, but not of his claim, is in the same position as a creditor who has notice of his claim, but not of the bankruptcy." *Waterman S.S. Corp. v. Aguiar (In re Waterman S.S. Corp.)*, 141 B.R. 552, 559 (Bankr. S.D.N.Y. 1992) (quoting *Acevedo v. Van Dorn Plastic Machinery Co.*, 68 Bankr. 495, 499 (Bankr. E.D.N.Y. 1986)); *Gabauer v. Chemtura Corp. (In re Chemtura Corp.)*, 505 B.R. 427, 429-30 (S.D.N.Y. 2014) (same). *See also*, *Travelers Cas. & Sur. Co. v. Chubb Indem. Ins. Co. (In re Johns-Manville Corp.)*, 600 F.3d 135, 157 (2d Cir. 2010) ("*Manville IV*") (finding due process violation where a party provided with publication notice of a major settlement between the debtor and its primary insurer would have had to have been "prescient" about the debtor's relationship with its insurer and of future bankruptcy court interpretations of its orders to adequately comprehend that the proposed settlement purported to bar third party claims against the insurer that were not derivative of claims against the debtor).

Thus, a debtor that has actively withheld necessary facts upon which a claim is to be based cannot benefit from serving (either by publication or by mail) a generic notice to known creditors that does not inform them of the facts necessary for them to learn that their claims exist.

See, e.g., *Tillman v. Camelot Music, Inc.*, 408 F.3d 1300, 1308 (10th Cir. 2005) (debtor took out life insurance policies on employees but concealed existence of policies from employees and their families; post-emergence, widow of deceased employee sued to recover life insurance proceeds paid to debtor pre-petition; Tenth Circuit held that, because debtor concealed existence of policies underlying claim, claimant was denied due process as a result of only receiving generic publication notice of the existence of the bankruptcy case and, thus, her claims were not discharged in bankruptcy); *DPWN Holdings (USA), Inc. v. United Air Lines, Inc.*, 871 F. Supp. 2d 143, 155-56 (E.D.N.Y. 2012) ("*DPWN Holdings I*"), *rev'd on other grounds*, 747 F.3d 145 (2d Cir. 2014) ("*DPWN Holdings II*") ("The due process rights of an unknowing victim of a debtor's secret unlawful conduct are not protected by the victim's receipt of notice of the debtor's bankruptcy proceedings. Absent any practicable means of identifying what claim he might have, such a victim is no more able to become a claimant in the bankruptcy proceeding than if he had not received notice at all.").

The Supreme Court in *Mullane* recognized that that notice cannot be a "mere gesture." *Mullane*, 339 U.S. at 315. Rather, the party giving notice must attempt to provide affected parties with "notice and opportunity for hearing appropriate to the nature of the case." (emphasis added.) *Id.* at 313. Thus, *Mullane* teaches that appropriate notice is not just a matter of execution; it is also a matter of content. The right to be heard "has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear, default, acquiesce or contest." *Id.* at 314. For the claimant to be able to make a meaningful decision whether to object, he or she must be told what is at stake. That is especially true where, as in *Mullane*, the party charged with giving the notice is the party that is benefitted by the absence of objections to the relief sought. *Id.* at 316 ("But it is [the trust beneficiaries'] caretaker who in the

accounting becomes their adversary. Their trustee is released from giving notice of jeopardy, and no one else is expected to do so.").

As known creditors of Old GM, all owners of vehicles containing the Ignition Switch defect – including those whose cars had already crashed – were entitled to constitutionally sufficient notice of the proposed sale to New GM rather than the generic notice that was published by Old GM in several newspapers or that, in some instances, was mailed to plaintiffs in pending lawsuits, which did not mention the defective Ignition Switch or list the Subject Vehicles. The notice that Old GM should have given should have identified the Ignition Switch defect and advised the owners of the Subject Vehicles that the vehicles they were riding in, or that had already crashed, contained an embedded defect that could trigger an unexpected moving stall that would not only shut off power to the engine but also disable the power steering and brakes and disengage the airbags. Because Old GM kept this information hidden from owners of these vehicles, they lacked the information needed to understand that they had viable claims against Old GM and its proposed successor corporation and to mount a knowledgeable, forceful, and fact-based opposition to the free and clear nature of the 363 Sale to the taxpayer-funded acquisition entity that became New GM. Denying owners of these defective vehicles this crucial information denied them due process and Old GM's provision of publication or mailed notice of the 363 Sale was ineffective vis-à-vis these known creditors.

The deficiency in Old GM's notice is illustrated by comparing it to the situation this Court faced in the Chemtura case. In that case, the debtor ("Chemtura") had manufactured diacetyl, a flavoring ingredient used in food products that is now known to be a carcinogen. As of Chemtura's 2009 bankruptcy filing, the company had ceased production and sale of diacetyl and was already a defendant in personal injury lawsuits brought by approximately fifty plaintiffs.

See Chemtura, 505 B.R. at 430. Unlike Old GM, which as noted above was required by federal law to maintain the names and addresses of all purchasers of its vehicles, Chemtura did not have a list of all potential claimants who may have been exposed to diacetyl it had manufactured and sold (*i.e*., they were unknown). Nevertheless, to ensure that the maximum number of potential claimants were aware of the bankruptcy and its impact on their tort claims, this Court approved a procedure for noticing potential diacetyl claimants of the bankruptcy case. To that end, the bar date in that case informed potential claimants of crucial facts necessary for them to determine if they had a claim against Chemtura for diacetyl exposure and how such claims could be impacted in the bankruptcy. Specifically, the approved notice explicitly told the reader: (i) that Chemtura sold diacetyl to food flavoring companies throughout the United States from 1998 to 2005, (ii) that diacetyl was used in butter flavorings, (iii) that direct or indirect exposure to diacetyl may cause injuries that become apparent now or in the future for which damages may be available under various legal theories, and (iv) that failure to file a proof of claim for claims arising from diacetyl exposure by the applicable bar date will result in those claims being forever barred. *Id*. at 429. In addition, the notice was "site-specific" in that it specifically referenced the flavoring companies that did business with Chemtura and was published in the local newspapers in the towns where such companies were located. *Id.* As a result of this noticing process, approximately 325 more plaintiffs filed diacetyl-related proofs of claim prior to the bar date. *See* Chemtura Tr. 9/13/2013, 29:1-9.

Post-confirmation, certain individuals filed lawsuits in state court against Chemtura seeking damages for diacetyl exposure. Chemtura moved before this Court to enjoin these lawsuits as discharged under Chemtura's confirmed chapter 11 plan. This Court granted the debtor's motion, finding that the specific, informative, and geographically targeted notices

afforded diacetyl claimants with due process such that their claims were properly discharged. On appeal, Judge Furman of the district court for the Southern District of New York affirmed, agreeing with this Court that the notice provided was "reasonably calculated, under all the circumstances, to apprise [the post-bankruptcy claimants] of the pendency of the action and afford them an opportunity to present their objections." *Chemtura*, 505 B.R. at 431 (quoting *Mullane*, 339 U.S. at 314).

The *Chemtura* decision highlights perfectly the failures of due process in this case. On one hand, Chemtura utilized an informative and targeted publication notice to alert its unknown creditors of the potential existence of their claims and what to do to protect such claims from being extinguished. This Court and the district court correctly found that such notice passed constitutional muster under applicable Supreme Court precedent. On the other hand, Old GM knew of the Ignition Switch defect for years and knew the identities and addresses of those who could file claims for the defect. Unlike Chemtura, however, Old GM kept such information from these known claimants and the Court and, instead, prepared a notice of the 363 Sale that failed to inform owners of defective vehicles that they had viable damage claims and that any assertion of claims for this defect against Old GM's successor would be enjoined under the free and clear provisions of the 363 Sale. Under these circumstances, such generic notice failed the *Mullane* "reasonably calculated" notice test, resulting in a denial of all Plaintiffs' due process rights.[15]

[15] The Pre-Closing Accident Plaintiffs expect that New GM will point to colloquy in *Chemtura* between this Court and plaintiffs' counsel in which the Court said that "when your car goes off the road and gets into a crash, that's not so latent. I mean you know about it . . . . When you have a car wreck, which is what I talked about in GM, that's in Macy's window, everybody knows when they're in a car wreck the instant that the car wreck takes place." *In re Chemtura Corp.*, Case No. 09-11233 (REG), Hrg. Tr. 14:12-22, Jan. 31, 2013 (attached as Exhibit A). First, the Court made this statement in January of 2013, which was over a year before New GM first publicly disclosed the existence of the Ignition Switch defect and its knowledge thereof. Second, Pre-Closing Accident Plaintiffs acknowledge that their injuries were not latent and that they knew at the time their cars crashed that they had been injured. What they did not know is that their injuries were caused by a defect that was, in essence, manufactured directly into their vehicles and that Old GM knew about for years but failed to disclose. This can be compared to a former employee of a food flavoring plant who suffered from lung cancer at the time Chemtura filed for bankruptcy.

2. *Old GM Has Made No Showing That Any Pre-Closing Accident Plaintiffs Were Aware Of The Ignition Switch Defect*

While the Pre-Closing Accident Plaintiffs did experience car crashes prior to the 363 Sale closing, Old GM has presented no evidence upon which this Court can base a finding that this subset of Plaintiffs were aware of the Ignition Switch defect that may have caused their accidents. Accordingly, there is no basis for New GM to argue that Pre-Closing Accident Plaintiffs were on notice of their defect-related claims and should have objected to the free and clear nature of the 363 Sale on the basis of the undisclosed defect (or otherwise) if they wanted to preserve the ability to seek redress from New GM.

The *DPWN Holdings* case is particularly instructive with respect to the Pre-Closing Accident Plaintiffs. In that case, United Air Lines ("United") allegedly participated in illegal price-fixing activity prior to filing for bankruptcy that resulted in overcharges to its customers, including DPWN Holdings (USA), Inc. ("DHL"). Although, as a trade creditor, DHL received actual notice of United's bankruptcy filing and the bar date, United never provided DHL specific information regarding potential antitrust violations. Following United's emergence from bankruptcy, DHL sued for antitrust violations and United moved to dismiss on the grounds that DHL's claims were discharged in bankruptcy. The district court (assuming for purposes of the motion to dismiss that DHL could not have discovered its antitrust claims until after the bankruptcy) rejected United's motion to dismiss, finding that "where a debtor is aware of certain claims against it due to information uniquely within its purview, due process requires that it notify claimants of the character of those claims prior to any discharge." *DPWN Holdings I*, 871

Such a claimant would have been reasonably alerted by Chemtura's specific notice that the physical injury from which he suffered may have been caused by Chemtura's diacetyl-containing product. That notice was calculated to apprise him of his claim and what he needed to do to protect it. On the other hand, the generic notice Old GM provided gave Pre-Closing Accident Plaintiffs no clue as to why their car may have crashed and, thus no reason to object to New GM being shielded from liability to them.

F. Supp. 2d at 159 (emphasis added). On appeal, the Second Circuit did not upset this holding, however, it found that because there were several allegations in DHL's complaint of public, pre-petition activity by United that could have alerted DHL to the existence of its antitrust claims prior to the bankruptcy, it remanded the case to the district court to determine what aspects of United's alleged price-fixing conduct were known by DHL or reasonably ascertainable prior to plan confirmation. *DPWN Holdings II*, 747 F.3d at 152-53. On remand, the district court again rejected a motion to dismiss by United and has ordered that the parties undergo document and deposition discovery so that the court may resolve the question of "what DHL know and when" on a full evidentiary record. *DPWN Holdings (USA), Inc. v. United Air Lines, Inc.*, 11-CV-564 (JG), 2014 U.S. Dist. LEXIS 130154, *6 (E.D.N.Y. Sept. 16, 2014) ("*DPWN Holdings III*").

Just as in *DPWN Holdings I*, Pre-Closing Accident Plaintiffs who may have received actual notice of the impending 363 Sale, were nonetheless denied due process because that notice failed to apprise them of vital information necessary for them to understand the consequences to them of the free and clear aspect of the 363 Sale. In particular, these victims were unaware that they had substantial grounds to oppose the successor liability shield requested by New GM as part of the 363 Sale. They were also unaware that they had a credible causal connection between the existence of a known but undisclosed defect in their vehicle and their accident that would enhance their ability to succeed in recovering damages from Old GM's successor if successor liability protection was not granted.

Moreover, as in *DPWN Holdings*, it is impossible on the record as it exists today for the Court to determine that any of the Pre-Closing Accident Plaintiffs knew or should have known of the undisclosed Ignition Switch defect present in their vehicles at the time of their accidents.

Indeed, with respect to incidents involving Subject Vehicles owned by Pre-Closing Accident Plaintiffs, the following matters have yet to be determined and are not undisputed:

1) the facts and circumstances of the incidents, including matters of causation or fault;
2) the substance of any direct or indirect communications between Old GM and any of the Pre-Closing Accident Plaintiffs with respect to the incidents; and
3) the veracity, responsiveness, or candor of any discovery responses or deposition testimony given in connection with any litigation between any of the Pre-Closing Accident Plaintiffs and Old GM pending prior to July 10, 2009 concerning such incidents.

See Additional Pre-Closing Accident Stipulated Facts, at Exh. A.[16] Because Old GM did not disclose the critical fact that all Subject Vehicles contained a dangerous defect that was known to Old GM since the early 2000's, the Pre-Closing Accident Plaintiffs were denied due process along with the rest of the Plaintiffs. Any suggestion by New GM that the Pre-Closing Accident Plaintiffs who actually received notice of the 363 Sale knew or reasonably should have known of the Ignition Switch defect lacks any evidentiary support. Moreover, as the *DPWN Holdings*

[16] As has been recently reported, crash victims are just now learning that their Pre-Closing Accidents were caused by the Ignition Switch defect. Indeed, relations of Ms. Jean Averill, who was killed in a 2003 single car accident involving a Saturn Ion, were reportedly told by GM that it was denying an insurance claim because her airbag did not deploy when her car unexpectedly swerved off the road and hit a tree. *See* Rachel Abrams, *11 Years Later, Woman's Death Is Tied to G.M. Ignition Defect*, NY TIMES, Nov. 10, 2014, *available at* http://www.nytimes.com/2014/11/11/business/11-years-later-death-is-tied-to-gm-defect.html?_r=0. Old GM also failed to inform Ms. Candice Anderson that Old GM had determined in 2007 that the accident she suffered in 2004 in a Saturn Ion that caused the death of her boyfriend and serious injuries to her was linked to the Ignition Switch defect. Rebecca R. Ruiz, *Woman Cleared in Death Tied to G.M.'s Faulty Ignition Switch*, NY TIMES, Nov. 24, 2014, *available at* http://www.nytimes.com/2014/11/25/business/ woman-cleared-in-death-caused-by-gms-faulty-ignition-switch.html?_r=0. Rather than inform Ms. Anderson of the safety defect that caused this fatal accident, Old GM remained silent as Ms. Anderson pled guilty to criminally negligent homicide in 2007. *Id.* Thus, despite Old GM's knowledge of this deadly defect and its links to accidents such as these, communications and actions by Old GM appear to have dissuaded victims and their family members from previously pursuing claims against Old GM or its successor, New GM. If Old GM misled Pre-Closing Accident Plaintiffs through misinformation or disclosure failures about the nature of their claims (*i.e.*, that they were caused by a known defect), how could such Plaintiffs have been afforded due process by receiving a generic notice that Old GM was being Sold to New GM in a free and clear sale?

cases instruct, any determination of a creditor's knowledge of the facts underlying its claim can only be made after discovery and a ruling by a court of competent jurisdiction.

C. Due Process Violations Prejudiced Plaintiffs By Depriving Them Of The Opportunity To Advocate That New GM Be Forced To Assume Their Claims

New GM attempts to evade the consequences of its predecessor's failure to afford due process to known creditors with claims arising from the Ignition Switch defect by arguing that these creditors suffered no prejudice as a result of not being notified of the Ignition Switch defect prior to the 363 Sale. Specifically, New GM argues that because certain personal injury claimants, state attorneys general, and consumer advocates were unsuccessful in opposing the 363 Sale and forcing New GM to assume all liabilities for claims arising from vehicles manufactured by Old GM, that the Plaintiffs' participation in the process would have been unavailing.[17] In essence, New GM argues that the outcome of the 363 Sale would have been no different (or that Old GM would have certainly been liquidated) had the Court, owners of GM vehicles, the federal government, state attorneys general, and consumer advocacy groups government actors known that millions of GM vehicles were dangerously defective and that Old GM knew about it for years. These arguments are pure self-serving speculation on the part of New GM and cannot be the basis to justify the due process violations that occurred here.

Without question, the Pre-Closing Accident Plaintiffs suffered prejudice when they were denied constitutionally sufficient notice of the 363 Sale and its impact on their undisclosed claims arising from the Ignition Switch defect. As a result of Old GM failing to disclose this defect, all Plaintiffs, including Pre-Closing Accident Plaintiffs, were denied the ability to attempt to affect the outcome of the 363 Sale hearing by making an informed objection to the free and

[17] Indeed, *Mullane* holds that each claimant's right to be heard is unique to it and a due process violation cannot be cured by proxy -- that is, by another claimant's receipt of notice and opportunity to be heard. *See Mullane*, 339 U.S. at 314 ("[The] right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest.") (emphasis added).

clear aspect of that sale. The arguments made by others against the successor liability shield were made without facts and, thus, were abstract legal and policy arguments about contingent future claims or the limits of the bankruptcy court's jurisdiction. Put simply, the Pre-Closing Accident Plaintiffs were not prejudiced by being denied the opportunity to lose in real time. Rather, the prejudice Pre-Closing Accident Plaintiffs suffered was that they were deprived of a meaningful day in court to argue the true state of affairs with the knowledge that they were injured by defective vehicles and that they had viable claims. This due process violation cannot be fixed by assuming that arguments that were never made would have been overruled. Indeed, the denial of a meaningful opportunity to be heard is itself the prejudice, regardless of whether the result would have been different.[18]

Any suggestion by New GM that the Court would have ruled no differently even if it had the Valukas Report in hand on July 9, 2009, is unknowable speculation. No court can truly predict what it would have done if it had known that Old GM had known about this dangerous defect for years.[19] Moreover, no court can predict what the reactions of the other parties in the

[18] Plaintiffs dispute that a finding of "prejudice" is a prerequisite for this Court to find a denial of due process. Prejudice is not an element of due process. Rather, the cases that find no denial of due process usually do so based upon the claimant's eventual opportunity to be heard before relief was entered against it. Thus, the cases cited on pages 36 through 40 of the New GM Opening Brief generally set a "no harm, no foul" rule if the violation is cured, as opposed to an affirmative requirement for the injured party to show prejudice as a condition to obtaining relief.

[19] In support of its position that due process was satisfied because this Court approved the content and delivery mechanisms for the 363 Sale notice, New GM relies on statements this Court made when it barred a claimant (Shane Robley) from prosecuting a post-363 Sale lawsuit against New GM for injuries he suffered when his GM vehicle rolled over. *See* New GM Opening Brief at 35; Hr'g Tr. 25:21-26:4, June 1, 2010 . Reliance on these statements, however, is misplaced because such statements were made years before New GM disclosed the existence of the Ignition Switch defect. Under the circumstances known to the Court at the time – not having been told that millions of Subject Vehicles were known by Old GM to be hazardously defective – it is unsurprising that the Court approved a generic notice of the 363 Sale and permitted that notice to be served by publication pursuant to *Mullane*. That said, it is unknowable whether this Court would have approved the same notice and delivery mechanism had Old GM told the Court of the Ignition Switch defect before seeking approval of that notice. Indeed, when ruling against Mr. Robley this Court made clear that the result may have been different had there been evidence that Old GM had known of Mr. Robley's injuries and chose to use publication notice rather than a more effective method. Hr'g Tr. 28:2-9, June 10, 2010 ("If GM knew back then that your client had already been injured and chose to use the publication route rather than a way that would get to him more directly, that kind of factual circumstance would have troubled me."). Unlike Mr. Robley, here there is ample evidence before the Court that Old GM knew at the time it sought approval of the 363 Sale notice that all Subject Vehicles were defective and that the owners of such

case would have been in July of 2009 if the entire landscape of the case had undergone a seismic shift in the wake of the disclosures that were made in the Valukas Report. The same firestorm that erupted in 2014 likely would have erupted in 2009. Would the Department of the Treasury still have insisted on purchasing the assets free and clear of the claims of Plaintiffs, including Pre-Closing Accident Plaintiffs? Would Congress have sat still in the face of political pressure from angry constituents? Would the Executive Branch have supported using taxpayer money for a bailout that shielded New GM from the claims of the Pre-Closing Accident Plaintiffs? No one knows the answer to any of those questions and, as a result of the due process failures described above, Pre-Closing Accident Plaintiffs were forever barred from learning the answers.

For these reasons, the denial of due process prejudiced the Pre-Closing Accident Plaintiffs. But even though there are no do-overs and the sale is beyond revocation, as explained in the following section, binding precedent does provide a remedy: the free and clear aspects of the Sale Order and Injunction are inoperative as to those persons that were denied the notice they were entitled to receive.

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vehicles had potential successor liability claims that were to be extinguished through the 363 Sale. Under these circumstances, the notice given was unconstitutionally deficient and deprived all Plaintiffs of due process.

II. REMEDIES THESHOLD ISSUE: THE PROPER REMEDY FOR A DUE PROCESS VIOLATION IS TO PERMIT PLAINTIFFS TO PURSUE ALL RIGHTS OTHERWISE AVAILABLE ABSENT THE INJUNCTIVE PROVISIONS OF THE SALE ORDER AND INJUNCTION

For the reasons discussed above, Plaintiffs were denied procedural due process in connection with the Sale Motion and the Sale Order and Injunction. The proper remedy for such a due process violation is clear: the Plaintiffs cannot be bound by the Sale Order and Injunction to the extent it purported to enjoin the assertion of claims against New GM. As discussed below, this result is dictated by governing precedent of the Second Circuit Court of Appeals. Thus, the Plaintiffs must be permitted to pursue any and all available remedies for their injuries, including successor liability claims against New GM. As explained further below, this remedy does not have the effect of "setting aside" or "rewriting" the Sale Order and Injunction, notwithstanding New GM's attempt to characterize it as such. Rather, this remedy simply gives effect to the constitutional directive that absent due process, Plaintiffs could not have been deprived of their right to sue New GM.

A. Second Circuit's Decision In *Manville IV* Dictates Appropriate Remedy

In *Manville IV*, the Second Circuit specifically addressed the appropriate remedy for a due process violation resulting from a debtor's failure to give adequate notice in connection with a bankruptcy court order enjoining claims against non-debtors. *Manville IV*, 600 F.3d at 138. In that case, the bankruptcy court entered orders in 1986 (as well as a "clarifying order" in 2004) that enjoined claims against certain settling insurers, including Travelers Indemnity Company ("Travelers"). *Id.* at 141-42. The injunction of claims was part of a settlement through which Travelers agreed to contribute hundreds of millions of dollars to the debtor's estate. Years after entry of the 1986 orders, Chubb Indemnity Insurance Co. ("Chubb"), one of the parties purportedly subject to the injunction, argued that it could not be bound by the 1986 orders for

two independent reasons. First, Chubb argued that the bankruptcy court lacked subject matter jurisdiction to enjoin its claims against Travelers. *Id.* at 148. Second, Chubb argued that "it could not, as a matter of due process, be bound to the 1986 Orders' terms" because "it was not given constitutionally sufficient notice of the 1986 Orders." *Id.* at 137, 142. Chubb's due process argument was the focus of the Second Circuit's decision in *Manville IV*. *Id.* at 149 ("With respect to due process . . . . the issue is therefore whether Chubb may be bound at all by the 1986 Orders, whatever their meaning." (emphasis added)).

According to the Second Circuit, Chubb was "correct" that it did not receive constitutionally sufficient notice of the 1986 orders and that as a remedy, "due process absolves it from following them, whatever their scope." *Id*. at 137 (emphasis added, internal quotation marks omitted). In other words, because Chubb's due process rights were violated, it was "not bound by the terms of the 1986 Orders." *Id.* at 158 (emphasis added). As a result, Chubb was free to pursue its claims against Travelers notwithstanding the 1986 orders' purported injunction of those claims.[20] Based on the foregoing, the Court need look further than *Manville IV* to answer the Remedies Threshold Issue.[21]

[20] In its opening brief, New GM argues that because it was Old GM's obligation to provide adequate notice of the Sale Order and Injunction, any due process violation would have been committed by Old GM. New GM Opening Brief at 51. As such, New GM argues, it would be inappropriate to permit Plaintiffs to assert claims against New GM as a remedy for Old GM's due process violation. *Id.* Again, this argument is completely belied by the Second Circuit's holding in *Manville IV*, where Chubb was allowed to proceed against Travelers notwithstanding the fact that the debtor had failed in its obligation to provide constitutionally sufficient notice of the 1986 orders. Indeed, there is nothing in the Constitution that ties a litigant's right to adequate notice to fault or motive – either sufficient notice was given or it was not.

[21] The remedy imposed by the Second Circuit in *Manville IV* was anything but novel. U.S. Supreme Court precedent has long established that parties cannot be bound by the purported extinguishment of rights by courts or other government actors absent constitutionally sufficient notice. *See, e.g.*, *Mennonite Bd. of Missions*, 462 U.S. at 798-99 (holding that mortgagee could not be bound by tax sale of property where mortgagee was not provided constitutionally sufficient notice); *New York, New Haven & Hartford R.R. Co.*, 344 U.S. at 296 (holding that lien creditor could not be enjoined from enforcing liens on railroad's assets following reorganization because creditor was not provided with constitutionally sufficient notice of claims bar date); *Mullane*, 339 U.S. at 320 (holding that party could not be bound by judicial settlement of trust because notice was constitutionally deficient).

Tellingly, New GM failed to even cite *Manville IV* in its opening brief and instead opted to discuss inapposite and out-of-circuit authority. Any attempt by New GM to argue that *Manville IV* is somehow distinguishable because it addressed injunctions contained in confirmation and settlement orders (rather an order approving a sale) would not withstand scrutiny. Indeed, New GM's own brief contends that the Second Circuit's earlier analysis of the very same *Johns-Manville* orders and injunctions should inform the Remedies Threshold Issue in this case. New GM Opening Brief at 56 (citing *MacArthur Co. v. Johns-Manville Corp.*, 837 F.2d 89, 94 (2d Cir. 1988)). Moreover, the Second Circuit's *Johns-Manville* decision on which New GM relies explained that the bankruptcy court's order approving the settlement was actually akin to a section 363 sale order:

> The Bankruptcy Court, having jurisdiction over the property of the Bankrupt, and having jurisdiction to order the sale of the Bankrupt's property . . . had jurisdiction to enjoin a lien-holder from attempting to assert his lien against property in the hands of a purchaser who has acquired from the Bankruptcy Court a title free and clear of liens and encumbrances . . . . Admittedly, the insurance settlement and accompanying injunction in this case are not precisely the same as a traditional sale of real property free and clear of liens followed by a channeling of the liens to the proceeds of the sale . . . . Here, the property of the estate at issue (insurance policies) was not technically 'sold'; rather, Manville liquidated its interest via a voluntary settlement . . . . Nevertheless, the underlying principle of preserving the debtor's estate for the creditors and funneling claims to one proceeding in the bankruptcy court remains the same.

MacArthur, 837 F.2d at 93-94 (emphasis added).

In any event, even if the 1986 orders in *Manville IV* were not analogous to a sale order, the Second Circuit's due process remedy analysis would still apply with full force here. In both instances, claims against non-debtors were purportedly enjoined through an insufficiently noticed bankruptcy court order. There is no principled basis to argue that the appropriate remedy for the same constitutional violation should change based on whether an injunction is contained

in an order approving a sale as opposed to an order approving a settlement or confirming a plan. To that end, courts within the Second Circuit apply *Manville IV*'s due process remedy in the precise context of improperly noticed sale orders. *Morgan Olson L.L.C. v. Frederico (In re Grumman Olson Indus., Inc.)*, 467 B.R. 694, 709 (S.D.N.Y. 2012) ("Here, the court is not addressing whether [claimants] will ultimately be able to sustain their successor liability claim, the question is whether the Sale Order prevents them from even bring the suit in the first place. In light of the due process problems that would result from such an interpretation, the Court holds that the Sale Order cannot be enforced in this manner."). *See also Koepp v. Holland*, No. 13-4097, 2014 U.S. App. LEXIS 22108, *5-*6 (2d Cir. Nov. 21, 2014) (citing *Manville IV* and *Grumman* and ruling that a bankruptcy court could not extinguish property interests of parties who did not receive notice of the bankruptcy proceedings); *In re Savage Indus., Inc.*, 43 F.3d 714, 721-22 (1st Cir. 1994) (holding that plaintiffs' successor liability claims against asset purchaser could not be enjoined, notwithstanding "fee and clear" nature of the sale because plaintiffs were denied adequate notice in connection with sale); *Schwinn Cycling & Fitness v. Benonis*, 217 B.R. 790, 797 (N.D. Ill. 1997) (refusing to enjoin successor liability claims against asset purchaser where plaintiffs did not receive constitutionally sufficient notice in connection with the sale).

B. Authority Cited By New GM Is Inapposite

In addressing the Remedies Threshold Issue, New GM erroneously conflates two distinct concepts: (i) the "rewriting" or "setting aside" of a final bankruptcy court order and (ii) the determination that certain parties are not bound by its terms because they were denied due process. The Plaintiffs are only pursuing the latter remedy and are not seeking to rewrite or set aside the Sale Order and Injunction. In confusing these concepts, New GM cites case law that is simply inapposite. *See* New GM Opening Brief at 52-56. As the Second Circuit has recently

explained, excepting parties from the injunctive terms of a bankruptcy court's final order based on a lack of due process does not have the effect of rewriting or revoking that order. *In re Johns-Manville Corp*., 759 F.3d 206, 215 (2d Cir. 2014) ("*Manville V*").

This very issue arose in *Manville V*, where Travelers attempted to evade its settlement obligations to the debtor's estate based on the Second Circuit's ruling in *Manville IV* that Chubb was not bound by the injunctive provisions of the bankruptcy court's 1986 and 2004 orders. According to Travelers, the *Manville IV* decision had the effect of preventing the occurrence of two conditions precedent to its payment obligations under the settlement agreement. *Id.* at 213. The first condition precedent was that the bankruptcy court's 2004 clarifying order contain injunctive provisions of a specific breadth. *Id.* at 214. The second referenced condition precedent was that the 2004 clarifying order become a "final order." *Id.*

With respect to the "breadth" condition precedent, Travelers argued that although the bankruptcy court's order contained the injunctive language required by the settlement agreement, the *Manville IV* holding had the effect of rewriting the order's injunctive provisions. *Id.* at 215. In rejecting this argument, the Second Circuit pointed out the injunctive language in the bankruptcy court's order had been affirmed on appeal to the United States Supreme Court "and has not been altered since." *Id.* According to the Second Circuit,

> The fact that Chubb may collaterally attack the applicability of the Clarifying Order to actions it might bring – because it never received constitutionally sufficient notice – does not alter our conclusion. The error in Travelers' reading of the Clarifying Order stems from its conflation of two separate issues: (i) a party's ability to collaterally attack an order for lack of constitutional notice; and (ii) the integrity of that order and the breadth of the claims it bars.

Id. (emphasis added).

With respect to the "finality" condition precedent, Travelers similarly argued that the decision in *Manville IV* prevented the bankruptcy court's order from becoming "final." *Id.* at

217-18. In dismissing this argument, the Second Circuit pointed out that Travelers was again conflating two separate concepts in that Chubb's due process argument "had no bearing" on whether the bankruptcy court's order became final. *Id.* at 218. In other words,

> [*Manville IV*] did not alter any aspect of the Clarifying Order . . . . The fact that Chubb is not bound by the 1986 Orders does not, therefore, render the 1986 Orders any less 'final.'" . . . It would defy logic to hold that the Clarifying Order, as an extension of the 1986 Orders, is not 'final' simply because Chubb did not receive constitutionally adequate notice of the 1986 proceedings. If the 1986 Orders are final despite the inapplicability of the orders to Chubb, it follows that the Clarifying Order is just as final.

Id.

Just as Travelers did in *Manville V*, New GM incorrectly conflates a revocation or rewriting of the Sale Order and Injunction with a determination that certain parties are simply not bound by its the terms.[22] As explained in *Manville V*, a determination that Plaintiffs are not enjoined from asserting claims against New GM will neither modify the substantive terms of the Sale Order and Injunction nor alter its finality. New GM's argument is therefore based on the false premise that such a remedy would effect a "rewriting" or "revocation" of the Sale Order and Injunction that somehow undermines its finality. As instructed by *Manville IV*, a determination that Plaintiffs are not enjoined from asserting claims against New GM is the appropriate remedy recognized by the Second Circuit. As held in *Manville V*, such a remedy will neither rewrite nor revoke the Sale Order and Injunction, which will remain a final order, as entered by the Court in 2009.

Rather than acknowledging the Second Circuit's governing rulings in *Manville IV* and *Manville V*, New GM instead cites case law that has no application in this context. *See, e.g.*, New GM Opening Brief at 52-56 (citing *Cedar Tile Corp. v. Chandler's Cove Inn, Ltd.*, 859 F.2d

[22] Similar to its failure to address *Manville IV*, New GM's opening brief also fails to even acknowledge the Second Circuit's decision in *Manville V*.

1127 (2d Cir. 1988) for the proposition that a sale of substantially all of a debtor's assets can be unwound in its entirety if there was no notice or a hearing as required by Bankruptcy Code § 363(b); *In re BFW Liquidation, LLC*, 471 B.R. 652 (Bankr. N.D. Ala. 2012) (holding that transaction to sell substantially all of the debtor's assets could not be unwound in its entirety in case where no due process violation had occurred); *Douglas v. Stamco*, 363 Fed. App'x 100 (2d Cir. 2010) (affirming district court's dismissal of claims against purchaser of debtor's assets where (i) plaintiff failed to even plead successor liability; (ii) sale order provided that transaction was "free and clear" under Bankruptcy Code § 363(f); (iii) no lack of notice or due process violation was alleged with respect to the sale order and (iv) plaintiffs sought no relief from sale order); *Doktor v. Werner Co.*, 762 F.2d 494, 498-500 (E.D.N.Y. 2011) (dismissing claims against purchaser of debtor's assets where (i) plaintiff failed to establish a basis for successor liability; (ii) sale was "free and clear" of successor liability; (iii) no lack of notice or due process violation was alleged and (iv) plaintiff did not seek relief from sale order); *Morgenstein*, 462 B.R. at 500-05 (holding that plan confirmation order could not be partially revoked under Bankruptcy Code § 1144 and that plaintiff had utterly failed to adequately plead its fraud claim)).

Among the inapposite cases cited by New GM are those addressing Bankruptcy Code section 363(m), which provides that in the event of "reversal or modification on appeal" of an un-stayed sale order, "the validity of a sale" to a good faith purchaser will not be affected. *Id.* at 54-56 (emphasis added). New GM also relies on cases for the proposition that a sale order cannot be "partially revoked" because the order can only be completely valid or completely void. *Id.* None of these cases support New GM's position. First, Bankruptcy Code section 363(m) has no application to this dispute because it does not involve an appeal of the Sale Order and Injunction but rather, a constitutional challenge to its application to certain individuals after the

order became final. The section 363(m) cases cited by New GM do not even purport to address the appropriate remedy in this context.[23] New GM Opening Brief at 54-56 (citing *United States v. Salerno*, 932 F.2d 117 (2d Cir. 1991); *Campbell v. Motors Liquidation Co. (In re Motors Liquidation Co.)*, 528 B.R. 43 (S.D.N.Y. 2010)).

Second, notwithstanding, an out-of-circuit case opining that an asset sale cannot be partially revoked, *see* New GM Opening Brief at 55 (citing *In re Fernwood Markets*, 73 B.R. 616 (Bankr. E.D. Pa. 1987)), governing precedent of the Second Circuit provides that (i) parties are simply not bound by the injunctive provisions of a bankruptcy court order to the extent they were not given constitutionally sufficient notice and (ii) such a remedy does not have the effect of even partially revoking or rewriting the bankruptcy court's order. *Manville V*, 759 F.3d at 218 ("The Clarifying Order, as a restatement of the of the 1986 Orders' injunction, precludes claimants . . . from further prosecution of those claims against Travelers . . . The fact that Chubb may collaterally attack the applicability to the Clarifying Order to actions it might bring – because it never received constitutionally sufficient notice – does not alter our conclusion." (emphasis added)); *see also Grumman*, 467 B.R. at 711 ("The Court holds only that, under the circumstances presented in this case, to enforce the sale Order to enjoin [claimants'] state law suit would deny them due process . . ." (emphasis added)). Thus, New GM's argument lacks merit because Plaintiffs are not seeking a partial revocation of the sale order nor are they seeking to affect New GM's title to the purchased assets.

[23] New GM argues that section 363(m) should shield both appeals of un-stayed sale orders and post-closing due process challenges because, in its view, "the same reasoning applies." *Id.* at 55. This is simply wishful thinking untethered to law. The terms of section 363(m) speak for themselves: they apply to appeals. Furthermore, applying section 363(m) in such a manner would permit the calculated disregard of parties' due process rights without any practical consequence. New GM also misapprehends the scope of section 363(m), even where it does apply. As noted above, section 363(m) protects only the "validity" of a sale of assets to a good faith purchaser if the sale order is reversed. 11 U.S.C. § 363(m). Section 363(m) does not insulate all aspects of an un-stayed sale order from appellate challenge. Indeed, the special protections of section 363(m) would be unnecessary if certain aspects of a sale order were not subject to reversal or modification on appeal.

New GM's argument that the remedy sought by Plaintiffs "would result in an unjustified windfall" is equally misguided.[24] New GM Opening Brief at 55. The Plaintiffs did not choose to have their due process rights violated. The present litigation is before the Court only because Old GM denied Plaintiffs constitutionally sufficient notice in connection with the Sale Order and Injunction. As explained above, the existence of the undisclosed defect in the Subject Vehicles was known to Old GM for years prior to its bankruptcy proceedings. The decision of whether to provide Plaintiffs with adequate information of the Ignition Switch defect was uniquely in the control of Old GM personnel. This failure to provide constitutionally sufficient notice has consequences. The consequence here is that Plaintiffs cannot be bound to the injunctive terms of the Sale Order and Injunction. A different result would only incentivize companies to withhold information until after a "free and clear" sale has been accomplished as both Old GM and New GM did here.[25]

[24] In support of this argument, New GM cites the Third Circuit's decision in *In re Trans World Airlines, Inc.*, 322 F.3d 283, 291-93 (3d Cir. 2003) ("*TWA*"). That decision lends no support to New GM's position because it addressed only whether successor liability claims are "interests" subject to the "free and clear" language of Bankruptcy Code § 363(f). Thus, *TWA* has no bearing on the appropriate remedy for a due process violation in connection with a sale that was purportedly "free and clear" of successor liability claims.

[25] Thus, contrary to New GM's argument, the truly inequitable result would be to permit Old GM personnel to cross over to the other side of the room, start calling themselves "New GM" and then blame "Old GM" personnel for the deficiency in notice. Essentially, New GM is blaming itself. Old GM personnel knew they would be New GM employees the moment the Sale was approved. Thus, Old GM had every incentive to leave the liability for the Subject Vehicles behind so that its new incarnation would not be saddled with the obligations to account to these victims.

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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

OPENING BRIEF BY GENERAL MOTORS LLC ON THRESHOLD ISSUES CONCERNING ITS MOTIONS TO ENFORCE THE SALE ORDER AND INJUNCTION

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INTRODUCTION

In June 2009, during a period of dramatic financial upheaval, this Court was assigned the *Old GM*[1] bankruptcy case—one of the largest, most complex Chapter 11 cases in U.S. history. Old GM's bankruptcy not only directly jeopardized hundreds of thousands of jobs at Old GM, but also threatened many inter-related companies and jobs that depended on Old GM's business. President Barack Obama emphasized the importance of Old GM's business and a healthy automotive industry to our national interest. Ultimately, the United States and Canadian Governments ("**Governments**") decided that Old GM's business had to be saved. They formed a new entity, which became New GM, that acquired substantially all of Old GM's assets pursuant to the 363 Sale. The milestone event in the Old GM bankruptcy was this Court's Sale Order and Injunction (**Appendix, Exh. "E"**), which approved the 363 Sale to New GM.

In its Sale Decision, this Court outlined the multiple compelling reasons that supported the approval of the 363 Sale. In short, Old GM's core assets needed to be sold immediately, New GM was the only viable entity willing to purchase those assets based on "national interests" concerns, and the failure to consummate the 363 Sale would have been disastrous for the creditors of Old GM and the public at large. Certain creditors of Old GM, who would not be

[1] Capitalized terms not defined herein shall have the meanings ascribed to them in the *Motion of General Motors LLC Pursuant to 11 U.S.C. §§ 105 and 363 to Enforce the Court's July 5, 2009 Sale Order and Injunction* on April 21, 2014 [Dkt. No. 12620] ("**Motion to Enforce**") (**Appendix, Exh. "A"**). Unless otherwise indicated, the term "**Plaintiffs**" means the plaintiffs in the Ignition Switch Actions, as well as the plaintiffs that are subject to (i) the *Motion of General Motors LLC Pursuant to 11 U.S.C. §§ 105 and 363 to Enforce the Court's July 5, 2009 Sale Order and Injunction (Monetary Relief Actions, Other Than Ignition Switch Actions)* [Dkt. No. 12808] ("**Non-Ignition Switch Actions**") (**Appendix, Exh. "B"**), and (ii) the *Motion of General Motors LLC Pursuant to 11 U.S.C. §§ 105 and 363 to Enforce the Court's July 5, 2009 Sale Order and Injunction Against Plaintiffs in Pre-Closing Accident Lawsuits* [Dkt. No. 12807] (**Appendix, Exh. "C"**) ("**Pre-Closing Accident Cases**" and along with the Ignition Switch Actions and the Non-Ignition Switch Actions, collectively, the "**Actions**"). The term "**363 Sale"** means the transaction pursuant to which New GM acquired substantially all of the assets of Old GM. The term "**Sale Decision**" means the Court's July 5, 2009 *Decision on Debtors' Motion for Approval of (1) Sale of Assets to Vehicle Acquisition Holdings LLC; (2) Assumption and Assignment of Related Executory Contracts; and (3) Entry into UAW Retiree Settlement Agreement* [Dkt. No. 2967] (as modified by the Court's Errata Order [*see* Dkt. No. 2985]) (published at 407 B.R. 463 (Bankr. S.D.N.Y. 2009)). The term "**Sale Agreement**" means the *Amended and Restated Master Sale and Purchase Agreement*, dated June 26, 2009 (as amended) (**Appendix, Exh. "D"**), approved by the Court's Sale Decision, and Sale Order and Injunction.

paid in full under the 363 Sale, contested the 363 Sale in an attempt to increase the amounts they would be paid on their claims. But the U.S. Treasury drew a line in the sand: New GM would assume only those liabilities that the U.S. Treasury decided were commercially necessary for New GM's success. In particular, U.S. Treasury did not agree that New GM would assume successor liability claims, pre-petition accident claims, economic loss claims relating to Old GM vehicles and parts, and various claims predicated on Old GM's conduct.

Now, more than five years after the entry of the Sale Order and Injunction, well after the full implementation of the 363 Sale, Plaintiffs resurrect the same failed arguments as the creditors before them made in seeking payments from New GM for Old GM's liabilities. Specifically, Plaintiffs seek to hold New GM liable for a variety of Retained Liabilities, which is a violation of the Sale Order and Injunction.

Plaintiffs essentially concede that the Sale Order and Injunction would bar many of their claims. Nevertheless, they allege, without merit, that the Sale Order and Injunction should not be binding on them because Old GM deprived them of "proper" notice of the Sale Hearing. Plaintiffs further allege that, if they had received such notice from ***Old GM***, they would have objected to the 363 Sale and changed the outcome of the Sale Hearing with respect to their claims. Plaintiffs have not, however, disclosed any new arguments that other objectors to the Sale Motion (as defined below) did not make. Nor have Plaintiffs explained how these unarticulated, new arguments would have changed the 363 Sale outcome. Presumably, Plaintiffs will not contend that their arguments would have resulted in the denial of the Sale Motion back in 2009 because, in that case, as this Court has already found, Old GM would have liquidated and unsecured creditors (including Plaintiffs) would have received nothing on their claims. Such a result would have been far worse for Plaintiffs in the Ignition Switch Actions and Non-Ignition

Switch Actions because there would have been no entity to pay for any applicable glove box warranty repairs on their vehicles, or the recall repairs that are now being done at no cost to vehicle owners.

Plaintiffs' opaque hypothesis—that they somehow could have coerced New GM to assume their alleged pre-petition "economic loss" claims—ignores the following material undisputed facts, which inexorably lead to a contrary result. At the Sale Hearing, New GM refused to assume the claims of pre-closing accident claimants (including those subject to the Pre-Closing Accident Cases). There is no basis to assume that New GM would have paid economic loss claims for Old GM vehicles (*e.g.*, the loss in value of their vehicles) when it did not pay for the pre-closing injuries and property damage purportedly caused by the same Old GM vehicles. In addition, New GM refused to pay for any warranty claims, other than the glove box warranty and Lemon Law claims. There is likewise no basis to assume that New GM would have paid economic loss claims based on breaches of the same warranties that New GM refused to assume. New GM also refused to assume unconsummated class action settlements (such as *Castillo*, *Dexcool* and *Soders*[2]) relating to alleged defects in Old GM vehicles. There is also no basis to assume that New GM would have paid Plaintiffs' unliquidated, contingent warranty claims and not pay the fixed, liquidated claims set forth in the class action settlements. The purchaser testified that it would not have gone through with the 363 Sale if it were forced to assume such claims. Yet, somehow, Plaintiffs in the Ignition Switch Actions and the Non-Ignition Switch Actions contend, without explanation, that they had the missing "silver bullet"—the secret leverage point that would have forced a different result for them.

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[2] *See* Dkt. No. 6622 (Order dated August 10, 2010 approving resolution of *Soders*-related claims) (**Appendix, Exh. "F"**); Dkt. No. 10172 (Order dated May 3, 2011 approving resolution of *Dexcool* claims) (**Appendix, Exh. "G"**). The *Castillo* decision was recently affirmed by the Second Circuit and is discussed *infra*.

Importantly, the fact that Plaintiffs did not participate in the Sale Hearing did not preclude them, like other purported unsecured creditors, from asserting claims against Old GM seeking their allocable share of the 363 Sale proceeds. Old GM's bankruptcy schedules were filed after the 363 Sale was consummated, the unsecured claims bar order was entered after the 363 Sale was consummated, and the Old GM plan of liquidation was consummated years after the 363 Sale was consummated. Each of these events—relating to the determination of Plaintiffs' claims against Old GM—(a) obviously are not related to the 363 Sale since they all occurred ***after*** the 363 Sale, and (b) relate to the conduct of Old GM only (not New GM). Thus, any grievance that Plaintiffs may have about the bankruptcy process relating to their claims should be brought against Old GM (and its successor, the GUC Trust). Plaintiffs have no legitimate grievance against the 363 Sale and the amounts paid by New GM thereunder, which had the salutary effect of creating a fund for the unsecured creditors of Old GM.

Plaintiffs also argue, without any basis in fact, that there was a "fraud on the court" by ***Old GM*** in connection with the entry of the Sale Order and Injunction. Old GM was insolvent by tens of billions of dollars at the time of the Sale Hearing. Yet, Plaintiffs speculate, without any foundation, that Old GM and their restructuring professionals intentionally hid these particular product defect claims because they were somehow outcome-determinative of the issues that the Court needed to decide in approving the 363 Sale. Of course, the opposite is true: the more insolvent Old GM was, the more compelling the basis for the 363 Sale. And, at the time of the 363 Sale, while no one knew the quantum of economic loss claims that would actually be filed against Old GM,[3] the Sale Agreement always contemplated that there could be

[3] Plaintiffs' "fraud on the court" theory (which is based on the notion that their claims represented the tipping point for the approval of the 363 Sale) should be measured against the undisputed fact that, after the 363 Sale, there were ultimately 70,000 proofs of claim filed against Old GM; ***29,000 of which were unliquidated***. The

economic loss claims for Old GM vehicles and that such claims would be Retained Liabilities. In other words, while the magnitude of economic loss claims was unknown, the Sale Agreement was clear as to who bore the liability for such claims—it remained with Old GM, the party that always had the liability. Finally, the "fraud on the court" theory is inconsistent with the Sale Agreement, which was structured to provide for an upward adjustment of the purchase price in the event that allowed unsecured claims (driven by economic loss claims, or otherwise) ultimately exceeded $35 billion. In any event, this concocted hypothesis would not constitute "fraud on the court" within the legal standard of Rule 60(d) of the Federal Rules of Civil Procedure ("**Fed. R. Civ. P.**").

In addition to pre-closing wrongful death and personal injury claims both inside and outside Multi-District Litigation ("**MDL**") 2543 (*In re: General Motors LLC Ignition Switch Litigation* (S.D.N.Y.)), this brief discusses the applicability of the Motions to Enforce to the approximately 130 Ignition Switch and Non-Ignition Switch "economic loss" actions that have been consolidated in the MDL, along with other economic loss actions which have not been transferred to the MDL that relate to vehicles and parts manufactured by Old GM. On October 14, 2014, Lead Plaintiffs in MDL 2543 filed two consolidated complaints against New GM, one on behalf of Plaintiffs who are asserting economic damages for vehicles purchased prior to the closing of the 363 Sale ("**Pre-Sale Consolidated Complaint**"), and the other on behalf of Plaintiffs who are asserting economic damages for vehicles purchased after the closing of the 363 Sale ("**Post-Sale Consolidated Complaint**," and with the Pre-Sale Consolidated Complaint, the "**Consolidated Complaints**").[4]

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aggregate amount of such claims totaled approximately ***$270 billion***. *See* Disclosure Statement, p. 33. Relevant excerpts of the Disclosure Statement are contained in the Appendix as **Exhibit "H."**

[4] Copies of the Consolidated Complaints are contained in the Appendix being filed simultaneously herewith as **Exhibits "I"** and **"J."**

Assuming Plaintiffs subject to the Pre-Sale Consolidated Complaint lose the Due Process Threshold Issue, that Complaint should be dismissed in its entirety because the claims alleged therein are unequivocally barred by the Sale Order and Injunction. So too if Plaintiffs in the Pre-Closing Accident Cases lose the Due Process Threshold Issue; those complaints should also be dismissed in their entirety, as the claims alleged therein are unequivocally barred by the Sale Order and Injunction.

This brief, therefore, will primarily focus on whether the Post-Sale Consolidated Complaint asserts Retained Liabilities of Old GM against New GM in violation of the Sale Order and Injunction.[5] The Post-Sale Consolidated Complaint repeats most of the allegations and the same causes of action set forth in the Pre-Sale Consolidated Complaint, including claims purportedly on behalf of a nationwide class of Plaintiffs based on (i) the Magnuson Moss Warranty Act; (ii) a breach of the implied warranty of merchantability; (iii) fraudulent concealment; and (iv) unjust enrichment. Both Consolidated Complaints also include putative "sub-classes" for each state and the District of Columbia, which assert various state law claims based on consumer protection statutes (as well as for fraud, breach of implied warranty of merchantability, and negligence).

In actuality, the title of the Post-Sale Consolidated Complaint is misleading to the extent it suggests that all of the economic loss claims alleged therein are based on vehicles sold by New GM post-363 Sale. They are not. The majority of Named Plaintiffs are asserting economic loss claims for ***Old GM vehicles*** that were resold by dealers or third parties (but not New GM) after the 363 Sale. Additionally, the economic loss claims in the Post-Sale Consolidated Complaint

[5] This brief discusses the applicability of the Motions to Enforce to all economic loss and Pre-Closing Accident Cases as a whole (whether an individual Action was included in the original Motions to Enforce or in a supplemental schedule filed with the Bankruptcy Court). The arguments are generally the same; where there are differences, they are noted in the relevant sections.

are for ***all*** GM-branded vehicles sold (or resold) after the 363 Sale—not just the vehicles that are subject to the various recalls instituted this year. In other words, Plaintiffs' economic loss claims include used Old GM vehicles that were resold after the 363 Sale but have never been the subject of any recalls**.** Economic loss claims related to Old GM vehicles and parts are not Assumed Liabilities and, therefore, by definition, are Retained Liabilities of Old GM.

In ***Point I*** below, New GM will show that Plaintiffs' due process argument is meritless[6] because Plaintiffs (a) received proper publication notice of the 363 Sale as "unknown" creditors, (b) were generally aware of the 363 Sale in June/July 2009 and took no action in respect of the 363 Sale, (c) are now making the same arguments that were rejected by the Court in connection with the Sale Hearing, and (d) would not have changed the outcome of the Sale Hearing even if they made their objections at that time.

In ***Point II*** below, New GM addresses the Remedies Threshold Issue and demonstrates that, if Plaintiffs have a due process grievance against any entity (they do not), it is not against New GM, but is instead against the party required to give notice, Old GM (and its successor, the GUC Trust). In all circumstances, Plaintiffs should not be put in a better position than they could have achieved had they actually participated in the Sale Hearing. As this Court found in the Sale Decision, New GM purchased Old GM's core assets in good faith. New GM had no involvement with either the final decision as to who would receive notice of the 363 Sale, or the scope of Old GM's pre-sale disclosures relating to product defects. In other words, even if Plaintiffs' contentions were correct (they are not), these matters involve Old GM's conduct, and

[6] Plaintiffs in the Pre-Closing Accident Cases presumably cannot make this due process argument because they clearly *knew* they had a claim against Old GM prior to the closing of the 363 Sale, and either (i) received direct mail notice of the Sale Motion because their litigation was pending, (ii) received Publication Notice of the Sale Motion because no claim had yet been asserted, or (iii) had settled with Old GM (and been paid) before the Petition Date, and therefore were not creditors of Old GM at the time of the 363 Sale.

any remedy should be against Old GM, and the proceeds it received from the 363 Sale (now held by the GUC Trust).

In ***Point III*** below, which deals with the Old GM Claim Threshold Issue, New GM will show that except for Assumed Liabilities, New GM has no liability for vehicles or parts manufactured and/or sold by Old GM, regardless of when those vehicles were acquired by Plaintiffs (*e.g.*, in a third-party used vehicle sale after the 363 Sale). Assumed Liabilities is a contractually-defined term consisting of only three categories of liabilities relating to vehicle owners: (a) post-363 Sale accidents or incidents involving Old GM vehicles causing personal injury, loss of life, or property damage; (b) repairs or the replacement of parts provided for under the "glove box warranty"—a specific written warranty, of limited duration, that only covers repairs and replacement of parts (and not monetary damages); and (c) Lemon Law claims (as defined in the Sale Agreement), essentially tied to the failure to honor the glove box warranty. All other liabilities relating to vehicles and parts manufactured by Old GM are "Retained Liabilities" of Old GM. The economic loss claims in the Consolidated Complaints as they relate to Old GM vehicles and parts, and the Pre-Closing Accident Cases, do not fall within any of the three expressly defined categories of Assumed Liabilities. Such claims are therefore Retained Liabilities of Old GM. New GM did not acquire any new liabilities relating to Old GM vehicle owners after the 363 Sale. The allocation of responsibility for such liabilities was determined in the Sale Agreement. The claims "artfully" pled in the Post-Sale Consolidated Complaint relating to Old GM vehicles, parts and conduct are successor liability claims that are barred by the Sale Order and Injunction.

Finally, in ***Point IV*** below, New GM explains that, as a matter of law, fraud on the Court under Fed. R. Civ. P. 60(d) requires egregious conduct, which is qualitatively different than

fraud upon another litigant under Fed. R. Civ. P. 60(b). Fraud on the Court under Fed. R. Civ. P. 60(d)(3) is limited to only that species of fraud that defiles the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner. In other words, the fraud must be directed at the judicial process itself, not just at other litigants. As a matter of law, a party's alleged failure to disclose pertinent facts relating to a controversy does not, without more, constitute "fraud on the court."[7]

ARGUMENT

I. DUE PROCESS THRESHOLD ISSUE: PLAINTIFFS' DUE PROCESS RIGHTS WERE NOT VIOLATED

Plaintiffs seek to void the Sale Order and Injunction as to them by contending that they should have received direct mail notice of the 363 Sale. Significantly, Plaintiffs, as a putative class, have ***not*** affirmatively argued that the class, as a whole, was ***unaware*** of Old GM's bankruptcy filing and the pendency of the 363 Sale. The failure to establish that essential fact ends the "due process" argument for their putative class. Furthermore, they concede that they received publication notice.[8] As shown below, such notice satisfied constitutional due process requirements.

A party seeking relief under Fed. R. Civ. P. 60(b)(4) for lack of due process carries an extremely heavy burden, particularly when dealing with an asset sale order under section 363 of the Bankruptcy Code. Voiding a sale order against a good faith purchaser like New GM, more than five years after the transaction was consummated, requires rare and extraordinary proof; Plaintiffs do not come close to satisfying that demanding standard.

A. Plaintiffs Have Failed to Meet Their Burden Under Fed. R. Civ. P. 60(b)(4)

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7 This brief only addresses the legal standard regarding the "fraud on the court" issue. Substantive arguments demonstrating why there was no "fraud on the court" are not Threshold Issues.

8 Pre-closing accident claimants who had active lawsuits as of the Petition Date received direct mail notice of the Sale Motion.

Relief under Fed. R. Civ. P. 60(b) may only be granted in the "most exceptional of circumstances" and cannot "impose undue hardship on other parties." *In re Old Carco LLC*, 423 B.R. 40, 45 (Bankr. S.D.N.Y. 2010), *aff'd,* 2010 WL 3566908 (S.D.N.Y. Sept. 14, 2010), *aff'd*, *Mauro Motors Inc. v. Old Carco LLC*, 420 Fed. App'x 89 (2d Cir. 2011); *see also United States v. Int'l Bd. Of Teamsters*, 247 F.3d 370, 391 (2d Cir. 2001) (relief under Fed. R. Civ. P. 60(b) is "not favored and is properly granted only upon a showing of exceptional circumstances."); *Dickerson v. Bd. of Educ*., 32 F.3d 1114, 1116 (7th Cir. 1994). Furthermore, courts in this Circuit (and elsewhere) have broadly interpreted section 363(m) of the Bankruptcy Code to protect purchasers from attacks on the finality of bankruptcy sales.

In that context, a party challenging a 363 sale order (a challenge that would otherwise be statutorily moot pursuant to section 363(m) of the Bankruptcy Code) not only bears the burden of showing "exceptional circumstances" under Fed. R. Civ. P. 60(b)(4), but has the additional and higher burden of showing that its challenge overcomes the well-established legislative policy of protecting good faith purchasers of a debtor's assets. As stated by Judge Peck in *Lehman*:

> This tension relating to finality naturally exists to some extent in every motion under Rule 60(b) but the Court views final Sale Order and Injunctions as falling within a select category of court orders that may be worthy of greater protection from being upset by later motion practice. Sale Order and Injunctions ordinarily should not be disturbed or subjected to challenges under Rule 60(b) unless there are truly special circumstances that warrant judicial intervention and the granting of relief from the binding effect of such orders.

In re Lehman Bros. Holdings Inc., 445 B.R. 143, 149-50 (Bankr. S.D.N.Y. 2011), *aff'd in part and rev'd in part on other grounds*, 478 B.R. 570 (S.D.N.Y. 2012), *aff'd*, 761 F.3d 303 (2d Cir. 2014). In *Lehman*, significant information was omitted from the record of the sale hearing—facts that the Court "in a more perfect hearing" would have liked to have known. *Id.* at 150. However, "[d]espite what in retrospect appears to be a glaring problem of flawed

disclosure," the movants failed to carry their burden in establishing a right to relief from the sale order under Fed. R. Civ. P. 60(b). *Id.* at 150. Here, there was no flawed disclosure as to the assets sold, and *Lehman's* conclusion that relief under Fed. R. Civ. P. 60(b) is not available is therefore even more compelling for this proceeding.

Also, the law of this case is that the Sale Order and Injunction should not be overturned because any challenge thereto would be equitably moot. *See Campbell*, 428 B.R. at 60-64 (finding it clear that "this Court cannot fashion effective relief without rewriting and unraveling the integrated terms of this extensively negotiated transaction—which would be beyond our power . . ."); *Parker*, 430 B.R. at 80-83 ("[T]he 363 Transaction, as noted, has been consummated, with all of the attendant consequences of transferring and transforming a multibillion dollar enterprise, including its relationship to third parties, governmental entities, suppliers, customers and the communities in which it does business. The doctrine of equitable mootness thus applies."). In the words of the District Court, it is now too late for the Court to order effective relief from the Sale Order and Injunction. Millions of transactions have been undertaken based on the 363 Sale. To modify the Sale Order and Injunction now would "knock the props out" of the foundation upon which these transactions were based. *See Parker*, 430 B.R. at 82; *Campbell*, 428 B.R. at 63 n.31. This rationale is equally compelling in the Fed. R. Civ. P. 60 context, as it is in the appeal context.

Further, the law of this case is that the Sale Order and Injunction cannot be partially revoked. This form of relief is expressly prohibited by the Sale Order and Injunction, which provides that all of its terms are non-severable and mutually dependent on each other. *See* Sale Order and Injunction, ¶ 69. This "partial revocation" argument was also expressly rejected by the District Courts in ruling on the appeals of the Sale Order and Injunction. *See Campbell*, 428

B.R. at 52 ("the very nature of the requested relief, to the extent it could even be granted, would result in an inequitable rewriting of the Sale Order and Injunction"); *see also id*. at 61 ("As a threshold matter, the requested remedy (characterized as 'elective surgery' on the Sale Order and Injunction to 'carve out' its offending provisions) is beyond the power of this Court to grant . . . [and the] Bankruptcy Court could not have modified the Sale Order and Injunction without the parties' consent or written waiver"); *Parker*, 430 B.R. at 81-82.

B. Plaintiffs' Due Process Argument Fails Because Plaintiffs Received Constitutionally Adequate And Reasonable Notice Of The 363 Sale

1. Due Process Is A Flexible Standard Based On The Particular Facts And Circumstances Of The Case

Due process is a flexible standard requiring notice "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Parker*, 430 B.R. at 97 (quoting *Mullane v. Central Hanover Bank & Trust Co*., 339 U.S. 306, 314 (1950)). That flexibility is important in bankruptcy matters. For example, in *Caldor*, the court evaluated the reasonableness and adequacy of debtor's method of notice in light of the dire financial circumstances facing the debtor, the debtor's emergency application to the court, and the "formidable task of providing notice to approximately 35,000 entities" in a compressed time frame. *Pearl-Phil GMT (Far East) Ltd. v. Caldor Corp*., 266 B.R. 575, 583 & n.5 (S.D.N.Y. 2001).

Here, the reasonableness of the method of notice approved by the Court and provided by Old GM to Plaintiffs must be evaluated in the context of the extreme circumstances facing Old GM at the time of the 363 Sale. *See In re Drexel Burnham Lambert Grp.*, 995 F.2d 1138, 1144 (2d Cir. 1993) ("No rigid constitutionally mandated standard governs the contents of notice in a case like the one before us. The Due Process Clause requires the best notice practical under the circumstances." (*citing Mullane*, 336 U.S. at 314)). Further, "the Supreme Court has warned

against interpreting this notice requirement so inflexibly as to make it an 'impractical or impossible obstacle.'" *Id.* Importantly, in affirming the Sale Order and Injunction on appeal, the District Court properly recognized that this flexible standard applied with "due regard for the practicalities and peculiarities" of the Old GM bankruptcy. *Parker*, 430 B.R. at 97-98. In the Sale Procedures Order, the Court outlined how notice was to be given and to whom. The record is clear that GCG, on behalf of Old GM, provided notice of the 363 Sale in accordance with the Sale Procedures Order. Essentially, Plaintiffs are arguing that the Court erred in setting forth how, and to whom, Old GM was required to provide notice. It is far too late to make that argument now.

2. Under The Circumstances Facing Old GM, Plaintiffs Were "Unknown" Creditors

The 363 Sale involved an expedited, complex sale of assets in connection with an extremely complicated chapter 11 case. Well-established law provides that, in such circumstances, a debtor can rely on its books and records to identify its "known" creditors for sale notice purposes. In *In re Motors Liquidation Co*., 462 B.R. 494 (Bankr. S.D.N.Y. 2012) ("***Morgenstein***"), the Court held that since un-asserted, potential contingent product liability claims arising from allegedly undisclosed defects in Old GM's products were not in Old GM's books and records, the holders of such contingent product liability claims were not "known" creditors. *Id*. at 508 & n.68; s*ee also In re New Century TRS Holdings, Inc.*, No. 07-10416 (BLS), 2014 WL 842637, at *3-6 (Bankr. D. Del. Mar. 4, 2014); *In re Agway, Inc.*, 313 B.R. 31 (Bankr. N.D.N.Y. 2004) (holding that the plaintiff's claims were not "known" claims on Agway's books and records even though Agway held significant information regarding the possibility of the claim being brought against it); *In re Best Prods. Co*., 140 B.R. 353, 358

(Bankr. S.D.N.Y. 1992) (debtor not required to search beyond its own books and records to ascertain the identity of unknown creditors).

Here, at the time of the 363 Sale, Old GM's books and records did not identify Plaintiffs in the Ignition Switch Actions or the Non-Ignition Switch Actions as creditors of Old GM as a result of owning an Old GM vehicle. *See* Kiefer Declaration, ¶ 3. Old GM recognized that, with respect to vehicles it manufactured, some number of unknown vehicle owners might eventually assert claims against it. That is why Old GM established warranty and litigation reserves for financial reporting. Hr'g Tr. 161:23-21, June 30, 2009. But for un-asserted claims (such as Plaintiffs' claims in the Ignition Switch Actions and the Non-Ignition Switch Actions at the time of the 363 Sale), specific vehicle owners were not listed as creditors in Old GM's books and records. These owners were considered to have, at best, contingent claims. They were "unknown" creditors.

Plaintiffs point to the fact that a certain limited number of Old GM personnel were aware that there were some reported incidents prior to the 363 Sale where the ignition switch in an Old GM vehicle had turned from the run to the accessory or off position and that there were internal inquiries as to what had occurred. However, the mere possibility of purported claims based on engineering issues being investigated by Old GM prior to the 363 Sale does not make such purported claims "known" to Old GM as of the Petition Date. *See Morgenstein*, 462 B.R. at 508, nn.55, 67, 68; *see also In re Enron Corp.*, No. 01-16034 (AJG), 2006 WL 898031, at *4-5 (Bankr. S.D.N.Y. Mar. 29, 2006); *In re Envirodyne Indus., Inc.*, 206 B.R. 468, 473-75 (N.D. Ill. 1997); *New Century*, 2014 WL 842637, at *3-6.

Well-established law provides that, as part of the review of its books and records, a debtor's reasonable diligence does not require "impracticable and extended searches . . . in the

name of due process." *In re XO Commc'ns. Inc*., 301 B.R. 782, 793-94 (Bankr. S.D.N.Y. 2003) (citing *Mullane*, 339 U.S. at 317). A debtor does not have a "duty to search out each conceivable or possible creditor and urge that person or entity to make a claim against it." *Id*. at 793 (quoting *In re Brooks Fashion Stores, Inc*., 124 B.R. 436, 445 (Bankr. S.D.N.Y. 1991) (quoting *Charter Crude Oil Co. v. Petroleos Mexicanos* (*In re Charter Co*.), 125 B.R. 650, 654 (M.D. Fla. 1991))). A vast open-ended investigation is not required. *XO Commc'ns.*, 301 B.R. at 793; *Chemetron Corp. v. Jones*, 72 F.3d 341, 347 (3d Cir. 1995)). For due process in the bankruptcy context, requiring debtors to undertake extensive investigations would "completely vitiate the important goal of prompt and effectual administration and settlement of debtors' estates." *In re U.S.H. Corp. of N.Y.*, 223 B.R. 654, 659 (Bankr. S.D.N.Y. 1998) (internal quotations omitted); *Chemetron*, 72 F.3d at 348. As to contingent litigation claims, such as those held by Plaintiffs, "a debtor is not charged with the knowledge of the existence of a contingent claim absent a claimant's express statement of its intent to lodge a future claim against the debtor." *Agway,* 313 B.R. at 39 (citing *In re Brooks Fashion Stores, Inc*., No. 92 Civ. 1571 (KTD), 1994 WL 132280 (S.D.N.Y. Apr. 14, 1994); *In re L.F. Rothschild Holdings, Inc*., No. 92 Civ. 1129 (RPP), 1992 WL 200834 (S.D.N.Y. Aug. 3, 1992); *In re Best Prods. Co*., 140 B.R. 353 (Bankr. S.D.N.Y. 1992)); *In re Union Hosp. Ass'n*, 226 B.R. 134, 139 (Bankr. S.D.N.Y. 1998). Plaintiffs did not express any intent to bring a claim against Old GM until years after the consummation of the 363 Sale.

The Court's decision in *Morgenstein* is directly on point. There, this Court held that the plaintiffs were "unknown" creditors and could not use lack of actual notice to vacate the confirmation order. In *Morgenstein*, the plaintiffs alleged that, to obtain the Court's approval of Old GM's bankruptcy plan, Old GM concealed from the plaintiffs and the Court design defects

in 2007 and 2008 Chevy Impalas that were allegedly known to Old GM prior to the formulation of its liquidation plan. 462 B.R. at 505-08. The *Morgenstein* plaintiffs estimated that the defect, allegedly concealed by Old GM, impacted 400,000 vehicles and caused approximately $180 million in damages. *Id.* at 496 n.2. They argued that the plan confirmation order should not apply to them because they did not receive actual notice, asserting that:

> In [Old GM's] schedules and disclosure statement . . ., the Debtors falsely omitted disclosure of its obligations to an entire class [sic] Impala Owners/Lessees (hereinafter "Impala Owners") [sic] Debtors knew of this class of creditors ("Known Creditors"). Known Creditors knew nothing of Debtors' obligation to address their claims because the design defect in their respective vehicles was a latent defect of which GM gave no notice.

Id. at 497 n.6.

This Court rejected the *Morgenstein* plaintiffs' argument that they were "known" creditors. 462 B.R. at 508 & nn. 55, 67, 68. The Court's decision in *Morgenstein* was upheld on appeal. *See Morgenstein v. Motors Liquidation Co.*, Order, 12 Civ. 01746 (AJN) (S.D.N.Y. Aug. 9, 2012) [Dkt. No. 21] (**Appendix, Exh. "CC"**).[9]

Plaintiffs' arguments also are similar to the arguments rejected in *Burton v. Chrysler Group, LLC* (*In re Old Carco*), 492 B.R. 392 (Bankr. S.D.N.Y. 2013) ("***Burton***"). In that case, the plaintiffs alleged their pre-petition vehicles suffered from a design flaw known as a "fuel spit back" problem. *Id*. at 394. The plaintiffs asserted a due process violation saying they did not know of the defect at the time of the sale because they were not given notice and the defect did not manifest itself until after the sale.[10] Judge Bernstein rejected the plaintiffs' due process

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[9] The arguments raised by plaintiffs in *Morgenstein* have even less merit here. The *Morgenstein* plaintiffs asserted they were denied adequate notice of the proposed plan, where issues regarding the debtor's liabilities are specifically addressed and decided. In contrast, in the 363 Sale context, issues relating to specific liabilities ***not*** being assumed by the purchaser are not germane to whether the sale should be approved. The focus, in the 363 Sale context, is whether the sale process ultimately achieved the best price for the debtor's assets under the circumstances. Liabilities of the debtor that are retained by the debtor under the 363 Sale typically are sorted out after the 363 Sale is consummated, when there is a pool of assets to divide up among the creditors.

[10] *See* Burton Plaintiffs' Opposition to Motion to Dismiss (**Appendix, Exh. "DD"**), dated March 21, 2012, ¶ 66.

argument and held that New Chrysler was entitled to the protection in the sale order from economic loss claims for pre-petition vehicles. *See id.* at 402-03. The court ruled that even though Old Carco had actual knowledge relating to the defect in related vehicles prior to the sale and did not provide the plaintiffs with actual notice of the defect, that knowledge was insufficient to make the Old Carco plaintiffs "known" creditors. *Id.* As the *Old Carco* court found, "[a]nyone who owns a car contemplates that it will need to be repaired . . ."; such claims are contingent claims. *Id.* at 403. The *Old Carco* court's rationale is equally applicable here.

Likewise, *In re Enron* established that even an ongoing formal investigation does not transform a contingent creditor into a known creditor. 2006 WL 898031 (Bankr. S.D.N.Y. Mar. 29, 2006). In *Enron*, the State of Montana sought to file a late claim arguing that it was a "known" creditor deprived of due process because after bankruptcy, but before the bar date, the Federal Energy Regulatory Commission ("**FERC**") had started an administrative investigation into Enron's alleged power manipulation in the western United States, with the FERC ultimately concluding several years later that Enron had engaged in improper conduct. *Id*. at *1-2. After noting the flexible legal standards for due process and the legal distinction between "known" versus "unknown" creditors in the bankruptcy context, Judge Gonzalez rejected the State of Montana's argument holding that, even though at the time of the bar date the FERC was conducting an investigation, that fact was not sufficient to trigger a known creditor status for the State of Montana. *Id.* at *4-5. The *Enron* court also held that there was no indication that an investigation by the debtors of their books and records at that time would have demonstrated that the State of Montana held a claim. *Id.*; *see also Envirodyne Indus.*, 206 B.R. at 473-75 (holding that plaintiff alleging to be a victim of debtor's antitrust violations was an "unknown" creditor, notwithstanding debtor's receipt of a subpoena, prior to the confirmation of the debtor's

reorganization plan, from the United States Justice Department investigating allegations that debtor had violated antitrust laws).

Similarly, in *New Century*, Judge Carey denied a late claim seeking damages for alleged fraudulent mortgage loan practices. 2014 WL 842637. There, an examiner conducted an investigation and produced a report identifying some mortgage loan issues facing the debtor. *Id.* at *5. The court held that simply because a report highlighted issues with certain lending practices did not mean that the movant asserting some of those same practices was a "known" creditor. *Id.* at *6.

Moreover, the pendency of certain product liability lawsuits does not make parties with similar but unfiled claims "known" creditors. The *New Century* court held that the existence of litigation against the debtor by certain customers did not make every customer in the same category a "known" creditor at the time of the bankruptcy. *Id.* at *5. Instead, the court held that this type of unfiled, unasserted litigation claim was "either conjectural or future or, although [it] could be discovered upon investigation, [such claim did] not in due course of business come to the knowledge [of the debtor.]" *Id.* (citing *Chemtron*, 72 F.3d at 346). As in *New Century*, in *In re Spiegel, Inc*., 354 B.R. 51, 56-57 (Bankr. S.D.N.Y. 2006), the plaintiffs alleged they were "known" creditors because the debtor knew about litigation by a different party with claims similar to plaintiffs prior to confirmation. However, the plaintiffs themselves did not assert their litigation claims against the debtor until after the debtor's reorganization plan had been approved. Judge Lifland rejected the argument that simply having a litigation claim similar to another parties' pending litigation claim makes one a "known" creditor. He held that a debtor is "not required to employ a crystal ball . . . when one complaint is filed to determine whether any

other similar claims exist." *Id.* (citing *Tulsa Prof'l Collection Servs., Inc. v. Pope*, 485 U.S. 478 (1988)).

Also, in *Agway*, an employer knew about an employee's litigation against various entities in connection with an on-the-job injury. 313 B.R. at 36, 39. The employer filed for bankruptcy and did not provide actual notice to all the defendants in the employee's pending personal injury action, notwithstanding the foreseeable claims that defendants held against it for indemnity and contribution. *Id.* at 38-39. The court held that the defendants in the employee's personal injury action, who had not expressed an intent to lodge a claim against the employer prior to the bar date, held contingent claims that were therefore "unknown" to the employer for the purposes of notice. *Id.* at 39. The court ruled that a debtor's knowledge of some litigation claims does not make a person who might potentially assert similar claims a "known" creditor.

Here, as of June 2009, although there were some issues raised relating to certain Old GM vehicles, none of the Plaintiffs in the Ignition Switch Actions or Non-Ignition Switch Actions had commenced any litigation against Old GM, and none were listed as creditors on Old GM's books and records. *See* Kiefer Declaration, ¶ 3. The authorities cited above apply a consistent standard that leads to the inescapable conclusion that Plaintiffs were "unknown" creditors for purposes of notice of the Sale Hearing.

3. Plaintiffs Received Proper Notice Of The 363 Sale

At the time of the 363 Sale, Old GM's restructuring professionals (APS and WGM) provided guidance to Old GM as to the categories of individuals and entities that should receive direct mail notice of the 363 Sale. According to the GCG cost structure used for the direct mail notice of the Sale Motion, providing direct mail notice to the owners of the 70 million Old GM vehicles on the road in the United States would have cost Old GM approximately $43 million, or

14 times the cost actually incurred by Old GM for direct mail notice of the 363 Sale. *See* Davidson Declaration, ¶ 7.

Importantly, there was extensive news coverage of the pending 363 Sale to the U.S. Government. *See* Bloomer Declaration (discussing the over 1,250 written news stories concerning the Old GM bankruptcy and the 363 Sale in the weeks between the Petition Date and the Sale Hearing). Through these news stories and other extensive media coverage, the general public and Old GM's customers were undoubtedly aware of the contemplated 363 Sale.

Under these facts and circumstances, publication notice for vehicle owners who might potentially bring a claim related to their vehicles was proper. The notice informed the public of the proposed sale, including that the assets would be sold free and clear of claims. It also stated where additional information with respect to the Sale Motion could be obtained. Sending out more detailed and widespread direct mail notice would not have made any difference to the outcome of the 363 Sale. Instead, it would have cost Old GM millions of dollars, and taken more time to complete, thereby causing delay and further deterioration to the value of the Debtors' assets. The flexibility of due process does not require such a wasteful notice procedure.

Old GM requested and obtained approval from the Court to provide notice by publication for, *inter alia*, contingent claims. Specifically, in the Sale Motion, Old GM asserted:

> ***The notice to be provided via the Publication Notice is reasonably calculated to provide all parties in interest (including parties with contingent claims)*** with the necessary information concerning the 363 Transaction, the Sale Hearing, and the Sale Order, ***including the requested finding as to successor liability***, because providing notice to these parties by mail is not practicable.

Sale Motion, ¶ 46 (emphasis added).

Old GM also requested and obtained approval from the Court for a shortened notice period, citing to the extensive media coverage already provided:

> the fact that it ***has been widely known*** that the Company's assets and businesses have been available for sale and that the Debtors' precarious financial and operational condition have been ***widely reported in the media on a daily basis for the past few months***, due process is not hindered as a result of the proposed shortening of the applicable notice periods.

Id. (emphasis added).

This Court ruled in its Sale Decision that adequate notice by publication was given in connection with the 363 Sale. *Gen. Motors*, 407 B.R. at 494 ("Notice was extensively given, and it complied with all applicable rules"). The Court further found:

> With respect to parties who may have claims against the Debtors, but whose identities are not reasonably ascertainable by the Debtors (including, but not limited to, ***potential contingent warranty claims against the Debtors***), the Publication Notice was sufficient and reasonably calculated under the circumstances to reach such parties.

Sale Order and Injunction, ¶ E (emphasis added). Thus, the Court ruled that owners of vehicles manufactured by Old GM with "contingent claims," including "potential contingent warranty claims," received adequate notice through publication. This holding is directly applicable to Plaintiffs' claims and remains correct today.

A year after the Sale Hearing, this Court confronted a due process argument substantially similar to the one made by Plaintiffs here. In that case, a pre-363 Sale accident claimant (Shane Robley), who commenced a lawsuit against New GM post-363 Sale, complained that he only received publication notice of the Sale Motion, instead of direct mail notice. There, the Court ruled that publication notice satisfied due process for the vehicle owner:

> It's agreed by all concerned that Mr. Robley didn't get mailed a personal notice of the 363 hearing that resulted in the sale order, very possibly because as of that time, Mr. Robley had not sued either Old GM or New GM yet. It's also agreed that Old GM and New GM did not give personal notice of the 363 hearing to all of the individuals who had ever purchased a GM vehicle, and instead, supplemented its personal notice to a much smaller universe of people by notice by publication. ***It's also undisputed that I expressly approved the notice that had been given in advance of the 363 hearing including the notice by***

> ***publication, which I found to be reasonable under the circumstances***. Mr. Robley relies on the First Circuit's decision in *Western Auto Supply Company v. Savage Arms, Inc*., 43 F.3d 714 (1st Cir, 1994), in which the First Circuit Court of Appeals, speaking through Judge Conrad Cyr, a highly respected former bankruptcy judge, agreed with the district judge that the bankruptcy court had erred when the bankruptcy court enjoined prosecution of product line liability actions brought against the purchaser of the debtor's business for lack of notice. But the critically important distinction between this case and the *Savage Arms* case is that here, and not there, notice was also given by publication. We all agree that due process requires the best notice practical, but we look to the best notice that's available under the circumstances. Here, under the facts presented in June of 2009, ***GM didn't have the luxury of waiting to send out notice by mail to hundreds of thousands of GM car owners, and instead gave notice by publication, which I approved.*** In *Savage Arms*, the debtor "[concededly] made no attempt to provide notice by publication" (43 F.3d at 721) and the notice that was given was never determined, "appropriate in the particular circumstances" (*Id.* at 722). In other words, the First Circuit found it significant that the debtors in *Savage Arms* didn't do the very thing that was done here. ***As I've indicated, I've already determined that notice was appropriate in the particular circumstances, and provided for that in an order that entered on July 5th, 2009 that remains valid today. Moreover, it's obvious that the notice was, indeed, appropriate and did what it was supposed to do because it permitted Mr. Jakubowski, in particular, to make effectively and well the very arguments that Mr. Robley's counsel would, himself, have to make either now or back then and which I then considered and rejected.***

Hr'g Tr. 59:20-61:13, June 1, 2010 (emphasis added).

In the Sale Procedures Order, the Court also expressly approved the ***content*** of the direct mail notice and the Publication Notice. *See* Sale Procedures Order, ¶ 9. The fact that the 363 Sale notice did not identify or describe the liabilities owed by Old GM that were not being assumed by New GM was known at the time to the Creditors Committee, the States' Attorneys General, the Consumer Advocacy Groups, the plaintiffs' bar representing vehicle owners, and others. No one ever challenged the content of the notice or to whom the direct mail notice would be sent. It is far too late in the day to do so now. Accordingly, the method of notice approved by this Court in the Sale Procedure Order satisfied due process then and now.

C. Plaintiffs' Due Process Argument Fails Because Plaintiffs Cannot Demonstrate Prejudice

1. A Party That Has Suffered No Prejudice Has No Due Process Claim

Critically, for a party to establish that it has been deprived of due process, it must show that (i) proper notice was not given, ***and*** (ii) it suffered ***prejudice*** as a result of the method of notice used. *See, e.g., In re Edwards*, 962 F.2d 641, 644-45 (7th Cir. 1992); *Pearl-Phil GMT (Far East) Ltd. v. Caldor Corp*., 266 B.R. 575 (S.D.N.Y. 2001); *In re Vanguard Oil & Serv. Co*., 88 B.R. 576, 580 (E.D.N.Y. 1988); *In re Caldor, Inc.-NY*, 240 B.R. 180, 188 (Bankr. S.D.N.Y. 1999); *In re Gen. Dev. Corp*. 165 B.R. 685, 688 (S.D. Fla. 1994) ("A creditor's due process rights are not violated where the creditor has suffered no prejudice."); *see also Perry v. Blum*, 629 F.3d 1, 17 (1st Cir. 2010); *In re Parcel Consultants*, Inc., 58 F. App'x 946, 950-51 (3d Cir. 2003) ("Proof of prejudice is a necessary element of a due process claim"); *Parker*, 430 B.R. at 97-98 (finding that shortened notice period did not violate unsecured creditor's due process rights because, among other reasons, creditor "was in no way prejudiced by the expedited schedule which was necessitated by the unique and compelling circumstances of the Debtors' chapter 11 cases and the national interest.").

The burden is on the moving party to demonstrate that it was prejudiced by an alleged notice deficiency. *See Pearl-Phil*, 266 B.R. at 583 ("[E]ven if notice was inadequate, the objecting party must demonstrate prejudice as a result thereof."); *Rapp v. U.S. Dep't of Treasury, Office of Thrift Supervision*, 52 F.3d 1510, 1520 (10th Cir. 1995); *In re YBA Nineteen, LLC*, 505 B.R. 289, 300 (S.D. Cal. 2014). As a matter of law, a party cannot prove prejudice when it could not have done anything that would have made a material difference to the outcome of the proceeding, or improved its position in the proceedings had another method of notice been used. *See In re City Equities Anaheim, Ltd.*, 22 F.3d 954, 959 (9th Cir. 1994) (rejecting due process claim for lack of prejudice); *Secs. Investor Prot. Corp. v. Blinder, Robinson & Co., Inc*., 962 F.2d 960, 967 (10th Cir. 1992); *In re YBA Nineteen, LLC*, 505 B.R. at 300 (denying debtor's

appeal of conversion of bankruptcy case to Chapter 7 case on the grounds that "even if the Bankruptcy Court failed to provide Debtor with sufficient notice and opportunity to be heard, Debtor has failed to show that it was prejudiced by any defective process afforded it"); *In re U.S. Kids, Inc*., 178 F.3d 1297, 1999 WL 196509, at *5 (6th Cir. 1999); *see also In re Rosson*, 545 F.3d 764, 777 (9th Cir. 2008) ("Because there is no reason to think that, given appropriate notice and a hearing, Rosson would have said anything that could have made a difference, Rosson was not prejudiced by any procedural deficiency."). Thus, federal courts have routinely and uniformly held that where a movant has not proven prejudice there can be no violation of due process.

In *In re Edwards*, a known secured creditor with an undisputed claim sought relief from a 363 sale order under Fed. R. Civ. P. 60(b)(4), arguing that the lack of actual notice deprived him of due process and therefore the sale order was void. 962 F.2d at 644. In affirming the lower court decision, the Seventh Circuit weighed the lack of prejudice, the strong policies of finality of bankruptcy sales embodied in section 363(m), and the bedrock principle that a bona fide purchaser at a bankruptcy sale gets good title to the assets purchased. *Id.* at 645. The court enforced the sale order and held that it was not void even as to a known, undisputed secured creditor that was not provided actual notice that his own collateral was being sold. The *Edwards* court relied, in part, on the fact that there was no dispute about the sales process or the sales price. *Id.* Also, it reasoned that had the secured creditor been notified, appeared and objected at the sale hearing, nothing would have changed; the same sale to the same buyer at the same price would have been approved. The court stated that "[t]he law balances the competing interests [of a purchaser against a lienholder who did not receive notice], but weights the balance heavily in favor of the bona fide purchaser." *Id.* at 643.

In *In re Paris Indus. Corp*., 132 B.R. 504 (D. Me. 1991), the court reached the same conclusion. The debtor there sold its assets in bankruptcy "free and clear" of product liability claims. *Id.* at 506-08. A person injured after the sale by a product manufactured by the debtor prior to the sale brought suit in state court against several defendants, including the purchaser of the debtor's assets. *Id.* The purchaser's co-defendants in the state court action sought contribution from the purchaser. *Id.* In response, the purchaser filed an action in bankruptcy court seeking injunctive relief enforcing the "free and clear" language in the sale order. The bankruptcy court granted the purchaser's request and the co-defendants appealed on due process grounds, arguing that the sale order could not be enforced against them because they had not been provided actual notice of the sale. *Id*. at 509-10. The district court rejected that argument. It distinguished the purpose of notice in the context of claims discharge from the purpose of notice in the context of a sale of a debtor's assets. In the latter case, the purpose:

> is to insure that the sales price is fair and that the funds flowing into the bankrupt estate for distribution among creditors or for other purposes are the most that could be realized from the assets sold. …[appellants were] in no way prejudiced by the lack of notice and their inability to appear and argue their position on the sale. They have made no showing that, if they had been notified and had appeared, they could have made any arguments to dissuade the bankruptcy court from issuing its order that the assets be sold free and clear of all claims.

Id. The court found no prejudice by the sale because all the sale did was take a group of assets and convert them into cash. *Id*. The fact that the cash was subsequently distributed to creditors in accordance with bankruptcy law and appellants were subsequently left without recovery on their claim did not mean that they were prejudiced by the sale. *Id.*

Also on point is *Pearl-Phil GMT*, 266 B.R. 575. Pearl entered into an agreement with a chapter 11 debtor-in-possession to produce merchandise according to the debtor's specifications. *Id*. at 578. After the agreement had been entered into, the debtor filed an emergency application

to wind-down its business in chapter 11 and, because it was administratively insolvent, to bifurcate administrative expense claims into pre-wind-down claims (which would be paid *pro rata*) and post-wind-down claims (which would be paid in full). *Id*. at 578-79. The debtor did not provide notice to Pearl of the emergency hearing on the wind-down application. *Id*. The bankruptcy court held that Pearl, as the holder of a pre-wind down claim, should be paid on a *pro-rata* basis. *Id.* On appeal, the district court held that even if the debtor provided inadequate notice, Pearl was not deprived of due process because it was unable to establish any prejudice as a consequence of the method of notice provided. *Id.* In particular, Pearl was unable to provide any testimony or evidence that would have impacted the bankruptcy court's holding that Pearl should be paid on a pro-rata basis. *Id*. at 583-85.

2. Plaintiffs Have Suffered No Prejudice As A Result Of Their Receiving Notice Of The Sale Proceedings by Publication

Plaintiffs have not alleged, nor can they prove in light of the undisputed facts and record of the Sale Hearing, any tangible prejudice as a consequence of having received Publication Notice. Thus, they have not been deprived of due process and their request for extraordinary relief under Fed. R. Civ. P. 60(b)(4) should be denied.

The Sale Agreement and Sale Order and Injunction would not have been altered had Old GM provided each Plaintiff in the Ignition Switch Actions and Non-Ignition Switch Actions with direct mail notice (i) of the 363 Sale, (ii) identifying the precise nature of the purported defect, and (iii) that the 363 Sale would prevent them from asserting their claims against the purchaser. Pre-petition accident claimants who had filed litigation claims against Old GM as of the Petition Date received direct mail notice of the 363 Sale. However, over their objection, New GM did not assume those pending pre-petition accident claims. This is precisely the reason that the Plaintiffs' claims in the Pre-Closing Accident Cases are barred. There is no credible argument

that economic loss claimants such as Plaintiffs in Ignition Switch Actions or Non-Ignition Switch Actions would have done any better than pre-petition accident claimants. The same 363 Sale process would have taken place, the same overall consideration paid, and the same purchaser and Sale Agreement would have been presented and approved. In short, Plaintiffs cannot meet their burden of establishing that the result would have changed if they had been given direct mail notice of the 363 Sale.

a. Similarly-Situated Parties Filed Objections To The Sale Motion That Encompassed Objections That Plaintiffs Could Have Raised Had They Participated In The 363 Sale

The Sale Motion engendered objections from a coalition of parties representing Old GM vehicle owners, including the Consumer Advocacy Groups and Personal Injury Claimants, the Ad Hoc Committee of Consumer Victims, and States' Attorneys General. The asserted grounds for these objections included lack of due process and that New GM was not required to assume ***all*** vehicle owner liabilities ("**Vehicle Claim Objections**"). The Consumer Advocacy Groups and the Personal Injury Claimants objected to the 363 Sale as follows:

- "GM's attempt to enjoin successor liability claims against the Purchaser must be denied because it violates applicable law, notice, and due process requirements." Consumer Advocacy Limited Objection, ¶ 18;
- "[D]ue process principles do not allow GM to eliminate rights of future claimants, who have not and could not have received meaningful notice that their rights in a future suit are being lost, and thus have no opportunity to seek to preserve those rights." Consumer Advocacy Memo of Law, at 19;
- "People who have not yet suffered injury or ***loss*** because of GM's behavior cannot have an 'interest in' GM's property because the injuries that would lead them to have such an interest have not yet even occurred." *Id.* at 20 (emphasis added);
- "[T]he future causes of actions [sic] of people who have not yet suffered a ***loss*** or injury due to the defect in their vehicles would not be covered" under the definition of "claim." *Id.* at 20 (emphasis added); and
- "This Court should avoid the difficult constitutional questions that would arise from clearing the Purchaser of liability for claims that do not yet exist, and make clear that the sale does not release the claims of consumers who will be

injured ***or suffer losses*** in the future as a result of defects in GM vehicles." *Id.* at 23-24 (emphasis supplied).

The Ad Hoc Committee of Consumer Victims objected to the 363 Sale as follows:

- "To make matters worse, knowing that it is seeking an order which would eliminate tort claims, GM has continued to advertise and sell GM vehicles without advising unwitting consumers that it is seeking to bar future claims for injuries arising from defects in vehicles sold before the closing. Such conduct is unconscionable, if not illegal." Consumer Victims Objection, ¶ 38; and
- "Further, as soon as consumers comprehend that New GM has avoided responsibility for tort claims, their confidence will be shaken and the value of used GM vehicles will drop perhaps dramatically, damaging millions of consumers." *Id.* ¶ 40.

The States' Attorneys General stated the following objections:

- "[C]ertain rights are too inchoate or unknown to rise to the level of a claim at the time of the bankruptcy case and courts have not allowed such claims to be discharged by debtors in a plan." Second AG Objection, at 21.[11]

The Creditors Committee stated, in their limited objection to the 363 Sale, as follows:

- "As relevant to this Objection, successor liability claims falls into two broad categories. The first are claims for which a right to payment, contingent or otherwise, already exists ('existing claims'). The second are 'claims' for which a right to payment has yet to arise because no liability-generating conduct or incident has yet occurred ('future claims')." Creditors Comm. Objection, ¶ 58;
- "[S]everal courts have concluded – mistakenly, in the Committee's view – that bankruptcy courts can authorize sales free and clear of existing successor liability claims." *Id.* ¶ 59; and
- "The Committee objects because the proposed order approving the sale purports to cut off all state law successor liability for the new entity purchasing GM's assets. Current and future claimants alleging claims based on injuries caused by product defects, breach of implied warranties …would thus be limited to recourse against the limited assets being left behind in the old company." *Id.* at ¶ 5.

[11] As noted in the Court's *Castillo* decision, numerous State Attorneys General also objected, seeking to expand the definition of New GM's Assumed Liabilities to include implied warranty claims. *Castillo v. Gen. Motors LLC (In re Motors Liquidation Co.),* Adv. Proc. No. 09–00509, 2012 WL 1339496, at *5 (Bankr. S.D.N.Y. Apr. 17, 2012), *aff'd,* 500 B.R. 333 (S.D.N.Y. 2013), *aff'd*, No. 13-4223-BK, 2014 WL 4653066 (2d Cir. Sept. 19, 2014). They were not successful.

Notably, these groups expressly argued that it would violate due process to shield New GM from successor liability claims arising from defects in vehicles manufactured by Old GM. They argued that innocent vehicle owners had not been given actual notice or the opportunity to be heard regarding claims that were not known to them at the time of the Sale Hearing. *See e.g.,* Creditors Comm. Objection, ¶ 6 ("the attempt to cut off liability for *future* claims is ineffective and a violation of due process that would likely not even be honored by state courts" (emphasis in original)); Consumer Advocacy Limited Objection, ¶ 18 ("GM's attempt to enjoin successor liability claims against the Purchaser must be denied because it violates applicable law, notice, and due process requirements"). Those arguments were properly rejected by the Court, and therefore, Plaintiffs cannot show they were prejudiced by not allegedly having had the opportunity to make the very same objections.

b. New GM's Agreement To Assume Some Narrow Additional Categories Of Liabilities Specifically Confirmed That It Would Not Assume Existing Product Claims

In response to certain objections, New GM agreed to assume responsibility for (a) post-sale accidents and distinct incidents involving Old GM vehicles causing personal injury, loss of life or property damage, and (b) Lemon Law claims.[12] At the same time, New GM refused any further modifications with respect to other vehicle owner liabilities. New GM's refusal to assume a substantial portion of Old GM's liabilities was fundamental to the 363 Sale (*see* Sale Order and Injunction, ¶ DD) and was widely disclosed by Old GM to all interested parties. *See generally* Sale Motion**.** Like any other section 363 purchaser, New GM agreed to assume some, but not all of the Debtors' liabilities. On appeal, the District Court noted that even though New GM agreed to assume certain additional liabilities:

[12] Liabilities relating to the glove box warranty (as limited by the Sale Agreement and Sale Order and Injunction) were always considered Assumed Liabilities.

> [T]he transfer of the Purchased Assets was to remain free and clear of any Existing Products Claims.
>
> The agreement between the Debtors and the Purchaser, as embodied in the [Sale Agreement] and the Sale Order and Injunction itself, made clear that the Purchaser would not pursue the 363 Transaction unless the assets were sold free and clear of those liabilities the Purchaser had not agreed to assume***, including the Existing Products Claims***...

Campbell, 428 B.R. at 47-8 (emphasis added). Thus, it was an essential condition of the purchase that New GM not be saddled with claims such as those Plaintiffs are now asserting. Plaintiffs cannot show that, had they received direct mail notice of the 363 Sale, the result would have been different.

c. At The Sale Hearing, Old GM And New GM Made Clear That New GM Would Be Shielded From All Successor Liability Claims

At the Sale Hearing, the vehicle claim objectors persisted in their objections to the 363 Sale. They continued to challenge the provision that protected New GM from successor liability claims, which included the type of economic loss claims that Plaintiffs are now asserting. While some issues had been resolved prior to the Sale Hearing, the vehicle claim objectors did not withdraw their due process objections. At the outset of the Sale Hearing the Court stated:

> I am also going to want, at some point, and I'll take your recommendations as to the best time, for objectors on successor liability issues, which are the main issues in this case, and of the debtor, to give me one-page submissions as to their understanding as to which of the successor liability issues remain and which have been eliminated.

Hr'g Tr. 41:4-41:12, June 30, 2009.

Early in the first day of the Sale Hearing, Old GM's counsel made clear that the types of claims now being asserted by Plaintiffs would remain with Old GM:

> There are two areas in which there has been progress. On the product liability side, Your Honor, in respect of product liability claims arising from expressed warranties in connection with accidents from products, anything—any accident that occurs after the closing date, Your Honor, irrespective of when the vehicle was manufactured and sold, will be assumed by the purchaser, now New General

> Motors Corporation. . . . So there is a major concession on the part of the purchaser, Your Honor, with respect to that type of claims. . . . ***Other tort claims, other than what I've already explained, Your Honor, would remain with Old GM.***

Id. at 46:4-46:19 (emphasis added).

On the second day of the sale hearing, Harry Wilson (Auto Task Force member and U.S. Treasury official) testified that the U.S. Treasury made a business judgment that New GM would not assume responsibility for products liability claims arising out of accidents that occurred before the bankruptcy. *See* Hr'g Tr. 102:25-103:9, July 1, 2009. Mr. Wilson further testified that New GM agreed to accept only those liabilities that Treasury deemed "commercially necessary for the success" of the company. *Id.* at 104:13. New GM's position was that no other liabilities should be part of the transaction. *Id.* at 104:14-15. Mr. Wilson made clear that New GM does "not have any intention to move forward if the Sale Order and Injunction, with regard to successor liability, is not entered as described in here." *Id*. at 150:2-4. Later at the hearing, counsel for Old GM explained that a "363 sale enables the establishment of the value of the assets and leads to a determination of what the pie will be and ultimately, in subsequent proceedings, who will share in that pie." *Id.* at 238:22-25.

All of the foregoing exchanges occurred after Old GM advised the Court that New GM had agreed to accept liabilities related to post-363 Sale accidents or incidents involving Old GM vehicles causing personal injury, loss of life, or property damage. The above-quoted exchanges therefore did not relate to the issue of such "future" claims, which were resolved by agreement. They related to the very types of successor liability claims Plaintiffs are now asserting. Simply put, the vehicle claim objections that were not resolved by agreement, including the outstanding due process objections, were fully considered and properly rejected by the Court. As this Court previously noted in rejecting the same due process argument, "these provisions [free and clear of

successor liability] in the sale order were not slipped in the order with stealth, but were hotly contested before me." Hr'g Tr. 56:12-14, June 1, 2010.

The objections to the Sale Motion and arguments made at the Sale Hearing encompass any objections that Plaintiffs could have asserted. There is no reason to believe that Plaintiffs' economic loss claims would have received special treatment. There is nothing unique about Plaintiffs' economic loss claims that would have resulted in them being "Assumed Liabilities." Thus, Plaintiffs cannot demonstrate prejudice and their due process objection fails.

d. The Court Considered And Overruled The Vehicle Claim Objections

In approving the 363 Sale and overruling the Vehicle Claim Objections, the Court held that Old GM's assets could pass to New GM "free and clear" of successor liability claims. *Gen. Motors*, 407 B.R. at 499-506.[13] And, the Court determined that there was no due process violation. These rulings were affirmed on appeal. *Parker*, 430 B.R. at 65. The Court's ruling expressly encompassed both "present claims and unknown future claims." *Gen. Motors*, 407 B.R. at 505 & nn. 105-06 (citing *In re Chrysler LLC*, 405 B.R. 84 (Bankr. S.D.N.Y. 2009), *aff'd*, (2d Cir. June 5, 2009)).

In approving a similar Section 363 sale shielding the buyer from successor liability claims, in *In re Chrysler LLC*, Judge Gonzalez rejected the same type of due process objections relating to unknown product defects that Plaintiffs are making herein:

> Additionally, objections in this category touching upon notice and due process issues, particularly with respect to potential future tort claimants, are overruled as to those issues because, as discussed elsewhere in this Opinion, notice of the proposed sale was published in newspapers with very wide circulation. The Supreme Court has held that publication of notice in such newspapers provides sufficient notice to claimants "whose interests or whereabouts could not with due diligence be ascertained." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S.

[13] The Court noted that with respect to asbestos claims, it was precluding successor liability claims to the fullest extent it was permitted to do so. *Gen. Motors*, 407 B.R. at 507.

> 306, 317, 70 S. Ct. 652, 94 L. Ed. 865 (1950). Accordingly, as demonstrated by the objections themselves, the interests of tort claimants, including potential future tort claimants, have been presented to the Court, and the objections raised by or on behalf of such claimants are overruled.

405 B.R. at 111.

In Old GM's bankruptcy case, the Court noted Judge Gonzalez's rejection of similar due process objections in Chrysler, and came to the same conclusion:

> In Chrysler, Judge Gonzalez expressly considered and rejected the efforts to impose successor liability. And more importantly, the Second Circuit, after hearing extensive argument on this issue along with others, affirmed Judge Gonzalez's Chrysler order for substantially the reasons Judge Gonzalez set forth in his Chrysler decision.
> …
> One of the matters argued at length before the Circuit on the appeal was successor liability, both with respect to present claims and unknown future claims. They were hardly trivial elements of the appeal, and were a subject of questioning by members of the panel. If the Circuit did not agree with Judge Gonzalez's conclusions on successor liability, after so much argument on that exact issue, it would not have affirmed. Thus the Court has, at the least, a judgment by the Second Circuit that 363(f) may appropriately be invoked to sell free and clear of successor liability claims. The claims sought to be preserved here are identical to those in Chrysler. And Chrysler is not distinguishable in any legally cognizable respect. On this issue, it is not just that the Court feels that it should follow Chrysler. It must follow Chrysler. The Second Circuit's Chrysler affirmance, even if reduced solely to affirmance of the judgment, is controlling authority.
> …
> ***This Court fully understands the circumstances of tort victims, and the fact that if they prevail in litigation and cannot look to New GM as an additional source of recovery, they may recover only modest amounts on any allowed claims***—if, as is possible, they do not have other defendants who can also pay. But the law in this Circuit and District is clear; the Court will permit GM's assets to pass to the purchaser free and clear of successor liability claims, and in that connection, will issue the requested findings and associated injunction.

407 B.R. at 504-05 (emphasis added). This holding applies to Plaintiffs' claims. This Court already considered and overruled any objection that Plaintiffs could have raised to the Sale Motion. Plaintiffs simply cannot prove prejudice.

Plaintiffs' claims are readily distinguishable from the "future" claim involved in *In re Grumman Olson Indus., Inc*., 467 B.R. 694 (S.D.N.Y. 2012). The *Grumman* case involved a personal injury claim brought against the manufacturer of a product part incorporated into a Federal Express delivery truck by a plaintiff that had ***no*** pre-petition relationship with the debtor, did not suffer her accident and injury until after the section 363 sale, and had no reason to believe that the debtor's 363 sale might impact her rights. In contrast, Plaintiffs (or their predecessors-in-interest) had a pre-petition relationship with Old GM, the defect that is the subject of their claims existed pre-petition, and regardless of whether they knew of the specific defect, Plaintiffs had reason to know that Old GM's bankruptcy might impact their economic interests in their vehicles. Plaintiffs' due process argument is predicated on the mistaken notion that they were known creditors. They were unknown creditors. But, significantly, known creditors are, by definition, not "future creditors." In sharp contrast to Plaintiffs, in *Grumman*, the plaintiff did not argue that the plaintiff should have received notice of the 363 sale. Accordingly, *Grumman* is easily distinguishable and does not control here. Indeed, Judge Bernstein noted that the *Grumman* case was inapposite to the *Old GM* case and could never arise therein since *Grumman* involved a post-sale accident which was an Assumed Liability by New GM. *Id.* at 255.

In *Burton*, Judge Bernstein held that the holding in *Grumman* did not apply to claims, like the ones at issue in this case, brought by plaintiffs seeking economic losses arising from pre-petition defects in their vehicles. As stated by Judge Bernstein:

> *Grumman Olson* is distinguishable. The plaintiffs or their predecessors (the previous owners of the vehicles) had a pre-petition relationship with Old Carco, and the design flaws that they now point to existed pre-petition. At a minimum, they held contingent claims because "the occurrence of the contingency or future event that would trigger liability was 'within the actual or presumed

> contemplation of the parties at the time the original relationship between the parties was created.'"

Burton, 492 B.R. at 403 (citation omitted).

Furthermore, according to the Third Circuit, successor liability claims are claims of the bankruptcy estate and not individual claims, and therefore a bankruptcy trustee could compromise a successor liability claim, and it would be binding on all creditors. *See In re Emoral, Inc*., 740 F.3d 875, 882 (3d Cir. 2014).[14] So too, here, the barring of successor liability claims in the Sale Agreement is binding on all creditors. In sum, the Court was fully justified in approving the 363 Sale free and clear of successor liability claims, and the Plaintiffs cannot show prejudice.

e. Information Relating To The Product Defect Would Not Have Altered The Course Of The 363 Sale

Had Old GM disclosed the information in June 2009 that Plaintiffs contend it should have disclosed, such information would not have made any difference in the Court's approval of the 363 Sale. The Court acknowledged that contingent claims were hard to estimate. *See Gen. Motors*, 407 B.R. at 483. The generalized discussion at the Sale Hearing relating to contingent claims was not to quantify the amount of contingent claims. Rather, it was an argument made by the objectors that the contingent claims were sufficiently small that New GM should consider assuming them. Hr'g Tr. 157:15-165:19, June 30, 2009.

In the end, it did not really matter at the Sale Hearing what the financial magnitude of Retained Liabilities was because the Sale Agreement was the only thing that separated Old GM from a disastrous liquidation. What is more, there was protection to Old GM for the magnitude of Retained Liabilities. The Sale Agreement provided for an upward adjustment to the purchase

[14] The Third Circuit relied on *In re Keene Corp.*, 164 B.R. 844, 849 (Bankr. S.D.N.Y. 1994), finding that "state law causes of action for successor liability, just as for alter ego and veil-piercing causes of action, are properly characterized as property of the bankruptcy estate." *Id.* at 880.

price if allowed claims exceeded $35 billion. In all cases, the Sale Agreement specifically contemplated that claims would be determined ***after*** the 363 Sale without any effect on the closing. The reasons the Court extensively discussed in approving the 363 Sale still apply, regardless of whether Old GM would have disclosed an additional class of potential product claims.

As discussed above, Plaintiffs' argument is the same argument rejected in *Morgenstein*. There, the Court held, as a matter of law, a preplan disclosure by Old GM of a specific vehicle defect impacting hundreds of thousands of vehicles would not have impacted any action by the Court in confirming the Debtors' plan. *Morgenstein,* 462 B.R at 506-07. The Court reasoned that:

> We here had a plan of liquidation; Old GM would not survive. It would simply be taking whatever assets it had and distributing them, *pari passu,* to its creditors. ***If Old GM had known of, and disclosed, the design defect that is alleged, it would have (or at least could have) put up for confirmation the exact same liquidation plan, and the plan would have been just as feasible. If a class claim had been disclosed and ultimately allowed*** (or reserved for), individual creditors' *pari passu* shares of the available pot would have been less, of course (and that no doubt would have been of concern to them), but ***neither the Plan, nor any judicial action by this Court, would be any different***.

Id. (emphasis added).

Here, the 363 Sale would have been approved on the exact same basis. The bottom line is that, without the approval of the 363 Sale, there would have been nothing for unsecured creditors. Plaintiffs cannot show prejudice from the Court's approval of the 363 Sale, or from any alleged due process violation they now assert.

II. REMEDIES THRESHOLD ISSUE: IF A REMEDY IS WARRANTED, THE PROPER REMEDY IS TO ALLOW PLAINTIFFS TO SEEK TO RECOVER THEIR PRO RATA DISTRIBUTION FROM THE PROCEEDS OF THE SALE OF OLD GM'S ASSETS

Assuming, *arguendo*, that (i) Plaintiffs can prove they were deprived of due process by ***Old GM*** as a result of the type of notice ***Old GM*** provided in connection with the 363 Sale, and (ii) the approval of the Sale Order and Injunction would have changed as a result of the allegedly defective notice, the proper remedy would be to allow Plaintiffs to seek to recover their *pro rata* distribution from the proceeds of that sale. As of June 30, 2014, the GUC Trust held, in the aggregate, $1.1 billion in assets that remain from the proceeds of the 363 Sale.[15] That is where Plaintiffs should look for a remedy. Were this Court to find a due process violation (which New GM believes it should not), it could only have been Old GM—and certainly not New GM—that arguably committed that due process violation. The Old GM estate should bear the consequences of such action.

Furthermore, partially setting aside the Sale Order and Injunction as it applies to Plaintiffs is not a viable remedy for inadequate notice. As discussed above, this Court approved the inclusion of an integration clause in the Sale Order and Injunction that expressly prohibits the partial, selective enforcement of portions of the Sale Agreement. *See* Sale Order and Injunction, ¶ 69; *see also Campbell*, 428 B.R. at 52, 61; *Parker*, 430 B.R. at 81-82. Importantly, rewriting the Sale Order and Injunction to strip New GM of its bargained-for and Court-approved protections undermines two integral bankruptcy policy objectives: the finality of judgments and protecting good faith purchasers.[16] As the Court in *In re White Motor Credit Corp.*, 75 B.R. 944,

[15] As noted, the GUC Trust recently announced that it was going to reduce its holdings by making a distribution to its holders this month ***in excess of $225 million***, notwithstanding that the Threshold Issues have not yet been decided by the Court.

[16] *See Lehman*, 445 B.R. at 149-50.

950-51 (Bankr. N.D. Ohio 1987), noted in discussing the public policy objectives for imposing a successor liability bar on product liability claimants:

> The effects of successor liability in the context of a corporate reorganization preclude its imposition. The successor liability specter would chill and deleteriously affect sales of corporate assets, forcing debtors to accept less on sales to compensate for this potential liability. This negative effect on sales would only benefit product liability claimants, thereby subverting specific statutory priorities established by the Bankruptcy Code. This result precludes successor liability imposition.

There is no compelling reason for the Court to jettison these fundamental principles.

A. Setting Aside The Sale Order And Injunction Five Years After The Fact Is Not A Viable Option

Courts have held that Fed. R. Civ. P. 60(b)(4) may provide a remedy to set aside a sale in its entirety in the extreme circumstance where no notice is provided. *See Cedar Tide Corp. v. Chandler's Cove Inn, Ltd*, 859 F.2d 1127 (2d Cir. 1988) (bankruptcy court did not err in voiding debtor's post-petition transfer of substantially all of its assets without any notice and a hearing as required by section 363(b)); *McTigue v. Am. Sav. & Loan Assoc. of Fla.*, 564 F.2d 677, 679 (5th Cir. 1977). This drastic remedy exists to correct complete failures to comply with section 363 and the notice requirements of Bankruptcy Rule 2002.

Notably, in this case, extensive notice was provided to parties in interest. As highlighted, over four million direct mail notices were sent, Publication Notice was provided in nine major periodicals, and there was broad and widespread media coverage of the 363 Sale. Several hundred objections were filed on account of such expansive notice. This Court held extensive hearings over multiple days, and the Court carefully considered the objectors' arguments and the trial evidence. *See generally* Sale Hearing transcripts (6/30/09, 7/1/09 and 7/2/09). This Court, based on an extensive factual record, determined that the consideration that New GM offered

was fair and provided the creditors with a much more favorable return than liquidation. *See Gen. Motors*, 407 B.R. at 494. The Court's findings were upheld on appeal.

New GM is unaware of any legal authority endorsing the proposition that, in a bankruptcy case involving a large number of claimants where comprehensive notice and hearings took place, a sale order could be partially voided because one group of claimants allegedly did not receive proper notice of the sale. *See In re BFW Liquidation, LLC*, 471 B.R. 652 (Bankr. N.D. Ala. 2012). In fact, allowing a partial revocation of the sale order years after its entry would run contrary to the well-established public policy objectives of protecting asset purchases in bankruptcy so that a debtor can maximize the sale value of its assets for the benefit of its creditors. *See, e.g.*, *Douglas v. Stamco*, 363 Fed. App'x 100, 2010 WL 337043, at *2 (2d Cir. 2010) (warning against allowing torts claims against a purchaser who acquired a debtor's assets "free and clear" of such claims, explaining that allowing such claims would run counter to a core aim of the Bankruptcy Code, which is to maximize potential recovery by creditors, and holding that allowing such claims is particularly inappropriate where the "free and clear" nature of the sale was a crucial inducement to the sale). Allowing unknown, contingent creditors to assert claims against a purchaser of a debtor's assets could chill bidding and result in the debtor receiving far less for its assets than if such creditors were only permitted to proceed against the entity that allegedly wronged them—*i.e.*, the debtor. *See Doktor v. Werner Co.*, 762 F. Supp. 2d 494, 498-500 (E.D.N.Y. 2011).

To the extent Plaintiffs can prove that they are entitled to any relief, the appropriate remedy is to permit them to seek allowance of an unsecured claim against the Old GM bankruptcy estate, placing them in the same position they would have been in had they participated in the Sale Hearing—and no better position.

B. The Bankruptcy Code And Rules Do Not Allow For Partial Revocation Of The Sale Order And Injunction, And The Sale Order And Injunction Expressly Prohibits It

The Sale Order and Injunction (¶ 6) provides that it is binding on, among others, all "known and unknown creditors of . . . any Debtor." Plaintiffs ask that the Sale Order and Injunction be partially revoked so that it is not binding on them. There is no authority supporting such a remedy based on the facts of this case. This lack of legal authority is not surprising given that the plain language of section 363(m) of the Bankruptcy Code does not permit the modification of a sale order on appeal except under extremely limited circumstances, which are not present here. To foster the finality of bankruptcy sales and encourage parties to bid for assets sold in bankruptcy, section 363(m) provides that:

> The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

Here, the Court already ruled that New GM is a good faith purchaser, and entitled to section 363(m) protection. *Gen. Motors*, 407 B.R. at 494. Importantly, while certain parties appealed the Sale Order and Injunction, it was never stayed pending appeal. The 363 Sale was fully consummated and implemented years ago, and any argument seeking to undo it now would be equitably moot. *See, e.g., United States v. Salerno*, 932 F.2d 117, 123 (2d Cir. 1991) (holding that it is beyond the power of the court to rewrite the terms of sale where the consummation of the sale was not stayed). Therefore, the terms of the 363 Sale may not be modified as to New GM, who is a good faith purchaser. *See Campbell*, 428 B.R. at 60-64.

In *Campbell*, the District Court rejected the plaintiff accident claimants' argument that the Sale Order and Injunction could be enforced against everyone except them. *Id.* Judge

Buchwald refused to "rewrite," "unravel," or "carve out" any provisions from the "integrated terms of this extensively negotiated transaction." *Id.* at 60-61. She ruled:

> As the Bankruptcy Court found, and as discussed above, the various terms of the Sale Order and Injunction providing for the free and clear sale of the Purchased Assets were of critical significance to the 363 Transaction. *See, e.g.*, Sale Order and Injunction ¶ DD. Following the renegotiation of the agreements between Debtors and the Purchaser providing that the Purchaser would assume the Future Products Claims, the newly-expanded Assumed Liabilities still did not include the Existing Products Claims. *See, e.g.*, Appellants Br. 7–8. Moreover, the parties anticipated and contracted against the sort of interlinear relief Appellants request here. *See id*. App. B(MPA) Art. VII § 7.1. In other words, the Bankruptcy Court could not have modified the Sale Order and Injunction without the parties' consent or written waiver. Cf. Sale Op., 407 B.R. at 517 ("This Court has found that the Purchaser is entitled to a free and clear order. The Court cannot create exceptions to that by reason of this Court's notions of equity."). This Court likewise lacks the power to rewrite the Sale Order and Injunction.

Id. at 61-62. The result of a challenge to the Sale Order and Injunction using Fed. R. Civ. P. 60, as contrasted to an appeal, should be no different; the same reasoning applies.

In *In re Fernwood Markets*, the court provided additional reasons why the partial revocation of a sale order is improper:

> First, we believe that either the sale is totally void or voidable, or it is valid. We do not believe that it can be valid, or "reaffirmed," as to one lienholder and not to another. Secondly, we believe that allowing Shrager to retain its lien—or, more practically, pursue a claim against the TICP—while requiring other lienholders, who may be senior to Shrager, to resort to the sale proceeds just because of the fortuitous circumstance that Shrager failed to get proper notice of the sale would be to provide Shrager with an unjustified and unjustifiable windfall.

73 B.R. 616, 621 (Bankr. E.D. Pa. 1987). The same is true here. Plaintiffs' suggestion that the Sale Order and Injunction can be valid and binding against all of Old GM's creditors, but not against them, would result in an unjustified windfall.[17]

[17] *See, e.g., In re Trans World Airlines, Inc.*, 322 F.3d 283, 291-93 (3d Cir. 2003) (holding that allowing the claimants to seek a recovery from the successor entity while creditors which were accorded higher priority by the Bankruptcy Code obtained their recovery from the limited assets of the bankruptcy estate would "subvert the specific priorities which define Congressional policy for bankruptcy distribution to creditors").

Plaintiffs' request that the Court selectively rewrite portions of the Sale Order and Injunction also ignores the language of the Sale Order and Injunction, which provides that the numerous terms of the final sale cannot be selectively enforced. This Court approved the "Integrated Transaction" and "Conditions to Closing" provisions of the Sale Agreement, in which the purchaser expressly conditioned its purchase on the enforceability of the entirety of the Sale Agreement. *See* Sale Agreement, §§ 5.8, 7.1. Moreover, Plaintiffs' request to rewrite the Sale Order and Injunction is effectively the same as the request made in *Morgenstein* to rewrite the confirmation order, which this Court previously rejected. *See Morgenstein*, 462 B.R. at 500-05. The Court should similarly reject Plaintiffs' claims.

C. Plaintiffs Have A Viable Remedy Against Old GM's Unsecured Creditor's Trust

When a debtor's assets are disposed of free and clear of third-party interests, the third party's remedy should be against the proceeds of the disposition. *See MacArthur Co. v. Johns-Manville Corp.*, 837 F.2d 89, 94 (2d Cir. 1988); *In re Edwards*, 962 F.2d 641, 643-45 (7th Cir. 1992); *Conway v. White Trucks, A Div. of White Motor Corp.*, 885 F.2d 90, 96-97 (3d Cir. 1989). A decision by Judge Cohen in *In re BFW Liquidation, LLC*, 471 B.R. 652 (Bankr. N.D. Ala. 2012), is instructive. Shortly after filing for bankruptcy, the debtor sold leases following an extensive marketing and auction process. A comprehensive notice to a substantial numbers of creditors was sent. Following various court hearings, the court approved the asset sale under section 363. *Id.* at 658. Well after the sale closed, the plaintiff filed suit against the good faith purchaser seeking to hold the purchaser liable for the debtor's alleged bad actions, and to set aside the sale on the grounds that she did not receive notice of it. *Id.* at 669.

The court distinguished the case from the ones where no notice was given and there was a dispute as to the propriety of the sale process or the consideration paid. *Id*. at 673. The court

held that there was no basis to object to the sale and that plaintiff's interests had been protected by the creditors' committee and other parties. *Id.* In short, the court held plaintiff was not prejudiced by her lack of notice. The court also noted that the plaintiff was in the same position as many other creditors that did not receive direct notice of the sale based on the court's order limiting and specifying notice. Lastly, the *BFW* court held that there was simply no practical basis to set aside the sale order. "More importantly, from a practical perspective, it would simply be impossible to undo the sale, reassemble all of the things sold and since resold, and reimburse the buyer's purchase price money and other outlays at this late date." *Id.* Instead, the proper remedy was to permit the plaintiff to seek a claim against the debtor. In no event did the plaintiff have any remedy against the good faith purchaser. *Id.* at 669-74; *see also Molla v. Adamar of New Jersey, Inc.*, No. 11-6470 (JBS/KMW), 2014 WL 2114848, at *4 (D. N.J. May 21, 2014) (holding that if plaintiff did not receive adequate notice of the bankruptcy proceeding that is relevant to whether its claims will be discharged, but is not a basis to impose liability on a purchaser who acquired assets "free and clear" of such claims).

In sum, the Court should reject Plaintiffs' argument that they be allowed to pursue successor liability claims against New GM as a remedy for Old GM allegedly providing defective notice. This directly conflicts with controlling precedent protecting good faith purchasers who acquire a debtor's assets "free and clear" of claims. If there were a due process violation (which is not the case), then any remedy would be against Old GM's successor, the GUC Trust, which holds the proceeds of sale.

III. OLD GM CLAIM THRESHOLD ISSUE: CLAIMS ASSERTED IN THE CONSOLIDATED COMPLAINTS ARE RETAINED LIABILITIES OF OLD GM AND NOT ASSUMED LIABILITIES OF NEW GM

This section of the brief addresses (a) claims based on accidents that occurred prior to the closing of the 363 Sale, and (b) claims asserted in the Post-Sale Consolidated Complaint.[18] As noted, assuming the due process argument is resolved against Plaintiffs, it is anticipated that Plaintiffs will dismiss the Pre-Sale Consolidated Complaint.[19]

Most of the claims in the Post-Sale Consolidated Complaint implicate the Ignition Switch Motion to Enforce and the Monetary Relief Action Motion to Enforce. The Post-Sale Consolidated Complaint alleges, among other things:

(i) economic loss claims relating to Old GM vehicles and parts sold after the 363 Sale by dealers and third-parties (but not New GM). These claims are barred by the Sale Order and Injunction since the only liabilities assumed by New GM with respect to Old GM vehicles and parts were Assumed Liabilities—these claims are not Assumed Liabilities.

(ii) the alleged loss of value to New GM-sold vehicles based on the recall of 27 million vehicles (*see* Post-Sale Consolidated Complaint, ¶ 3), a substantial number of which were manufactured by Old GM between 1997 and 2009 (*see id.* ¶ 192). A damage calculation against New GM predicated on Old GM vehicles and parts, which does not relate to Assumed Liabilities, is barred by the Sale Order and Injunction. That type of damage calculation is predicated on a successor liability theory which is barred by the Sale Order and Injunction.

(iii) remedies, such as punitive damages, based, in large part, on the conduct of Old GM. The Post-Sale Consolidated Complaint incorporates by reference all of the paragraphs

[18] The Motions to Enforce also concern any other cases that assert economic loss claims based on Old GM vehicles and parts that are referenced in the schedules (and supplemental schedules) to the Motions to Enforce but, to date, have not been consolidated in MDL 2543. These include: *Watson, Bloom, Alers* and *Frank*.

[19] It is New GM's understanding that, based on the directives of the MDL Court, the 692-page Post-Sale Consolidated Complaint subsumes and replaces all of the economic loss complaints filed in the individual actions that have been transferred to the MDL. Stated otherwise, if a cause of action is not contained in the Post-Sale Consolidated Complaint, it is not being asserted against New GM by the Plaintiffs in the MDL regardless of whether such economic loss claim was previously contained in an individual complaint. For that reason, New GM is not briefing, among other things, causes of action based on RICO and Lemon Laws since the Post-Sale Consolidated Complaint (as compared to some isolated individual economic loss complaints) does not contain such causes of action. In the event this understanding is further clarified by the MDL Court, or the Consolidated Complaints are further amended to add additional causes of action, New GM reserves the right to supplement this brief to address such additional claims.

> which deal with Old GM events that took place before the 363 Sale. Essentially, Plaintiffs are basing their damage demand, in large part, on Old GM's conduct, which is prohibited by the Sale Order and Injunction.

The Sale Order and Injunction expressly provides that, except for contractually defined "Assumed Liabilities," New GM shall have no liability for claims arising from or based upon vehicles or parts manufactured by Old GM:

> ***Except for the Assumed Liabilities*** expressly set forth in the [Sale Agreement], none of the Purchaser … shall have any liability for any claim that … ***relates to the production of vehicles prior to the Closing Date***, or otherwise is ascertainable against the Debtors or is related to the Purchased Assets prior to the Closing Date.

Sale Order and Injunction, ¶ 46 (emphasis added).

The Sale Order and Injunction also provides that except as expressly permitted under the Sale Agreement or the Sale Order and Injunction, all persons and entities, including litigation claimants (such as Plaintiffs), holding claims against Old GM, contingent or otherwise, arising under, out of, in connection with, or in any way ***relating to Old GM and the operation of its business prior to 363 Sale*****,** are barred from asserting such claims against New GM. *Id.* ¶ 8.

In addition, the Sale Order and Injunction states that, except for Assumed Liabilities, all claims arising in connection with Old GM's actions or omissions (*i.e.*, Old GM's conduct) may not be asserted against New GM. *See id*. ¶ AA. Based on, among other things, these provisions of the Sale Order and Injunction, with respect to Old GM vehicles or parts, whether they were sold by Old GM before the 363 Sale, or a dealer or third party (not New GM) after the 363 Sale, all economic loss claims arising therefrom are obligations of Old GM (and not New GM).

Under the Sale Agreement, New GM assumed only three expressly defined categories of liabilities for vehicles and parts manufactured by Old GM: (a) post-sale accidents involving Old GM vehicles causing personal injury, loss of life or property damage; (b) repairs or the replacement of parts provided for under the "glove box warranty"; and (c) Lemon Law violations

as defined in the Sale Agreement. All other liabilities relating to vehicles and parts sold by Old GM are, by definition, "Retained Liabilities" of Old GM. *See* Sale Agreement § 2.3(b).

Neither the Post-Sale Consolidated Complaint (as it relates to Old GM vehicles, parts or conduct) nor the Pre-Closing Accident Cases fall within any of these three categories of Assumed Liabilities: (i) post-363 Sale accidents; (ii) the already expired glove box warranty for Old GM vehicles (*see* New GM SOF, ¶ 67); or (iii) violations of Lemon Laws (as defined in the Sale Agreement). Therefore, Plaintiffs' claims relating to Old GM vehicles sold after the 363 Sale by dealers or third parties are not Assumed Liabilities; to the contrary, they are liabilities retained by Old GM.

Retained Liabilities for Old GM vehicles and parts include:

i. Liabilities "arising out of, relating to or in connection with any (A) implied warranty or other implied obligation arising under statutory or common law without the necessity of an express warranty or (B) allegation, statement or writing by or attributable to Sellers." Sale Agreement § 2.3(b)(xvi); *see also* Sale Agreement, ¶ 6.15(a). This would include liabilities based on implied warranty of merchantability, redhibition, and state consumer protection statutes.

ii. All liabilities of Old GM based upon contract, tort or any other basis. Sale Agreement, § 2.3(b)(xi). This covers claims based on negligence, state consumer protection statutes, concealment and fraud.

iii. All liabilities relating to vehicles and parts sold by Old GM with a design defect.[20]

iv. All Product Liabilities (as defined in the Sale Agreement) arising from any accidents, incidents or other occurrences that happened prior to the closing of the 363 Sale. Sale Agreement, § 2.3(b)(ix). This covers claims alleged in the Pre-Closing Accident Cases.[21]

v. All Liabilities based on the conduct of Old GM, including any allegation, statement or writing attributable to Old GM. This covers fraudulent concealment

[20] *See* Sale Order and Injunction, ¶ AA; *see also Trusky v. Gen. Motors LLC (In re Motors Liquidation Co.)*, Adv. Proc. No. 09–09803, 2013 WL 620281, at *2 (Bankr. S.D.N.Y. Feb. 19, 2013).

[21] *See Decision on New GM's Motion to Enforce Section 363 Order with Respect to Product Liability Claim of Estate of Beverly Deutsch*, dated Jan. 5, 2011 [Dkt. No. 8383](**Appendix, Exh. "EE"**), at 3 ("Thus, those Product Liability Claims that arose from 'accidents or incidents' occurring before July 10, 2009 would not be assumed by New GM . . . .").

type claims and any punitive damage remedy predicated on Old GM's conduct. *See* Sale Order and Injunction, ¶¶ AA, 56.

vi. All claims based on the doctrine of "successor liability." *See, e.g.* Sale Order and Injunction, ¶ 46.

In the Post-Sale Consolidated Complaint, with respect to such Old GM vehicles and parts, Plaintiffs are essentially seeking to hold New GM liable as a successor to Old GM. That is expressly barred by the Sale Order and Injunction. *See* Sale Order and Injunction, ¶ 47.

A. This Court's Prior Decisions Demonstrate Why Plaintiffs' Claims Are Retained Liabilities And Not Assumed Liabilities

This Court, on previous occasions, addressed similar issues to those raised in the Motions to Enforce, and held that New GM did not assume the types of liabilities that Plaintiffs now assert against New GM. As the Court found in *Castillo*, "it was the intent and structure of the 363 Sale, as agreed on by the Auto Task Force and Old GM, that New GM would start business with as few legacy liabilities as possible, and that presumptively, liabilities would be left behind and not assumed." 2012 WL 1339496 at *3. In addition, "by the end of the 363 Sale hearing it was clear not only to Old GM and Treasury, but also to the Court and to the public, that the goal of the 363 Sale was to pass on to Old GM's purchaser—what thereafter became New GM—only those liabilities that were commercially necessary to the success of New GM." *Id.* at *4. While certain objectors at the 363 Sale hearing argued that New GM should assume additional liabilities based on Old GM vehicles, the U.S. Treasury refused to do more than what was included in the Sale Agreement. As found by the Court, the States' Attorneys General "urged in argument before the Court that New GM take on liabilities broader than those that would be undertaken under the Sale Agreement as initially proposed—including implied warranties, additional express warranties, statutory warranties, and obligations under Lemon Laws." *Id.* at

*5. In fact, the States' Attorneys General wanted New GM to take on "everything" related to Old GM vehicles. *Id.* at *5.[22]

Plaintiffs in the Post-Sale Consolidated Complaint seek to recover for liabilities that were never assumed by New GM, and are clearly barred by the Sale Order and Injunction. *Trusky* is on point. There, New GM sought to enforce the Sale Order and Injunction against a purported class of plaintiffs who asserted that New GM assumed liabilities related to an alleged defect in vehicles (2007 and 2008 Chevrolet Impalas) manufactured by Old GM. Similar to claims raised in the Ignition Switch Actions and the Non-Ignition Switch Actions, the claims alleged in *Trusky* were based on (i) breaches of express and implied warranties, (ii) a design defect, and (iii) Old GM conduct. The plaintiffs sought damages based on economic loss, as well as injunctive relief. This Court found that such claims were barred by the Sale Order and Injunction:

> (1) To the extent that the Trusky Plaintiffs are pursuing a claim for design defects in the spindle rods or other components of the 2007 and 2008 Impalas, they may not do so; claims for design defects may not be asserted against New GM, as New GM did not assume liabilities of that character;
>
> (2) New GM is not liable for Old GM's conduct or alleged breaches of warranty;
>
> (3) New GM's warranty obligations are limited to honoring the specific terms of the glove box warranty as to vehicles presented for repair to New GM dealers within the mileage and duration limitations of the glove box warranty…;
>
> (4) New GM is not liable for monetary damages or other economic loss under the terms of the glove box warranty.

Trusky, 2013 WL 620281, at *2.

[22] The Court in *Castillo* ultimately found that New GM had not assumed the liabilities at issue (*i.e.*, a prepetition class action settlement relating to an alleged defect in Old GM vehicles).

The *Trusky* decision demonstrates that New GM did not assume liabilities associated with Old GM vehicles sold by a dealer or third party after the 363 Sale that are based on (i) a design defect, (ii) express warranty theories, other than the performance obligations under the glove box warranty (which expired[23]), (iii) implied warranty claims, which include the implied warranty of merchantability, or (iv) Old GM's conduct including Old GM's failure to disclose.

B. New GM Cannot Be Held Liable For Old GM's Alleged Conduct, Either Directly Or As Old GM's Alleged "Successor"

Plaintiffs in the Ignition Switch Actions and the Non-Ignition Switch Actions do not dispute that (a) certain vehicles and/or parts at issue were manufactured by Old GM prior to the Sale Order and Injunction, and (b) the purported economic loss claims being asserted against New GM are not Assumed Liabilities under the Sale Agreement. Plaintiffs try to paint such claims as post-363 Sale obligations that New GM independently incurred. In reality, they are successor liability claims that are prohibited by the Sale Order and Injunction.

As provided in the Sale Order and Injunction, New GM is not a successor to Old GM; New GM assumed no liabilities in connection with successor or transferee liability. The Court has already ruled: "[T]he law in this Circuit and District is clear; the Court will permit GM's assets to pass to the purchaser free and clear of successor liability claims, and in that connection, will issue the requested findings and associated injunction." *Gen. Motors*, 407 B.R. at 506. The Sale Order and Injunction specifically found:

> ***The Purchaser shall not be deemed***, as a result of any action taken in connection with the [Sale Agreement] or any of the transactions or documents ancillary thereto or contemplated thereby or in connection with the acquisition of the Purchased Assets, ***to: (i) be a legal successor***, or otherwise be deemed a successor to the Debtors (other than with respect to any obligations arising under the Purchased Assets from and after the Closing); ***(ii) have, de facto or otherwise,***

[23] As part of the recall process, New GM is essentially providing the repair remedy that would otherwise have been performed under the glove box warranty prior to its expiration.

> ***merged with or into the Debtors; or (iii) be a mere continuation or substantial continuation of the Debtors or the enterprise of the Debtors***. Without limiting the foregoing, the Purchaser [New GM] shall not have any successor, transferee, derivative, or vicarious liabilities of any kind or character for any claims, including, but not limited to, under any theory of successor or transferee liability, de facto merger or continuity, environmental, labor and employment, and products or antitrust liability, whether known or unknown as of the Closing, now existing or hereafter arising, asserted, or unasserted, fixed or contingent, liquidated or unliquidated.

Sale Order and Injunction, ¶ 46 (emphasis added); *see also id.* ¶¶ AA, BB, DD, 6, 7, 8, 10 and 47; Sale Agreement, § 9.19; *see also Trusky*, 2013 WL 620281, at *8 ("The Sale Order, by which I approved the Sale Agreement, further ensures that New GM would acquire the assets free and clear of successor liability.").

In addressing a motion seeking to enforce the Sale Order and Injunction against a plaintiff's suit against New GM a year after the Petition Date, the Court specifically recalled that the successor liability issue had been extensively briefed and argued in connection with the Sale Hearing:

> The sale order makes clear that New GM was purchasing the assets free and clear of all liens, claims, encumbrances, and other interests including any rights or claims based on any theory of successor transferee, derivative or vicarious liability, or de facto merger or continuity of any kind or character. ***These provisions in the sale order were not slipped into the order with stealth but were hotly contested before me. One lawyer, in particular, Steve Jakubowski, litigated them vigorously and at length both before me and on appeal.*** I dealt with the successor liability issue extensively in my written decision and the appeal by Mr. Jakubowski from that decision was dismissed by the district court where my decision was also affirmed

Hr'g Tr. 56:7-20, June 1, 2010 (emphasis added). The Court went on to find as follows:

> I've already ruled on the arguments dealing with the underlying propriety of a free and clear order cutting off product liabilities claims as set forth in my opinion published at 407 B.R. 463. Until or unless some higher court reverses my determination—and neither of the district courts who've ruled on that determination have yet done so (*see* 2010 W.L. 1524763 and 2010 W.L. 1730802) —they're res judicata, or at least res judicata subject to any limitations on the res judicata doctrine requiring a final order. And of course, they're stare decisis. I found these arguments to be unpersuasive last summer, and considering the great

> deal with which my previous opinion dealt with those exact issues, I am not of a mind, nor do I think I could or should, come to a different view on those identical issues today.

Id., 61:14-62:2. Plaintiffs' successor liability allegations relating to Old GM vehicles and parts are the type of claims barred by the Sale Order and Injunction. *Res judicata* and *stare decisis* principles on this issue are controlling.

Plaintiffs have not expressly alleged successor liability in the Post-Sale Consolidated Complaint. Nevertheless, many of their claims against New GM fail because they are successor liability claims, transparently cast in a different way. In a case directly on point, the bankruptcy court in *Burton* reviewed whether New Chrysler assumed Old Chrysler's duty to warn its customers as to a "fuel spit back" defect. 492 B.R. at 405 While a recall was not initiated, New Chrysler did issue Technical Services Bulletins ("**TSBs**") to its dealers alerting them to the defect in certain models. *Id.* at 406. A class action was commenced by customers who owned vehicles subject to the defect. In finding that the sale order in *Old Carco* barred the customers' claims, the bankruptcy court first found that plaintiffs had not properly asserted a "duty to warn" case. Typically, "duty to warn" cases involve a plaintiff who sustained a *personal injury* because someone failed to warn him about a dangerous product, and the failure to warn proximately caused his subsequent injury. *Burton*, 492 B.R. at 405. The plaintiffs in *Old Carco* (like Plaintiffs in the Ignition Switch Actions and the Non-Ignition Switch Actions) did not allege subsequent personal injuries, and thus, in an economic loss case, there was no common-law duty to warn. *Id.*

Judge Bernstein properly analyzed the *Old Carco* case as one (like the Ignition Switch Actions and the Non-Ignition Switch Actions) where the plaintiffs alleged that they purchased a defective vehicle manufactured by Old Carco that requires more servicing and is worth less

money. The Court found that New Chrysler's conduct did not proximately cause economic loss to the plaintiffs. Any loss occurred when the vehicle was sold by Old Carco. The alleged failure to disclose "is a typical successor liability case dressed up to look like something else, and is prohibited by the plain language of the bankruptcy court's Order." *Burton*, 492 B.R. at 405 (internal citations omitted).

Here, Plaintiffs in the Ignition Switch Actions and the Non-Ignition Switch Actions are contending that, upon purchasing the assets from Old GM, New GM also acquired (and instantaneously became liable for breaching) a brand new duty to warn Plaintiffs about alleged defects in certain Old GM vehicles. However, as found in the *Old Carco* case, this theory is nothing more than a "dressed up" successor liability claim, and is barred by the Sale Order and Injunction. *Id.* at 406. In other words, if an Old GM vehicle is implicated, and the claim is not an Assumed Liability, New GM has no obligation to the vehicle owner. It is not more complicated than that.

The fact that Old GM vehicles may have been sold after the closing of the 363 Sale on the secondary market by used car dealers or other individuals, or that New GM may have sold New GM vehicles that were later unknowingly repaired by a third party (but not New GM) with a defective ignition switch acquired from Old GM, does not change the analysis. The operative facts for the successor liability analysis are the same: ***Old GM*** manufactured a vehicle with a defective part (or sold the defective part itself). Claims based on the facts alleged in the Actions are not Assumed Liabilities of New GM.

Moreover, a Plaintiff who purchased a used Old GM vehicle after the 363 Sale should not have any greater rights than the original owner of that vehicle. Generally speaking, a purchaser or assignee receives no greater rights than the seller or assignor had at the time of sale. *See In re*

Flanagan, 415 B.R. 29, 42 (D. Conn. 2009) ("In acquiring the estate's rights and interests . . . Titan acquired no more and no less than whatever rights and interests to MJCC and its properties the estate possessed at the time of the assignment."). In other words, an owner of an Old GM vehicle should not be able to "end-run" the applicability of the Sale Order and Injunction by merely selling that vehicle after the closing of the 363 Sale. Simply put, if the Sale Order and Injunction would have applied to the original owner who purchased the vehicle prior to the 363 Sale, it equally applies to the current owner who purchased the vehicle after the 363 Sale.

C. Plaintiffs' Warranty Assertions With Respect To Old GM Vehicles And Parts Do Not Enable Them To Circumvent The Court's Sale Order And Injunction

1. Plaintiffs Have Not Asserted A Glove Box Warranty Claim

The glove box warranty is for a limited duration and has expired for all of the vehicles that are the subject of the Motions to Enforce. In any event, the glove box warranty covers only repairs and replacement parts; the economic losses asserted by Plaintiffs in the Ignition Switch Actions and the Non-Ignition Switch Actions are for monetary damages and expressly barred by the glove box warranty. *See Trusky*, 2013 WL 620281, at *8. This bar pertains to all incidental or consequential damages, such as lost wages or vehicle rental expenses. *See id*. (quoting glove box warranty). "New GM undertook a performance, and not a monetary, obligation," meaning that the remedy for alleged breaches would entail specific performance, not monetary damages. *Id*. at *2.

2. New GM Did Not Assume Any Implied Warranties Or Other Implied Obligations Under Statutory Or Common Law

The Sale Agreement and the Sale Order and Injunction provide that implied warranty and other implied obligation claims are Retained Liabilities for which New GM is not responsible. Specifically, the Sale Agreement stated that Retained Liabilities of Old GM include liabilities

"arising out of, related to or in connection with any (A) ***implied warranty*** or other ***implied obligation arising under statutory or common law*** without the necessity of an express warranty or (B) allegation, statement or writing by or attributable to [Old GM]." Sale Agreement, § 2.3(b)(xvi) (emphasis added). The Sale Agreement further provides that "for avoidance of doubt," New GM "shall not assume Liabilities arising under the law of implied warranty or other analogous provisions of state Law, other than Lemon Laws, that provide customer remedies in addition to or different from those specified in Sellers' express warranties." *Id*. § 6.15(b).

The Sale Order and Injunction reiterated the point by providing that New GM "is not assuming responsibility for Liabilities contended to arise by virtue of other alleged warranties, ***including implied warranties*** and statements in materials such as, without limitation, individual customer communications, owner's manuals, advertisements, and other promotional materials, catalogs and point of purchase materials." Sale Order and Injunction, ¶ 56 (emphasis added); *see also Castillo*, 2012 WL 1339496, at *7 (paragraph 56 of the Sale Order and Injunction, "emphasized, once again, that New GM would be assuming only express warranties that were delivered upon the sale of vehicles—and as having been intended to exclude other kinds of warranty-related claims").

Based on the foregoing, it is beyond dispute that New GM did not assume any liabilities for Old GM vehicles or parts predicated on alleged breaches of either (1) express warranties allegedly contained in materials outside the four corners of the glove box warranty, (2) implied warranties, including the implied warranty of merchantability[24] and redhibition[25] (each of which

[24] While Plaintiffs in the California Class assert that their claim based on the "Song-Beverly Consumer Warranty Act for Breach of Implied Warranty of Merchantability" is a lemon law claim (*see* Post-Sale Consolidated Complaint, ¶ 1158), this claim does not fit within the definition of "Lemon Laws" in the Sale Agreement. Lemon Laws is defined as "a state statute requiring a vehicle manufacturer to provide a consumer remedy when such manufacturer is unable to conform a vehicle to the express written warranty after a reasonable number of attempts, as defined in the applicable statute." Sale Agreement, p. 11. Plaintiffs in this count make absolutely no assertion that New GM failed to conform the vehicle "after a reasonable number of attempts." *See* Post-Sale

is expressly pled in the Consolidated Complaints), or (3) implied obligations under state statutes, including consumer protection statutes (also expressly pled in the Consolidated Complaints). Plaintiffs' claims against New GM with respect to Old GM vehicles and parts based on these legal theories are barred by the Sale Order and Injunction.

3. Claims Based On The Magnuson-Moss Warranty Act Cannot Be Asserted Against New GM With Respect To Old GM Vehicles Or Parts

In the Consolidated Complaints, Plaintiffs also attempt to assert claims against New GM based on the Magnuson Moss Warranty Act. *See* 15 U.S.C. § 2301, *et seq*. That statute creates a federal private cause of action for a warrantor's failure to comply with the terms of a written warranty, but the only express warranty claim assumed by New GM was under the now expired, limited glove box warranty. All other express warranty claims with respect to Old GM vehicles and parts, including claims based on the Magnuson Moss Warranty Act, are Retained Liabilities.

The statute also allows a suit for breach of an implied warranty, but as previously noted (*see* Part III.C.2, *supra*), New GM did not assume liabilities "arising out of, related to or in connection with any [ ] implied warranty . . .," and therefore any implied warranty claim based on the Magnuson Moss Warranty Act are Retained Liabilities. *See* Sale Agreement, § 2.3(b)(xvi); Sale Order and Injunction, ¶ 56; *see also Castillo*, 2012 WL 1339496, at *7.

D. Any Claims Based On A Design Defect Are Barred By The Sale Order And Injunction

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Consolidated Complaint, ¶¶ 1146-1160. The Song-Beverly statute is merely another state statute that concerns the implied warranty of merchantability. Claims based on such implied warranties are barred by the Sale Order and Injunction.

[25] Both Consolidated Complaints contain claims based on Louisiana's "redhibition" statute, LA. CIV. CODE ART. 2520, *et seq.* The name of the statute is "***warranty*** against redhibitory defects" and provides that "[t]he seller ***warrants*** the buyer against redhibitory defects . . . ." *Id.* (emphasis added). As Louisiana's redhibition statute is an "implied obligation arising under statutory . . . law," any claims based on it are barred by the Sale Agreement and Sale Order and Injunction. *See* Sale Agreement, §§ 2.3(b)(xvi), 6.15(b); Sale Order and Injunction, ¶ 56. In addition, as New GM did not assume liabilities based on design defects in Old GM vehicles, claims based on redhibition defects would similarly be barred. *See Trusky*, 2013 WL 620281, at *2; *Vanderbrook v. Coachmen Indus., Inc.*, 818 So.2d 906, 912 (La. App. 1 Cir. 2002) (a necessary element of a redhibition claim is that "the defect existed at the time of sale, and was not apparent . . .").

Many of the claims set forth in the Consolidated Complaints are predicated on an alleged design defect in vehicles and/or parts manufactured and/or sold by Old GM. *See*, *e.g.*, Post-Sale Consolidated Complaint, ¶ 2560 ("The Defective Ignition Switch Vehicles contained a design defect, namely, a faulty ignition system that fails under reasonably foreseeable use, resulting in stalling, loss of brakes, power steering, and airbags, among other safety issues, as detailed herein more fully."); ¶ 2563 ("The design defects in the vehicles were the direct and proximate cause of economic damages to Plaintiffs, as well as damages incurred or to be incurred by each of the other Ohio Ignition Switch Defect Subclass members.). However, as expressly found in *Trusky*, New GM did not assume any liabilities based on an alleged design defect in Old GM vehicles. *See Trusky*, 2013 WL 620281, at *2.

The Sale Order and Injunction also applies to claims relating to New GM vehicles to the extent those vehicles are alleged to contain a defective part manufactured by Old GM. Indeed, subsequent to the New GM sale, in a limited number of cases, an original, defective ignition switch—one sold by Old GM prior to the closing of the 363 sale—may have been unknowingly installed by a dealer or other third party (but not New GM) when the vehicle was repaired. While New GM believes that the number of affected vehicles was small, New GM initiated a full-scale recall to ensure there would be no issue. Obviously, no design defect claim of any kind will lie for any Plaintiff who owned a New GM vehicle that was prophylactically repaired under the recall because his/her vehicle never contained a defective part.

The repairs performed by dealers or other third parties in which a defective ignition switch was installed are not attributable to New GM. Those dealers and other third parties are not agents of New GM. *See Causey v. Sewell Cadillac-Chevrolet, Inc.*, 394 F.3d 285, 290 (5th Cir. 2004) (holding that General Motors "has no agency relationship with [GM dealership] and

cannot be held liable for any improper acts that occurred at the [GM] dealership"); *Murphy v. DirecTV, Inc.*, 724 F.3d 1218, 1232 (9th Cir. 2013) ("Generally, retailers are not considered the agents of the manufacturers whose products they sell."); *Carlisle v. Deere & Co.*, 576 F.3d 649, 656 (7th Cir. 2009) ("As a general rule, a dealer is not an agent for manufacturers of the products it sells."); *Proctor & Gamble Co. v. Haugen*, 222 F.3d 1262, 1278 (10th Cir. 2000) (holding that distributors of manufacturer's products were not agents of the manufacturer).

E. Any Claims Based On "Contract, Tort Or Otherwise" Are Barred By The Sale Order And Injunction

1. Tort-Based Claims Are Not Assumed Liabilities

As noted, one of the express categories of Retained Liabilities is "all Liabilities to third parties for Claims based upon Contract, tort or any other basis." Sale Agreement, § 2.3(b)(xi). Claims for common-law fraud, fraudulent concealment, fraudulent misrepresentation, tortious interference with contract, violations of consumer protection statutes, unjust enrichment, and similar theories, are all claims that sound in tort and are barred by the Sale Order and Injunction. *See e.g., Gruber v. Victor*, No. 95 Civ. 2285 (JSM), 1996 WL 492991, at *17 (S.D.N.Y. Aug. 28, 1996) ("The tort of fraudulent concealment similarly requires a relationship between the parties creating a duty to disclose."); *St. John's Univ. v. Bolton,* 757 F. Supp. 2d 144, 174 (E.D.N.Y. 2010) ("The Complaint includes a tort claim . . . for fraudulent concealment . . . ."); *Official Comm. of Unsecured Creditors of Lois/USA, Inc. v. Conseco Fin. Servicing Corp. (In re Lois/USA, Inc.)*, 264 B.R. 69, 98 (Bankr. S.D.N.Y. 2001) ("At the other extreme are claims (# 4, Fraudulent Misrepresentation; # 5, Fraud; and # 6, Negligent Misrepresentation) which are plainly in the nature of tort."); *Beyond Sys., Inc. v. Kraft Foods, Inc.*, 972 F.Supp.2d 748, 768 (D. Md. 2013) ("'[V]iolations of the Consumer Protection Act, are 'in the nature of a tort.' Indeed, both statutes regulate[ ] false and deceptive trade practices . . . the same principles that when

faced with questions of individual liability for torts apply here.' [citation omitted]. California law is equally clear that statutory violations may be deemed as being in the nature of torts."); *Hiller v. Mfrs. Prod. Research Grp. of N. Am., Inc.*, 59 F.3d 1514, 1537 (5th Cir. 1995) (claims based on Texas Deceptive Trade Practices and Consumer Protection Act "sound in tort"); *Segal v. Firtash***,** No. 13–cv–7818 (RJS), 2014 WL 4470426, at *7 (S.D.N.Y. Sept. 9, 2014) (stating that an unjust enrichment claim sounded in tort); *Rodriguez v. It's Just Lunch, Intern.*, 300 F.R.D. 125, 135 (S.D.N.Y. 2014) ("Plaintiffs' fraud and unjust enrichment claims sound in tort pursuant to New York law."). These types of claims are not Assumed Liabilities under the Sale Agreement. Accordingly, any such claims in the Consolidated Complaints based on Old GM vehicles, parts and/or conduct are barred by the Sale Order and Injunction.

2. Claims Premised On Fraud And Consumer Protection Statutes That Are Based On Old GM Conduct Are Barred

Moreover, any claims for fraud or fraudulent concealment, as well as claims based on consumer protection statutes, arise from Old GM's duties and emanate from Old GM's conduct at the time of Old GM's sale of the vehicle. The Consolidated Complaints are littered with allegations of Old GM concealing information or fraudulently inducing Plaintiffs to purchase vehicles. New GM did not exist at that time and, by definition, had absolutely no involvement in such sales. As a matter of law, New GM could not have concealed any information or fraudulently induced purchases of vehicles sold by Old GM. Moreover, New GM did not inherit from Old GM any common-law or statutory duty to disclose information about a product defect to current owners or future purchasers of used vehicles made and/or sold by Old GM. That would be another form of a successor liability claim, which New GM did not assume.

Hearing Date and Time: To Be Determined
Opposition Deadline: December 16, 2014
Reply Deadline: January 16, 2015

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Designated Counsel for Certain Plaintiffs

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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

DESIGNATED COUNSEL'S OPPOSITION TO NEW GM'S MOTIONS FOR ENFORCEMENT OF SALE ORDER AND INJUNCTION

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Designated Counsel,[1] for and on behalf of certain Plaintiffs, file this brief in opposition (the "**Opposition**") to New GM's Motions[2] and in response to the *Opening Brief By General Motors LLC On Threshold Issues Concerning Its Motions To Enforce The Sale Order And Injunction*, dated November 5, 2014 [ECF No. 12981] (the "**New GM Brief**" or "**Br.**") and respectfully represent as follows:[3]

PRELIMINARY STATEMENT

New GM first perpetrated and was then forced to publicly acknowledge a deliberate, systematic, and callous cover-up of dangerous defects. That admitted cover-up has resulted in numerous deaths and scores of serious bodily injuries, allowed innocent persons to be accused of and given criminal or moral responsibility for accidents that were the fault of GM,[4] and caused

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[1] Lead Counsel appointed in the General Motors LLC Ignition Switch Litigation Multidistrict Litigation in the United States District Court for the Southern District of New York, Judge Furman presiding, Case No. 14-MD-2543 (JMF) (the "**MDL Proceeding**"), have retained the undersigned Designated Counsel, pursuant to Lead Counsel's authority under *Order No. 13 (Organization of Plaintiffs' Counsel, Protocols for Common Benefit Work and Expenses)*, dated September 16, 2014 [MDL Proceeding ECF No. 304], to brief the Threshold Issues with respect to plaintiffs who have asserted actions consolidated for pre-trial purposes in the MDL Proceeding ("**Plaintiffs**"). See also *Scheduling Order Regarding (I) Motion of General Motors LLC Pursuant to 11 U.S.C. §§ 105 and 363 to Enforce the Court's July 5, 2009 Sale Order and Injunction, (II) Objection Filed by Certain Plaintiffs in Respect Thereto, and (III) Adversary Proceeding No. 14-01929*, dated May 16, 2014 [ECF No. 12697] (in which certain Plaintiffs designated Designated Counsel to appear for Plaintiffs' regarding New GM's Motions); *Supplemental Scheduling Order Regarding (I) Motion of General Motors LLC Pursuant to 11 U.S.C. §§ 105 and 363 to Enforce the Court's July 5, 2009 Sale Order and Injunction, (II) Objection Filed by Certain Plaintiffs in Respect Thereto, and (III) Adversary Proceeding No. 14-01929*, dated July 11, 2014 [ECF No. 12770] (the "**Supplemental Scheduling Order**") (ordering Designated Counsel to, *inter alia*, file and serve a response to the New GM Brief).

[2] "New GM's Motions" are (i) *Motion of General Motors LLC Pursuant to 11 U.S.C. §§ 105 and 363 to Enforce the Court's July 5, 2009 Sale Order and Injunction*, dated April 21, 2014 [ECF No. 12620]; (ii) *Motion of General Motors LLC Pursuant to 11 U.S.C §§ 105 and 363 to Enforce this Court's July 5, 2009 Sale Order and Injunction Against Plaintiffs in Pre-Closing Accident Lawsuits*, dated August 1, 2014 [ECF No. 12807]; and (iii) *Motion of General Motors LLC Pursuant to 11 U.S.C. §§ 105 and 363 to Enforce the Court's July 5, 2009 Sale Order and Injunction (Monetary Relief Actions, Other Than Ignition Switch Actions)*, dated August 1, 2014 [ECF No. 12808]. See *Appendix of Exhibits for Opening Brief by General Motors LLC on Threshold Issues Concerning Its Motions to Enforce the Sale Order and Injunction*, **Exhibits A, B, and C**, dated November 5, 2014 [ECF No. 12982] (the "**New GM Appendix**").

[3] Capitalized terms not otherwise defined in this Opposition shall have the meanings ascribed to them in the New GM Brief or the *Agreed and Disputed Stipulations of Fact Pursuant to the Court's Supplemental Scheduling Order, Dated July 11, 2014*, dated August 8, 2014 [ECF No. 12826]. See New GM Appendix, **Exhibit K**.

[4] For example, in 2004, a woman inexplicably lost control of the Saturn Ion she was driving and crashed, killing her boyfriend who was a passenger. The woman was convicted of criminally negligent homicide in 2007. Although

dramatic economic loss to millions of victims. Despite New GM's purported commitment to transparency and accountability, it now argues that a Sale Order,[5] entered five years before New GM initiated the long-overdue ignition switch defect recalls, provides New GM with total immunity from liability, for its own actions and for the actions of Old GM.

New GM's arguments ignore the constitutionally protected due process rights of the Plaintiffs and are a dangerous invitation to abuse the bankruptcy process whenever a company knows of serious liabilities but chooses not to disclose them and seeks, instead, to transfer its valuable assets to a "new" company while attempting to leave its undisclosed liabilities behind.

New GM's motions must be denied as to all categories of claimants: (a) those who bought or leased Old GM manufactured cars before the entry of the Sale Order (the "**Pre-Sale Class**"); (b) those who bought or leased Old GM manufactured cars after the entry of the Sale Order; and (c) those who bought or leased New GM manufactured cars (categories (b) and (c) together, the "**Post-Sale Class**").

As to the Pre-Sale Class members, New GM argues they were "unknown creditors" entitled only to constructive notice by publication. New GM is wrong. The Pre-Sale Class's damage claims and its members' identities were both readily ascertainable, as was the means to provide them with direct and meaningful notice. The existence of an ignition switch defect that caused loss of power and disablement of power steering, brakes and airbags in several model years of GM vehicles (the "**Ignition Switch Defect**" or "**ISD**") was known to a broad range of

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Old GM knew the crash was the result of a power failure, Old GM never came forward, and New GM only admitted that the ignition switch defect caused the accident this year. See Rebecca R. Ruiz, Woman Cleared in Death Linked to G.M.'s Faulty Ignition Switch, N.Y. Times, Nov. 24, 2014, http://www.nytimes.com/2014/11/25/business/woman-cleared-in-death-caused-by-gms-faulty-ignition-switch.html, attached as **Exhibit A** to the Affidavit of Edward S. Weisfelner (the "**Weisfelner Decl.**"), filed in connection herewith.

[5] A copy of the Sale Order is attached as **Exhibit E** to the New GM Appendix.

Old GM engineers, warranty claims managers, supply chain officials, test-track drivers, product quality managers, and counsel. Old GM continued to install the same or similarly faulty and unsafe ignition switches into multiple models of cars even as, year in and year out, reports of unexplained stalls and resulting accidents continued to pour into Old GM, and lawsuits resulting therefrom were settled with authorization from the highest corporate levels.

Purchasers of vehicles with undisclosed latent safety defects have claims against the manufacturer of such vehicles, for, *inter alia*, economic losses, a fact well known to Old GM.

The identities of the members of the Pre-Sale Class were reasonably ascertainable to Old GM because, as required by federal law, Old GM had systems in place to track product safety issues and the means to identify and communicate directly with owners and lessees of manufactured cars, even after multiple ownership changes.

As known creditors with cognizable claims whose contact information was readily (and reasonably) ascertainable, the members of the Pre-Sale Class were entitled to actual, direct and meaningful notice of the proceeding. It was not given. Because the right to bring a claim against New GM as a state law successor to Old GM is "property" cognizable under the Fifth Amendment, and because the members of the Pre-Sale Class were not provided with adequate notice of the hearing, the Sale Order is not enforceable against its members.

New GM argues that, even if the Pre-Sale Class was denied adequate notice and an opportunity to be heard, such deprivation is not, in and of itself, a denial of due process. According to New GM, the Pre-Sale Class must also show "prejudice." Thus, New GM argues that if the Plaintiffs cannot demonstrate that constitutionally required notice would have altered the outcome of the Sale Hearing, the Pre-Sale Class members can have sustained no prejudice and therefore have not shown a due process violation.

New GM's "lack of prejudice" argument flies in the face of decades of due process jurisprudence. Because the Due Process Clause protects, *inter alia*, the right to be heard, not the right to win, an order issued without providing for adequate notice and the right to be heard is unenforceable as against the party deprived of that right. Moreover, there is no way to determine, some five years later, what the outcome would have been had the bombshell of Old GM's concealment of this massive safety defect been made known to the Court, the Treasury, Congress, the public, the press and the various objectors. That is precisely why the case law is so clear that if there was a denial of due process, the resulting order cannot be enforced against the parties so deprived. The law simply does not permit Monday-morning quarterbacking in connection with a game that the Plaintiffs were precluded from playing in real time.

In any case, New GM's self-serving speculation regarding possible outcomes had the ISD been disclosed and notice to the Pre-Sale Class been given are not even plausible. Treasury has testified that the line it drew on which obligations New GM would assume was based on a determination of what liabilities were "commercially necessary" for the success of New GM. In that regard, had the Court and governmental authorities known that Old GM had knowingly placed millions of cars on the road with a life-threatening safety defect (and that New GM intended to continue to allow such cars to remain on the road with those known defects), it is not reasonable to assume (as New GM does) that such a revelation could only have resulted in a disastrous liquidation and the end of GM as a functioning company. Instead, it is likely that such an outcome would have still been avoided (for numerous reasons, political, national economic and otherwise, that were still significant, compelling and extant), and that the entry of the Sale Order would have been conditioned on New GM's assumption of all related liabilities so as to

ensure the commercial success of the purchasing entity. Indeed, that was the rationale behind the last-minute amendment to the deal that saw New GM take on liabilities for post-sale accidents.

Addressing the issue of remedies, New GM then argues that even if there was a denial of due process, the fault lies with Old GM and the only remedy is to have the Pre-Sale Class target the GUC Trust. This argument, again, ignores that it is New GM that is seeking a remedy here—the enforcement of the Sale Order. Notwithstanding the potential legal availability to Plaintiffs of relief on other claims against other parties, the violation of the due process rights of the Pre-Sale Class prevents, as a matter of law, New GM from enforcing the Sale Order against its members. Furthermore, New GM's finger-pointing is particularly inapposite (and disappointing) given that members of Old GM management who were complicit in the due process violations at issue (as well as the underlying misconduct) continued on as the leadership of New GM. In that role, the former Old GM management then perpetuated—for years—the same obdurate pattern of violation of law and disregard for the rights of others as they had begun as management of Old GM.

New GM's Motions to enforce the Sale Order against the Post-Sale Class must likewise be denied based on fundamental due process considerations. The identity of the members of this class could not be predicted at the time of the Sale Hearing, nor did their claims then exist. As "future claimants" they could not have been (and were not) afforded notice or an opportunity to be heard. Moreover, even though Old GM knew that millions of dangerously defective cars were on the roads and in the stream of commerce, it did nothing that would have enabled future claimants from avoiding either physical or economic injury. Under well-established law, the Sale Order is ineffective to bar their claims against New GM either as successor to Old GM or on any other footing.

Finally, it must be emphasized that each and every one of the direct claims asserted against New GM targets New GM's own actions and failures in causing cognizable injuries. New GM is not absolved from liability because it was perpetuating the safety flaws embedded in cars designed by Old GM. New GM and New GM alone is responsible for continuing to manufacture defective motor vehicles after the Sale, for failing to timely recall the dangerous vehicles that it and it alone put on the roads, and for further delaying those recalls even after it started ordering replacement parts to remedy the ISD. It was New GM that fired some fifteen New GM employees (including in-house counsel) and entered into a Consent Order with the National Highway Traffic Safety Administration ("**NHTSA**"), in which it admitted that it (and not just "Old GM") violated federal law by not disclosing the ISD, and agreed to pay the maximum available civil penalty for its violations. And it was New GM's conduct that generated a firestorm of negative publicity surrounding the safety and reliability of the GM brand, thus causing a dramatic drop in the value of GM cars still on the road. While New GM would like to construe the Sale Order as a "get out of jail free" card that shields it from its own acts and failures, that cannot be the proper construction of the subject order.

NEW GM'S MOTIONS

Through its Motions, New GM seeks to enjoin, *inter alia*, the prosecution of all claims by owners or lessees of ISD-affected vehicles ("**Defective Vehicles**").[6] Plaintiffs oppose the Motions as to claims they have asserted in the MDL Proceeding,[7] including those claims alleged

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[6] Through its motions New GM also seeks to enjoin prosecution of economic loss claims involving vehicles and parts sold by Old GM and containing a defect other than the ISD. This Opposition does not address these claims for the reasons discussed infra at note 9.

[7] As of the date of this Opposition, approximately 132 actions have been consolidated for pre-trial purposes in the MDL Proceeding, a number which may still increase. See Transfer Order, In re Gen. Motors Ignition Switch Litig., MDL No. 2543, Doc. No. 266 (J.P.M.L. June 12, 2014) ("**Transfer Order**"), attached hereto as **Exhibit 1**. Each individual action asserts claims on behalf of classes or individuals for "economic damages . . . stemming from an

in the two amended consolidated class action complaints (the "**Consolidated Complaints**," attached as **Exhibits I and J** to the New GM Appendix):

i. **The "Pre-Sale Action"**: Asserting claims on behalf of the Pre-Sale Class against New GM as successor to Old GM and based on New GM's own wrongful conduct and breaches of its own independent, non-derivative duties;

ii. **The "Post-Sale Action"**: Asserting claims on behalf of the Post-Sale Class against New GM for New GM's own wrongful conduct and breaches of its own independent, non-derivative duties.[8]

In connection with the Motions, the Court issued an Order directing Plaintiffs, New GM and the GUC Trust to initially address certain Threshold Issues. See Supplemental Scheduling Order at 2.[9] The Court ordered that there be no discovery at present with respect to the Threshold Issues, and no discovery has been conducted in this forum. Id. at 4. Plaintiffs, New GM, and the GUC Trust agreed that in addressing these Threshold Issues, they may rely upon the agreed factual stipulations filed with the court and any factual materials that would be considered by the Court pursuant to Federal Rule of Bankruptcy Procedure 7056.[10] Id. at 4-5.

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alleged defect in certain General Motors vehicles that causes the vehicle's ignition switch to move unintentionally from the 'run' position to the 'accessory' or 'off' position, resulting in a loss of power, vehicle speed control, and braking, as well as a failure of the vehicle's airbags to deploy." Transfer Order at 1-2.

[8] The New GM Motions also seek to enjoin two actions brought by States' Attorney Generals: California v. Gen. Motors LLC, No. 8:14-cv-01238 (Super. Ct. Cal. June 27, 2014), and Arizona, ex rel. Horne v. Gen. Motors LLC, No. CV2014-014090 (Super. Ct. Ariz. Nov. 19, 2014). However, these actions seek civil penalties that are based solely on the Post-Sale conduct of New GM and as such are outside of the scope of the Sale Order.

[9] The Supplemental Scheduling Order does not order briefing for claims not related to ISD defects. As a result, the stipulations of fact that constitute the record for the Threshold Issues do not address those claims and the factual record with respect to them has not been adequately developed in this Court. It may well be most efficient for due process issues related to non-ISD claims to be addressed in the MDL Proceeding, upon reference withdrawal, together with other motions directed to the Consolidated Complaints, after this Court determines the Threshold Issues based upon the stipulated record developed for the ISD. But, in any event, the Sale Order should not apply to claims in the Post-Sale Complaint because (i) they are based exclusively on New GM's own conduct and are outside the scope of the Sale Order, see infra Section III; (ii) certain of the claims involve vehicles manufactured or sold by New GM, and are outside the scope of the Sale Order, see infra Section III, and (iii) the Sale Order barred them without due process, see infra Section I.D.

[10] If this Court determines, based on a lack of discovery, that contested factual issues remain, Plaintiffs suggest that those factual issues may be most efficiently resolved in the MDL Proceeding where discovery has been proceeding and ongoing under Judge Furman's supervision.

FACTUAL BACKGROUND

A. The Defective Ignition Switch Was Engineered By Old GM In 2001.

Beginning in or before 2001, several models of vehicles designed, manufactured, and sold by Old GM through June 10, 2009, had a safety defect that, without the driver so intending, caused the vehicle's ignition switch to move from the "Run" position to the "Accessory" or "Off" position during ordinary driving conditions. No less than 13 million vehicles containing the ISD have now been recalled.[11] An ignition switch with this defect (an "**Ignition Switch**") is more likely to move position during a collision, on bumpy roads, if the key chain is heavy, or if the driver's knee inadvertently touches the ignition key. See *Certain Plaintiffs, Through Designated Counsel, And The Groman Plaintiffs' Agreed-Upon Stipulations Of Fact In Connection With The Four Threshold Issues Identified In This Court's July 11, 2014 Supplemental Scheduling Order*, ¶ 10(A), dated August 8, 2014, [ECF No. 12826-2] ("**DC Stipulated Facts**"). While in the "Accessory" or "Off" position, the vehicle will lose power and the driver will be unable to control the vehicle's speed and braking functions. Additionally, in the event of a collision, the vehicle's airbags will not deploy. The inadvertent movement of the Ignition Switch is due to one or more design and engineering defects which allow the ignition key to move too easily while the vehicle is being operated. See Anton R. Valukas, Report to Board of Directors of General Motors Company Regarding Ignition Switch Recalls, dated May 29, 2014, at 29-30, attached to the Weisfelner Decl. as **Exhibit B** ("**Valukas Report**" or "**V.R.**"). As New GM has acknowledged, the ISD results in "increas[ed] risk of injury or fatality." DC Stipulated Facts ¶ 3.

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[11] See GM 2014 Year-to-Date North American Recalls Including Exports, available at http://media.gm.com/content/dam/Media/images/US/Release_Images/2014/05-2014/recalls/Recalls-Running-Total.jpg (last accessed Dec. 15, 2014), attached hereto as **Exhibit 2**.

Old GM first identified the ISD fourteen years ago in late 2001 or early 2002, during validation testing of the 2003 model year Saturn Ion, then still in pre-production. See, e.g., V.R. at 45, 54. Old GM's design release engineer for the Ignition Switch, Raymond DeGiorgio, reported it consistently missed the final torque specifications provided to the part's supplier, Delphi Automotive Systems ("**Delphi**"). DC Stipulated Facts ¶¶ 14(I); V.R. at 37, 44-45.

Notwithstanding that the Ignition Switch did not meet Old GM's safety specifications, Old GM manufactured vehicles containing the Ignition Switch and released them into the public starting in the fall of 2002. See V.R. at 54. Immediately thereafter, Old GM began receiving reports from customers that their vehicles would stall while driving.

On October 3, 2003, Old GM opened the first of many internal investigations into the moving stall safety issue. Id. Old GM employees readily replicated the issue upon driving the subject vehicles and concluded that the inadvertent engine shut-offs resulted from a driver's knee grazing the key fob. See DC Stipulated Facts ¶¶ 7-8 (describing statement of Old GM employee Raymond P. Smith); V.R. at 57 n.219 (describing January 9, 2004 report from an engineer in Old GM's High Performance Vehicle Operations Group that a driver in a track test of the Chevrolet Cobalt SS repeatedly experienced a moving stall when his knee slightly grazed the key fob).

On July 4, 2004, a vehicle occupant died after her 2004 Saturn Ion (which contained the ISD) left the road and struck a utility pole head on. The airbag did not deploy. See DC Stipulated Facts ¶ 14(C)(i). Old GM was aware of this incident.

In August 2004, the 2005 Chevrolet Cobalt went into production and contained the ISD. V.R. at 57. Around the time of the Cobalt's launch, reports surfaced of moving stalls caused by drivers bumping the key fob or chain with their knees. Old GM was aware of these reports. See V.R. at 59-63; DC Stipulated Facts ¶ 14(B)(i).

B. Old GM Initiates Internal Investigations Of The ISD.

On November 19, 2004, Old GM initiated a Problem Resolution Tracking System ("**PRTS**") to address the inadvertent shut-off issue. See V.R. at 63. Beginning a troubling pattern, the November 2004 PRTS was closed by Old GM with no action. Nevertheless, Old GM continued to receive reports of moving stalls associated with the defective Ignition Switches. See V.R. at 75-78; DC Stipulated Facts ¶ 14(S)(ii) (May 2005 customer demand that Old GM repurchase the customer's Cobalt because the Ignition Switch shut off during normal driving).

On May 17, 2005, a second PRTS was opened, as complaints of moving stalls continued to roll in. See V.R. at 78, 84. Testing done as part of the May 2005 PRTS confirmed that the force required to dislodge the Ignition Switch from "Run" was far below Old GM's manufacturing specifications. See DC Stipulated Facts ¶ 14(R)(i).

Mr. DeGiorgio, Ignition Switch lead design engineer, asked Delphi for data for a fix to the Ignition Switch, leading a Delphi engineer to comment, "Cobalt is blowing up in their face in regards to turning the car off with the driver's knee."[12]

Instead of a true fix, Old GM proposed other "solutions:" a plug to insert in keys and a change to the key for future production. But dealers only offered the plug to customers who complained of problems associated with the ISD. And the key change, described by one Old GM engineer as a "band-aid," was not even implemented then. DC Stipulated Facts ¶ 14(R)(ii).

On June 29, 2005, Old GM received a customer complained to Old GM about a 2005 Cobalt:

> Dear Customer Service:
>
> *This is a safety/recall issue if ever there was one* . . . . The problem is the ignition turn switch is poorly installed. Even with the slightest touch, the car will shut off

[12] See **Exhibit 27** to the Declaration of Steven W. Berman, filed in connection herewith ("**Berman Decl.**").

> while in motion. I don't have to list to you the safety problems that may happen, besides an accident or death, a car turning off while doing a high speed . . . .

V.R. at 89 (emphasis added).

On July 29, 2005, a 2005 Chevrolet Cobalt crashed, killing the occupant. The airbags did not deploy. DC Stipulated Facts ¶ 14(C)(i). Old GM was aware of this incident.

C. Old GM Notifies Its Dealers Of The ISD.

In December 2005, Old GM issued Service Bulletin 05-02-35-007 (the "**December 2005 Service Bulletin**") to its dealers with respect to the 2005-2006 Chevrolet Cobalt, 2006 Chevrolet HHR, 2003-2006 Saturn Ion, and 2006 Pontiac Solstice. Bearing the subject reference, "Information on Inadvertent Turning Off of Key Cylinder, Loss of Electrical System and No [Diagnostic Trouble Codes]," it described circumstances likely to increase the chance of an inadvertent shut-off ("if the driver is short and has a large and/or heavy key chain") and gave dealers talking points for customers who brought vehicles in for regular service (customers "should be advised of this potential and should take steps to prevent it—such as removing unessential items from their key chain"). Id. ¶¶ 10, 10(A). Old GM did not issue any public statements related to the December 2005 Service Bulletin, nor did it use the word "stall" in the bulletin. Id. ¶¶ 10(C), 10(D).

In October 2006, Old GM updated the December 2005 Service Bulletin (as updated, the "**October 2006 Service Bulletin**") to include additional vehicle models and model years—namely, the 2007 Saturn Ion, the 2007 Saturn Sky, the 2007 Chevrolet HHR, the 2007 Pontiac Solstice, and the 2007 Pontiac G5. Id. ¶ 11. The October 2006 Service Bulletin acknowledged that "[t]here [was] potential for the driver to inadvertently turn off the ignition due to low ignition key cylinder torque/effort." The October 2006 Service Bulletin again advised dealers to

tell their customers to remove unessential items from their key chains. Id. ¶ 11(A). There was again no public statement or use of the word "stall." Id. ¶ 11(B).

D. Old GM Re-Engineers The Ignition Switch Without Fixing The ISD.

In April 2006, Raymond DeGiorgio, the Old GM Design Release Engineer who had provided Delphi with the final specifications for the Ignition Switch and observed in 2001-2002 that it was not meeting those specifications, approved a change in its design intended to solve the problem of low rotational torque. The changed design did not fix the ISD. The change was implemented without changing the defective Ignition Switch's part number in an apparent effort to hide the evidence of the ISD. V.R. at 98-101.

E. Old GM Learns Of Multiple Fatal Or Serious Accidents Evidencing A Safety Defect Involving Ignition Switches.

Even as Old GM continued to fail to address or even disclose the ISD, it knew people were dying and being seriously injured in crashes involving Defective Vehicles, as indicated in the following non-exclusive examples:

- On October 24, 2006, two passengers died and a passenger was severely injured when a 2005 Chevrolet Cobalt left the road, struck a telephone box, and its airbags did not deploy. V.R. at 113-14. Old GM learned of the crash on November 15, 2006 through a reporter's inquiry. Id. at 114.
- In October 2006, a Collision Analysis & Reconstruction Report (the "**Wisconsin Report**") written by a Wisconsin State Patrol Trooper regarding a 2005 Chevrolet Cobalt stated that *it appeared likely that the vehicle's key turned to the Accessory position as a result of the low key cylinder torque/effort, and connected this to the failure of the airbags to deploy*. See V.R. at 116-17. The Wisconsin Report was in the possession of Old GM; Dwayne Davidson, Old GM's Senior Manager for TREAD Reporting, stated that he obtained the Wisconsin Report from "*someone at Old GM Legal*" in 2007. DC Stipulated Facts ¶ 14(H)(i) (emphasis added).
- On December 29, 2006, the driver of a 2005 Chevrolet Cobalt suffered severe injuries when the vehicle drove off the road, hit an embankment and a large tree, and the airbag failed to deploy. Upon review of this incident, neither Old GM nor its outside counsel had an explanation for the non-deployment. See V.R. at 130.

- In May 2007, Old GM received from its outside counsel, Hartline, Dacus, Berger & Dryer, LLP, an evaluation of a November 15, 2004 airbag non-deployment crash. See id. at 124. According to the evaluation, the impact of the crash was so severe that "*the airbag non-deployment 'must be' attributable to power loss.*" Id. at 125 (emphasis added). Manuel Peace, the Old GM Field Performance Assessment engineer assigned to the case, also believed that the most likely explanation for the airbag non-deployment was a "power loss." Id.

- In September 2007, Old GM's "Roundtable Committee," responsible for approving settlements between Old GM and third parties between $100,000 and $1.5 million, reviewed a crash that severely injured the driver of a 2005 Saturn Ion that ran into the rear of a tractor trailer on June 26, 2005.[13] *The presentation made at the Roundtable indicated a probable power loss during the crash*. See DC Stipulated Facts ¶ 14(L).

- In late 2008 or early 2009, Old GM Field Performance Assessment engineers learned about a September 13, 2008 Cobalt crash in Stevensville, Michigan, which resulted in two deaths. V.R. at 132.

F. Knowledge Of The ISD Was Widespread Within Old GM.[14]

Among many others, the following Old GM employees learned of the ISD in the course of their employment by Old GM:

- Raymond DeGiorgio, the lead design engineer for the Ignition Switch in the 2003 Saturn Ion and 2005 Chevrolet Cobalt and for the replacement ignition switches in 2006, came to be intimately familiar with the ISD through his involvement with Old GM's investigation starting in 2005, see DC Stipulated Facts ¶ 14(I). In 2006, he approved a change in the Ignition Switch that increased the torque required to turn the key. Despite this change to the Ignition Switch, Old GM did not change the Ignition Switch's part number, see id. ¶¶ 14(I)(v); 22;

- Gary Altman, the program engineering manager responsible for the design and development of the 2005 Chevrolet Cobalt, attended a press event for the launch of the Cobalt in the summer or fall of 2004. V.R. at 59-60. At the press event, a journalist informed the Cobalt's chief engineer, Doug Parks, that the journalist had inadvertently turned off his Cobalt by hitting his knee against the key fob or chain while driving. Id. at 60. Parks asked Altman to investigate the complaint

[13] Michael Gruskin, an attorney in Old GM's general counsel's office, was involved in the Roundtable Committee's review of Chevrolet Cobalt and Saturn Ion crash cases involving the Ignition Switch beginning in January 2006. See DC Stipulated Facts ¶ 14(L).

[14] After the parties completed their factual stipulations as directed by the Supplemental Scheduling Order, additional discovery produced by New GM in the MDL Proceeding has revealed that Old GM was aware of dozens of additional complaints and accidents concerning the ISD in addition to those collected infra. See Berman Decl., filed in connection herewith.

by trying to replicate the incident and determine a fix. Id.[15] After the press event, Altman and another GM engineer test drove a Cobalt at the Milford Proving Grounds and replicated the incident described by the journalist and, on November 19, 2004, a PRTS was opened for it. Id. at 63. The engineers responsible for the PRTS developed a number of potential solutions, including moving the location of the Ignition Switch to a higher mount on the steering column. Id. at 65-67. However, on March 9, 2005, the PRTS was closed with "no action" at the "directive" of Altman (then the Cobalt program engineering manager), V.R. at 68;

- Steven Oakley, a Chevrolet Cobalt brand quality manager responsible for monitoring warranty claims, became aware of the ISD in March 2005 and submitted a PRTS report, see DC Stipulated Facts ¶ 14(S);

- William Chase, a warranty engineer responsible for reducing warranty costs for the Chevrolet Cobalt and Pontiac G5, provided an estimate of how many Chevrolet Cobalts would experience inadvertent shut-offs due to the ISD, see id. ¶ 14(F);

- Michael Gruskin, an attorney in Old GM's general counsel office who sat on a committee charged with authorizing settlements and spotting trends indicative of safety issues, was involved in the committee's review, beginning in January 2006, of Chevrolet Cobalt and Saturn Ion crash cases involving the ISD, see id. ¶ 14(L); V.R. at 110;

- William J. Kemp, counsel for Global Engineering Organization, sat on Old GM's Settlement Review Committee and participated for years in Old GM's review of the ISD. See DC Stipulated Facts ¶ 14(O). He worked closely with the Old GM engineering group and had extensive experience with safety-related liability. Id. In 2005, Kemp suggested sending a columnist a videotape demonstrating the remoteness of the risk of inadvertently moving the ignition to the "accessory" position, see id.; V.R. at 85-86;

- Dwayne Davidson, senior manager for TREAD Reporting, conducted a search of Old GM's TREAD database after receiving an email in November 2006 from Alan Adler, a manager for safety communications, concerning a fatal October 2006 crash involving a 2005 Cobalt. See DC Stipulated Facts ¶ 14(H). Davidson's search revealed ***no fewer than 700 records of field reports and complaints*** involving vehicles containing the ISD, see id.;

[15] Although there is no indication that the journalist reported his complaint publicly, it is likely that members of Old GM's senior management were made aware of it given the high profile of the launch event. See V.R. at 59-60. Moreover, it appears that approximately three other Old GM executives, in addition to Mr. Altman, were present at the press event, including: Lori Queen, a Vehicle Line Executive; Jim Queen, the Vice President for Global Engineering; and Robert Lutz, the Vice President for Global Product Development. Id. at 60 n.231.

- Jack Weber, an Old GM engineer, in 2005 reported that he had turned off a Chevrolet Cobalt SS with his knee while "heel-toe downshifting," see id. ¶ 14(B)(iv);

- Eric Buddrius, an Old GM engineer, was scheduled to present a May 4, 2007 Investigation Status Review Presentation Planning Worksheet on an issue described as "Cobalt/Ion Airbag (NHTSA discussion item)," see id. ¶ 14(E)(i);

- Viktor Hakim, an Old GM employee, who as of June 11, 2013 had been with Old GM and then New GM for more than forty-three years, testified that there was a summary Excel spreadsheet from the Old GM Company Vehicle Evaluation Program containing comments from drivers of Ion vehicles, including a January 9, 2004 statement from one driver of a Saturn Ion that the Ignition Switch was positioned too low on the steering column, that the keys hit his knee while driving, that the Ignition Switch should be raised on the steering column at least one inch, that this was a basic design flaw, and that it should be corrected if Old GM wanted repeat sales, see id. ¶ 14(M);

- Gay Kent, Old GM's Director of Product Investigations, and Douglas Wachtel, an Old GM Product Investigations Manager, obtained a Cobalt in or around 2005 and drove around Old GM's property in Warren, Michigan, during which they were able to knock the Ignition Switch from the "Run" to "Accessory" position simply by contacting the key chain, see id. ¶ 14(P);

- Elizabeth Kiihr, an engineer with Old GM's Products Investigations Unit, created a file in 2005 that contained: (i) customer complaints; (ii) a copy of a February 2005 "Preliminary Information" report on engine stalls in the Cobalt; (iii) several TREAD data reports regarding the Cobalt; (iv) PowerPoint presentations, including presentations from an Investigation Status Review meeting in 2005 and a Vehicle and Progress Integration Review meeting in 2005; (v) a cost estimate for changing the design of the ignition key; and (vi) a copy of a Product Investigation Bulletin titled "Engine Stalls, Loss of Electrical Systems, and No DTCs," see id. ¶ 14(Q)(ii);

- Alberto Manzor, an Old GM engineer involved in the investigation of the Cobalt Ignition Switch, stated that, in or around the spring of 2005, he had said that the Cobalt Ignition Switch was incorrectly categorized as a moderate issue and should have been categorized as a safety issue, see id. ¶ 14(R)(i);

- Laura Andres, an Old GM employee, sent an email on August 30, 2005 to Jim Zito, copying ten other Old GM employees, including Ray DeGiorgio. See E-mail from Laura Andres, General Motors, to Jim Zito, General Motors (Aug. 30, 2005, 3:39 p.m.) (GMHEC000442219), attached to the Weisfelner Decl. as **Exhibit C**. In her email, Ms. Andres stated: "I picked up the vehicle from repair. No repairs were done. . . . The technician said there is nothing they can do to repair it. He said it is just the design of the switch. He said other switches, like on the trucks, have a stronger detent and don't experience this." Id. (emphasis in original). Ms. Andres' email continued: "*I think this is a serious safety problem,*

especially if this switch is on multiple programs. I'm thinking big recall. I was driving 45 mph when I hit the pothole and the car shut off and I had a car driving behind me that swerved around me. I don't like to imagine a customer driving with their kids in the back seat, on I-75 and hitting a pothole, in rush-hour traffic. I think you should seriously consider changing this part to a switch with a stronger detent," see id. (emphasis added);

- Doug Parks, Old GM's Vehicle Chief Engineer for the Chevrolet Cobalt, sent an e-mail in late 2004 to various Old GM personnel regarding "GMX 001: Inadvertent Ign turn-off," writing, "for service, can we come up with a 'plug' to go into the key that centers the ring through the middle of the key and not the edge/slot? This appears to me to be the only real, quick solution," see DC Stipulated Facts ¶ 14(T)(ii);

- Douglas Wachtel, a manager in Old GM's Product Investigations Unit, approved a revised service bulletin in April 2007, which was never published, warning drivers that the inadvertent turning off of key cylinders could cause vehicles to stall, see id. ¶ 14(AA)(ii)-(iv); and

- Joseph Manson, an Old GM engineer, emailed colleagues in February 2009 and stated that issues with the Ignition Switch inadvertently turning off while driving "ha[d] been around since man first lumbered out of [the] sea and stood on two feet," see id. ¶ 14(B)(vi).[16]

G. The February 2009 "Band-Aid" Change To The Cobalt Key.

In February 2009, Old GM responded to "a high number of warranty claims" against "the Cobalt key cylinder design" by changing the key's design for future model year Cobalts. V.R. 132-33. Although a design change was previously discussed in 2006, the change was not completed at that time "because of problems with the original supplier of the key and [a] backlog of other part changes to the Cobalt that [David] Trush [an Old GM engineer] believed *were more important*." Id. at 133 (emphasis added). By June 2009, GM finally attempted a fix, changing the "slot" at the top of the key head to a "hole," which had been previously suggested in 2005. Id. Even though Trush said he believed, in 2005 and 2009, that the effort was merely "a 'band-aid,' because the complete solution was to change the Ignition Switch," Trush ultimately chose

[16] Each of Altman, Buddrius, Chase, Davidson, DeGiorgio, Gruskin, Hakim, Kemp, Kent, Kiihr, Manzor, Oakley, Parks, and Wachtel, among others, became an employee of New GM. See DC Stipulated Facts ¶¶ 14(B)(vii); (E)(v); (H)(ii); (I)(vii); (L)(i); (M)(i); (O)(iii); (P)(ii); (Q)(iii); (R)(iii); (S)(iv); (T)(iii); (AA)(vii).

to "support[] the decision because it would reduce his warranty numbers, even if it did not entirely solve the problem" reflected in the related PRTS inquiry. Id.

H. The 2009 Report By An Old GM Supplier Confirms Existence Of The ISD.

On May 15, 2009, Continental, the manufacturer of the Sensing Diagnostic Module for the Chevrolet Cobalt, held a meeting (the "**May 2009 Continental Meeting**") to present and discuss its findings and its report on a September 13, 2008 accident involving a 2006 Chevrolet Cobalt (the "**Continental Report**"). See DC Stipulated Facts ¶ 14(E)(ii). A number of Old GM employees attended that meeting. See id. ¶ 14(E)(iii).[17]

The Continental Report disclosed that the Sensing Diagnostic Module had not deployed the airbag because certain algorithms were disabled at the start of the event, and identified two possible causes for the disabled algorithms, either: (a) the vehicle experienced "loss of battery;" or (b) the Sensing Diagnostic Module received a power mode status of "Off" from the Body Control Module. Id. ¶ 14(E)(iv).

The May 2009 Continental Meeting confirmed a safety issue that had been well known to Old GM for years—that the airbags were not being properly deployed because the power mode status was in the "Off" or "Accessory" position in the Defective Vehicles. See V.R. at 134-35; DC Stipulated Facts ¶ 14(X)(i).

I. Old GM's Bankruptcy Proceedings.

On June 1, 2009 (the "**Petition Date**"), Old GM and certain of its affiliates (collectively, the "**Debtors**") commenced its cases in this Court. That same day, Old GM asked the Court to

[17] Attendees of the May 2009 Continental Meeting included: James Churchwell, Old GM engineer; Eric Buddrius, Old GM Product Investigations Unit engineer; John Dolan, Old GM electrical engineer; William Hohnstadt, Old GM sensing performance engineer; John Sprague, Old GM Field Performance Assessment engineer; Lisa Stacey, Old GM Field Performance Assessment engineer; Brian Everest, Old GM Field Performance Assessment Supervisor; and Jaclyn C. Palmer, Old GM product liability attorney. See DC Stipulated Facts ¶¶ 14(E), (E)(iii), (G), (J), (K), (N), (T), (U)(i), (X), (Y).

approve a sale of substantially all of its assets to NGMCO, Inc. (subsequently renamed General Motors, LLC, a/k/a "**New GM**") in a government-sponsored transaction under Bankruptcy Code Section 363 (the "**363 Sale**"). Under the Amended and Restated Master Sale and Purchase Agreement, dated June 26, 2009 [ECF No. 2968-2] (the "**MSPA**"), New GM expressly undertook to "comply with the certification, reporting and recall requirements" of the Safety Act and other federal regulations for cars and car parts "manufactured or distributed by [Old GM]," MSPA § 6.15(a),[18] thereby requiring it to recall any vehicles or vehicle parts manufactured by Old GM that had safety-related defects, such as the ISD. See, e.g., 49 U.S.C. ch. 301.

Old GM also sought the Court's approval of the form and manner of the notice to be given in connection with the Sale Motion. See Sale Motion, Exs. C to G (forms for Sale Procedures Order and notices to creditors).[19] Pursuant to the Sale Procedures Order, Old GM purported to provide direct mail notice of the Sale Motion to "all parties who are known to have asserted any lien, claim, encumbrance, or interest in or on the Purchased Assets," and "all other known creditors." See Sale Procedures Order ¶¶ 9(a)(xiii), 9(b)(i).[20] At no time prior to the 363 Sale did Old GM disclose the existence of the ISD to owners or lessees of Defective Vehicles. It is undisputed that owners or lessees of vehicles known to contain the ISD did not receive mailed notice. See *New GM's Agreed-Upon Factual Stipulations, and Disputed Factual Stipulations*, ¶¶ 19-20, dated August 8, 2014 [ECF No. 12826-1] ("**New GM Stipulated Facts**").

The Sale Procedures Order also required publication notice in various national and local newspapers and on the website of the Debtors' claims and noticing agent, The Garden City

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[18] A copy of the MSPA is attached as **Exhibit D** to the New GM Appendix.

[19] A copy of the Sale Motion is attached as **Exhibit L** to the New GM Appendix.

[20] A copy of the Sale Procedures Order is attached as **Exhibit M** to the New GM Appendix.

Group, Inc. (the "**Publication Notice**"). See Sale Procedures Order ¶ 9(e). The Publication Notice did not disclose the ISD, or that persons owning or leasing a car with the ISD may have a claim against Old GM that could be barred under the proposed Sale Order if not asserted. See New GM Stipulated Facts ¶ 25.[21]

The hearing on the Sale Motion commenced on June 30, 2009 and continued through July 2, 2009. Old GM did not disclose the ISD in connection with the Sale Hearing and no objection to the 363 Sale was made by any person representing the named Plaintiffs or based on claims arising from the ISD, which still had not been disclosed publicly despite Old GM's knowledge thereof. See New GM Stipulated Facts ¶¶ 32, 61.

On July 5, 2009, the Court entered the Sale Order. See Sale Order at 50. On July 10, 2009, the Debtors consummated the 363 Sale. See New GM Stipulated Facts ¶ 56. By the 363 Sale, New GM purchased substantially all of Old GM's assets, including, *inter alia*, vehicle inventory, intellectual property and licenses, books and records related to all purchased assets, and all goodwill in connection with the purchased assets. See MSPA § 2.2(a).

J. Post-Sale, New GM Continues The Business Of Old GM And Issues Recalls.

The vast majority of Old GM employees, including many that were aware of the ISD (and many who attended the May 2009 Continental Meeting), were "**Transferred Employees**" (as such term is defined in the MSPA)—meaning they went to bed as Old GM employees and woke up the next day as New GM employees. See MSPA § 6.17(a). New GM also assumed

[21] Over the course of the bankruptcy cases, Old GM also failed to provide direct notice to the Plaintiffs on account of the ISD of: (i) the bar date to file proofs of claim (notwithstanding that the order establishing the bar date required service of notice thereof on "all parties known to the Debtors as having potential Claims against any of the Debtors' estates"), see Bar Date Order at 6; (ii) the hearing on approval of the Disclosure Statement for Debtors' Amended Joint Chapter 11 Plan (the "**Disclosure Statement**") (notwithstanding that the motion seeking approval of the Disclosure Statement indicated that the Debtors would serve notice thereof on "any . . . known holders of Claims against . . . the Debtors"), see ECF No. 6854, ¶ 26 ; or (iii) the hearing on confirmation of the Debtors' Joint Chapter 11 Plan (the "**Plan**") (notwithstanding that the order approving form of notice of the confirmation hearing required service thereof on "any . . . known holders of Claims against . . . the Debtors"), see ECF 8043, ¶ 32(f).

ownership of substantially all of Old GM's books and records, including those reflecting knowledge of the ISD. See MSPA § 7.2(c)(xxiv).

Notwithstanding the personal knowledge of the Transferred Employees, the independent documentation of the existence of the ISD, and New GM's assumption of Old GM's duties under the Safety Act to recall defective vehicles, New GM did not issue any recalls of GM-Branded Vehicles affected by the ISD until February 2014.

New GM now admits that it (*i.e.*, New GM as opposed to Old GM) violated the Safety Act by failing to timely provide notice of the ISD to NHTSA and has agreed to pay the maximum civil penalty of thirty-five million dollars ($35,000,000) for its violation. See Consent Order, In re TQ14-001 NHTSA Recall No. 14V-047, ¶¶ 10-11 (U.S. Dep't of Transp. May 16, 2014) (the "**Consent Order**"), attached to the Weisfelner Decl. as **Exhibit D**. As of the date of this Opposition, a total of 42 death claims and 58 injury claims relating to the ISD have been approved by New GM's victim compensation program.[22] As New GM Chief Executive Officer Mary Barra ("**Barra**") conceded on March 17, 2014, "something went wrong with our process in this instance and terrible things happened." See Mary Barra, Update On Recalls - Message to GM Employees, at 00:00:34 to 00:00:39 (Mar. 17, 2014), available at http://media.gm.com/media/us/en/gm/news.detail.html/content/Pages/news/us/en/2014/mar/0317-video.html.

Since February 2014, New GM has issued five recalls for vehicles with defective Ignition Switches (collectively, the "**Ignition Switch Recalls**"), affecting more than 13 million Defective Vehicles across various models of cars manufactured by Old and New GM. See GM 2014 Year-

[22] Upon information and belief, the victim compensation program will be accepting claims for compensation for deaths and injuries caused by the ISD until January 31, 2014. Thus, the figures representing death and personal injury claims are likely to increase following the date of this Opposition.

to-Date N. Am. Recalls, Ex. 2. The first Ignition Switch Recalls in February and March 2014 impacted 2005-2010 Cobalts; 2007-2010 Pontiac G5s; 2006-2011 Chevrolet HHRs; 2006-2010 Pontiac Solstices; 2003-2007 Saturn Ions; and 2007-2010 Saturn Skys.[23]

On June 19, 2014, New GM notified NHTSA that it was issuing a second recall for Defective Vehicles for 464,712 model year 2010-2014 Chevrolet Camaros afflicted with a safety defect that can cause the Ignition Switch to inadvertently move from the "Run" to the "Accessory" position.[24] The great majority of the defective Camaros were sold by New GM, though some percentage were made and sold by Old GM.[25]

On June 20, 2014, New GM notified NHTSA that it was issuing a third recall for 3,141,731 Defective Vehicles afflicted with a safety defect related to an ignition key slot.[26] Of the Defective Vehicles subject to the third recall, approximately 2.4 million were made by Old GM and 700,000 were made and sold by New GM.[27] On July 2-3, 2014, New GM announced it

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[23] See Letter from M. Carmen Benavides, Director, Product Investigations and Safety Regulations, General Motors LLC ("**Benavides**"), to Nancy Lewis, Associate Administrator for Enforcement, NHTSA ("**Lewis**") (Feb. 7, 2014); see also Letter from Benavides to Lewis (Feb. 24, 2014); Letter from Benavides to Lewis (Feb. 25, 2014); Letter from Benavides to Lewis (Mar. 11, 2014); Letter from Benavides to Lewis (Mar. 28, 2014); Letter from Benavides to Lewis (Apr. 11, 2014), attached to the Weisfelner Decl. as **Exhibit E**.

[24] See Letter from Brian Latouf, Director, Field Product Investigations & Evaluations, General Motors LLC ("**Latouf**") to Lewis (June 19, 2014); see also Letter from Jim Moloney, General Director, Customer and Relationship Services, General Motors LLC ("**Moloney**") to General Motors Customers, regarding Recall No. 14294 (Aug. 2014) (New GM subsequently notified customers of the defect and product recall in August), attached to the Weisfelner Decl. as **Exhibit F**.

[25] 117,959 of the Chevrolet Camaros recalled on June 19, 2014 were manufactured between December 3, 2008 and June 3, 2010. See Ex. F. It is probable that certain of these vehicles were sold by Old GM prior to the July 5, 2009 entry of the Sale Order.

[26] See Letter from Latouf to Lewis (June 20, 2014); see also Letter from Latouf to Lewis (July 2, 2014); Letter from Moloney to General Motors Customers, regarding Recall No. 14299 (Aug. 2014) (New GM subsequently notified customers of the defect and product recall in August), attached to the Weisfelner Decl. as **Exhibit G**.

[27] The Defective Vehicles made by Old GM with the ignition key slot defect include: 2005-2009 Buick Lacrosse; 2006-2009 Buick Lucerne; 2000-2005 Cadillac Deville; 2007-2009 Cadillac DTS; 2006-2009 Chevrolet Impala; and 2006-2007 Chevrolet Monte Carlo. See Ex. G (the numbers of vehicles made by Old and New GM respectively are approximate given that there is no indication what percentage of MY 2009 and 2010 vehicles may have been made by either Old or New GM).

was recalling 7,284,070 Defective Vehicles due to a safety defect related to "unintended key rotation."[28] The vehicles with the unintended key rotation defect were built with defective Ignition Switches just like the other Defective Vehicles.[29]

On September 4, 2014, New GM announced it was recalling 46,873 Defective Vehicles due to a safety defect related to unintended ignition key rotations.[30] The Defective Vehicles include vehicles made by both Old GM and New GM.

Shortly after Barra's admission of wrongdoing and the publication of the Valukas Report, Barra announced that at least fifteen New GM employees (including executives, engineers and at least six in-house lawyers responsible for, *inter alia*, safety issues) had been fired for misconduct, failure to respond properly to evidence of the ISD, incompetence and in some cases, because "they simply didn't do enough, they didn't take responsibility, they didn't act with a sense of urgency" given their knowledge of the ISD.[31] However, New GM has refused to identify the employees by name. See id.

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[28] See Letter from Latouf to Lewis (July 2, 2014); see also Letter from Latouf to Lewis (July 16, 2014); Letter from Latouf to Lewis (Aug. 6, 2014); Letter from Latouf to Lewis (July 3, 2014); Letter from Latouf to Lewis (July 16, 2014); Dealer Notice Letter from General Motors Customer Care & Aftersales, General Motors LLC, to All General Motors Dealers (July 17, 2014), attached to the Weisfelner Decl. as **Exhibit H**.

[29] The Old GM Defective Vehicles implicated in the July 2-3, 2014 Recall are: 2000-2005 Chevrolet Impalas and Monte Carlos; 1997-2005 Chevrolet Malibus; 1999-2004 Oldsmobile Aleros; 1998-2002 Oldsmobile Intrigues; 1999-2005 Pontiac Grand Ams and 2004-2008 Pontiac Grand Prixs; certain 2003-2009 Cadillac CTSs; and certain 2004-2006 Cadillac SRX vehicles.

[30] See Letter from General Motors, Customer Care & Aftersales, General Motors LLC, to All General Motors Dealers (Sept. 4, 2014); Letter from Jennifer Timian, Chief, Recall Management Division, NHTSA, to Latouf (Oct. 3, 2014), attached to the Weisfelner Decl. as **Exhibit I.**

[31] See Mary Barra, Chief Executive Officer, General Motors Company, General Motors Ignition Switch Update and Press Conference, at 00:10:50 to 00:11:35 (June 5, 2014), available at http://media.gm.com/businessupdate.html.

K. Old GM Had A Culture Of Downplaying Safety Related Problems, Which Has Persisted In New GM.

Notwithstanding that the law required Old GM to diligently track and immediately report safety defects, a "not me" culture festered at Old GM that encouraged just the opposite and caused management and employees to downplay serious safety issues and avoid accountability.[32] V.R. at 255-56. The culture manifested in such mainstays as the "GM salute," signaled by "a crossing of arms and pointing outwards towards others, indicating that the responsibility belongs to someone else, not me," and the "GM nod," a phenomenon in which, as Barra put it, "everyone nods in agreement to a proposed plan of action, but then leaves the [conference] room with no intention to follow through, and the nod is an empty gesture." Id. at 256.

The culture is also apparent in Old GM's training and reporting practices. For example, in formal training, employees learned to write safety reports sanitized of any reference to a safety issue, and were *specifically instructed* to avoid the words problem, safety, or defect when writing about safety issues, and instead to hedge their statements by substituting "safety" with "has potential safety implications," and "defect" with "does not perform to design." Id. at 253-54. Senior attorneys and engineers at Old GM failed to elevate and "raise significant safety issues to key decision-makers" out of fear of pushback or retaliation. Id. at 253. Supervisors at Old GM routinely sought to downplay safety issues and discouraged employees from raising safety

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[32] The culture of nondisclosure was not limited to out-of-court settings. In 2007, the Third Circuit affirmed a district court's conclusion that Old GM had intentionally withheld relevant evidence in a product design defect case concerning the "T-top roof" for GM's 1986 Chevrolet IROC Camaro. See Newman ex rel. Green v. Gen. Motors Corp., 228 F. App'x 245, 245 (3d Cir. 2007). Magistrate Judge Patty Schwartz below found sufficient allegations to support a finding that GM had "*made a calculated decision to withhold [evidence] or delay its disclosure, thereby allowing the plaintiff and the state court to labor under a misapprehension as to the true state of affairs*. The record show[ed] a pattern of troubling discovery conduct." *Opinion* at 81, Newman v. Gen. Motors Corp., No. 02-135 (D.N.J. Mar. 24, 2005) (ECF No. 60), attached hereto as **Exhibit 3**. The Third Circuit affirmed. Newman ex rel. Green, 228 F. App'x at 246 (finding "no error in the findings of fact or legal conclusions drawn by Judge Schwartz and . . . no need to expand upon her fine opinion").

concerns, and communicated this message by warning employees to "never put anything above the company" and "never put the company at risk." Id. at 252-53.

The "extraordinary cost-cutting" of the 2000s exacerbated the culture, sending "messages from top leadership at GM—both to employees and to the outside world" that the need to control costs ruled supreme over safety. V.R. at 250. For example, teams were themselves now directly responsible for any added costs incurred as a result of part changes. Id. "[I]f the Cobalt team wanted an ignition switch replaced, the other vehicle lines that used the ignition switch would request that the cost for their new switches be paid for by the Cobalt team because the Cobalt team requested the change."[33] Id.

New GM continued this culture of conscious avoidance following the 363 Sale. As a company-wide survey conducted in 2013 revealed, "GM's [employees'] rate of reporting misconduct they observed was below the benchmark rate developed by the Compliance and Ethics Leadership Council based on responses and experiences of [other] participating companies." Id. at 252. Moreover, the lack of "coordination between groups with interrelated responsibilities" at New GM allowed the corporate culture that did not dedicate enough resources to safety concerns to continue for more than five years before the Ignition Switch Recall was announced. Id. at 259-60. The Valukas Report went so far as to recommend that New GM "explicitly communicate to employees that they should not be reluctant to classify issues as safety issues or potential safety issues" to combat the preexisting culture at the company. V.R. at 260 (citing Consent Order ¶ 20).

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[33] In this same vein, Old GM cut personnel from its TREAD Reporting team, which was dedicated to mining "the TREAD data and prepar[ing] scatter graphs . . . in an effort to identify any spikes in the number of accidents or complaints." V.R. at 307. Although the team typically operated with eight employees from 2003 until roughly 2008, Old GM eliminated five employees in or around 2007 or 2008, leaving just three employees, and also "pared down" its data mining process. Id. Old GM thus chose to save costs by starving the TREAD Reporting team of resources, rather than prioritizing safety concerns.

The legacy of the culture endured with New GM intentionally delaying disclosure of the ISD for nearly two months even after placing an "urgent" order for 500,000 replacement parts,[34] followed by its total failure to plan, even after disclosure, for timely manufacture and shipment of the necessary parts.[35] New GM then took up to an ***additional two months*** after the February announcement of the ISD to notify the first 778,562 owners of defective cars of the safety issue.[36]

L. Plaintiffs' Economic Loss Claims.

The Consolidated Complaints allege damages in the form of the diminution of value of the Defective Vehicles resulting from the ISD and Old and New GM's respective roles in first concealing the existence of the ISD and then disclosing its existence in the context of a firestorm of negative publicity. The diminution of value is not based solely on the mechanical and design defect now known to impair the Defective Vehicles. As alleged in the Consolidated Complaints, a vehicle made by a disreputable manufacturer that is known to devalue safety and to conceal serious safety defects from consumers and regulators is worth less than an otherwise similar vehicle made by a reputable manufacturer of safe and reliable vehicles; the unprecedented scope of these recalls and related disclosures have damaged the value of the GM brand and undermined assertions regarding the safety and reliability of GM-Branded Vehicles.

The Consolidated Complaints allege two main theories: first, that both Old GM and New GM are guilty of egregious misconduct that has harmed millions of consumers; and second, New

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[34] See Email from Sarah Missentzis, Top 100 Project Manager, General Motors Company, to Lisa Augustine, DPSS COP Specialist, Delphi Automotive PLC (dated Dec. 18, 2013, 3:16 p.m.) (DLPH_MDL_0004241 R), available at http://www.detroitnews.com/story/business/autos/general-motors/2014/11/10/gm-ignition-switch-recall/18791811/, attached to the Weisfelner Decl. as **Exhibit J**.

[35] See Email from Christine Witt, Senior Coordinator - Parts Alerts, General Motors Company, to Susan Dowling, DPSS, Delphi Automotive PLC (dated February 13, 2014, 3:28 p.m.) (DLPH_MDL_0004349 R), available at http://www.detroitnews.com/story/business/autos/general-motors/2014/11/10/gm-ignition-switch-recall/18791811/, attached to the Weisfelner Decl. as **Exhibit K**.

[36] Id.

GM's recall of over 27 million vehicles in just nine months—13 million of which relate to the ISD—has permanently destroyed any favorable or competitive perception of GM-Branded Vehicles and thus irreparably diminished the fair market and resale value of such vehicles.[37]

ARGUMENT

I. Due Process Threshold Issue.

A. Due Process Requires Notice And Opportunity To Be Heard.

The core elements of Fifth Amendment due process are well known: "'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.'" Hamdi v. Rumsfeld, 542 U.S. 507, 533 (2004) (internal citation omitted). To satisfy the demands of due process, all persons must be afforded notice "reasonably calculated, under all the circumstances" to apprise them of the pendency of any proceeding that may result in their being deprived of any property and "afford them an opportunity to present their objections." Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950). As the Second Circuit has held, due process principles are fully applicable to proceedings in bankruptcy and "[b]ankruptcy courts cannot extinguish the interests of parties who lacked notice of or did not participate in the proceedings." See Koepp v. Holland, No. 13-4097, 2014 U.S. App. LEXIS 22108, *5 (2d Cir. Nov. 21, 2014) (discussed infra Section II.A). As explained below, Plaintiffs and members of the Pre- and Post-Sale Classes were deprived of due process in connection with the Sale Hearing.

[37] As New GM acknowledges, Old GM had previously settled similar claims arising out of mass defects in its vehicles. See Br. at 3 n.2; see also infra Section I.B.1.

1. Due Process Requires Direct Notice To Creditors Whose Identities Are Reasonably Ascertainable.

Mullane is the seminal Supreme Court case establishing due process requirements for creditors in a bankruptcy proceeding. In Mullane, the Court held that statutory notice by publication of a proposed judicial settlement of a trust failed to satisfy the constitutional requirements of due process with respect to the trust's known beneficiaries. Id. at 315. Despite the large number of beneficiaries, the Court found that because the trustee, with due diligence, could ascertain their names and addresses, they were entitled to mail notice of the settlement. Id. at 318-19. That the trustee had mailed notices to these ascertainable beneficiaries in the past was, to the Court, "persuasive" as to his ability to mail notice in the case at hand. Id. at 319.

Notwithstanding the practical concerns of providing direct notice to the very large number of beneficiaries involved in Mullane, the Court identified only three categories of "unknown" creditors for whom publication notice could suffice. See id. at 317. The first category was that of beneficiaries whose "interests . . . could not with due diligence be ascertained." Mullane, 339 U.S. at 317. The second category of "unknowns" was beneficiaries whose "whereabouts" were unknown and not reasonably ascertainable. Id. The third category was claimants whose interests, at the time of the proceeding, were either "conjectural or future."[38] Id. Thus, as the Supreme Court has further elaborated, if both the existence of a claim and the identity of the persons with such claim are "reasonably ascertainable" by the debtor through reasonable diligence, the creditor is entitled to direct notice. See Mennonite Bd. of Missions v. Adams, 462 U.S. 791, 800 (1983) ("Notice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition to a proceeding which will

[38] As to future claims based on conduct that had not caused an identifiable harm to an identifiable plaintiff at the time of the order, the affected claimants could not possibly receive sufficient notice to satisfy due process, and their claims generally may not be discharged or extinguished by such an order. See infra Section I.D.

adversely affect the liberty or property interests . . . if [the party's] name and address are reasonably ascertainable."); Lousiana Dep't of Envtl. Quality v. Crystal Oil Co. (In re Crystal Oil Co.), 158 F.3d 291, 297 (5th Cir. 1998) (noting, in *dicta* that, a claim is reasonably ascertainable where the debtor has in its possession information that "reasonably suggests both the claim for which the debtor may be liable and the entity to whom he would be liable"); see also Tulsa Prof'l Collection Servs., Inc. v. Pope, 485 U.S. 478, 490 (1988) (holding that if a claimant's identity was known or reasonably ascertainable, termination of its claim without actual notice violated due process and remanding for further findings regarding whether creditor was known).[39]

Mullane's analysis of the due process rights owed to trust beneficiaries applies equally to bankruptcy proceedings that propose to bar or extinguish a creditor's claim or interest. These proceedings include the establishment of a bar date, an auction or sale of the debtor's assets that transfers those assets "free and clear" of the creditors' interests, the release of claims against third parties, including a release pursuant to settlement with the debtor, and the discharge of claims upon plan confirmation. See, e.g., Nat'l Pipe & Plastics, Inc. v. N.P.P. Liquidation Co. (In re Nat'l Pipe & Plastics, Inc.), No. A-99-12, 2000 Bankr. LEXIS 1329, at *32 (Bankr. D. Del. Sept. 25, 2000) (known creditor is entitled to direct notice and an opportunity to contest the findings of a sale order pursuant to section 363; thus "cannot be held bound by" a sale order if notice is deficient); Folger Adam Sec., Inc. v. DeMatteis/MacGregor, JV, 209 F.3d 252, 265 (3d Cir. 2000) (concluding that, under the circumstances, constitutionally mandated due process required that notice of auction of the debtor's assets apprise claimant that contract defenses against the debtor would be waived) (citing Mullane, 339 U.S. at 314-15).

[39] On remand from the Supreme Court, the state court, in Estate of Pope, 808 P.2d 640 (Okla. 1990), found that the creditor's due process rights had been violated because it had been "a known health care provider during the decedent's last illness" and thus qualified as "a likely or ascertainable creditor" that should have received "actual notice of the statutory period for submission of claims." Id. at 647.

Following Mullane and its progeny, courts addressing the adequacy of notice in bankruptcy proceedings first assess whether both the creditor's claim and the identity of the creditor were "known" (*i.e.*, reasonably ascertainable) or whether, in the alternative, the creditor falls within one of the three categories of "unknowns," *i.e.*, interest unknown, whereabouts unknown, or claims, albeit foreseeable, that are non-existent as of the time because they would arise only in the future. See In re Drexel Burnham Lambert Grp. Inc., 151 B.R. 674, 680 (Bankr. S.D.N.Y. 1993) ("For purposes of determining constitutionally acceptable notice . . . bankruptcy law divides creditors into two groups: known and unknown."), aff'd, 157 B.R. 532 (S.D.N.Y. 1993). If a creditor is "known" to the debtor, process will be found to be inadequate unless actual, direct notice of the proceeding has been given. See, e.g., id. at 680 ("According to well-established case law, due process requires that a debtor's known creditors be afforded actual notice . . . .").

When determining whether a claim is "reasonably ascertainable" to the debtor, courts will consider whether such a claim could be discovered with reasonable diligence by resort to information in the debtor's possession, including its books and records. Id. at 680. An adequate review of a debtor's "books and records" must also include "a reasonable search for contingent or unmatured claims" that would not, under generally accepted accounting practices, necessarily or even ordinarily appear on such accounting records. Id. at 681-82. "Reasonable diligence in ferreting out known creditors . . . [varies] in different contexts and may depend on the nature of the property interest held by the debtor." Id. at 680; see also In re Arch Wireless, 332 B.R. 241, 254 (Bankr. D. Mass. 2005) (noting that "[w]hether a creditor's claim was reasonably ascertainable must be determined by the circumstances of the case"), aff'd, 534 F.3d 76 (1st Cir. 2008). "What is reasonable depends on the particular facts of each case," but requires a debtor

"to undertake more than a cursory review of its records and files to ascertain its known creditors." Drexel Burnham, 151 B.R. at 681.

The inquiry is not limited to accounting records, but includes operating records, public records, and the systems and procedures of the debtor. See, e.g., id. at 681-82 (considering contract guaranty between debtor and creditor); In re Interstate Cigar Co., 150 B.R. 305, 310 (Bankr. E.D.N.Y. 1993) (creditor's claim arising out of pension plan fund should have been known where Debtor knew that pension plan was underfunded prior to bankruptcy *and* the debtor's actions prior to filing indicated its "recogni[tion] that a liability to the [creditor] existed"); In re Feldman, 261 B.R. 568, 577 (Bankr. E.D.N.Y. 2001) (in context of claim by judgment-creditor, considering, *inter alia*, a publicly filed "Assignment of Judgment" at the county clerk's office; reasoning that debtor was "sufficiently sophisticated" to have searched the public record to ascertain its proper creditors). New GM is simply wrong when it argues that the inquiry into whether the Pre-Sale Class's claims were known to Old GM should begin and end with whether such claims appeared on the accounting ledgers of Old GM. See Br. at 27-28; Kiefer Decl. ¶ 3 (claiming that Old GM's books and records did not identify Plaintiffs as creditors because Plaintiffs were not included on Old GM's ledgers and supplying declaration of accounting officer to such effect).[40] Indeed, in Drexel Burnham, the Bankruptcy Court gave short shrift to and dismissed similar technical, accounting-based arguments, stating that they "lie on the floor like pennies not worth picking up." Id. at 681. As the Court said there, financial records are just one kind of record considered when determining whether a creditor's claim was

[40] In re Agway, Inc., 313 B.R. 31, 38-39 (Bankr. N.D.N.Y. 2004), relied on by New GM, only further refutes New GM's argument by including a notice of lien issued in connection with a lawsuit in the "books and records" analysis. Br. at 27. The same is true for Barry v. L.F. Rothschild & Co. (In re L.F. Rothschild Holdings, Inc.), No. 92 Civ. 1129, 1992 WL 200834, at *4 (S.D.N.Y. Aug. 3, 1992), where the court relied on memoranda and letters exchanged between the debtor and claimant, and affidavits submitted to the court, to determine whether the claimant was "known" to the debtor. See Br. at 29.

"reasonably ascertainable." See id. at 681-82; see also Arch Wireless, 332 B.R. at 255 (finding debtor's assertion that creditor was "unknown" was "wholly unpersuasive" where debtor "relie[d] solely on the fact that its books, at all relevant times, showed [only] a balance owed on [the creditor's] accounts").

Moreover, direct notice cannot be dispensed with merely because known creditors supposedly were aware of the pendency of bankruptcy proceedings.[41] Creditors with knowledge of bankruptcy proceedings generally "have a right to assume that the statutory 'reasonable notice' will be given them" before an order is entered in those proceedings that will bar their claims. See, e.g., City of New York v. N.Y., New Haven & Hartford R.R. Co., 344 U.S. 293, 297 (1953) (the fact that the city of New York was aware of the debtor's reorganization did not excuse debtor's failure to provide any notice to it other than by publication), motion to modify denied, 345 U.S. 901 (1953); Brunswick Hosp. Ctr., Inc. v. New York Dep't of Health (In re Brunswick Hosp. Ctr., Inc.), Nos. 892-80487-20, 894-8283-346, 1997 WL 836684, at *5 (Bankr. E.D.N.Y. Sept. 12, 1997) (finding due process violation for failure to provide direct notice of bar date, even where known creditor had actual knowledge of bankruptcy filing).

2. Due Process Requires Notice To Contain Sufficient Information To Inform Creditors Of Their Interests.

To be constitutionally adequate, notice must contain sufficient information to alert the party to the interest that is potentially affected. No form of notice, published or otherwise, can pass constitutional muster *if the persons to whom the notice is directed have no knowledge, or ability to understand, that they hold rights that are about to be taken away*. See Schroeder v. City of New York, 371 U.S. 208, 211-13 (1962); Covey v. Town of Somers, 351 U.S. 141, 145-

[41] Although New GM baldly asserts Plaintiffs' awareness here, it supplies no proof in support of its argument that, even given the notoriety of the bankruptcy proceedings, Plaintiffs were aware that their interests would be affected by the Sale Order. See, e.g., Br. at 12, 33.

47 (1956). In Travelers Cas. & Sur. Co. v. Chubb Indem. Ins. Co. (In re Johns-Manville Corp.), 600 F.3d 135, 143, 158 (2d Cir. 2010), cert. denied, 131 S. Ct. 644 (2010) ("**Manville IV**"), the Second Circuit applied this principle to a final order of the bankruptcy court that released asbestos-related claims against the debtor and the debtor's insurance carriers. Thereafter, when a non-settling insurer sought indemnity and contribution from a settling insurer, the Second Circuit held that the non-settling insurer was not bound by the order releasing claims because it could not have anticipated at the time the notice was given that the order would be interpreted to cover rights to contribution and indemnity arising from direct liability of insurers to persons harmed by asbestos-related activities. Id. at 145, 157; see also Folger Adam Sec., Inc., 209 F.3d at 265 (even where creditor received notice of Section 363 sale motion, notice was constitutionally insufficient where it failed to describe the interests that would be affected by the free and clear sale); Acevedo v. Van Dorn Plastic Mach. Co., 68 B.R. 495, 499 (Bankr. E.D.N.Y. 1986) ("A creditor who is notified of the bankruptcy but not of his claim is in the same position as a creditor who has notice of his claim, but not of the bankruptcy.").

3. The Due Process Requirements Of Adequate Notice And Opportunity To Be Heard Apply With Equal Force To Section 363 Sale Orders.

Due process applies with equal force to claims and interests extinguished without notice by Section 363 sale orders and related injunctions, despite the bankruptcy policy interests in finality and protection of good faith purchasers. For example, in Citicorp Mortg., Inc. v. Brooks (In re Ex-Cel Concrete Co.), 178 B.R. 198, 205 (B.A.P. 9th Cir. 1995), the Bankruptcy Appellate Panel of the Ninth Circuit concluded that "the lack of any notice" to a lienholder whose lien the sale purported to extinguish "constituted constitutional lack of due process." In Western Auto Supply Co. v. Savage Arms, Inc. (In re Savage Industries, Inc.), 43 F.3d 714, 721-22 (1st Cir. 1994), the First Circuit held that a Section 363 sale order purporting to bar a claimant's successor

liability claims against a purchaser of estate assets violated that claimant's due process rights, where the claimant was not provided with notice of the sale—even though the claims of such persons were unknown, future claims at the time of the sale order. And in In re Polycel Liquidation, Inc., No. 00–62780, 2006 WL 4452982, at *9, *11 (Bankr. D.N.J. Apr. 18, 2006), aff'd, No. 06-2183, 2007 WL 77336 (D.N.J. Jan. 8, 2007), where a creditor did not receive proper notice of a Section 363 sale, even where it learned of the proceedings prior to the execution of the sale, the bankruptcy court found the creditor's knowledge insufficient to satisfy due process requirements and held that the interests of finality, while important, could not "trump constitutionally mandated due process requirements for notice and an opportunity to be heard." Id. (finding persuasive "ample authority" for the principle that "'sales within the scope of § 363(b)(1), of which no proper notice was provided, may be set aside'") (internal citation omitted); see also Nat'l Pipe & Plastics, 2000 Bankr. LEXIS 1329 at *25-26, *32 (applying Mullane in a Section 363 sale context and finding due process violation where sale order purported to bind known creditor to its finding that purchaser was not a successor-in-interest to the debtor in liquidation, but creditor had not received adequate notice of sale); Metal Founds. Acquisition, LLC v. Reinert (In re Reinert), 467 B.R. 830, 831-32 (Bankr. W.D. Pa. 2012) (applying Mullane in Section 363 sale context and finding due process violation where sale order purported to bind entity with interest in property sold, but entity did not receive adequate notice); Doolittle v. Cnty. of Santa Cruz (In re Metzger), 346 B.R. 806, 819 (Bankr. N.D. Cal. 2006) (finding sale order void to extent it affected rights of known lienholder that did not receive due process); Morgan Olson L.L.C. v. Frederico (In re Grumman Olson Indus., Inc.), 467 B.R. 694, 706-07 (S.D.N.Y. 2012) ("**Grumman**") (applying Mullane in Section 363 sale context and

finding due process violation where sale order purported to bar successor liability claims, even where claimants were unknown, future claimants).

No doubt recognizing that due process was not afforded here, New GM points to two decisions that purport to hold that a Section 363(f) order provides a due process exception and can bar claims regardless of whether notice was given to a claimant. See In re Edwards, 962 F.2d 641, 645 (7th Cir. 1992) (holding that, when the debtor fails to notify lienholders of a Section 363(f) sale, the order is effective anyway due to the "policy of finality"); Paris Mfg. Corp. v. Ace Hardware Corp. (In re Paris Indus. Corp.), 132 B.R. 504, 509-10 (D. Me. 1991) (holding that due process permits the sale of assets free and clear of future claims against a purchaser). Because these decisions incorrectly disregard due process rights in reliance on the need for finality and the desirability of maximizing the value of the estate, Edwards and Paris were wrongly decided. These cases cannot pass muster under Supreme Court precedent, and they have been rejected.[42] This Court should do likewise.[43]

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[42] See, e.g., In re Ex-Cel Concrete Co., 178 B.R. at 205 ("disagree[ing] with Edwards to the extent that it allows considerations, such as the exigent needs of the bankruptcy system or the innocence or good faith of third parties involved in bankruptcy sales, to justify departures from due process standards in adjudicating property rights."); In re Polycel Liquidation, Inc., 2006 WL 4452982, at *10 ("This court is inclined to disagree with the reasoning of the Seventh Circuit [in Edwards], and instead follows the more persuasive line of cases that recognize the importance of affording parties their due process rights over the interest of finality in bankruptcy sales."); Compak Cos., LLC v. Johnson, 415 B.R. 334, 342 (N.D. Ill. 2009) (holding that patent licensors' interests could not be extinguished by a sale order without due process, notwithstanding Edwards, given that the lienholder in Edwards had suffered only a trivial loss of interest).

The First Circuit itself has rejected the district court's reasoning in Paris. In In re Savage Industries, Inc., the First Circuit reversed a bankruptcy court that had improperly granted a purchaser's request to enjoin a state law successor liability suit pursuant to a Section 363 sale order, where the claimant had received no notice. 43 F.3d at 721-22. The bankruptcy court had cited Paris for the principle that "successor liability actions might 'chill' all-asset sales under chapter 11 by prompting potential purchasers to hedge their bids against unquantifiable future product liability costs." Id. at 719. In reversing, the First Circuit refused to credit that concern, reasoning that it was "largely illusory" and "entirely of the parties' own making," brought on by the sale of the debtor's assets "without regard to basic Bankruptcy Code notice requirements." Id. at 722; see also Ninth Ave. v. Remedial Grp., 195 B.R. 716, 732 (N.D. Ind. 1996) (noting court's decision in Paris before concluding that "a sale free and clear does not include future claims that did not arise until after the bankruptcy proceedings concluded").

[43] To the extent the deciding courts considered equitable factors in deciding those cases, it is also significant that those cases did not involve a multi-year-long cover-up of a product defect, by both the seller and the purchaser as is

Contrary to the overriding weight Edwards and Paris placed upon the finality of Section 363 sale orders and related injunctions, such orders are no different than any other final order in their finality. It is the very potential of orders—whether under Section 363 or otherwise—to finally adjudicate interests in property that call into play the requirements of due process. See Mullane, 339 U.S. at 314 ("An elementary and fundamental requirement of due process in any proceeding *which is to be accorded finality* is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.") (emphasis added). Accordingly, as the Ninth Circuit's Bankruptcy Appellate Panel observed in critiquing Edwards, notice and an opportunity to be heard cannot be dispensed with, and collateral attack made unavailable, *because of* the need for finality. See In re Ex-Cel Concrete Co., 178 B.R. at 205. The Ex-Cel court went on to quote Ray v. Norseworthy, 90 U.S. 128 (1874)—cited but given only lip service by the Edwards court—in which the Supreme Court refused to grant a good faith purchaser of property absolute title where a secured creditor had not been notified of the sale, reasoning that "[n]otice in some form must be given in all cases, else the judgment, order, or decree will not conclude the party whose rights of property would otherwise be divested by the proceeding." Id. ("'No man is to be condemned without the opportunity [to make] a defence, or to have his property taken from him by a judicial sentence without the privilege of showing, if he can, that the pretext for doing it is unfounded.'" (quoting Ray, 90 U.S. at 136)). Nor can the mere utility of the power to eliminate

present here. For Old GM and New GM to conceal the ISD until the Sale Order became final and then turn around and say that its finality should protect them cannot be what the Seventh Circuit intended in announcing a "strict rule." See Edwards, 962 F.2d at 745-46 (where debtor had attempted notice, but used the wrong address, and where claimant had filed proof of claim and then ceased to pay attention to case, court had no "cause . . . to question the benefits of having a strict rule in favor of the bona fide purchaser").

liabilities as a means to maximize the value of an estate for creditors justify overriding due process concerns, as the Paris court proposes. See In re Paris Indus. Corp., 132 B.R. at 509 n.11.

4. A Failure Of Due Process Cannot Be Cured By Speculation About What Could Have Occurred Absent The Violation.

Contrary to New GM's arguments, once a claimant has shown that it has been deprived of an interest or claim without constitutionally adequate notice and opportunity to be heard, a due process violation has been established.[44] The claimant is not obligated to demonstrate a "reasonable likelihood that the result of this claim would have been different absent the violation." Lane Hollow Coal Co. v. Dir., Office of Workers' Comp. Programs, 137 F.3d 799, 807 (4th Cir. 1998). As the Supreme Court has explained, "[t]o one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merit." Fuentes v. Shevin, 407 U.S. 67, 87 (1972) (citation omitted), reh'g denied, 409 U.S. 902 (1972). Thus, courts reject as "improper speculation" and "hindsight rationalization[]"

[44] New GM does not seriously dispute that Plaintiffs' successor liability claims are property interests. Nor could it, as this was the precise reason this Court found it could give New GM the successor liability bar on which it now relies. See In re Gen. Motors Corp., 407 B.R. 463, 503-04 (Bankr. S.D.N.Y. 2009) (concluding successor liability claim is "interest in property" that may be barred pursuant to Section 363(f) if other requirements are satisfied), aff'd sub nom. Campbell v. Motors Liquidation Co. (In re Motors Liquidation Co.), 428 B.R. 43 (S.D.N.Y. 2010), and aff'd sub nom. Parker v. Motors Liquidation Co. (In re Motors Liquidations Co.), 430 B.R. 65 (S.D.N.Y. 2010). Instead, New GM says that any successor liability claims were property of Old GM's estate as of the Sale Order and could be released without Plaintiffs' participation. Br. at 48-49. New GM selectively cites the Third Circuit's decision in In re Emoral, Inc., 740 F.3d 875 (3d Cir. 2014), cert. denied sub nom. Diacetyl Plaintiffs v. Aaroma Holdings, LLC, 135 S. Ct. 436 (2014), ignoring that other circuits around the country, including the Second Circuit, have rejected similar arguments. See Picard v. JPMorgan Chase & Co. (In re Bernard L. Madoff Inv. Sec. LLC), 721 F.3d 54, 70 (2d Cir. 2013) (analyzing whether the underlying creditor claims were personal to the creditor or general to the corporation to determine property of the estate issue, rather than analyzing whether claims were generalized or particularized as did Emoral), cert. denied sub nom. Picard v. HSBC Bank Plc, 134 S.Ct. 2895 (2014); Ahcom, Ltd. v. Smeding, 623 F.3d 1248, 1249 (9th Cir. 2010) (holding that creditor, as opposed to trustee, was proper party to assert alter ego action); In re Savage Indus., Inc., 43 F.3d at 722 (concluding non-debtor's successor liability claim against asset purchaser could not be extinguished by Section 363 sale without notice, and thus implicitly concluding claim belonged to tort claimant and not estate). In any event, Emoral has little relevance here, as the injured claimants there had notice of the settlement and had actually appeared to contest it, such that no due process issues were before the court. See In re Emoral, Inc., 740 F.3d at 877, 882 (construing estate release language in court-approved settlement agreement, which was negotiated with participation of diacetyl plaintiffs, to release successor liability claims).

arguments that, had a claimant been properly noticed, he would have lost anyway. See New Concept Hous., Inc. v. Poindexter (In re New Concept Hous., Inc.), 951 F.2d 932, 942 (8th Cir. 1991) (dismissing as "sheer improper speculation" and "hindsight rationalization[]" the argument that an improperly noticed debtor's objection would not have made any difference in approval of settlement); Consol. Coal Co. v. Borda, 171 F.3d 175, 184 (4th Cir. 1999) (finding that a 16-year delay in providing notice of a claim stripped the claimant of a full and fair opportunity to defend itself and refusing to speculate on whether the claimant would be successful now on the merits); White v. Chance Indus., Inc. (In re Chance Indus., Inc.), 367 B.R. 689, 709 (Bankr. D. Kan. 2006) (refusing to enforce discharge and plan injunction against tort claimant who received no notice and finding due process violation notwithstanding debtor's speculation that the tort claimant's participation in confirmation process would not have changed the result).[45]

Although New GM cites a multitude of decisions in support of its argument that "prejudice" is a required element of a due process violation, the cases it cites do not support its contention. Most of the cases illustrate the unremarkable proposition that if, despite inadequate notice, a party is provided with an *actual* opportunity to be heard, it has not suffered a due process violation.[46] Thus, for example, in In re Caldor, Inc., N.Y., 240 B.R. at 188, relied upon

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[45] Contrary to New GM's assertions, In re Chrysler LLC, 405 B.R. 84 (Bankr. S.D.N.Y. 2009), cert. granted, judgment vacated sub nom. Indiana State Police Pension Trust v. Chrysler LLC, 558 U.S. 1087 (2009), did not involve "the same type of due process objections relating to unknown product defects that Plaintiffs make herein." Br. at 46. The ISD was not an "unknown product defect," as was the issue in Chrysler, but rather a defect that was widely known throughout Old GM. The due process objections raised herein are, therefore, not the "same type" as those addressed in Chrysler.

[46] Perry v. Blum, 629 F.3d 1, 17 (1st Cir. 2010) (although defendants were removed then re-joined to the action, the defendants were original parties to the action and testified extensively at the trial); Rosson v. Fitzgerald (In re Rosson), 545 F.3d 764, 775-76 (9th Cir. 2008) (party "had an opportunity to present [his] arguments" in a motion for reconsideration); Oan Servs., Inc. v. Official Comm. of Unsecured Creditors of Nat'l Telecomms., Inc. (In re Parcel Consultants, Inc.), 58 F. App'x 946, 950-51 (3d Cir. 2003) (appeals court considered full substantive arguments on appeal); Global Commercial Fin., L.L.C. v. Old Kent Bank (In re U.S. Kids, Inc.), No. 97-1939, 1999 WL 196509, at *5 (6th Cir. Mar. 25, 1999) (unnoticed party introduced evidence, offered witnesses and cross-examined witnesses at the summary proceeding in which it appeared and participated); Rapp v. U.S. Dep't of Treasury, Office of Thrift Supervision, 52 F.3d 1510, 1520 (10th Cir. 1995) (parties appeared and participated in

by New GM, the court rejected a due process challenge where the objectant had an opportunity, albeit belatedly, to contest an order that had granted super-priority status to some claims but not the objectant's. Id. at 584. These cases are irrelevant because here Plaintiffs had neither notice nor an opportunity to be heard.

Edwards and Paris fall into a second category of cases that have rejected due process challenges by erroneously concluding that the would-be objectant was not deprived of any property. Thus in Edwards and Paris, the courts rationalize their conclusion that no due process violation occurs when a Section 363 sale extinguishes liens or bars claims without notice by reasoning that, in any event, the creditor's claim attaches to the proceeds of the sale. As long as the price is adequate—so the reasoning goes—the creditor can have no deprivation of property. See In re Edwards, 962 F.2d at 645 ("[T]his case appears to work no great hardship" where the creditor "does not suggest that the property was worth more than [the sale price]."); In re Paris Indus. Corp., 132 B.R. at 510 ("[T]he liquidation of the assets and their replacement with cash . . . has not affected [the creditors'] ability to recover on their claim."). The flaw in this analysis is that it fails to take into account the loss of the very property interest that is being eliminated without due process: the state law successor-in-interest claim potentially available against the successor-in-interest to the debtor. See supra Section I.A.3. In what is clearly *dicta* given the court's finding that claimant had been afforded an opportunity to be heard, the court in Pearl-Phil

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hearing); City Equities Anaheim, Ltd. v. Lincoln Plaza Dev. Co. (In re City Equities Anaheim, Ltd.), 22 F.3d 954, 959 (9th Cir. 1994) (debtor raised arguments before bankruptcy court); YBA Nineteen, LLC v. IndyMac Venture, LLC (In re YBA Nineteen, LLC), 505 B.R. 289, 300 (S.D. Cal. 2014) (debtor received extension of time to comply with order despite late initial notice); Parker, 430 B.R. at 97-98 (creditor had opportunity to take discovery and argue before the court); Cont'l Cas. Co. v. Gen. Dev. Corp. (In re Gen. Dev. Corp.), 165 B.R. 685, 688 (S.D. Fla. 1994) (bankruptcy court vacated original settlement order and reinstated it after hearing originally unnoticed surety's objections); Apex Oil Co. v. Vanguard Oil & Serv. Co. (In re Vanguard Oil & Serv. Co., Inc.), 88 B.R. 576, 580 (E.D.N.Y. 1988) (creditor filed sale objection and appeared at hearing); In re Caldor, Inc., N.Y., 240 B.R. 180, 188 (Bankr. S.D.N.Y. 1999) (creditor had subsequent opportunity to contest entry of order), aff'd sub nom. Pearl-Phil GMT (Far E.) Ltd. v. Caldor Corp., 266 B.R. 575 (S.D.N.Y. 2001).

commented that the claimant had not suffered an "actual deprivation" of property where the claimant was insolvent because the claimant, even if deprived of due process, was no worse off than if he had appeared and successfully opposed the sale order. Pearl-Phil, 266 B.R. at 579. As discussed infra however, this kind of hindsight analysis is prohibited by controlling Supreme Court precedent so that, if it had been determinative of a remedy in Pearl-Phil (which it did not), such ruling would have been in error.

B. The Pre-Sale Plaintiffs Were Reasonably Ascertainable Claimants At The Time Of The 363 Sale.

As explained supra, if the debtor either knows or can "reasonably ascertain" both the existence of a claim and the identity of the person holding it, that person is deemed a "known creditor" entitled to direct notice. See In re Crystal Oil Co., 158 F.3d at 297 (claim is reasonably ascertainable where the debtor has in its possession information that "*reasonably suggests* both the claim for which the debtor may be liable and the entity to whom he would be liable") (emphasis added). Following these clear rules, the members of the Pre-Sale Class were known creditors of Old GM as of the time of the entry of the Sale Order and were entitled to direct notice of the Sale.

1. Old GM Knew Of The ISD And That It Was A Safety Defect.

Belying the assertion that Old GM did not know owners and lessees of Defective Vehicles had claims arising from the ISD and thus was not obligated to provide them with notice of the Sale, Old GM was (as New GM is today) subject to a comprehensive statutory and regulatory scheme that imposed upon it *an affirmative duty* to know of safety defects in its products and, upon learning of such defects, to promptly provide notice of those defects as well as to take other remedial action. Thus, contrary to New GM's argument, Old GM already had

the data it needed to discharge its due process obligations and no "impracticable and extended search[]" was necessary to identify the claims of members of the Pre-Sale Class. Br. at 28.

The National Traffic and Motor Vehicle Safety Act (the "**Safety Act**"), as amended in 2000 by the Transportation Recall Enhancement, Accountability and Documentation Act (the "**TREAD Act**"), and related regulations require motor vehicle manufactures to obtain and submit to NHTSA, on a quarterly basis, data concerning incidents involving death or injury, claims relating to property damage received by the manufacturer, warranty claims paid by the manufacturer, consumer complaints, and field reports prepared by the manufacturer's employees or representatives concerning failure, malfunction, lack of durability or other performance issues. See 49 U.S.C. § 30166(m)(3); 49 C.F.R. § 579.21. These "early warning reports" must be retained by manufacturers together with all underlying records on which they are based. See 49 C.F.R. §§ 576.5 to 576.6.

The Safety Act further requires immediate action when a manufacturer determines or should determine that a safety defect exists. See United States v. Gen. Motors Corp., 574 F. Supp. 1047, 1049-50 (D.D.C. 1983). A "safety defect" is defined by regulation to include any defect that creates an "unreasonable risk of accidents occurring because of the design, construction, or performance of a motor vehicle" or "unreasonable risk of death or injury in an accident . . . ." See 49 U.S.C. § 30102(a)(8). Within five days of learning about a safety defect, a manufacturer *must* notify NHTSA and provide a description of the vehicles potentially containing the defect, including "make, line, model year, [and] the inclusive dates (month and year) of manufacture," a description of how these vehicles differ from similar vehicles not included in the recall, and "a summary of all warranty claims, field or service reports, and other information" that formed the basis of the determination that the defect was safety related. See 49

U.S.C. § 30118(c); 49 C.F.R. §§ 573.6(b)-(c). Then, "within a reasonable time"[47] after deciding that a safety issue exists, the manufacturer *must* notify the owners of the defective vehicles. See 49 C.F.R. §§ 577.5(a), 577.7(a). Violating these notification requirements can result in a maximum civil penalty of $35,000,000. See 49 U.S.C. § 30165(a)(1).

Old GM used several processes to identify safety issues, including the TREAD database and PRTS. See V.R. at 282-313. The TREAD database, used to store the data required for the quarterly NHTSA early warning reports, was the principal database used by Old GM to track incidents related to its products. See id. at 306. The database included information from the following: (i) customer service requests; (ii) repair orders from dealers; (iii) internal and external surveys; (iv) field reports from employees who bought GM-branded vehicles and from Captured Test Fleet reports;[48] (v) complaints from the OnStar call center; and (vi) a database maintained by GM legal staff to track data concerning complaints filed in court. Id. A TREAD reporting team would conduct monthly database searches and prepare scatter graphs to identify spikes in the number of accidents or complaints related to various GM-branded vehicles. See id. at 307. The PRTS is a database that tracks engineering problems identified in testing and manufacturing, through warranty data, and through customer feedback. See id. at 282. The PRTS process involves five steps: "identification of the issue; identification of the root cause; identification of a solution; implementation of the solution; and feedback." See V.R. at 284.

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[47] 49 C.F.R. § 577.7(a) was amended effective October 11, 2013, to replace "within a reasonable time" to "no later than 60 days" from the filing of the NHTSA notification.

[48] Captured Test Fleet reports were submitted by employees who were given vehicles and asked to document any problems that arose while driving. See V.R. at 300. The Quality Group would review, summarize, and group these reports into categories. See id.

Documents reflecting internal activity associated with Old GM's compliance related activities, which have become known to Plaintiffs (without the benefit of discovery here) no doubt represent the tip of the iceberg of what Old GM knew and include, *inter alia*:

- presentations on and settlements with respect to car crash cases involving the Ion and Cobalt approved by the Old GM general counsel's Roundtable Committee, see DC Stipulated Facts ¶¶ 14(D)(ii), 14(L), 14(U)(i);
- Captured Test Fleet vehicle reports from 2002-2006, in which issues with the Ignition Switch were noted by program team executives, see id. ¶¶ 14(FF); V.R. 59;
- at least four PRTS Reports related to the ISD, at least one of which explicitly identified defects in the Ignition Switch that allowed the key to be inadvertently cycled to the off position, see DC Stipulated Facts ¶¶ 14(B)(ii), 14(F)(i)-(ii), 14(V)(ii), 22;
- at least two service bulletins issued by Old GM in December 2005 and October 2006 with respect to vehicles that contained the ISD, see id. ¶¶ 10, 11;
- claim reports resulting from the ISD from 2005-2009 received by various dealers or dealerships of Old GM and accessible to persons working for or employed by Old GM, see id. ¶¶ 14(F), 21, 22;
- NHTSA's crash investigation on airbag non-deployment in a 2005 Chevrolet Cobalt and the related legal department file on the crash and investigation, see V.R. at 103-04 & n.419-20, 110 & n.453; Case No: CA05-049, Calspan On-Site Air Bag Non-Deployment Investigation, Crash Data Research Ctr., Calspan Corp. (Feb. 2009), available at http://docs.house.gov/meetings/IF/IF02/20140401/102033/HHRG-113-IF02-20140401-SD029.pdf, attached to the Weisfelner Decl. as **Exhibit L**;
- Trooper Young's 2007 report on a crash finding that the ISD likely caused airbag non-deployment, located in Old GM's legal department's files, see DC Stipulated Facts 14(H)(i), 14(BB);
- various reports on crashes involving airbag non-deployment reviewed by Old GM's legal staff in 2006, see id. ¶¶ 14(A)(i), 14(C)(iii), 14(D)(i)-(ii), 14(L), 14(O)(i)-(ii), 14(T), 14(CC), 14(DD); and
- a 2007 Warranty, Settlement and Release Agreement and Covenant Not to Sue with Delphi, which includes a chart with entries regarding "ignition switch failure," see id. ¶ 14(I)(vi).

The extensive documentation of the ISD in Old GM's books and records, including internal reports and investigations, distinguishes this case from those in which the information available to a debtor was not of a nature to alert it to the possibility of a lawsuit or impose a duty

of notice. See In re Enron Corp., No. 01-16034, 2006 WL 898031, at *5 (Bankr. S.D.N.Y. Mar. 29, 2006) (Gonzalez, J.) (existence of federal regulatory agency investigation of debtor did not make potential claim by the State of Montana known to the debtor); In re Envirodyne Indus., Inc., 206 B.R. 468, 474 (Bankr. N.D. Ill. 1997) (issuance of Department of Justice subpoena did not mean that the debtor knew that antitrust claims existed against it, requiring the debtor to provide actual notice to all potential claimants), aff'd, 214 B.R. 338 (N.D. Ill. 1997); see also In re Spiegel, Inc., 354 B.R. 51, 56-57 (Bankr. S.D.N.Y. 2006) (no basis for due process violation where, although *similar* pre-confirmation copyright action had been filed against debtor's licensee, plaintiffs did not allege that a proper examination of the books and records would have uncovered the basis for *their* claim against debtor), aff'd, 269 F. App'x 56 (2d Cir. 2008).[49]

Nor is it possible for New GM to argue that even if Old GM knew of the ISD, it was unaware of the claims and interests of the Pre-Sale Class. Such claims were neither conjectural nor future, see Mullane, 339 U.S. at 317, but gave rise, under a panoply of state statutes and common law, to fully mature, present and cognizable legal claims for, *inter alia*, economic loss damages, which had already accrued as of the time of the Sale. See supra Factual Background, Section M. It is a matter of public record that, by the Petition Date, Old GM had settled a number of class action lawsuits seeking damages for economic losses arising from defects in Old GM vehicles. See *Order Pursuant to Fed. R. Bankr. P. 9019 and Fed. R. Civ. P. Rule 23*

[49] Similarly wide of the mark is New GM's reliance on the Robley matter in which New GM successfully enjoined a claim based on a pre-Sale accident involving an Old GM vehicle. See Br. at 35-36. Critical to this Court's reasoning there was that Old GM had *no knowledge* of the facts surrounding Mr. Robley's claim prior to the Sale, making Mr. Robley, unlike Plaintiffs, an "unknown creditor" for which publication notice was constitutionally sufficient. See *Motion of Gen. Motors, LLC for Entry of An Order Pursuant to 11 U.S.C. Section 105 Enforcing 363 Sale Order* Hr'g Tr. 28:2-10, In re Motors Liquidation Co., Case No. 09-50026 (Bankr. S.D.N.Y. June 1, 2010) ("**Robley Hr'g Tr.**") (attached as **Exhibit N** to the New GM Appendix). The Court, in fact, recognized that publication notice would be suspect if Old GM had knowledge of Mr. Robley's claim prior to the Sale. See id. ("If GM knew back then that your client had already been injured and chose to use the publication route rather than a way that would get to him more directly, that kind of factual circumstance would have troubled me.").

Approving Agreement Resolving Proof of Claim No. 51095 and Implementing Modified Dex-Cool Class Settlement, In re Motors Liquidation Co., No. 09-50026 (Bankr. S.D.N.Y. May 4, 2011), ECF No. 10172 (pre-petition settlement, modified and implemented post-petition, see ECF No. 9905, relating to defects in intake manifold gaskets), attached hereto as **Exhibit 4**; *Final Judgment*, Castillo v. Gen. Motors Corp., No. 07-2142 (E.D. Cal. Apr. 16, 2009), ECF No. 74 (pre-petition settlement, see ECF No. 48, relating to defective transmissions), attached hereto as **Exhibit 5**; *Final Judgment*, Zwicker v. Gen. Motors Corp., No. 07-0291 (W.D. Wash. Nov. 7, 2008), ECF No. 31 (pre-petition settlement, see ECF No. 31-2, relating to defective transmissions), attached hereto as **Exhibit 6**. Accordingly, the "interest" of members of the Pre-Sale Class was known to Old GM. See Mullane, 339 U.S. at 317-18 (limiting "unknown" status to claimants whose "interests" were unknown to the debtor). For this reason, contrary to New GM's argument, it cannot be relevant, let alone determinative, whether any member of the Pre-Sale Class had actually commenced litigation based on the ISD against Old GM at the time of the Sale Hearing.[50]

New GM nevertheless wrongly suggests that members of the Pre-Sale Class had only "un-asserted" and "contingent" claims at the time of the Sale and thus were not "known" creditors entitled to direct notice. Br. at 27-28. In the Second Circuit, courts are clear that a contingent claim is one that "does not become an obligation until the occurrence of a future

[50] Nor is New GM correct that Plaintiffs' claims are "contingent." Br. at 27-29. Plaintiffs' successor liability claims arose from events that occurred prior to the sale—indeed, the ISD existed for over a decade prior to Old GM's bankruptcy, unbeknownst to all Plaintiffs although known to Old GM—and were not dependent on any later occurrence. See In re Thomson McKinnon Secs. Inc., 130 B.R. 717, 720 (Bankr. S.D.N.Y. 1991) (holding that debtor's pre-petition obligation to deliver certain shares to creditor gave rise to liability that "was fixed, noncontingent and not disputed"). Plaintiffs' claims are therefore distinguishable from claims long recognized as contingent, such as contribution or indemnity claims. See Agway, 313 B.R. at 39 (entity with unasserted contingent contribution and indemnity claim was not known creditor); In re Union Hosp. Ass'n of the Bronx, 226 B.R. 134, 139-40 (Bankr. S.D.N.Y. 1998) (in action seeking to file a late proof of claim for contribution and indemnity, court found that claims were too far removed from debtors' records; reasoning, *inter alia*, that the claims could only have been known to debtor if and when the claimants were ultimately adjudged liable in separate state court suits).

event," in contrast to a non-contingent claim, for which all events giving rise to liability for the debt have occurred. In re R.H. Macy & Co., 283 B.R. 140, 146 (S.D.N.Y. 2002) (quoting Mazzeo v. United States (In re Mazzeo), 131 F.3d 295, 303 (2d Cir. 1997)). For claims asserted in the Pre-Petition Action, the claimants' pre-petition injury was their purchase of a car containing the defect, giving rise to an immediate non-contingent claim. See Factual Background, Section L. Thus, Plaintiffs' claims can be distinguished from claims that arise only upon a future event, such as contribution and indemnity claims that arise only upon a primary judgment, and of which the debtor would have had no knowledge unless it was party to the primary suit. See In re Agway, Inc., 313 B.R. at 36-37 (claim against debtor for contribution and indemnity against was "uncertain and speculative" where debtor was not party to primary suit).

New GM suggests that the court in Burton v. Chrysler Group, LLC (In re Old Carco LLC), 492 B.R. 392 (Bankr. S.D.N.Y. 2013) ("**Burton**") considered similar claims to Plaintiffs' and found them to be contingent and not "known" creditors. See Br. at 30. But the court in Burton had no occasion to consider whether the plaintiffs were known creditors, because the plaintiffs did not make such an argument, instead only arguing that they were *future* creditors as to whom no notice could be sufficient. Id. at 402-03; see also *Plaintiffs' Opposition to Chrysler Group, LLC's Motion to Dismiss Second Amended Complaint* at 16-17, Burton v. Chrysler Grp., LLC (In re Old Carco LLC), No. 13-01109 (ECF No. 15), attached hereto as **Exhibit 7**. The Burton court rejected the "future claims" characterization, noting that the defects had occurred pre-sale and the claims were therefore "*[a]t a minimum* contingent" (*i.e.*, claims for which some future contingency is in the plaintiffs reasonable contemplation)—and thus not truly future. Burton, 492 B.R. at 403 (emphasis supplied). Indeed, elsewhere in the opinion, in concluding that direct independent claims against the successor failed on the merits (albeit properly

pleaded),[51] the court noted that the proximate cause for any injury occurred as a result of a pre-sale defect, thereby undercutting any argument that the claims were in fact contingent. Id. at 405 (characterizing the actions as seeking recovery for pre-sale design flaw because each plaintiff purchased a defective vehicle that "require[d] more servicing and was worth less money").[52]

Finally, New GM mischaracterizes the law when it suggests that contingent creditors are only known creditors if they have actually asserted claims. A debtor's due diligence in identifying claims and claimants includes "a reasonable search for contingent or unmatured claims." Drexel Burnham, 151 B.R. at 681. The cases New GM cites for its purported rule to the contrary stand instead for the unremarkable proposition—inapplicable here—that, where a debtor has no way to learn of a claim against it or the identity of the claimant, that claimant is not "known."[53]

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[51] As Plaintiffs demonstrate elsewhere in the brief, the court's focus on the substantive elements of the plaintiffs' claims was unnecessary and inappropriate for its analysis of the plaintiffs' direct claims, but it is useful in demonstrating the court's view of when the claims arose.

[52] New GM's selective quoting of Burton to suggest that vehicle owners always know they have claims because vehicles often need to be repaired is incomplete and misleading. See Br. at 30. The full quote, following an explanation that, because of the multiple recalls, it was within the plaintiffs' contemplation that their vehicles would need to be repaired, reads: "***Anyone who owns a car contemplates that it will need to be repaired, particularly when, as here, Old Carco had already issued at least two and possibly three recall notices for the 'fuel spit back' problem for certain Durango and other Old Carco vehicles before the original purchasers bought their vehicles from Old Carco***." Burton, 492 B.R. at 403 (emphasis added); see DPWN Holdings (USA), Inc. v. United Air Lines, Inc., 747 F.3d 145, 150 (2d Cir. 2014) (where claim against debtor was based on debtor's alleged violation of law, whether claimant in fact had knowledge of her claim at the time of a sale may be relevant to the due process inquiry).

[53] See, e.g., In re New Century TRS Holdings, Inc., No. 07-10416, 2014 WL 842637, at *4-5 (Bankr. D. Del. Mar. 4, 2014), appeal pending No. 14-822 (D. Del. June 25, 2014) (putative creditor could not have been "known" as of the bar date because her claim first arose after the bar date had passed); In re XO Commc'ns, Inc., 301 B.R. 782, 794-95 (Bankr. S.D.N.Y. 2003) (holding that claimant that filed for bankruptcy after debtor had filed for bankruptcy and that asserted preference claim against debtor was not known creditor of debtor because debtor was not notified of claimant's bankruptcy filing and had no way of knowing claimant would pursue preference claim, and debtor and claimant's long-standing business relationship was not a sufficient basis to make claimant known creditor), aff'd, No. 04 Civ. 01489LAK, 2004 WL 2414815 (S.D.N.Y. June 14, 2004); Brooks Fashion Stores, Inc. v. Michigan Emp't Sec. Comm'n (In re Brooks Fashion Stores, Inc.), 124 B.R. 436, 444 (Bankr. S.D.N.Y. 1991) (holding that taxing authority was unknown creditor because taxing authority's claim was based on pre-petition taxes that the debtor had paid when due and debtor was not aware of any redetermination with respect to previously paid taxes);

Nor does Morgenstein v. Motors Liquidation Co. (In re Motors Liquidation Co.), 462 B.R. 494 (Bankr. S.D.N.Y. 2012), support New GM's argument that a plaintiff's product liability claims are not ascertainable from Old GM's "books and records" and that such a plaintiff is not a "known creditor." Br. at 27. As the Court is well-aware, the plaintiff in Morgenstein *did not* challenge the adequacy of notice and the Court was not required to make any findings about whether the plaintiff's claims were ascertainable from Old GM's records. Instead the Court dismissed the claim in Morgenstein because the plaintiff made only "conclusory statements," alleged without evidentiary facts, that the debtor knew about and fraudulently concealed the alleged defect, such that the allegations did not satisfy the Rule 9(b) pleading standard applicable to the plaintiff's fraud on the court action. See Morgenstein, 462 B.R. at 506-08. New GM's citation to Morgenstein in the due process context is therefore inapposite. And, in any event, here even New GM has acknowledged Old GM's wrongful conduct, and commissioned a fact-finder (Mr. Valukas) to investigate the wrongdoing for purposes of ferreting out the truth, and making vastly-needed business and safety improvements.

2. Agency Principles Confirm Old GM's Actual Knowledge.

Knowledge of the ISD was wide-reaching and extensive within Old GM, including among Old GM's counsel, management, and lead design engineers. See Factual Background,

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Grant v. U.S. Home Corp. (In re U.S.H. Corp. of N.Y.), 223 B.R. 654, 660 (Bankr. S.D.N.Y. 1998) (holding that debtors could not have discovered plaintiffs' pre-petition claims arising from homes built by debtors because such claims were not based on the violation of a "standard or law which required [debtors] to build according to [applicable] standards," but rather were based only on debtors' failure to meet voluntary insurance industry guidelines for home construction); accord Chemetron Corp. v. Jones, 72 F.3d 341, 347-48 (3d Cir. 1995) (affirming district court finding that claimants were unknown creditors because title search of contaminated homes on which claims were based would not have revealed identity of vast majority of claimants, most of whom were only guests in the contaminated homes, and debtor had no other way of identifying, locating or providing actual notice to claimants), cert. denied sub nom. Jones v. Chemetron Corp., 517 U.S. 1137 (1996); Charter Crude Oil Co. v. Petroleos Mexicanos (In re Charter Co.), 125 B.R. 650, 655-57 (M.D. Fla. 1991) (reversing and remanding bankruptcy court's finding that claimant was a known creditor entitled to actual notice of bar date because bankruptcy court did not consider evidence that claimant had abandoned or resolved claim prior to debtors' bankruptcy filings, and abused discretion in not considering evidence showing that claimant's claim was not reasonably ascertainable).

Section F. Under agency principles of universal application,[54] the knowledge of these employees and counsel must be imputed to Old GM.[55] Imputation of knowledge to the corporation is proper even if it is never communicated[56] and even if employees fail to properly report their knowledge to senior management because of negligence, omissions, or general organizational incompetence.[57] Here, Old GM's counsel, management, lead engineers and other personnel acquired knowledge of the ISD while performing their duties, using systems and procedures that Old GM maintained to comply with its legal obligations and that gave Old GM the ability to identify the ISD.

New GM's suggestion that only a "limited" number of Old GM personnel were aware of the ISD is therefore wrong, as is any assertion that only Old GM's low- or mid-level employees knew of it. And, in any event, an employee's position within the corporate hierarchy is

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[54] Plaintiffs take no position as to which law will control on a choice of law analysis, but submit that the law on these issues is substantially the same across the law of Michigan (where Old GM was based), Delaware (where it was incorporated), and New York (most frequently analyzed in this District) and therefore discuss the law applicable in all jurisdictions.

[55] New York Marine & Gen. Ins. Co. v. Tradeline L.L.C., 266 F.3d 112, 122 (2d Cir. 2001); Allard v. Arthur Andersen & Co. (USA), 924 F. Supp. 488, 494-95 (S.D.N.Y. 1996) (applying New York and Michigan law to impute the knowledge and conduct of corporate officials acting within the scope of their employment); see also Link v. Wabash R.R. Co., 370 U.S. 626, 633-34 (1962) ("[E]ach party is deemed bound by the acts of his lawyer-agent and is considered to have notice of all facts, notice of which can be charged upon the attorney.") (citation omitted), reh'g denied, 371 U.S. 873 (1962); Veal v. Geraci, 23 F.3d 722, 725 (2d Cir. 1994) ("[U]nder traditional principles of agency the attorney's knowledge must be imputed to [the client].").

[56] Kirschner v. KPMG LLP, 938 N.E.2d 941, 950-51 (N.Y. 2010) (applying legal presumption that agents communicate information to principals).

[57] In re Tex. E. Transmission Corp. PCB Contamination Ins. Coverage Litig., 870 F. Supp. 1293, 1325 n.41 (E.D. Pa. 1992) (finding that the ignorance of some employees will not be imputed to the corporate employer), aff'd, 15 F.3d 1249 (3d Cir. 1994); 3 William Meade Fletcher, Fletcher Cyclopedia of the Law of Private Corporations § 790 (1994) (noting that it has been widely held that a corporation is charged with imputed knowledge "even though the officer or agent does not in fact communicate the knowledge to the corporation"); Restatement (Third) of Agency § 5.03 cmt. b ("A principal may not rebut imputation of an agent's notice of a fact by establishing that the agent kept silent."). Courts have imposed a conclusive presumption that the agent has discharged his duty to impart the principal with all his knowledge which is necessary for the principal's protection or guidance. First Ala. Bank of Montgomery, N.A. v. First State Ins. Co., 899 F.2d 1045, 1061 n.8 (11th Cir. 1990) (citing Nat'l Union Fire Ins. Co. v. Lomax Johnson Ins. Agency, Inc., 496 So.2d 737, 739 (Ala. 1986)). These legal presumptions are intended "to avoid the injustice which would result if the principal could have an agent conduct business for him and at the same time shield himself from the consequences which would ensue from knowledge of conditions or notice of the rights and interests of others had the principal transacted his own business in person." Id.

irrelevant for purposes of imputation, so long as she obtained the knowledge while acting within the scope of her authority.[58] Further, a corporation is charged with the collective knowledge of all of its employees even if no single individual possessed all of the relevant knowledge or was individually responsible for acting on it.[59] The Michigan Supreme Court applied this "imputed collective knowledge" standard in Upjohn Co. v. New Hampshire Ins. Co., 476 N.W.2d 392 (Mich. 1991), reh'g denied, 503 N.W.2d 442 (Mich. 1991), where it considered an insurance claim for damages from the continuous leaking of toxic materials from a corroded underground storage tank, which was regularly monitored by the plaintiff corporation's employees. Id. at 395-96. The court held that information available to the corporation, "through its various employees and through its records," permitted a finding that the corporation had expected the leak, and *refused* to ignore knowledge obtained by individual employees, even if they could not comprehend its full import. Id. at 400-01.

3. Old GM Had Standard Procedures For Effecting Recalls That Made The Identities And Mailing Addresses Of Pre-Sale Class Members Reasonably Ascertainable.

Regulations promulgated under NHTSA require manufacturers of motor vehicles to provide notification regarding safety defects by first class mail to registered owners of vehicles

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[58] See Kellogg Brown & Root Servs., Inc. v. United States, 728 F.3d 1348, 1369-70 (Fed. Cir. 2013) (reversing holding that employees were insufficiently senior in the corporate hierarchy for their actions and knowledge to be imputed), cert. denied, 135 S. Ct. 167 (2014); Woods v. Maytag Co., 807 F. Supp. 2d 112, 126-27 (E.D.N.Y. 2011) (imputing authorized Maytag repairman's knowledge of oven's defects and of attempts to conceal the defects to Maytag, where repairmen obtained this knowledge in the course of repairing Maytag ovens).

[59] See Copeman Labs. Co. v. Gen. Motors Corp., 36 F. Supp. 755, 762 (E.D. Mich. 1941) ("The knowledge possessed by a corporation about a particular thing is the sum total of all the knowledge which its officers and agents, who are authorized and charged with the doing of the particular thing acquire, while acting under and within the scope of their authority."); Albert v. Alex. Brown Mgmt. Servs., Inc., No. 762-N, 2005 Del. Ch. LEXIS 133, at *39 (Del. Ch. Aug. 26, 2005) ("Delaware law states the knowledge of an agent acquired while acting within the scope of his or her authority is imputed to the principal."); Restatement (Third) of Agency § 5.03 cmt. c. ("Organizations are treated as possessing the collective knowledge of their employees and other agents, when that knowledge is material to the agents' duties, however the organization may have configured itself or its internal practices for transmission of information.").

and, if the owner cannot be reasonably ascertained, to the most recent purchaser known to the manufacturer ascertainable through state records and other sources. See 49 C.F.R. § 577.7(a). On those occasions prior to the Sale when Old GM decided to recall vehicles, its ordinary practice and the method for doing so was to outsource the task of obtaining owner contact information to R.L. Polk and Company ("**R.L. Polk**"), a service provider. See New GM Stipulated Facts ¶ 18. Shortly before the Sale, in April 2009, Old GM sent registered letters informing owners/lessors of a recall of its model year 1997-2003 3.8 liter V6 engine Chevrolet, Buick, Oldsmobile, and Pontiac vehicles.[60] In keeping with Old GM's ordinary practice, New GM used registration information obtained through R.L. Polk to mail notice of the Ignition Switch Recall in 2014. See Ignition Recall Safety Information: Frequently Asked Questions, General Motors, http://www.gmignitionupdate.com/faq.html#L3 (last visited Dec. 10, 2014) ("The current owner information from your state vehicle registration will be used to mail out customer communication for the recall."). That Old GM had a legal obligation to notify owners of its vehicles of safety defects, that it had a system in place and always available to it that it had used to comply with this obligation, and that this system has even been used to notify owners of vehicles with this particular product defect—the ISD—should be conclusive of any possible dispute regarding whether the identities and addresses of owners of Defective Vehicles were discoverable to Old GM with reasonable diligence.[61] See Mullane, 339 U.S. at 319 (finding fact

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[60] See Letter from George Person, Chief, Recall Management Division, NHTSA, to Gay P. Kent, Director, Product Investigations, General Motors Corp. (Apr. 10, 2009), available at http://www-odi.nhtsa.dot.gov/acms/cs/jaxrs/download/ doc/ACM8195398/RCAK-07V589-4556.pdf/, attached to the Weisfelner Decl. as **Exhibit M**.

[61] Old GM was also required to notify lessees directly where its contracts with lessors so provided or where the relevant lessee information was registered with states. 49 C.F.R. § 577.7(a)(2)(i). For any remaining lessees, it was required to provide notice to their respective lessors. See 49 C.F.R. §§ 577.5(h), 577.7(a)(2)(iv).

that trust company gave direct notice to beneficiaries at the time of trust fund establishment to be "persuasive" of the absence of undue burden).

The availability of the recall system for notifying claimants of a defect makes this case distinct from the cases cited by New GM. For example, in Beeman v. BGI Creditors' Liquidating Trust (In re BGI, Inc.), 772 F.3d 102 (2d Cir. 2014), the Second Circuit ultimately affirmed the bankruptcy court's finding that holders of gift cards issued by the debtors were "unknown" creditors, because the debtor "'*had no reasonable method*' for ascertaining gift card holders' '*addresses or identifying information*.'" Id. at 106 n.6 (quoting In re BGI, Inc., 476 B.R. 812, 824 (Bankr. S.D.N.Y. 2012), aff'd, 772 F.3d 102 (2d Cir. 2014)) (emphasis added). The company's purchaser database contained no information linking to specific gift cards purchased, the gift card database contained no information about purchasers, and neither was helpful, in any event, for identifying the ultimate recipients of gift cards. See In re BGI, Inc., 476 B.R. at 821-22. Here, in contrast, Old GM's recall system gave it access to registration information (including name and address) for owners or lessees of the Defective Vehicles, as well information regarding parts—including the faulty Ignition Switch—used in those Defective Vehicles.

Similarly, in In re New Century TRS Holdings, Inc., not only did the creditor's claim not arise until after the bar date, see 2014 WL 842637, at *4 (noting that, by the claimant's own declaration, her problem with her loans did not arise until months after the bar date had passed), but also nothing in the record suggested that her claim could have been discovered upon investigation. Id. at *5-6. Although, there the debtor had on file the names and addresses of its customers, and further had information about which loans had so-called "scratch-and-dent" or "kick-out" problems, assignment to those categories had no correlation to whether the party had

a claim against the debtor. Id. Here, Plaintiffs were not just undifferentiated "customers" who could potentially make general allegations against Old GM. Rather, Old GM had established methods to determine the identities and addresses of persons who had vehicles with the defective Ignition Switch. Nor could it be said that their identification as the owners of vehicles with an ISD would be uncorrelated to their claims. The claims directly relate to the receipt of a vehicle with an ISD.

New GM is wrong and disingenuous in asserting that ascertaining the names and addresses of owners or lessees of defective cars would have entailed "a vast open-ended investigation." See Br. at 28. Old GM was (and New GM is) required by law to maintain an ability to notify vehicle owners/lessees of safety issues and recalls. The procedures Old GM had in place to satisfy this obligation—and that New GM employed in 2014 to notify owners/lessees of the Ignition Switch Recalls—enabled Old GM to readily identify the names and mailing addresses of vehicle owners/lessees in order to provide them with notice of the Sale Motion.

C. GM Did Not Apprise Plaintiffs That Their Interests Could Be Affected By The Sale Order.

New GM makes no attempt to argue that anything less than direct notice can ever be sufficient notice for known creditors;[62] nor does it argue that Plaintiffs received direct notice. Therefore, if this Court finds that the members of the Pre-Sale Class were known creditors, it follows that their due process rights were violated. But even if, counter-factually, Old GM had been unable to provide direct notice, the constructive notice that Old GM provided was plainly

[62] New GM does suggest that Old GM was not required to provide direct notice, even to known creditors whose interests would be extinguished by the order, because noticing all 70 million owners of GM vehicles would have been too expensive. See Br. at 33-34. But New GM cites no facts in the record (because none exit) to support the underlying assumption of its argument regarding costs (*i.e.*, that *every* GM car owner would be entitled as known creditors to direct notice of the Sale Motion). In any event, New GM significantly exaggerates the cost, as Plaintiffs nowhere allege that all 70 million GM vehicles on the road as of the Sale Order contained the ISD.

deficient to inform claimants such as those in the Pre-Sale Class that their rights could be affected by the Sale. Old GM never, either through direct notice or through publication notice, disclosed the existence of the ISD, identified the make or model numbers of the Defective Vehicles, or explained that economic loss or other injuries from the purchase of a Defective Vehicle could be substantively affected by entry of the Sale Order. Without this information, no reader of the publication notice that was actually provided by Old GM could possibly know that they even had a claim against Old GM, and thus publication notice was ineffective to inform Plaintiffs that their rights could be affected.[63]

The mere fact that notice was published will not make it adequate if the *persons to whom the notice is directed have no knowledge, or ability to understand, that they hold rights that are about to be taken away*. See Schroeder, 371 U.S. at 212-14; Covey, 351 U.S. at 144-47. Unsurprisingly, then, courts in this circuit and other circuits routinely hold that notice informing creditors that some claims may be barred will fall short of due process if it does not inform the creditors in question of their claims or potential claims. See, e.g., Manville IV, 600 F.3d at 158 (holding claimant could not be bound by bankruptcy court orders where, even with notice, "it could not have anticipated . . . that its . . . claims . . . would be enjoined"); Waterman Steamship Corp. v. Aguiar (In re Waterman S.S. Corp.), 141 B.R. 552, 558 (Bankr. S.D.N.Y. 1992) (finding notice ineffective if readers would not have known it affected their rights), aff'd in part, vacated

[63] The ability of Plaintiffs to determine, based on Old GM's publication notice, that they had claims that could have been affected by the 363 Sale is significantly different than the ability of those claimants who knew they had concrete interests in Old GM. For example, in this Court's discussion of the Robley matter, the Court was persuaded that the publication notice given was adequate as to Robley, because having received it, and having been injured while driving a GM car, he had clearly understood enough to show up in court to object to the Sale. See Robley Hr'g Tr. 61:5-13. The Court relied upon In re Savage Industries, Inc., 43 F.3d at 721, to conclude that publication notice was sufficient. See Robley Hr'g Tr. 60:8-61:4. However, in In re Savage Industries, Inc., the court had no occasion to address the quality of publication notice that would have been sufficient. Id. at 721-22. The case did not, therefore, suggest that the bare notice of proceedings would have been sufficient without facts indicating why the claimants would have had claims.

and remanded, 157 B.R. 220 (S.D.N.Y. 1993); Acevedo, 68 B.R. at 499 ("A creditor who is notified of the bankruptcy but not of his claim is in the same position as a creditor who has notice of his claim, but not of the bankruptcy."); see also Folger Adam Sec. Inc., 209 F.3d at 265 (even where creditor received notice of Section 363 sale motion, notice was constitutionally insufficient where it failed to describe the interests that would be affected by the free and clear sale).

The constructive notice provided by the debtor in Gabauer v. Chemtura Corp. (In re Chemtura Corp.), 505 B.R. 427, 430 (S.D.N.Y. 2014) (Furman, J.), provides a textbook example of what constitutionally adequate notice must contain in order to inform tort claimants, even those whose identities are unknown, that their rights may be affected. Chemtura had been a manufacturer of diacetyl, a toxic chemical whose use may have resulted in injuries to, among others, workers at particular, known facilities. Id. at 428-29. The debtor sent "site-specific" publication notices targeted towards unknown creditors, published in the geographical locations where exposure was most likely to have occurred, and explained not only that Chemtura had manufactured diacetyl but that any person who had been exposed to the chemical "*may have a claim under various legal theories for damages.*" Id. at 431 (emphasis added).

In upholding the sufficiency of notice given by publication, the district court held that potential future claimants "could have anticipated that their substantive rights might be affected by the Bar Date and taken steps . . . to protect their rights." See id. Likewise in In re Tronox Inc., the published bar date notice used to notify unknown claimants injured by exposure to a toxin explained where such exposure could have occurred and further explained that anyone injured from exposure, regardless of whether that exposure had become apparent, must file a claim by the bar date. See *Tronox's Motion for Entry of an Oder (A) Setting Bar Dates for*

Filing Proofs of Claim, (B) Approving the Form and Manner for Filing Proofs of Claim and (C) Approving Notice Thereof at Ex. E, Case No. 09-10156 (Bankr. S.D.N.Y. May 28, 2009) (ECF No. 399), as approved by the Court (ECF No. 466), attached hereto as **Exhibit 8**; accord *Notice and Motion for Approval of Proposed Publication Notice of Claims Bar Date and Publication Schedule and Request for Expedited Consideration* at Ex. A, In re Freedom Indus., Case No. 14-20017 (Bankr. S.D.W. Va. Jan. 17, 2014) (ECF No. 421) (bar date notice explained that Freedom Industries spilled chemicals into the Elk River on January 19, 2014, and provided: "*If you believe that you have a claim against Freedom resulting from the Chemical Spill . . . you must file [a] proof of claim.*") (emphasis added), attached hereto as **Exhibit 9**.

Here, in contrast, Old GM's published notices did not disclose that Old GM cars were affected by the ISD, nor did they identify the make or model number of the Defective Vehicles or explain that claims regarding economic loss or other injuries from purchase of a Defective Vehicle could be substantively affected by the Sale Order. As the Court of Appeals for the Tenth Circuit has explained: "When a party conceals the necessary facts upon which a claim is to be made, that party cannot benefit from publication by notice. *Due process does not allow a debtor who has actively concealed facts necessary to the presentation of certain claims to notify by publication those persons adversely affected by the active concealment.*" Tillman v. Camelot Music, Inc., 408 F.3d 1300, 1308 (10th Cir. 2005) (emphasis added). The notices were therefore insufficient to apprise members of the Pre-Sale Class of the substantive impact on their rights if the Sale was approved.

D. No Notice Could Be Sufficient To The Post-Sale Claimants As Unknown Creditors.

The claims of the Post-Sale Class did not exist at the time of the Sale Hearing. From the vantage point of the date of the Sale Hearing, the identities of the members of the Post-Sale Class

were neither known nor ascertainable. However, as of that date, it was certain that following the Sale, Defective Vehicles would be purchased by members of the public at prices that did not reflect the ISD. Accordingly, on the day of the Sale Order, the unknown members of the Post-Sale Class were "future claimants." See Grumman, 467 B.R. at 703 (future claimants are holders of "a claim against a purchaser that is based on pre-bankruptcy conduct of the debtor that did not cause any harm to an identifiable claimant until after the bankruptcy closed."). Because future claimants cannot possibly be provided notice of a bankruptcy, "for due process reasons, ***their claims cannot be discharged***" by an order of the bankruptcy court. Id. at 707 (collecting cases in support of same) (emphasis added); see also id. at 704-05 ("Generally, courts have held that future claims cannot be considered 'claims' that are dealt with and discharged by a confirmation plan.") (collecting cases in support of same).

Grumman is directly on point. There, the bankruptcy court order approving a sale included an injunction against tort claims brought against the purchaser ("**Purchaser**") based on allegedly defective products manufactured and sold by the debtor ("**Seller**") prior to the sale, including any claims based on theories of vicarious or successor liability. Id. at 697. Post-sale, the plaintiff was injured while driving a truck with the Seller's defective product parts, and brought personal injury claims based on theories of state law successor liability against the Purchaser. It was not disputed that the plaintiff had not received notice of the sale.

The district court found that the sale order could not be enforced to enjoin plaintiff's claims, reasoning that enforcing such an injunction against the plaintiff, whose identity was unknown and unknowable at the time of the sale, would violate both bankruptcy procedure and due process. Id. at 696; see also Chateaugay Corp. v. LTV Corp. (In re Chateaugay Corp.), 944 F.2d 997, 1003 (2d Cir. 1991) (analyzing appropriate notice to be given to claimants who are not

only unidentified, but unidentifiable, and noting that "[t]o expect 'claims' to be filed by those who have not yet had any contact whatever with the tort-feasor has been characterized as 'absurd.'") (citations omitted). So too here. Because members of the Post Sale Class were future claimants, there was no way Old GM could have provided them with constitutionally adequate notice of the Sale Hearing and, therefore, the Sale Order cannot be enforced to bar their state law successor liability claims against New GM.[64]

New GM's contention that "a Plaintiff who purchased a used Old GM vehicle after the 363 Sale should not have any greater rights than the original owner of that vehicle," and thus that the Post-Sale Class assumed the Sale Order by "assignment," is without any merit. See Br. at 66 (citing In re Flanagan, 415 B.R. 29, 42 (D. Conn. 2009)). First, a member of the Post-Sale Class that purchased a used Old GM vehicle has the *same* rights against New GM as does a member of the Pre-Sale Class in that both have been injured by New GM's fraudulent conduct and violations of its legal obligations. Moreover, both have economic loss injuries relating to diminution of value and are entitled to other economic and injunctive remedies. New GM has cited *no authority* for the proposition that the rights of future claimants (such as members of the Post-Sale Class) are defined or circumscribed by claimants existing at the time of a Section 363 sale.[65] Flanagan, the sole case with which New GM attempts to support this proposition, is both

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[64] New GM attempts to distinguish Grumman by pointing out that the Grumman plaintiff did not argue that she should have received notice of the 363 sale. That is no real distinction; the Post-Sale Class likewise does not argue they should have received notice of the 363 Sale. Indeed, because the members of the Post-Sale Class were future creditors, notice was impossible. New GM's "distinction" only underlines that Grumman is on all fours with respect to the rights of the Post-Sale Class.

[65] Elsewhere in its brief, see Br. at 48, New GM cites to Burton in support of the proposition it is permissible to bar the claims of persons who might be later injured as a result of the defect. Burton, 492 B.R. at 403. However, the Court's reasoning, which relied, in part, on the fact that both plaintiffs and their "predecessors" (*i.e.*, prior owners of the cars) had a pre-petition relationship with Old Carco is of no import here. See id. Rather, the Court's decision in Burton highlights the importance of a claimants' knowledge for due process purposes. See supra note 51. The plaintiffs in Burton are unlike Plaintiffs here, where both Plaintiffs and their predecessors had no knowledge of the ISD given Old and New GM's intentional cover-up of the defect.

legally and factually inapposite. In Flanagan, applying the unremarkable and wholly distinct rule that a trustee acting pursuant to 11 U.S.C. § 541 is subject to all of the same defenses as the debtor pre-bankruptcy, the court held that the trustee's Section 541 claim to recover assets was barred by *in pari delicto*. Flanagan, 415 B.R. at 33-34.

Even if, arguendo, members of the Post-Sale Class are subject to the Sale Order to the same extent as members of the Pre-Sale Class, this would be of no help to New GM. The Sale Order is not binding on the Pre-Sale Class. See infra Sections I.B to I.C.[66]

E. In Addition To Being Legally Unsupportable, New GM's Inevitability Argument Is Factually Unfounded.

Notwithstanding the total deprivation of Plaintiffs' successor liability claims without notice, New GM argues that this deprivation is not a due process violation because, had Plaintiffs had an opportunity to object to the Sale Order, they could not have succeeded. Even crediting New GM's argument that the inevitability of the result is somehow relevant to the due process inquiry (which it is not; see supra Section I.A.4), here the result, if Plaintiffs had been properly noticed and appeared, was far from inevitable. The ISD has affected millions of cars and constitutes a severe safety issue as to the operation of those cars. The nation has now witnessed the political, public relations and legal firestorm that has resulted from the long-overdue disclosure of the ISD and the related revelations of Old GM and New GM misconduct. New GM's argument speculatively presumes that this Court would have written exactly the same opinion in July of 2009 *even if* it had been aware of the ISD, the now well-documented campaign to cover it up, and Old GM's abdication of its legal duties to owners and lessees of Defective

[66] New GM acknowledges the converse is true. See Br. at 66 (stating that "***if*** the Sale Order and Injunction would have applied to the original owner who purchased the vehicle prior to the 363 Sale, it equally applies to the current owner who purchased the vehicle after the 363 Sale.") (emphasis added).

Vehicles.[67] It also presumes that, despite the sheer numbers of citizens the ISD adversely impacted, giving proper notice to such persons could only have resulted in either the extinguishment of ISD-related economic claims or everyone simply throwing up their hands and leaving Old GM to a liquidation.[68] These two outcomes were, of course, not the only ones possible or even probable in the counterfactual scenario of Old GM complying with its obligations. Based on what is now understood to have been a gross violation by Old GM of both the law and the public trust, it is equally or even more likely that Old GM and Treasury—who, New GM acknowledges, was the one to draw "the line in the sand"—would have chosen to deal with objections from Plaintiffs in the same way it chose to deal with objections from consumer safety groups, by adding Plaintiffs' claims to assumed liabilities. In any event, New GM cannot support its speculation as to the potential outcome had Old GM disclosed, on the eve of filing for bankruptcy, that it had put millions of cars on the road with a known but hidden life-threatening defect while failing to disclose that fact to those most affected by it.

Nor does the fact that some consumer groups challenged the Sale Motion (with some successfully persuading New GM to assume liabilities) mean that Pre-Sale Class members'

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[67] At the very least, Plaintiffs could have presented a compelling argument that New GM was not a "good faith purchaser" due to its knowledge of the ISD. A determination of good faith not only considers whether the purchaser buys in good faith and for fair value, but also considers the integrity of the purchaser's conduct during the course of the sale proceeding. In re Gucci, 126 F.3d 380, 390 (2d Cir. 1997). This good-faith requirement prohibits fraudulent, collusive actions specifically intended to affect the sale price or outcome of the sale. Id. New GM's omissions with respect to the known ISD throughout preparation for and during the sale itself indicate a fraudulent action intended to affect the outcome of the sale—namely to avoid the significant liabilities arising from the ISD and prevent them from delaying or interfering with the sale. Plaintiffs could have been expected to raise these issues at the Sale Hearing had the ISD been disclosed.

[68] It is clear, for example, that the U.S. Treasury was kept entirely in the dark regarding the existence of the ISD and Old GM's "inexcusable" failure to disclose it. In response to a question regarding what "went wrong in terms of the ignition switch recall, why it took so long," and whether there was "any hint of this at the Auto Taskforce that there was some problem like this looming," Harry Wilson, a key member of the Auto Task Force and U.S. Treasury official at the time of the 363 Sale, replied: "***Absolutely not. Let's be very direct and clear about that. We didn't know about anything like this.***" See The Brookings Inst., Recovery Road? An Assessment of the Auto Bailout and the State of U.S. Manufacturing – A Discussion with Chrysler Chairman and CEO Sergio Marchionne and Larry Summers Panel Tr. at 36 (May 21, 2014) (emphasis added), attached to the Weisfelner Decl. as **Exhibit N**.

constitutionally protected right to notice and an opportunity to be heard may be denied. Revealingly, New GM cites no legal authority for this proposition, and Plaintiffs are aware of none. Contrary to the implications of New GM's argument, the participation of another party in interest does obviate the need for the *claimant* to receive due process. See, e.g., Nelson v. Adams USA, Inc., 529 U.S. 460, 469-72 (2000) (failure to provide notice to civil defendant not excusable as harmless even where another party purportedly had the same claims and defenses as defendant); Molamphy v. Town of S. Pines, No. 02-00720, 2004 WL 419789, at *10 (M.D.N.C. Mar. 3, 2004) (criticizing the notion that due process defects are curable based on the participation of similarly situated parties as "encourag[ing] sloppy practices, the avoidance of which is the rationale behind requiring adequate notice in the first instance"). Indeed, basic principles of claim preclusion hold that a party with even a "similar" interest, where not a legal representative of the missing claimant,[69] cannot bind a missing claimant. See Ruiz v. Comm'r of Dep't of Transp. of City of New York, 679 F. Supp. 341, 348 (S.D.N.Y. 1988) ("Where the prior action is brought by individuals who purport to be members of a class sharing similar interests, but where the class is not certified, an adverse decision in the prior action will not preclude other individuals who were not personally involved in the prior action.").

[69] In the case of a confirmation order affecting the rights of "future claimants," some courts suggest that the due process rights of such future claimants can be satisfied through the participation of a "virtual representative"—but that representative must have an express or implied legal relationship with the future claimants and be accountable to those future claimants. See, e.g., In re Fairchild Aircraft Corp., 184 B.R. 910, 928-32 (Bankr. W.D. Tex. 1995), vacated on other grounds, 220 B.R. 909 (Bankr. W.D. Tex. 1998) (noting in *dicta* that bankruptcy court order may extend to future claims if a future claims representative had been appointed or other legal representative was appointed); Meza v. Gen. Battery Corp., 908 F.2d 1262, 1268-73 (5th Cir. 1990) (describing concepts of virtual representatives and adequate representatives, and finding union did not adequately represent interests of union members). Plaintiffs in the Pre-Sale Class were known creditors, not future claimants, and this line of cases is inapplicable to them. In any event, the parties that appeared certainly had no express or implied legal relationship with Plaintiffs, whether Pre-Sale or Post-Sale Class members.

II. Remedies Threshold Issue.

A. This Court Should Deny The Motions To Enforce The Sale Order, As They Purport To Deprive Plaintiffs of Property Without Due Process.

A party "is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process." Richards v. Jefferson Co., 517 U.S. 793, 798 (1996). Thus, in bankruptcy proceedings, a creditor's claim cannot be barred by a discharge and plan injunction where the creditor received inadequate notice under due process standards.[70] See DPWN Holdings (USA), Inc., 747 F.3d at 150-53 (holding that "[a] claim cannot be discharged if the claimant is denied due process because of lack of adequate notice," remanding motion to dismiss post-confirmation complaint for determination of due process facts, and stating that a creditor was not required to seek relief from confirmation order to proceed with claim); see also Arch Wireless v. Nationwide Paging, Inc. (In re Arch Wireless), 534 F.3d 76, 87 (1st Cir. 2008) (dismissing debtor's motion for contempt against creditor for bringing post-confirmation complaint, and holding that the plan confirmation order's discharge injunction could not extinguish claims for acts or omissions occurring prior to the confirmation date where creditor received inadequate notice of the bankruptcy proceedings); Waterman S.S. Corp. v. Aguiar (In re Waterman S.S. Corp.), 157 B.R. 220, 222 (S.D.N.Y. 1993) (in debtor's action to enjoin commencement of post-confirmation complaint against the debtor for pre-petition claims, holding that discharge order and injunction could not be enforced against known asbestosis claimants who received inadequate notice of the bar date).

[70] The Second Circuit has also applied this rule to the releases of claims against third parties in settlements. See Manville IV, 600 F.3d at 158 (holding settlement order barring claims against the debtor's insurance carriers was unenforceable against a non-settling insurer that sought to assert a claim for indemnity and contribution against a settling insurer).

This approach must apply to New GM's Motions to enforce the Sale Order against Plaintiffs who did not receive adequate notice. Where purchasers seek to enforce Section 363 orders against persons who did not receive adequate notice consistent with due process, lower courts—including in this district—simply deny the purchasers their requested relief and refuse to enforce the Section 363 sale order as to the objecting claimant who did not receive due process.

The Second Circuit recently recognized this principle in the case of Koepp v. Holland, 2014 U.S. App. LEXIS 22108, at *5, holding (although in the context of a transfer of assets in a reorganization) that "[b]ankruptcy courts cannot extinguish the interests of parties who lacked notice of or did not participate in the proceedings." Id. (emphasis added). There, the Second Circuit affirmed the district court's finding that an order that purported to vest certain real property in a reorganized railroad free and clear of interests could not operate to extinguish plaintiffs' predecessor-in-interest's easements on land belonging to the railroad where there was no evidence that the predecessor-in-interest received notice of the bankruptcy. See id. at *5-7. The Second Circuit relied on the generally accepted principles provided by it in Manville IV, 600 F.3d at 153-54, as well as upon the decision of the district court in Grumman, 467 B.R. at 706, for its conclusion that a creditor who does not receive notice of bankruptcy proceedings cannot be bound by a judgment entered by the court that purports to extinguish its claims. Koepp, 2014 U.S. App. LEXIS 22108, at *5-6.

In Grumman, the district court dismissed an action brought by a purchaser to enforce a 363 sale order and injunction barring personal injury claims against a claimant who had not received adequate notice. 467 B.R. at 696. The district court first observed that "the Second Circuit [has] rejected the argument that bankruptcy provides a special 'remedial scheme' that creates an exception to the 'principle of general application in Anglo-American jurisprudence

that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process." Id. at 706 (further reasoning that even the "special remedial scheme" afforded by bankruptcy proceedings can only extinguish creditors' rights "if the scheme is otherwise consistent with due process") (quoting Manville IV, 600 F.3d at 153-54). As a result, the district court concluded that "the Sale Order [could not] be enforced in [a] manner" to prevent the claimants "from even bringing suit in the first place" because they were denied adequate notice of the proceedings and thus could not be bound by the order's terms. Id. at 709.

Courts around the country have come to the same conclusion. For example, in In re Savage Industries, Inc., 43 F.3d at 722, the First Circuit held that the bankruptcy court had improperly granted a purchaser's request to enjoin a state law successor liability suit brought by a creditor who had not received notice of a Section 363 sale purportedly barring those claims. The court held that, regardless of whether the creditors' state successor liability claims constituted an "interest" in the debtor for purposes of a Section 363 sale, such an interest could only be "extinguishable under section 363(f) 'after notice and hearing.'" Id. at 721 (quoting 11 U.S.C. § 102(1)). As a result, the court reasoned that there could "be no question that [the creditors'] claim could not be extinguished absent a showing that [the creditor] was afforded appropriate notice in the particular circumstances." Id. at 721. In finding that "it was never determined 'appropriate in the particular circumstances' for [the] Debtor . . . and [the successor] to dispense with all notice and opportunity to be heard on the part of potential claimants," the court held that "it would border on the bizarre to conclude that the third-party complaint [alleging successor liability claims] . . . threatened disruption to any legitimate function served by the Bankruptcy Code priority scheme." Id. at 722.

Similarly, in Schwinn Cycling & Fitness Inc. v. Benonis, 217 B.R. 790 (N.D. Ill. 1997), the district court held that the bankruptcy court had properly dismissed an action brought by a purchaser to enforce a Section 363 sale order against claimants who had no notice of the sale or bankruptcy. Id. at 797. Again, the district court concluded that enjoining the claimants' claims against the purchaser as the purchaser requested would itself effectively violate their rights to due process. Id. ("[The purchaser's] attempt to enjoin the [claimants'] state court action would, in effect, deny them of their rights to due process."); see also In re Reinert, 467 B.R. at 832 (dismissing action by purchaser to enforce sale order against creditor who received insufficient notice, and holding that, *inter alia*, because creditor had received insufficient notice he was not bound by its terms).

B. No Rule Or Standard Prohibits This Court's Denial Of The Motions.

Ignoring the ample precedent for this Court to refuse to enforce the Sale Order against persons who received no constitutionally sufficient notice, New GM suggests that Plaintiffs are asking this Court to revoke the Sale Order under Rule 60(b)(4), and then throws up a variety of purported obstacles to Rule 60(b)(4) relief that they say Plaintiffs cannot satisfy.[71] Some courts do address the question of enforceability of a Section 363 sale order issued without notice by applying Rule 60(b)(4). But in contrast to those cases, in which lienholders typically seek to reinstate liens or other property rights extinguished by a Section 363(f) order because non-enforcement of the sale order cannot grant complete relief, see, e.g., In re Ex-Cel Concrete Co.,

[71] Contrary to New GM's arguments, in which it cites only cases applying *other* subsections of Rule 60(b), see Br. at 23-24, the standards for relief from judgment under Rule 60(b)(4) for a due process violation are in any event substantially identical to those applicable here: a finding of a due process violation requires relief from the judgment. See Cent. Vt. Pub. Corp. v. Herbert, 341 F.3d 186, 189 (2d Cir. 2003) (a court has no discretion to deny a Rule 60(b)(4) motion if the court finds a due process violation); see also Grace v. Bank Leumi Trust Co. of N.Y., 443 F.3d 180, 193 (2d Cir. 2006) (relief from judgment proper under Rule 60(b)(4) where judgment entered "in a manner inconsistent with due process of law").

178 B.R. at 205 (affirming Rule 60(b)(4) relief from sale extinguishing lien without due process),[72] here the Court can grant complete relief by simply refusing to enforce the Sale Order against Plaintiffs and resort to Rule 60(b)(4) is unnecessary.[73] The only remedy required for the violation of Plaintiffs' due process rights is to deny New GM's Motions to enforce—a remedy that does not require revoking or even partially revoking the Sale Order.

Nor should this Court credit New GM's argument that this Court should craft a "remedy against Old GM" instead of simply refusing to enforce the Sale Order against Plaintiffs. New GM cites scant authority in support of this final approach, which it claims is the only proper one; and in the decisions they do cite, see Br. at 56-57, the courts found no due process violation, making the decisions oddly incongruous on the issue of the appropriate remedy for the violation of Plaintiffs' rights. For example, Austin v. BFW Liquidation, LLC (In re BFW Liquidation, LLC), 471 B.R. 652, 669 (Bankr. N.D. Ala. 2012), did not involve the enforcement of an order extinguishing claims or interests against one whose interest was extinguished but instead

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[72] See also Compak Cos., LLC, 415 B.R. at 343 (voiding sale order to the extent it extinguished defendants' patent license); Esposito v. Title Ins. Co. of Pa. (In re Fernwood Mkts.), 73 B.R. 616, 621 (Bankr. E.D. Pa. 1987) (court granted relief and allowed lienholder who did not receive adequate notice of sale to choose between voiding the sale and restoring all parties to status quo, or allowing sale to go through and attempt to attach lien to proceeds).

[73] The Seventh Circuit illustrated this distinction in a pair of decisions addressing Section 363 "free and clear" sales that extinguish, on the one hand a lienholder's interest, and on the other hand a successor liability claimant's interest. Compare In re Edwards, 962 F.2d at 643 (a lienholder's interest that was purportedly extinguished under a sale order entered without notice could only be reinstated through voiding the part of the sale order that affected the lien), with Zerand-Bernal Grp., Inc. v. Cox, 23 F.3d 159, 164 (7th Cir. 1994) (a due process violation against a claimant with a successor liability claim that was purportedly barred under a sale order could be remedied by refusing to enforce the sale order as to that claimant on jurisdictional grounds). The difference therefore is the nature of the interest that must be protected and the violation that must be remedied: a lienholder's interest is in the finite value of its lien which must be reinstated once an order entered without due process extinguishes it; whereas a claim for successor liability is less tangible and can be protected so long as the order purporting to extinguish the claim is not imposed without proper jurisdiction. See Zerand-Bernal Grp., 23 F.3d at 163 (holding that the claimants' successor liability claims could not be enjoined, despite a sale pursuant to Section 363(f), on basis that, *inter alia*, claimants were not attempting to enforce a lien and had not been afforded "a chance to obtain a legal remedy against the predecessor [entity]"). Although some courts in the Second Circuit have reached a different conclusion regarding bankruptcy courts' subject matter jurisdiction to enjoin successor liability claims following a Section 363 sale, the distinction between the proper remedy for due process violations against *in personam* claims and liens stands. See Back v. LTV Corp. (In re Chateaugay Corp.), 213 B.R. 633, 637-38 (S.D.N.Y. 1997).

concerned a complaint to set aside a sale order pursuant to Rule 60(b) of the Federal Rules of Civil Procedure for failure to provide Rule 2002 notice to creditors. Id. The sale at issue in BFW was not a sale "free and clear" of liens and interests under Section 363(f), and thus did not implicate the due process standards derived from Mullane that are applicable when a bankruptcy proceeding deprives a creditor of an interest in property such as a lien or successor liability claim. Id. at 670 (discussing relief from sale order under Rule 60(b)(6)). Unsurprisingly then, the court did not even cite, let alone discuss, the standards for determining a due process violation.[74] Id. And, in any event, the claimant there was not even a known creditor at the time of the sale and, thus, would not have been entitled to direct notice even if the court had applied due process standards: "It is not credible to suggest that [the debtor], under the scenario outlined in the plaintiff's complaint, knew or should have known, either when it filed its case, or when it formulated its creditor matrix, or when it noticed the sale, or when the sale took place, that the plaintiff had acquired or would acquire a cause of action against it." Id. at 672. The court never reached the appropriate remedy for a due process violation, because it did not find any had occurred.[75]

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[74] In any event, and in contrast to a violation of the due process rights of individual interest holders whose interests are extinguished by Section 363(f), which may be remedied through simple non-enforcement of the sale order, a complete failure to provide notice or a hearing under Section 363(b) requires different relief. See Cedar Tide Corp. v. Chandler's Cove Inn, Ltd. (In re Cedar Tide Corp.), 859 F.2d 1127, 1133 (2d Cir. 1988) (affirming nullification of sale that failed to comply with notice and hearing requirements of § 363(b)), cert. denied, 490 U.S. 1035 (1989); McTigue v. Am. Sav. & Loan Ass'n of Fla. (In re First Baptist Church), 564 F.2d 677, 679 (5th Cir. 1977) (noting in *dicta* that a sale may be set aside for failure to provide notice under § 363(b)).

[75] The remaining cases New GM cites likewise did not purport to craft a different remedy for a due process violation, as they did not find a due process violation at all. See MacArthur Co. v. Johns-Manville Corp. (In re Johns-Manville Corp.), 837 F.2d 89, 91, 94 (2d Cir. 1988) (finding no due process violation where objecting creditor was given direct notice of settlement and actually appeared and objected), cert. denied, 488 U.S. 868 (1988); In re Edwards, 962 F.2d at 645 (finding no violation of due process and noting "although unnecessarily" that the lack of notice in that case "appear[ed] to work no great hardship" because lienholder would also have a claim against the estate); Molla v. Adamar of N.J., Inc., No. 11-6470 (JBS/KMW), 2014 WL 2114848, at *4 (D.N.J. May 21, 2014) (applying state substantive law to find no successor liability because purchaser of assets did "not expressly or impliedly assume [predecessor's] liability for personal injury claims; there is no actual or *de facto* consolidation or merger of the companies; [successor] is not a 'mere continuation' of [predecessor]; and the purchase was not

C. Principles Of Bankruptcy Policy Do Not Warrant A Different Result.

New GM is left relying on a purported public policy that protects the finality of sales that New GM argues should require enforcement of the Sale Order notwithstanding the due process violation. For the reasons argued supra, the better view, expressed by the majority of courts and supported by the Supreme Court precedent collected herein, is that due process concerns should not yield to other "considerations, such as the exigent needs of the bankruptcy system or the innocence or good faith of third parties involved in bankruptcy sales." In re Ex-Cel Concrete Co., 178 B.R. at 205; see supra Section I.A.3.

Moreover, New GM's concern that this Court's refusal to enforce the Sale Order against Plaintiffs would interfere with the Bankruptcy Code's interest in the finality of Section 363 sales is overblown. State law successor liability theory recognizes the interest in finality of asset sales, and for that reason finds successor liability appropriate only in limited circumstances. Plaintiffs believe those circumstances are present here, whereas New GM does not. But the proper place for these arguments of state law successor liability is not here but before the district court adjudicating Plaintiffs' Consolidated Complaints in the MDL Proceeding or the state courts adjudicating the relevant state law complaints. This principle is confirmed by the very decisions New GM cites as bolstering its finality point, as they determined, *on the merits*, that state law successor liability did not attach. For example, in Douglas v. Stamco, 363 F. App'x 100, 102-03 (2d Cir. 2010), the Second Circuit held that a successor entity was not subject to successor liability claims following a Section 363 sale. Id. However, Douglas did not involve any disputes

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undertaken fraudulently to avoid liability," and in *dicta* refusing to recognize that due process principles prohibited sale without notice); see also Conway v. White Trucks, A Div. of White Motor Corp., 885 F.2d 90, 93-96 (3d Cir. 1989) (applying requirement of applicable substantive state successor liability law that claimant have no available remedy against predecessor, and holding that remedy against predecessor was available, notwithstanding lack of notice of bar date, because claimant could allege due process violation and seek to file late claim).

over proper notice or due process violations. Instead, the court's reasoning relied heavily on the state law doctrine of successor liability, and the finality of Section 363 sales arose only in the public policy balancing required for the on-the-merits state law successor liability analysis. Id. In fact, the court based its decision on the fact that the "plaintiff [was] unable to substantiate a claim for successor liability under New York law," not whether successor liability claims *per se* survived a Section 363 sale. Id. at 103. See also Doktor v. Werner Co., 762 F. Supp. 2d 494, 498-99 (E.D.N.Y. 2011) (in case with no alleged due process violations, holding that purchaser's acquisition of assets through bankruptcy proceeding "raise[d] a policy matter that strengthen[ed] the court's conclusion" that, on the merits, facts did not support state law successor liability).[76]

Finally, GM attempts to rely on the protections of Section 363(m) of the Bankruptcy Code, claiming that New GM is a good faith purchaser, and that Section 363(m) provides that the terms of the 363 Sale may not now be modified. Br. at 54. However, Section 363(m) expressly provides that the "reversal or modification *on appeal*" of a sale order does not affect the validity of the sale, and here, the Plaintiffs do not seek reversal or modification and do not appeal the Sale Order. Instead, lacking notice and an opportunity to be heard, the Plaintiffs are not bound by the Sale Order and are free to pursue their state law claims against New GM. See supra

[76] New GM also relies heavily upon the decisions in prior appeals or adversary proceedings stemming from the sale of Old GM to New GM. See Br. at 24-25. These decisions are not "law of the case" and are, in any event, distinguishable. The law of the case doctrine applies within the confines of one action only and does not apply to new proceedings. See Johnson v. Holder, 564 F.3d 95, 99 (2d Cir. 2009) ("The law of the case doctrine commands that 'when a court has ruled on an issue, that decision should generally be adhered to by that court *in subsequent stages* ***in the same case***.'") (emphasis added) (citation omitted), cert. denied, 560 U.S. 919 (2010). And even so, this Court's reasoning in Campbell and Parker did not concern the same policy issues because no due process violations were found in either case. See, e.g., Campbell, 428 B.R. at 52 (appeal of sale order challenged sale of assets to New GM free and clear of certain product liability claims without raising any due process violations); Parker, 430 B.R. at 73, 97-99 (in appeal of sale order challenging proposed transaction as "*sub rosa*" plan of reorganization based upon, *inter alia*, treatment of certain bondholders, finding that expedited sale hearings did not violate due process). The same is true for Volvo White Truck Corp. v. Chambersburg Beverage (In re White Motor Credit Corp.), 75 B.R. 944 (Bankr. N.D. Ohio 1987), in which the court found no violation of due process because the claimants had no specific interest in the property being sold and were not known claimants on the date of sale. Id. at 949-50.

Section I.A. Accordingly, Section 363(m) is inapplicable, and New GM's reliance on it is misplaced. See In re Polycel Liquidation, Inc., 2006 WL 4452982, at *9 (finding that Rule 60(b) motion for relief from an order was not an appeal of the order and as such, limitations of Section 363(m) were not applicable); Tri-Cran, Inc. v. Fallon (In re Tri-Cran, Inc.), 98 B.R. 609, 618 (Bankr. D. Mass. 1989) (finding Section 363(m) inapplicable where matter was not an appeal, but a motion to set aside sale filed pursuant to Rule 60(b)).[77]

III. Old GM Claim Threshold Issue: The Consolidated Complaints Assert Claims That Are Based On New GM's Post-Sale Conduct And Not Subject To The Sale Order.

As a preliminary matter, there can be no dispute that the Sale Order does not enjoin claims asserted by Plaintiffs, including as many as twenty-nine named class representatives suing on behalf of millions of other consumers, who purchased vehicles manufactured by New GM.[78] In fact, New GM concedes that claims involving vehicles that it manufactured are not covered by the Sale Order. See May 2, 2014 Status Conference Hr'g Tr. 36:24-37:4, Groman v. Gen. Motors LLC, Adv. Pro. No. 14-01929 (REG) (Bankr. S.D.N.Y. 2014).[79] New GM's liability, however, is not limited to claims asserted by Plaintiffs who purchased cars manufactured by New GM post-Sale. Indeed, with the exception of claims expressly predicated on successor

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[77] Even as to appeals, New GM's claim under Section 363(m) that "any argument seeking to undo the Sale now would be equitably moot," see Br. at 54, would be incorrect, as even equitable mootness cannot justify a due process violation. See, e.g., Campbell, 428 B.R. at 57 n.18 (noting in dicta that "due process concerns render[] mootness and res judicata doctrines inapplicable" by comparing an appeal from the Sale Order, which raised no due process issues, with Manville IV, 600 F.3d at 158, where the claimant "lacked adequate notice of the underlying channeling [injunction] and settlement orders"); IRS v. Moberg Trucking, Inc. (In re Moberg Trucking, Inc.), 112 B.R. 362, 363 (B.A.P. 9th Cir. 1990) (finding "[Section] 363(m) mootness is not applicable when the Appellant seeks to attack the § 363 sale of estate property on the grounds of improper notice").

[78] At least nine class representatives bought cars manufactured by New GM. In addition, thirteen class representatives own Model Year 2010 vehicles, and seven own Model Year 2009 vehicles, some or all of which may have been manufactured by New GM. See Post-Sale Compl. ¶¶ 31, 33-35, 42, 44, 47, 48, 50, 61-62, 66, 68, 70-72, 87-88.

[79] Attached hereto as **Exhibit 10**.

liability asserted by members of the Pre-Sale Class, each claim asserted in the Consolidated Complaints is based on New GM's own, independent failure to fulfill the duties imposed on it by law. See Post-Sale Compl. ¶¶ 864-3200; Pre-Sale Compl. ¶¶ 815; 847-2854. In addition to the successor liability claims against New GM asserted by members of the Pre-Sale Class, Plaintiffs (on behalf of both the Pre-Sale and Post-Sale Classes) assert direct causes of action against New GM for: (i) violation of state law consumer protection statutes; (ii) fraudulent concealment; and (iii) unjust enrichment. Members of the Post-Sale Class who purchased vehicles from New GM also assert causes of action for: (i) violation of the Magnuson-Moss Warranty Act; (ii) breach of the implied warranty of merchantability; and (iii) negligence.

Even if the Sale Order were enforceable against Plaintiffs—and it is not, for the reasons described supra—the Sale Order cannot bar those claims based on New GM's post-Sale conduct for the independent reasons that this Court lacked jurisdiction to enjoin them in the Sale Order and that, in any event, the Sale Order does not apply by its terms to bar them.

A. The Bankruptcy Court Lacked Jurisdiction To Enjoin Future Claims Against New GM Arising Out Of Post-Sale Violations Of New GM's Independent Legal Duties.

Assuming that the Sale Order was even directed at the claims against New GM for its own conduct (and it was not, see infra), such an injunction would extend beyond the jurisdiction of the bankruptcy court. Subject matter jurisdiction in a bankruptcy proceeding over third-party claims (such as the non-derivative claims of the Post-Sale Class) can extend only to actions affecting the *res* of the bankruptcy estate. Johns-Manville Corp. v. Chubb Indem. Ins. Co. (In re Johns-Manville Corp.), 517 F.3d 52, 66-68 (2d Cir. 2008) (holding that, despite a "common nucleus of operative facts involving" the debtor and the insurer, bankruptcy order enjoining third-party claims against insurers predicated on insurer's independent misconduct were

unrelated to *res* of the estate and outside the scope of the bankruptcy court's injunction power);[80] see also Pfizer Inc. v. Law Offices of Peter G. Angelos (In re Quigley Co., Inc.), 676 F.3d 45, 61-62 (2d Cir. 2012) (bankruptcy court lacks jurisdiction to enjoin a claim against a third party where such claim would not have an effect on the *res* of the bankruptcy estate), cert. denied, 133 S. Ct. 2849 (2013). That a broad injunction against future claims against a purchaser might result in a buyer paying a higher price for assets in a Section 363 sale is pure speculation, and in any event cannot confer jurisdiction over future claims against the purchaser arising from its independent misconduct. See Zerand-Bernal Grp., 23 F.3d at 164 (rejecting the argument that bankruptcy courts may immunize a purchaser from state or federal law in the interests of increasing the value of a debtor's assets.)

B. This Court's Prior Decisions Do Not Shield New GM From Liability For Its Own Conduct.

According to New GM, this Court's prior rulings constrain it to treat Plaintiffs' claims as liabilities retained by Old GM pursuant to the Sale Order (the "**Retained Liabilities**"), and not liabilities that New GM agreed to assume (the "**Assumed Liabilities**"). See Br. at 58-60. In support, New GM principally relies on Castillo v. General Motors LLC (In re Motors Liquidation Co.), Adv. Proc. No. 09-00509 (REG), 2012 WL 1339496 (Bankr. S.D.N.Y. Apr. 17, 2012), and Trusky v. General Motors LLC (In re Motors Liquidation Co.), Adv. Pro. No. 12–09803, 2013 WL 620281 (Bankr. S.D.N.Y. Feb. 19, 2013). See Br. at 61-62. But nothing in these decisions, let alone in the Sale Order, grants New GM immunity for a third category of liabilities—those incurred by New GM post-Sale through its own wrongful post-Sale conduct.

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[80] Following a reversal on other grounds, the Second Circuit adopted this holding with the condition that only a party who was not present or represented at the hearing leading to entry of the injunction could collaterally attack the bankruptcy court's jurisdiction. See Manville IV, 600 F.3d at 153. As noted above, supra Section I, Plaintiffs did not have proper notice and were not present at the hearings leading to the Sale Order, so they satisfy this condition and may collaterally attack the jurisdictional basis for the order.

In Castillo, plaintiffs sought to hold New GM liable for a pre-petition settlement agreement under which Old GM agreed to pay for vehicle repairs, arguing that these repairs were an Assumed Liability because they arose under express written warranties. See Castillo, 2012 WL 1339496, at *3. The Castillo plaintiffs' argument failed because their warranties had expired. Id. at *10. Nonetheless, New GM cites Castillo for the proposition that "it was the intent and structure of the 363 Sale . . . that New GM would start business with as few legacy liabilities as possible . . . ." See Br. at 61 (quoting Castillo, 2012 WL 1339496 at *3). This intent, however, is not undermined by Plaintiffs' claims, which implicate New GM's independent liability arising post-Sale—not Old GM's legacy liabilities.

Likewise, in Trusky, plaintiffs sought to impose liability on New GM for certain product defects based on New GM's assumption of Old GM's obligations under the Glove Box Warranty. See Trusky, 2013 WL 620281, at *6-9. The Court held that New GM was liable under the warranty for claims based on defective workmanship and faulty materials, but that claims based on design defects were outside the scope of the assumed warranty obligations. The Court left it for the district judge to determine whether the claims were based on design defects or defective workmanship. See id. at *6 n.3. Here, Trusky is inapposite because the Plaintiffs do not seek to enforce warranty obligations assumed under the Sale Order.[81]

C. Plaintiffs Assert Direct Claims Based On New GM's Conduct.

New GM contends that Plaintiffs on behalf of the Pre-Sale Class and the Post-Sale Class assert disguised and improper successor liability claims to the extent that with respect to any such claim (i) "an Old GM vehicle is implicated," and (ii) "the claim is not an Assumed

[81] New GM's harangue that the Consolidated Complaints are "littered with allegations" about the conduct of Old GM is irrelevant. Old GM's conduct is referenced: (i) to establish New GM's knowledge of the ISD based on the continuity of employees; and (ii) in connection with successor liability claims asserted by Pre-Sale Class plaintiffs.

Liability." See Br. at 66. New GM's argument is grounded on the incorrect supposition that neither the statutory nor common law of the fifty states, nor federal law, imposes independent duties on New GM vis-à-vis owners or lessees of vehicles that it did not manufacture. See id. at 8. In fact, Plaintiffs' claims for violations of consumer protection statutes, fraudulent concealment, and unjust enrichment arise out of New GM's own post-Sale misconduct in violation of its independent duties—not Old GM's manufacture of defective vehicles—and are thus not barred by the Sale Order.[82] Further still, Plaintiffs received no notice of the Sale Order and are thus not bound by its terms. Yet, even if constitutionally adequate notice had been provided to Plaintiffs (which it was not), the Sale Order is still inapplicable to the direct claims arising exclusively from New GM's conduct

For example, the Consolidated Complaints allege that New GM caused injury to Plaintiffs by violating its independent obligations under consumer protection statutes designed to safeguard the public from fraudulent practices in commerce. Liability under these statutes is not limited to defendants who sell products to plaintiffs. Rather, these statutes are broadly construed, and defendants are liable thereunder if: (i) they engaged in a deceptive act or practice that is likely to mislead a reasonable consumer; (ii) in connection with trade or commerce; (iii) the deception directly and proximately caused the plaintiffs' injury; and (iv) the plaintiffs suffered ascertainable loss. See, e.g., Valley Forge Towers S. Condo. v. Ron-Ike Foam

[82] The other claims in the Post-Sale Complaint—for violations of the Magnuson-Moss Warranty Act, breach of implied warranty, and negligence—are each brought only on behalf of purchasers and lessees of vehicles sold or leased as new vehicles by New GM, namely, members of the Ignition Switch Defect Subclass. See Post-Sale Compl. ¶¶ 885 (Magnuson-Moss); 902 (Implied Warranty); 908 (Negligence). Even New GM concedes that these claims will go forward without impediment from the Sale Order with respect to claims relating to vehicles manufactured by New GM.

Insulators, Inc., 574 A.2d 641, 645 (Pa. Super. Ct. 1990), aff'd, 605 A.2d 798 (Pa. 1992); Inkel v. Pride Chevrolet-Pontiac, 945 A.2d 855, 858-59 (Vt. 2008).[83]

The Consolidated Complaints state viable, direct claims against New GM for violating consumer protection statutes by engaging in deceptive post-sale conduct that misled consumers and caused damage to Plaintiffs. Among other things, the Consolidated Complaints allege that New GM publicly touted its commitment to safety and product quality, including in advertising campaigns (see Post-Sale Compl. ¶¶ 98-149; Pre-Sale Compl. ¶¶ 419-71), while simultaneously failing to address the safety defects that New GM knew plagued GM-Branded Vehicles. Plaintiffs were injured insofar as they overpaid for (or retained) unsafe GM-Branded Vehicles (see Post-Sale Compl. ¶¶ 13, 193, 205, 209-92; Pre-Sale Compl. ¶¶ 99, 208-48, 474-504, 912) whose value was diminished when New GM's deception was revealed, tarnishing the GM brand name. See Post-Sale Compl. ¶¶ 820-25; Pre-Sale Compl. ¶¶ 756-63. Plaintiffs' claims for violations of consumer protection statutes are direct, non-derivative claims against New GM arising out of New GM's post-Sale deception, and are thus not barred by the Sale Order.

Plaintiffs' claims for fraudulent concealment, which arise out of New GM's breach of its duty to disclose safety defects impacting GM-branded vehicles, likewise constitute direct claims against New GM. See Post-Sale Compl. ¶¶ 151, 153, 948; Pre-Sale Compl. ¶ 472, 883 (alleging, *inter alia*, that New GM had superior, if not exclusive, knowledge of "the many serious defects plaguing GM Branded Vehicles," that it "took steps to ensure that its employees did not reveal

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[83] See also Furst v. Einstein Moomjy, 860 A.2d 435, 441 (N.J. 2004) ("The Consumer Fraud Act is remedial legislation that we construe liberally to accomplish its broad purpose of safeguarding the public."); Cameron v. Terrell & Garrett, Inc., 618 S.W.2d 535, 540-41 (Tex. 1981) (holding that liability may be imposed upon any defendant engaging in the proscribed deceitful conduct, regardless of whether that defendant was the seller in the relevant transaction or the manufacturer of the goods that were sold); State ex rel. Miller v. Cutty's Des Moines Camping Club, Inc., 694 N.W.2d 518, 526-27, 531 (Iowa 2005) (holding that the Consumer Fraud Act is not limited to sellers or to conduct occurring prior to or contemporaneously with a sale).

known safety defects to regulators or consumers," and that Plaintiffs were injured as a result). Nor can New GM escape liability for unjust enrichment resulting from, *inter alia*, its own failure to timely disclose safety defects, as it was required to do under the Safety Act, and by continuing to profit from the sale of Defective Vehicles. See Post-Sale Compl. ¶¶ 3, 98, 150, 194, 307, 332, 373; Pre-Sale Compl. ¶¶ 419, 468. By alleging New GM benefited from its campaign of deception, Plaintiffs assert direct, non-derivative unjust enrichment claims against New GM.[84]

Finally, New GM asserts various arguments that go beyond the scope of the Threshold Issues and instead concern the factual and/or legal sufficiency of Plaintiffs' claims (which are matters for the district court in the MDL Proceeding). See, e.g., Br. at 70 (arguing that dealers performing repairs are not agents of New GM); id. at 72 (arguing that Plaintiffs' unjust enrichment claims are "not credible"); id. at 73-74 (arguing that plaintiffs' negligence claims improperly rely on the Restatement of Torts). Plaintiffs dispute New GM's analysis and will respond to its arguments at the appropriate time. This Court, however, can appropriately limit its ruling to the question of whether Plaintiffs' claims are asserted directly against New GM and defer the issue of the *merits* of those claims against New GM to the district court. See Trusky, 2013 WL 620281, at *6 n.3 (determining what types of claims fell under the Sale Order, but leaving it for the district judge to adjudicate the merits of plaintiffs' claims).[85] For this reason,

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[84] New GM's argument that the Post-Sale Class's Glove Box Warranty claims, implied warranty of merchantability claims and claims for the violation of the Magnuson-Moss Warranty Act are Retained Liabilities of Old GM is based on a mischaracterization of the Post-Sale Complaint, as (i) the Post-Sale Complaint contains no claims for breach of Old GM's glove box warranty, and (ii) claims for breach of the implied warranty of merchantability and violation of the Magnuson-Moss Warranty Act in the Post-Sale Complaint are asserted only on behalf of purchasers who bought new vehicles from New GM.

[85] As explained in Trusky, while this Court has jurisdiction to construe the Sale Order, jurisdiction over monetary controversies between non-debtor parties is questionable and "it's in the interests of justice to allow a district judge . . . to rule on the issues that might remain once the Sale Order has been construed." See Trusky, 2013 WL 620281, at *1. Similarly, courts have found a lack of bankruptcy jurisdiction over state law claims that do not require construction of bankruptcy court orders outside the sale order injunction context without deciding the sufficiency of the alleged state law claims. See, e.g., Park Ave. Radiologists v. Melnick (In re Park Ave. Radiologists, P.C.), 450

and in this procedural context in which only the Threshold Issues are before this Court, New GM's reliance on Burton to support its position that the claims asserted in the Post-Sale Complaint are disguised successor liability claims is misplaced. In Burton, the bankruptcy court held that certain of plaintiffs' claims were properly asserted as direct claims against New Chrysler but nonetheless went on to address the merits of those claims and found proximate cause issues with those claims. See Burton, 492 B.R. at 405. This Court need not (and should not) conduct any such merits analysis, which properly will be left to the district court.

In sum, contrary to GM's contention that certain of Plaintiffs' claims are "predicated" on an "alleged design defect" by Old GM, Plaintiffs' claims are in fact based on misconduct by New GM. No prior decision of this Court, let alone the Sale Order, grants New GM a free pass to manufacture, advertise, and sell vehicles that it knows are defective, even if the defect originated at Old GM.

D. Plaintiffs Correctly Assert Consumer-Based Claims Arising Out Of New GM's Failure To Comply With The Safety Act And Plaintiffs' Resulting Harm.

New GM does not—and cannot—dispute its extensive obligations under the Safety Act, nor that New GM is solely responsible for complying with those obligations. Instead, New GM argues that Plaintiffs cannot hold New GM liable for failing to issue the necessary recalls sooner because individual consumers lack "standing to seek damages for alleged violations of a car manufacturer's reporting and recall-related obligations to NHTSA" under the Safety Act. Br. at 75. But New GM ignores that its violation of its recall obligations forms the basis for liability under various State laws, which Plaintiffs do identify. See Post-Sale Compl. ¶ 1113; Pre-Sale Compl. ¶¶ 1046, 1065.

B.R. 461, 467-71 (Bankr. S.D.N.Y. 2011); Penthouse Media Grp. v. Guccione (In re Gen. Media, Inc.), 335 B.R. 66, 74-77 (Bankr. S.D.N.Y. 2005).

For example, California's Unfair Competition Law ("**UCL**") prohibits "unlawful, unfair, or fraudulent business acts and practices." See Cal. Bus. & Prof. Code § 17200. One way to identify such unlawful, unfair, or fraudulent business practices is by demonstrating a violation of a state or national statute, such as the Safety Act. See In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, and Prods. Liab. Litig., 754 F. Supp. 2d. 1145, 1175 (C.D. Calif. 2010) (finding allegations of a violation of the Safety Act sufficient to establish unlawful conduct in violation of the UCL); Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co., 973 P.2d 527, 539 (Cal. 1999) (explaining that UCL's broad coverage "borrows" the violations of other laws, treats them as unlawful practices, and makes them independently actionable under California law). Indeed, in the recent decision of California v. Gen. Motors LLC, No. 14-2543, 2014 WL 6655796, at *7 (S.D.N.Y. Nov. 24, 2014), Judge Furman explicitly rejected the argument that claims against New GM under the UCL arose under the Safety Act, ruling that, "although the UCL claims are predicated, in part, on alleged violations of [the Safety Act]," the State's claims nonetheless "arise solely under California state law." Id.

Plaintiffs are entitled to legal recourse for the violation of state law consumer protection statutes and other laws.[86] Nothing in the Safety Act or the Sale Order prohibits establishing that New GM violated State law obligations by wholly failing to live up to its reporting obligations, which require notification of a motor vehicle defect within five days of discovering such safety defect. Even if New GM's recall covenant is not a "back door" assumption by New GM of Retained Liabilities under the MSPA, New GM remains liable under state consumer protection statutes and other laws.

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[86] As explained above, see supra Section III.C, claims based on New GM's violation of deceptive trade and consumer protection statutes, such as the UCL, are not barred by the Sale Order.

IV. Fraud on the Court Standard.

"'Fraud on the court' encompasses conduct that prevents the court from fulfilling its duty of impartially deciding cases." Grubin v. Rattet (In re Food Mgmt. Grp., LLC), 380 B.R. 677, 714-15 (Bankr. S.D.N.Y. 2008) (citing Gazes v. DelPrete (In re Clinton St. Food Corp.), 254 B.R. 523, 532 (Bankr. S.D.N.Y. 2000)). Unlike motions to set aside a judgment under Fed. R. Civ. Pro. 60(b)(3) for fraud, a claim of fraud on the court under Fed. R. Civ. Pro. 60(d)(3) is not time-barred, although it must allege conduct other than that proscribed by Rule 60(b)(3). See In re Old Carco LLC, 423 B.R. 40, 51-52 (Bankr. S.D.N.Y. 2010). To succeed on a claim of fraud on the court under Rule 60(d)(3), plaintiffs must demonstrate four elements. See Clinton St., 254 B.R. at 533 (Bankr. S.D.N.Y. 2000) (citing Leber-Krebs, Inc. v. Capitol Records, 779 F.2d 895, 899 (2d Cir. 1985)) (reciting elements); In re Food Mgmt. Grp., LLC, 380 B.R. at 714-15.

First, the perpetrator must make a misrepresentation to the court. Clinton St., 254 B.R. at 533. Where the misrepresentation was "intentionally false, willfully blind to the truth, or [] in reckless disregard of the truth," courts will find fraud on the court. See Esposito v. New York, No. 07-11612, 2012 WL 5499882, at *2 (S.D.N.Y. Nov. 13, 2012). The must fraud be directed at the court, not another party. See Hadges v. Yonkers Racing Corp., 48 F.3d 1320, 1326 (2d Cir. 1995) ("The concept of 'fraud on the court' embraces 'only that species of fraud which does or attempts to defile the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases.'" (quoting Kupferman v. Consol. Research & Mfg. Corp., 459 F.2d 1072, 1078 (2d Cir. 1972))). A failure to disclose material facts may be sufficient to establish fraud on the court if neither the court nor the adverse party had reason to question the veracity or completeness of evidence and where the court relied on the false statements or incomplete evidence. See Levander v. Prober (In re Levander), 180 F.3d 1114, 1120 (9th Cir. 1999); see also In re Food Mgmt. Grp., LLC,

380 B.R. at 715 (denying motion to dismiss fraud on the court claim based on allegations that attorneys failed to disclose all material facts in presenting bidding procedures and auction bids for court approval in connection with 363 sale).[87] Fraud on the court is not necessary limited to situations where the perpetrator is an officer of the court, and may encompass the actions of litigants. See Esposito, 2012 WL 5499882, at *2; Clinton St., 254 B.R. at 532-33. But, in any event, a "debtor in possession is an officer of the court and, as such, can be a perpetrator of fraud on the court." In re Tri-Cran, Inc., 98 B.R. at 617.

Second, the misrepresentation must impact the proceedings. Clinton St., 254 B.R. at 533. The misrepresentation need not be the primary basis for the court's ruling, but must actually deceive the court and influence the ruling. See Esposito, 2012 WL 5499882, at *2; Old Carco, 423 B.R. at 52-53. For example, in Clinton Street, 254 B.R. at 527, 533, the court found this element satisfied where it found the defendants' failure to disclose to an agreement not to bid during a Section 363 sale contributed to the court's acceptance of the sole bidder's bid and approval of the sale order. By contrast, in Tese-Milner v. TPAC, LLC (In re Ticketplanet.com), 313 B.R. 46, 65 (Bankr. S.D.N.Y. 2004), the court dismissed a claim for fraud on the court because the essential facts surrounding the alleged misrepresentation were known at the time the court made its decision, so the misrepresentation did not substantially impact the court's ruling.

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[87] By contrast, where nondisclosures or perjury could have been challenged in the original proceeding, did not affect the court's decision, or injured only a single litigant, it will not constitute fraud on the court. The majority of cases cited by New GM are in this context. See, e.g., Gleason v. Jandrucko, 860 F.2d 556, 558 (2d Cir. 1988) (holding that officers' perjury in depositions was not fraud on the court when the issue of the credibility of these witnesses was already before the court and nothing prevented plaintiff from impeaching their testimony in the original proceeding); Andrada Fin., LLC v. Humara Grp., Inc. (In re Andrada Fin., LLC), No. 10-00289, 2011 WL 3300983, at *7 (B.A.P. 9th Cir. Apr. 7, 2011) (holding that appellant could not establish fraud on the court based on appellee's submission of document with alleged forged signature of appellant because appellant was in a position to know whether the signature was forged); Krietzburg v. Mucci (In re Mucci), 488 BR 186, 193-94, 193 n.8 (Bankr. D.N.M. 2013) (holding that no fraud on the court existed where the alleged fraud did not affect the court's decision); Hoti Enters., L.P. v. GECMC 2007 C-1 Burnett St., LLC (In re Hoti Enters., L.P.), No. 12-cv-5341, 2012 WL 6720378, at *3 n.4 (S.D.N.Y. Dec. 27, 2012) (alleged forgery in connection with mortgage and note that allegedly defeated a single creditor's ability to assert a secured claim did not rise to the level of a fraud on the court).

Third, there must have been no opportunity to discover the misrepresentation and either bring it to the court's attention or bring some other corrective proceeding prior to seeking relief for fraud on the court. Clinton St., 254 B.R. at 533. Thus, a movant should not use a claim of fraud on the court to attack issues that could have been raised during the original proceedings or on appeal. Compare Clinton St., 254 B.R. at 533 (holding that trustee sufficiently alleged a claim of fraud on the court in connection with a Section 363 sale when "the trustee lacked the opportunity to discover the fraud in light of the summary nature of the sale proceeding and the relatively short time frame (only three weeks between the filing of the sale application and the auction)"), with Old Carco, 423 B.R. at 54-55 (finding no fraud on the court when movants had the opportunity to raise the alleged fraud on a timely appeal).

Fourth, the perpetrator of the fraud must have derived a benefit from inducing the court's erroneous decision. Clinton St., 254 B.R. at 533. For example, in Clinton Street, where certain potential bidders had agreed that only one of them would bid during a Section 363 sale but did not disclose that fact to the court, they all benefitted from the nondisclosure—the sole bidder because it bought the assets at an artificially low price and the other non-bidders because they received payments from that bidder for agreeing not to bid. Id. at 527, 533.

The Court has not directed briefing as to whether the standard for fraud on the court has been satisfied here, and Plaintiffs reserve all rights to fully brief the issue at the appropriate time. However, for substantially the same reasons that the Sale Order did not satisfy due process with respect to Plaintiffs, Old GM's evidence regarding its compliance with due process was knowingly or recklessly incomplete and justifies a finding of fraud on the court. Old GM's evidence regarding New GM's good faith (the basis for the conclusion that successor liability was warranted) was similarly incomplete, and independently justifies a finding.

CONCLUSION

WHEREFORE, Designated Counsel, for and on behalf of certain Plaintiffs, respectfully requests that the Court (i) deny New GM's Motions to Enforce the Sale Order and Injunction, and (ii) grant such other and further relief as the Court may deem just and proper.

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Respectfully submitted,

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